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What Counsel for the Ward Can Learn From Will Contests

By Alison McChrystal Barnes

When courts base their determinations of competency on a preference for family control of assets, the property rights of older people are diminished. For elder law advocates to protect their clients' interest in controlling their own property, it is necessary to move the recognition of the family paradigm in guardianship and will contests beyond mere anecdote.

Recent commentary on guardianship reveals that major statutory reforms produce few results in the courts.¹ Major studies of guardianship case files

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show that few limited guardianships are created to preserve for elderly wards any powers to act for themselves or determine their living situations, though some wards are capable of doing so.²

The appointment of counsel for the prospective ward seldom results in zealous advocacy.³ One detailed study found that the respondent's lawyer might actually sit silent throughout the hearing.⁴ A majority of wards were absent from the adjudication of their incompetency.⁵

Another Reform Failure: Inheritance Law

The failure of statutory reform resembles the failures in another area of law, the law of wills and inheritance. Critical commentary caused a relaxation of the formalities requirements in the 1990 revision of the Uniform Probate Code (U.P.C.).⁶ In addition, the 1990 reform included a new provision with a dispensing power that allows the court to admit to probate wills with flawed formalities, provided that it finds clear and convincing evidence that the decedent intended the document to be his or her will.⁷

The reforms were intended to give expression more often to

the testator's intent by reducing the number of wills rejected for failure to fully comply with formalities requirements. It was anticipated that the result would be the development of legal principles for determining the testator's intent.

Few states have adopted these U.P.C. provisions.⁸ Further, researchers reviewing probate court judgments since the adoption of these provisions by several states show that the reforms have not significantly changed the courts' rejection based on a finding of lack of intent.⁹

Where they have been adopted, courts continue to decide cases seemingly without defining principles, and without reference to the statutory law.¹⁰ The opinions vary from case to case in the rigor with which they view formalities flaws and other evidence of intent. For example, in one case a will signed by the witnesses out of the actual line of sight of the testator is considered to be witnessed "in the conscious presence" of that testator and admitted, while on similar facts another will is rejected by the same court.¹¹

In neither case is there evidence that the will provisions are

suspect, yet one testator's instructions are thrown out and the law of intestacy applied instead.

As with guardianship reform, it is useful to inquire just why the conscientiously crafted revision is ineffective. In will contests, it appears, the courts' decisions frequently rely on family ties to indicate who are the correct beneficiaries, rather than searching for the testator's intent.¹² Thus, the flaw in formalities is sufficient basis to reject the will as invalid when the disposition of the property is nontraditional, while the similarly executed will document that makes a disposition to close family members is valid.

Similarly, the courts manipulate the doctrine of undue influence to the point where its legal significance is in doubt.¹³ A finding of undue influence is based on evidence that the testator was coerced to make the provisions of his or her will by the influential words or acts of another, or that the influence imposes such control over the testator that the will of the other person is substituted for the testator. Undue influence can be inferred from the existence of a "confidential relationship" between the testator and other person. However, courts vary from case to case on the evidence that makes a relationship "confidential".¹⁴

The evidence of lack of mental capacity to make a will is a particularly interesting illustration of the preference for family members, the so-called "family paradigm".¹⁵ In order to have sufficient capacity, the testator must know who are the "natural objects of her bounty"—i.e., close family members. Disposition to

one who is not related raises the question of whether the testator did in fact have that knowledge. Thus, disposition to an unrelated person provides part of the proof that the testator lacked capacity to make the will at all.

The Family Paradigm

A number of commentators on will contests have considered the family paradigm at work. One envisions the preference for family as arising from the (usually implicit) promises exchanged in a long-term relationship.¹⁶ For example, the son provides attentive and respectful care with the implicit understanding that the "family's" assets will someday become his. It would be a betrayal of this "contract" if the parent's will gave the property to others. Therefore, courts recognize and enforce such promises through the manipulation of wills doctrines.¹⁷ This line of thinking implies that the preference for family generally is justified.

