Conservator-Created Wills: Issues in Litigation

by Thomas A. Rodriguez and Brooke W. Brestel

When a conservator creates or modifies a protected person's will under CRS § 15-14-411, it raises issues for the conservator, and for those persons who, at some point, may wish to challenge the new or revised will. The following explores these issues, including the proper procedure, potential pitfalls, and possible avenues for a contest.

In the past, there was no effective way in Colorado to draft a will for an individual who lacked testamentary capacity. In fact, the law specifically prohibited a conservator from executing a will on behalf of a protected person.[1]

Since 2001, a conservator appointed by a Colorado district or probate court may make a will for a protected person with court approval of an appropriate petition after notice to interested parties.[2] Under the same statute, in addition to making wills, conservators can amend or revoke a protected person's will with court approval and notice to interested parties. When considering each of these actions, the petitioned court primarily must consider the decision that the protected person would have made, to the extent that decision can be ascertained.[3]

When the statute's procedures are followed, they essentially eliminate lack of testamentary capacity as a ground to contest a will that a protected person's conservator executes or a will that a conservator amends or revokes in writing. Still, other grounds for contesting a conservator-created will exist, before and after the protected person's death. This article addresses the procedure to seek and obtain court approval of a conservator-created will and potential areas of challenge to them pre- and postmortem, focusing on best practices for practitioners.

Hypothetical Case Study

To illustrate the issues involved with conservator-created wills for protected persons, including the ways in which to challenge such wills before and after they are made, this article uses the fictional case of Albert Anderson (known as Burt since childhood). Now 60 years old, the Colorado native and resident suffered a traumatic brain injury in 2102 in a freak work accident when he was ejected from the piece of heavy machinery he operated.

Immediately after the accident Burt was moderately confused, had difficulty handling everyday tasks, and had severe memory problems. In June 2013, more than a year after the accident, Burt's older sister Betty Anderson Beckett petitioned the appropriate district court sitting in probate to be appointed as Burt's guardian and conservator. The probate court, after notice and a hearing on both petitions, made appropriate findings of fact and conclusions of law based on clear and convincing evidence and appointed Betty as guardian and conservator.

Burt and his wife Sue divorced in 1990, eleven months after they separated and three weeks after she gave birth to a baby boy. In addition to Betty, Burt's family consists of that boy Bobby Anderson (who has never played football), and Burt's two older brothers Zeke and Uriah. Burt and his siblings have always been very close. Questions linger regarding Bobby's paternity, but Burt has raised Bobby as his own child, and he and his siblings have always treated and considered Bobby as Burt's son.

In early 2014, Burt received a $5 million personal injury settlement from his accident. Betty placed it in a supplemental care trust. By mid-2013, as medical experts prognosticated, Burt's condition got much worse. Betty knew it was time to have Burt move out of Zeke's house and into a skilled nursing facility. This was painful to everyone because Betty, Zeke, and Uriah had always been able to shower Burt with love, affection, and financial assistance whenever needed, and, for over two years, provided whatever he needed for

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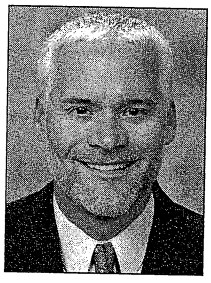

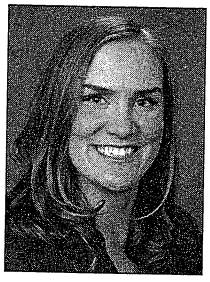

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his daily care. After taking appropriate steps and giving appropriate notices, Burt was moved into a skilled nursing facility.

Betty knew that Burt never executed a will or other estate planning documents. After consulting with you, her attorney, Betty realized that if Burt did not execute a will, his sizeable estate would be distributed after his death under Colorado's intestacy laws. This would leave open the possibility that Bobby Anderson will receive nothing if it is determined that he is not Burt's biological son. Conversely, if Bobby is Burt's biological son, Betty was certain Burt would not want the entirety of his estate distributed to Bobby through intestacy, leaving nothing to his siblings, who she knows Burt loves and always said he wanted to pay back for their generosity.

You, as Betty's attorney, met with Burt to see how he was doing. When you met Burt you saw that he was almost completely helpless; his confusion and memory problems were severe. He was confused about why you came to see him and what a will does. He could not say anything about how he wanted what might be left of his $5 million distributed after his death.

