

# CCCBA - Elder Law Training Series

February 10, 2021

## Your Presenters:

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# Topics of Discussion:

- ▶ *Guardians Ad Litem*
- ▶ *Court Appointed Counsel*
- ▶ *Conservatorships*
- ▶ *Power of Attorney*
- ▶ *Private Fiduciaries*
- ▶ *Role of Legal Counsel*

Featuring:

- ▶ **The Most Horrific Case Scenario  
We Could Write !**

# Case Synopsis:

- ▶ **What happens when a spouse from a long term, loving second marriage, each with their own children . . .  
takes ill . . .  
and the other spouse has declining capacity?**

Answer:

## The Vultures Start Circling



# And They Plan Their Attack . . .



# Facts of the Case

## Chapter 1:

- ▶ Mom and Dad have been married for 18 years.
- ▶ It is a second marriage for both.
- ▶ Dad is 79 and Mom is 72.
- ▶ Dad has 2 kids from his first marriage, and Mom has 3 from her prior marriage.
- ▶ The family (parents and children) are generally close, celebrating holidays together, and seeing each other multiple times each year; however, they rarely socialize outside the presence of the parents.



# Facts of the Case

## Chapter 2:

- ▶ Dad was hospitalized at a sub-acute facility to rehab from a broken hip.
- ▶ He just tested positive for Covid-19.
- ▶ He is showing significant signs of dementia according to the nurses and doctor. On the phone, he does not seem to understand why he is in the hospital. These issues first became obvious in the past several weeks.
- ▶ Mom's capacity has seen better days. She is afraid her husband will die and cries a lot to the children. She feels alone and isolated, unable to see her husband, and able to regularly socialize in person with her children and grandchildren.
- ▶ She now shows signs of confusion and memory loss. Dad always handled the finances, and Mom does not really know what to do with the bills.

# Facts of the Case

## Chapter 3:

- ▶ Larry Lawyer has been their estate planning attorney for many years.
- ▶ He is solely an estate planner with no litigation experience.
- ▶ They both signed a H/W conflict waiver years ago.
- ▶ They have a joint trust with three asset schedules:
  - ▶ Dad's sp, Mom's sp, and community property.
- ▶ The primary assets consist of a residence, a vacation home in Tahoe. Both properties are encumbered, and Dad's pension. They have very little liquid resources.
- ▶ All assets are in the trust.
- ▶ Mom and Dad have mirrored Powers of Attorney for Financial Management and Health Care, naming each other as sole agent. No successor agent is named.
- ▶ The AHCD is the simple CMA form granting authority, but with no specific guidance of Dad's desires for health care and end of life decisions.

# Facts of the Case

## Chapter 4:

- ▶ Dad's kids are very concerned that Mom is failing and lacks capacity. She cannot find the estate plan documents.
- ▶ They do not think she is capable of giving specific medical instructions in her current state of mind.
- ▶ Dad's kids are worried about the cost of care and their shrinking inheritance.
- ▶ Dad's kids called Larry Lawyer and made an appointment with him.
- ▶ Dad's kids bring Mom to the appointment and insist they sit in on the meeting.
- ▶ Dad's kids obtained a copy of the AHCD from the hospital and found out that Larry Lawyer was their estate planning attorney.

# The Office Meeting with Larry Lawyer:

- ▶ Dad's kids and mom met with Larry Lawyer. Mom insisted she was perfectly capable of making all decisions for Dad and managing their finances. Dad's kids do not think she has sufficient capacity and distrust her children.
- ▶ Dad's kids had looked in the house for the estate planning documents but could not find them. They suspect that Mom's kids took the estate plan binder.
- ▶ Dad's kids want Larry Lawyer to file a conservatorship petition naming Dad's kids as Dad's co-conservators. They also think mom should be conserved, and since her children do not live close by, they want to be her conservators, as well.
- ▶ What advice should Larry Lawyer give?
- ▶ Can Larry prepare and file the petition?

# Conservatorship Proceedings:

- ▶ Mom wants Larry Lawyer to represent her because he has been her attorney for 20 years. However, Larry is solely an estate planning attorney and rarely goes to court.
- ▶ Dad is now on a ventilator.
- ▶ Everyone shows up (Mom's kids too) at the ex-parte hearing and make a ruckus in the hallway in front of Department 1530. Out of necessity, the Judge agrees to invite everyone into her courtroom. The pleadings indicate the existence of the trust.

# Court Considerations:

- ▶ What petitions are submitted to the Court?
- ▶ How should the Court approach the ex-parte petitions?
- ▶ Should anyone be appointed? If so, who?
- ▶ What are the issues and alternatives that the Court will consider?

# Panelists' Thoughts:

- ▶ **Is the Trust important in the Court's consideration?**

  - What assets are in the trust?

  - Mom is remaining co-Trustee and can act independently in managing the assets. What is her capacity to serve as Trustee?

  - Can she withdraw trust assets and give them to her kids?

- ▶ **Is Mom presumed to be competent and not suspended as trustee ?**

  - Evid Code 730 evaluation for Mom.

  - Cap Dec Dad?

- ▶ **Conservatorship or Trust Proceeding?**

  - CAC for conservatorship proceeding for both Dad and Mom?

  - GAL for Dad re trust proceedings ?

- ▶ **Private Personal Fiduciary**

  - Preservation of assets

- ▶ **Least restrictive alternatives** - if mom has capacity, Larry can prepare a simple POA

- ▶ **Encourage Mediation** since the trust has limited liquidity?

- ▶ **Fees AND Costs ?** Benefit to conservatorship estate and Trust?

# How the Panelists Would Rule:

- ▶ Appoint PPF for Dad
- ▶ Grant temporary Cons of Person for Dad What about Cons of Estate?
- ▶ Requested Cap Dec before considering Evid Code 730 evaluation for Mom
- ▶ Judge is concerned about restricting rights of Mom
- ▶ GAL appointed when / if Trust proceeding filed
- ▶ CAC for both Dad and Mom
- ▶ Should Court appoint a PPF (temporary) to prevent dissipation of assets and need for transparency
- ▶ Order immediate mediation and return to Court in 30 days
- ▶ Order CAC to report on issues, assets, and least restrictive alternatives
- ▶ Stay on discovery pending further order



# Other Considerations:

## ▶ **WHAT IS THE CASE ALL ABOUT?**

- ▶ Limited financial resources - need for active Court management
- ▶ Key is to protect and preserve assets and provide for proper management economically and efficiently

## ▶ **Role of Court Appointed Counsel** for Dad and Mom ?

- ▶ Mom's capacity and Mom has a useless POA

## ▶ **Infighting between kids on both sides**

- ▶ Who pays the legal fees? Are the kids stuck paying their fees ?
- ▶ Preference of family member in control, but will it work here ?

## **Substituted judgment** - modification to trust terms and designation of Trustee

- ▶ Execution of new trust based on settlement agreement or Court's ruling?
- ▶ Who should file for Substituted judgment ?

# Epilogue:

- ▶ Dad dies
- ▶ Cremation vs. funeral
- ▶ Division of assets? Control into the future for mom?
- ▶ Continued control and management of the trust
- ▶ Dad's kids concerned mom will use up their inheritance.
- ▶ Who pays for Mom's future extensive costs of care?
- ▶ What does the Trust provide?

**NO GOOD DEED GOES UNPUNISHED !**