CAN A WILL BE PREPARED FOR SOMEONE WHO LACKS TESTAMENTARY CAPACITY?

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I. HISTORICAL PERSPECTIVE

Prior to the enactment of the Colorado Uniform Guardianship and Protective Proceedings Act in 2001, a conservator was prohibited from creating wills for protected persons. In common law, cases uniformly held that a guardian/conservator cannot make a will for his or her ward, and the Colorado Probate Code codifies that holding. Although a conservator lacked the power to make the will, permissible powers included will substitutes, power to enter into contracts – presumably life insurance contracts to change insurance beneficiaries – and power to enter into both revocable and irrevocable trusts which may extend beyond the life of the protected person.[1] According to James R. Wade, Colorado Probate Code C.R.S. §15-14-408 (1995) (superseded) had been used by courts in Colorado: to create trusts with dispositive provisions contrary to the intestacy statute; to manage and dispose of minors' injury settlements; to substitute a trust for a will for the post death protection of assets in the case of a disabled successor; to effectuate traditional marital deduction/exemption equivalent planning; and to substitute a trust for a will so as to take advantage of changes in the law regarding the design for generation-skipping transfer.[2] Through the exercise of the principle of substituted judgment, the court could adjust or modify the estate plan of a protected person to take into account changes in circumstances, amendment of tax law and the evolving best interests of the protected person. The standard for lack of testamentary capacity, which falls below the standard for incapacity for purposes of guardianship and conservatorship, reinforces the distinction between testamentary an *inter vivos* jurisdiction or, put differently, between probate and protective proceedings.

Read in harmony, the statutory provisions governing power to make wills, authority of court to conduct affairs of a protected person, and voidability of sales, encumbrances and transactions undertaken by protected persons, specifically exclude from the power of the court all dispositions made by will, since a will is ambulatory and does not "speak" until death. At the time of death, the will may be set aside if the testator is shown to have been incompetent at the execution of the will or induced into signing by fraud, undue influence or coercion.[3]

Courts of protection *vis a vis* guardianships and conservatorships avoid making findings as to the protected person's testamentary capacity. This offers one explanation as to why the Uniform Probate Code prior to the adoption of the Colorado Uniform Guardianship and Protective Proceedings Act excluded the power to make a will for a disabled person from the otherwise plenary powers of the conservatorship scheme, and it also explains why inventive estate planners have found it so difficult to take advantage of the existing protective jurisdiction in order to fashion some form of "do-it-yourself" living probate.[4]

Thus, the former C.R.S. §15-14-408 (1995) reflected the Colorado perspective on the Uniform Probate Code II ("UPC II"), the Uniform Probate Code's first wholesale repeal and re-enactment, on the question of the limited gifting powers of the conservator. That section of the Colorado Probate Code provided, in pertinent parts:

> (1) The Court has the powers specified in this section which may be exercised directly or through a conservator in respect to the estate and affairs of protected persons.
>
> (4) After hearing and upon determining that a basis for an appointment or other protective order exists with respect to a person for reasons other than minority, the court has for the benefit of this person and members of his household, all the powers of his estate and affairs which he could exercise if present and not under disability, *except the power to make a will.* These powers include, but are not limited to, power to make gifts . . . to create revocable or irrevocable trusts of property of the estate which may extend beyond his disability or life, ...
> (Emphasis supplied).

II. PROTECTIVE PROCEEDINGS: NEW FORM AND SUBSTANCE

In the new Colorado Uniform Guardianship and Protective Proceedings Act (2001), the specific authorization of C.R.S. §15-14-411(1)(g) for a conservator to

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make a will represents an explicit and affirmative statement of the Colorado General Assembly effecting a clear expansion and new direction in the Colorado law of conservatorship authority.

A conservator's explicit power to make a will in Colorado thus arose in the Colorado Uniform Guardianship and Protective Proceedings Act (the "CUGPPA"). Colorado's repeal and re-enactment of Parts 1-4 of Article 14, Title 15, C.R.S., effective January 1, 2001.[5] Concentrating on affirmation of the fundamental civil rights of allegedly incapacitated persons or persons allegedly in need of protection,[6] the CUGPPA accordingly and consistently endowed such persons – who might not otherwise execute a valid will pursuant to all the testamentary-capacity criteria as set forth in *Breeden v. Stone*, 992 P.2d 1167 (Colo. 2000)[7] – with a mechanism to devise their estates. Rather than depriving a person under conservatorship protection of the fundamental property right to determine the disposition of his or her estate at death, the mechanism that the General Assembly enacted, C.R.S. §15-14-411, facilitated for such persons a fulfillment of one of the Colorado Probate Code's underlying purposes: To discover and make effective the intent of a decedent in distribution of his or her property.[8] Indeed, the Code should be construed liberally to effect such purposes.[9]

