Elder Law/ Trusts & Estates

Guardianship Proceedings and Mental Illness

Carolyn Reinach Wolf

Jamie A. Rosen

Attorneys may face challenges when attempting to assist individuals suffering from a mental illness. Such individuals may deny suffering from a mental illness and therefore refuse treatment or the assistance of a family member or loved one, insisting that they can function independently, despite evidence to the contrary. They may prevent others from accessing medical and financial information, thereby making it impossible to speak to care providers and financial institutions to protect, advocate and plan for the future. Even if the individuals have the capacity to sign advance directives such as a Power of Attorney[1] or Health Care Proxy,[2] they could either refuse to do so or revoke those documents after execution. The circumstances might require a more restrictive type of intervention.

Attorneys practicing elder law or trusts and estates law should be familiar with the use of the New York Mental Hygiene Law Article 81 Guardianship Proceeding for an individual suffering from a mental illness, whether the individual is young or geriatric. While a guardianship proceeding is often appropriate for an individual with Alzheimer's Disease, Dementia, or other cognitive impairment, it is also appropriate for individuals suffering from a mental illness.

What Constitutes a Mental Illness?

There are many different conditions that are classified as mental disorders (mental illness) according to the Diagnostic and Statistical Manual of Mental Disorders (DSM-5).[3] Common "Axis I" diagnoses include Schizophrenia, Bipolar Disorder, Major Depressive Disorder and Post-Traumatic Stress Disorder.[4] Symptoms of these disorders include, but are not limited to, delusions, hallucinations, agitation, labile mood, aggression, disorganized thought process, paranoia, suicidal or homicidal ideation, isolative behavior, refusal to take prescribed psychiatric or medical medication, and an inability to care for oneself.

The DSM-5 also recognizes Axis II Disorders such as Antisocial, Borderline, Narcissistic, and Obsessive-Compulsive Personality Disorders.[5] Symptoms include, but are not limited to, distrust and suspicion of others, disregard for, and violation of the rights of others, a pattern of unstable interpersonal relationships or self-image, grandiosity, a need for admiration, impulsivity, and a preoccupation with perfectionism or control.[6] These disorders can affect cognition, or the way an individual perceives and interprets him/herself, other people and events, and can affect interpersonal functioning and impulse control.[7] There are also co-morbid or dual diagnoses where there is a psychiatric diagnosis and either alcohol or drug abuse.

Regardless of the diagnosis, when determining whether an individual suffering from a mental illness requires the appointment of a guardian, it is important to focus on whether the individual's symptoms and behaviors impair the ability to provide for his/her personal needs or property management, as discussed in more detail below.

Personal Needs Issues in the Context of Mental Illness

An individual may require the appointment of a Personal Needs Guardian if he or she suffers from functional limitations specific to the needs of food, clothing, shelter, health care and safety.[8]

For example, the individual may refuse or be unable to care for his or her activities of daily living or may neglect necessary mental health, medical or dental care. The individual may be prone to police intervention, such as for harassing neighbors due to poor impulse control or frivolously making police reports due to paranoid delusions. The Alleged Incapacitated Person, or AIP, may engage in dangerous behaviors such as leaving the stove on, pulling the smoke alarm off the wall, barricading himself in a room, creating a fire hazard, wandering the streets, walking in traffic, or driving erratically. These behaviors, and others, can be exhibited by the general elderly population, but are exacerbated when that individual is also suffering from a mental illness.

Further issues arise when the AIP refuses necessary psychiatric treatment or medication. The individual's impaired judgment and lack of insight into the need for treatment may prevent him from understanding and appreciating the nature and consequences of these functional limitations. While an Article 81 Guardian cannot commit an individual to a psychiatric hospital, there are many important roles that a Guardian can play in relation to psychiatric treatment and compliance, subject to statutory limitations.

If the individual is acutely ill, the Guardian can explore options for hospitalization. Hospitalization would allow for a psychiatrist or other physician to evaluate any mental health or medical issues, establish a diagnosis and recommend a treatment plan. The principal statute governing the inpatient hospitalization of mentally ill patients in New York is the Mental Hygiene Law, Article 9. This statute contains the legal standards and procedures for the voluntary, involuntary or emergency admission to a hospital, as well as retention of patients pursuant to a court order.

If the individual has decompensated and requires hospitalization, a Guardian or other concerned individual can initiate a request for a "Mental Hygiene Warrant."[9] This civil proceeding involves petitioning the court to issue a civil warrant to bring the individual to court for a hearing. The petition must allege with specificity that the individual exhibits behavior that is likely to result in serious harm to self or others. The individual is appointed counsel through the Mental Hygiene Legal Service.[10] At the hearing the court determines if this standard has been met, and if so, the court can issue a civil order directing the removal of the individual to a hospital for immediate evaluation not to exceed 72 hours.[11] The hospital must then determine whether that individual should be admitted or discharged.