Following your advice, Betty petitioned the court to appoint a neutral special conservator for the specific purpose of creating a will on Burt's behalf. The petition outlined Burt's condition, the predicament the family found themselves in, and Betty's concerns that Burt's loved ones could potentially be left out of his estate entirely, which she maintained was contrary to Burt's true intentions.

In her petition, Betty asserted that drafting a will for Burt that all interested parties could agree on would benefit Burt's conservatorship estate by avoiding potential future litigation, particularly because there were more than adequate assets to provide for Burt's future care needs. After reviewing the petition and conducting an evidentiary hearing on the matter, the court appointed local attorney Michelle Miway special conservator and granted Miway authority to draft a will on Burt's behalf.

Miway reviewed Burt's assets, medical records, and spending and gift giving histories, and interviewed Betty, Zeke, Uriah, and Bobby. She concluded that Burt would want 50% of his assets at his death to go to his son, and the other 50% to be divided equally among his surviving siblings. Miway then petitioned the court to approve that plan for the testamentary disposition of Burt's estate. After notice to Burt, the siblings, and Bobby, the court held a hearing and approved the special conservator creating the recommended will for Burt.

Just after Miway executed the will for Burt, word got around to the members of the family's church that Burt was going to leave half of his estate to his siblings and the other half to his son. Cathy Comlatle, a member of the church, talked to Betty, Zeke, and Uriah. She told them that in addition to being in the church choir with Burt starting in 2008, they also were secretly involved in an intimate relationship that started the same year and ended only after Burt's accident. In fact, she and Burt had talked about getting married for the umpteenth time on the morning of his accident, and they had surreptitiously started living together three months before the accident. Cathy adamantly maintained that Burt wanted the entirety of his estate to go to his son Bobby and said she was going to visit an attorney to review the possibility of contesting the will Miway created on Burt's behalf.

Betty recently visited you to get input about what to do now. You seek input before you get back to Betty. Here is a memo you received from renowned probate litigator Harold (Hal) O. Towsis, whom you retained, with Betty's knowledge and consent, to help you unravel what seems to be a mess.

Memo to Betty's Attorney: The Basics of Contesting a Conservator-Created Will

Attorney: Thank you for forwarding the information about your client Betty's situation. Although it may appear to be a mess, there are ways to prepare for or altogether avoid a will contest going forward. The following is a brief memo I prepared outlining the possible avenues to attack the will created for Burt, and an analysis of the strengths and vulnerabilities of Betty's actions. Good luck to you.

—Mr. Harold O. Towsis, Esq.

Lack of Testamentary Capacity

There are many grounds for contesting a will. The most common claims are that the decedent lacked testamentary capacity when preparing his or her will or that someone unduly influenced the decedent in preparing his or her will.[4] To have testamentary capacity, the testator must be "of sound mind."[5] The testator's soundness of mind may be evaluated under the *Cunningham* test and the insane delusion test.[6]

The *Cunningham* test evaluates five traits the testator must possess to have the mental capacity to make a will. These are:

1) the person must understand the nature of the act;
2) the person must know the extent of his or her property;
3) the person must understand the proposed testamentary disposition;
4) the person must know the natural objects of his or her bounty; and
5) the will must represent the person's wishes.[7]

An individual lacks testamentary capacity under the insane delusion test if he or she suffers from an insane delusion that materially affected the disposition provided for in the will.[8]

Typically, a will contestant has the burden of establishing lack of testamentary capacity by a preponderance of the evidence, once the proponent of the will offers *prima facie* proof that the will was duly executed.[9] Yet, by allowing courts to grant conservators authority to create wills on behalf of protected persons, CRS § 15-14-411(1)(g) may effectively make the testamentary capacity of the protected persons irrelevant.[10]

Although many protected persons retain testamentary capacity,[11] many do not, or they retain capacity that is questionable. Will-making authority as outlined in CRS § 15-14-411(1)(g) is designed precisely for protected persons who lack elements of testamentary capacity or protected person's with questionable or suspect capacity.[12] The statute permits and enables persons who lack one or more of the elements of testamentary capacity to "discover and make effective the intent of a decedent in the distribution of his property," an underlying policy of the Colorado Probate Code, by allowing a court-appointed fiduciary to act on their behalf.[13]

