

Effectively Addressing Bank, Brokerage and Real Property Issues in an Article 81 Guardianship Proceeding

By Anthony J. Enea

In most Article 81 Guardianship Proceedings the assets of the alleged incapacitated person (AIP), specifically title to said assets, are not the primary focus. Generally, the physical and mental incapacities of the AIP and the need for the appointment of an appropriate guardian of the person and property for the AIP are the center of attention. However, the attorney for the petitioner should carefully and thoroughly review all of the assets owned by the AIP and pay specific attention to how title to said assets is held and whether or not said assets are titled jointly with others and/or have named beneficiaries. The failure to do so may detrimentally impact the AIP as well as the individuals he or she intends to receive those assets.

Additionally, a thorough review of the AIP's assets is critical in formulating the relief to be requested in the petition with respect to how title of the AIP's assets is to be held once a guardian(s) is appointed, and with respect to the potential transfer of the AIP's assets for long term care (Medicaid) and estate planning purposes.

The following is an example of the information and documents regarding the AIP's assets that should be gathered by the attorney before filing the petition:

- (a) Copies of all deeds for real property owned by the AIP with the approximate present fair market value of said property. The attorney should pay particular attention to whether the real property is held jointly with a third party (family/non-family), whether said joint ownership is with rights of survivorship or as a tenancy in common, the percentage of ownership interest, and whether the property is owned in the name of a corporation or some other legal entity. It may be necessary to obtain the specifics as to any corporation or other entity, such as copies of documents relevant to the formation of the entity and stock certificates and/or other documents establishing the ownership interest of the AIP and/or others;
- (b) Copies of all recent account statements for all bank accounts and investment accounts stating the current value of the accounts. Again, particular attention should be paid as to whether the joint accounts are accounts which bestow rights upon the joint tenants during the life of the AIP (joint with rights of survivorship) or upon the death of a joint tenant, "in trust for"

accounts, "for convenience only" accounts, "transfer on death" and/or "payable on death" accounts;

- (c) Copies of all recent account statements for any IRAs, 401(k)s, 403(b), annuities (whether they be qualified or non-qualified accounts) with copies of all beneficiary designations for said accounts. Remember, if the aforesaid IRA and/or 401(k) does not have a named beneficiary upon the death of the account holder then the beneficiary will be his or her estate, thus necessitating the probate of his or her Last Will and Testament or the filing of an administration proceeding. It should also be ascertained whether or not the AIP is receiving the "minimum required distributions" from any of the aforesaid retirement accounts;
- (d) Copies of all life insurance policies owned by the AIP with proof of beneficiary designation for said policies. It is also important to determine if the policies have any cash value;
- (e) Copies of all trust agreements executed by the AIP and documentary evidence (deeds/account statements) evidencing whether said trust(s) have been funded with the AIP's assets or the assets of any third parties;
- (f) Copies of any copyrights, trademarks and licensing agreements owned by the AIP;
- (g) Copies of any mortgages and/or promissory notes due to the AIP with all amortization schedules. If there exists the possibility of recorded mortgages and/or UCC financing statements, it may be advisable to obtain copies of same.

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(h) Obtain information as to the AIP's annual income. For example, obtain copies of any W-2s, social security statements and any pension statements if appropriate. If the AIP is receiving any government benefits such as supplement security income (SSI), social security disability insurance (SSDI), or Medicaid, obtain the appropriate documentary proof. In order to ascertain the amount of interest and/or dividend income the AIP is receiving, it may be necessary to review the most recent income tax returns filed by the AIP, if available, and/or obtain copies of 1099's relevant to same.

Once the attorney has gathered the aforesaid, the next step is to thoroughly analyze the information and documentary proof to ascertain what impact the assets and title to said assets will have upon the guardianship proceeding and the ultimate relief requested in the petition.

"Section 675 of the Banking Law provides that the making of a deposit in the name of the depositor and another to be paid to either or to the survivor is prima facie evidence that the depositor intended to create a joint tenancy, and that when such a deposit is made, the burden of proof is upon the one challenging the presumption of joint tenancy."

In order to make this analysis pre-petition, it is imperative that the petitioner's attorney have a solid understanding of the relevant laws and legal principles with respect to the ownership of real and personal property and, particularly, the impact of the joint ownership thereof.

Common Law Rules for Ownership of Property and Their Codification

The joint ownership of both real and personal property has been recognized for centuries as a valid legal doctrine. At common law, three forms of joint ownership were recognized:

- (a) tenancy in common wherein the owner has a divisible fractional share with no right of survivorship in the other tenants' interest;
- (b) tenancy by the entirety (applicable to husband and wife and ownership of real property only, wherein each owns an undivided interest with a right of survivorship, but without the right to unilaterally sever or partition their interests); and
- (c) joint tenancy (the joint tenants have an undivided interest which can be unilaterally severed

or destroyed) and whereby the tenants have a right of survivorship.

