The Legal Intersection of Inheritance and Disability: A Primer

By Regina Kiperman and Naomi Levin

Picture John. John has had a difficult life and, now that he is dead, will have a difficult estate to settle, due mostly to the composition of his family. John is survived by four siblings. One of John's siblings is missing, the other in jail, the third (the nominated executor) was involved in a tragic accident and now has a court-appointed guardian of the person and property, and the fourth—the baby, if you will—happens to be 13. In short, John's estate is a recipe for disability disaster.

Commencement of Proceeding

The first issue is who can commence this proceeding? Although the nominated executor is incapacitated, the nominated executor's court-appointed guardian may commence the probate petition.[1] (Incidentally, the court-appointed guardian would also be able to commence an administration proceeding if John had died intestate.[2])

When an estate proceeding is commenced, the Surrogate's Court must (i) acquire jurisdiction over all interested parties; and (ii) ensure that the rights of all interested parties are adequately protected. When an interested party is under a disability, the court takes certain precautions. A person under a disability is defined in New York Surrogate's Court SCPA 103(40), and includes five groups of people: (a) an infant, (b) an incompetent, (c) an incapacitated person, (d) unknown or whose whereabouts are unknown, or (e) confined as a prisoner who fails to appear under circumstances which the court finds are due to confinement in a penal institution.

Jurisdiction

The second issue is how the court can acquire jurisdiction over interested parties, including those under a disability. The court obtains personal jurisdiction over all of the parties by ensuring they are either served with process, sign a Waiver of Process and Consent to Probate, or make an appearance.[3]

Service of Process

In Surrogate's Court, process is typically made by distribution of a Citation to the interested parties[4] in the manner authorized by the court.[5] With few exceptions, a person under a disability should still personally receive process. If the disabled person has a guardian, then the Citation is issued to both the disabled person and the guardian, or person concerned with the disabled person's welfare.[6] In our case at hand, John's incarcerated brother would be served personally; the warden of the prison would also be served.

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Exceptions to personally serving the person under a disability are where the person cannot be found. In this case the court typically requires an affidavit of due diligence and may then authorize an alternative method of service, including, but not limited to, service of citation by publication.[7] The fiduciary of John's estate will need to prepare an affidavit, explaining the efforts taken to find John's missing brother.[8] Another exception is where the disabled person is an infant under the age of 14 and residing with the petitioner, in which case no service is required upon the infant.[9] John's 13-year-old brother, therefore, may not need to be served if he is residing with the Petitioner (who, in this case, would be John's executor).

Waiver and Consent

Typically, and depending on the type of disability, a person under a disability cannot sign a waiver and consent. However, if a person under a disability was, during a period of capacity, able to nominate an attorney-in-fact under a Power of Attorney, then the agent under the Power of Attorney could execute the Waiver of Process and Consent to Probate on behalf of the disabled person so long as the agent was given the specific authority to execute such a document in the Power of Attorney document and provided that the Power of Attorney is recorded with the court.[10] If the person under a disability has a guardian, then the guardian can also execute a Waiver and Consent provided that the guardian submits an affidavit to assure the court that, in essence, the guardian does not have a conflict.[11]

Appearance

A person under a disability may make an appearance. An infant or an incapacitated person may appear by their guardian.[12] Hence, if a disabled individual is to receive an inheritance, one of the options is to petition the court for the appointment of a guardian for that person and for that person's property (SCPA Article 17 (for infants), SCPA 17A (for developmentally or intellectually disabled)

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or Mental Hygiene Law Article 81 (for incapacitated individuals)). The theoretical benefit to the appointment of a guardian would be the familiarity of the person serving as the guardian (rather than a completely independent court appointed Guardian ad Litem ("GAL"). Once a guardian is appointed, that guardian would then have standing to make an appearance on behalf of the disabled individual and protect the disabled individual's interests. Although a parent is a natural guardian of an infant, a parent may not always be able to appear on behalf of the infant child because of possible conflicts of interest. (For example, if John's parents were alive, it could be conceivable that the parents would not be able to speak for the minor child, even if appointed his guardian, if the parents were planning to contest the validity of a will, which would then put the infant child's share in jeopardy).