The plain language of CRS § 15-14-411(1)(g) supports the position that testamentary capacity of the protected person is not a prerequisite for a conservator to create a will on behalf of the protected person.[14] To impose a prerequisite that the protected person have testamentary capacity would add a requirement not present in the statute, and one the Colorado Legislature did not intend.[15] Rather, excluding testamentary capacity as a requirement for con-

servator-created wills furthers the legislature's intent to recognize and expand the opportunities of protected persons to exercise their right to testamentary disposition of property.[16]

In Burt's case it seems clear that his condition had deteriorated to the point where he lacked the requisite testamentary capacity to execute a will, and that he failed at least two factors of the *Cunningham* test. One cannot have testamentary capacity if he does not understand the nature of the act he is about to undertake in creating, amending, or revoking a will. Additionally, there was documentary evidence before the probate court that Burt did not know how he wanted his property distributed after he died. It was clear that Burt did not have the capacity to execute a will.

Before 2001, this likely meant that, unless Burt regained capacity at a later time, he would have had no choice but to die intestate, potentially leaving close family members without an inheritance and facing the risk of costly litigation regarding paternity, equitable adoption, and/or heirship after his death. Now, CRS § 15-14-411(1)(g) gives protected persons like Burt the ability to effectively draft a will by and through someone acting on their behalf, and to have the same rights as those with testamentary capacity to plan for the distribution of their property.

In this case, it does not matter that Burt lacked testamentary capacity. Rather, the main concern lies with ascertaining Burt's intent. Therefore, a will contest by Cathy Comlatle or Bobby Anderson based on Burt's alleged lack of testamentary capacity will likely (or should) be rejected by the court, because Burt's will was created by a conservator with prior court approval. A successful challenge to Burt's conservator-created will would almost certainly be based on procedural or other grounds.

Contesting a Conservator-Created Will—Procedural Challenges

In exercising the powers outlined in CRS § 15-14-425, Miway reviewed some, if not all, of Burt's financial records, as well as other relevant information. She knew he did not have any estate planning documents at the time of the work accident.

Betty, as a conservator for a protected person, could have moved forward and executed all of the documents she thought necessary and essential for Burt's estate plan without petitioning the court for prior approval. However, Betty followed a best practice by petitioning the probate court for prior approval so that a special conservator could execute a will for him.[17]

It would have been a significant mistake for Betty, as Burt's conservator, to execute Burt's will without prior court approval. Doing so was an option, but not a recommended one. Pursuing ratification of an estate plan executed by a conservator without prior court approval may be theoretically possible, but the petitioner and the drafting attorney are, at a minimum, exposed to sanctions.

Because Betty, as conservator, could have a potential conflict of interest in making recommendations about a new will, she took the safer approach by asking that the court appoint a neutral special conservator. Depending on the way the order was drafted, Miway could have drafted the new will without further court approval. However, she took the preferred approach by petitioning the court to approve her recommendations of a new will, with notice to those potentially affected by the new will.

All persons who may be affected by the proposed action of executing a will for a protected person—at a minimum, the protected person/testator (usually represented by a guardian *ad litem*, an attorney, or both), the protected person's heirs at law, and named beneficiaries under an existing instrument—are entitled to notice of hearing.[18]

> "Interested person" includes heirs, devisees, children, spouses, creditors, beneficiaries, and any others having a property right in or claim against a trust estate or the estate of a decedent, ward, or protected person, which may be affected by the proceeding. It also includes persons having priority for an appointment as a personal representative and other fiduciaries representing the interested person. The meaning as it relates to particular persons may vary from time to time and shall be determined according to the particular purposes of, and matter involved in, any proceeding.[19]

With Burt's conservator-created will, Cathy Comlatle may have grounds for challenging the will if she was entitled to notice as an interested person but was not adequately notified of the probate court proceedings. As Burt's fellow choir member and purported girlfriend, Cathy may have an opportunity to challenge the will if the court determines that she qualifies as an interested person and, therefore, should have received notice of the petition.[20] Notice by mail is generally acceptable.[21] Nevertheless, if there is the concern or expectation that the appointment or proposed will may be approved, personal service or certified mail with a return receipt may be preferable to avoid the potential for a later argument that a person did not receive notice by mail.

