

NAELA Contested Guardianship and Fiduciary Litigation Presentation

NAELA Maryland and District of Columbia Chapter

Guardianship Summit

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I. Is Guardianship The Appropriate Remedy?

a. Ask: Why Do You Need A Guardianship?

- i. Guardianship is a comparatively drastic, invasive remedy. The end result is the Circuit Court assuming ultimate responsibility over the alleged disabled person. *Kicherer v. Kicherer*, 285 Md. 114 (1979). The alleged disabled person loses the right to make important decisions about his or her living arrangements, finances, etc., depriving him or her of an important liberty interest. *In re Lee*, 132 Md. App. 696 (2000). The Court obtains a permanent role in overseeing the finances and well-being of the alleged disabled person. From a practical perspective, it may create an adversarial dynamic between the person bringing the claim and the alleged disabled person.
- ii. Obtaining a guardianship does not, in and of itself, remedy other losses or financial abuses that have taken place. For example, if a family member has been misappropriating funds, the guardianship may help to prevent further abuse, but will not remedy past harms.
- iii. Additionally, there may already be other asset management mechanisms in place. These include powers of attorney, revocable trusts, or joint bank accounts. Depending on the type of harm that has occurred, Maryland law provides a number of causes of action that may be asserted either in lieu of or in addition to a guardianship proceeding.

b. Hypothetical: A client believes that his sister is taking advantage of his elderly widowed mother. The sister lives with the mother and handles all her finances and medical appointments. The sister is named as the mother's agent under a durable power of attorney and as her health care agent under her advance directive. The mother's brokerage account is titled in her own revocable living trust, with sister named as first successor trustee. Client has seen bank statements that show large cash withdrawals from his mother's bank account and, following a review of property tax records, sees that sister has been added as a joint owner with rights of survivorship on mother's condo.

c. Standing Issue:

- i. All suits must be prosecuted by the real party in interest. Md. Rule 2-201.
- ii. Md. Rule 2-202 ("Capacity") states that "[a]n individual under disability to sue may sue by a guardian or other like fiduciary or, if none, by next friend, subject to any order of court for protection of the individual under disability." Md. Rule 2-202(b). An "individual under disability" means an individual under the age of 18 years or an individual incompetent by reason of mental incapacity.
- iii. A key threshold question is always whether and individual has the right to file a claim, either of his or her own accord or on behalf of the alleged disabled.

d. What Other Remedies Might Be Available?

i. Maryland General and Limited Power of Attorney Act:

1. Duties imposed: The Maryland General and Limited Power of Attorney Act imposes statutory duties upon "an agent that has accepted appointment." These include the duty to act in accordance with the principal's reasonable expectations to the extent known, and otherwise to act in the principal's best interest; to act with care, competence, and diligence for the principal; and act only within the scope granted in the power of attorney. Md. Code Ann., Estates & Trusts § 17-113(a)(Est. & Trusts Article is referred to herein as "ET"). There are also a number of "default" duties that apply unless the power of attorney provides otherwise, including the duty to act loyally for the principal's benefit, to not create a conflict of interest that impairs the agent's ability to act impartially, and to attempt to preserve the principal's estate plan, to the extent actually known by the agent, if preserving the plan is consistent with the principal's best interest on all relevant factors.

2. Statutory remedies:

A. ET § 17-102: A principal or an interested person may file a petition under Title 15, Chapter 500 ("Injunctions") of the Maryland Rules in the Circuit Court for the county in which

the power of attorney is recorded to enjoin an agent to comply with requirements relating to disclosure of receipts, disbursements, or transactions by the agent. "Interested person" is not defined under Title 17.

- B. ET § 17-103: Permits certain persons to "petition a court to construe a power of attorney or review the agent's conduct, and grant appropriate relief." There is a large class of individuals who may file such a petition, including the principal's spouse, parent, or descendant, "[a]n individual who would qualify as a presumptive heir of the principal," or a "person named as a beneficiary to receive any property, benefit, or contractual right on the principal's death or as a beneficiary of a trust created by or for the principal that has a financial interest in the principal's estate." However, the court must dismiss the petition on motion by the principal unless the court finds that the principal lacks capacity to revoke the agent's authority or the power of attorney.
- C. As of October 2017, there are no published decisions citing either ET § 17-102 or § 17-103. Sections 17-102 and 17-103 are analogous to §§ 114 and 116, respectively of the Uniform Power of Attorney Act. Although Maryland has not weighed in on the issue, an Ohio court has determined that its adoption of § 116 allows for the descendant or presumptive heir to bring, in his or her individual capacity, a civil action to redress agent misconduct. *Cartwright v. Batner*, 15 N.E. 3d 401, 412 (Ohio App. 2d. 2014). The Comment to § 116 supports this view, stating that the "primary purpose of this section is to protect vulnerable or incapacitated principals against financial abuse" by creating "broad categories of persons who have standing to petition the court for construction of the power of attorney or review of the agent's