Guardian ad Litem to Protect the Disabled Person's Interests

Where the disabled person does not have a guardian, the appearance shall be made by the GAL.[13]Although a GAL may be nominated and appointed by an infant who is over the age of 14,[14] the court may deny the nomination where there is a conflict of interest.[15] A GAL may also be appointed by the court.[16] A GAL shall be an attorney admitted to practice in the state of New York.[17]

There are circumstances where the court does not need to appoint a GAL. These are set forth in SCPA 403. Generally, a GAL is not as necessary where the disabled beneficiary would receive the same or greater than he would receive in intestacy. For example, if John bequeathed his 13-year-old sibling a quarter of the estate, a GAL would probably not be appointed. However, if John bequeathed his 13-year-old sibling 1/10 of the estate, a GAL may be appointed to determine whether to contest the bequest. A GAL is also not appointed where the assets of the estate are less than $50,000 and the sole beneficiary is the surviving spouse.[18]

The GAL serves as the fiduciary for the disabled person for this proceeding and is therefore empowered to submit moving papers and request additional information from the parties. Typically, the GAL will review the court file, confirm that jurisdiction is complete, speak to the relevant parties, investigate the circumstances, and submit a report to the court. The GAL may file objections to a will, or engage in pre-objection discovery (routinely known as 1404 depositions and discovery). The GAL may also assert the surviving spouse's right of election.[19] If the failure to exercise the right of election would impact the surviving spouse's eligibility for Medicaid benefits, then the GAL has a duty to seek approval to elect.[20] If a Guardian ad Litem appears, the disabled person can still be heard. A GAL cannot enter a settlement over the objections of the disabled person.[21]

Once the GAL writes the report and a decree is entered, the GAL is discharged. The court will direct the payment of the GAL's fees—be they from the estate, from the petitioner—or from any other party.[22]

Even though a GAL is appointed to represent the person under a disability, this appointment is temporary. If the disability persists beyond the proceeding, then the appropriate party will need to petition for either a limited or permanent guardian under SCPA Article 17, Article 17A, or Mental Hygiene Law Article 81. In John's case, a GAL is virtually unavoidable for the missing beneficiary/distributee. The GAL for the 13-year-old can be avoided if the 13-year-old resides with the nominated executor, who, in this case, is himself represented by this Article 81 Guardian. The prisoner could expedite matters by appointing somebody to act as his GAL, or, better yet, getting out of prison.

Endnotes

1. New York Surrogate's Court Procedures Act ("SCPA") 1402(1)(a).
2. SCPA 1001(4).
3. SCPA 203.
4. SCPA 306.
5. *See generally* SCPA 307.
6. SCPA 311.
7. SCPA 307(3).
8. *See* 22 NYCRR 207.16 for list of methods to be employed to meet the due diligence requirement.
9. SCPA § 307(4).
10. New York Estates Powers and Trusts Law ("EPTL") 13-2.3. If the POA is going to be recorded, then 22 NYCRR 207.48 requires that the person attempting to record the POA also include an affidavit explaining the circumstances that gave rise to the furnishing of the POA. The POA and the affidavit pursuant to 207.48 are typically filed in the miscellaneous department. There is a cost for filing. *See* SCPA 2402.
11. SCPA 402(1).
12. SCPA 402(1).
13. SCPA 402(2).
14. SCPA 403(1).
15. SCPA 403(1)(c).
16. SCPA 403(2).
17. SCPA 404(1).
18. SCPA 403(3)(d).
19. EPTL 5-1.1-A(c)(3)(D); *In re Furrer*, N.Y.L.J., May 14, 1996, at 32 (Sur. Ct., Suffolk County).
20. *In re* Mattei, 169 Misc. 2d 989, 647 N.Y.S.2d 415 (Sup. Ct., Nassau County 1996).
21. *In re Estate of Bernice B.*, 176 Misc. 2d 550 (Sur. Ct., NY County 1998)
22. SCPA 405.