TRUST & ESTATE CONTROVERSY VIRTUAL FORUM

GUARDIANSHIP ESTATE PLANNING FOR ADULTS WITH DISABILITIES

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OVERVIEW

- The problem
- What can you do?
- How do you do it?
- What are the issues?
- What are the states doing?
- Powers of attorney

THE PROBLEM

- The U.S. population is aging.
- Cognitive deficit related to aging impacts donative capacity (gifts, irrevocable trusts and contracts) and testamentary capacity (wills and revocable trusts).
- Elderly people making or changing existing estate plans can invite contests based on diminished capacity.
- Until fairly recently, formal guardianship adjudication could effectively end the estate planning process.
- Problems arise when an elderly person's wishes have changed, and tax and other planning opportunities may be lost.

WHAT CAN YOU DO?

- Guardianship does not, as a matter of law, prohibit planning.
- The capacity standard to establish guardianship is higher (you can't manage your finances without help) than the standard for wills and revocable trusts (you know you're giving stuff away at your death, and can sort out who gets what).
- But, guardianship usually requires a court order and a doctor's determination of capacity, and guardianship estate planning often is limited to testamentary transfers.
- It may only be available where courts have sanctioned it.
  - *See, e.g., Pendarvis v. Gibb*, 159 N.E. 353 (Ill.1927).
- These documents are likely to attract post-death contests.

WHAT CAN YOU DO?

- Even before states modified probate codes to allow planning on behalf of disabled persons, many states (Delaware and California, for example) allowed guardianship estate planning by court order after an evidentiary hearing.
- These cases were based on the doctrine of “Substituted Judgment,” which required a trial over “what the disabled person would have done, if they still had capacity.”
- This doctrine is usually limited to lifetime gift making, and is based on evidence of gifting by the disabled person before guardianship was established.
- So, it is not useful for people who’ve been disabled since birth or who don’t have a discernable pattern of gifting.

WHAT CAN YOU DO?

- Thirty-two states now have statutory provisions which allow estate planning of some sort undertaken by a guardian on behalf of a disabled person.
- The statutes differ and many expressly prohibit making a will, either for a person who has no will, or even for a person with an existing will.
- Only seven states allow a guardian to make a new will (CA, CO, Il, MA, MN, MT, SD).
- Many states permit a guardian to make a codicil to an existing will.

WHAT CAN YOU DO?

- Generally, most states with statutory authorization allow creating, funding or amending revocable trusts.
  - But, some states don't allow cutting out an existing beneficiary. *See, e.g., Guardianship of E.N.*, 877 N.E.2d 795 (Ind. 2007).
- And, courts can be skittish if it appears the main purpose of setting up and funding a trust is to remove the guardianship property from court oversight.
  - *See, e.g., In re Estate of Ahmed*, 322 Ill. App. 3d 741 (1st Dist. 2001).
- This can be addressed by providing that trust administration is still subject to court supervision.

WHAT CAN YOU DO?

- Although some states prohibit making new wills, most others allow making codicils and amending trusts, creating the odd situation where, in some states, people with wills can modify them, but disabled persons without wills can be stuck with intestate heirship.
- This can be overcome indirectly by creating and funding a revocable trust with post-death dispositive provisions, which, ironically, is allowed even in states that prohibit guardians from making new wills.
- This is likely the result of state legislators both confused and enamored with the process of will-making.

WHAT CAN YOU DO?

- Most states with statutory authorization allow a wide range of ancillary actions by guardians, including:
  - Executing or modifying insurance and employee benefit beneficiary designations.
  - Making gifts.
  - Creating and funding irrevocable trusts
  - Disclaiming property.
  - Making tax and benefits elections, like electing lump sums or rolling over employee benefits to an IRA.

HOW DO YOU DO IT?

- Most states require a court hearing, with special notice to impacted parties, witnesses and standards that must be met before the planning is allowed.
- This often requires counsel with both estate planning and trial experience.
- Notice provisions differ state to state and are typically set by the court.
- Notice is critical, as it may complicate your hearing with objections, but is likely necessary to block post-death contests of the disabled person's documents and the actions by his or her administrator.
  - *See, e.g., In re Estate of Barth*, 792 N.E.2d 315 (2003).

HOW DO YOU DO IT?

- Court hearings generally require that certain standards be proven, before the plan can be approved, including:
  - That the assets to be used in gifts or other planning will not be needed for the disabled person's support and needs.
  - That the disability is likely to be permanent.
  - That the action proposed takes advantage of available tax benefits.
  - That the action proposed is consistent with the intentions of the disabled person, to the extent those intentions can be ascertained.

