Denver Law Review

Volume 29 | Issue 8 Article 3

June 2021

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Recommended Citation
Richard P. Brown, Problems in the Administration of Estates of Mental Incompetents, 29 Dicta 286 (1952).

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PROBLEMS IN THE ADMINISTRATION OF ESTATES OF MENTAL INCOMPETENTS

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This article will assume that adjudication of the incompetent and appointment of a conservator have already been accomplished. The discussion will be directed to the practical aspects of the conservator's problems, with consideration of detailed legal questions left, of necessity, to the practitioner as he encounters them.

As a background to the consideration of the conservator's problems, it is desirable to understand the source and nature of his powers and duties. The conservator is an officer of the court appointing him, both the court and the conservator deriving their powers from the statutes of the jurisdiction. Being an officer of the court, and serving in a fiduciary relationship to the ward, the conservator owes to the court, and to his ward, the duties of the highest fidelity, good faith, and whole-hearted service. Serving in a statutory office, the conservator's powers are limited to those given him by statute and proper order of court and inherent or implied powers are few. The position of a conservator is generally considered to be somewhat between that of an agent and that of an administrator. A conservator acts on behalf of the ward, who is a living person, subject to suit and retaining title to his own property. In this light the conservator appears to be an agent, but the mental competence of the principal and the voluntary character of the relationship, both necessary to a true agency, are lacking. A conservator is appointed by, and subject to the jurisdiction of, a court. He is given many of the same duties, powers, and responsibilities of the administrator of a decedent's estate, and the laws governing his rights and duties are inextricably bound with those relative to executors and administrators; yet the estate of an incompetent is not a legal entity, separate and apart from the incompetent, as in the estate of a decedent, and the transmission of the ward's property to his heirs, legatees, or devisees is not a portion of the conservator's duties. Thus, in spite of its resemblence to an agency and to an administration, a conservatorship is neither, but is a separate and distinct type of legal relationship.

CARE AND SUPPORT OF THE WARD AND OTHERS

Ordinarily, the order adjudicating the incompetent will commit his care and custody to an appropriate person or institution. The primary responsibility for the personal care and custody will rest with that person or institution. It is, however, the duty of the conservator to be at all times cognizant of the care and treatment his ward is receiving, and to assure himself that such care and treatment are the best obtainable consistent with the condition of the ward and the means available for that purpose. He

should make application to the court of his appointment for orders authorizing such expenditures as are necessary for this purpose and if at any time a change in the custody of the ward appears desirable, should make application to the court therefor.

Our statutes provide specifically that the court may set over to the wife of the ward such articles of personal property as in its discretion it deems necessary for the use of the wife and children of the ward, and may make further allowances to the wife for her support, and the support and education of the minor children, such sums to be paid at such times and in such amounts as the court may direct. This statutory authorization of allowance to the wife and children is not considered to be exclusive. There is a surprisingly extensive body of law to the general effect that the assets of the ward may be used to support adult children, parents, grandchildren, and others more distantly related, where it can be made to appear to the court that the assets of the ward are sufficient to justify these expenditures without jeopardizing the future care of the ward and those legally dependent upon him, and it can be established to the satisfaction of the court that the ward, had he remained competent, would in all probability have supported such person or persons. This latter showing is generally made by proving that the ward, prior to his adjudication, had in fact supported them and had by word or deed clearly indicated an intention to continue their support.

INCOME TAXES

The ward's income tax status is not changed by the fact of his adjudication or by the appointment of his conservator, and the estate of the incompetent is not a separate tax-paying entity, as is the estate of a deceased person. The ward retains the same rights, so far as exemptions and deductions are concerned, that he had prior to his adjudication. It is the duty of the conservator to file both Federal and state income tax returns on behalf of the ward in the manner and within the time required by the respective Federal and state laws. The return should be filed in the name of the ward, or, if it is advantageous (as it probably will be) to file a joint return, in the name of the ward and his spouse. The Federal return is due on the same date as individual returns and not on April 15, as is the case with fiduciary returns. Failure of the conservator to discharge these duties properly may result in the conservator becoming personally liable for the taxes due.

