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SPECIAL NEEDS CHILDREN TURNING 18 YEARS OLD

BY LORI K. MURPHY, ESQUIRE*

A single mother of an adult child visited me to prepare her estate plan. During our first meeting, she shared that her 24-year-old adult son lives at home and has a mental impairment. He recently needed a new physician and my client requested to direct his medical care. In response, the new physician asked for her son's medical power of attorney. My client was thrown for a loop–she had always directed his medical care and no one before had asked for a power of attorney. Later, she determined this was because her son had the same medical treatment team since he was a young boy and the team knew her son's medical condition and that his mother directed his care. Now that new care was needed, the physician's office properly sought the mother's authority to direct care and she needed to determine how to continue to help him. Our discussion turned from her own estate planning to one about guardianship, conservatorship and powers of attorney.

In no legal field have I been challenged more than in representing families with special needs children. Over the past 14 years, I have had the pleasure of working with families with estate planning efforts, including those who have children with Down syndrome, Autism Spectrum Disorder, Spina bifida, birth injuries and other conditions impacting a person's mental capacity. A topic many families are passionate about is determining how to attend to the less-abled child after he or she attains the age of 18 (the age of legal majority) and whether a guardianship and conservatorship is appropriate.

When discussing this topic with clients, it is crucial to consider both the cognitive capability of the child and the parent's perceived need to continue involvement in the child's financial life and medical affairs. Other relevant factors include an analysis of the pros and cons of guardianship, conservatorship, agency under a financial power of attorney, and agency under an advance directive/health care power of attorney. Additional factors that impact the analysis include whether the child needs outside care, such as an assisted-living facility or companion-care home, and the parent's financial resources.

Important Factors

In determining how to best help parents provide for their adult child with special needs, it is important to take into account the self-sufficiency of the adult child. Here are factors to discuss when tailoring a course of action:

- Whether the child is capable of communicating his or her needs and wants

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regarding his or her care;
- Degree to which the child can adequately feed, clothe and otherwise take care of his or her basic needs;
- Whether the child is employed outside of the home;
- Whether the child will require outside care (i.e. an assisted-living facility);
- Degree to which the child can understand the effects and consequences of his or her actions; and
- Income and finances of the child and the child's family.

It is crucial to take the adult child's needs and wants, if capable of expressing them, into account when determining how to best provide for him or her. Apart from moral sensitivities, Virginia law provides that fiduciaries in charge of the child's care allow the child to participate in the process as much as he or she is able. Further, if the child has no input in the process, it could disrupt his or her relationship with the parents, making the process emotionally taxing on everyone involved.

Guardianships & Conservatorships

Run to the Courthouse. One way to provide continued care for special needs children over the age of 18 is by securing a guardianship or conservatorship. Adult guardianship is the legal process in which a guardian is appointed by a court to make personal decisions on behalf of the adult child, including decisions about where he or she lives and what medical treatment he or she receives. In contrast, adult conservatorship is a legal process in which a conservator is appointed to make decisions about an adult's financial world, including property and estate. An adult's guardian and conservator are often the same person, but need not be, and one does not have to seek the appointment of both. If a guardianship and conservatorship is sought by the parents, an official opinion from a physician must be presented to a court stating the reasons it is necessary.

Virginia law provides that a court order granting guardianship be tailored to rectify the incapacity of the individual. As a result, guardianship is a particularly flexible system in Virginia: the court order appointing a guardian can be as broad as covering all decision-making or limited to specific decision-making spheres, such as medical care. Some parents welcome the child's right to vote, for example, and are pleased to learn that a court order can provide that the adult child retains that right.

When a child does not have the cognitive ability to direct his or her own financial or medical affairs, a guardianship and conservatorship are appropriate. The parents are relieved to know they can continue to direct the child's affairs after the age of 18 and welcome the daily involvement. Most parents of children with mental incapacity determine that a guardianship and conservatorship is the right thing to do for a child who cannot live independently.

