

ELDERLAW

NEWS

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PREVENTING FUTURE CHALLENGES TO YOUR ESTATE PLAN

When developing your estate plan, it is important to recognize the possibility that, after your death, the plan could be challenged by those who expected more favorable treatment from you under your Last Will and Testament. For example, if you choose not to leave your estate equally to all of your children under your will, those children treated less favorably may bring a "will contest" after your death, claiming that your will was the product of "undue influence" or that you lacked the mental capacity to execute your will. With this in mind, if you do not intend to distribute your estate equally to your heirs, you can take steps now to minimize the risk of a future challenge to your will.

Standards For Determining Testamentary Capacity

A person possesses the capacity to make a valid will if he/she is at least 18 years of age and "of sound mind." This requires being "capable of understanding the general nature of the business in which he is engaged and the particular distribution he is effecting; of recollecting the property of which he means to dispose and the persons who naturally are the objects of his bounty; and of comprehending the interrelation of these factors."

This standard is not considered to be demanding. A "very

low degree of intelligence" is sufficient; in fact, even a person with memory lapses or classified as insane or a "senile dement," or who is sufficiently impaired as to justify the appointment of a guardian, may have the capacity to make a valid will. However, because a person with diminished capacity is generally more vulnerable, proving that a "testator," or a person making a will, was in a weakened mental state may bolster a claim of undue influence.

Standards For Determining Undue Influence

Undue influence is defined as "mental, moral or physical' exertion which has destroyed the

If you choose not to leave your estate equally to all of your children under your Last Will and Testament, your estate plan could be challenged after your death by those who expected more favorable treatment unless you take steps now to minimize the risk of a future challenge to your will.

'free agency of a testator' by preventing the testator 'from following the dictates of his own mind and will and accepting instead the domination and influence of another.'" If the will benefits a per-

son who stood in a "confidential relationship" with the testator, and there are additional "suspicious" circumstances, the law presumes that undue influence was present, unless the person defending the will proves otherwise.

Examples of a "confidential relationship" include when the testator lives with and depends upon one of his/her children for his/her daily needs. "Suspicious circumstances" may include a will favoring one family member over all the rest; the beneficiary arranging for the will drafting or execution; the beneficiary accompanying the testator to the lawyer's office, being present at discussions with the lawyer concerning the will, concealing the fact that the will had been executed, or denying family members access to the testator.

Taking Steps Now To Avoid Will Contests Later

As illustrated above, the same factors that may lead you

(Continued on Page 2)

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(Continued from Page 1)

to favor one child in your estate plan (for example, the fact that you might live with that child and depend on him/her for your daily needs) may also be used to support a claim of undue influence. Moreover, although it is certainly unfair to presume that an individual lacks testamentary capacity simply based upon his/her age, it is important to document your decision-making abilities when it comes time to execute a will.

With this in mind, it is important to address these issues with your lawyer when considering and executing an estate plan.

When it is time to execute your will, keep in mind that those persons who have an interest in your estate plan (for example, the child that you intend to favor in your will) should never be used as a witness to the will, because using an "interested" witness could later raise a question of undue influence. In fact, the mere attendance of a family member or other person with an interest in your estate plan at the will signing should be avoided:

A testator is often brought to the attorney's office by one of his or her children. If the testator is not leaving his or her estate equally to all of his or her children, the child or children who accompany the testator should not be allowed in the conference room while the Will is being explained to, and signed by, the testator. Indeed, once the testator indicates that he or she does not wish to treat his or her children equally, his or her attorney should insist that the testator's children stay in the waiting room at all

later meetings between the testator and the attorney to discuss the Will.

Another device that may be used to guard against will challenges by providing evidence of the testator's intent is a plain language letter from the attorney to the testator that memorializes the testator's estate planning objectives. Yet another tool is for the testator to prepare a family tree and a balance sheet of assets, to demonstrate that any exclusion of a relative from the will was not accidental, and to show that the testator knew the extent of his/her assets.

The testator might also consider explaining, either in the will or in a separate letter, why he/she is making an "unnatural" disposition favoring a particular heir.

Additionally, the lawyer's use of a checklist, which will then be included in the lawyer's file, may help to ensure (and document) that key issues and questions have been addressed at or before the will signing. Finally, if the testator's mental capacity is in issue, or there is a potential for a claim of undue influence, the testator may wish to consider being interviewed by a psychiatrist.

Conclusion

In sum, while the disposition of your estate is a highly personal decision, keeping in mind the potential consequences of an unequal estate distribution, and taking steps now to avoid challenges to your estate plan, is the best measure toward achieving your estate planning goals.

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One of the major concerns of parents with disabled adult children is how to provide for their financial future. Here are five key tips:

1) Buy enough life insurance. Life insurance proceeds can provide assets needed to pay for necessary care after a parent dies. Premiums for second-to-die **TIPS ON PROVIDING FOR**

TIPS ON PROVIDING FOR CHILDREN WITH DISABILITIES

CHILDREN WITH DISABILITIES

(Continued from Page 2)

insurance (which pays only when the second of two parents passes away) can be surprisingly low.