C.R.S. §15-14-418(4) of the Colorado Probate Code, also enacted effective January 1, 2001, as part of the CUGPPA, empowers a conservator to access, and take into account, the protected person's estate plan in the context of "investing an estate, selecting assets . . . for distribution, and invoking powers of revocation or withdrawal . . . exercisable by the conservator." However, the 2002 Comment to the same subsection of the Uniform Probate Code (1998), §5-418(d), which subsection's language does not differ consequentially from C.R.S. §15-14-418(4), states, "Access to the estate plan also facilitates, where appropriate, the filing of a petition with respect to the protected person's estate as authorized by Section 5-411." Further, in an observation of a directive consistently expressed throughout the Uniform Guardianship and Protective Proceeding Act (UGPPA), the Comment notes, "Such access is essential for the conservator to carry out the obligation, as stated in subsection (b), *to consider the protected person's views when making decisions.*"(Emphasis supplied).

Thus, the ascertainment and consideration of the protected person's views and desires is a touchstone mandate, consistently expressed throughout the UGPPA and the CUGPPA, including at C.R.S. §15-14-411(3), which states: "The court, in exercising or *in approving a conservator's exercise* of the powers listed in subsection (1) of this section, shall consider *primarily the decision the protected person would have made, to the extent that the decision can be ascertained.*" (Emphasis supplied).

III. §15-14-411 CRITERIA AND STANDARD FOR REVIEW

Applied as the statutory basis for the making of the will as described in the factual recitation, C.R.S. §15-14-411, states, in pertinent parts:

> (1) After notice to interested persons and upon express authorization of the court, a *conservator* may:
>
> (g) Make, amend, or revoke the protected person's will.
>
> (2) A conservator, in making, amending, or revoking the protected person's will, shall comply with section 15-11-502 or 15-11-507.
>
> (3) The court, in exercising or *in approving a conservator's exercise* of the powers listed in subsection (1) of this section, shall consider *primarily the decision the protected person would have made, to the extent that the decision can be ascertained. To the extent the decision cannot be ascertained*, the court shall consider the best interest of the protected person. The court shall also consider: [(a) through (g)].

(Emphasis supplied.) Specifically with respect to §15-14-411(3), the 2002 Comment to the concomitant subsection of the UGPPA [§5-411(c)], states, in pertinent part.

. . . decisions by the conservator under this section must be based primarily on the decision that the protected person would have made, if of full capacity. The protected person's personal values and expressed desires, past and present, are to be considered when making decisions. *Carrying out the protected person's intent or probable intent is a major theme of this article. In this regard, the section probably confirms what is already the law.* (Emphasis supplied).

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Only by the rule of law – codified, for example, at C.R.S. §15-10-102(2)(b) – may the deceased's expression of intent be effectuated. An underlying policy of the Colorado Probate Code, the statute says, is to "discover and make effective the intent of a decedent in distribution of his property." Those policy principles of the Code must be read and considered in the context of C.R.S. §15-14-411, as set forth above. Whether a will created, and proposed for approval, pursuant to §15-14-411 comports with ascertainable intent of the Respondent Protected Person depends on an analysis in accordance with the criteria set forth in the statute: for examples, the consistency with which the Respondent expressed testamentary wishes and the history of familial relations-contacts as described in a conservator's investigation of the circumstances.

The fundamental purpose of C.R.S. §15-14-411 is to permit and enable those persons who would lack one or more elements of testamentary capacity to effectuate their testamentary intent, whether ascertained by clear expression or determined by consideration of the best interests of the respondent and the other factors set forth at §15-14-411(3). The threshold question for the Court is, can "the decision the protected person would have made" be ascertained? If the answer is yes, that ends the inquiry. The protected person's ascertained decision then must be the primary consideration of the Court in "approving a conservator's exercise of the power" to make a will for the protected person, pursuant to the plain language of C.R.S. §15-14-411(3). Only if the answer is no – "to the extent the decision cannot be ascertained," as the statute puts it – does the Court move on to the "default" considerations of the person's best interest and the (a)-(g) factors of subsection (3).

Based on the foregoing analysis, which conceives of a protocol for Court review discernable directly from the language of the statute, the testamentary capacity of the Protected Person (defined as it must be by the *Breeden* standards, *supra*) is simply irrelevant. Otherwise, there would be no need for or purpose to the specific authorization for a conservator to make a will for the Protected Person pursuant to C.R.S. §15-14-411. Based on the history of and rationale behind the CUGPPA, as noted above, the will-making authority of C.R.S. §15-14-411 was designed precisely *for* protected persons who lack all the elements of testamentary capacity.

