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Heirs in Waiting? Pre-Mortem Probate Disputes in the Context of Guardianships, Conservatorships, Powers of Attorney, and Family Business Entities

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I. Introduction

Americans are living longer. Senior family members are accumulating vast wealth. Heirs in waiting are facing financial demands in an increasingly competitive economy. Meanwhile, the heirs often know that their parents' estate planning lawyers are seeking to reduce estate taxes by transferring ownership interests before death. The heirs may need money now, rather than waiting to receive their inheritances in the future.

Suddenly, cracks begin to appear in the glue that holds a family together -- the patriarch or matriarch (often the person who keeps all family disputes in check) takes ill or faces a long-term decline in their ability to manage their affairs or govern themselves.

If you think Prince Charles is the only heir in waiting, think again! These social, economic and estate planning considerations have manifested themselves in a growing number of disputes involving the management, control and disposition of assets before the senior generation dies. These disputes may evolve into a pre-mortem "will contest." This program explores the mechanisms for asserting and defending these disputes and the ethical and legal constraints governing pre-mortem litigation.

This program has been developed to review some of the procedural and substantive rules that become relevant when a dispute arises before the death of an elderly or incapacitated person. Those disputes may evolve into what is, in essence, a will contest while the testator remains alive. Such disputes have received heightened media attention over the last few years. See, e.g., A Family Feud Sheds Light on Differences in Probate Practices From State to State, New York Times, December 28, 2005; Back Home for a Mother Stuck in Texas by Legal Feud, New York Times, April 29, 2006.

Another commentator described the demographic and other conditions leading to apparent increase in such disputes:

> Some of the thorniest custody battles these days are over the care of elderly parents, spouses or grandparents. As longevity increases, a growing number of siblings and other family members are fighting over where elderly parents should live, who should be their primary caregiver, and who should control their finances.
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> The custody fights are shining a spotlight on adult guardianship, in which a person is named by a court to manage an incapacitated adult's finances or personal care. Amid a patchwork of different state laws on the subject, more states are updating their guardianship laws and are seeking to make battles less complicated by making their laws more uniform.
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> There are no reliable national statistics on the number of guardianships -- let alone disputes -- but some attorneys who focus on elder law say that such feuds are on the rise. Bernard A. Krooks, a New York elder lawyer, says he has seen "a tremendous uptick" in caregiver disputes in his practice over the past five years. [Latest Custody Battle -- Who Gets Mom?, Wall Street Journal, August 17, 2006]

The panelists for this program practice in a number of different jurisdictions. The law cited here is intended to provide examples of the applicable legal principles in jurisdictions where the panelists practice. Each section may highlight the law of one state; it is important for the reader to bear in mind, as this outline demonstrates, that the operative legal principles may vary greatly depending on the applicable jurisdiction. It is equally important to bear in mind that jurisdictions may use similar terms to describe different concepts (the "term" conservator, for example, may describe different positions). Similarly, the use of words to describe a person who has been declared legal incapacitated may vary, although most jurisdictions seem to have abandoned ancient words such as "lunacy proceedings" in favor of words such as "incapacity proceeding."

A. Protecting the Elderly and Incapacitated

Most probate courts -- typically considered courts of equity -- possess broad powers to protect those who are under its jurisdiction. In New Jersey, for example, N.J.S.A. 3B:12-1 empowers the Superior Court, Chancery Division, Probate Part, to implement a "protective arrangement" to protect the person or estate of an incapacitated person or alleged incapacitated person.

It has been said that "courts are zealous to safeguard the personal and property rights of incompetent parties…" Borough of East Paterson v. Karkus, 136 N.J. Eq. 286 (Ch. 1945). The court's power to protect the person and the assets of those within its jurisdiction has been employed in numerous contexts.

For example, in In Re Trott, 118 N.J. Super. 436 (Ch. Div. 1972), the court allowed the guardian of an incapacitated person to make gifts from the incompetent's estate in order to minimize taxes upon the incompetent's death. In that case, the court held that "under the doctrine of parens patriae, the court, as representative of the sovereign, may intervene in the management and administration of an incapacitated person's estate the benefit of the incompetent or of his estate." 118 N.J. Super. at 440. The Trott principles were approved and expanded upon in In re Keri, 181 N.J. 50 (2004) (adopting Trott criteria in addressing guardian's implementation of asset transfers as part of program to qualify incapacitated person for Medicaid).

In a similar vein, courts have long recognized their power to protect and aid the best interests of a person with a disability, particularly with respect to health care surrogate decision-making. See, e.g., Matter of Quinlan, 137 N.J. Super. 227 (Ch. Div. 1975), modified and remanded 70 N.J. 10 (1976), cert. den. Garger v. New Jersey, 429 U.S. 922 (1976). In Matter of Conroy, 98 N.J. 321, 364-365 (1985), a case in which the guardian sought the removal of a feeding tube from an incompetent, the Court stated that "[a]n incompetent, like a minor

child, is a ward of the state, and the state's parens patriae power supports the authority of its courts to allow decisions to be made for an incompetent that serve the incompetent's best interests, even if the person's wishes cannot be clearly established." (Emphasis supplied.)

B. Standards for Capacity

In many jurisdictions, the law presumes that a testator has the required capacity to make a will. Gellert v. Livingston, 5 N.J. 65, 71 (1950). Consequently, the burden of proof as to a testator's lack of testamentary capacity falls upon the contestant, who must prove such lack of capacity by a preponderance of the evidence. Id. Some courts have required the contestant to show lack of capacity by clear and convincing proof. In Re Hoover, 21 N.J. Super. 323 (App. Div 1952) certif. den. 11 N.J. 211 (1952). Ordinarily, however, the challenger must prove that the testator lacked capacity to execute the contested will at the time of its execution. Sloan v. Maxwell, 3 N.J. Eq. 563 (N.J. Prerog. 1831).

It has been said that a very low degree of intelligence, less than that needed to enter into a contract, suffices for testamentary capacity. Ward v. Harrison, 97 N.J. Eq. 309 (E. & A. 1925); In Re Rasnick, 77 N.J. Super. 380 (Cty. Ct. 1962). A person can be feebleminded, Howell v. Taylor, 50 N.J. Eq. 428 (N.J. Prerog. 1942), a drunk, a drug addict, or old, Gellert, 5 N.J. at 77, eccentric, In Re Lucas, 124 N.J. Eq. 347 (N.J. Prerog. 1938), or even suffering from lapses of memory. In Re Rein, 139 N.J. Eq. 122 (N.J. Prerog. 1946); In Re Gotchel, 10 N.J. Super. 208 (App. Div. 1950). Thus, the testator need only be able to "comprehend the property he is about to dispose of; the natural objects of his bounty; the meaning of the business in which he is engaged; the relation of each of these factors to the others, and the distribution that is made by the will." Gellert v. Livingston, 5 N.J. 65, 73 (1950).

In the context of modern estate planning, it may become significant to distinguish among the different capacity standards. It is possible, for example, that some courts might conclude that the standard for making a will would be lower than the standard foe entering into an LLC operating agreement.

In New Jersey, where a person has been adjudicated incompetent, the law presumes that a will executed thereafter is invalid. N.J.S.A. 3B: 12-27; In Re Estate of Bechtold, 150 N.J. Super. 550 (1977), aff'd, 156 N.J. Super. 194 (App. Div. 1978), certif. den., 77 N.J. 468 (1978); Matter of Guardianship of Frisch, 250 N.J. Super. 438 (Law Div.1991) (addressing application to restore incapacitated person to capacity to permit him to execute a will).

C. Pre-Mortem Probate -- General Concepts

Historically, it has been said that a person must be injured by the probate of a will he contests in order to have standing to maintain that contest. In Re Myers Will, 20 N.J. 228 (1955); In Re Hand's Will, 95 N.J. Super., 182, certif. den. 50 N.J. 286 (1967) (if standing depends on validity of earlier wills, the court should determine validity of such wills in order to resolve standing issues). See Gaeta v. DeGise's Will, 139 N.J. Eq. 44, (Prerog. 1946) (executor appointed under one of decedent's earlier wills did not have standing to contest probate of last will); In re Rogers, 15 N.J. Super. 189 (Cty. Ct. 1951) (similar).

Given that strong policy regarding standing, New Jersey (like most other states) lacks a formal procedure for pre-mortem probate, since no one is "injured" by probate until the testator dies and her last will is identified. Before 2007, it appeared that New Jersey law required that the testator be deceased before a probate proceeding may be commenced.