These three common law forms of ownership have been codified in Section 6-2.2 of the New York Estates, Powers and Trusts Law (EPTL).¹ With respect to the authorization of conveyances of an interest in real property by one or more persons, the relevant statutory provisions are found in Section 240-b of the New York Real Property Law (RPL).² As to the severance of an interest(s) in jointly held real property the relevant statutory authority is found in Section 240-c of the RPL.³

Relevant Statutory Provisions for Jointly Titled Bank and Brokerage Accounts

It is important to note that the right to receive assets by operation of law in a joint account upon the death of the joint tenant does not apply to a joint ac-

count that is created and held "for the convenience" of the depositor. Accounts "for the convenience" are regulated by Section 678 of the New York Banking Law.⁴ Section 678 provides that accounts held "for the convenience" shall not affect the title to such deposit or shares. The depositor is not considered to have made a gift of one-half of the deposit or of any additions or accruals thereon to the other person, and on the death of the depositor, the other person shall have no right of survivorship in the account.⁵

In order for Section 678 of the Banking Law to apply, the words "for the convenience" or similarly "for convenience only" must appear in the title of the account.⁶ If they do not appear, then the presumptions created by Section 675 of the Banking Law will be applied.⁷

Section 675 of the Banking Law provides that the making of a deposit in the name of the depositor and another to be paid to either or to the survivor is prima facie evidence that the depositor intended to create a joint tenancy, and that when such a deposit is made, the burden of proof is upon the one challenging the presumption of joint tenancy. Under Section 675 of the Banking Law, three rebuttable presumptions are created: (i) as long as both joint tenants are living, each has a present unconditional property interest in an un-

divided one-half of the money deposited; (ii) that there has been an irrevocable gift of one-half of the funds in the account by the depositor to the other joint tenant; and (iii) that the joint tenant has a right of survivorship in the entire joint account upon the death of the other joint tenant.⁸

Section 675(b) of the Banking Law provides that the burden of proof is upon the person challenging the presumption of a joint tenancy.⁹

With respect to securities accounts or brokerage accounts in joint names, the Transfer-on-Death Security Registration Act and EPTL Sections 13-4.1 through 13-4.12 permit joint securities and brokerage account holders to have the rights and choices that joint bank account holders have.¹⁰ The Transfer-on-Death Security Registration Act was enacted on July 26, 2005 and it amended the EPTL by enacting a new part four (4) to Article 13. It is essentially codified in EPTL Sections 13-4.1 through 13-4.12.¹¹

Under EPTL 13-4.2, a “transfer on death” or “payable on death” securities or brokerage account can only be established by sole owners or multiple owners having a right of survivorship in the account. The owners of a securities or brokerage account held as tenants-in-common are expressly prohibited from creating a “transfer on death” account. The creation of a “transfer on death” or “payable on death” securities or brokerage account does not require that any specific language be utilized to create the account; however, evidence of its creation is the usage of the phrases “transfer on death” and “payable on death” or their abbreviations TOD or POD.¹¹ Under EPTL Section 13-4.4, evidence of the establishment of the account is the account opening documentation that indicates whether the beneficiary is to take ownership at the death of the other owner(s).¹²

The Pitfalls of Jointly Titled “In Trust For” or Other Accounts Where Property Passes by Operation of Law

The manner in which one holds title to property at the time the commencement of a guardianship proceeding, and at the time of the AIP’s demise, will have a critical and significant impact upon the relief sought in the guardianship proceeding. With the exception of property (real and/or personal) held jointly as tenants in common, all other jointly held property, “in trust for” accounts, “transfer on death” accounts, IRAs, 401(k)s and life insurance policies which have a named beneficiary (other than one’s estate) are accounts that pass by operation of law and are non-probate assets. Thus, they are assets that are not controlled by one’s Last Will and Testament. While for many individuals (those with relatively small estates), jointly titled property or having property passing by operation of law may be advisable, for many others it can have di-

sastrous and unforeseen consequences if not properly addressed prior to death, and particularly in the guardianship petition.

Because the ownership of real and personal property jointly with another or in a manner that it will pass by operation of law upon the death of a joint tenant is very common, it is important that said joint accounts be specifically identified in the guardianship petition and the impact upon both the AIP and any joint tenant or account/property recipient upon the death of the AIP be specifically addressed.

It requires the attorney to undertake an assessment and review of how and why the joint account(s) was created and is entitled to notice of the relief being sought, and his or her right to be heard in the guardianship proceeding. The survivorship rights of a joint tenants(s) cannot and should not be terminated or modified in a guardianship proceeding without the joint tenant being given notice of the proposed change and the opportunity to be heard. To accomplish this, it is necessary that the petitioner undertake a thorough investigation of the account(s) in issue and specifically delineate what is being proposed with respect to the joint account(s).