Another commentator approaches the question with objections to who is considered family under the existing paradigm.¹⁸ The modern "family", she writes, includes people who have made commitments to one another, and/or provide care and support, without marriage or other family status under the law. A revision of the family in the family paradigm, then, might lead the courts to continue support the testator provided during life, or award property to a non-family member based on the worthiness shown by providing care in the testator's old age.

Reform of the law of wills has been cut off in the courts by a preference that close family

members, the traditional "natural objects of (an elder's) bounty", take most of the property. Those excluded may be close friends, live-in companions, or any non-family member the elder designates. The commentary cited here is critical of the practice, but ultimately returns to some version of the family paradigm, calling for courts to favor those who "acted like family" to the decedent. The reform in favor of individual choice for the testator is cut off from its full implementation.

Does the Family Paradigm Impede Guardianship Reform?

No similar research has taken place in guardianship case law. Indeed, it is possible that too few appellate opinions exist involving guardianship for elders to provide a discernable pattern. Yet, the question arises regularly as to whether older people are as free to incur the costs of new initiatives and new relationships.¹⁹ Indeed, guardianship has been depicted as a tool for coercion of uncooperative elders.²⁰ The doctrine most likely to be subject to the courts' manipulation is the determination of competency itself, an elusive concept poorly encompassed by the law.²¹

Without doubt, the same results can be produced by guardianship and wills contest: the nullification of an elder's choices about his or her property. In each instance, the individual's freedom is curtailed and the property is turned over to others. The courts in will contests prefer to provide property to family; eighty-five percent of guardians for the elderly are

family members.²²

Many anecdotes among elder law attorneys relate that family members petition for guardianship when they become alarmed about their elder's spending. The elder might meet a new romantic interest and begin to spend on travel, gifts, or even a home suitable to the new domestic situation. Alternatively, the elder might endorse a cause or religious group, and propose to donate property. If the choices are made by the living, the legal intervention is a guardianship proceeding.

Do case opinions exist in sufficient numbers to show a pattern in guardianship? It remains for elder law advocates to move the recognition of the family paradigm in guardianship beyond

anecdote and establish whether courts at least sometimes base their determinations of competency on a preference for family control of the assets. If this is so, then older people have diminished property rights. Their interest in controlling their own property is deemed less important than the interests of younger family members who expect to receive that property as inheritance.

If this is true, then two possible actions follow:

- First, advocates for elderly wards must actively defend their clients' rights to spend their assets as they wish, rather than presuming that the courts decide

competency on the evidence of decision-making capabilities.

The elder's spending on a new interest introduces an element to the case that is ignored at peril to the outcome.

- Second, it may be possible to articulate the reasons that elders' interests in their property are in fact sometimes diminished.

The implicit agreements of long-term relationships may have a valid role in determining when the family can take control in order to preserve some of the assets. Understanding the nature of the family's claim may lead to fairer outcomes, in which elders retain some freedom to spend.