That changed, however, in In re the Guardianship of Lillian Glasser, 2007 WL 867783 (N.J. Super. Ct. Mar. 8, 2007), which might be described as pre-death

will contest. There, the two children of Lillian Glasser brought competing guardianship actions in New Jersey and Texas.

The New Jersey court ultimately concluded that it had primary jurisdiction, as Glasser had been a long-time resident and domiciliary of New Jersey. [Opinion Attached as Exhibit A].

The New Jersey court ruled that Glasser lacked capacity and set aside an estate plan she signed (with the involvement of her daughter) that significantly benefited her daughter's family at the expense of her son. As a result, as earlier version of Glasser's estate plan was adopted, in which her two children were essentially treated equally. This entire litigation was conducted while Glasser was alive.

Some states (Arkansas, North Dakota and Ohio) apparently have adopted statutes which authorize a pre-mortem probate mechanism. See, e.g., Ark. Code Ann. §§ 28-40-201 to -203 (Michie 1987); N.D. Cent. Code §§ 30.1-08.1-01 to -04; Ohio Rev. Code Ann. §§ 2107.081 to .085.

Several states have declined to adjudicate pre-mortem probate disputes as a matter of common law. Cowan v. Cowan, 254 S.W.2d 862 (Tex. Civ. Ct. App. 1952). The Cowan court concluded that "since [the testator] is not dead, there are no heirs, and there is no will." Id. at 865. Cowan, which cites numerous cases, indicates that until the testator has died, his will is nothing more than a piece of paper, and those who are beneficiaries under that will do not have any interest until his death.

The various factors that weigh in favor of, or against, pre-mortem probate are discussed in Leopold & Beyer, Ante-Mortem Probate, 43 Ark. Law Rev. 131, 159 (1990). The three cited state pre-mortem probate statutes have three general purposes (1) to avoid spurious will contests; (2) to avoid the evidentiary problems that are present when the will is offered to probate after death, when the testator is

no longer available to testify; and (3) to prevent the frustration of the testator's intent. See Leopold & Beyer, supra, at 134-141.

Pre-mortem will contests have been litigated around the country in the past several years. The Indiana Supreme Court recently took an interesting position in In re Guardianship of E.N., 877 N.E.2d 795 (Ind. 2007). The adult children of E.N. were appointed his co-guardians and petitioned the court to establish the "E.N Revocable Trust" and transfer all of E.N.'s property to the Trust. The Trust provided for distributions of income and principal for E.N.'s support during his lifetime, and any property remaining after E.N.'s death was to be distributed to his children. E.N.'s brothers opposed the estate plan in the guardianship proceeding. The contested guardianship proceedings took many years, and E.N. died while the dispute was still pending. Ultimately, the Supreme Court of Indiana ruled that Indiana's substituted judgment statute does not authorize dispositions of the ward's entire estate, but only of those assets in excess of the ward's needs. Accordingly, the estate plan was denied.

In re Conservatorship of Davis, 954 So.2d 521 (Miss. App. 2007), concerns the standing afforded to a beneficiary of an incompetent person's estate plan. Lauree Davis executed a 1995 will leaving all of her property to the three minor daughters of a friend, Alvin Peyton. In 2004, she was found incompetent, and an alleged "informally adopted son," John Longo, was appointed her conservator. Peyton challenged both Longo's appointment and a deed apparently executed by Davis to Longo a few weeks before she was judged incompetent. The trial court found that Peyton lacked standing, but the Court of Appeals of Mississippi concluded that Peyton was an interested party because his daughters have a prospective interest in Davis's estate.

Linthicum v. Rudi, 148 P.3d 746 (Nev. 2006), also demonstrates that guardianship proceedings appear to be the favored venue for pre-death contests. Claire Linthicum-Cobb executed a revocable trust in 2002, naming her brother

and sister-in-law (the Linthicums) as beneficiaries. In 2004, Linthicum-Cobb executed an amendment, replacing the Linthicums with her deceased husband's nephew, Arnold Rudi. A guardian was subsequently appointed for Linthicum-Cobb, and the Linthicums filed a trust action seeking to cancel the trust amendment. The trial court found that the Linthicums did not have standing to challenge the amendment during Linthicum-Cobb's lifetime. The Supreme Court of Nevada affirmed, noting that the Linthicums could challenge Linthicum-Cobb's capacity to make amendments in the guardianship proceeding, but lacked standing to bring a trust contest during her lifetime.

Brown v. Ainsworth, 943 So.2d 757 (Miss. App. 2006) began as a pre-death contest, but the conservatee passed away before a resolution. In 1998, Samuel Brown transferred 122 acres of real property to his friend, Charles Ainsworth. Brown suffered from mental and physical illness, and had been under a conservatorship since the 1970's. However, the conservatorship was lifted in 1995 and was not replaced until 1999, a year after Brown had transferred the property in question. In 1999, Brown's sister was appointed conservator, and she filed a petition to set aside the deed to Ainsworth. The trial court found that the conservator did not meet her burden of proof, by clear and convincing evidence, that Brown lacked capacity to execute the deed, and the Court of Appeals of Mississippi affirmed.

In re Guardianship of Replogle, 841 N.E.2d 330 (Ohio App. 2005), concerns the question of proper jurisdiction in a multi-state guardianship proceeding. Elizabeth Replogle's mother was appointed her guardian in Indiana, where Replogle had lived for most of her life. Replogle's sister filed a petition to remove the mother as guardian, and the mother moved Replogle to Ohio. The Indiana court ordered Replogle returned to Indiana, but a guardianship proceeding began in Ohio. The Ohio trial court ultimately terminated the Ohio guardianship,

and the Court of Appeals of Ohio affirmed, finding that the Indiana court was in a better position to determine Replogle's best interest.

In re Prye, 169 S.W.2d 116 (Mo. App. 2005), is another case of disputed guardianship jurisdiction. A guardian was appointed for Steven Prye in Illinois. Subsequently, Prye was transferred among numerous mental health facilities in both Illinois and Missouri. After residing in Missouri for six months, a petition for guardianship was filed in Missouri. The Missouri trial court declined to appoint a guardian, finding that Prye's Illinois guardian did not have authority to move Prye to Missouri and that Prye should be returned to Illinois. The Missouri Court of Appeals reversed, ordering that the Illinois guardianship was entitled to recognition and enforcement by Missouri courts under the Full Faith and Credit Clause of the United States Constitution.

Persinger v. Holst, 639 N.W.2d 594 (Mich. App. 2002), raises interesting questions about legal malpractice liability in conservatorship proceedings. In this case, Helen Fuite executed a power of attorney naming an unrelated gentleman, Mark Hall, as her agent, a will naming Hall the sole beneficiary of her estate, and two deeds transferring real property to Hall. A few months later, Richard Persinger was appointed as Fuite's conservator, the power of attorney was revoked, the will was set aside, the properties were returned to Fuite, and Hall was ordered to repay money he had transferred from Fuite's estate. Persinger than filed a malpractice claim against Richard Holst, the attorney who prepared the questionable documents. The Michigan court declined to impose a legal duty on the attorney to prevent Fuite from designating the agent of her choice. Furthermore, in the absence of evidence of unmistakable signs of incompetency, the court found that Holst was not liable for permitting Fuite to execute the documents, even thought she was subsequently found to be incompetent.

In In re Guardianship of Garcia, 631 N.W.2d 464 (Neb. 2001), the guardian and conservator of Ida Garcia requested authority to amend a trust

executed before Garcia was found incompetent. The beneficiaries of the trust, who would be removed from the trust under the guardian's proposed amendment, objected to the request. The Supreme Court of Nebraska found that the guardian had the authority to amend the trust under Nebraska law, but that the guardian had failed to show, by clear and convincing evidence, that the actions were in Garcia's best interest. Accordingly, the trust was not amended, and the trust beneficiaries remained.

In In re Guardianship of Mowrer, 979 P.2d 156 (Mont. 1999), Clara Mowrer appointed her niece and her niece's husband (the Eddies) as her agents under a durable power of attorney after a two-month hospitalization in 1995. Over the next several years, the Eddies moved Mowrer from Kansas to Montana, where they lived, transferred hundreds of thousands of dollars from Mowrer's name to their own, and assisted Mowrer in executing a new will, which left all of her estate to the Eddies. In 1997, Mowrer revoked the power of attorney and requested an accounting from the Eddies. The Eddies responded by filing a petition for guardianship and conservatorship, which Mowrer opposed. The court found that Mowrer was not incompetent, and that the transfers from Mowrer to the Eddies had been the result of duress and undue influence. The Eddies were ordered to repay Mowrer over $800,000. The opinion does not discuss the disposition of the new will, but under the circumstances, it seems reasonable to assume that the will benefiting the Eddies was set aside. Again, Mowrer, who was 104 years old at the time of trial, was alive throughout this entire proceeding.