Identifying the Joint Accounts in the Petition

Section 81.08 of the New York Mental Hygiene Law (MHL) specifically provides for the disclosure of the approximate value of any property or assets held by the alleged incapacitated person (AIP) in the petition for the appointment of a guardian. It is incumbent upon the petitioner to undertake the necessary investigation to determine which bank or brokerage accounts the AIP has in his or her name alone or holds jointly with others and/or is the beneficiary of, and to disclose same in the guardianship petition.¹³

In doing so with respect to any bank or brokerage accounts, the petitioner should specifically identify any jointly held bank or brokerage account(s), and whether or not said joint account(s) are joint accounts entitled to the presumptions of Section 675 of the Banking Law, or are “for the convenience” accounts under Section 678 of the Banking Law, or “transfer on death” accounts with respect to any brokerage account pursuant to the Transfer-on-Death Security Registration Act and EPTL 13-4.1 through 13-4.12. The petition should specifically identify any person who has an interest in the account, the extent of his or her interest, and whether or not he or she has a right of survivorship in the account.¹⁴

In most cases this is not problematic if the joint account holder is the spouse of the AIP, and he or she has a joint account with the AIP. However, if the joint account holder is a child of the AIP or a third party, the petitioner should obtain copies of the account signa-

ture cards and any other bank or financial institution records which may describe whether the account is a joint account with rights of survivorship that is entitled to the presumptions of Section 675 of the Banking Law, a “transfer on death” account under EPTL 13-4.1 through 13-4.12, or merely a “for the convenience” account under Section 678.16 of the Banking Law.

Specifically Delineate Your Proposal as to Any Joint Account(s) or Jointly Held Real Property in the Guardianship Petition

The guardianship petition should contain a clear and concise description of the relief sought by the petitioner with respect to any joint bank or brokerage account(s) or real property. For example, if a transfer of the title of the joint account or real property from the AIP to the other named joint account holder or to a third party (not a joint tenant) is being sought, it is necessary that same be specifically requested in the petition and notice be given to the party or possible beneficiary under a will, trust or presumptive distributee whose interest in said account(s) or property may be impacted by the transfer. The petition should also specifically identify the account by its account number, name of bank or brokerage firm, as well as the existing title on said account. It should also specify the title of the account to be created once the account or any part thereof has been marshaled by the guardian, or whether an apportionment of the account or outright transfer to the other named account holder or any other party is being sought. Additionally, it is critical to address the survivorship interest of each joint tenant in the petition, and the petitioner’s proposal with respect thereto.¹⁵

If the potential exists that the AIP may need Medicaid (nursing home and/or home care services) and a transfer of the assets in a joint bank or brokerage account is being sought to the spouse, blind or disabled child (exempt transfer(s) for Medicaid eligibility), the court will usually approve a transfer of the AIP’s interest in said account(s) to the other named title holder without any apportionment to the AIP.¹⁶ This is also true if no objection to the proposed transfer is made by any other interested party to the guardianship proceeding and the AIP’s testamentary scheme as reflected in his or her Last Will or Trust is consistent with the proposed transfer.

Obviously, complications could arise when the proposed transfer is to a joint account holder who is not the spouse of the AIP. If, for example, the joint account holder is a child, family member or friend, there will be issues as to whether the child, family member or friend contributed any of the funds in the joint account(s), and whether the proposed transfer will create the five-year look-back period for nursing home Medicaid purposes (or does it qualify as an

exempt transfer to a spouse, blind or disabled child). There will also be the issue of whether the other interested parties to the guardianship will consent to the transfer, if the account is to be apportioned by and between the account holders, how title to each apportioned account will be held, and what impact the apportionment will have on the survivorship interest of each joint tenant. The protection of the survivorship interest of each joint account holder must be addressed.

For example, if apportionment is not sought and a complete transfer is made to the non-incapacitated account holder, will it be necessary that said account be held “in trust for” the incapacitated person? This could be problematic if the incapacitated person is a candidate for Medicaid benefits, and the prior death of the non-incapacitated person would result in the passage of the funds by operation of law in the account to the incapacitated person. This problem may be obviated if the incapacitated party can be the beneficiary of a Supplemental or Special Needs Trust (SNT). In that event, it would be appropriate to title the account of the non-incapacitated party “in trust for” the SNT of the incapacitated party.

Additionally, in order to protect the non-incapacitated account holder, it may be necessary that the account marshaled by the guardianship be titled “X as Guardian of the property of Y in trust for Z” so as to protect Z’s survivorship interest.

Clearly, the title of the assets held at the commencement of the guardianship proceeding and how they will be titled once a guardian has been appointed are important issues that need to be thoroughly analyzed and reviewed pre-petition by the attorney and the client.

Endnotes

1. EPTL 6-2.2.
2. RPL § 240-b.
3. RPL § 240-c.
4. Banking Law § 678.
5. *Id.*
6. *Id.*
7. Banking Law § 675.
8. *Id.*
9. *Id.*
10. EPTL 13-4.1-13.4.12.
11. *Id.*, EPTL 13-4.2, 13-4.5.
12. EPTL 13-4.4.
13. MHL § 81.08.
14. Banking Law §§ 675, 678; EPTL 13-4.1, 13-4.12.
15. MHL §§ 81.07 [d], 81.21 [c].
16. New York Social Services Law § 366.