

Probate and Trust Basics for the Trial Lawyer

Presenters

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Introductions



Dylan Dinkla, J.D., CTFA

- Trust Officer, Security National Bank (5 years)
- SNB Wealth Management has 7 attorneys, 3 CFAs, and a 401(k) specialist on staff
- Offices in West Des Moines, Omaha, and Dallas, TX
- Administration of unique assets and accounts, as well as traditional trust, investment management, and 401(k) administration



Greg Kenyon, Esq

- Shareholder, Bradshaw Law Firm
- Iowa Supreme Court Guardianship and Conservatorship Task Force 2015-17
- Past Chair, ISBA's Probate and Elder Law Sections
- Frequent speaker on probate and elder law topics
- Former trust officer



Abigail Hillers, Esq

- Associate, Bradshaw Law Firm
- ISBA Elder Law Section Council
- Past Chair, ISBA YLD Elder Services
- Former Trust Officer

Roadmap

- Introductions/Roadmap (5 min)
- Why is this an important topic? (10 min)
- Basics of Iowa Guardianship/Conservatorship Law (10 min)
- Updates of new Iowa Conservatorship laws (5 min)
- Medical Assistance Special Needs Trusts (15 min)
- Investments (10 min)
- Corporate Fiduciaries (10 min)
- Tying it altogether: trial strategy using a corporate fiduciary (5 min)
- Questions, Thank You's, Conclusion (15 min)



**Why is this an
important topic?**

Why is this an important topic?

Setting Client Expectations

- Guardianship/Conservatorship (G/C) or potentially a Special Needs Trust (SNT) are the next logical steps for a client after a serious personal injury or medical malpractice case
- This discussion is about “setting the table” for the handoff of the client as a personal injury client to a G/C or SNT client



Setting Client Expectations

- The “New Normal”
 - The trial lawyer should not be expected to replace the expertise of probate lawyers and trust officers
 - But you can play a vital role by demonstrating a basic knowledge of the “new normal” to the client
 - Potentially bolster the client’s confidence in the new group of professionals they will be dealing with
 - The “new normal” will look different to the client; the client (or their representative) will be expected to participate in court proceedings, provide accounting information where required, and communicate regularly with a new set of professionals

Setting Client Expectations (cont'd)

- Transition Period
 - Important time for communication amongst all interested parties
 - Good time to discuss expectations for fees for all professionals and where they will be paid from

Try to assemble the “team” early in the transition period (trial lawyer, G/C or SNT lawyer, court visitor, fiduciary, tax professional, etc.)



Iowa Guardianships and Conservatorships

Iowa Guardianship/Conservatorship Basics

- Guardianship
 - Decision-making capacity of the respondent is so impaired that the respondent is unable to care for the respondent's safety or provide necessities such as food, shelter, or medical care
 - Simple terms: Guardian has control of the physical placement and healthcare decisions of the protected person

Citation: IA Code 633, Subchapter XIII

Iowa G/C Basics (cont'd)

- Conservatorship
 - Decision-making of the respondent is so impaired that the respondent is unable to make, communicate, or carry out important decisions concerning the respondent's financial affairs
 - Simple terms: Conservator has control of the checkbook

Citation: IA Code 633 Subchapter XIV

Iowa G/C Basics (cont'd)

- Who can be a Conservator?
 - Individuals OR Corporate Fiduciaries
- Duties of the Conservator
 - *Fiduciary duty: utmost prudence and loyalty to the protected person*
 - Investments
 - Payment of bills
 - Care and maintenance of real estate
 - *Settle Claims*

Iowa G/C Basics (cont'd)

- Role of Court Visitor (f/k/a Guardian ad Litem)
 - Protect legal interests of protected person
 - Ensure that the protected person has been given notice and advised of their rights as best as can be reasonably achieved
 - Court appointed attorney; fees are paid from the estate of the protected person

Iowa G/C Basics (cont'd)

When do you need a conservatorship?