Obviously, questions of pre-death probate disputes are beginning to bubble to the surface, in particular in the context of conservatorship and/or guardianship proceedings. It will be interesting to observe whether courts will begin to allow these contests outside of the conservatorship context, and what procedures might be employed to allow potential beneficiaries to contest questionable estate plans.

D. Commencing a Pre-Mortem Dispute

Before a family member becomes involved in a pre-mortem dispute, however, the attorney may need to identify ways in which a family member might seek scrutiny of disputed transactions involving an elderly family member. These might include, for example, a need to scrutinize the actions of a person acting under a power of attorney or trust. Alternatively, a concerned family member might bring an action to appoint a guardian for an incapacitated person. In some states, a guardian is called a conservator (New Jersey, in addition to appointing guardians, may also appointed a conservator, but in a conservatorship, the elderly person is not incapacitated, but essentially consents to the appointment of a fiduciary who is supervised by the court).

This program will consider and compare the law of several states in which the authors practice (California, Illinois, New Jersey, and Virginia) to address various procedural and substantive issues involving pre-mortem challenges to testamentary dispositions.

E. Compelling an Account from an Agent or a Trustee.

1. California

The circumstances under which one can compel an accounting from an agent under a power of attorney in California are limited. The agent must keep records of all transactions, but the agent does not have a duty to account except in the following circumstances:

- At any time when requested by the principal;
- If the power of attorney requires the agent to account and specifies to whom the account is to be made;
- At the request of the conservator of the estate of the principal while the principal is living;
- At the request of the principal's personal representative or successor in interest after the death of the principal; or

- Pursuant to a court order.

Cal. Prob. C. § 4236.

Before filing a petition to compel an account or report, an interested person must make a written request for the account. The agent has 60 days after the written request to submit an account. If the agent does not submit an account within 60 days, the interested person may file a petition with the court to compel an account or report. Cal. Prob. C. § 4541(c). An "interested person" is defined broadly to include an heir, devisee, child, spouse, creditor, beneficiary, or any other person having a property right or claim in an estate. Cal. Prob. C. § 48.

An interested person's ability to compel an accounting from a trustee may be even more limited, depending on the competence of the trustor and the specific language of the trust. The trust document can waive a report or account, and this waiver is usually enforceable. However, if the sole trustee is a "disqualified person," as defined in Probate Code section 21350.5 (i.e., the drafter of an instrument and related persons, or a care custodian and related persons), a waiver of account contained in the trust document is void. Cal. Prob. C. § 16062(e). In addition, upon a showing that it is "reasonably likely that a material breach of the trust has occurred," the court may compel an accounting even if the trust document waives the account. Cal. Prob. C. § 16064(a).

In the case of a revocable trust, during the time the trust is revocable and the trustor is competent, the trustee owes all duties to the trustor and not to the beneficiaries. Cal. Prob. C. § 15800. This specifically includes the duty to account: "The trustee is not required to report information or account to a beneficiary in any of the following circumstances . . . In the case of a beneficiary of a revocable trust, as provided in Section 15800, for the period when the trust may be revoked." Cal. Proc. C. § 16064(b).

If the trustor of a revocable trust is no longer competent, or in the case of an irrevocable trust, the trustee has a duty to account at least annually, at the termination of the trust, and upon a change of trustee. The trustee must account to both principal and income beneficiaries. Cal. Prob. C. § 16062(a). (These accounting requirements do not apply to trusts executed before July 1, 1987.) In addition, upon reasonable request by a beneficiary, the trustee must provide the beneficiary with a report "about the assets, liabilities, receipts, and disbursements of the trust, the acts of the trustee, and the particulars relating to the administration of the trust relevant to the beneficiary's interest, including the terms of the trust." Cal. Prob. C. § 16061. Furthermore, a trustee has an ongoing duty to keep beneficiaries reasonably informed of the trust and its administration. Cal. Prob. C. § 16060.

As in the context of an agent under a power of attorney, a beneficiary who is entitled to an accounting may file a petition to compel a report or accounting from the trustee. However, the beneficiary first must submit a written request for the account, and the trustee has 60 days to submit the account. If the trustee does not submit an account within 60 days, and there has been no report or account within six months preceding the request, the beneficiary may file a petition with the court to compel the account or report. Cal. Prob. C. § 17200(a)(7).

2. New Jersey

The power of attorney may authorize an agent to act on behalf of the principal on a limited or general basis. *N.J.S.A.* 46:2B-8.1 (the "Revised Durable Power of Attorney Act"). By law, a power of attorney terminates upon death of the principal, but the principal may also revoke the power of attorney at any time. *N.J.S.A.* 46:2B-8.5. Since a power of attorney terminates upon the death of the principal, it may not be used to administer the deceased principal's affairs after his death. It is possible, however, that the personal representative of the

principal's estate will be entitled to an account from the agent. *N.J.S.A.* 46:2B-8.13

All of the persons appointed during a decedent's lifetime (agents under a power of attorney, trustees of an *inter vivos* trust, guardians and conservators) may be obligated to deliver the assets in their custody to the person charged with the administration of those assets after death. The personal representative responsible for administering the estate after death (executor, administrator, or trustee) may demand an accounting (formal or informal) of what occurred while the assets were being administered. N.J.S.A. 46:2B-8.4; 8.13. Such a fiduciary would be required to document and explained all transactions. See, e.g., D'Amato v. D'Amato, 305 N.J. Super. 109 (App. Div. 1997) (regarding accounting of attorney in fact to personal representative and describing burdens of proof with respect to unexplained transactions).

3. Virginia

Under the law of Virginia, an accounting may be obtained from agents acting under Powers of Attorney. Currently, Virginia Law provides:

Va. Code Section 11-9.1: provides in part that:

> If any conservator, guardian, or committee shall thereafter be appointed for the principal, the attorney-in-fact or agent shall, during the continuance of such appointment, account to such conservator, guardian, or committee as he would otherwise be obligated to account to the principal.

Va. Code Section 37.2-1018 provides that:

> § 37.2-1018. Discovery of information and records regarding actions of certain agents and attorneys-in-fact
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> A. For purposes of this section:
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> "Member of the principal's family" means an adult who is a parent,

brother or sister, niece or nephew, child or other descendent, spouse of a child of the principal, and spouse or surviving spouse of the principal.

"Person who is or was interested in the welfare of a principal" means any member of the principal's family; a person who is a co-agent or co-attorney-in-fact, an alternate agent or attorney-in-fact, or a successor agent or attorney-in-fact designated under the power of attorney or other writing described in § 11-9.1; and, if none of these persons is reasonably available and willing to act, the adult protective services unit of the local department of social services for the city or county where the principal resides or is located at the time of the request or where a deceased principal resided at the time of his death. Further, in the case of a deceased principal, the term also means a personal representative of the estate of a deceased principal.

"Principal believed to be unable to properly attend to his affairs" means an individual believed in good faith by the petitioner to be a person who is impaired by reason of mental illness, mental retardation, physical illness or disability, substance abuse, or other causes to the extent of lacking sufficient understanding or capacity to make or communicate responsible decisions.

B. After having first made a request to an agent or attorney-in-fact for disclosure under § 11-9.6, any person interested in the welfare of a principal believed to be unable to properly attend to his affairs may, for the purpose of obtaining information pertinent to the need or propriety of (i) instituting a proceeding under this chapter; (ii) terminating, suspending, or limiting the authority of an attorney-in-fact or other agent; or (iii) bringing a proceeding to hold the attorney-in-fact or other agent, or a transferee from such attorney-in-fact or other agent, liable for breach of duty or to recover particular assets or the value of such assets of a principal or deceased principal, petition a circuit court for discovery from the attorney-in-fact or other agent of information and records pertaining to actions taken pursuant to powers or authority conferred by a power of attorney or other writing described in § 11-9.1 within the time periods set forth under § 11-9.6.