conduct." Unlike Ohio, Maryland did not adopt § 117 of the Uniform Power of Attorney Act, which provides a specific restitutionary remedy for agent misconduct.

ii. Maryland Trust Act (MTA)

1. Duties imposed: The MTA codifies certain common law duties of a trustee and clarifies who is eligible to intervene in the administration of a trust. Certain duties, such as the duty of loyalty, are codified. ET § 14.5-802. Otherwise, the common law of trusts and principles of equity supplement the MTA. ET § 14.5-106.

2. Judicial Intervention

A. Section 14.5-201 states that "[o]n invocation of the court's jurisdiction by an interested person, on the court's own motion, or as otherwise provided by law, the court may intervene actively in the administration of a trust, fashioning and implementing remedies as the public interest and the interests of the beneficiaries may require." ET § 14.5-201(a). This power is vested in the courts "having equity jurisdiction," i.e. the Circuit Courts.

B. Standing Issues:

a) For a revocable trust, rights of the beneficiaries are subject to the control of the settlor and the duties of the trustee are owed exclusively to the settlor. ET § 14.5-603. The fact that the settlor becomes incapacitated or loses the capacity required to create a will does not convert a revocable trust into an irrevocable trust. ET § 14.5-601. However, while a trust is revocable and the settlor does not have the capacity to revoke the trust, a beneficiary to which distributions may be made during the lifetime of the settlor shall have the right to enforce the trust as if it were irrevocable. ET § 14.5-603(b).

- b) Consequently, if the revocable trust permits distributions to an individual other than the settlor during the settlor's life, the permissible distributees have the right to intervene in the administration of the trust. Otherwise, they do not have standing on their own to challenge the trust administration.
- c) If the settlor is disabled, certain individuals are entitled to represent the settlor with respect to trust disputes. Depending on the circumstances, these include the guardian of the property or person, an agent having specific authority to act with respect to trust matters, and parents and other ancestors. ET § 14.5-303.
- d) Additionally, the Maryland Rules permit an "interested person" to petition a court to assume jurisdiction over the fiduciary estate of a minor or disabled person. Md. Rule 10-501. "Interested person" has a broad definition, and includes the disabled person's heirs at law. Md. Rule 10-103. A court supervising a trust administration may act on its own accord to compel the trustee to perform his duties under the trust. Restatement (Second) of Trusts § 200(h).

iii. Declaratory Judgment:

1. Maryland's declaratory judgment statute provides a statutory cause of action and remedy that is conceptually similar to equity courts' exercise of jurisdiction over the administration of trusts and estates. *Kann v. Kann*, 344 Md. 689, 701 (1997) (analogizing declaratory judgment procedure under ET § 3-408 to historical equity procedure in trust and estate matters).

2. Md. Code Ann., Courts & Judicial Proceedings § 3-408 authorizes a court to determine "rights or legal relations in respect to the trust or the estate of [a] decedent, minor, disabled person, or insolvent" by ordering a fiduciary to do or to abstain from doing something, or to determine "any question" arising in the administration of the estate or trust. Md. Code Ann., Courts & Judicial Proceedings §3-408.
3. The declaratory judgment act permits intervention by "[a]ny person interested as or through a personal representative, trustee, guardian or other fiduciary, creditor, devisee, legatee, heir, next of kin, or beneficiary of a trust, in the administration of a trust, or in the estate of a decedent, a minor, a disabled person, or an insolvent." Md. Code Ann., Courts & Judicial Proceedings §3-408.
4. The declaratory judgment statute closely tracks the 1922 Uniform Declaratory Judgments Act, and was enacted in Maryland in 1973. From its enactment until the 2016 General Assembly session, Maryland's declaratory judgment statute differed from the uniform law in an (arguably) important way: the court's intervention was limited to "the trust or the estate of a decedent." In 2016, the Annual Corrective Bill changed the language of § 3-408 to more closely track the language of the 1922 uniform law to permit the court to intervene in "the trust or the estate of the decedent, minor, disabled person, or insolvent." 2016 Md. Laws. Ch. 8 (S.B. 506).