Assuming that notice of both hearings (Betty's request to appoint Miway and Miway's recommendations about the new will) was provided to Bobby, there are limits to the avenues of attack, at least for Bobby. If notice was given to Cathy, she would have a difficult time explaining why she slept on her rights to object to one or both hearings. It would have been a best practice to notice Cathy if there was knowledge of her relationship with Burt.

There is no penalty for "over-noticing" a hearing. Armed with advance knowledge of Cathy's position, it might have been wise to indicate that a courtesy copy of the notice of each petition was being sent to her. Care would have had to be taken so that sending those notices was not a concession that Cathy was an interested party and that she had standing to intervene on her own behalf.

Based on Cathy's statement that Bobby should get everything under Burt's will, she may be estopped from making such an argument on Bobby's behalf if Bobby failed to object to either of his Aunt Betty's petitions. On the other hand, if Cathy, as the secret girlfriend, takes the position that she should have received her slice of the pie, perhaps as a common law spouse, a further hearing on that issue may be necessary, or at least advisable, to bolster the will Miway executed for Burt.

Betty prudently petitioned the probate court to appoint a special conservator for the specific purpose of preparing Burt's will.[22] This reduces ethical or legal issues that exist when an interested party—for example, an heir or relative—is already serving as guardian or conservator. It also helps to eliminate an argument that the conservator is proposing and making the change for his or her own benefit if the conservator stands to gain from the estate planning changes. Betty was already serving as Burt's guardian and conservator, and stood to gain from creating an estate plan that split Burt's estate between his siblings and Bobby. Asking the court to appoint a neutral professional special conservator to execute a will on Burt's behalf may not have removed the appearance of impropriety on Betty's part, but it certainly reduced it.

Betty's petition to the probate court to appoint Miway was based on a doctor's letter (such a letter or other supporting affidavits should typically accompany the initial petition). The probate court then held an evidentiary hearing where it appointed Miway and granted her the power to make, amend, or revoke the protected person's estate plan.[23]

It appears that Betty expected her petition to be uncontested. She gave notice of a non-appearance hearing under Colorado Rule of Probate Procedure 8.8. As often happens, the probate court did not consider her petition routine as required by that Rule, and it ordered an evidentiary hearing. It is not a best practice to try to use Rule 8.8 to give notice of potential action on an initial petition for appointment of a conservator for a protected person when the appointee (conservator) is to be appointed to execute a will. A hearing on the initial petition to appoint a conservator to look into executing a will for a protected person like Burt introduces an opportunity for a challenge. An interested party—or even the protected person—may object to the initial grant of power. For instance, the protected person may still have testamentary capacity and want to execute his or her own will or keep an existing plan in place. Notwithstanding the risks of a contested hearing, it is preferable to address those issues directly before the court in an evidentiary hearing.

It is also not a best practice for a conservator to try to use Rule 8.8 when petitioning the probate court to authorize the execution of a specific will, or when petitioning the probate court to amend or revoke an existing will. That said, there may be circumstances where Rule 8.8 can be used effectively. For example, in a situation where there is uncontested tax planning for a protected person, an evidentiary hearing may not be necessary if all potentially affected parties were involved in the tax planning discussions. Rule 8.8 could also be used when creating an offset for an heir in a will where it is determined that said heir financially exploited the protected person for an amount certain derived through civil or criminal prosecution. Of course, a court order remains a court order, irrespective of whether it was procured after a non-appearance hearing or an evidentiary hearing. Still, if it might be necessary to later defend the conservator-created will, a practitioner could feel better defending a process where the court order was entered after a full evidentiary hearing. Regardless, even if a petition is submitted under Rule 8.8, it will be up to the court whether to grant the request on the non-appearance docket or insist on an evidentiary hearing.

In re Estate of Romero holds that appointment of a conservator is not a determination of testamentary incapacity of the protected person.[24] Therefore, even if a conservator is appointed, the protected person may not need a conservator to execute a will on his or her behalf. On the other hand, a protected person may have sufficient testamentary capacity, in the estimation of an estate planning attorney and the protected person's medical providers (or an expert engaged to do an evaluation of the protected person for this specific purpose), that execution of a will by a person, like Burt, with questionable or suspect capacity at best, may be vulnerable to attack after the protected person's death, or at least encourage the negatively impacted parties to pursue a will contest. If Burt had an estate plan before his accident and he executed all the documents in it before there was any question about his testamentary capacity, initiating a proceeding to change Burt's (a protected person's) will could expose him (or any other similarly situated protected person) to a contested proceeding (effectively a pre-mortem will contest) and alienate the protected person from some family members.

