Estate planning by guardians: The next generation

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When the late Judge Philip R. Toomin authored his 1973 article titled "Propriety of Court Adoption of an Estate Plan for Incompetents" (1973, 61 Ill. B. J. 608), he was commenting on a 1971 amendment to the Probate Act which allowed the use of a ward's estate not only for support of the ward, but also "for any other purpose which the court deems to be for the best interests of the ward...." Although this may have then been a revolutionary breakthrough, and a clear enhancement of the power of the court in what was then known as the estates of "incompetents," the 1971 amendment was a generation away from the statutory scheme adopted in 1996 which authorizes the court to engage in what is now more conventionally known as estate planning for a disabled ward.

The 1996 provision, as subsequently modified, is set forth in 755 ILCS 5/11a-18(a-5) as one of the "[d]uties of the estate guardian." Significantly, the statutory provision states that the court "*may* [emphasis added] authorize the guardian to exercise any and all powers over the estate and business affairs of the ward that the ward could exercise if present and not under disability." Although the drafting of a will for a ward is not specifically addressed, such powers "may include, but shall not be limited to" a myriad of estate planning opportunities, including the making of gifts, the creation of revocable or irrevocable trusts, and "modifying by means of codicil or trust amendment the terms of a ward's will or any revocable trust created by the ward, as the court may consider advisable in light of changes in applicable tax laws."

The reference to "changes in applicable tax

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laws" has previously given rise to an argument that any changes to the existing estate planning documents of a ward must be based on a tax savings rationale. However, this view was soundly rejected in the recent First District opinion in *Zagorski v. Kaleta (In re Estate of Bozenna Michalak)*, 2010 Ill. App. LEXIS 869 (Ill. App. Ct. 1st Dist. Aug. 20, 2010), which was, perhaps coincidentally, authored by Judge Toomin's son, Justice Michael P. Toomin, who now sits in the Fifth Division of said court.

After extensive discussion, the *Michalak* court concludes that, since the "broad permissive language" of the statute allows the guardian to "exercise any or all powers over the estate and business of the affairs of the ward that the ward could exercise if present and not under disability," and that the same "may include, but shall not be limited to, the following," any references to changes in the applicable tax law are advisory, not mandatory, in nature. Accordingly, an amendment to the ward's revocable trust which did not relate to tax savings was upheld on appeal.

The First District took a further step in its September 17, 2010 unpublished Order in *JPMorgan Chase Bank, N.A. v. Peter H. Wemple (In re Estate of Richard V. Henry)* (No. 1-09-1795, on appeal from Cook County Case No. 2009 P 1779). The *Henry* court also approved non-tax related estate planning of a guardian, including the drafting of a will for the ward, over objections that the drafting of a will is not within the enumerated powers. In reaching its decision, the court cites the "may include, but shall not be limited to," language of the statute (Order, p. 7). As a result thereof, it is now clear that a guardian is considered to have broad estate planning powers in this state.

Notwithstanding these decisions, however, there are a number of issues which still must be resolved by the legislature or courts in the future. First and foremost of these issues is reconciling the above provisions of 755 ILCS 5/11a-18(a-5) with that of 5/11a-18(d), which states that a "guardian of the estate shall have no authority to revoke a trust that is revocable by the ward....". It is unclear how one may exercise a number of powers under (a-5), including the amendment of a trust, but not have the authority under (d) to revoke a trust, given that an "amendment and restatement" of a trust is essentially a revocation of the prior document.

A second issue which will require further attention is that of standing. Who has a right to notice, and to what extent may such individuals participate in a trial court determination of the estate planning intent of the ward, are also issues which still need to be addressed. Notwithstanding the fact that pour over wills and living trusts are routinely used as substitutes for traditional dispositive wills, *Michalak* says that contingent beneficiaries of an existing living trust have standing to participate, while *Henry* takes the position that named beneficiaries of an existing will do not. There is no compelling reason why standing should be determined on this basis.

A final issue relates to the 1958 Illinois Supreme Court decision in *Peters v. Catt*, 154 N.E.2d 280, in which it was held that "a testator, when making a will, must have sufficient mental capacity to know the natural objects of his bounty, to comprehend the kind and character of his property, to understand the particular business in which he is engaged, and to make disposition of his property according to some plan formed in his mind. However, he does not have to be of absolutely sound mind in every respect in order to have sufficient mental capacity to make a will."

The impact of this case was reflected in the 1979 decision in the *Estate of Anna J. Letsche*, 392 N.E. 2nd 612. In *Letsche*, an individual who had been adjudicated "incompetent" arranged for the preparation of a will on her own behalf. Court approval of the ward's will was not initially sought. Upon challenge, however, the First District held that "nowhere does the statute direct the conservator to obtain approval of a will executed by a ward. Furthermore, if the ward has the mental capacity required to execute a will, then he may dispose of his property by a will without involvement of the conservator or approval of the court. The fact that a conservator has been appointed is not conclusive on the issue of whether the ward possesses the requisite mental capacity."

These two cases demonstrate that, even after an adjudication of disability, an Illinois ward has the right to make his or her own testamentary decisions provided that he or she then has "testamentary capacity." How this will impact the statutory right of the guardian to do estate planning for the ward, and whether the guardian must first determine and allege that the ward does not have such requisite capacity, are issues for future cases as well.

Accordingly, although we have come a long way since the 1971 amendment, and the opportunities for guardians to document the intentions of a ward have significantly increased as a result of recent decisions interpreting the 1996 amendment, we still have conflicting authority on related matters. We look forward to a future generation of additional legislative and judicial input to clear the way. ■