iv. Unjust Enrichment/Constructive Trust:

1. Constructive trust is an equitable remedy imposed by courts of equity whenever the title to property is found in one who, in fairness, ought not to be allowed to retain it. They may be created even when no express trust is involved, but when property has been obtained or retained by other unconscionable conduct. The court merely uses the constructive trust as a method of forcing the defendant to convey to the plaintiff. Sandler, Paul Mark & James K. Archibald, *Pleading*

Causes of Action in Maryland § 8.19 (4th Ed.) (2008); *Wimmer v. Wimmer*, 287 Md. 663, 668 (1980) ("[C]onstructive trust is a remedy employed by a court of equity to convert the holder of legal title to property to a trustee for one who in good conscience should reap the benefits of the possession of said property.")

2. Elements:

A. Generally: (1) There is an acquisition of property in which the plaintiff has some good equitable claim; (2) There is evidence of wrongdoing such as fraud, misrepresentation, or other improper method; and (3) There are circumstances which render it inequitable for the holder of the legal title to retain the beneficial interest. Sandler, *supra*, at § 8.20; *Wimmer*, 287 Md. at 668.

B. Confidential relationship: (1) There is an acquisition of property in which the plaintiff has some good equitable claim; (2) There is a confidential relationship; and (3) The confidential relationship was breached by the dominant party, with the property transferred from the trusting party to the dominant party. Sandler, *supra*, at § 8.21; *Wimmer*, 287 Md. at 668–71; *Figgins v. Cochrane*, 403 Md. 392, 410 (2008).

3. Confidential relationship: Proof of a confidential relationship is often key in constructive trust cases. Normally, the plaintiff must prove both the wrongdoing and the unfairness of the transaction by clear and convincing evidence. *Wimmer*, 287 Md. at 668-69. However, if the plaintiff proves that there was a confidential relationship between the transferor and transferee, and the transferee is the "dominant" party in the relationship, a "heavy" burden shifts to the transferee to prove the fairness and reasonableness of the transaction. *Figgins*, 403 Md. 392. The transferee must prove that the transfer was the free and uninfluenced act of the transferor, upon

full knowledge of all the circumstances connected with it and its contents. *Id.* Factors in determining whether a confidential relationship exists include the familial relationship (e.g. parent-child, husband-wife), the subservient party's age/infirmity, and the subservient party's reliance upon dominant party for care or protection or guidance in business affairs. *Id.* at 410.

II. Contested Guardianship: Room for Litigation

a. Standing:

- i. Any interested person may bring a petition for guardianship. ET §13-210.
- ii. The term "interested person" includes guardians, heirs (as defined under the laws of intestacy), governmental agencies paying benefits, and any person or agency eligible to service as guardian. ET §13-101(i).
 1. Heirs at law: (1) spouse and surviving issue; (2) parents and siblings; (3) grandparents, aunts, uncles and their issue. ET §3-101, *et seq.*
 - A. Step-child – if there are no blood relatives up through the decedent's great-grandparents, then stepchild inherits. ET §3-104(e).
 2. Interested person can also be a minor. ET §13-101(i). In that event, their parent or guardian can participate.

b. Jurisdiction:

- i. The Circuit Court
 1. exclusive jurisdiction over guardianship matters involving disabled persons (adults). ET §13-105.
- ii. The Orphans' Court
 1. concurrent jurisdiction with the Circuit Court over a guardianship matter involving a minor. ET §13-105.
 2. Petitioner has right to transmit issues to the Circuit Court.
 3. Benefits of Orphans' Court: quick!
 4. Cons of Orphans' Court: lack of sophistication

c. Venue:

- i. Person: Md. Rule 10-201

1. Md. Resident: where the person resides or where hospitalized
 2. Non-Md. Resident: where the person is physically located
 3. Can the person change residence if incompetent?
- ii. Property: Md. Rule 10-301
1. Md. Resident: venue is proper where the person resides, even if the person is temporarily absent
 2. Non-Md. Resident: (1) where the petition for guardian of the person may be filed; (2) where any part of the property is located.
 - A. TPP – where it is located
 - B. IPP – Location of instrument or residence of debtor
 - C. Trust – where trustee can be sued

d. Guardianship Elements

- i. Presumption of Mental State:
 1. Law presumes adults are competent unless proven otherwise.
 2. For both guardianship of property and of the person, minors are presumed incompetent.
- ii. Of the Person, ET §§ 13-701, et seq.:
 1. In the case of an adult, the petitioner must show with:
 - A. clear and convincing evidence that the alleged disabled:
 - B. lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person, including provisions for healthcare, food, clothing, or shelter; and,
 - C. cannot communicate those decisions because of "any mental disability, disease, habitual drunkenness, or addiction to drugs; and
 - D. that there is no less-restrictive alternative to a guardianship consistent with the person's welfare and safety. ET §13-705.
 2. The standard of "responsible decisions" is problematic or wonderful (depending on your client) because it is such a flexible term. *See Mercy Hosp. v. Jackson*, 62 Md. App. 409 (1985) *vacated as moot*,

306 Md. 556 (1986) (refusing to implement a guardianship for a pregnant woman who refused blood transfusions because of her religious beliefs).

3. Minors:

A. Md. is a parent-appointed state; in the case of a minor child, the surviving parent may appoint, in his or her will, an individual to act as guardian and that individual may act without court approval. ET §13-701.

a) Compare with guardian of a minor's property who must be court appointed. ET §13-201.

b) In DC, a 14-year-old is able to select his or her own guardian of the person or property. D.C. Code, §21-108.

B. If neither parent is serving as guardian and neither parent appointed a guardian in his or her will, then the court will appoint someone. ET §13-702(a). However, a 14-year-old may select his or her own guardian of the person if no appointment provided in the will. ET §13-702.

iii. Of Property, ET §§13-201, et. seq.:

1. To be appointed guardian, the petitioner must show that:

A. An adult has a disability that prevents him or her from effectively managing his or her property or that the individual is a minor;

B. That the individual *has or may be entitled to property* or benefits; and,

C. That the property requires *proper management*.

2. "Has or may be entitled": A guardian of property is vested with title to all the property that the alleged disabled held at the time the guardianship was instituted. *See Battley v. Banks*, 177 Md. App. 638, 648 (2007). If a trust holds legal title to the alleged disabled's property then, arguably, there is no property subject to the

guardianship proceeding at all because the alleged disabled does not hold title.

3. "Property that requires proper management:" A guardianship of the property is only appropriate where the alleged disabled has property that requires proper management. Thus, if there are already schemes in place to manage the alleged disabled's property—for example a power of attorney— that element of the petition may remain unmet. This is especially true if the alleged disabled has transferred his or her property to a revocable trust.
4. Disability is due to: physical or mental disability, disease, habitual drunkenness, addiction to drugs, imprisonment, compulsory hospitalization, confinement, detention by a foreign power, or disappearance.
5. Minor: can appoint guardian of the property at 16 years of age. Md. Rule 10-301 for form appointment.

e. Petition for Guardianship

i. Specific Elements of Petition – Statutory Petitions

1. Md. Rule 10-110 – Combined Petition for Person and Property
2. Md. Rule 10-111 – Minor
3. Md. Rule 10-112 – Adult
4. i.e. description of property: the petition must include a detailed and comprehensive description of the property subject to the guardianship.

A. Should you include a statement concerning management of the property, waste or misuse of property, fraud, etc.?

ii. Medical Examination:

1. What: A petition to institute a guardianship for an alleged disabled person must be accompanied by two certificates of physicians or a physician and a licensed psychologist or certified clinical social worker who have examined and/or evaluated the alleged disabled. Md. Rule 10-202(a)(1).

2. When: At least one of the evaluations/examinations must be within 21 days of the filing of the petition.
3. No Access to Disabled Person: A petition may be filed without these certificates if it claims that someone is preventing the examination and evaluation of the alleged disabled. In such a case, the petition would include a request for the court to order the examination and evaluation of the alleged disabled. Md. Rule 10-202(a)(3).
 - A. If the alleged disabled is a beneficiary of the Department of Veterans Affairs, the petition may substitute the two medical certificates with a certificate from the Department of Veterans Affairs stating that the alleged disabled has been rated disabled by the Department. Md. Rule 10-202(a)(4).
4. Case Law: The Court of Special Appeals addressed the contents of the Doctors Certificates required under Md. Rule 10-202 in its decision in *In re Lee*, 132 Md. App. 696 (2000).
 - A. Should you expand on the minimum requirements?
 - B. Evaluation of nursing/daily care?
 - C. Evaluation of living situation?
5. Choosing Doctors:
 - A. Geriatric Psychiatrist: Alzheimer's, dementia, elder individual
 - B. Regular Physician v. New Doctor (fact witness/expert)
 - C. Review of existing medical records
 - D. Many doctors are hesitant to sign evaluation
6. Minor: In the case of a minor both parents must consent, or the petitioner must provide the court with information about attempts to obtain consent. Md. Rule 10-202(b).

iii. Emergency Petition:

1. Person – ET §13-709 – extensive statute concerning orders that can be granted and allowing interested person to set aside or modify at any time.

