ACTEC Law Journal

Volume 46 | Number 1 Article 4

9-1-2020

Trusts in Guardianship: Using "Family Freeze" Agreements to Resolve Disputes

Gerard G. Brew

Trusts in Guardianship: Using "Family Freeze" Agreements to Resolve Disputes

*Gerard G. Brew**

Elizabeth continues to run the family business at age 94. Meanwhile, her 99-year-old husband, Philip, faces medical challenges and is probably incapacitated. Their four children consider the future: the eldest, Charlie, has been involved in the family business for decades, but he is now 71 himself. He resents that Mom will not put him in control and fears she will outlive him. The other children, less known outside the business, take care of Mom and Dad, often without recognition. The youngest, Edward, bears the brunt of the work: Mom and Dad rely upon him for their daily needs.

Tensions build. Conflict simmers among the children. And when things take a turn for the worse and Mom starts to fail, the children's angst drives them to a guardianship court. There, the siblings squabble over control, access to Mom and Dad, and ultimately over their wealth.

In the world of a monarchy, we know the outcome: Mom dies, Charles gains the throne, and the rest of the children fade into obscurity.

In a real guardianship court, however, the outcome would be very different: the children could end up in court long before Mom dies. This is not like primogeniture; as in many states, adult children are equally entitled to serve as guardian. But, by the time that issue plays out in court, the children might resent each other. The one who runs the business expects to be in charge, while the one who took care of Mom and Dad for many years expects to continue to care for them – and to be compensated for years of unrecognized work. Both might have an equal "claim" to manage Mom and Dad's affairs, but meanwhile, the other siblings are fed up with their squabbles.

Judges often confront these guardianship "will contests in disguise." Frequently, in the midst of declining health and perhaps incipient incapacity, the children take Mom or Dad to lawyers, resulting in estate planning arrangements that "compensate" (favor?) those who live nearby or care for the parents. Throughout history, parents have promised their caretakers that they will be compensated financially.[1] Those

* Newark, New Jersey.

[1] *See* HENDRIK HARTOG, SOMEDAY ALL THIS WILL BE YOURS: A HISTORY OF INHERITANCE AND OLD AGE, 1, 2-6, 9 (2012).

arrangements, even if reasonable or enforceable, fan the flames of suspicion.

Can the resulting guardianship conflagration be avoided or resolved?

In an ideal world, parents would plan for their decline: they would regularly update their estate planning documents with the assistance of their long-term counsel, who would understand the family dynamics and reasonably address these issues. The parents might even make the sensible decision to communicate their plans to the children, explaining why they have decided to give authority or even additional dispositions to the children who are involved in running the business or caring for them. After all, if properly explained, the children might understand that neither of those tasks should go uncompensated.

All of that could be accomplished through a fully-funded "management trust" that is either irrevocable (or more likely, for tax reasons, revocable, but requiring the "protective" consent of another). Estate planners often focus on trusts from a tax planning or probate avoidance perspective, but trusts also provide a powerful mechanism to avoid family conflict, particularly if they are implemented *long before* the unfortunate decline that leads families to guardianship disputes. If it is necessary to create a revocable trust for tax or other reasons, the parents could insert a trusted advisor in a position of control, for example, by requiring their consent to revoke or modify the trust. If that advisor knows the situation, and understands the family dynamics, he would decline to modify arrangements if concerned that the proposed changes would modify the long-held plan and might be the product of impaired capacity or undue influence.

This type of mechanism might also protect the declining parents from elder financial abuse, at the hands of a caretaker, family member, or financially-motivated friend or neighbor. In fact, this could be even more critical for a person without immediate family members who remains vulnerable to financially-motivated predators. In all too many tragic elder abuse cases, the victim might very well have come to rely upon a friend or neighbor. That innocent reliance sometimes devolves into a quest for financial control when the caretaker discovers significant wealth. A trustee could serve as a "firewall" – if the trustee become concerned that improper efforts are being made to gain control, or observes signs of abuse, the trustee could stop those efforts or even sound the alarm by seeking court involvement.