Bearing significantly on the foregoing considerations are fundamental rules of statutory construction. First, it is presumed that, in enacting a statute, the General Assembly intends to comply with the constitutions of Colorado and the United States, per C.R.S. §2-4-201(1)(a), which indeed was a fundamental consideration underlying the entire CUGPPA. Further, it must be presumed that "a result feasible of execution is intended." C.R.S. §2-4-201(1)(d).

Second, in effecting the intent of the General Assembly, a court must avoid a statutory construction which defeats the obvious legislative intent of the statute and must give effect to the plain and ordinary meaning of language of the statute.[10]

Third, note that the section which imports consideration of testamentary capacity, C.R.S. §15-11-501 ("sound mind" to make a will), is *omitted* from the conservator's compliance requirements set forth at C.R.S. §15-14-411(2). There is a presumption that the General Assembly enacts statutory sections with knowledge of those already in existence.[11] Therefore, the General Assembly's omission of C.R.S. §15-11-501 from the prerequisites of C.R.S. §15-14-411 for a conservator-made will must be regarded as *deliberate*.

All the foregoing considerations of statutory construction, and the plain language of the statute itself, support the notion that the testamentary capacity of the protected person is not a prerequisite for the creation of a valid will of the protected person pursuant to C.R.S. §15-14-411(1)(g). Therefore, an objection to such will based on the protected person's lack of testamentary capacity is irrelevant as a matter of law and must be rejected. To impose testamentary capacity of the protected person as a prerequisite to a will's validity in this statutory context would be to engraft onto §15-14-411 an additional requirement the General Assembly did not intend, either in that statute or in the entire scheme of the CUGPPA. Instead, to exclude the question of testamentary capacity from the analysis as irrelevant would further the basic intent of the CUGPPA to expand and enforce recognition of the civil liberties of protected persons to retain their right to testamentary disposition of property.

While undue influence affecting a will drawn pursuant to C.R.S. §15-14-411 is conceivable in the abstract, there must be some *prima facie* showing of such

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influence in an objection before a petition to approve a will created pursuant to C.R.S. §15-14-411 should be denied. Significant is the protective procedure, by which the will was drawn, which as a matter of law may preclude undue influence. The Court has no less protective oversight of a conservator's activities in this context than in any other under the protective proceedings sections.

IV. RELEVANCY AND RIPENESS IN CONSERVATORSHIP CONTEXT

Pursuant to C.R.S. §15-12-407, undue influence and lack of testamentary capacity are issues to be raised formally by contestants to probate of a will. Probate of will occurs at the death of the testator or testatrix. A will operates only upon death.[12] Survival of a devisee is a prerequisite to a devise, and estate plans are not accelerated to suit the whims of heirs who wish to take now. To object, therefore, based on allegations of undue influence and lack of testamentary capacity, to a will drawn pursuant to C.R.S. §15-14-411, would be to interpose issues that statutorily lack ripeness, irrespective of whether an issue of material fact could be formulated. Such objections at the time of a conservator's petition to approve will, on alleged grounds circumscribed by statute to formal testacy proceedings, are premature, irrelevant and beyond the scope of C.R.S. §15-14-411's mandate.

Note that in enacting C.R.S. § 15-14-411, the General Assembly presumably intended to confer on district courts authority to approve conservator-created wills prior to the protected person's death. The heading for § 15-14-411 is "Required Court Approval." More consequentially, Subsection 3 of the section expressly authorizes courts to approve a conservator's exercise of powers, including, in reference to subsection (1)(g), the power to make, amend or revoke a protected person's will. Further support for the inference that the General Assembly conferred such authority is found in the protocol that Subsection (3) prescribes for the court's consideration in rendering such approval. Nevertheless, as of this writing, no Colorado appellate court has addressed the jurisdiction of courts sitting in probate to adjudicate "pre-mortem will contests" or approvals requested pursuant to §15-14-411(1)(g).

V. CONCLUSION: AUTHORITY THAT WILL BE USED

A Colorado conservator now has the authority to make a will for the protected person irrespective of the protected person's testamentary capacity. The protocol prescribed by C.R.S. §15-14-411 effectively facilitates conservator creation of a will, with court oversight, despite the existence of testamentary incapacity. Indeed, it may be discerned that a purpose of the section was to make estate planning – as a fundamental property interest of the person, within the scope of conservatorship protection and in furtherance of the respondent's testamentary desires – available to the cognitively disabled person under conservatorship who lacks testamentary capacity. It therefore follows logically that the C.R.S. §15-14-411 protocol, if properly followed through to court approval with proper notice and hearing, will eliminate lack of testamentary capacity as a ground to contest such will after the protected person-testator's death.