- If you are nearing settlement and your client is:
 - A minor
 - Has impaired capacity
 - Currently subject to a guardianship
- Consider using a *temporary conservatorship*

Citation: IA Code 633.585

Recent Updates to Iowa Conservatorship Law

Main takeaway: court approval required for nearly all of conservator's actions unless specified in financial plan

- Financial Plan
 - Budget
 - Investment Plan
 - Deposit and expense payment capabilities
- Bonding Requirement Changes
 - Particularly important for individuals conservators

Special Needs Trusts

Medical Assistance Special Needs Trusts

- Definition: an arrangement by which a trustee holds property for the benefit of a *Medicaid* member who is *under 65 years of age* and of which the trust fund may make distributions for the “special needs” of the beneficiary

Citation: 42 USC 1396(D)(4)(A); IA Code 633C



Special Needs Trusts (cont'd)

- Typical Situation
 - Legal settlement of a personal injury case or medical malpractice action
 - Injured client is a Medicaid recipient
 - Injured client continues to meet Medicaid guidelines if not for the injury award/settlement
 - There are ongoing medical expenses

Special Needs Trust (cont'd)

- Requirements
 - Trust must be irrevocable
 - Established by the *individual* or legal representative (i.e. conservator)
 - Created with the beneficiary's own assets
 - Most likely the injury award/settlement proceeds
 - Cannot be funded by a third party or established as part of someone else's estate plan
 - State of Iowa must be a residual beneficiary
 - Annual court reporting with the state's Medicaid Trust Program given proper notice

Special Needs Trust (cont'd)

- Distributions
 - Must be for the sole benefit of the beneficiary to “enhance the quality of life”
 - Not intended to supplant other government benefits like housing assistance
 - Must not be made if it will make the beneficiary ineligible for government assistance
 - *Single distributions exceeding \$1,000 must receive court approval*

Investments

Investments

- Uniform Prudent Investor Act
 - Applies generally to all fiduciaries
 - Definition: A fiduciary shall invest and manage trust property as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances, while exercising reasonable care, skill, and caution
 - Not just about the quality of the investment itself, but also must take into consideration economic conditions, inflation, and tax consequences

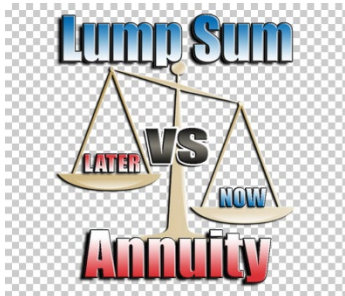
Citation: IA Code 633A.4301 – 633A.4309

Investments (cont'd)

- Large Award Considerations
 - Does an individual fiduciary have the skill to be able to manage such a large amount?
 - Is there a chance the individual fiduciary could use some of the funds to invest in their own business or another speculative investment?
 - Potential middle-ground: co-conservator with a professional or hiring a professional advisor or Bank as an investment agent

Investments (cont'd)

- Structured Settlements and Annuities
 - Common option for settlements is a structured settlement or an annuity with a guaranteed rate of return
 - Considerations
 - Ongoing medical expenses, as well as day-to-day expenses
 - Rate of return, particularly as it relates to age