FEES

Until 1941 the fee chargeable by a conservator was limited by Section 232 of Chapter 176 C.S.A., regardless of the period of time through which the conservatorship might be continued. In 1941 the legislature enacted what now appears as Section 89(5) of Chapter 176, which permits the court to order additional compensation to be paid to a conservator where the administration continues for more than one year. It is customary for both cor-

porate and individual conservators to make a charge on account of their total fees at yearly or other intervals and, upon the conclusion of the administration, whether occasioned by the death or restoration to reason of the ward, or by the exhaustion of the ward's assets, to charge such additional fee as will bring the total of the fees charged up to a reasonable compensation for the whole of the services rendered during the period of administration of the estate. There are no statutes regulating the fees of attorneys in estates of mental incompetents. The minimum fee provisions relative to estates, included in the schedule adopted by the Denver Bar Association at its May 5, 1952 meeting, are generally considered to apply to estates of mental incompetents, and, in determining the aggregate of the fees to be charged for the whole administration of the estate, attorneys will properly take into consideration the duration of the estate, as well as the other factors customarily considered in fixing a fee.

INVESTMENTS AND RETENTION OF ASSETS

Subject to qualifications hereinafter set out concerning the administration of the estates of wards of the Veterans Administration, the powers and duties of conservators, with reference to the investment of the funds of their wards, and the retention of the assets owned by their wards, are identical with those of executors (except as their powers are enlarged by will), administrators, and guardians, and are set forth in the chapter of the Session Laws of 1951 adopting the "Prudent Man" rule in Colorado.[1] The objective of the conservator's dealings with assets of the ward, however, is substantially different from that of an executor or administrator, who is mainly concerned with the preservation of a decedent's assets through a relatively short period of administration. A conservator, in determining investment policy, must adopt a longer range view point, as it is his duty to invest and reinvest the assets of the ward's estate in a manner consistent with the best interests of the ward and those dependent upon him over a period of time, which will in all probability not end until the death of the ward. In proper exercise of the broad discretions granted a conservator by the "Prudent Man" rule the conservator should give careful consideration to all pertinent facts, such as the ward's age, physical condition, possibility of restoration of reason, former standard of living, and the apparent requirements of those dependent upon the ward for funds, and determine upon an investment policy which will best permit an estate the size of the ward's to meet the needs which those facts forecast.

ELECTION WITH REFERENCE TO WILL OF DECEASED SPOUSE

Should the spouse of the ward die, testate, during the lifetime of the ward, the ward, as the surviving spouse, may elect to receive one-half of the decedent's estate in lieu of the provisions made by will, or, by failing to make such election within the allotted six months period, become bound by the terms of the will. Section

[1] SESSION LAWS OF COLORADO 1951, Chap. 297, sec. 1, p. 840.

37 (b) of Chapter 176 C.S.A. makes it the duty of the conservator to ascertain the relative benefits to the ward obtainable under the will and under the statute, and to report thereon to the court, which will make the election for the ward.

Where the will of the deceased spouse contains provisions leaving definite amounts, or properties, or a fixed fraction of the estate, to the ward, the conservator's job (and that of the court) is simple. Where, however, the provision for the ward is a life estate, or a beneficial interest in a testamentary trust, computation of the value of the rights of the ward thereunder may be difficult and the court may have a difficult problem in judgment. The problem is further complicated in the case of a will which creates a trust from which the trustee is authorized to use income or principal up to the whole of the trust for the support of the ward. Thus, if an election to take against a will would result in an outright addition of $50,000 to the ward's estate, while an acceptance of the provisions of the will would result in a $100,000 trust being held for the benefit of the ward, to be expended on behalf of the ward if and when necessary, with the unexpended balance to go over to other beneficiaries upon the death of the ward, the court would have to weigh the relative advantages of the two possibilities. While the court will reach individual decisions upon individaul facts, such experience as the writer has had indicates that the court will be, and should be, more interested in assuring the greatest security to the ward than in increasing the ward's estate, and would elect to accept the benefits provided by the will.

If the conservator has an adverse interest, the court is directed to appoint some other suitable person to discharge this duty.

UNIFORM VETERANS GUARDIANSHIP ACT

The Uniform Veterans Guardianship Act, as adopted by our legislature in 1945,[2] applies to the estates of mental incompetents, as well as to those of minors, and if the ward is a beneficiary of the Veterans Administration the provisions of the act apply to his estate, or at least to the portion thereof which is attributable to funds having their origin in veterans' benefits. A full dress review of the U.V.G.A. is not appropriate here, but certain specific provisions deserve attention. The investment provisions in Section 13 of that act are not superseded by the recent legislative adoption of the so-called "Prudent Man" rule, and investment of the funds of the ward, so far as they are attributable to V.A. sources, is still governed by Section 13 of U.V.G.A., and by the laws governing investments by fiduciaries at the time of the adoption of the U.V.G.A.

Compensation of the conservator, so far as derived from V.A. funds, or the product thereof, may not exceed five per cent of the income upon such funds for the period covered by the fee, except in the case of extraordinary services by the conservator, in which case an additional fee may be allowed by court order. Other pro-

[2] CSA, vol. 4B, ch. 150, sec. 55 (1-21).

visions of the act require service of notices, petitions, accountings, and the like, upon the Veterans Administration.

