

private client services update

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INCAPACITY CAN BE EXPENSIVE IN MORE WAYS THAN ONE

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Although modern medicine has greatly lengthened the average lifespan, it also has created a situation where more people will spend a longer period of time in an incapacitated state prior to death. An adult who is unable to handle and manage his or her finances must be assisted by an agent or fiduciary of some type. If the incapacitated adult executed a power of attorney prior to the incapacity, the agent named in the power of attorney will be able to act on behalf of the incapacitated individual. However, if there is no power of attorney, a family member or other interested party must petition the Court for appointment of a guardian and/or conservator. A guardian cares for the physical well being of the incapacitated adult and a conservator manages the assets of the incapacitated adult. Frequently, the same person serves as both guardian and conservator, but this is not always the case. For purposes of this article, however, the terms “guardian” and “guardianship” include guardian and conservator and guardianship and conservatorship, respectively.

Unfortunately, sometimes a family member who is serving as the agent under a power of attorney, mishandles or misappropriates the incapacitated adult’s assets. If other family members realize that the misconduct is occurring, they may file a petition with the appropriate court in order to terminate the authority under the power of attorney and appoint a different person as the conservator. Under the new Uniform Power of Attorney Act, which became effective on July 1, 2010 in Virginia, an agent under a power of attorney has a duty to keep records of all receipts, disbursements and other transactions and to disclose the same upon request by certain parties. The list of who can request and receive information about the agent’s conduct under the power of attorney includes the principal under the power of attorney (here, the incapacitated adult), a guardian, a conservator, a person authorized to make health care decisions for the principal, the principal’s spouse, parent or descendant, an adult sibling or niece or nephew of the principal, a person named as a beneficiary in the principal’s estate plan, adult protective services, the principal’s caregiver and anyone asked to accept the authority of the agent under the power of attorney. All of these parties also have standing to petition a court to review the agent’s conduct under the power of attorney and to grant relief if necessary, such as, removing the agent under the power of attorney and appointing a conservator.

Conservatorship litigation is filed in the circuit court where the incapacitated adult resides. The petition includes information about the incapacitated adult and his or her current health condition, as well as the names and addresses of certain family members including the spouse, adult children, parents and adult siblings. All fiduciaries currently representing the incapacitated adult and family members are entitled to receive notice that the litigation has been filed. Another unfortunate situation occurs when the incapacitated adult is relocated to avoid discovery of wrongdoing and/or to inhibit litigation.

A guardian ad litem (an independent attorney) is always appointed by the court to represent the interests of the incapacitated adult. The guardian ad litem will visit and interview the incapacitated adult and attempt to advise him or her of the nature of the proceedings and will file a report with the court addressing whether the incapacitated adult needs a guardian and/or conservator and whether the proposed or existing fiduciary is suitable to serve. Sometimes the incapacitated adult also employs separate counsel; particularly if the adult is contesting his or her incapacity. A medical evaluation of the incapacitated adult is required to be conducted, which must detail the type of incapacity and the limitations on independent living.

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Pretrial discovery for such proceedings can be just as comprehensive as with any other litigation, especially when the petitioner is concerned that assets of the incapacitated adult have been misappropriated. Such discovery may require the disclosure and production of all of the incapacitated adult's assets and affairs; including, bank and brokerage account statements, credit card statements, income tax returns, copies of wills and trusts, lists of beneficiaries named on accounts, certificates of deposit, retirement accounts and life insurance, credit reports, deeds to real property, all documents related to lifetime gifts, list of safe deposit boxes and their contents, and any other relevant documentation. The point here is that the agent under a power of attorney has significant record keeping obligations, and the actions of the agent are subject to critical scrutiny after the fact.

When a court considers the appointment of a conservator, depending upon the nature and extent of the adult's incapacity, the conservator may have broad or limited authority. The court also has the power to address previous inappropriate transactions conducted by an agent under a power of attorney or any other person who had access to the incapacitated adult's funds. For example, the court may utilize the concept of a constructive trust in order to compel the return of property to the estate of the incapacitated adult, invalidate deeds, contracts and wills, and even authorize the creation of an express trust.

Litigation of this nature can be expensive, intrusive and emotionally challenging for a family. However, if an agent under a power of attorney is misappropriating assets of an incapacitated adult, frequently the only avenue for complete relief is through the court system.



Lawrence G. Cumming is the managing partner of the Hampton office of Kaufman & Canoles. Larry's practice focuses on commercial transactions, estate planning and administration and real estate transactions. He helps clients establish, purchase and sell businesses, negotiate loans and leases, develop employment contracts and create succession plans for their businesses. In addition, Larry represents individual clients in personal matters such as preparing estate plans, purchasing a home, contracting to build a home and handling legal issues regarding the care of elderly parents. He is a graduate of the College of William & Mary School of Law and his civic involvement includes service to Greater Peninsula NOW, Peninsula Estate Planning Council, Christopher Newport University School of Business, Coliseum Central Business Improvement District, and the Peninsula Town Center Advisory Board. He serves on the Board of Directors of TowneBank and Harrison & Lear. Larry can be reached at (757) 224.2910 or lgcumming@kaufcan.com.

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