Slow down. However, guardianship and conservatorship are not always the appropriate tools to protect individuals with mental impairments. First, the cost to be designated by a court as a guardian and conservator can easily exceed several thousand dollars in legal fees. Second, a guardian is required to provide significant attention to the incapacitated adult. Third, the guardian has to report at least annually to the state as to, in part, the living arrangements, mental, physical and social condition, and the scope of services provided and whether those services provide adequate care to the individual. Furthermore, the guardian directs the living arrangements and health care of the incapacitated individual and often those decisions are challenging.

Conservatorships, in particular, require significant maintenance. A full conservator is required to post surety on a bond with the court, annually report on all income received on behalf of the adult child, and annually report on all funds expended on behalf of the adult child to the local Commissioner of Accounts. This means a conservator must collect and keep record of all receipts, checks and bills so he or she can account for all the child's funds "to the penny". Without help from an accountant or financial planner (which can be costly), this can be time consuming. Many of my clients are working parents, juggling the responsibility of raising multiple children, including the special needs child, so this additional work is burdensome.

Further, a guardianship and conservatorship can infringe upon the child's independence if it is not tailored toward that child's needs and level of functioning. A child who is autistic, for example, may be able to work, earn an income, ride public transportation, and pay rent, and may not need much parental control after the age of 18. Also, the legal process of obtaining a guardianship and conservatorship over an adult child may be a stressful

experience for such a child.

If a guardianship and conservatorship is the right decision for a parent and child, the process is typically initiated about six months before the child turns 18. This provides sufficient time to obtain the necessary medical, psychological, or psychiatric opinions required, to seek the input of a guardian ad litem (a person appointed to protect the rights of the adult child), and to prepare the court petition for appointment of guardian and conservator.

Powers of Attorney

Let's get powers of attorney.

An alternative to guardianship and conservatorship are the powers of attorney. A power of attorney is a legal document in which a person (the "principal") appoints an individual (the "agent") to make decisions and take action on behalf of the principal. For our discussion purposes, an adult child who has already attained the age of 18 would execute powers of attorney as the principal and would delegate authority to one or both parents as the agent(s). The adult child would also name successor agents if the parent was unable to attend to the adult child's affairs.

There are two types of powers of attorney used in lieu of a guardianship and conservatorship: (1) Advance Directive/Health Care Power of Attorney and (2) Durable General Power of Attorney. The former document allows an agent to make decisions about medical affairs including typical, daily health care decisions as well as the serious end-of-life decisions. The latter document allows an agent to make decisions about financial and administrative affairs. Generally, if powers of attorney are properly executed, a guardianship or conservatorship not necessary. Additionally, the cost to secure powers of attorney is low in comparison to the court-administered process of guardianship or conservatorship and the ongoing cost is nil – there is no annual reporting to a third party associated with the powers of attorney (unless the adult child makes that specific request).

The appointment of a power of attorney can be a wholly private affair. So long as the adult child demonstrates sufficient capacity, he or she can execute the two powers of attorney and the relationship between parent as caregiver and overseer will be continued with little interruption after the eighteenth birthday.

But only if there is capacity.

However, powers of attorney can be executed by the adult child only if he or she has sufficient mental capacity. (For powers of attorney, "capacity" is the term used rather than ability or disability). In fact, determining capacity is often the crux of the decision-making process of whether to obtain a guardianship and conservatorship or to request the child to execute powers of attorney. No legal checklist exists that can be used to determine whether a child meets the capacity level required to execute a power of attorney. Thus, it is often the most important thing an attorney can do. Yet, many attorneys are uncomfortable with making the assessment as determining cognitive ability can be perceived to cross into the medical arena.