Memo Conclusions

I suspect that Betty balanced the risks and the benefits of petitioning for the appointment of a conservator to execute a will for Burt. I suspect that Miway also balanced the risks and the rewards of seeking a specific court order authorizing her to execute Burt's will. In each case, the fact that Burt did not have an estate plan and had not executed any estate planning documents before his accident almost certainly tipped the scales toward petitioning the probate court to appoint Miway as special conservator and her petitioning it to authorize her to execute Burt's will.

Balancing the risks and the rewards both before the probate court appoints a conservator to assess the propriety of executing a will and before it grants a conservator the power outlined in CRS § 15-14-411)(1)(g) are best practices. However, these are procedural or preliminary issues that have little to do with actually contesting a conservator created will.

Certain assumptions are being made about what Miway did before she petitioned the probate court to allow her to execute Burt's will. Just like any other conservator appointed to create a will on behalf of a protected person, Miway was required by CRS § 15-14-411(3) to consider primarily the decision that Burt would have made, to the extent that the decision can be ascertained. Substantiating what Burt would have done was the court's primary consideration. An absolutely crucial component of Miway exercising her power and executing Burt's will required her to gather information that would reflect what Burt would have done if he had testamentary capacity.

Miway's petition shows she did (and any similarly situated conservator should) interview the protected person in an attempt to ascertain how he would devise his estate. Miway did (and any similarly situated conservator should) look into corroborating evidence, such as interviews with family and acquaintances, past gifting patterns, an existing estate plan, and other relevant factors in ascertaining what the protected person would do.[25]

Assuming for now that Miway had done a thorough enough investigation to support her view that it was appropriate for Burt's will to leave half of Burt's estate to his son and half to his surviving siblings (either because she could establish what Burt wanted done in his will or she could establish what was in his best interests), she did well to return to the probate court with a petition to authorize her to execute Burt's will.[26]

Although Miway did not have to petition the probate court for authority under the statute to execute Burt's will (and it may seem that this was an unnecessary and expensive additional step), it is considered a best practice for the reasons spelled out above and because it may help collaterally estop a postmortem will contest. Of course, the downside is permitting any interested party to object to the special conservator's recommendations and proposed will. Still, addressing these issues presently (and not postmortem) typically is the goal.

The petition Miway filed with the probate court seeking authority to execute Burt's will should have completely detailed the evidence she gathered that supported her conclusion that he wanted to leave one-half of his estate to Bobby and the other half to his surviving siblings. Again, all interested parties should have received notice of the hearing to approve her petition seeking that authority.

This second stage of process concerning conservator-executed wills (as opposed to the first stage where a petition to appoint a conservator to execute a will for a protected person) is where most challenges occur. Those challenges include potential undue influence claims, as well as substantive challenges to the conservator's process and investigation.

If Miway's investigation had uncovered Cathy's relationship with Burt and she had interviewed Cathy and found out that she thought Burt wanted to leave everything to Bobby, those facts should have been included in the second petition. Also, as discussed above, it would have been preferable to give notice of the petition seeking probate court approval to execute Burt's will to Cathy. Then Cathy could have challenged Miway's conclusions as

special conservator and her decision to execute a will splitting Burt's estate between his son and siblings.

However, if Miway did not know about a relationship between Cathy and Burt or if Miway knew about the relationship but did nothing to give Cathy notice of the hearing on Miway's petition, (that is, Cathy did not learn of the conservator-created will until after the fact), Cathy may have lost her opportunity to challenge the will until after Burt's death. At the same time, Burt may have lost his opportunity to collaterally estop Cathy from a postmortem challenge. These can be serious problems in the future.

