NEWSLETTER
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Message from the Chair

Kevin Stemple

On behalf of the Board of Governors of the Trusts and Estates Section of the Virginia State Bar, I am pleased to present the Fall 2023 issue of the Trusts and Estates Section Newsletter.

This season's newsletter delves into two important topics to trusts and estates attorneys. First, Rachel Snead provides us with an analysis of estate planning considerations for individuals with mental illnesses. Rachel explains how attorneys can help clients and clients' support networks navigate mental illness challenges through use of techniques such as Advance Medical Directives, Psychiatric Advance Directives, Supported Decision-Making Agreements, and Trusts.

Next, Ellis H. Pretlow discusses the details trusts and estates attorneys should know about burial and funeral issues. Ellis analyzes some of the Virginia statutes and case law related to issues surrounding burial, cremation, and funerals, including when a decedent's family members do not agree on these very important decisions.

Many thanks to our Newsletter Editor, Emily Martin, and our Assistant Newsletter Editor, Peter Holstead Davies, for their work preparing this edition.

We would also like to extend our appreciation to the authors for generously offering their time and expertise to serve the Virginia State Bar. If you are interested in writing for future editions of the Trusts and Estates Section Newsletter, I encourage you to contact Emily (emartin@hooklawcenter.com) or Peter (phdavies@davies-davies.net).

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Estate Planning for Individuals with Mental Illness –Considerations for Practitioners

by Rachel H. Snead, Esq.

Most, if not all of us, know someone that is affected by mental illness. Mental illness refers to a wide range of conditions that affect an individual's mood, thinking, and behavior.[1] These conditions can affect a person's ability to function in daily life and can vary in severity from mild to severe.[2] It can be temporary, episodic or life-long.[3] According to the National Alliance on Mental Illness (NAMI) and the American Psychiatric Association (APA), 1 in 5 adults experience mental illness, and 1 in 20 adults experience a serious mental illness during their lifetime.[4]

With rates of mental illness being so prevalent and undiscriminating against those that it affects, attorneys should be considering and discussing the intersection between estate planning and mental illness and should be aware of the tools that can be used to best assist clients retain autonomy where possible while also protecting them during times when they are unable to make rational decisions for themselves.

Most of us, as estate planners, have likely drafted plans for individuals with mental illness at some point in our career or met with individuals with concerns surrounding the mental illness of a parent, child, beneficiary, etc. It can be difficult to have conversations about mental illness as it is a sensitive topic for most people and a subject that still faces some stigma within our society. However, it is important to ask these questions up front to ensure that all opportunities for the proper planning are utilized.

From the perspective of estate planning, individuals with mental illness face potential challenges that other clients may not face that must be considered and kept at the forefront of the planner's mind. It's important to remember that each individual, whether they have a mental illness or not, deserves a tailored solution, so that they can have as much discretion and autonomy as possible and a plan that serves their individual needs and goals. The reality for some individuals with mental illness is that there may be some limitations when crafting an estate plan. For example, (1) whether they have capacity to serve as a fiduciary, (2) the individual's ability to manage assets, (3) potential disqualification from receiving government benefits, etc.

An important consideration is the individual's ability to manage their own assets and make decisions for themselves. When someone is battling a mental illness, it may lead them to make decisions that aren't rational or in their best interest in certain circumstances or at times when their symptoms are unmanaged. This is not to say that they are never capable of making their own decisions, however, depending on the illness, an individual may experience manic episodes that cause them to overspend, or they may be more susceptible to falling prey to predatory schemes.

Not all of these limitations will apply to individuals with mental illness. However, it's important to be aware of potential limitations and challenges when planning for an individual with mental illness and to know when it's necessary to find a different solution such as a guardianship and conservatorship. However, in many cases, individuals suffering from a mental illness still have capacity to execute estate planning documents. Below is a list of estate planning tools that can be used when creating a plan for an individual with mental illness.

Advance Medical Directive

While the advance medical directive is a document that all estate planners are familiar with, there are important considerations when drafting for an individual with mental illness. The advance medical directive should include provisions that the individual can be committed to a hospital against their protestations in the event of an episode related to their mental illness. An advance medical directive with this type of provision will need to be signed by the individual's physician or licensed clinical psychologist pursuant to Virginia Code § 54.1-2986.2.[5]

Virginia Code § 54.1-2986.2 explicitly states under which circumstances a patient's agent may make health care decisions over the protest of the patient. This can be a very useful tool for individuals that suffer from mental illness but that are willing to participate in estate planning and whose symptoms are normally well managed on medications. It allows for the agent to make decisions for them during an episode, psychotic break, or other event that may temporarily make them unable to make rational decisions while still supporting the individual's autonomy over their own decisions. The goal, of course, when planning for an individual with mental illness is to interfere as little as possible with their independence, seeking to intervene only when there are issues relating to health, safety, etc.

