

# NJ Laws Email Newsletter E371

## Kenneth Vercammen, Attorney at Law

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### **In This Issue:**

**1. You are invited to Ken Vercammen's Annual Summer Happy Hour, Friday, July 8 · 5:00pm - 7:00pm**

**2. Belmar 5 fun teams July 9, 2011 8:30**

**3. On DWI court can weigh mitigating and aggravating.**

**4. Defendant entitled to PCR hearing on whether they the court advised of deportation consequences.**

**5. Don't always put Pod on bank accounts. Avoid This Common Banking Error By Tom**

Greetings Kenneth Vercammen,

**1. You are invited to Ken Vercammen's Annual Summer Happy Hour Friday, July 8 · 5:00pm - 7:00pm**

Bar Anticipation  
703 16th Avenue  
Belmar, NJ

This is the 35th Annual Vercammen Summer Blast

Free Food 5-7 Hot & Cold Buffet with carving station

\$1.00 Drafts 6-7 [need special wrist band from Ken V]

Games & prizes

We will be at outside bar #1 in the back, near cabana 1, not far from outdoor band duo called the Toxic Twins, who play 5-9 Hydrate for Belmar 5 mile Race the next day

- Meet the "SuperLawyers" of NJ

## Begley III

This is open to your friends. If attending email Ken's Law Office so we can put your name on the list for wristbands: [VercammenLaw@Njlaws.com](mailto:VercammenLaw@Njlaws.com)

- Appearances by the "Legends of Belmar" and Janet Vercammen of Ohio

After Happy Hour, join us outside at Cabana #1, VIP area

More details at:

<http://www.facebook.com/event.php?eid=206188099419852>

## **2. Belmar 5 fun teams July 9, 2011 8:30**

Kenneth Vercammen is again putting together 5 teams of both competitive and non- competitive runners. If you can finish 5 miles in less than 1 hour, you can be on our teams of fun.

Our winning teams in 2010 won free beer tickets. Individual Application online at: <http://www.belmar5.com/belmar.pdf> or go to: <http://Active.com>

The name of Ken's teams are US Olympic Development 1, RVRB Beer Mile Champs, and US Olympic Development 3 [just trying to finish] and our masters, known as "The Legends of Belmar". We will have

runners from several running clubs, including RVRR, JSRC, CJRR & Sandy Hooker Tri Club and Rumson Hash.

You do not need to be a member of USATF or any club to be on a team. We would like 30 people of different abilities.

**Post Race Activities -**

Enjoy a complimentary massage and stop by the sponsor and merchant tables in Silver Lake Park, for sampling and giveaways.

Team awards, music and Beach party, after the race at Bar Anticipation.

Bring your Belmar Five Mug - mug discounts all day after the Race!

Bar Anticipation - 703 16th Avenue, Lake Como (formerly South Belmar)

If you have or will enter the Belmar 5, email Ken V at [KenV@njlaws.com](mailto:KenV@njlaws.com)

Call Kenneth Vercammen at 732-572-0500

More details on Belmar 5 at <http://www.belmar5.com/>

**3. On DWI court can weigh mitigating and aggravating. State v Henry \_\_\_ NJ Super. \_\_\_ (Law Div. 2011) Mercer**

## **Municipal Appeal 2010-16**

In determining the term of incarceration for a defendant convicted of a second DUI offense, the court held that aggravating and mitigating factors prescribed by the Criminal Code, N.J.S.A. 2C: 44-1, if appropriately tailored, provide an appropriate guide for the exercise of sentencing discretion, although the factors are not mandated. The court also held that a driver's extremely high blood-alcohol level may be considered an aggravating factor, and does not constitute impermissible double counting of an element of the offense. The court also held that a probationary sentence conditioned on a jail term is authorized by N.J.S.A. 39:5-7, so long as the court imposes at least the mandatory custodial term under N.J.S.A. 39:4-50. 2/10/2011

Source: [dailybriefing@njsba-njldailybriefing.com](mailto:dailybriefing@njsba-njldailybriefing.com)

### **4. Defendant entitled to PCR hearing on whether they the court advised of deportation consequences. State v Gaitan 419 NJ Super. 365 (App. Div. 2011)**

Defendant filed a petition for post-conviction relief, arguing his attorney failed to discuss with him the deportation consequences of his guilty plea. The trial judge denied the petition, concluding without the benefit of an evidentiary hearing that defendant's responses to the plea form as

well as his testimony at the plea hearing demonstrated he understood the deportation consequences. In reversing that determination, the court also considered the impact of Padilla v. Kentucky, 559 U.S. \_\_\_, 130 S. Ct. 1473, and State v. Nuñez-Valdéz, 200 N.J. 129 (2009), both of which were decided after defendant pled guilty and after his PCR petition was denied.