Best Practices

The following discussion focuses on the best practices that should be part of having a special conservator appointed to execute a will for a protected person, and in seeking court approval of the decision of a special conservator to execute a protected person's will. Conservator-created wills are a fairly new phenomenon and there is a dearth of case law nationwide interpreting the relevant statutes. There is none in Colorado. Practitioners should be careful when petitioning for prior court approval to execute any estate planning documents for a protected person or amending or revoking any estate planning documents.

At a minimum, best practices include:

- Notice—even over-notice when appropriate—all parties who may be affected by the request to change the will; consider including an investigation to confirm all mailing addresses are current or sending service by certified mail or personal service instead of first-class mail.
- Notice the same parties after the conservator's investigation with a proposed draft of the new will (or other estate planning document—for example, trust, beneficiary designation, or power of appointment).
- Ensure that the conservator does a thorough investigation into the protected person's current and past wishes, including his or her history of support of gifting for beneficiaries or heirs. Selection of an experienced special conservator is critical.
- Avoid the appearance of undue influence by having any affected beneficiaries (including those indirectly affected) involved when the conservator investigates the facts and proposes and executes the will.
- Avoid use of a Rule 8.8 non-appearance hearing in favor of an evidentiary hearing, unless the circumstances are very clear cut and unlikely to be challenged.
- Consider ordering a transcript of the hearings done in the probate court and professionally videotaping the signing ceremony to demonstrate who was involved in the execution of the will. Doing so may cost money now but save a fortune later.
- Conversely, negatively affected future contestants should be wary of simply relying on the authority that says a will contest is not ripe until after the death of a testator.[27] A contestant who takes no action may very well be collaterally estopped from bringing a postmortem will contest on the grounds of testamentary capacity and undue influence.

Beyond the Basics

Facts that could support other challenges to Burt's will—or any conservator-created will—are not part of the hypothetical case, but a brief discussion of them follows. CRS § 15-14-411(1)(g) should effectively eliminate lack of testamentary capacity as a ground to contest a will created by a conservator with court approval.[28] This leaves undue influence, challenges to the conservator's investigation, and pre-mortem will contests as potential grounds for contesting a conservator-created will.

Undue Influence

Undue influence means:

> words or conduct, or both, which, at the time of the making of a will, 1) deprived the person making the will of his or her free choice, and 2) caused the person making the will to make the will or to make one or more provisions differently than he or she otherwise would have.[29]

Further, to prove a will or parts of a will were prepared or executed as a result of undue influence, the contestant(s) must prove:

1) a person was unquestionably susceptible to undue influence;
2) the opportunity of a third person to exercise undue influence and to affect a wrongful purpose;
3) a disposition to influence unduly for the purpose of procuring an improper benefit; and
4) an unnatural result (a result appearing to be the effect of the supposed influence.[30]

These elements are, at best, difficult to prove in a case of a conservator-created will.[31]

First, in the case of a conservator-created will, the person executing the will (and therefore, the one allegedly being unduly influenced) should be an uninterested party who is charged by the court with a specific task that he or she is duty-bound to carry out with full credibility and integrity.[32] Contestants would have the burden to show a third party somehow unduly influenced the conservator either in making the will or in his or her independent review of the reliability of the statements relied on in devising the protected person's estate.[33] Therefore, it typically is a bad idea to have a family member conservator petition to change and execute a new will on behalf of a protected person, because this opens the door for a disgruntled heir or beneficiary to allege undue influence later. This situation, however, will not always control. For example, the restoration of a prior estate plan in favor of a protected person's natural heirs may be pursued by a family member who stands to benefit from the will when a third party (such as a caregiver) has financially exploited a protected person, including causing the protected person to change his or her will in the favor of a third party.

If contestants could make such a *prima facie* showing of undue influence, the conservator would still have the benefit of safeguards that effectively preclude undue influence as a matter of law.[34] These include the protected person's own counsel, appointed by the court, who has no interest in or relationship to any devisees and is charged with representing the protected person's best interests and oversight by the court, by the very review initiated by the petition to approve the will.[35] Thus, in the hypothetical, even though Betty was the initial petitioner and she ended up benefiting from the special conservator's determination that half of Burt's estate should go to his siblings, an undue influence allegation by Cathy would likely fail.