Psychiatric Advance Directive

A psychiatric or mental health advance directive (PAD) is another tool that allows a person with mental illness to state their preferences for treatment in advance of a crisis.[6] They can serve as a way to protect a person's autonomy and ability to self-direct care while understanding that they may be in a position in the future where they are unable to be involved in decision-making regarding their medical decisions at least temporarily. Similar to an advance medical directive, a psychiatric advance directive is a legal document completed in a time of wellness that provides instructions regarding treatment or services one wishes to have or not have during a mental health crisis and may help influence his or her care.[7] A psychiatric advance directive allows the individual to specify considerations about their mental health care treatment and appoint an agent who may make decisions about their treatment in the event of a mental health crisis. This type of forethought and planning specifically related to the individual's mental health is critical to a successful plan and often overlooked in the course of normal planning.

Release of Protected Health/Psychotherapy Information

Many individuals with mental illness regularly participate in therapy sessions and are treated by a therapist, psychiatrist or other mental health professional. When drafting an authorization for release of protected health information (HIPAA) it is important to include the release of psychotherapy notes for individuals receiving counseling to ensure access to all of their medical information as well as psychotherapy notes.

Supported Decision Making Agreement

This tool may not be the first to come to mind when assisting individuals with mental illness. However, just like with individuals suffering from other illnesses or disabilities that limit capacity, the least restrictive alternative for individuals with mental illness is always preferrable when possible. For individuals with more serious mental illness that would normally be put under a guardianship and conservatorship, supported decision making (SDM) can be used to assist with decision making while enabling individuals to retain autonomy over their personal everyday decisions. SDM involves the recruitment of trusted supports to enhance an individual's capacity in the decision-making process and is memorialized in an agreement between the parties.[8] Emerging research involving individuals with cognitive disabilities suggests that guardianships are presently applied too broadly and may potentially have harmful effects such as lowered self-esteem, lower perceived self-efficacy, behavioral passivity, etc.[9] In SDM, typically individuals receive assistance from family, friends, or other trusted persons to enhance their decision making capacity and skills. Because SDM is a newer tool, there is currently little research regarding the benefits of SDM for persons with serious mental illness.[10] However, it is still a viable tool and a less restrictive

alternative that should be considered in certain situations in order to promote autonomy of individuals with mental illness.

Trusts

Finally, individuals with mental illness can benefit from having a trustee manage their assets in trust. Of course there are many different types of trusts that can be used depending on the individuals circumstances including a revocable trust, supplemental needs trust, special purpose trust, etc. If the individual is receiving or considering receiving government benefits, such as Social Security Income (SSI) and Medicaid, they may need a Supplemental Needs Trust (SNT). A SNT preserves their assets during their lifetime while allowing them to continue to receive SSI and Medicaid. This special type of trust must be carefully drafted to ensure that the individual is not made ineligible to receive the government benefits that they rely on.

A trust can also be useful for individuals who are not receiving government benefits as well but simply need assistance with the management of their assets. However, a special purpose trust (as coined by Shawn Majette) can be a very useful tool for individuals with mental illness.[11] In many ways they are like advance medical directives. They let the person with certain disabilities legally plan for a predictable flare up in symptoms by establishing a trust which he or she can change or even revoke except when the person is deemed so mentally ill that he or she cannot understand the nature of such actions. While the person is sick, the trustee protects the assets. The attraction of these trusts is that the lawyer can explain that they allow the client to control his or her own financial destiny. The trust can be changed at any time except when the client is having an episode and the trustee believes the beneficiary to be irrational. This is huge for the client because it preserves and protects autonomy. The client is the subject who acts for himself or herself, and not the object of someone else acting "for his or her best interest." When compared with the alternative, a public guardianship and conservatorship hearing many consider a demeaning, humiliating experience, these trusts are a fantastic option.

As seen above, there are a variety of estate planning tools that can be used to assist and protect individuals with mental illness that we should consider when meeting with clients that have a mental illness themselves. As with all estate plans, there is no one size fits all plan, and each plan should be created for the individual and their specific circumstances. ⚜

(Endnotes)