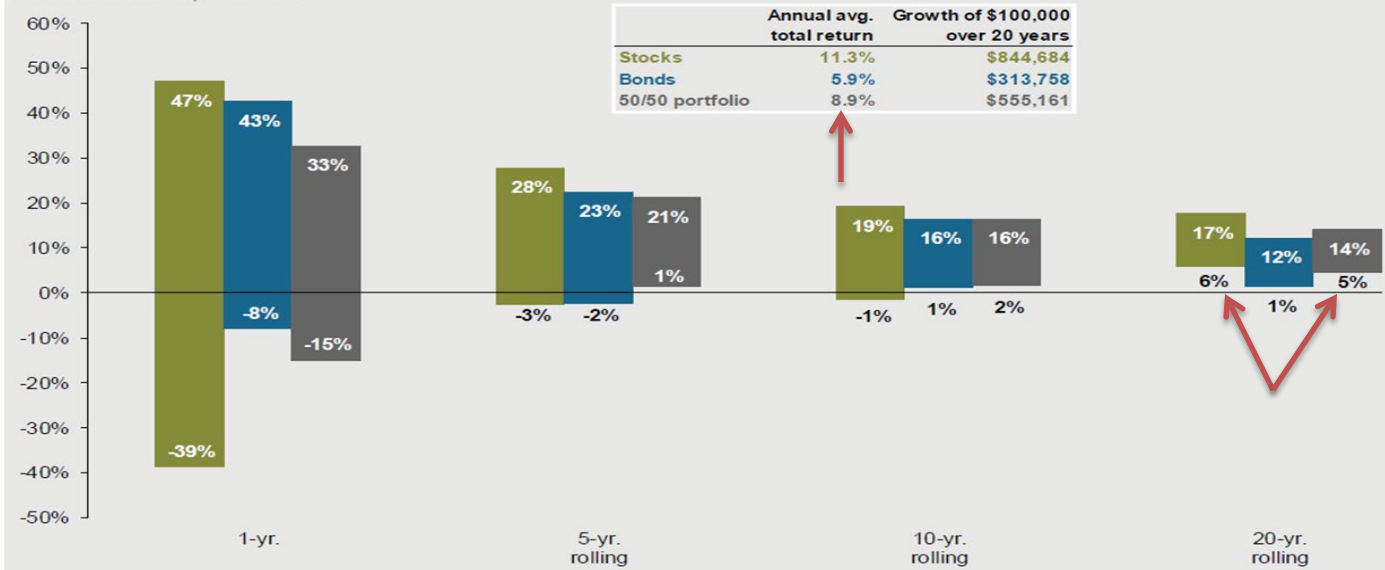
Investments (cont'd)

Time, diversification and the volatility of returns

GTM - U.S. | 65

Range of stock, bond and blended total returns

Annual total returns, 1950-2019



Source: Barclays, Bloomberg, FactSet, Federal Reserve, Robert Shiller, Strategas/Ibbotson, J.P. Morgan Asset Management. Returns shown are based on calendar year returns from 1950 to 2019. Stocks represent the S&P 500 Shiller Composite and Bonds represent Strategas/Ibbotson for periods from 1950 to 2010 and Bloomberg Barclays Aggregate thereafter. Growth of \$100,000 is based on annual average total returns from 1950 to 2019. Guide to the Markets - U.S. Data are as of June 30, 2020.

Investing principles

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J.P.Morgan
Asset Management

Credit: JP Morgan Asset Management

Corporate Fiduciaries

When and why to use a Corporate Fiduciary?

Ask yourself: Where can value be added by a professional?

- Asset base <\$200,000
 - Consideration: the corporate fiduciary's minimum annual fees and annual fee schedule (typically 1-1.5%)
- Accounts that are all cash with no investments (typically, a structured settlement)
 - The fiduciary is mostly a bill-paying service at this point

Corporate Fiduciary (cont'd)

- Advantages of using a Corporate Fiduciary
 - No bonding requirement
 - Heavily regulated by different authorities
 - Investment expertise
 - Broad base of knowledge concerning legal, tax, and Medicaid issues
 - Indefinite presence (cannot die)
 - Independent 3rd party to manage family relationships
 - Comfort with court procedure

Tying it Altogether

Tying it Altogether

A strategy for trial lawyers using the presence of a conservatorship and corporate fiduciary

- When presenting to a jury, you can bolster confidence in them to not be afraid of a large award for the client because you can assure them the funds will be managed appropriately and not at the disposal of others
- When making a settlement offer, you can feel more comfortable making demands for lump sum payouts instead of structured settlements for the same reason



Conclusion

Final Thoughts

3 goals of this presentation

- Setting client expectations for the next step and “new normal”
- Build the client’s confidence in the process
- Ensure a smooth transition from the trial world into the probate and trust world

Miscellaneous Items

- **Iowa CLE Activity ID: 349620**
- Feedback on this event or ideas for future topics that would be appealing are greatly appreciated

Disclosures

- Disclosures: this material is merely informational and illustrative and should not be considered actual legal advice or guarantee of future investment returns

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SNB Mid-year Economic Outlook

- <https://www.snbconnect.com/Wealth-Management-Publications>



Questions?



Thank you for attending!



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