The court recognized that certain aspects of Padilla -- namely, its holding that counsel's failure to give any deportation advice is no different than the rendering of bad deportation advice, and its holding that the direct/collateral methodology regarding deportation advice had never applied to Sixth Amendment claims of ineffectiveness -- did not create new rules insofar as the Sixth Amendment is concerned. Because defendant was entitled to the benefit of that federal rule, the argument that Nuñez-Valdéz's rejection of the direct/collateral methodology as a matter of New Jersey constitutional law constituted a new rule was irrelevant in determining whether defendant received the effective assistance of counsel when he pled guilty.

These immigration cases have accounted for more than half of all new prosecution.

For more information: <http://www.njcrimmigration.com>

## **5. Don't always put Pod on bank accounts. Avoid This Common Banking Error By Tom Begley III**

Many people make mistakes in titling bank and investment accounts. Often advisors and bankers counsel customers to "put your child's name on the account" or to set the account up as a "pay on death" (POD) account. However well-intentioned the advice, the results of either approach to titling an account can be surprising and unpleasant. Good intentions do not make good advice.

### **The Allure of Joint and POD Accounts**

Often the attraction is probate avoidance. Either a joint account with survivorship features or a POD account will pass as a nonprobate asset and avoid a state-mandated probate process, which can in exceptional cases take several months to a year or longer.

For joint accounts, the attraction is often convenience. Unlike a POD account, during the parent's lifetime a joint account holder has immediate co-ownership rights, and, thus, immediate access to the account. An older person may feel better knowing that a

trusted son or daughter has immediate access to an account "in case something happens."

### **The Dangers of Joint and POD Accounts**

If the POD or joint account payee is a child with disabilities, the result could be terrible for the child upon the parent's death because the receipt of the account could jeopardize continuing qualification for public benefits such as Medicaid or SSI.

There are other compelling reasons why a joint account may not be the proper approach:

The co-owner child now owns the account as much as the parent. What if the child is sued? What if the child goes through a messy divorce? Or what if the IRS takes a keen interest in the child's affairs? Those events happen to the best of children; nevertheless, in those cases the joint account will be presumed to be owned by the child.

Another problem is that the co-owner/child's sibling may be out of luck. This happens all the time. For example, Mom wanted the kids to share equally, but after Mom is gone Sis suddenly recalls that Mom wanted her to have the accounts since she "was the one who always helped Mom." Because Sis was a co-owner of Mom's accounts and likely had survivorship rights, she owns the

accounts now. Usually there is nothing the rest of the family can do about it, even with legal assistance.

## **A Better Way**

If the goal is asset management in the event the owner becomes incapacitated, one effective approach is a properly drafted power of attorney.

A power of attorney has nothing to do with appointing lawyers. The word "attorney" has its roots in an old French Norman word for "legal substitute." A power of attorney is simply a document signed by someone called the "principal" appointing an "attorney-in-fact" or "agent" to manage some or all of the principal's financial and business affairs.

The terms of the power of attorney document control what the agent may, or may not, do. If the document covers a broad spectrum of duties, then it is a "general" power of attorney. An agent can be given very broad powers, but if that makes the principal nervous, the instrument can require the agent to secure some other person's permission before use. (Note: Many banks and financial institutions prefer to use their own POA forms, but a growing number of states have laws requiring the institutions to accept other, often attorney-drafted, power of

attorney documents.)

If the goal is to avoid probate upon death of the account owner, the better approach may be a revocable or living trust. The assets in the trust will avoid probate. In fact, a revocable trust can also assist in post-incapacity management of the person's assets because a successor trustee named in the trust agreement can step in to handle continuing management of all assets held in the trust. Moreover, in contrast to the unlimited access of a joint account co-owner who may have issues with his own creditors, the assets in the trust are protected from the trustee's creditors.

Finally, all of the above considerations especially apply if the parent has a child with disabilities. There will rarely, if ever, be an appropriate time to name a child with disabilities as the co-owner of a joint account or the beneficiary of a POD account. Carefully consider using a special needs trust, either under a will, as part of a revocable trust, or created as a separate trust document, to hold that child's intended inheritance. Properly drafted, the special needs trust assets will not jeopardize the child's continuing eligibility for various public benefits.

Here's the point: Do not put your children on the accounts as a joint owner. Instead,

execute a power of attorney that grants appropriate sorts of powers to an agent whom you completely trust to assume the day to day responsibility for managing your financial and business affairs when and if needed. Alternatively, consider a revocable trust. In the meantime, keep the accounts in your name.

The downside to the advice given here: Some fees to a lawyer. The upside: You may avoid a train wreck.

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**Editorial Assistance provided by Hetal Patel. Ms. Patel will be entering her second year of law school at New York Law School and is currently participating in our Kenneth Vercammen's summer internship program.**

## Editor's Note and Disclaimer:

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