C. The petition may be filed in the circuit court of the county or

> city in which the attorney-in-fact or agent resides or has his principal place of employment, or, if a nonresident, in any court in which a determination of incompetency or incapacity of the principal is proper under this title, or, if a conservator or guardian has been appointed for the principal, in the court that made the appointment. The court, after reasonable notice to the attorney-in-fact or agent and to the principal, if no guardian or conservator has been appointed, may conduct a hearing on the petition. The court, upon the hearing on the petition and upon consideration of the interest of the principal and his estate, may dismiss the petition or may enter such order or orders respecting discovery as it may deem appropriate, including an order that the attorney-in-fact or agent respond to all discovery methods that the petitioner might employ in a civil action or suit subject to the Rules of the Supreme Court of Virginia. Upon the failure of the agent or attorney-in-fact to make discovery, the court may make and enforce further orders respecting discovery that would be proper in a civil action subject to such Rules and may award expenses, including reasonable attorney's fees, as therein provided. Furthermore, upon completion of discovery, the court, if satisfied that prior to filing the petition the petitioner had requested the information or records that are the subject of ordered discovery pursuant to § 11-9.6, may, upon finding that the failure to comply with the request for information was unreasonable, order the attorney-in-fact or agent to pay the petitioner's expenses in obtaining discovery, including reasonable attorney's fees.
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> D. A determination to grant or deny in whole or in part discovery sought hereunder shall not be considered a finding regarding the competence, capacity, or impairment of the principal, nor shall the granting or denial of discovery hereunder preclude the availability of other remedies involving protection of the person or estate of the principal or the rights and duties of the attorney-in-fact or other agent.

In addition to the foregoing, another remedy in Virginia involves a suit for accounting at equity. An accounting is a type of equitable relief that may be ordered by a court against a fiduciary. An accounting may be ordered by the court against any fiduciary. Va. Code section 8.01-31. In an accounting action,

the agent generally has the burden of proving that his actions were proper. A commissioner in chancery may be appointed to oversee the accounting.

Virginia has proposed adopting a variation of the Uniform Power of Attorney Act ("UPAA") developed by The National Conference of Commissioners on Uniform State Laws ("NCCUSL") The proposed Virginia Uniform Durable Power of Attorney Act (the "Act") was introduced in the General Assembly on January 8, 2008 as House Bill 950, and would add a new Chapter 7 to title 26 of the Virginia Code and make other conforming amendments to other sections. The Bill was referred to the Committee on Commerce and Labor. On February 12, 2008, the Bill was "left" in the Committee, and is expected to be taken up next year. The following proposed provisions of the Act will have a significant impact on fiduciary litigation concerning agents acting under powers of attorney.

The Act has provisions addressing the agents duties and disclosure. § 26-71.14 governs the agent's duties:

> A. Notwithstanding provisions in the power of attorney, an agent that has accepted appointment shall:
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> 1. Act in accordance with the principal's reasonable expectations to the extent actually known by the agent and, otherwise, in the principal's best interest;
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> 2. Act in good faith; and
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> 3. act only within the scope of authority granted in the power of attorney.
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> B. Except as otherwise provided in the power of attorney, an agent that has accepted appointment shall:
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> 1. Act loyally for the principal's benefit;

2. Act so as not to create a conflict of interest that impairs the agent's ability to act impartially in the principal's best interest;

3. Act with the care, competence, and diligence ordinarily exercised by agents in similar circumstances;

4. Keep a record of all receipts, disbursements, and transactions made on behalf of the principal;

5. Cooperate with a person that has authority to make health care decisions for the principal to carry out the principal's reasonable expectations to the extent actually known by the agent and, otherwise, act in the principal's best interest; and

6. Attempt to preserve the principal's estate plan, to the extent actually known by the agent, if preserving the plan is consistent with the principal's best interest based on all relevant factors, including:

   (a) The value and nature of the principal's property;

   (b) The principal's foreseeable obligations and need for maintenance;

   (c) Minimization of taxes, including income, estate, inheritance, generation-skipping transfer, and gift taxes; and

   (d) Eligibility for a benefit, a program, or assistance under a statute or regulation.

C. An agent that acts in good faith is not liable to any beneficiary of the principal's estate plan for failure to preserve the plan.

D. An agent that acts with care, competence, and diligence for the best interest of the principal is not liable solely because the agent also benefits from the act or has an individual or conflicting interest in relation to the property or affairs of the principal.

E. If an agent is selected by the principal because of special skills or expertise possessed by the agent or in reliance on the agent's representation that the agent has special skills or expertise, the special skills or expertise shall be considered in determining whether the agent has acted with care, competence, and diligence under the circumstances.

F. Absent a breach of duty to the principal, an agent is not liable if the value of the principal's property declines.

G. An agent that exercises authority to delegate to another person the authority granted by the principal or that engages another person on behalf of the principal is not liable for an act, error of judgment, or default of that person if the agent exercises care, competence, and diligence in selecting and monitoring the person; however, nothing herein is intended to abrogate any duty of the agent under the Uniform Virginia Prudent Investor Act (§ 26-45.3 et seq.).

H. Except as otherwise provided in the power of attorney, an agent shall disclose receipts, disbursements, or transactions conducted on behalf of the principal if requested by the principal, a guardian, a conservator, another fiduciary acting for the principal, or, upon the death of the principal, by the personal representative or successor in interest of the principal's estate. If so requested, within 30 days the agent shall comply with the request or provide a writing or other record substantiating why additional time is needed and shall comply with the request within an additional 30 days.

I. Except as otherwise provided in the power of attorney, an agent shall, on reasonable request made by a person listed in subdivisions A 3 through A 9 of § 26-71.16 who has a good faith belief that the principal suffers an incapacity or, if deceased, suffered incapacity at the time the agent acted, disclose to such person the extent to which he has chosen to act and the actions taken on behalf of the principal within the five years prior to either (i) the date of the request or (ii) the date of the death of the principal, if the principal is deceased at the time such request is made, and shall permit reasonable inspection of records pertaining to such actions

> by such person. In all cases where the principal is deceased at the time such request is made, such request shall be made within one year after the date of the death of the principal. If so requested, within 30 days the agent shall comply with the request or provide a writing or other record substantiating why additional time is needed and shall comply with the request within an additional 30 days.

The Act also addresses the type of judicial relief that are available regarding the conduct of the agent. § 26-71.16 provides:.

> A. In addition to the remedies referenced in § 26-71.23, the following persons may petition a court to construe a power of attorney or review the agent's conduct, and grant appropriate relief:
>
> 1. The principal or the agent;
>
> 2. A guardian, conservator, personal representative of the estate of a deceased principal, or other fiduciary acting for the principal;
>
> 3. A person authorized to make health care decisions for the principal;
>
> 4. The principal's spouse, parent, or descendant;
>
> 5. An adult who is a brother, sister, niece, or nephew of the principal;
>
> 6. A person named as a beneficiary to receive any property, benefit, or contractual right on the principal's death or as a beneficiary of a trust created by or for the principal that has a financial interest in the principal's estate;
>
> 7. The adult protective services unit of the local department of social services for the county or city where the principal resides or is located;

8. The principal's caregiver or another person that demonstrates sufficient interest in the principal's welfare; and

9. A person asked to accept the power of attorney.

B. 1. Whether or not supplemental relief is sought in the proceeding, where an agent has violated duties of disclosure imposed by § 26-71.14, any person to whom such duties are owing may, for the purpose of obtaining information pertinent to the need or propriety of (i) instituting a proceeding under Chapter 10 (§ 37.2-1000 et seq.) of Title 37.2; (ii) terminating, suspending, or limiting the authority of the agent; or (iii) bringing a proceeding to hold the agent, or a transferee from such agent, liable for breath of duty or to recover particular assets or the value of such assets of a principal or deceased principal, petition a circuit court for discovery from the agent of information and records pertaining to actions taken pursuant to a power of attorney.

2. The petition may be filed in the circuit court of the county or city in which the agent resides or has his principal place of employment, or, if a nonresident, in any court in which a determination of incompetency or incapacity of the principal is proper under Chapter 10 (§ 37.2-1000 et seq.) of Title 37.2, or, if a conservator or guardian has been appointed for the principal, in the court that made the appointment. The court, after reasonable notice to the agent and to the principal, if no guardian or conservator has been appointed, or to the conservator or guardian, if one has been appointed, may conduct a hearing on the petition. The court, upon the hearing on the petition and upon consideration of the interest of the principal and his estate, may dismiss the petition or may enter such order or orders respecting discovery as it may deem appropriate, including an order that the agent respond to all discovery methods that the petitioner might employ in a civil action or suit subject to the

Rules of the Supreme Court of Virginia. Upon the failure of the agent to make discovery, the court may make and enforce further orders respecting discovery that would be proper in a civil action subject to such Rules and may award expenses, including reasonable attorney fees, as therein provided. Furthermore, upon completion of discovery, the court, if satisfied that prior to filing the petition the petitioner had requested the information or records that are the subject of ordered discovery pursuant to § 26-71.14, may, upon finding that the failure to comply with the request for information was unreasonable, order the agent to pay the petitioner's expenses in obtaining discovery, including reasonable attorney fees.