It frequently occurs that a portion of the ward's estate is derived from veterans' benefits, while the remainder is derived from other sources. In this case the portion of the estate attributable to veterans' benefits is subject to the U.V.G.A., while the remainder is not. Because of the restrictive investment provisions of the U.V.G.A., it is often desirable, if the estate is of reasonable size, to separate the two portions of the estate, keeping entirely separate accountings as to the two portions, and to administer the portion attributable to veterans' benefits in accordance with the U.V.G.A.; the other portion may be administered without regard to the U.V.G.A. This procedure will permit full compliance with the U.V.G.A. as to the portion of the estate to which it applies, without restricting the conservator's investments and adding to his procedural burdens as to the remainder of the estate.

CONTINUATION OF THE ESTATE AFTER THE DEATH OF THE WARD

Section 89 (5) of Chapter 176 C.S.A., hereinabove referred to in connection with fees, provides in a most sketchy manner for the continuation of the administration of an incompetent's estate after his death. The statute provides no guide for court, conservator, executor, or administrator, and the Supreme Court has never been called upon to interpret the statute or supply the detail which it lacks. The county courts, through a process of careful exploration of the matter, seem to have arrived at the uniform conclusion that the statute means little more than that the administration of the decedent's estate shall have the same file number as that of the incompetent's estate, and that the papers of both shall be filed in the same jacket.

Customary procedure, dictated in large measure by natural caution and the indefiniteness of the statute, calls for the filing of a petition for letters testamentary or of administration upon the death of the incompetent, the admission to probate of the will, if there be one, and the issuance of letters to the executor or administrator. Notice to creditors is published as required by law and a sepaarte inventory is filed. Meanwhile, the conservator is publishing notice of the final settlement of his accounts, will file his final report, and, upon the entry of an order of final settlement, will deliver the assets in his hands to the executor or administrator, and be discharged. The clerks of the county courts firm up the separation of the two administrations by charging a new docket fee upon the filing of the petition for letters, after the ward's death.

There is a period of time during which the conservator, and the executor or administrator, both hold office. During this period the conservator is largely shorn of his powers by reason of the death of the ward. He may, however, upon order of court, take such steps as may be necessary to the protection of assets of the ward, pending delivery thereof to the executor or administrator.

The executor or administrator, during this period, is entitled to exercise all the powers granted by law, or by the will, as to assets under his control, and the power to act, during this period of overlapping powers, is determined, as to any given asset, by the power to control that asset.

PROPERTY DISPOSED OF BY THE INCOMPETENT'S WILL

An interesting problem may be presented in the case where the ward, prior to his adjudication, has executed a will.

Let us suppose that the will leaves specified securities to A and that, in the opinion of the conservator, retention of those securities as a part of the ward's estate is not consistent with sound judgment. What are the conservator's duties, and what is the effect of a sale by the conservator? It appears clear that the conservator is bound to manage the estate in the best interest of the ward only, and should not permit his judgment to be varied by the fact that following it may operate to adeem a legacy provided by the ward's will. He should apply to the court for an order to sell.

The question of whether a sale under such circumstances adeems the legacy has not been decided by our Supreme Court. Authorities in other states are divided. Some jurisdictions, which consider that ademption or not is a matter of testatorial intent, hold that the ward cannot have intended an ademption, and that none has occurred. Other jurisdictions, holding that ademption depends not on intention but upon the bald fact of disposition of the property before death, hold that a sale by a conservator works an ademption of the legacy. The county court of one of the larger counties of the state recently entered an order, without notice, which adopted the theory that no ademption was accomplished by such a sale, and ordered the executor to pay in cash to a legatee a sum calculated to restore to the legatee a diminution in value occasioned by the conservator's action in redeeming certain U.S. Savings Bonds, which were left to the legatee, and the subsequent purchase, with the proceeds from such redemption, of other similar bonds which were ordered delivered to the legatee.

In the solution of all these problems the conservator should obtain such orders of court as may be necessary to protect him in the course which he intends to pursue and noticing in individuals who appear to have a potential interest in the ward's assets in the event of his death. All expenditures made by the conservator should be pursuant to order of court properly entered, or at least within the framework of a general order, authorizing the conservator to make expenditures of a given general character. The conservator will find that many of the problems presented to him involve the personal feelings of the individuals with whom he deals more deeply than he suspects, and a large measure of human understanding and tact will be the greatest single factor in solving many of his problems.