

Elder Law

The newsletter of the Illinois State Bar Association's Section on Elder Law

Estate Planning for Disabled Adults

BY ROBERT W. KAUFMAN, ESQ.

The Illinois Probate Act (the "Act"), at 755 ILCS 5/4-1(b), sets forth the general proposition that "there is a rebuttable presumption that a will or codicil is void if it was executed or modified after the testator is adjudicated disabled" **and** either (1) a plenary guardian has been appointed, or (2) a limited guardian has been appointed **and** the court has made a determination that the testator lacks testamentary capacity. However, that rebuttable presumption does not close the door on estate planning for such an

individual, and the Act provides a couple of opportunities in that regard.

The first opportunity resides in the same statutory provision, as section 4-1(b) goes on to state that the "rebuttable presumption is overcome by clear and convincing evidence that the testator had the capacity to execute the will or codicil at the time the will or codicil was executed." This section implies that the evidence could be provided after-the-fact, while trying to admit such a will or codicil to probate. From a practical

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2020 Resolutions

The start of each new year is an opportunity to revisit your personal resolutions. To maximize your opportunity for success, consider this month's namesake, Janus, the Roman god of beginnings, change, doors, endings, and transitions. Janus is often depicted as two-faced, simultaneously capable of looking toward the past and at the future, so take some time to reflect on your past successes and plans that did not turn out so well. Do you feel fulfilled in both your personal life and professional work? What you want to

accomplish over the course of the year, in three years, and by the end of five years? How can you recharge and regain your motivation?

Here is a list of resolutions which working on will get you to a happier place by year's end:

- Keep your promises.
- Take better care of your mental and physical health.
- Spend more time in the moment with your loved ones.
- Manage your stress level.

- Stay focused on positive things.
- Start scheduling your vacation time.
- Practice the fine art of delegation more often at work.
- Fear less and act more to grow boundaries and reach your best potential.
- Plan for you financial future and increase retirement account contributions.
- Revisit your insurance coverage and estate planning documents.

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standpoint, however, it would be best to provide this evidence contemporaneously with the execution of the document, so that, if you are unable to establish testamentary capacity, the second approach afforded by the Act remains open to you.

In order to overcome the presumption, you will need to have the ward examined by an appropriate medical professional, who renders a written opinion that this individual does, in fact, have testamentary capacity. While it is unclear how one could use this approach if there is a limited guardianship and a prior finding of lack of testamentary capacity, this approach is clearly available in plenary guardian situations.

You would then bring a motion to the guardianship judge, under Probate Act section 11a-18(d-5), seeking approval to have the ward execute the proposed estate planning documents based upon this medical finding. Although not specifically referenced in the statute, it would be advisable to further request that the judge also specifically find that this individual has testamentary capacity, which should suffice to rebut a challenge thereto after the death of the testator. Although section 11a-18(d-5) refers only to a “will or codicil”, if the court determines that the ward does, in fact, have testamentary capacity, one could presume that the execution of a living trust by this individual would also be presumptively valid.

If you are unable to procure the requisite medical finding, a second approach is available under section 11a-18(a-5), which lists a number of estate planning related actions to be undertaken by the guardian on behalf of the ward so that the “ward’s wishes as best they can be ascertained shall be carried out, whether or not tax savings are involved.” In this case, you would need to bring a Motion to the guardianship judge outlining the proposed action(s) and expected benefit(s), which make a case why it is in the best interests of the ward.

The specified actions include making gifts (section 11a-18(a-5)(1)), exercising powers of appointment (section 11a-18(a-5)(3)), creating revocable or irrevocable trusts for the ward (section 11a-18(a-5)(6)), and modifying by means of codicil or trust amendment the terms of the 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 (section 11a-18(a-5)(11)).

Although the list does not specifically include the execution of a will on behalf of the ward, Illinois courts have found that authority based on the use of the clause “may include, but shall not be limited to, the following” in section 11a-18(a-5).

In an unpublished Order under *In re Estate of Richard V. Henry, Deceased v. Peter H. Wemple*, No. 1-09-1795, First District Appellate Court upheld a ruling by the Circuit Court of Cook County authorizing the estate guardian of Mr. Henry to execute a living trust and, in the alternative, a will or codicil, on behalf of the ward. The court rejected the claims of beneficiaries of prior estate planning documents that will modifications were permitted only if tax purposes so dictate, and that the failure of the ward to personally execute the will ran afoul of the attestation requirements for wills. The court cited section 11a-18(a-5) of the Act which provides that “the ward’s wishes as best they can be ascertained shall be carried out, whether or not tax savings are involved.”

Similarly, in *Zagorski v. Kaleta (In re Estate of Bozena Michalak)*, 2010 Ill. App. LEXIS 869, the Court held that the “broad permissible 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.” As a result, an amendment to the ward’s revocable trust, which did not relate to tax savings, was upheld.

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OFFICE

ILLINOIS BAR CENTER
424 S. SECOND STREET
SPRINGFIELD, IL 62701
PHONES: 217-525-1760 OR 800-252-8908
WWW.ISBA.ORG

EDITORS

Karen A. Kloppe
Eugenia C. Hunter

PUBLICATIONS MANAGER

Sara Anderson
✉ sanderson@isba.org

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In addition, the court in the *Estate of Howell v. Howell*, 2015 IL App (1st) 133247 (2015), authorized a guardian to execute testamentary documents on behalf of a ward which would reflect his “best interests,” notwithstanding the ward’s lack of testamentary capacity throughout his lifetime.

Although the foregoing analysis not does address questions relating to the parties to whom notice is required in any such

action, it is comforting to know that an adjudication of incapacity, or even the lack of testamentary capacity, does not foreclose the opportunity to act on estate planning matters in the best interests of a ward. As a result, guardians should be cognizant of these opportunities, and avail themselves of the same when it does serve the interests of the ward. ■

The author is a principal at the Chicago law firm of Fischel|Kahn, and a past Chair of the ISBA Trusts and Estates Section Council. He is current a member of the ISBA Elder Law Section Council.

2020 Resolutions

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- Execute advance directives if need to and periodically check in with your agent about your wishes and changing circumstance.
- Get organized before an emergency arises.
- Make an inventory of your possessions.
- Be a mentor or volunteer or step up and take on a leadership role.
- Practice gratitude and take the time to express your appreciation to others.
- Commit to generosity within your means.
- Learn something new.

Remember these words of wisdom from Dr. Seuss: “How did it get so late so soon? It’s night before it’s afternoon. December is here before it’s June. My goodness how the time has flown. How did it get so late so soon?” ■



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28 Data Privacy Day

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17 Random Acts of Kindness Day

21 Section Council Meeting

March

3 Caregiver Appreciation Day

6 Employee Appreciation Day

8 International Women's Day

16 Freedom of Information Day

17 Section Council Conference Call

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- Karen Kloppe - Karen.Kloppe@Illinois.gov

Let us know if there are any topics you would like to see covered in the future. ■