3. A determination to grant or deny in whole or in part discovery sought hereunder shall not be considered a finding regarding the competence, capacity, or impairment of the principal, nor shall the granting or denial of discovery hereunder preclude the availability of other remedies involving protection of the person or estate of the principal or the rights and duties of the agent.

C. The agent may, after reasonable notice to the principal, petition the circuit court for authority to make gifts of the principal's property to the extent not inconsistent with the express terms of the power of attorney or other writing. The court shall determine the amounts, recipients, and proportions of any gifts of the principal's property after considering all relevant factors including, without limitation, those contained in subsection C of § 26-72.17.

D. Upon motion by the principal, the court shall dismiss a petition filed under this section, unless the court finds that the principal lacks capacity to revoke the agent's authority or the power of attorney.

Virginia also addresses the manner in which an interested person obtains an accounting from one acting as trustee of a trust. This may be based upon

common law, such as that described in Section 173 of the Restatement 2nd of Trusts:

> The trustee is under a duty to the beneficiary to give him upon his request at reasonable times complete and accurate information as to the nature and amount of the trust property, and to permit him or a person duly authorized by him to inspect the subject matter of the trust and the accounts and vouchers and other documents relating to the trust.

A similar analysis may be found in Scott on Trusts, Section 173:

> The trustee is under a duty to the beneficiaries to give them on their request at reasonable times complete and accurate information as to the administration of the trust. The beneficiaries are entitled to know what the trust property is and how the trustee has dealt with it. They are entitled to examine the trust property and the accounts and vouchers and other documents relating to the trust and its administration. Where a trust is created for several beneficiaries, each of them is entitled to information as to the trust. Where the trust is created in favor of successive beneficiaries, a beneficiary who has a future interest under the trust, as well as a beneficiary who is presently entitled to receive income, is entitled to such information, whether his interest is vested or contingent.
>
> A beneficiary is entitled to inspect opinions of counsel procured by the trustee to guide him in the administration of the trust. It is held, however, that where there is a conflict of interest between the trustee and the beneficiaries and the trustee procures an opinion of counsel for his own protection, the beneficiaries are not entitled to inspect the opinion.
>
> Thus, in Talbot v. Marshfield the trustees took the opinion of counsel as to whether they were justified in making an advance to some of the beneficiaries,

> and thereafter when a suit had been instituted against them to restrain them from making such advances, they took a second opinion as to their defense in the suit. Some of the beneficiaries brought a proceeding to compel the trustees to permit them to inspect the opinions of counsel. The court held that the beneficiaries were entitled to inspect the first opinion but not the second. The first opinion was taken to guide the trustees in the administration of the trust and the expense of obtaining the opinion was payable out of the trust estate, and all the beneficiaries were therefore entitled to see it. On the other hand, the second opinion was obtained by the trustees to guide them in their defense of the suit that had been brought, and the expense of procuring the opinion can be charged against the estate only if it ultimately appears that it is properly chargeable against the estate.

In Fletcher v. Fletcher, 253 Va. 30 (1997), the Virginia court held that trust beneficiaries are entitled to a full copy of the trust instrument.

Virginia has adopted its own variation of The Uniform Trust Code. The Uniform Trust Code ("UTC") is a codification of the law of trusts prepared by NCCUSL. The goal of the UTC is uniformity of trust law across the country. The UTC, with state variations, has thus far been enacted in 19 states: Alabama, Arkansas, the District of Columbia, Florida, Kansas, Maine, Missouri, Nebraska, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Virginia, and Wyoming.

The UTC imposes several distinct duties to provide information to beneficiaries, all of which are located in Section 813 (Duty to Inform and Report). The concept of the "qualified beneficiary" is important to understanding Section 813. Section 103 of the UTC defines "qualified beneficiary" as a beneficiary who, on the date the beneficiary's qualification is determined: (a) is a distributee

or permissible distributee of trust income or principal; (b) would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in subparagraph (a) terminated on that date without causing the trust to terminate; or (c) would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date. UTC section 813 imposes several disclosure duties on trustees, as follows:

> 813(a) (duty to keep reasonably informed): A trustee shall keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests.
>
> 813(a) (duty to respond to requests for information): Unless unreasonable under the circumstances, a trustee shall promptly respond to a beneficiary's request for information related to the administration of the trust.
>
> 813(b)(1) (duty to provide a copy of the trust instrument): A trustee…upon request of a beneficiary, shall promptly furnish to the beneficiary a copy of the trust instrument.
> 813(b)(2) (duty to notify of acceptance of trusteeship): A trustee…within 60 days after accepting a trusteeship, shall notify the qualified beneficiaries of the acceptance and of the trustee's name, address, and telephone number.
>
> 813(b)(3) (duty to notify of trust existence and beneficiary rights): A trustee…within 60 days after the date the trustee acquires knowledge of the creation of an irrevocable trust, or the date the trustee acquires knowledge that a formerly revocable trust has become irrevocable, whether by the death of the settlor or otherwise, shall notify the qualified beneficiaries of the trust's existence, of the identity of the settlor or settlors, of the right to request a copy of the trust instrument, and of the right to a trustee's report as provided in subsection (c).
>
> 813(b)(4) (duty to notify of change in compensation): A trustee…shall notify the qualified beneficiaries in advance of any change in the method or rate of the trustee's compensation.

> 813(c) (duty to provide reports): A trustee shall send to the distributees or permissible distributees of trust income or principal, and to other qualified or nonqualified beneficiaries who request it, at least annually and at the termination of the trust, a report of the trust property, liabilities, receipts, and disbursements, including the source and amount of the trustee's compensation, a listing of the trust assets and, if feasible, their respective market values. Upon a vacancy in a trusteeship, unless a cotrustee remains in office, a report must be sent to the qualified beneficiaries by the former trustee. A personal representative, [conservator], or [guardian] may send the qualified beneficiaries a report on behalf of a deceased or incapacitated trustee.

Under UTC section 813(d), a beneficiary may (a) waive the right to any information under section 813, and (b) withdraw a waiver previously given. Under UTC section 813(e), subsections 813(b)(2) (notice of acceptance of trusteeship) and 813(b)(3) (notice of trust existence and beneficiary rights to request) do not apply to a trustee who accepts a trusteeship before the date the UTC is enacted, to an irrevocable trust created before date of enactment, or to a revocable trust that becomes irrevocable before the date of enactment. Section 105 of the NCCUSL version of the UTC provides that the most provisions of the UTC are default rules in the absence of provisions in the governing instrument. Section 105 includes optional provisions for enacting jurisdictions as to whether the disclosure provisions of the UTC may be overridden by the terms of the governing instrument.

F. Appointment of a Conservator or Guardian.

1. California

In California, a conservatorship is the proper proceeding to appoint a manager for the financial affairs or personal care of someone over the age of 18 who is unable to handle either or both. A guardianship applies only to minors.

A petition for conservatorship may be filed by the proposed conservatee, the spouse or domestic partner of the proposed conservatee, a relative of the proposed conservatee, any interested state or local agency, or any other interested person or friend of the proposed conservatee. Cal. Prob. C. § 1820.

A conservator of the person may be appointed for a person who is "unable to provide properly for his or her personal needs for physical health, food, clothing, or shelter." Cal. Prob. C. § 1801(a). A conservator of the estate may be appointed for a person who is "substantially unable to manage his or her own financial resources or resist fraud or undue influence." Cal. Prob. C. § 1801(b).

In appointing the conservator(s), the court is guided by the best interests of the proposed conservatee. Cal. Prob. C. § 1812(a). If the proposed conservatee has sufficient capacity to form an intelligent preference, the conservatee's preference is given the highest priority. The court shall appoint the conservatee's nominee "unless the court finds that the appointment of the nominee is not in the best interests of the proposed conservatee." Cal. Prob. C. § 1810.