Even when the family is already in court, hope remains, if the children come to their senses. Achieving the latter might require help: an experienced mediator could help the children voice their concerns in a way that does not fan the flames of animosity, while perhaps helping the

family understand the reasons why one child might run the business while another is compensated for care. The mediator might strive to fashion a mechanism that uses transparency to limit suspicion.

That process might lead the family to a "freeze agreement" within the context of a guardianship (or even before the dispute ends up in court). Courts possess the inherent authority to formulate a protective arrangement.[2] That could involve a guardianship or, at least in some states, a consensual arrangement regarding the management of financial affairs (in New Jersey, that is called a "conservatorship" and requires capacity to consent to the restrictive arrangements).[3]

Guardianship and conservatorship arrangements involving court supervision tend to achieve one important goal: transparency. That goal is fulfilled by reporting requirements (accountings, inventories, and periodic reports) as well as court control over major events (court approval of transactions, major disbursements, and the like). Unfortunately, when a guardianship squabble arises among family members, as described above, courts often look to appoint "independent" fiduciaries. While that promotes transparency and might reduce resentment, those persons would have no familiarity with the ward's objectives or desires (because they are already incapacitated or subject to influence). Independent fiduciaries may create challenges when issues arise regarding family members running a business or serving as compensated caregivers. Also, but for estate planning documents created during the period of incapacity,[4] guardianship proceedings typically do not resolve the inevitable probate and estate disputes that will arise after death, but that sometimes occurs, as was the case in the oft-cited case of *In re Glasser*.[5]

The guardianship court might address all of these issues by approving a family agreement that manages all of the assets in a court-supervised trust. Statutes permit a guardianship court to create or approve a trust, even one that continues after the ward's death.[6] That type of trust would effectively be created by a guardian acting in the ward's name, with approval of the court. The court would retain jurisdiction over the trust, thereby preventing any alterations to the fundamental plan. That trust – with the proper, perhaps independent, trustee – can achieve all of the required objectives: providing resources for care of the ward, au-

---

2 *See* N.J. STAT. ANN. § 3B:12-1 (West 2020). The author has cited New Jersey law in this essay because he practices there in part, but similar principles exist under the laws of other states.

3 N.J. CT. RULES, r. 4:86-11 (2020).

4 *See* N.J. STAT. ANN. § 3B:12-27.

5 *See In re* Glasser, No. A-0500-08T3, 2011 N.J. Super. Unpub. LEXIS 1959, at *9, *14, *22, *26 (N.J. Super. Ct. App. Div. July 21, 2011).

6 N.J. STAT. ANN. § 3B:12-49.

thorizing a trustee to manage the family business, and permitting the trustee to approve compensation to family members involved in the care arrangements. The trustee could provide regular reporting to all interested family members.

That type of trust ordinarily would not create a lifetime tax event, as the trust would contain provisions focused on the ward's lifetime benefit. It therefore would be included, if desired, in the ward's taxable estate. This factor addresses one consideration that often causes people to avoid "locking up" their estate planning. Alternatively, if the objective involves removing assets from the ward's estate, for tax or other reasons, that can be achieved by use of the substitute judgment doctrines. The court – with or without the agreement of the family members – can approve gifting and similar arrangements that achieve the desired objectives.[7] But those same objectives can be achieved in a court-supervised trust, by applying those substituted judgment doctrines as well as trust modification mechanisms that focus on the intent of the grantor, such as probable intent-driven modifications to achieve tax purposes.[8]

While some have criticized the use of substituted judgment and the creation of similar mechanisms,[9] this author submits that those concerns can be addressed through the proper involvement of a guardian ad litem or court appointed counsel to either advocate the ward's desires or best interests.[10] In a world where we recognize limited guardianships – which typically require a finding of incapacity – it should be appropriate to implement an arrangement that will protect the ward while promoting family harmony and averting suspicion.[11]

Nonetheless, it is important to focus on whether the alleged incapacitated person is *in fact* incapacitated. A guardian ad litem or the court cannot make an agreement that binds someone who might possess capacity unless the court determines, pursuant to applicable standards, that the person is incapacitated. The New Jersey Supreme Court recently addressed this issue in the context of a guardian ad litem's approval of a civil case settlement, declining to permit a court to approve that settlement where the ward objected and her capacity had not been determined.[12]

---

[7] *See In re* Trott, 288 A.2d 303, 305 (N.J. Super. Ct. Ch. Div. 1972); *see also In re* Keri, 853 A.2d 909, 913, 916 (N.J. 2004).

