

Utah Spirit

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Elder Law: Avoid Litigation in Guardianship and Conservatorship Proceedings

In an earlier column, I discussed the increasing need for a conservator and/or guardian. Our aging society is generally in better health and enjoying life more than ever. The result, however, is that we are living longer—giving rise to a need for care beyond our capacity to provide it for ourselves.

When we can no longer make reasonable decisions about our financial and personal affairs, we have to rely on someone else to make those decisions for us. Sometimes a spouse or a child takes over for us through a durable power of attorney.

For some, there is no spouse or child to assume those duties. For others, there are children or siblings who contend for control of our estates and our person. In the later case, family battles often result. Our children or siblings often mean well. But their inability to agree on who ought to make decisions for us may spawn costly litigation.

A dispute resolved by a judge or jury can easily cost each side of the dispute more than \$10,000. Perhaps more important than money is the damage to the family and the long-term destruction these disputes often cause.

There are some easy measures that can be taken to avoid these family fights, or at least to minimize them. First, we can take advantage of the 1997 legislative amendments that now permit us to nominate in advance our own conservator and guardian. Making such nominations are easily accomplished and are often combined with the preparation and signing of a Will or Trust.

By nominating someone to be your guardian or conservator, the Courts are obligated to give such person priority over all others who may contend to serve in those capacities. More importantly, however, these nominations act as a deterrent against children or siblings who may otherwise petition the Court to be your guardian or conservator.

Although you can nominate your own guardian and conservator, most will not likely do so. It is like making out a Will. We may have good intentions, but we most often fail to act in a timely manner. So, most of us will not have nominated a guardian or a conservator.

Under these circumstances then, how can litigation be avoided? Sometimes, family members harden their positions so that litigation is the only way to resolve their dispute. In others, mediation may help.

Unlike most civil litigation, neither side makes a claim for damages in guardianship and conservatorship proceedings. Rather, the central issue in dispute is who should make decisions for “Mom” or “Dad.” In effect, it is usually about control.

A subsidiary issue is “trust;” one child is often distrustful of a sibling who has been exercising control over Mom or Dad. While physical care of Mom or Dad may be of some concern, the distrust normally arises from how Mom’s or Dad’s money is being spent. And rarely is there any accountability.

Given these circumstances and combined with a history of strained relations between siblings, a family battle begins. If there are other siblings, they may take sides: several children on one side and several on the other. The objective at that point is to quickly diffuse the emotions and try to keep the matter out of the Court.

The second way to avoid litigation is to retain a good Elder Law Attorney who can guide the family through a process of resolution. A family meeting may be helpful if the family members are willing to try.

Mediation may also produce positive results. If a resolution is reached, it is by agreement between the two sides. Since an agreement is reached voluntarily and not imposed by a judge, it usually is more acceptable by both sides. It is more like a successful negotiation; more like a win-win solution.

Although not binding on your children, you should put in writing that you want any disputes over your care or finances to be mediated and not litigated. At the same time, if you have made the effort to let your children know your feelings, you should also formalize your choice of which child or children should be your guardian or conservator.