Endnotes

1. From the Editor, ELDER'S ADVISOR, Vol. 4, No. 1 (Summer 2002) at iii. Papers and recommendations from the Wingspan conference on guardianship are published in 31 Stetson L. Rev. 573-1094 (Spring 2002).
2. See, e.g., PAT M. KEITH & ROBBYN R. WACKER, OLDER WARDS AND THEIR GUARDIANS 177-79 (1994).
3. Wingspan recommendation 29 calls for counsel for the respondent to zealously advocate the course of actions chosen by the client. Wingspan, the Second National Guardianship Conference Recommendations, 31 STETSON L. REV. 595, 601 (2002). The American College of Trust and Estate Counsel (ACTEC), which cosponsored the conference, dissents from this recommendation, asserting that such a requirement conflicts with the requirement of due diligence in Model Rule of Professional Responsibility 1.3. Letter from the president of ACTEC, Carlyn S. McCaffrey, to conference organizers Rebecca Morgan, Charles Sabatino and Frank Johns, April 8, 2002 (on file with the author.)
4. Lauren Barritt Lisi, Anne Burns, & Kathleen Lussenden, NATIONAL STUDY OF GUARDIANSHIP SYSTEMS: FINDING AND RECOMMENDATIONS, The Center for Social Gerontology 57 (1994) [hereinafter TCSG NAT'L STUDY] (collecting data in ten states and 30 courts (California (3 courts), Colorado (2), Florida (1), Indiana (1), Kansas (4), Michigan (3), Minnesota (2), New York (4), Oregon (9), Washington (1)).
5. *Id.* at 49-50.
6. U.P.C. § 5-502 requires only that a will be 1) in writing; 2) signed by the testator or in the testator's name by some other individual in the testator's conscious presence and by the testator's direction; and 3) signed within a reasonable time by two individuals who witnessed either the signing of the will or the testator's acknowledgement of that signature or acknowledgement of the will.
7. U.P.C. § 5-503.
8. Six states had adopted the reforms by 2000. DUKEMINIER AND JOHANSON, WILLS, TRUSTS AND ESTATES (6th ed.) at 261.
9. The testator might be found to lack the requisite intent to make a will because the document lacks formalities that indicate it is a will, or because of the undue influence of another who substitutes his own intent for the testators.
10. Adam J. Hirsch, *Inheritance and Inconsistency*, 57 OHIO ST. L.J. 1057, 1058-59 (1996); Bruce H. Mann, *Formalities and Formalism in the Uniform Probate Code*, 142 U. PA. L. REV. 1033, 1036, 1040-41 (1994).
11. Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235, 266-73 (1996)
12. It is widely acknowledged that finding the testator's intent is a highly speculative activity.
13. DUKEMINIER AND JOHANSON observe that undue influence is one of the most bothersome concepts in all the law. It cannot be precisely defined. Proof of undue influence may be inferred from the circumstances, and may be applied to the testator by the beneficiary or by another. Courts have purported to require

- proof that the testator was susceptible to undue influence, the influencer had the disposition and opportunity to exercise the influence, and that the disposition results from the influence. DUKEMINIER AND JOHANSON, *supra* note 9 at 176-77.
14. Leslie, *supra* note 11 at 253.
 15. Professor Leslie examined all 160 of the undue influence cases listed in Westlaw under topic number 409 (Wills), key numbers 154-66 (undue influence and related evidentiary and procedural issues) between December 31, 1984 and January 1, 1990, in which the court considered undue influence on a motion for summary judgment, directed verdict or judgment notwithstanding the verdict.
 16. Melanie B. Leslie, *Enforcing Family Promises: Reliance, Reciprocity and Relational Contract*, 77 N.C. L. REV. 551, 553-54 (1999).
 17. *Id.* at 551.
 18. Frances H. Foster, *The Family Paradigm of Inheritance Law*, 80 N.C.L. REV. 199, 209-16 (2001)
 19. For an early discussion, with illustrative cases from guardianship and wills contests, see generally Note, *The Disguised Oppression of Involuntary Guardianship: Have the Elderly Freedom to Spend?* 73 YALE L.J. 676 (1964).
 20. See, e.g., Annina Mitchell, *The Objects of Our Wisdom and Our Coercion: Involuntary Guardianship for Incompetents*, 52 S. CAL. L. REV. 1045, 1431 (1979).
 21. See generally Charles S. Sabatino, *Competency: Refining Our Legal Fictions*, in THE IMPACT OF THE LAW ON OLDER ADULTS' DECISION-MAKING CAPACITY 254 (Michael Smyer, Marshall Kapp and K.W. Schaie, eds. 1996).
 22. HERBERT KRITZER & HELEN MARKS DICKS, ADULT GUARDIANSHIPS IN WISCONSIN: AN EMPIRICAL ASSESSMENT, a report for the Center for Public Representation and the Elder Law Center Coalition of Wisconsin Aging Groups 10, 16 (Jan. 1992).