Once the individual is admitted to a hospital, communication with the treatment team is essential. The Guardian can be granted the power to access and authorize disclosure of medical and mental health records, as well as the authority to communicate with providers. Without this power, the patient can refuse to sign a HIPAA release or other appropriate releases, thereby preventing family members or other loved ones from participating in treatment.

The Guardian (and the individual's family) must discuss discharge planning with hospital staff to ensure that the individual can survive safely in the community and will continue treatment once discharged. Discussions with the treatment team should include mental health and medical planning such as appointments with outpatient providers, prescriptions and administration of medication, physical or occupational therapy needs and other supportive services available such as from a geriatric care manager, visiting nurse service or home health aides. The team should discuss housing arrangements in the community or placement in a facility, if appropriate.

While a guardianship proceeding is often appropriate for an individual with Alzheimer's Disease, Dementia, or other cognitive impairment, it is also appropriate for individuals suffering from a mental illness.

It is important to note that a Guardian, family member or health care agent cannot authorize the involuntary administration of psychiatric medication. In New York, when a patient refuses psychiatric medications (or other treatment), "there must be a judicial determination of whether the patient has the capacity to make a reasoned decision with respect to proposed treatment before the drugs [or other treatment] may be administered."[12] New York law provides a procedure for the patient's physician in a psychiatric unit or hospital setting to apply to the court for authorization to administer medication or other treatment.

If the individual, either about to be discharged from a hospital or residing in the community, refuses to cooperate with outpatient psychiatric treatment, the hospital or Guardian can apply for Assisted Outpatient Treatment (AOT), known as "Kendra's Law" in New York.[13] AOT is court-ordered psychiatric treatment and supervision in the community with the goal of preventing "a relapse or deterioration."[14]

To be eligible for AOT, the individual must be eighteen years of age or older, suffer from a mental illness, unlikely to survive safely in the community without supervision and have a history of non-compliance with psychiatric treatment.[15] AOT can provide case management or an Assertive Community Treatment (ACT) Team to coordinate the individual's care, as well as medication, alcohol or substance abuse counseling, random urine or blood testing and therapy.[16] If non-compliant with the AOT plan, the individual can be brought to a hospital for an evaluation and possible admission.[17] Overall, AOT is a valuable tool for mentally ill individuals who refuse services in the community and are frequently hospitalized.

Additional powers related to the personal needs of a mentally ill AIP may include, but are not limited to, the authority to:

(1) retain a care manager, home health aides, visiting nurse service or any other service designed to assist the AIP;
(2) determine whether the AIP should have a driver's license or access to a motor vehicle;
(3) determine whether AIP should travel, including authority to secure the AIP's passport; and
(4) choose place of abode.

It may be beneficial for the Guardian to request the secondary appointment of a Geriatric Care Manager or Psychiatric Case Manager to help effectuate these powers. A case manager, often a social worker, or other mental health professional trained in behavioral issues, can assess the individual's ability and needs, arrange and advocate for services and monitor the individual in the community. A case manager can also find creative solutions to maintain an individual safely in the community or assist with locating housing if the individual's current living situation is no longer appropriate.

Property Management Issues in the Context of Mental Illness

An individual suffering from mental illness may also require the appointment of a Property Guardian due to functional limitations specific to financial management. On the one hand, an individual with significant income or assets may be unable to properly manage assets, may frivolously spend money or may be vulnerable to exploitation. These scenarios result in the waste, loss or misappropriation of assets. On the other hand, an individual with minimal or zero income or assets may be unable to pay bills and settle debts or may refuse to apply for benefits.

Property management issues may be caused or exacerbated by the symptoms of a mental illness. For example, the individual may be at risk of eviction due to landlord-tenant issues such as hoarding, bed bugs, destruction of property, non-payment of rent or harassing neighbors.

A Guardian may be successful in obtaining a temporary stay of an eviction proceeding to resolve pending issues and maintain the individual at home. The Guardian may have to hire a home health aide, companion or heavy-duty cleaning service. If the individual is forced to leave the home, the Guardian can ensure a safe relocation to another appropriate residence or facility.

See GUARDIANSHIP, Page 10

How Tax Reform Affects Estate Planning

After much anticipation and a whirlwind drafting and negotiation period, President Trump signed the Tax Cuts and Jobs Act of 2017 (the Act)[1] into law on December 22, 2017. Many commentators tout the Act as comprehensive tax reform, and the Act contains significant provisions altering the laws governing several areas of taxation, including the transfer tax regime.