Thus, if the adult child has a diagnosed condition affecting decision-making capacity, it is important to secure a medical opinion as to the adult child's mental capacity. If decision-making capability is not a factor, then it is general practice that an adult child with sufficient capacity must be able to consciously understand (1) the nature of a power of attorney; (2) the effect of signing a power of attorney such as when the power begins and the subject matter over which the agent can exercise control; (3) the power of attorney can be limited or broad; (4) the power of attorney can be revoked so long as the adult child has capacity to do so; and (5) the power of attorney continues even if the adult child becomes incapacitated. However, in any case, the attorney will want to meet with the adult child alone, without the influence of his or her parents. This allows the attorney to make the difficult decision of whether the adult child has sufficient capacity to execute the powers of attorney and that the terms in the powers of attorney are directed by the adult child.

An issue that needs to be acknowledged by the parents is that if the adult child has sufficient capacity to execute the powers of attorney in favor of his or her parent, he or she can also execute powers of attorney in favor of another person. An elderly woman called me to

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express concern that her middle-aged adult child with some mental impairment had recently executed powers of attorney in favor of his girlfriend. It was difficult to hear the elderly woman express her concern that the girlfriend may take advantage of her son. This is a real issue that needs to be considered if powers of attorneys sound like an easy, cost-effective solution to managing an adult child's care.

Even though executing a power of attorney comes with its own complex issues, especially when adult special needs children are slightly mentally impaired and the determination of capacity is a close-call, a power of attorney is a far less invasive means of providing for the care of a special needs adult child. It requires almost no maintenance, unlike a guardianship and conservatorship, and is a low-cost method to ensure the continued care of the child by the parents.

Other Considerations

When deciding whether to pursue a guardianship and conservatorship of an adult child with special needs or have the adult child execute powers of attorney, it is imperative that the discussion includes consideration of whether the child is receiving or will receive public benefits (both Federal and local) and whether the parent has completed his or her own estate planning. Public benefits and the special needs child go hand in hand with topics like appointing a Representative Payee for social security payments, preparing special needs trusts, and the relationship of the child to the parent's own financial estate.

Conclusion

In evaluating whether a guardianship and conservatorship or powers of attorney are appropriate, a parent should consider the adult child's mental capacity, the ability of the child to manage his or her own affairs, and the deprivation of rights imposed by a guardianship and conservatorship. If the adult child has the capacity to execute powers of attorney, then that is a good first step. A formal guardianship and conservatorship may then be sought later, but only if needed.

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ESTATE TAX SAVINGS AND INCREASED CREDITOR PROTECTIONS WHEN YOU INCORPORATE LLCS AND LIMITED PARTNERSHIPS INTO YOUR ESTATE PLAN

BY LAUREN K. KEENAN, ESQUIRE

Did you know that incorporating limited liability companies ("LLCs") and limited partnerships ("LPs") into your overall estate plan can result in significant estate tax savings and offer greater asset protection from creditors? This article seeks to introduce you to two types of corporate entities, the LLC and LP, discuss the basic steps of forming these entities and explain some of the benefits of incorporating them into your estate plan.

An LLC is a type of business entity that shields its creator from personal liability. To better understand how it works, consider a person who owns multiple rental properties. Property owners are easy targets for lawsuits, and unfortunately, lawsuits tend to be a natural by-product of the rental business. Savvy property owners often transfer their rental properties into multiple LLCs rather than owning their assets outright in their individual name. The benefit of having an LLC own your property is that upon a successful lawsuit, the Plaintiff generally cannot recover a judgment against all of your personal property; instead, the judgment is limited to the property within the LLC. This is an asset protection strategy that is well-known and well-utilized by many small business owners seeking to separate their business liabilities from their personal ones.

An LP, or limited partnership, is a different type of business entity from an LLC, but offers similar benefits. An LP is a partnership with one or more general partners who manage the business, and one or more limited partners who invest in the business but have no management role. The limited partners in a limited partnership enjoy limited liability, while the general partners do not. To

increase the personal liability protection for the general partner, consider forming an LLC to serve as the general partner of the limited partnership.