2. Property – doesn't really exist; always file an "emergency" petition.
- iv. Notice/Due Process Requirements:
 1. Person:
 - A. Petitioner must serve the petition, a show cause order and Advice of Rights on the alleged disabled or minor and the individual caring for the alleged disabled or minor. Md. Rule 10-203.
 - B. The petitioner must mail a copy of the petition and the show cause order to any attorney of the alleged disabled or minor. Md. Rule 10-203.
 - C. The petitioner must mail a copy of the petition, show cause order, and Notice to Interested Persons to all "interested persons" by certified mail. Md. Rule 10-203(b).
 2. Property: Same requirements; different rules. Md. Rules 10-302 and 10-303.
- v. Court Appointed Attorney for Disabled Person
 1. ET §13-211 – if disabled person doesn't have attorney
 2. Make your friend
 3. If attorney does not litigate?

f. Discovery Rules:

- i. Absent a court order, only interested persons may obtain discovery in guardianship matter. Md. Rule 10-102(b).
- ii. An interested person may conduct discovery pursuant to the Maryland Rules 2-401, *et seq.*, unless the court chooses to order otherwise. Md. Rule 10-102(b).
- iii. The rest of Title 2—Civil Procedure in the Circuit Court—is applicable where referenced in Title 10—Guardians and other Fiduciaries—and where the court orders. Md. Rule 10-102(b).

g. Litigating over the Guardian:

- i. Priority of appointment. Generally, the appointment of a guardian follows the order of priority found in ET § 13-207 (stating that an individual

nominated in a designation signed by the disabled person when he had sufficient capacity supersedes the order of priority in the statute). However, the Court may appoint anyone it chooses for good cause. *See* Comment to Pleading Causes of Action in Maryland §5.8 (5th ed. 2013) citing ET §§ 13-207(c), 13-707(c); Md. Rules 10-205, 10-304. The Court's freedom to select the appropriate guardian stems from the fact that "the court is the guardian; an individual who is given that title is merely an agent or arm of that tribunal in carrying out its sacred responsibility." *Kicherer v. Kicherer*, 285 Md. 114, 118 (1979). "[A]ppointment to that position rests solely in the discretion of the equity court," *id.* at 119, because "[a] statutory preference in the appointment of a guardian, although seemingly mandatory and absolute, is always subject to the overriding concern of the best interest of the ward." *Mack v. Mack*, 329 Md. 188, 203 (1993). Also see in the probate estate context *Preston Phillips v. Lynn Krause, Personal Representative* (Md. Ct. Spec. App. May 20, 2002)(unreported)(if there is "reason enough to remove a person from serving as personal representative, it is reason enough not to appoint him in the first place.").

- ii. History and sophistication of the guardian.
 - 1. History of poor money management
 - 2. History of abuse, neglect or abandonment
 - 3. Third Party vs. Family Member
 - 4. Trust Company vs. Individual

h. Hearing (See Outline Below):

- i. If no one responds to the show cause order issued in a guardianship of the person of a minor matter, the court may rule on the matter without holding a hearing. Md. Rule 10-205(a)(1). Regardless of whether there is a response to the show cause order in a matter involving the guardianship of the person of an alleged disabled adult, the court will set a jury trial. The alleged disabled or his or her counsel may waive a jury and proceed with a bench trial. Md. Rule 10-205(b).