1. Mayo Clinic Staff. "*Mental Illness*." Mayo Clinic. mayoclinic.org/diseases-conditions/mental-illness.
2. Id.
3. Id.
4. See (NAMI cite); Ihuoma Njoku, M.D. "*What is Mental Illness*?" American Psychiatric Association. Psychiatry.org/patients-families/what-is-mental-illness.
5. Va. Code § 54.1-2986.2.
6. National Resource Center on Psychiatric Advance Directives.
7. Id.
8. Jeste DV, Eglit GML, Palmer BW, Martinis JG, Blanck P, Saks ER. Supported Decision Making in Serious Mental Illness. Psychiatry. 2018 Spring.
9. Jameson JM, Riesen T, Polychronis S, Trader B, Mizner S, Martinis J, & Hoyle D ((2015). Guardianship and the Potential of Supported Decision Making With Individuals With Disabilities. *Research and Practice for Persons with Severe Disabilities*, 40(1), 36–51.
10. Pathare S & Shields LS (2012). Supported decision-making for persons with mental illness: A review. *Public Health Reviews*, 34(2)., 1–40.
11. Majette, Shawn. Consider Special-Purpose Trusts When facing Mental Illness or Substance Abuse. Special Needs Alliance. Specialneedsalliance.org/blog/consider-special-purpose-trusts-when-gacing-mental-illness-or-substance-abuse/.

What Most Estate Planning Attorneys Don't Know about Death: Burial and Funeral Issues

by Ellis H. Pretlow

As planning and estate administration attorneys, we constantly think and talk about death and dying, but we rarely are involved in the details of our clients' burials, cremations, or funeral arrangements. We oftentimes assume that is a process best handled by family, and when it comes time for the executor to qualify under a will or for financial items to be handled, we step in as the advisor on those administrative matters. Therefore, it has been interesting and instructive to me to research the statutes and case law related to issues surrounding burial, cremation, and funerals in Virginia, especially when a decedent's family members do not agree on these very important decisions. I hope to provide a solid foundation of the current state of Virginia law in this area and also raise some issues for attorneys to consider in their own practice.

Defining Next of Kin: Va. Code § 54.1-2800

The first step in dealing with issues of burial, cremation, and funeral is defining who are a decedent's next of kin. In the absence of a burial directive (more on that later), next of kin are the responsible parties for these decisions immediately following the death of an individual and are given the authority to act for these specific decisions regardless of the appointment of a personal representative for the decedent's estate.

> 'Next of kin' means any of the following persons, regardless of the relationship to the decedent: any person designated to make arrangements for the disposition of the decedent's remains upon his death pursuant to Virginia Code § 54.1-2825, the legal spouse, child aged 18 years or older, parent of a decedent aged 18 years or older, custodial parent or noncustodial parent of a decedent younger than 18 years of age, siblings over 18 years of age, guardian of minor child, guardian of minor siblings, maternal grandparents, paternal grandparents, maternal siblings over 18 years of age and paternal siblings over 18 years of age, or any other relative in the descending order of blood relationship. Va. Code § 54.1-2800.

Very importantly, there is no hierarchy for who is defined as "next of kin" for purposes of body identification, funeral, burial, and cremation. Presumably this is to allow for flexibility and expeditiousness in arranging for the disposition of a body, but the over-inclusivity of the category of next of kin seems ripe to cause conflict.

Presumably, predicting there could be such a conflict, in 2010, the Virginia General Assembly enacted Virginia Code § 54.1-2807.01 to address a disagreement among next of kin:

> A. In the absence of a [burial directive], when there is a disagreement among a decedent's next of kin concerning the arrangements for his funeral or the disposition of his remains, any of the next of kin may petition the circuit court where the decedent resided at the time of his death to determine which of the next of kin shall have the authority to make arrange-

ments for the decedent›s funeral or the disposition of his remains. The court may require notice to and the convening of such of the next of kin as it deems proper.

B. In determining the matter before it, the court shall consider the expressed wishes, if any, of the decedent, the legal and factual relationship between or among the disputing next of kin and between each of the disputing next of kin and the decedent, and any other factor the court considers relevant to determine who should be authorized to make the arrangements for the decedent›s funeral or the disposition of his remains.

Although Virginia Code § 54.1-2807.01 seeks to provide a process for certainty in the case of disagreement among next of kin, its procedure raises more questions than it does provide answers. Practically, how would a funeral services establishment know if there is a disagreement among the next of kin and does it have the affirmative obligation to seek out approval from all possible next of kin as defined under the law? In reality, I imagine most funeral service establishments take instruction from any next of kin who it happens to speak to first, and it would be protected by the law in taking any next of kin's instruction.

Practically, how quickly must an action like the one provided for in Virginia Code § 54.1-2807.01 be instituted following a decedent's death? If an individual's remains are to be held for more than 48 hours prior to disposition, then a funeral services establishment must provide for the correct storage of the remains, and the body cannot be embalmed without the "express permission by a next of kin" or a court order, which could provide practical issues for the funeral services establishment if it is on notice of a disagreement or a pending lawsuit. Va. Code § 54.1-2811.1.

Although the law in Virginia has produced some very interesting factual cases over the years, I cannot imagine the family members involved in such litigation appreciated the issues caused by the law. *See, e.g., Goldman v. Mollen*, 168 Va. 345 (1937); *Grisso v. Nolen*, 262 Va. 688 (2001); *Mazur v. Woodson*, 191 F. Supp. 2d 676 (E.D. Va. 2002).