[8] *See* N.J. STAT. ANN. §§ 3B:31-27, -31 to -33 *cf.* UNIF. TRUST CODE §§ 411, 415-16 (UNIF. L. COMM'N 2010).

[9] *See In re* Cohen, 760 A.2d 1128, 1137 (N.J. Super. Ct. App. Div. 2000).

[10] *See In re* M.R., 638 A.2d 1274, 1280, 1283-84 (N.J. 1994).

[11] *In re* Guardianship of Macak, 871 A.2d 767, 771-73, 775 (N.J. Super. Ct. App. Div. 2005).

[12] *See* S.T. v. 1515 Broad Street LLC, 227 A.3d 1190, 1205 (N.J. 2020) (court could not approve settlement agreement where party to the agreement, for whom a guardian

Even outside the court context, or if, as in *Macak*, concerns arise that the parent is not incapacitated, similar arrangements can be achieved through creative use of trusts and contracts not to revoke dispositions among the family members.[13] Properly drafted, the family members could agree to a lifetime trust, coupled with an agreement not to revoke the dispositions at death. Of course, if the parent cannot join, but all of the persons who might become interested in the estate might agree, they might make such an agreement even without approval by the parent.[14]

Unfortunately, family litigation – in guardianship and probate courts – is fueled by suspicions and tensions that arise when an elderly person declines mentally. In the high profile Doris Duke will contest, it was suggested that the decedent's estate planning was like "musical chairs" – there were so many changes in the plan it was difficult to predict who would be left out when the music stopped (i.e., the testator died).[15] In that world of uncertainty, squabbling family members are often better served by an agreement among themselves (and their parent, if she still has capacity to agree).

This essay seeks to remind those involved that, with some creative thought, those suspicion-fueled disputes might be averted. Those who might face such decline in their future would be well advised to plan early, and regularly update their plans, to make sure that their objectives are well-identified and memorialized. Although no one wants to talk about their demise or death, reality dictates that we are better served by facing it rather than leaving the decisions to others, as is true with health care decisions. The interests of those who might face that decline could be promoted by forming and maintaining a stable relationship with trusted counsel, who might, when disability arises, invoke the mechanisms available under RPC 1.14[16] to protect their disabled client.

---

ad litem was appointed, objected to the settlement; courts can only appoint someone to bind a person's interests after full guardianship procedures). *See also In re* Bernice B., 672 N.Y.S.2d 994 (N.Y. Sur. Ct. 1998) (applying similar concepts in settlement of probate dispute).

13 N.J. STAT. ANN. § 3B:1-4.

14 *See* N.J. STAT. ANN. § 3B:23-9 ("Agreements among successors binding on personal representative"); *cf.* UNIF. PROBATE CODE § 3-912 (UNIF. L. COMM'N amended 2019). Remember, of course, such agreements should recite a bona fide dispute or otherwise address the notion that such an agreement could be deemed to create gifts among the successors.

15 *See In re* Duke, 663 N.E.2d 602 (N.Y. 1996); Don van Natta Jr., *Deal Reached Over the Estate of Doris Duke*, N.Y. TIMES (Apr. 11, 1996), https://www.nytimes.com/1996/04/11/nyregion/deal-reached-over-the-estate-of-doris-duke.html.

16 MODEL RULES OF PROF'L CONDUCT r. 1.14 (AM. BAR ASS'N 2020) ("When the lawyer . . . believes that the client has diminished capacity . . . and cannot . . . act in [their]

In the absence of proper planning, however, guardianship litigants and courts should explore the use of trust mechanisms to resolve these disputes. In many instances, such mechanisms reduce effectively tensions and allow the family to focus on the final years without suspicion or conflict.

---

own interest, the lawyer may take . . . protective action, including consulting with individuals . . . that have the ability to . . . protect the client . . . .").