HOW DO YOU DO IT?

- Once a court order is obtained, authorizing the guardian to implement the planning, actual documents should be executed—the court order isn't enough.
- Typically, the guardian executes the will, codicil, trust, amendment, or beneficiary designation, on behalf of the disabled person.
- Executing a trust without a pour over will to that trust, can be ineffective—guardianship assets are probate property, so an actual, court-ordered transfer of the guardianship assets to the trust is required to make the trust effective.

WHAT ARE THE ISSUES?

- Can these documents be contested, like regular wills and trusts?
  - Typical capacity challenges are irrelevant.
  - Undue influence is also likely not relevant, for a court-ordered and court-approved will or trust.
  - Notice can be critical.
  - If a person adversely impacted got notice and didn't object at the court hearing, they are likely barred.
    - Some states have carved exceptions to this rule (*See, e.g., Guardianship of E.N.*, 877 N.E.2d 795 (Ind. 2007)).

WHAT ARE THE ISSUES?

- The court's authority is typically discretionary.
  - Meaning, the court can deny the request to execute planning documents for virtually any reason.
  - Challenges to a refusal must typically be based on abuse of discretion.
    - *See, e.g., In re Estate of Ahmed*, 322 Ill. App. 3d 741 (1st Dist. 2001).
  - Abuse is not second guessing where you prove up the elements and get the plan.
  - Courts often will deny the planning if they foresee an encroachment on their jurisdiction or a negative impact on the disabled person.

WHAT ARE THE ISSUES?

- The IRS, previously hostile to granting tax attributes to surrogate planning, has dropped most objections to state-sponsored guardianship planning. *See, e.g.*, I.R.S. PLR 9015017 (April 30, 1990); (I.R.S. Tech. Adv. Mem. 9413002 (Apr. 1, 1994)).
  - These documents generally create marital and charitable estate tax and gift tax deductions.
  - Gifting qualifies for annual exclusion treatment.
  - But, no authority on GST exemption qualification.
  - Court-modified GST grandfathered documents should retain status, qualifying for the so-called “D” safe harbor (Treas. Reg. § 26.261-1(b)(4)(i)(D)), assuming no extended vesting date or shift of beneficial interest to lower generation.

WHAT ARE THE STATES DOING?

- 50 State Survey.
- With the exception of the fairly common “No Wills” rules and cases, most states with statutory authorization allow fairly liberal application.
- The no-statute states may allow some planning by filing a general petition, pursuant to typical guardianship power to expend funds for the “best interests” of the disabled person.
- However, “best interests” authority is limited, as it operates on an objective, not a subjective standard: Will the disabled person *personally* be better off after the transaction, generally meaning, have more property or value after the transaction.

WHAT ARE THE STATES DOING?

- California: Broad-based power to plan, including wills, but plan must be consistent with substituted judgment.
- Arizona: Broad-based power, but no wills and gifting is limited to a prescribed list of permissible beneficiaries.
- Texas: Broad-based power to plan, but no wills.
- Illinois: Extensive list which is non-inclusive, and while wills are not listed, they have been routinely allowed by courts, so virtually anything goes. *See* 755 ILCS 5/11a-18(a)(5).
  - Missing from IL Statute? – Initiating divorce.
    - *But see Karbin v. Karbin ex rel. Hibler*, 2012 IL 112815.

WHAT ARE THE STATES DOING?

- New York: Essentially unavailable. Wills and codicils expressly prohibited.
- Massachusetts: Broad powers, including wills and codicils.
- Ohio: Essentially unavailable.
- Virginia: Fairly broad power to plan, but case law holds guardian can't supersede a prior will with guardianship planning.
- Florida: Fairly broad powers, including codicils for amendments related to charitable deductions only.
- Washington State: Gifts and trusts authorized, put probably not wills.
- Hawaii: Gifting, tax elections and beneficiary designations; wills and trusts not expressly authorized.

POWERS OF ATTORNEY

- Most states with a Durable Powers statute (allowing execution of Powers of Attorney that remain effective after disability of the principal), allow planning pursuant to the Power, *to the extent the Power expressly authorizes the creation of the specific planning tool.*
- Probate courts, however, are all over the map on allowing or enforcing such documents, and most state guardianship codes allow a guardian to set aside such documents if they are not created in the disabled person's best interests.
- So, this is generally an inferior way to plan, even if popular among planners and clients who seek to avoid guardianship.

THANK YOU