Put differently, to the extent the section makes lack of testamentary capacity irrelevant to proper creation and court approval of the person's will pursuant to C.R.S. §15-14-411, lack of testamentary capacity cannot become a relevant basis for objection to probate of that will. Undue influence accordingly is left as the sole major basis to contest such will, but even its legitimacy is put into question if not diminished by virtue of the oversight prescribed by C.R.S. §15-14-411. Moreover, there is no jurisdiction to address such formal testacy issues until the will in question becomes operative – at the death of the testator.

Notes

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1. *Wade/Parks Colorado Law of Wills, Trusts and Fiduciary Administration,* Section 44.24. Estate Planning; Disturbance of Post Mortem Plans. *In the Matter of Jones,* 379 Mass. 826, 401 N.E.2d 351 (1980) (wherein the Court authorized the creation of revocable and irrevocable charitable remainder trusts for protected person who had no will). *In re Guardianship and Conservatorship of Garcia,* 262 Neb. 205; 631 N.W.2d 464 (2001).

2. *Id.* at Section 44.24.

3. *Matter of Estate of Anderson,* 671 P.2d 165 (Utah 1983).

4. *John H. Langbein "Living Probate the Conservatorship Model"*, 77 Mich. Law Review 63 (1978-1979).

5. *See* C.R.S. §§ 15-14-101 and 15-17-103.

6. *See, generally*, "Highlights of Colorado's New Guardianship and Conservatorship Laws," 30 Colo.Law. 5 (January 2001) (Sandra Franklin, Denver Probate Magistrate, co-author).

7. The Colorado Supreme Court's enunciation of the consolidated rule that sound mind "includes the presence of the *Cunningham* factors [the four factors of *Cunningham v. Stender,* 127 Colo. 293, 255 P.2d 977 (1953)] *and* the absence of insane delusions that materially affect the will . . . ." (Emphasis in original).

8. C.R.S. §15-10-102(2)(b).

9. C.R.S. §15-10-102(1). *See* section II.D., *infra.*

10. *People v. District Court, 2d Jud. Dist.*, 713 P.2d 918 (Colo. 1986).

11. *Rodriguez v. Nurseries, Inc.*, 815 P.2d 1006 (Colo.App. 1991).

12. *Heinneman v. Colorado College,* 150 Colo. 515, 374 P.2d 695 (1962).

CREDITOR PROTECTION FOR IRAS IN COLORADO

*by Nancy R. Crow**

Account balances in retirement plans covered by the Employee Retirement Income Security Act of 1974 ("ERISA") are protected from creditors by ERISA's anti-alienation provision. ERISA § 206(d).[1] Once a balance is rolled over to an IRA, that limitation no longer applies; state law controls. Colorado law provides substantial insulation from creditors' claims for IRAs, non-qualified deferred compensation and other retirement plan accounts.

Levy, Attachment and Execution. Colorado Revised Statutes § 13-54-102(1)(s) exempts from levy and sale under writ of attachment or writ of execution "[p]roperty, including funds, held in or payable from any pension or retirement plan or deferred compensation plan, including those in which the debtor has received benefits or payments, has the present right to receive benefits or payments, or has the right to receive benefits or payments in the future and including pensions or plans which qualify under the federal Employee Retirement Income Security Act of 1974 as an employee pension benefit plan, as defined in 29 U.S.C. sec. 1002, any individual retirement account, as defined in 26 U.S.C. sec. 408, any Roth individual retirement account, as defined in 26 U.S.C. sec. 408A, and any plan, as defined in 26 U.S.C. sec. 401, and as these plans may be amended from time to time."

The Colorado statute is explicit and comprehensive. As a blanket rule, IRAs and other retirement accounts are not subject to levy or execution. The statute makes no distinction between an IRA established by the debtor and one established by another of which the debtor is a beneficiary. Thus IRAs, including inherited IRAs and Roth IRAs, remain protected until the funds are distributed, as they ultimately must be under the minimum distribution rules.[2] Once distributed, the payments will most likely be commingled with, and become indistinguishable from, other property of the debtor and will thus lose their exempt status. Note, however, that in *Guidry v. Sheet Metal Workers Nat'l Pension Fund,* 39 F.3d 1078 (10th Cir. 1994) (en banc), a majority of the Tenth Circuit concluded, among other findings, that a debtor would not lose his exemption under Colorado law to his pension funds after they were paid to him and deposited into a non-commingled bank account. The court relied on *Rutter v. Shumway,* 16 Colo. 95, 26 P. 321 (1891), which extended a former statute's exemption for wages to wages that had been deposited with a financial institution. The Shumway court found any other construction of the statute "would be narrow and illiberal. It would compel the laborer to leave his earnings in the hands of his employer, or else forego the protection of the statute altogether." *Id.*, 26 P. at 322. The Tenth Circuit also relied on the Supreme Court's interpretation of the

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