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Guardians and Wills: “Substituted Judgment” in Estate Planning Deserves Another Look

In some circumstances, a guardian is faced with estate planning documents that may not reflect the ward’s true intentions. In many states, the guardian has no option to alter or change those documents. The author asserts that in some circumstances, a guardian should have the authority to change a ward’s estate plan.

By Edward A. Shipe

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An 88-year old man, with a seven-figure estate, executes a will under the clear, undue influence of a nurse. The will leaves his entire estate to the nurse. By executing the will, the man has revoked a previous will. He has written out three children, six grandchildren, and a great-grandchild and has bypassed a number of charities that he had made gifts to over most of his lifetime.

In many circumstances, the family would not even hear of the will until after the man’s death. Let’s assume that the children get wind of the changes and that they are not happy.

A reasonable probate litigator might say, “Let’s get a court declaration in guardianship court that your father is incapacitated. That way, we will have clear evidence and a court order, once your father passes.”

The family might reasonably ask, “Why can’t we change the will now? Why do we have to wait until our father has passed?”

Many states do not have a clear answer to these questions. In Florida, where I practice, the family would be precluded from taking this step. In California, by contrast, a lengthy statute provides a procedure for relief in this situation.

It is this author’s contention that in certain limited circumstances, a court should have the discretion to grant authority to a guardian to change a ward’s estate plan. Let me present a true case from Florida.¹

The Sherry Decision

As befitting a state with such a large population of older persons, Florida’s guardianship code is lengthy

and complicated.² Having sifted through the guardianship laws of most states, the two with the most complicated statutes appear to be California and Florida. By contrast, some states have virtually no law at all on situations where a person needs to be appointed to manage another person's affairs.³

In Florida, a guardian is required to submit annual pleadings indicating the status and health of a ward.⁴ A guardian must submit annual accountings that, at least in some counties, are subject to rigorous audits by the clerk's office.⁵ A lengthy code provides the powers a guardian may exercise and specifies which powers must be granted by a specific court order.⁶ As a basic proposition, a guardian may substitute his or her judgment for that of the ward when the circumstances require such an action, with court approval.⁷ But it is generally held that this "substituted judgment" may occur only when the legislature has clearly made provision for it, as guardianship is generally considered to be a legislative and not judicial creation.

For all of this complexity, the Florida statutes provide no clear guidance on the question of whether and when a guardian may exercise substituted judgment for a ward in determining an estate plan. Various appellate decisions have permitted guardians to create a trust,⁸ change the trustee of a trust,⁹ set aside gifts made by the ward,¹⁰ or change the designee on an IRA account.¹¹

A Florida appellate court recently dealt with the situation of actual changes to a ward's will and living trust, changing the beneficiaries of those instruments.¹² The Fourth District Court of Appeal held that a guardian may not change the *post-mortem* estate plan of a ward, and a court may not grant such authority to a guardian, since specific statutory authority does not exist.¹³ The court appeared to suggest that further legislative action is necessary to permit a guardian, upon court order, to modify a ward's estate plan in certain limited circumstances.

The facts of that case are illuminative of the vexing questions that a guardian can face. Ruth Sherry initiated proceedings to divorce her second husband. In the course of the divorce, Ruth's attorney came to believe that Ruth lacked capacity to perform many functions. Another attorney was retained to commence incapacity and guardianship proceedings for Ruth.

The guardianship court ultimately found Mrs. Sherry fully incapacitated. The court appointed a professional guardian, Mickey Klevansky, as

plenary guardian for her. The court appointed the author as Mrs. Sherry's guardian *ad litem* for purposes of the divorce proceeding.

The marital assets were in a "living" trust. A separation agreement was negotiated that gave Mrs. Sherry one half of the corpus of the trust. She also had a will that "poured" her estate into the trust. The divorce court and the guardianship court (in this case, the same judge) approved the agreement. This writer's involvement in the case then concluded.

Klevansky petitioned the guardianship court for authority to create a new trust from Mrs. Sherry's assets, with a friend of the ward, Tillie Fields, as sole *post-mortem* beneficiary. This would have changed Mrs. Sherry's estate plan, which at the date of her adjudication of incapacity, had left her estate to her stepson (the husband's son) and step-daughter-in-law.

