Problems With Guardianship System Is Focus of John Oliver Show

John Oliver recently highlighted problems with the guardianship system on his HBO show, Last Week Tonight with John Oliver. The comedian provided a scary and funny explanation of how guardianship works, ending with a public service announcement by William Shatner, Lily Tomlin and others explaining steps you can take to avoid the guardianship.

The show focuses on the abuses of a professional guardian in Las Vegas, April Parks. She is clearly at the far end of guardianship exploitation and is currently facing prosecution on more than 200 charges. But Oliver does a good job of explaining how guardianship takes away rights without providing oversight of the people appointed to handle personal and financial decisions for people who can no longer make decisions for themselves.

He explains how courts do not have the resources necessary to provide proper oversight, reporting that only 12 states certify professional guardians. In addition, according to an investigation by the Government Accountability Office, states don't even do credit or criminal background checks on candidates for guardianship.

Nevertheless, the reality is that guardianship and conservatorship actually work in most cases. Family members seek the legal authority they need to make personal, financial and legal decisions for loved ones who have lost the capacity to do so for themselves. In many cases, these non-professional guardians don't follow through with the court reporting required by law, not because they have anything to hide but

because they don’t know that they have the obligation or don’t know how to provide the reporting. More robust follow up by the probate court could seek to enforce the reporting rules, but also could result in much more red tape without much more protection for the people under guardianship or conservatorship.

In any event, the best approach is to avoid the need for guardianship and conservatorship by putting durable powers of attorney and health care proxies in place ahead of time when you can choose who you would like to make decisions for you when necessary. Even if you’re not at risk of exploitation because your children or grandchildren would step in, the need for court intervention causes otherwise unnecessary expense and delay.

This is what estate planners counsel their clients all the time. But William Shatner, Lily Tomlin, Rita Moreno, Fred Willard, and Cloris Leachman do it so much better. With some side discussions about hippos, they recommend executing a durable power of attorney and health care proxy naming someone you trust to make decisions for you if you can’t for yourself. They all agree that the person they most trust for this role is Tom Hanks.

To watch the clip from the show, click here. (Warning: The clip contains occasional profanity.)

When Can an Adult Child Be

Liable for a Parent’s Nursing Home Bill?

Although a nursing home cannot require a child to be personally liable for their parent’s nursing home bill, there are circumstances in which children can end up having to pay. This is a major reason why it is important to read any admission agreements carefully before signing.

Federal regulations prevent a nursing home from requiring a third party to be personally liable as a condition of admission. However, children of nursing home residents often sign the nursing home admission agreement as the “responsible party.” This is a confusing term and it isn’t always clear from the contract what it means.

Typically, the responsible party is agreeing to do everything in his or her power to make sure that the resident pays the nursing home from the resident’s funds. If the resident runs out of funds, the responsible party may be required to apply for Medicaid on the resident’s behalf. If the responsible party doesn’t follow through on applying for Medicaid or provide the state with all the information needed to determine Medicaid eligibility, the nursing home may sue the responsible party for breach of contract. In addition, if a responsible party misuses a resident’s funds instead of paying the resident’s bill, the nursing home may also sue the responsible party. In both these circumstances, the responsible party may end up having to pay the nursing home out of his or her own funds.

In a case in New York, a son signed an admission agreement for his mother as the responsible party. After the mother died, the nursing home sued the son for breach of contract, arguing that he failed to apply for Medicaid or use his mother’s money to pay the nursing home and that he fraudulently transferred

her money to himself. The court ruled that the son could be liable for breach of contract even though the admission agreement did not require the son to use his own funds to pay the nursing home. (Jewish Home Lifecare v. Ast, N.Y. Sup. Ct., New York Cty., No. 161001/14, July 17,2015).

Although it is against the law to require a child to sign an admission agreement as the person who guarantees payment, it is important to read the contract carefully because some nursing homes still have language in their contracts that violates the regulations. If possible, consult with your attorney before signing an admission agreement.