1. Notice: Md. Rule 10-302 has the same notice requirements as Md. Rule 10-203 (guardianship of the person, explained above).
2. Hearing: If no one responds to the show cause order issued in a guardianship of property matter, the court may rule on the matter without holding a hearing. Md. Rule 10-304(a).

i. Breach of Fiduciary Duty by Guardian/Removal of Guardian

- i. Person – Md. Rule 10-208
 1. Petition shall state the reasons for removal.
- ii. Property – Md. Rule 10-305 references Md. Rules 10-702 through 10-712
 1. Md. Rule 10-712 – state the reason for removal
- iii. Similar venue issues.
- iv. ET §15-112 – Grounds for Removal of Fiduciary
 1. A court shall remove a fiduciary who has:
 - A. willfully misrepresented material facts leading to his appointment or to other action by the court in reference to the fiduciary estate;
 - B. Willfully disregarded an order of court;
 - C. Shown himself incapable, with or without fault to properly perform the duties of his office; or
 - D. Breached his duty of good faith or loyalty in the management of property of the fiduciary estate.
 2. A court may remove a fiduciary who has:
 - A. Negligently failed to file a bond within the time required by rule or order of court;
 - B. Negligently failed to obey an order of court; or
 - C. Failed to perform any of his duties as fiduciary, or to competently administer the fiduciary estate.
- v. Accountings
 1. Annual accountings
- vi. Health Care Directive/End of Life Care
 1. Does the disabled person have one?

2. ET §13-712: Withholding or Withdrawal of life-sustaining procedure
 - A. Allows a court to order withholding
 - B. Clear and convincing evidence

j. Other Litigation involving Guardianship Estate

i. Claims

1. Against the guardianship estate? Or the probate/trust estate?
 - A. ET §13-708 – person who wants to be compensated by a ward must submit the request to the court supervised guardian. The Circuit Court then adopts guidelines for the rate of reimbursement and establishes the appropriate procedures for records, inspections, audits, or other requirements.
 - B. Specific authority to satisfy claims after the death of the ward was added to the Code in 2010. See H.D. 328, 2011 Leg., 427th Sess. (Md. 2010).
2. Contracts
 - A. Did the disabled person have the mental capacity to form a contract?
 - B. *Shaefer v. Hewes*, 225 Md. 207, 211 (1961); *Bantz v. Bantz*, 52 Md. 686, 693 (1880)(in the context of making a claim against an estate)("Must have been a design, at the time of rendition, to charge, and an expectation on the part of the recipient to pay for the services.").
3. Family doing work/care for the disabled person
 - A. *Schaefer v. Heaphy*, 45 Md. App. 144, 155 (1980)(context of submitting claim to estate)(Family member creates a presumption that services were gratuitous and the claimant can only overcome presumption with clear and convincing evidence of an intent to pay).

- B. Family member is someone living in the same household.
Jones v. Jones, 146 Md. 19 (1924).

III. Evidentiary Issues

a. Confidential Relationship—Evidentiary Perspective. The term "confidential relationship" under Maryland law is used to describe a type of dependent relationship between two or more people. *Sanders v. Sanders*, 261 Md. 268, 276-77 (1971). The American Law Institute has explained that the term "'confidential relationship' embraces three sometimes distinct relationships – fiduciary, reliant or dominant-subservient." Restatement (Third) of Property: Wills and Other Donative Transfers §8.3, cmt. g.

- i. How a Confidential Relationship Arises. A fiduciary confidential relationship arises when the donor and the donee find themselves in a settled category of fiduciary obligation. Restatement (Third) of Property: Wills and Other Donative Transfers §8.3, cmt. g. For example, a fiduciary confidential relationship includes an attorney-client, trustee-beneficiary or guardian-ward relationship. *Id.*
- ii. Question of Fact. Whether the confidential relationship can be defined as a reliant relationship is determined by fact. *Id.* In order to establish a reliant relationship, Plaintiffs must present evidence that shows the relationship based on special trust and confidence. *Id.* For example, the donor was accustomed to being guided by the judgment or advice of the alleged wrongdoer. *Id.*

The existence of a dominant-subservient relationship is also a question of fact. As such, the person wishing to establish it must present evidence to establish that the donor was subservient to the alleged wrongdoer's dominant influence. *Id.*

These principles articulated by the America Law Institute accord with Maryland law. For example, the Court of Appeals has stated that "in some relationships, such as attorney-client or trustee-beneficiary, a confidential relationship is, indeed, presumed as a matter of law." *Upman v. Clark*, 359 Md. 32, 42 (2000). Otherwise, the "existence of a confidential relationship

is an issue of fact and not presumed as a matter of law." *Id.* at 42 (citing *Sanders v. Sanders*, 261 Md. 268, 276 (1971)).