After a hearing at which conflicting evidence was presented as to Mrs. Sherry's relationship with each of the parties, the guardianship court granted the petition. There was no direct evidence that, had Mrs. Sherry possessed capacity, she would have left her estate to Tillie Fields. The stepson appealed, arguing that the guardianship court did not have the authority to grant the petition.

The District Court of Appeal reversed, holding that Florida's guardianship code did not provide the "clear legislative authority" for the guardian to substitute his judgment on estate planning for that of his ward. In the absence of legislative intent to alter the proscription on a guardian's "substituted judgment" for a ward, the panel essentially said that it was up to the legislature to craft a remedy. And so, in Florida a ward's *post-mortem* estate plan is frozen as of the adjudication of incapacity.¹⁴

Hypotheticals

Various hypothetical situations are presented. It must be emphasized that many of the questions asked here were not involved in the *Sherry* situation.

1. *What if all of the money in the trust was the wife's money? What if she contributed the entire corpus and the husband contributed none?* Though the wife wanted to divorce her husband and, presumably, wanted to sever ties with the husband's family, the husband's family would still receive her estate.
2. *What if the ex-husband's family was the reason the wife wanted a divorce?* The ex-husband's

family would take her estate, regardless of whether the money had been hers or her ex-husband's.

3. *What if there was clear and convincing evidence of abuse by the ex-husband's family? What if the ex-husband's family somehow caused the dementia that resulted in the adjudication of incapacity?* The ex-husband's family would still take the estate.
4. *What if there was evidence that the wife executed the instrument, as the result of undue influence by the ex-husband's family?* The ex-husband's family would take the estate anyway, assuming no litigation from intestate heirs or from devisees of past instruments, either of which could conceivably be impaired by the passage of time. In many cases, the actual litigation awaits the death of the testator, which can be many years. The passage of time may well destroy whatever case might have existed for throwing out the questionable documents.
5. *What if estate taxes could be reduced by changing the wife's estate plan to include charities (to which the wife would have donated during her lifetime)?* The ex-husband's family would still take the estate, and pay lots of estate taxes while receiving a small, incremental boost in their take (depending, of course, on the size of the estate) from what they would have received with reasonable advance planning.

Suggestions

The absence of a specific statute on this point can lead to unjust results. At least one state, California, permits a guardian to change a ward's estate plan in certain circumstances. As noted, most states do not have guardianship statutes as detailed as Florida's, and so most states do not deal with the issue at all.

While we should correctly be hesitant to grant unlimited powers to a guardian, it is clearly fair and equitable to permit a guardian to amend the estate plan of a ward in some circumstances.

Exhibit 1 (pages 60 and 61) presents the California statute as a possible starting point. Some changes to that statute would be in order. For example, a professional guardian should never be written into a ward's estate plan. But there are situations in which any guardian should have the power to alter a ward's estate plan.

Potential Pitfalls

Turning Guardianships into Will Contests

By permitting this type of action, a state may be doing nothing more than turning the guardianship court into the “*pre-mortem* will-contest” court, depriving a court of time needed to supervise what, at least in Florida, can be a clogged docket of guardianships. The belief that a guardianship is an opportunity for the government to protect the individual would be severely tested in some cases.¹⁵

Turning Guardianships into Opportunities to Insert One's Name into a Will

A person, whether family or not, could use a guardianship to get into someone's estate plan, when the evidence is not clear that a ward would have wanted that action to take place. Of course, the best protection against that possibility is a competent, conscientious judge with experience in elder affairs.

The “Schmooze” Factor

An attorney takes a potential client to dinner and does all the things attorneys do to land a client. The attorney does the client's estate plan. Then, poof, a guardian gets appointed, a new will is done, and the attorney is out of the picture. Needless to say, this action may not be too popular with that attorney.

The “Playing God” Factor

Some may not be comfortable in vesting judges with the broad discretion required to change the direction of an estate plan. Of course, the decision seems small next to some other decisions that judges make such as those in death-penalty cases or in termination-of-life situations.

Conclusion

It is the author's contention that in permitting a guardian to alter a ward's estate plan, the benefits outweigh the pitfalls. In certain limited situations, a guardian should be able to change a ward's estate plan—with close court supervision and only with court approval.