Conservator's Investigation

Another potential avenue for attacking a conservator-created will is to challenge the conservator's testamentary decisions by crit-

icizing his or her investigation into the wishes of the protected person.[36] As stated above, CRS § 15-14-411(3) requires the appointed conservator to "consider primarily the decision that the protected person would have made, to the extent that the decision can be ascertained."[37] It is imperative for the conservator to not only evaluate what the protected person would have done, but also carefully justify what the conservator ultimately devises.[38] The conservator should conduct a thorough investigation into the protected person's current and historical wishes. A will contest in this instance would likely focus on whether the conservator properly did his or her job, rather than on the protected person's capacity and the traditional grounds for a will contest.[39]

In the case of Burt's conservator-created will, if Cathy truly was Burt's longtime girlfriend (or even his common law spouse) and Miway failed to interview her or if the evidence clearly showed that Burt's intention was for his entire estate to go to Bobby even though questions or paternity lingered, Cathy may be able to challenge the resulting will based on Miway's flawed investigation.

Pre-Mortem Will Contests

Very few states allow direct challenges to the validity of a will before the death of the testator.[40] The vast majority of states still treat wills as ambulatory documents that do not "speak" until the testator's death.[41] Until the will operates, there are no persons with an actual interest in the will and, therefore, no one with standing to contest the validity of the will until after the testator's death.[42] Additionally, CRS § 15-12-407 states that undue influence and lack of testamentary capacity are to be raised by contestants during probate.[43] An attempt to contest a conservator-created will pursuant to CRS § 15-14-411 before the testator's death is an attempt to introduce issues that lack ripeness.[44]

However, pre-mortem challenges to conservator-created wills differ from formal will contests, in that the former simply involves submitting a will for court approval pursuant to a conservator's court-appointed powers.[45] Further, CRS § 15-14-411(3) expressly authorizes courts to approve a conservator's exercise of powers, including the power to make, amend, or revoke a protected person's will.[46] While the procedures differ, the issues raised in a formal probate proceeding and a conservator-created will contest, in addition to the end result, may be the same.[47]

Because § 15-14-411 allows for a pre-mortem hearing on the validity and appropriateness of a conservator-created will, potential contestants must keep collateral estoppel and issue preclusion in mind when attacking the validity of such wills.[48] Collateral estoppel bars relitigation of an issue that was resolved at a prior proceeding.[49] In *Bennett College v. United Bank of Denver, N.A.*, the Colorado Supreme Court established four factors that determine whether an issue was previously litigated.[50] An issue is barred if:

1) the issue precluded is identical to an issue actually determined in the prior proceeding;
2) the party against whom estoppel is sought was a party to or was in privity with a party to a prior proceeding;
3) there was a final judgment on the merits in the prior proceeding; and
4) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding.[51]

Thus, if the proponent of a will for probate can establish the four factors established in *Bennett College*, a later postmortem will contest could be barred, depending on the grounds.

For instance, if an interested party objects to a petition to approve the conservator-created will on grounds of undue influence and the court rules in the conservator's favor, finding that there was no undue influence and upholding the will, it is not likely the issue of the will's validity could be re-introduced after the testator's death in a formal probate proceeding, provided the party seeking estoppel can establish the remaining three factors outlined above.[52] In this case, the validity of the will was "actually litigated and necessarily adjudicated," in the initial proceeding. On the other hand, if the original proceeding regarding the conservator-created will involved only issues of incapacity and not specifically testamentary capacity, collateral estoppel would not bar litigation of the testamentary capacity issue after the testator's death.[53] The party seeking estoppel still has the burden of proving all four factors established in *Bennett College*. Of course, whether a contestant can realistically raise testamentary capacity as grounds to challenge a conservator-created will as the testamentary capacity of the protected person may be moot.

Alternatives to Conservator Created Wills—*Inter Vivos* Trusts

As an alternative to having a conservator appointed for the purpose of creating a will for a protected person or for someone who lacks testamentary capacity, an agent acting under a general durable power of attorney may be able to devise the principal's estate by creating an *inter vivos* trust, including a provision in the trust instrument that distributes the principal's estate at death. Although this option may seem more convenient and less burdensome than having to involve the courts, there are several potential pitfalls in choosing this route.

First, pursuant to CRS § 15-14-724(1)(a), an agent may create, amend, revoke, or terminate an *inter vivos* trust only if the power of attorney expressly grants the agent the authority to do so. Thus, if the document is silent in this regard, the agent simply does not have the power, even if the power of attorney contains a broadly stated general grant of authority.