If the proposed conservatee does not make a nomination, the order of preference for appointment as conservator is as follows:

- The spouse or domestic partner of the proposed conservatee, or the person nominated by the spouse or domestic partner;
- An adult child of the proposed conservatee, or the person nominated by the child;

- A parent of the proposed conservatee, or the person nominated by the parent;
- A brother or sister of the proposed conservatee, or the person nominated by the brother or sister; or
- Any other person or entity eligible for appointment under the Probate Code or the Welfare and Institutions Code.

Cal. Prob. C. § 1812.

After a petition for conservatorship is filed, a number of persons may appear and either support or oppose the conservatorship. The proposed conservatee, the spouse or registered domestic partner, a relative, or any other interested person or friend of the proposed conservatee may appear in support of or opposition to the conservatorship. Cal. Prob. C. § 1829. If the proposed conservatee objects to the conservatorship, he/she may demand a jury trial to determine whether a conservator should be appointed. Cal. Prob. C. § 1827. This is one of the few instances in California probate practice where a party has the right to a jury trial.

The appointment of a conservator of the estate is considered an adjudication that the conservatee lacks the legal capacity to enter into any transaction that binds or obligates his/her estate. Cal. Prob. C. § 1872. This lack of capacity must be supported by evidence of a deficit in mental function and a correlation between the deficit(s) and the ability to enter into transactions. Cal. Prob. C. § 811.

If a conservator of the estate is appointed, unless specifically ordered otherwise, the conservatee lacks capacity to make a contract, sale, transfer or conveyance, to incur a debt, to encumber property, to make a gift, to delegate a power (including a power of attorney), or to waive a right (including a disclaimer). Cal. Prob. C. § 1870. On the other hand, the conservatee retains the capacity to control an allowance and wages or salary, to enter into transactions to

the extent necessary to provide the necessaries of life for the conservatee and his/her family, and to make a will. Cal. Prob. C. § 1871.

In the context of personal, rather than financial, decisions, the conservatee also is presumed to have capacity to give informed consent to medical treatment (Cal. Prob. C. § 2354) and to marry or enter into a registered domestic partnership (Cal. Prob. C. § 1900). If the court determines that the conservatee is not capable of completing a voter registration affidavit, the court will disqualify the conservatee from voting. Cal. Prob. C. § 1910. Finally, the conservatee is also disqualified from serving on a jury. Cal. C. Civ. Proc. § 203(a)(8).

2. New Jersey

The Superior Court may appoint a guardian for a person who is a minor or an adult who has been determined by a court to be mentally incapacitated. *N.J.S.A.* 3B:12.-1 *et seq*; *New Jersey Court Rule* 4:86. A guardianship terminates upon the death of the minor or incapacitated person. A guardian may be appointed to manage a person's property (a "guardian of the property") or his personal affairs (a "guardian of the person"); the minor or incapacitated person may be called the "ward." The statutes do not clearly indicate that the incapacitated person must be domiciled in New Jersey, but it seems clear some tangible connection to the state is required, either by residence or through the possession of real or personal property in state. N.J.S.A. 3B:12-21 (apparently applicable to all guardianships, although this same standard is not recited in the statute generally applicable to the guardianship of adults, N.J.S.A. 3B:12-24).

Recent revisions to New Jersey guardianship statutes also provide for the appointment of a guardian in a limited role (a "limited guardian"). The scope of a limited guardian's authority will be based upon the determinations made by the court as to the ability of the incapacitated person to handle certain issues. *N.J.S.A.* 3B:12-24.1. Under that provision, a court might conclude based on the facts presented in a particular case, that the otherwise incapacitated person needs a

guardian for most purposes, but that he should be permitted to make basic choices as to his living arrangements or have control over limited financial matters such a modest personal spending account. These types of limitations on the guardian's authority should be set forth in the judgment appointing the guardian.

Subject to any restrictions imposed by the Court, a guardian may possess every power the incapacitated person possessed (subject to limitations imposed by the court), except the power to make a will. In certain instances, however, the guardian may be permitted (with approval of the court that appointed the guardian) to create trusts for the benefit of his incapacitated ward, which trusts may contain provisions operative after the death of the ward. These trusts therefore might be utilized to implement estate planning for the incapacitated person. *See*, *N.J.S.A.*3B:12-49; *In re Trott*, 118 N.J. 436 (Ch. Div. 1972) (describing factors for a court to consider when asked to authorize guardian's implementation of gift programs).

Another form of estate planning arises under a statute that allows the guardian of a minor who receives an intestate share to obtain court approval for the creation of a trust to hold such assets until the minor reaches age 35 (with provisions for distributions before that termination date). *N.J.S.A.* 3B:12-54.1. Thus, when the administrator of an intestate estate learns that substantial funds may be distributed to minors, he might consult with each minor's guardian regarding the implementation of a trust under *N.J.S.A.* 3B:12-54.1 (the burden is on the parent, guardian or some other interested person to seek court approval for the creation of such a trust). The fiduciary might also consider the law (existing before the statute) described in *In the Matter of the Guardianship of ADL*, 208 N.J. Super. 618 (App.Div. 1986). *ADL* remains relevant after the enactment of *N.J.S.A.*12-54.1 because that law is specifically limited to intestacy, while there may be circumstances when an individual dies testate or assets pass by beneficiary designation and it becomes necessary to seek creation of a trust.

Since a guardianship terminates upon the death of the incapacitated person, the guardian must then account for and deliver the assets to the personal representative of the estate. *N.J.S.A.* 3B:12-60. In certain instances, where no one has sought appointment as personal representative of the deceased incapacitated person within 40 days of death, the guardian may seek appointment as personal representative. *N.J.S.A.* 3B:12-61.

New Jersey law also authorizes the appointment of a court-appointed fiduciary where no incapacity exists. This is an arrangement akin to an agency under a power of attorney, but with court supervision. A person, who by reason of age, illness or infirmity, determines that he wishes to have a person appointed to manage his assets on his behalf may ask a court to appoint a "conservator" for him. *N.J.S.A.* 3B:13A-1 *et seq*. A conservator may be appointed only with the consent of (or lack of objection from) the person seeking to have his affairs managed, who is called the "conservatee." *N.J.S.A.* 3B:13A-2 and -4. The court must determine that the conservatee has the mental ability to consent. *Id.* The conservator selected becomes a court-appointed fiduciary who is designated to act on behalf of the conservatee. In many respects, a conservator plays a role similar to that of an agent under a power of attorney, but there are two significant differences: (a) the conservator appointment can only be revoked with court approval upon application by the conservatee, *N.J.S.A.* 3B:13A-33; and (2) the conservator remains at all times under the continuing supervision of the court. *N.J.S.A.* 3B:13A-25 to -27. A conservator appointment terminates at the death of the conservatee, and the conservator must then account and deliver the property to the fiduciary of the decedent's estate. *N.J.S.A.* 3B:13A-34.

3. <u>Virginia</u>

Under Virginia law, a Petition is filed in the circuit court where the incapacitated adult (called the "respondent" in the statutes) resides, is located, or where the respondent resides before becoming a patient, voluntarily or

involuntarily, in a hospital or a resident in a nursing home, convalescent home, assisted living facility, or other similar institution. Va. Code 37.2-1001(A). If the petition is for a nonresident with property in the state, petition is filed where the property is located. Va. Code 37.2-1001(A). The court may transfer venue only if in the best interests of the respondent. Va. Code 37.2-1001(D).

It may be necessary to keep regular track of the physical location of the respondent. This may be best accomplished through a guardian ad litem. A wrongdoer, facing a challenge to an attempt to take control of assets through conservatorship proceedings, may seek to remove the respondent from the jurisdiction and file proceedings in another jurisdiction covertly. In the event of relocation, it will be necessary to monitor the court filings in the other jurisdiction. In the event another suit is filed, it may be possible to ask the other jurisdiction to stay its proceedings on principles of comity or other reasons (i.e. you cannot change residence without mental capacity, etc.), and facilitate retained jurisdiction by the original court if that is desirable.

Virginia law specifies the contents of the petition (Va. Code 37.2-1002). These include the respondent's personal information, such as name, DOB, residence, and social security number (under seal); the names and addresses of spouse, adult children, parents, adult siblings, or if none, at least three other known relatives (or certification that such persons do not exist); Information about any care facility; the name and address of any agents under powers of attorney or advance medical directives, and any other guardians or conservators regardless of state where appointed; a description of the incapacity and the relief requested; the name and address of any proposed fiduciaries and their relationship to the respondent; a statement of financial resources.