2) Set up a Trust. Any funds left for a disabled child, whether from an estate or the proceeds of a life insurance policy, should be held in trust.

(Continued on Page 3)

Leaving money for anyone with a disability jeopardizes public benefits. Also, many disabled people cannot manage funds.

3) Will/Appointment of Guardian. While the appointment of a guardian is important for anyone with minor children, it is doubly so if the child is disabled. The will is the vehicle for the appointment of a guardian.

4) Care Plan. All parents caring for disabled children are advised to write down what any successor caregiver would need to know about the child and what the parent's wishes are for his or her care. The memo or letter containing the care plan can be kept in the attorney's files with the parent's estate plan.

5) Coordination with Other Family Members. Even a carefully developed plan can be sabotaged by a well-meaning relative who leaves money directly to the child with a disability. If a trust is created, family should direct any bequest to that child through the trust. ❧ ❧

Geriatric Care Management has been around for a decade, but I am still frequently asked, "What is a Geriatric Care Manager (GCM), and what do you do?" A story about one of our clients usually helps to clarify what it is that we do.

Anne is an 83-year-old woman who lives by herself in a one-story home. She has mild dementia. Her daughter who lives out of state contacted me about five years ago. She was

ELDERCARE RESOURCES: GERIATRIC CARE MANAGERS

By Mary Ellen Kilgallen, Geriatric Care Manager and Guest Contributor

concerned about her mom who was being discharged from the hospital after falling and dislocating her hip, which had been replaced three years before. When she arrived home after her hip dislocation she became very dizzy and fell. She was readmitted to the local hospital and had a pacemaker put in. Her daughter had been visiting during this episode, but was now very concerned as she was due to fly home in several days and knew her mom required assistance she was unable to give. I visited Anne and her daughter the next day. A plan for her immediate care was established, a safety assessment of the home was done, and plans to address long-term needs were begun as well.

Five years and two hip replacements later, staff from Senior Support Specialists, a firm which provides geriatric care management services, continues to provide the assistance necessary for Anne to remain in her own home. Our staff has made arrangements for such diverse things as making arrangements for the heating system to be checked, arranging rehabilitation after her surgery, and monitoring and setting up a medication system. There have been some challenging times for Anne, but with ongoing support she has been able to remain relatively independent. As her status has changed over the years, we have made the necessary changes to help her carry out her wish to remain in her own home. A member of the staff sees Anne on a daily basis and makes sure she has eaten,

taken her medications, and checks on her general well being. She is seen by both our companion and professional staff. We take her to doctor's appointments, the grocery store, and on other errands. Although her daughter visits about every three months, she is in regular communication with our staff via e-mail so she knows exactly what is going on. She is kept in the loop regarding all decisions and can go about her daily life knowing that her mother is well cared for.

This personal story described some of the aspects of what a Geriatric Care Manager does. Other clients and families require different types of assistance. Some need help to choose the right long-term care facility. A GCM will help the client and family to choose a facility that matches their physical, psychosocial and financial requirements. If needed, ongoing visits are made to the long-term care facility to assess the quality of care delivered and to act as an advocate for the client. Other families want an assessment, and they then carry out the plan by themselves. They simply want reassurance that they are making the right decisions for their loved ones. We assure clients and their families that we can offer as much or as little assistance as they require.

GCMs are very knowledgeable about community resources and how to access those resources. They often make referrals to many other professionals such as elder-law

(Continued on page 4)

**ELDERCARE RESOURCES:
GERIATRIC CARE MANAGERS**

(Continued from Page 3)

attorneys, physicians, and others depending upon what the client requires or requests. They provide crisis intervention and act as a liaison to families and other professionals. Some care managers provide therapeutic counseling. Many elderly clients have issues related to depression, grief or difficulty dealing with new situations, such as adjusting to a move to an assisted living facility or nursing home. Medicare sometimes covers counseling services.

GCMs, by definition, are skilled professionals who assist older people and their families to create and implement the care needed for that person to remain as independent as possible for as long as possible. Most GCMs are social workers, nurses, or have a degree in gerontology or its equivalent. The National Association of Professional Geriatric Care Managers has been in existence since 1986 and promotes the highest standards of practice. The web site, www.caremanager.org, gives information about the national organization and provides a directory by state that lists its individual members. By checking the membership list,

prospective consumers can find out if the prospective caregiver meets the criteria to be a GCM. To qualify, applicants must be licensed in their field, trained in geriatrics and must adhere to professional guidelines and ethics.

Professional fees for care managers range from about \$85 dollars per hour to \$140 dollars per hour. Companion fees, depending on the level of care required, are about \$20-\$25 per hour. There is usually an initial consultation fee as well. While some people may be concerned about the cost, it is important to remember that professional GCMs often help clients and families avoid or put off more expensive, residential levels of care by providing the resources needed for the person to remain in their home for as long as safely possible. GCMs, with their wealth of knowledge about community resources can also help to access programs or entitlements about which the family may be unaware.

Our elderly population continues to grow in number and to live longer. A major percentage of our society are members of the work force, care for their children and often their parents!

These members of the Sandwich Generation look to GCMs for help. GCMs help provide the services so that the elderly can live longer ...and better.



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