Another way children may be liable for a nursing home bill is through filial responsibility laws. These laws obligate adult children to provide necessities like food, clothing, housing, and medical attention for their indigent parents. Filial responsibility laws have been rarely enforced, but as it has become more difficult to qualify for Medicaid, states are more likely to use them. Pennsylvania is one state that has used filial responsibility laws aggressively.

Take These Three Steps When Your Child Turns 18

If your child has reached the teenage years, you may already feel as though you are losing control of her life. This is legally true once your child reaches the age of 18 because the state considers her to be an adult with the legal right to govern her own life.

Up until your child reaches 18, you are absolutely entitled to access your child’s medical records and to make decisions

regarding the course of his treatment. And, your child's financial affairs are your financial affairs. This changes once your child reaches the age of 18 because your now-adult child is legally entitled to his privacy and you no longer have the same level of access to or authority over his financial, educational and medical information. As long as all is well, this can be fine. However, it's important to plan for the unexpected and for your child to set up an estate plan that at least includes the following three crucial components:

1. Health Care Proxy with HIPAA Release

Under the Health Insurance Portability and Accountability Act, or HIPAA, once your child turns 18, her health records are now between her and her health care provider. The HIPAA laws prevent you from even getting medical updates in the event your child is unable to communicate her wishes to have you involved. Without a HIPAA release, you may have many obstacles before receiving critically needed information, including whether your adult child has even been admitted to a particular medical facility.

Should your child suffer a medical crisis resulting in her inability to communicate for herself, doctors and other medical professionals may refuse to speak with you and allow you to make medical decisions for your child. You may be forced to hire an attorney to petition to have you appointed as your child's legal guardian by a court. At this time of crisis, your primary concern is to ensure your child is taken care of and you do not need the additional burden of court proceedings and associated legal costs. A health care proxy (also called a health care power of attorney or Advance Directive, depending on your state) with a HIPAA release would enable your child to designate you or another trusted person to make medical decisions in the event she is unable to convey her wishes.

2. Durable Power of Attorney

Like medical information, your 18-year-old child's finances are also private. If your child becomes incapacitated, without a durable power of attorney you cannot access his bank accounts or credit cards to make sure bills are being paid. If you needed to access financial accounts in order to manage or resolve any problem, you may be forced to seek the court's appointment as conservator of your child.

Absent a crisis, a power of attorney can also be helpful in issues that may arise when your child is away at college or traveling. For example, if your child is traveling and an issue comes up where he cannot access his accounts, a durable power of attorney would give you or another trusted person the authority to manage the issue. An alternative may be to encourage your child to consider a joint account with you. However, this is rarely recommended because of the unintended consequences for taxes, financial aid applications, creditor issues, etc.

3. Will

Your child owns any funds given to her as a minor or that she may have earned. In the catastrophic event that your child predeceases you, these assets may have to be probated and will pass to your child's heirs at law, which in most states would be the parents. If you have created an estate plan that reduces your estate for estate tax or asset protections purposes, the receipt of those assets could frustrate your estate planning goals. In addition, your child may wish to leave some tangible property and financial assets to other family members or to charity.

While a will may be less important then the health care proxy, HIPAA release or durable power of attorney, ensuring that your child has all three components of an estate plan can prevent you, as a parent, from having to go to court to obtain legal authority to make time-sensitive medical or financial decisions for your child.

Is It Better to Use Joint Ownership or a Trust to Pass Down a Home?

When leaving a home to your children, you can avoid probate by using either joint ownership or a revocable trust, but which is the better method?

If you add your child as a joint tenant on your house, you will each have an equal ownership interest in the property. If one joint tenant dies, his or her interest immediately ceases to exist and the other joint tenant owns the entire property. This has the advantage of avoiding probate.