Whether a power of attorney is one of the per se categories is not absolutely clear under Maryland law. Cases such as *Sanders v. Sanders*, 261 Md. 268, 271 (1971)(stating a power of attorney creates a confidential relationship) and *Henry v. Leech*, 123 Md. 436 (1914) (stating that a confidential relationship will undoubtedly be presumed in a relationship of a principal-agent) seem to support such a rule. When *Henry v. Leech* states that a confidential relationship will undoubtedly be presumed in a relationship of a principal-agent the Court cites to *Brown v. Mercantile Trust Co.*, 40 A. 256 (1898) for this proposition. However, *Brown* does not support that statement unconditionally. Rather, the Court in *Brown* states that a confidential relationship:

"will undoubtedly be presumed in certain cases, as, for instance, in that of a guardian and ward, parent and child, attorney and client, and also in that of a principal and agent, and may exist in many other relations. But it will not and cannot reasonable be presumed that the mere fact of the relation of principal and agent for limited or special purposes necessarily raises a controlling presumption of undue influence on the part of the agent over the principal, particularly in matters outside of the special purposes for which the agent has been employed."

Brown, at 258.

An agent under a power of attorney, of course, has long been considered a fiduciary. When that term defines the scope and character of a trustee's obligations, there is much case law, if not broad consensus, as to the meaning of what being a fiduciary entails. That is not true, however, when the term is used as characterizing the principal/agent relationship as noted in the comments under the Uniform Power of Attorney Act which served as

a basis for the Maryland General and limited Power of Attorney Act (Title 17 of the Estates and Trusts statute). One difference, aside from its historical roots in contract law, is the obligation to act at the principal's direction or following the reasonable expectation of the principal and not necessarily in the principal's best interest. Thus, unlike the bright-line confidential relationship arising out of the attorney-client or trustee-beneficiary relationships, that of an agent is a bit more nuanced.

- iii. Presumption. Under Maryland case law, when an *inter vivos* gift is made and there is the existence of a confidential relationship between the donee and the donor the burden of proof shifts to the donee "to show the fairness and reasonableness of the transaction." *Upman v. Clark*, 359 Md. 32, 42 (2000).

In a testamentary situation, on the other hand, a confidential relationship is only one factor to be considered when attacking a testamentary instrument. It does not shift the burden of proof to the party defending the instrument.

- iv. Joint Accounts as Testamentary, not Inter Vivos. The Court of Appeals in a criminal case held that the creation of a joint account does not necessarily effectuate an *inter vivos* gift. In *Wagner v. State*, 445 Md. 404 (2015), a father added his daughter to a multiple-party account as a "joint owner" for his convenience. He was having difficulty managing his affairs and placed his daughter on the account to help him pay bills. Under the account agreement, the daughter enjoyed the right of survivorship and upon the death of the father would have become the rightful owner of the account. Once the daughter was added to the account, she began drawing out funds for her own purposes. When the father discovered what she was doing, he filed a criminal complaint for theft and embezzlement. The daughter was tried and convicted by the Circuit Court.

The daughter appealed the decision based on a seemingly simple proposition: How can a joint account holder be guilty of theft from an account upon which she was legally permitted to withdraw funds? Of course, a multiple-party account gives all account holders equal rights to

withdraw funds. In deciding the issue, the Court of Appeals held that while Md. Code Ann., Fin. Inst. §1-204 applies to vest ownership of the funds in the surviving joint owner(s) upon the death of one of the account holders, but it does not control the ownership of the funds in the account during the lives of the joint account holders. The Court held that the purpose of the legislature in passing Fin. Inst. §1-204 was to clarify ownership interest following the death of a joint account holder but that it did not clarify ownership interests during the lifetimes of the account holders. To determine ownership of the account proceeds during the lifetime of the parties, the Court held that one must ascertain the intent of the parties from the facts and circumstances of the case. Thus, the power to access or withdraw funds from a joint account is not the equivalent of "ownership" of the funds and ownership is established by the intent of the parties. Accordingly, the daughter in Wagner committed theft because her father testified that she was added to the account for his convenience and that ownership of the funds did not transfer when she was added to the account. Under federal tax laws, the creation of a joint account is not a present gift. The gift is deemed only when funds are removed by the noncontributing joint owner. Treas. Reg. §25.2511-1(h)(4). Medicaid law takes a similar approach regarding joint accounts. Under the Medicaid rules, an applicant who has transferred away any of his or her assets (for example, by making a gift of funds) in the five years preceding the date of his application for long-term care benefits would generally be penalized for making such a transfer. However, the mere act of adding a joint owner to an applicant's account is not considered to be a transfer subject to penalty as long as the presence of the new joint owner does not limit the applicant's actual ability to access to the funds. State of Maryland, Dept. of Health and Mental Hygiene, Division of Eligibility Services, Maryland Medical Assistance Policy Manual 800.19(a) (July 2012). Under Medicaid law, a "transfer" subject to penalty only occurs when the new joint owner actually removes

funds from the account, thereby preventing the applicant from accessing them.

