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MEMBER



Special needs require special lawyers.

INSIDE THIS ISSUE

- Powers of Attorney and Fiduciary Duty
- Announcements
- Ask Allie
- Distribution of This Newsletter

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POWERS OF ATTORNEY AND FIDUCIARY DUTY

A recent Fauquier County, Virginia, Circuit Court case illustrates the need for specific provisions in durable powers of attorney.

In *Mountjoy v. Smith* (Case No. CL8-300, February 26, 2009), the matter came before the court upon cross-motions for summary judgment. Mr. Smith's executrix alleged that his wife, Evelyn Smith (now deceased), breached the fiduciary duty owed Mr. Smith under a power of attorney executed by Mr. Smith. The court issued an opinion in which it addressed the threshold question of the validity of the durable power of attorney (DPOA).

Mr. & Mrs. Smith were married in 1946 and remained married until their deaths. In May, 2006, Mr. Smith executed a DPOA naming Mrs. Smith as his agent. The DPOA did not include specific authority for the agent to create a trust, although the DPOA did have several paragraphs granting other specific powers. The DPOA also included two paragraphs with general grants of authority. Mr. Smith never directed Mrs. Smith to make an estate plan for him; however, Mrs. Smith arranged for two separate trust documents to be prepared, one for her, and one for Mr. Smith. Mrs. Smith executed both trust documents without her husband's knowledge. The trusts were not mirror images of each other; the estate plan included transferring real properties into the trusts, changing the ownership of the properties from tenants by the entireties into tenants in common. Mr. Smith was unaware of these actions until two months after Mrs. Smith's death; he then executed a document revoking the trust in his name that Mrs. Smith had established. Mr. Smith, through counsel, made a demand for alleged entitlements existing through Mrs. Smith's trust.

The court's analysis focused on the lack of specific authority in the DPOA for Mrs. Smith to set up an estate plan for Mr. Smith. Mrs. Smith's estate argued that the specific powers in the DPOA to negotiate sums of money and

enter into contracts, along with the DPOA's general grants of authority, were sufficient authority for Mrs. Smith's actions. The court stated that "The law in Virginia is that a power of attorney will be strictly construed" (citing *Bank of Marion v. Spence*, 155 Va. 51, 53 (1930) and *Horchkiss v. Middlekauf*, 96 Va. 649 (1899).) Mrs. Smith's executrix suggested that the Commonwealth has softened its stance on this issue in *Jones v. Brandt Executrix*, 274 Va. 131 (2007). The court stated that Brandt differed from the case at hand because Mrs. Smith created a trust in which she named herself as beneficiary of the trust if Mr. Smith died first, then changed the form of ownership of properties transferred into the trust. Mr. Smith was not the beneficiary of the trust she created for herself, if Mrs. Smith died first. Further, Mrs. Smith concealed her actions from Mr. Smith. She could have sought her husband's approval for her actions, but did not. The court also found that Mr. Smith did not ratify Mrs. Smith's actions; on the contrary, he terminated the trust Mrs. Smith created for him as soon as he learned of the trust. The court also found that Mr. Smith's attempt to protect his property rights by demanding alleged entitlements from Mrs. Smith's trust did not serve as ratification of her actions. The court held that Mr. Smith's trust was void; this also invalidated the conveyance of the real properties to both trusts.

The attorneys at Oast & Hook can help clients with their estate, investment, insurance, long-term care, veterans' benefits and special needs planning.

Announcements

The Chesapeake, Oast & Hook, Towne Investment Group, and TowneBank will co-present two seminars entitled "Long-term Care Planning in the Current Economy" at 6:30 p.m., Thursday, April 30th and at 1:00 p.m., Thursday, May 7th at The Chesapeake, 955 Harpersville Road, Newport News, Virginia. Seats are limited, so please register early. For more information or to register, please phone Jennifer Lantz at 757-399-7506.

Save the date for some spring cleaning. From 10:00 a.m. to 1:00 p.m., Saturday, May 9th, Stealth Shredding will have a truck at Oast & Hook's Portsmouth office so Oast & Hook's clients and friends can bring their papers to be shredded at no cost. (Stealth Shredding recycles the shredded material.)



Ask Allie

O&H: Allie, we've heard about a unique group that trains dogs to become service dogs. Please tell us more!

Allie: Sure! Many service organizations train service dogs to assist people with disabilities; however one unique group consists of inmates serving time at the brig at Camp Lejeune, North Carolina. Dogs who graduate from the Military Prison Service Dog Training Program are given to Marines wounded in Iraq and Afghanistan. This program, a first for a military prison, was initiated by Carolina Canines for Service of Wilmington, North Carolina. The program has proved beneficial to all involved. The program currently involves eleven inmates and two guards; the inmates are divided into pairs, and each pair is responsible for one dog. The dogs live with the trainers, sleep in kennels between the inmates' beds, and accompany them to meals. The training lasts nine months, with the dogs learning approximately 70 tasks. Some dogs are also trained as "walker dogs" for Marines with mobility issues. The animals involved in the program come from area shelters and breeders. The brig social worker heads the selection process for the inmates in the program. She noted that the program has resulted in a boost in the self-esteem of the inmates involved, and that the dogs have been therapeutic for those who are in treatment for post-traumatic stress disorder. Although it's difficult for them to part with their canine companions at the end of training, the inmates know that their dogs are making Marines' lives better.



Please feel free to e-mail your pet- and animal-related questions to Allie at: allie@oasthook.com.

Distribution of This Newsletter

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