A disadvantage of joint tenancy is that creditors can attach the tenant's property to satisfy a debt. So, for example, if a co-tenant defaults on debts, his or her creditors can sue in a "partition proceeding" to have the property interests divided and the property sold, even over the other owners' objections. In addition, even without an issue with a creditor, one co-owner of the property can sue to partition the property, so one owner can force another owner to move out.

Joint tenancy also has a capital gains impact for the child. When you give property to a child, the tax basis for the property is the same price that you purchased the property for. However, inherited property receives a "step up" in basis, which means the basis is the current value of the property. When you die, your child inherits your half of the property, so half of the property will receive a "step up" in

basis. But the tax basis of the gifted half of the property will remain the original purchase price. If your child sells the house after you die, he or she would have to pay capital gains taxes on the difference between the tax basis and the selling price. The only way to avoid the tax is for the child to live in the house for at least two years before selling it. In that case, the child can exclude up to $250,000 ($500,000 for a couple) of capital gains from taxes.

If you put your property in a revocable trust with yourself as beneficiary and your child as beneficiary after you die, the property will go to your child without going through probate. A trust is also beneficial because it can guarantee you the right to live in the house and take into account changes in circumstances, such as your child passing away before you.

Another benefit of a trust is with capital gains taxes. The tax basis of property in a revocable trust is stepped up when you die, which means the basis would be the current value of the property. Therefore, if your child sells the property soon after inheriting it, the value of the property would likely not have changed much and the capital gains taxes would be low.

In general, a trust is more flexible and provides more options to protect you and your child, but circumstances always vary.

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Preventing a Will Contest

Emotions can run high at the death of a family member. If a family member is unhappy with the amount they received (or didn't receive) under a will, he or she may contest the will. Will contests can drag out for years, keeping all the heirs from getting what they are entitled to. It may be impossible to prevent relatives from fighting over your will entirely, but there are steps you can take to try to minimize squabbles and ensure your intentions are carried out.

Your will can be contested if a family member believes you did not have the requisite mental capacity to execute the will, someone exerted undue influence over you, someone committed fraud, or the will was not executed properly. (For more information on will contests, click here.)

The following are some steps that may make a will contest less likely to succeed:

- Make sure your will is properly executed. The best way to do this is to have an experienced elder law or estate planning attorney assist you in drafting and executing the will. Wills need to be signed and witnessed, usually by two independent witnesses.
- Explain your decision. If family members understand the reasoning behind the decisions in your will, they may be less likely to contest the will. It is a good idea to talk to family members at the time you draft the will and explain why someone is getting left out of the will or getting a reduced share. Whether you should state the reason in the will itself depends on state law; in some cases, its better to remain silent. Discuss this with your lawyer.
- In some states, a no-contest clause can be useful; in others it will have little or no worth. And leaving something of value to the potentially disgruntled family

often is counter-productive because it will mean that person becomes an “interested person” entitled to certain privileges in the probate process. It’s better to disinherit the person entirely, but again discuss this with your lawyer.

- Prove competency. One common way of challenging a will is to argue the deceased family member was not mentally competent at the time he or she signed the will. You can try to avoid this by making sure the attorney drafting the will tests you for competency. This could involve seeing a doctor or answering a series of questions.
- Videotape the will signing. A videotape of the will signing allows your family members and the court to see that you are freely signing the will and makes it more difficult to argue that you did not have the requisite mental capacity to agree to the will.
- Remove the appearance of undue influence. Another common method of challenging a will is to argue someone exerted undue influence over the deceased family member. For example, if you are planning on leaving everything to your daughter who is also your primary caregiver, your other children may argue your daughter took advantage of her position to influence you. To avoid the appearance of undue influence, do not involve any family members who are inheriting under your will in drafting your will. Family members should not be present when you discuss the will with your attorney or when you sign it. To be totally safe, family members shouldn’t even drive you to the attorney.

Again, I emphasize that some of these strategies may not be advisable in certain states. For an article on how to use a will to disinherit a relative, click here.

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