Assuming the power of attorney document does expressly grant an agent the power to create an *inter vivos* trust on the principal's behalf, an agent that creates a trust may be more vulnerable to liability for breaching their fiduciary duty than a court-appointed conservator with permission to create a will on behalf of a protected person. Because the agent must act in the principal's best interests, questions arise when the agent acts in a way that benefits someone other than the principal, and certainly when the agent benefits himself or herself. Much like a family member conservator ideally should not be the one creating a will on behalf of a protected person, an agent who creates a trust with distribution provisions to himself or herself arguably breaches the agent's fiduciary duty to the principal and, at the very least, invites litigation and challenges from disgruntled family members and omitted beneficiaries. Although it is true that challenges could occur in either situation, in the case of the agent acting under a power of attorney, those unhappy parties would likely be suing the agent rather than contesting the validity of a will. Additionally, providing notice to all interested parties, giving them an opportunity to be heard as part of the conservator-created will procedure, and perhaps even reaching an agreement on the testamentary disposition makes conservator-created wills a more transparent process, and potentially averts family squabbles down the line.

Similarly, an agent acting under a power of attorney who creates an *inter vivos* trust loses the oversight and protection that comes with a court-approved conservator-created will. Having the court review the conservator's findings and approve the testamentary dispositions before the will is even drafted provides a safeguard not available to a trust that is privately created. This procedure not only insulates the conservator and his or her actions but also could potentially bar relitigation of issues already resolved.

Conclusion

Since 2001, Colorado residents who lack testamentary capacity may make testamentary distributions by and through a conservator appointed by the court for the specific purpose of drafting and/or executing a will. Although conservator-created wills come with procedural and substantive safeguards by their very nature, they are not unassailable. Conservators appointed to create a will on behalf of a protected person must follow the prescribed procedure, and most important, must try to ascertain the wishes of the protected person and draft a document in accordance with what the protected person would want to do.

Notes

1. Tucker *et al.*, "Will Preparation for Individuals Lacking Testamentary Capacity," 33 *The Colorado Lawyer* 93, 95 (Aug. 2004).
2. *Id* at 93.
3. CRS § 15-11-411(3).
4. Olsen and Traeger, *Will Contests* (CBA-CLE, 2003).
5. CRS § 15-11-501.
6. *In re Estate of Romero*, 126 P.3d 228, 230 (Colo.App. 2005).
7. *Id.*
8. *Id.*
9. *Id.*
10. *See* Tucker, *supra* note 1 at 96.
11. *Romero*, 126 P.3d at 233. *See also* CRS § 15-14-409(4).
12. *Id.*
13. *See* Tucker, *supra* note 1 at 96.
14. *Id.*
15. *Id.* at 97.
16. *Id.*
17. Fitzsimons, "Guardianship Litigation and Pre-Death Will Contests are on the Rise," 36 *Estate Planning* 39, 45 (Jan. 2009).
18. *Id.*
19. CRS § 15-10-201(27).
20. *Id.*
21. CRS § 15-10-401.
22. *See* Tucker, *supra* note 1 at 96.
23. *Id.*
24. *Romero*, 126 P.3d at 231.
25. *See* Tucker, *supra* note 1 at 96.
26. *Id.* at 96.
27. *Heinneman v. Colorado College*, 374 P.2d 695 (Colo. 1962).
28. *Id.*
29. *See* Olsen, *supra* note 4 at 6.
30. *Id.*
31. *See* Tucker, *supra* note 1 at 97.
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. CRS § 15-14-411(3).
38. *See* Tucker, *supra* note 1 at 97.
39. *Id.*
40. *See* Fitzsimons, *supra* note 17 at 44 (Arkansas, North Dakota, and Ohio).
41. *Id.*
42. *Id.*
43. CRS § 15-12-407.
44. *See* Tucker, *supra* note 1 at 98.
45. *Id.*
46. *Id.* at 98-99.
47. *Id.* at 98.
48. *Id.* at 97.
49. *Bennett College v. United Bank of Denver*, 799 P.2d 364, 366 (Colo. 1990) (*en banc*).
50. *Id.*
51. *Id.*
52. *See* Tucker, *supra* note 1 at 97.
53. *Id.* at 98. ■