Matthew E. Rappaport

With sweeping legislation like the Act, estate planning attorneys inevitably revisit the playbook and evaluate how they ought to advise clients under the new rules. While estate, gift, and generation-skipping transfer (GST) taxes were not a major focus of the Act, the changes to those areas may spur attorneys and accountants to recommend some clients to make new moves in the coming months and years.

A Brief Description of the Environment Prior to the Act

After the American Taxpayer Relief Act of 2012 (ATRA),[2] an individual's "coupled" estate and gift tax exemption "permanently" became $5,000,000, indexed for inflation from 2010. ATRA also kept the "portability" feature added in 2010, through which a surviving spouse could add the exemption of a deceased spouse to his or her own exemption.[3] The annual gift tax exclusion was $10,000 per-donor per-donee, indexed for inflation from 1997.[4]

On the New York State level, 2014 legislation amended Tax Law § 952(c)(2) to ensure that the New York State estate tax exemption would "ratchet" up from its previous level of $1,000,000 per individual to match the federal exemption amount by January 1, 2019.[5] Notably, the New York State estate tax exemption is not portable. The same 2014 legislation also imposes a three-year "clawback" for certain gifts made by decedents dying between April 1, 2014 and January 1, 2019, but New York State still does not otherwise impose a gift tax as the federal government does.[6]

This environment encouraged most families to keep assets inside of their taxable estates to achieve the so-called "step-up in basis," which is the adjustment to the income tax basis of assets acquired from a decedent.[7] The step-up in basis functions to drastically reduce or even eliminate the built-in taxable gain on assets eligible for the basis adjustment. With many families nowhere near a net worth meriting a state or federal estate tax concern, simple measures could be built into a married couple's Last Wills and Testament to flexibly plan for optimal tax results, and those would likely be sufficient for tax planning purposes. Lifetime transfers were unnecessary for such couples.

On the other hand, for families still harboring estate tax concerns, the increased exemption allowed a taxpayer to "seed" an irrevocable trust with a healthy amount of capital and/or assets, setting up an opportunity to leverage the capital and/or assets to remove even more value from the taxpayer's gross estate. Clever uses of the annual exemption allowed a taxpayer to achieve even further leverage, typically in the form of an irrevocable life insurance trust ("ILIT"). Clients with especially high net worth could use a litany of more advanced techniques to optimize estate and gift tax treatment.

Overview of Transfer Tax Changes

Section 11061 of the Act doubles the coupled estate and gift tax exemption to $10,000,000 per individual, indexed for inflation from 2010 (making the current exemption $11,200,000 per individual). Married couples will enjoy a $20,000,000 combined exemption ($22,400,000 after inflation indexing), and each spouse's exemption will remain "portable" to the surviving spouse upon death.[8] However, these provisions "sunset" after December 31, 2025; if the government does not extend the estate and gift tax revisions to later years, the coupled exemption would return to its previous level of $5,000,000 per individual (indexed for inflation from 2010). By extension, the GST tax exemption will also double, and it remains non-portable between spouses.[9]

Equally interesting is what the Act does *not* change. Assets includible in a decedent's taxable estate will still experience a basis adjustment to fair market value on the date of death. Although Congress considered proposals to limit or even eliminate this basis adjustment, Congress ultimately chose to preserve the statute as is. Congress also left the annual gift tax exclusion unchanged at $10,000 per donor-per donee after the Obama Administration proposed making the exclusion $50,000 per donor without regard to the number of donees.[10] Congress chose not to alter other techniques commonly used to plan around the gift and estate tax, such as grantor retained annuity trusts ("GRATs"),[11] leaving these planning options open for future use.

Where Do We Go from Here?

Despite the quite minimal extent of the Act's changes to the estate and gift tax laws, many clients will be well served coming back to the drawing board and considering whether they should revise their estate plans by taking new measures or amending documents. Points for discussion between clients and advisors will include: the decision to gift immediately or to wait; assessment of the overall flexibility and adaptability of a client's current estate plan; and evaluating whether the client wishes to make certain aggressive moves to exploit so-called "loopholes" available in the new legislative environment.

To Gift or to Wait?

The increased estate and gift tax exemption is a double-edged sword; while the breathing room will be most welcome, the "sunset" provision will require clients to make difficult gifting choices. If a future Congress lets the increased exemption expire, clients may give up an opportunity to remove over $5,000,000 of assets – and all future income and appreciation from the gifted assets – from their taxable estates. This $5,000,000 or more of extra "seed" money in irrevocable trusts could be used to "freeze" the discounted value of even more assets.

Taking a "wait-and-see" approach could potentially be costly; planners never want to rely on last-minute maneuvering if at all possible, and the time-value of money could play a major role. Making the decision even more complicated is the remote possibility of a "clawback," or the concept of taxing clients at death if the exemption decreases at any point when the client is alive; this phenomenon would make a large lifetime gift backfire. Finally, clients and advisors should consider the possibility of a future Congress making the increased exemption "permanent," which would mean all gifted assets would no longer qualify for the step-up in basis at death.