Exhibit 1. California Probate Code (relevant provisions)

Note: A “conservator” is the California equivalent of Florida’s “guardian of an adult person.” A “conservatee” is the California equivalent of Florida’s “ward.” Different states use different terms to describe these concepts. In some states, a guardianship proceeding is entirely separate from a conservatorship.

§ 2580

- (a) The conservator or other interested person may file a petition under this article for an order of the court authorizing or requiring the conservator to take a proposed action for any one or more of the following purposes:
- (1) Benefiting the conservatee or the estate.
 - (2) Minimizing current or prospective taxes or expenses of administration of the conservatorship estate or of the estate upon the death of the conservatee.
 - (3) Providing gifts for any purposes, and to any charities, relatives (including the other spouse), friends, or other objects of bounty, as would be likely beneficiaries of gifts from the conservatee.
- (b) The action proposed in the petition may include, but is not limited to, the following:
- (5) Creating for the benefit of the conservatee or others, revocable or irrevocable trusts of the property of the estate, which trusts may extend beyond the conservatee’s disability or life. . . .
 - (6) Transferring to a trust created by the conservator or conservatee any property unintentionally omitted from the trust.
 - ...
 - (9) Exercising the right of the conservatee to elect to take under or against a will.
 - ...
 - (11) Exercising the right of the conservatee (i) to revoke or modify a revocable trust or (ii) to surrender the right to revoke or modify a revocable trust, but the court shall not authorize or require the conservator to exercise the right to revoke or modify a revocable trust if the instrument governing the trust (i) evidences an intent to reserve the right of revocation or modification exclusively to the conservatee, (ii) provides expressly that a conservator may not revoke or modify the trust, or (iii) otherwise evidences an intent that would be inconsistent with authorizing or requiring the conservator to exercise the right to revoke or modify the trust.
 - ...
 - (13) Making a will.

§ 2581

Notice of the hearing of the petition shall be given, regardless of age, . . . to all of the following:

- ...
- (b) The persons required to be named in a petition for the appointment of a conservator.
- (c) So far as is known to the petitioner, beneficiaries under any document executed by the conservatee which may have testamentary effect unless the court for good cause dispenses with such notice.
- (d) So far as is known to the petitioner, the persons who, if the conservatee were to die immediately, would be the conservatee’s heirs under the laws of intestate succession unless the court for good cause dispenses with such notice.
- (e) Such other persons as the court may order.

§ 2582

The court may make an order authorizing or requiring the proposed action under this article only if the court determines all of the following:

- (a) The conservatee either (1) is not opposed to the proposed action or (2) if opposed to the proposed action, lacks legal capacity for the proposed action.
- (b) Either the proposed action will have no adverse effect on the estate or the estate remaining after the proposed action is taken will be adequate to provide for the needs of the conservatee and for the support of those legally entitled to support, maintenance, and education from the conservatee, taking into account the age, physical condition, standards of living, and all other relevant circumstances of the conservatee and those legally entitled to support, maintenance, and education from the conservatee.

§ 2583

In determining whether to authorize or require a proposed action under this article, the court shall take into consideration all the relevant circumstances, which may include, but are not limited to, the following:

- (a) Whether the conservatee has legal capacity for the proposed transaction and, if not, the probability of the conservatee's recovery of legal capacity.
- (b) The past donative declarations, practices, and conduct of the conservatee.
- (c) The traits of the conservatee.
- (d) The relationship and intimacy of the prospective donees with the conservatee, their standards of living, and the extent to which they would be natural objects of the conservatee's bounty by any objective test based on such relationship, intimacy, and standards of living.
- (e) The wishes of the conservatee.
- (f) Any known estate plan of the conservatee (including, but not limited to, the conservatee's will, any trust of which the conservatee is the settlor or beneficiary, any power of appointment created by or exercisable by the conservatee, and any contract, transfer, or joint ownership arrangement with provisions for payment or transfer of benefits or interests at the conservatee's death to another or others which the conservatee may have originated).
- (g) The manner in which the estate would devolve upon the conservatee's death, giving consideration to the age and the mental and physical condition of the conservatee, the prospective devisees or heirs of the conservatee, and the prospective donees.
- (h) The value, liquidity, and productiveness of the estate.
- (i) The minimization of current or prospective income, estate, inheritance, or other taxes or expenses of administration.
- (j) Changes of tax laws and other laws which would likely have motivated the conservatee to alter the conservatee's estate plan.
- (k) The likelihood from all the circumstances that the conservatee as a reasonably prudent person would take the proposed action if the conservatee had the capacity to do so.
- ...
- (m) Whether a beneficiary has committed physical abuse, neglect, false imprisonment, or fiduciary abuse against the conservatee after the conservatee was substantially unable to manage his or her financial resources, or resist fraud or undue influence, and the conservatee's disability persisted throughout the time of the hearing on the proposed substituted judgment.