Any person may file a petition for guardian or conservator. Va. Code 37.2-1002(A). Fiduciaries (i.e. agents, guardians, conservators) and family members are entitled to notice of the proceedings. The Virginia guardianship

statutes do not expressly address those parties that may intervene in the proceedings. However, under general principles any person with an interest should be able to intervene. This may include non-family beneficiaries named under estate planning documents. A guardian ad litem will be appointed for the respondents, with duties that are defined by the statutes. Va. Code 37.2-1003. The court may also appoint counsel for the respondent. Va. Code 37.2-1006.

In the proceedings, the court may appoint a limited conservator, or a full conservator. Va. Code 37.2-1009. It may define the duties of the conservator. Va. Code 37.2-1009. It may revoke or suspend powers of attorney. Va. Code 11-9.1(B) states:

> The appointment of a conservator, guardian, or committee pursuant to Title 37.2 shall not of itself revoke or limit the authority of the attorney-in-fact or other agent. However, in a proceeding in which the attorney-in-fact or other agent is made a party, the court which appointed the conservator, guardian, or committee may revoke, suspend, or otherwise limit the authority of the attorney-in-fact or other agent at the request of, and based upon information provided by, the conservator, guardian, committee, or other interested parties for an incapacitated individual. Furthermore, where no conservator, guardian, or committee has been appointed, the circuit court of the city or county where the principal resides or is located, in a proceeding brought by a person interested in the welfare of the principal as defined in § 37.2-1018, and in which the attorney-in-fact or other agent and the principal are made parties, may terminate, suspend, or otherwise limit the authority of the attorney-in-fact or other agent upon a finding that such termination, suspension or limitation is in the best interests of the principal or his estate.

Virginia law confers broad powers on the conservator (Va. Code 37.2-1023), unless limited by the court. These include all of the very broad financial and fiduciary powers granted under Va. Code 64.1-57 (Virginia's "incorporation by reference" laundry list of fiduciary powers). Specifically, the conservator has power over contracts; to pay obligations and for needs to pay for insurance; to manage assets, deliver instruments, and take all actions that will serve in the best interests of the incapacitated person; to sue to revoke a power of attorney or make an augmented estate election; to borrow; and to convey real estate (unless conditioned by court); and to engage in certain estate planning (Va. Code 37.2-1024).

G. Jurisdiction of Multi-State Conservatorships.

The problem of multi-state conservatorships or guardianships has garnered national attention in recent years. Multi-state jurisdiction issues can arise in litigation, as occurred in the New Jersey Glasser litigation.

To address these concerns, the National Conference of Commissioners on Uniform State Laws has proposed the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (the "UAGPPJA"). The UAGPPJA provides that an individual's "home state" has primary jurisdiction to appoint a guardian or conservator, followed by any state with a "significant connection" to the individual.

The NCCUSL Website (as of March 31, 2008), indicates that only one state (Utah) has enacted this statute, but it is under consideration in several other jurisdictions. The Executive Committee of the State Bar of California Trusts and Estates Section is currently considering whether to recommend adoption of the UAGPPJA.

1. California

Theoretically, such multi-state disputes should not arise with respect to a conservatorship initiated in California because the conservator of the person must

obtain court permission before moving the conservatee out of state. Cal. Prob. C. § 2352(c). If the court approves the move out of state, the court will also require either (a) that the conservatee is eventually returned to California, or (b) that a conservatorship or equivalent proceeding is commenced in the place of the new residence, when the conservatee has resided in the new residence for four months, or such longer or shorter time as the court may specify. Cal. Prob. C. § 2352(d). Therefore, when a conservatorship is commenced in California, existing statutes prevent the conservatee from being transferred out of state without court approval and an order concerning ongoing jurisdiction.

On the other hand, if a conservatorship/guardianship is initiated in another state, and the conservatee/guardian is then moved to California, the question of the California courts' jurisdiction may arise. California does not automatically recognize the authority of a conservator or guardian appointed in another state. Cal. C. Civ. Proc. § 1913(b). A conservator or guardian appointed in another state must instead file a petition for conservatorship in California if the conservatee is moved to California, and the California courts will determine the need for a conservator according to California standards. *See* Conservatorship of McGowan, 2002 WL 31424565 (Cal. Ct. App. Oct. 30, 2002).

2. New Jersey

New Jersey statutes do not address these specific issues. As noted, in the Glasser litigation, the New Jersey court held that because the incapacitated person was domiciled in New Jersey, that forum was the appropriate location for adjudication of matters involving her. The guardianship statutes confer jurisdiction, however, over persons who reside in New Jersey or who possess "a real or personal estate" in New Jersey. N.J.S.A. 3B:12-21. New Jersey does have statutes authorizing our courts to transfer an existing guardianship (a case where capacitated has been adjudicated an a guardian has been appointed) both into New

Jersey and out of New Jersey. N.J.S.A. 3B:12 -66.1 and -66.2. These involve applications where the guardian desires to move to or from this state with his "ward" (the incapacitated person). These statutes, however, do not address the procedure to be employed before an adjudication of incapacity,

H. Authority of Guardian or Conservator to Create Estate Plans.

1. California

As discussed above, the appointment of a conservator in California does not automatically prevent the conservatee from making a will. Unless the court orders otherwise, the conservatee retains the capacity to make a will. Cal. Prob. C. § 1871. However, in order to make a valid will, the conservatee must meet the general requirements for testamentary capacity. In other words, the conservatee must be able to understand the nature of the testamentary act, understand and recollect the nature of his/her property, and remember and understand his/her relations to living descendants, spouse, parents, and others whose interests are affected by the will. Cal. Prob. C. § 6100.5.

If the conservatee lacks testamentary capacity, the conservator can petition the court for authority to create an estate plan under the conservator's substituted judgment. The conservator can petition for authority to perform a broad number of actions relating to the conservatee's estate plan, including the authority to make gifts, create revocable or irrevocable trusts, revoke or modify a preexisting revocable trust, and make a will. Cal. Prob. C. § 2580. The conservator must show that the proposed action(s) will benefit the conservatee or the estate, minimize current or prospective taxes, reduce expenses of administration during lifetime or at death, or provide gifts to any persons or entities who would be likely beneficiaries of gifts from the conservatee. The court may only grant the substituted judgment petition if it finds:

> The conservatee is not opposed to the proposed action, or if the conservatee is opposed, the conservatee lacks legal capacity for the proposed action; and
>
> the proposed action will have no adverse effect on the estate, or the remaining estate will be adequate to provide for the needs of the conservatee and those legally entitled to support from the conservatee.

Cal. Prob. C. § 2582.

Interestingly, an agent under a power of attorney may create, revoke, or modify a trust, if the agent is expressly authorized to do so by the power of attorney (Cal. Prob. C. § 4264), but the agent may **not** make, amend, or revoke the principal's will (Cal. Prob. C. § 4265).

2. New Jersey

N.J.S.A. 3B:12-27 provides that a will executed after the commencement of proceedings that result in the appointment of a guardian is invalid. That would mean, if no prior wills were executed by the incapacitated person, the person's assets would pass by intestacy (or presumably, if there were prior wills, pursuant to the wills executed before the guardianship proceeding was commenced.

N.J.S.A. 3B:12-49 authorizes a court to approve a guardian's creation of a trust or similar arrangement. See also N.J.S.A. 3B:12-1. Such a trust may continue during the lifetime of the incapacitated person, but it may continued after death as well. N.J.S.A. 3B:12-49. Although New Jersey has not specifically adjudicated the factors governing post-mortem dispositions, several guardianship cases discussed earlier have applied "substituted judgment" factors to support gift and Medicaid planning. In Re Trott, 118 N.J. Super. 436 (Ch. Div. 1972) (authorizing guardian to make gifts to minimize taxes upon the incompetent's death); In re Keri, 181 N.J. 50 (2004) (adopting Trott criteria in addressing guardian's implementation of asset transfers as part of program to qualify

incapacitated person for Medicaid); see also, In re Cohen, 335 N.J. Super. 13 (App. Div.2000) (applying substituted judgment criteria in declining to approve agreement among beneficiaries of a will of an incapacitated person in which they sought to modify disposition of the incapacitated person's estate).