Thus, the laws that govern the federal income tax and Medicaid, in effect, supports the concept that the addition of a new joint owner on a bank account does not create an *inter vivos* gift. The gift is not complete unless and until the new account holder withdraws the money out for their own purpose.

b. Deadman statute. Potential evidentiary issue that parties to a guardianship may face is the dead man's statute's prohibition on testimony regarding transactions with the incompetent person. This issue, of course, more often appears in post death litigation.

- i. Majority Approach: Maryland is one of a minority of jurisdictions that still has a Dead Man Statute—codified at Md. Code Ann. Courts and Judicial Proceedings §9-116. *See* Ed Wallis, *An Outdated Form of Evidentiary Law: A Survey of Dead Man's Statutes and a Proposal for Change*, 53 Clev. St. L. Rev. 75, 76-77 n.9 (2005-06) (listing 32 states that have expressly rejected the Dead Man Statute). The majority of states have continued to follow the long-lasting trend of including a witness's testimony regardless of the witness's interest in the matter. *See* Joseph A. Colquitt & Charles W. Gamble, *From Incompetency to Weight and Creditability: The Next Step in an Historic Trend*, 47 Ala. L. Rev. 145, 145 (1995).
- ii. Maryland Approach: Rather than abolishing the Dead Man Statute altogether, Maryland has kept the provision but interpreted it narrowly. *See Reddy v. Mody*, 388 A.2d 555, 560 (Md. Ct. Spec. App. 1978). In keeping with this general approach, the Maryland court has restricted the Dead Man Statute to situations that would "tend to increase or diminish the estate of a decedent [or incompetent person in a guardianship situation] by establishing or defeating a cause of action by or against the estate." *Estate of Soothcage v. King*, 176 A.2d 221, 226 (Md. 1961) quoting *Riley v. Lukens Dredging & Contracting Corp.*, 4 F. Supp. 144, 147 (D.C., Md. 1933).

iii. Application to Guardianship: As a preliminary matter, "Qualification or competency is largely within the discretion of the trial court." *Horsey v. State*, 225 Md. 80, 82 (1961) citing *Saldiveri v. State*, 217 Md. 412, 419 (1958). If the court deems an individual competent to testify, then the Dead Man Statute will not apply. *Davis v. Corbin*, 28 Md. App. 364, 367 (Md. Ct. Spec. App. 1975). While a person may be disabled for the purpose of the guardianship proceedings, he or she may still be competent to testify. *See Id.* at 375 quoting *Johnston v. Frederick*, 140 Md. 272, 281.

c. **Hearsay**: If the alleged disabled's estate planning documents are at issue in the guardianship matter, the parties may encounter hearsay objections. Maryland Rule 5-803 (b)(3) permits evidence of state of mind and/or intention as an exception to the hearsay rule.

i. Federal Rule: The Maryland Rule is derived from the Federal Rule of Evidence 803(3), which sets out an exception to the hearsay rule to permit declarations of intention. In its current form, Federal Rule of Evidence 803(3) excepts from the general prohibition against hearsay

statement[s] of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.

Fed. R. Evid. 803(3). This is a true exception: it permits a third party to testify as to what the declarant said about his or her plan or intention, including in the case of testamentary documents, a memory or belief about what the declarant intended by a then-existing document.

ii. Maryland Rule: Md. Rule 5-803(b)(3) allows evidence of

Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind,

emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), offered to prove the declarant's then existing condition or the declarant's future action, but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

Maryland case illustrates the backward-looking element of Md. Rule 5-803(b)(3) and how statements by a testatrix after execution of a will may be admissible to show how she meant the will to be interpreted. *YIVO Inst. for Jewish Research v. Zalenski*, 874 A.2d 411 (Md. 2005) and *Nat'l Soc'y of Daughters of Am. Revolution v. Goodman*, 736 A.2d 1205 (Md. App. 1999) are both cases where the otherwise objectionable statements were admissible under of Md. Rule 5-803(b)(3).