There have been numerous attempts since 2010 to amend the Virginia Code to provide for a hierarchy for next of kin in the form of a priority provision, but none has been passed by the General Assembly to date. Without any formal legislative history in Virginia, it is hard to opine on why the attempts have been wholly unsuccessful, but one commentator has stated that the funeral and burial industry is responsible for strong lobbying against such a priority provision. J. Rodney Johnson, Article: Wills, Trusts, and Estates, 45 U. Rich. L. Rev. 403, 415-17 (2010). The same commentator criticized the current statute as "patently defective" and has called for the institution of a "back-up priority provision." *Id* at 416. I agree that the current statutory scheme seems random and chaotic especially when compared with the very orderly hierarches laid out in Virginia's intestacy statute and Virginia's Health Care Decisions Act. Va. Code §§ 64.2-200; 54.1-2986.

In the absence of any next of kin (and if the decedent had no burial directive), burial action and disposition of remains decisions can be taken by an agent under an advance medical directive, a legal guardian, or "any other person 18 years of age or older who is able to provide positive identification of the deceased and is willing to pay for the costs associated with the disposition of the decedent's remains." Va. Code § 54.1-2807.02. Importantly, this list does not include an executor or administrator of a decedent's estate, which is who I have found most clients assume would take responsibility for such actions.

Burial Directives: Va. Code § 54.1-2825

Fortunately in 1989, the Virginia General Assembly passed a law to provide a mechanism to avoid a fight among next of kin after a decedent's death: a burial directive. Va. Code § 54.1 -2825. A burial directive appoints an agent (and successor agent if desired) to make all decisions relating to the decedent's funeral and disposition of remains. The burial directive statute does not allow for a decedent to leave specific instructions relating to burial, cremation, or funeral arrangements, but in practice I have seen these documents utilized in this way also—to

provide instructions to the agent as well as appoint the agent. It is also important to note that for the burial directive to be honored, it must be presented within forty-eight hours after a funeral service establishment has received the decedent's remains. If not, the funeral service establishment can fall back on instructions of any next of kin without any priority given to the agent in the burial directive.

I have found that a lot of estate planning attorneys (myself included) do not always include a burial directive as part of the standard estate planning package, but I argue that this document is just as important as any other testamentary document drafted by an estate planning attorney. The burial directive must be signed and notarized by the client and also accepted in writing by the agent and successor agent named in the directive for it to be valid, so oftentimes it can be practically more difficult to get accomplished but well worth it in most circumstances. *Id*.

Although a burial directive does provide a lifeline among the chaos of the next of kin provision, it does still raise some unanswered questions: If the burial directive has not been accepted by the named agent during the decedent's lifetime, is it invalid? Can the named agent accept the designation in writing following the death of the decedent? Can a burial directive be embedded within a will if the will is notarized and the designation is accepted in writing by the agent? Or, can and should the burial directive be embedded in an advance medical directive that is notarized and accepted by the agent in writing? Unfortunately, I only have questions and not any answers, but I imagine litigation will bear out these questions over time as we have seen in the area of burial and funeral arrangements.

Burial directives are especially relevant in cases of a client with a blended family or spouse that is not the parent of the client's children, no close family members, a close relationship that may not be defined by statute (friend, long-time significant other, and/or estrangement from particular family members), or for a client who has different spiritual beliefs than his or her family. Prior to same sex marriage being recognized in Virginia, it was especially important to make sure that same sex couples had a burial directive in place to avoid difficult situations between the decedent's next-of-kin and a significant other following the decedent's death who may have very different beliefs and understandings of the decedent's desires.

Burial Plots: A Surprising Result

Finally, a note on burial plots. In *Terry v. Rickett,* No. 171410, 2018 Va. Unpub. LEXIS 27, 2018 WL 6695892 (Va. Dec. 20, 2018), the Supreme Court of Virginia clarified that an owner of burial plots is contractually limited by provisions in a cemetery's bylaws or rules and regulations about the disposition of the burial plots upon death. Because the cemetery's rules and regulations stated that if a cemetery plot owner died without specifically devising the unused internment rights in a will or by written direction to the cemetery, then the burial plots passed to the owner's heirs at law pursuant to the cemetery's rules and regulations and not in accordance with the residuary clause in the decedent's will.

For these reasons, attorneys should update their estate planning intake forms to specifically inquire about the ownership of burial plots so that these issues can be dealt with while the owner is still living. If not properly handled, there could be unintended (and sometimes very surprising) results if the plots do not pass through the residuary clause of a decedent's will and instead pass through intestacy or pursuant to the cemetery's own rules and regulations. ⚜

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