3. Virginia

A Virginia court may authorize the conservator to implement additional estate planning actions (Va. Code 37.2-1024). In addition to the other enumerated powers, the conservator may take the following actions with court permission (with a guardian *ad litem* for the incapacitated person and notice to all presumptive heirs, distributees, and named beneficiaries). He may make gifts from assets not needed for maintenance that court determines incapacitated person would have made; disclaim interests in property; or revoke or amend a trust on good cause shown. In addition, without court permission, the conservator may make gifts up to $100 per donee, if appropriate consider several factors and if consistent with immediate prior history of gift giving; transfer assets to an irrevocable burial trust; or execute a pre-need funeral contract.

The Virginia court may authorize the conservator to bring suits for the incapacitated adult, or restrict the conservator from such actions. (Va. Code 37.2-1025 & 37.2-1026). Thus, for example, a court may impose a constructive trust to return property to the conservatorship estate, to prevent fraud, to remedy a wrong, to prevent unjust enrichment, and to avoid an unconscionable result. The imposition of a constructive trust may require a high degree of proof (i.e. clear and convincing). The proponent of the constructive trust generally bears the burden of proof.

The court's authority to invalidate post-incapacity deeds and contracts is not expressly provided for in the statutes. However, Virginia courts have been willing to invalidate post-incapacity deeds and contracts on proof in incapacity and in order to protect the incapacitated adult from abuse. Because of the

protective nature of the proceedings, such action are generally permissible under the court's general powers and the court's protective power. Due process concerns should be addressed (i.e. notice and an opportunity to be heard for any persons affected by the invalidation of deeds and contracts).

The court's authority to invalidate post-incapacity wills is not expressly provided for in the statutes. Arguably the court has the authority to invalidate post-wills in order to protect the incapacitated adult from abuse. This may especially be the case where the alleged will is executed after the conservatorship proceedings are filed and the protection of the incapacitated adult is before the court – and even more so where the procuring of the will is done in violation of the court's orders. Due process concerns should be addressed (i.e. notice and an opportunity to be heard for any persons affected). A court may prefer an alternative approach – such as creation and funding of a trust and elimination of any probate estate, thereby rendering provably fraudulent wills ineffective. This may be due to certain wills doctrines, such as the notion that a will is ambulatory and does not "speak" until the death of the testator. There are also strategic concerns in litigating the probate dispute prior to death – including the concern that an incapacitated adult may consume significant assets for care during period of incapacity, which may impact the cost-benefit analysis of bringing the will contest prior to death when the value of the amount at issue can be determined with better certainty.

A Virginia court should have the authority to order the creation and funding of a trust for the incapacitated adult. The authority can be found in the statutory powers of the conservator. The power may also be available under the doctrine of "substituted judgment," although that doctrine has not yet been expressly recognized or rejected by the Virginia Supreme Court. Virginia Code 37.2-1023 sets forth management powers of conservator, and includes (at A(5)) the power to "execute and deliver all instruments and to take all actions that will

serve in the best interests" of the incapacitated adult." The statute also grants the conservator the powers in Va. Code 64.1-57, which are broad enough to contemplate trust creation. Note, however, that there is an "estate planning" statute (Va. Code 37.2-1024) and creation of a trust for estate planning is not expressly within that statute. Arguably, the proper construction of the statutes is to view the powers of the conservator broadly so that the conservator "steps into the shoes" of the incapacitated adult. Va. Code 64.1-57: (most relevant excerpts from powers):

> (a) To sell, assign, exchange, transfer and convey or otherwise dispose of, any or all of the investments and property, either real, personal or mixed, which may be included in, or may at any time become part of the trust or estate upon such terms and conditions as the fiduciary, in his absolute discretion, may deem advisable, at either public or private sale, either for cash or deferred payments or other consideration, as such fiduciary may determine; and for the purpose of selling, assigning, exchanging, transferring or conveying the same, to make, execute, acknowledge and deliver any and all instruments of conveyance, deeds of trust, or assignments in such form and with warranties and covenants as such fiduciary may deem expedient and proper; and in the event of any sale, conveyance, exchange, or other disposition of any of the trust or estate, the purchaser shall not be obligated in any way to see to the application of the purchase money or other consideration passing in connection therewith.
>
> To do all other acts and things not inconsistent with the provisions of the will or trust in which these powers are incorporated which such fiduciary may deem necessary or desirable for the proper management of the trusts herein created, in the same manner and to the same extent as an individual might or could do with respect to his own property.

The issues may be on decided as a matter of common law, as in cases such as Matter of Jones, 379 Mass. 826 (1980), where the court authorized creation of trusts or Americans for the Arts v. Lilly, 855 N.E. 2d 592 (2006), where the court

authorized creation of new trusts by corporate conservator. This concept is addressed further in Restatement Third of Trusts, Section 11 (Capacity of a Settlor to Create a Trust): which states that "under some circumstances...the legal representative of a property owner who is under a disability may create a trust on behalf of the property owner". In the comments, there is a lengthy discussion of the substituted judgment doctrine. See PLR 9731003, in which the IRS recognized the validity of the substituted judgment doctrine.

An issue that frequently arises in contested conservatorship proceedings is whether the court should invalidate alleged gifts due to incapacity, fraud, or abuse. These issues may be resolved under case law, such as Kaplan v. Copeland, 183 Va. 589 (1945) ("the measure of one's capacity to execute a deed of gift being sufficient mental capacity to understand the nature of the transaction he was entering into"); Shenandoah Valley Bank v. Lineburg, 179 Va. 734 (1942) ("Upon one who claims to be the donee of a gift rests the burden of proof"); Mathews v. Hanson, 145 Va. 614 (1926) (burden of proof on the donee is "clear and satisfactory proof" of the intent to make a gift).

The capacity to make gifts or donative transfers is addressed further in Restatement 3d Property (Wills and Other Donative Transfers). Section 8.1 provides: (a) Á person must have mental capacity in order to make or revoke a donative transfer…(c) If the donative transfer is in the form of an irrevocable gift, the donor must have the mental capacity necessary to make or revoke a will *and must also be capable of understanding the effect that the gift may have on the future financial security of the donor*…" Similarly, Section 8.2 provides that aonative transfer is invalid if procured by undue influence, duress, or fraud.

Virginia permits gifts by an agent acting under a proper power of attorney. Va. Code 11-9.5 (Gifts under power of attorney). That section provides that gifts by power of attorney may only be made "in accordance with the principal's personal history of making or joining in the making of lifetime gifts".

I. State Law Approaches to Pre-Mortem Will Contests.

There is no direct provision in the California Probate Code, under which a party can obtain a court determination, during the lifetime of a testator, of whether the testator has the capacity to prepare an estate plan. However, the substituted judgment statutes discussed above allow a conservator, at least indirectly, to raise the issue of a conservatee's capacity for testamentary acts.

In Conservatorship of Johnson, 2003 WL 57892 (Cal. Ct. App. Jan. 8, 2003), the conservator of Eunice Johnson's estate filed a petition requesting authority to create a revocable trust and pour over will for Johnson. The requested estate plan would leave Johnson's home to one of her four grandchildren, and would split Johnson's remaining assets equally between her only daughter and the same granddaughter, effectively disinheriting Johnson's remaining three grandchildren. Johnson's daughter objected to the petition. The trial court heard testimony from Johnson and concluded that she had testamentary capacity and that this was the estate plan she desired. The court granted the petition, and the Court of Appeal affirmed.

In another substituted judgment case, Conservatorship of McDowell, 125 Cal. App. 4th 659 (2004) (disapproved on other grounds by Bernard v. Foley, 39 Cal. 4th 794 (2006)), the conservator of Kathryn McDowell filed a substituted judgment petition seeking the authority to execute a new will and trust for McDowell, on the grounds that her existing will and trust were invalid, in that they named McDowell's "care custodians" as the sole beneficiaries. The trial court granted the petition, but the Court of Appeal reversed, finding that McDowell's companions did not fall in the class of disqualified "care custodians."

Thus, in both McDowell and Johnson, conservators have used the substituted judgment petition as an effective means to "litigate" a conservatee's estate plan during the conservatee's lifetime. These cases demonstrate that substituted judgment petitions can provide a powerful tool for litigating pre-death

will contests, at least when a conservator has been appointed. However, substituted judgment is only available when a conservatorship exists. Outside of the conservatorship context, there is no comparable procedure in California for pre-death will contests.

In the Glasser litigation discussed earlier, a New Jersey court determined the validity of wills executed in the period just before the guardianship proceeding was commenced. That determination was made in the same proceeding in which the Court adjudicated Mrs. Glaser's incapacity, revoked a power of attorney executed by her, and appointed guardians for her.