If you are in a high-risk profession and likely to be sued, holding assets in an LLC or LP may offer greater protection from future creditors (this should not be seen as a strategy for current obligations). Consider working with an estate planning attorney to create an asset protection strategy that manages your risks. Not only will holding assets in an LLC or LP protect the assets within the entity from outside liabilities, (e.g., if you're in a car accident and found personally liable, the business assets held in your LLC may be better protected from such liability), but also assets outside your LLC are more protected from liabilities within the LLC or LP (e.g., if a tenant has an injury on your rental property, your personal assets outside the LLC or LP may be protected from any claims they may advance against the entity).

Another benefit of holding assets in an LLC or LP is that there are limited remedies that a claimant can seek as recovery. In many states, a claimant against an LLC or LP can only recover a charging order against the entity. This means that the claimant only gets paid if an income distribution is made from the entity. If a distribution is not made, then the claimant does not get paid. This generally makes parties bringing the claim more amenable to a settlement rather than pursuing their claim to the less favorable outcome of a charging order. It's important to know the laws in your state and determine if a charging order is the exclusive remedy or if the court could impose other remedies. If your state does not have charging orders as an exclusive remedy, many commentators recommend establishing your LLC or LP interest in a state that does.

To maximize your protection, also consider coupling your LLC or LP interest with an asset protection trust or a dynasty trust. This takes the protection of an LLC or LP one-step further. Not only does it mean a creditor is likely to have a charging order as their only remedy (in a sole-remedy state), but unlike the scenario above where no distributions can be made, if you couple your interest with a trust, distributions are still possible. If the trust provides for distributions to the transferor's beneficiaries (e.g., your spouse or children), then they are likely able to continue receiving distributions under the trust, even in the face of a charging order issued against the entity. By setting up an LLC or LP interest and coupling it with a trust naming multiple beneficiaries, such as a spouse or children, assets are protected, but they can still be used for the benefit of other beneficiaries.

In addition to limiting liability, LLCs and LPs also offer opportunities for estate tax savings. Estate planning attorneys understand the benefit of discounting and use it often. Discounting is a legitimate valuation method that is commonly used throughout the industry to transfer a greater amount of an individual's wealth, tax-free. The discounting process takes the value of an asset and considers various factors that may affect its overall fair market value, such as lack of control, lack of marketability, etc.

Here's an example of how discounting works with LLC and LP interests. Let's say you own a non-voting interest in an LLC which owns several properties. You have a minority interest in the LLC (meaning you own less than 50% of the interest in the entity) and there are three other owners with equal interests. The total value of the LLC is $20 million and your one-quarter share would be worth $5 million without discounting. Now consider the following: You're a minority shareholder, meaning you have to act in consultation with three other owners; you have a non-voting interest, meaning you lack voting control; and as a result of these factors, you lack marketability, because who would buy a small, minority interest in an LLC for its full value when they have to deal with three other owners and lack voting control? The reality is, few will, and as a result, your interest's value is actually less than $5 million after the appropriate discounts are applied.

Discounting can make a significant difference when making a gift or valuing a person's estate for estate tax purposes. This year, the lifetime gift tax exemption is $5.12 million per individual. By effectively utilizing appropriate discounting methods, taxpayers may be able to transfer more wealth and stretch their exemption further.

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END-OF-YEAR TAX CHANGES REMINDER

A quick note on end-of-year gift and estate tax

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exemptions.

If Congress doesn't act, the estate and lifetime gift tax exemptions, which are currently $5.12 million per person and $10.24 million per married couple, will expire at the end of 2012 and return to $1 million per person and $2 million per married couple in 2013.

Congress may choose to extend the current exemption amounts, or they may set the 2013 exemption at an amount between this year's exemption amount and $1 million per person, but it's still unclear what will happen.

If Congress doesn't act, one thing is certain, the amount you are allowed to give away tax-free will be much less beginning on January 1, 2013. If you intend to gift significant funds and reduce the size of your overall estate, now is the perfect time to consider doing so while the higher exemptions are still in place.

Several gift options may be available to you, and an estate planning attorney can advise you as to which option is best for you. Keep in mind that several of these options require appraisals or valuations by professional valuation firms to pass IRS scrutiny. Such valuations take time, so if you want to take advantage of these exemptions before year-end you must consider taking action now.