§ 2584

After hearing, the court, in its discretion, may approve, modify and approve, or disapprove the proposed action and may authorize or direct the conservator to transfer or dispose of assets or take other action as provided in the court's order.

§ 2585

Nothing in this article imposes any duty on the conservator to propose any action under this article, and the conservator is not liable for failure to propose any action under this article.

Endnotes

1. *In re* Guardianship of Sherry, 668 So. 2d 659 (Fla. Dist. Ct. App. 1996).
2. FLA. STAT. ch. 744 (1999).
3. Andrew P. Brusky, *Guardianship Reform Revisited After 10 Years*, ELDER'S ADVISOR, Spring 2000, at 83-84 ("It was the government's duty to protect those who could not or would not take care of themselves.").
4. FLA. STAT. SEC. 744.3675 (1999).
5. FLA. STAT. SEC. 744.3678 (1999).
6. FLA. STAT. SEC. 744.441, 744.444 (1999); *see generally* FLA. STAT. Ch. 744 (1999).
7. *In re* Guardianship of Bohac, 380 So. 2d 550 (Fla. Dist. Ct. App. 1980).

8. *Gray v. Worley*, 573 So. 2d 873 (Fla. Dist. Ct. App. 1991) (guardian may create trust with court approval).
9. *In re Guardianship of Muller*, 650 So. 2d 698, 699 (Fla. Dist. Ct. App. 1995) (guardian with court approval may amend trust to appoint new trustee). *Contra Reddick v. Suntrust Bank*, 718 So. 2d 950, 950 (Fla. Dist. Ct. App. 1998) (ward's best interests are served by continuing corporate trustee rather than appointing guardian/wife as successor trustee).
10. *Ullman v. Garcia*, 645 So. 2d 168, 169 (Fla. Dist. Ct. App. 1994) (guardian has duty to set aside gifts procured by undue influence) (dicta).
11. *Goeke v. Goeke*, 613 So. 2d 1345, 1348 (Fla. Dist. Ct. App. 1993) (guardian with court approval may designate new beneficiaries on IRA account).
12. *Sherry*, *supra* note 1.
13. *See also Whitley v. Craig*, 710 So. 2d 1375, 1375 (Fla. Dist. Ct. App. 1998) (guardian may not revoke ward's will).
14. *Sherry*, *supra* note 1, at 661 ("We conclude that placing Ruth's property in a trust that will pass on her death to a beneficiary different from the ones who would receive her assets at death under the estate planning documents existing on the date of her adjudication is tantamount to amending her will. Section 744.441 does not include a provision permitting guardians, even with court approval, to amend their wards' wills, other than in the limited circumstances authorized in subsection 744.441(18). Absent clear legislative authority, subsection 744.441(19) should not be used for that purpose.").

FLA. STAT. SEC. 744.441 provides in relevant part:

Powers of guardian upon court approval.

After obtaining approval of the court pursuant to a petition for authorization to act, a plenary guardian of the property, or a limited guardian of the property within the powers granted by the order appointing the guardian or an approved annual or amended guardianship report, may:

....

(18) When the ward's will evinces an objective to obtain a United States estate tax charitable deduction by use of a split interest trust (as that term is defined in s. 737.501), but the maximum charitable deduction otherwise allowable will not be achieved in whole or in part, execute a codicil on the ward's behalf amending said will to obtain the maximum charitable deduction allowable without diminishing the aggregate value of the benefits of any beneficiary under such will.

(19) Create revocable or irrevocable trusts of property of the ward's estate, which may extend beyond the disability or life of the ward in connection with estate, gift, income, or other tax planning or in connection with estate planning.

15. *E.g.*, *Morgan v. Guardianship of Turgeon*, 755 So. 2d 161 (Fla. Dist. Ct. App. 2000); *Morgan v. Guardianship of Turgeon*, 724 So. 2d 175 (Fla. Dist. Ct. App. 1999).