Flexibility Check

The idea that the new estate and gift tax exemption could potentially be temporary means planning must allow more flexibility than ever. Does a client's Last Will and Testament allow for complete discretion over use of the estate tax marital deduction? Does a client's trust allow altering or even "undoing" planning if a client changes his or her mind? Attorneys should revisit forms to ensure the language allows for optimal tax consequences, even if achieving the best results may require post-mortem planning.

Gaming the System

With such a large federal estate tax exemption, should a client consider using the exemption of an elderly relative to achieve a step-up in basis on the highest possible amount of appreciated assets? Should a client be willing to risk falling over the New York estate tax "cliff" and incurring a maximum 16% New York estate tax rate to wipe out long-term capital gain payable at a top federal, state, and local rate of as much as 36.496%?[12] In this planning environment, creative uses of powers of appointment could be highly effective.

The estate and gift tax changes in the Act were rather simple, but the implications appear to be anything but. Advisors should contact clients now and prepare for in-depth conversations about how to optimize their estate plans to accommodate the new legislation, because the solutions to choose from could prove surprisingly complicated.

Matthew Rappaport is a sole practitioner concentrating in taxation as it relates to closely-held businesses, trusts and estates, and real estate. His offices are located in Manhattan and Rockville Centre.

1. Tax Cuts and Jobs Act, P.L. 115-97.
2. American Taxpayer Relief Act of 2012, P.L. 112-240.
3. IRC § 2010(c)(4); P.L. 111-312.
4. IRC § 2503(b).
5. Laws 2014, ch 59, § 11. Senate Bill 6359, enacted March 31, 2014.
6. Tax Law § 954(a)(3). Tax Law § 956, which imposed a gift tax, was repealed effective February 1, 2000.
7. IRC § 1014(a).
8. IRC § 2010(c)(2)(B).
9. IRC § 2631(c).
10. *See generally* IRC § 2503(b).
11. *See generally* IRC § 2702; *see also Walton v. Commissioner*, 115 T.C. 589 (2000).
12. *Compare* Tax Law § 952(b), (c) *with* IRC § 1(h), Tax Law § 601(a), New York City Admin. Code § 11-1701.

GUARDIANSHIP...

Continued From Page 8

A Guardian for a mentally ill individual should also be authorized to defend that individual in any civil or criminal proceedings, including the authority to retain appropriate counsel. In these situations, it may be necessary to request the secondary appointment of counsel that has expertise in the specific area at issue.

Certain standard property management powers are particularly important with a mentally ill AIP, including, but not limited to the power to: marshal and manage income and assets; create a budget for reasonable expenses; apply for government and private benefits; engage in planning and apply for Medicaid; establish and fund a Supplemental Needs Trust or another appropriate Trust; create and fund an irrevocable burial trust; and access and authorize disclosure of confidential financial records.[18]

There are many nuances to a guardianship proceeding involving an individual who suffers from a mental illness, particularly in the elderly population. A Guardian can creatively work within the legal and clinical systems, with the help of certain secondary appointees and government agencies, to ensure that the individual is safe and his property is secure.

Carolyn Reinach Wolf, Esq. is an Executive Partner in the law firm of Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara, Wolf, & Carone, LLP and Director of the firm's unique Mental Health Law practice. She may be reached via email at cwolf@abramslaw.com.

Jamie A. Rosen, Esq. is an Associate Attorney at Abrams, Fensterman, LLP where she practices Mental Health, Health Care and Elder Law. She serves as Co-Chair of the NCBA Mental Health Law Committee and Co-Chair of the New Lawyers Committee. She may be reached via e-mail at jrosen@abramslaw.com.

1. Gen. Oblig. Law § 5-1501B(1)(b).
2. Pub. Health Law § 2981.
3. Diagnostic and Statistical Manual of Mental Disorders (5th ed. 2013).
4. *Id*. at 87, 123, 160, 271
5. *Id*. at 645.
6. *Id*.
7. *Id*. at 646.
8. Mental Hyg. Law § 81.03(f).
9. Mental Hyg. Law § 9.43.
10. Mental Hyg. Law § 47.01.
11. Mental Hyg. Law § 9.43. At any time during the 72-hour period the patient may, if appropriate, be admitted as a voluntary or involuntary patient.
12. *Rivers v. Katz,* 67 N.Y.2d 485, 497 (1986).
13. Mental Hyg. Law § 9.60.
14. *Id.* at § 9.60(a), (c)(6).
15. *Id.* at § 9.60(c).
16. *Id.* at § 9.60(a).
17. *Id.* at § 9.60(n).
18. Mental Hyg. Law § 81.21.