Will Preparation for Individuals Lacking Testamentary Capacity

by Herb Tucker, Spencer Crona, and Martha Ridgway

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The Colorado Uniform Guardianship and Protective Proceedings Act authorizes a court-appointed special conservator to create a will for the respondent/protected person. This article describes the statutory context, basis, and protocol for exercise of that power, scope of the court's authority for review of such exercise, and legal implications of a conservator-created will.

Since January 1, 2001, a Colorado conservator has had authority to make a will for a protected person, irrespective of the protected person's testamentary capacity. The protocol prescribed by CRS § 15-14-411 facilitates conservator creation of a will, with court oversight, despite the existence of testamentary incapacity. Thus, the statute may be used to further the testamentary desires of a cognitively disabled person under conservatorship who lacks testamentary capacity, as well as to protect his or her fundamental property interests.

If properly followed, the CRS § 15-14-411 protocol effectively eliminates lack of testamentary capacity as a ground to contest a will after the death of the protected person/testator.[1] Nonetheless, other grounds for contesting the court-approved will may still be viable after the protected person's death. Further, depending on the protected person's health condition, he or she could regain capacity and revoke the court-approved will or execute a new will.

This article addresses the concept of conservator will preparation for individuals lacking testamentary capacity. It reviews the statutory history of the issue and provides an overview of the rationale for this particular section of the Colorado Probate Code ("Code").[2] The article uses a hypothetical case study to illustrate what the Code affords to a person who lacks testamentary capacity but has ascertainable preferences as to testamentary disposition of his or her estate. It discusses the procedure for preparing a will for a protected person lacking testamentary capacity, which includes court approval following proper notice and a hearing.

Statutory Context for Will Approval

The Colorado Uniform Guardianship and Protective Proceedings Act ("CUGPPA")[3] was enacted as part of the Code.[4] Before the CUGPPA went into effect on January 1, 2001, a conservator was prohibited from creating wills for protected persons. The common law uniformly held that a guardian or conservator could not make a will for his or her ward,[5] and the Uniform Probate Code codified that holding.[6]

Pre-2001 Will Powers

Prior to the CUGPPA, although a conservator lacked the power to make a will, permissible powers included will substitutes. This included the power to enter into contracts (presumably life insurance contracts to change insurance beneficiaries) and the power to enter into both revocable and irrevocable trusts, which may extend beyond the life of the

protected person.[7] In addition, Colorado courts had permitted use of the Code to:

1) Create trusts with dispositive provisions contrary to the intestacy statute;
2) Manage and dispose of minors' personal injury settlements;
3) Substitute a trust for a will for the post-death protection of assets of a disabled successor;
4) Effectuate traditional marital deduction and exemption equivalent planning; and
5) Substitute a trust for a will to take advantage of changes in the law regarding the design for generation-skipping transfers.[8]

Through the exercise of the principle of substituted judgment, a court could adjust or modify the estate plan of a protected person to take into account changes in circumstances, changes in tax law, and the evolving best interest of the protected person. The fact that the substantive standard of capacity for testation is lower than for appointment of a guardian or conservator supports the previous distinction between the court's jurisdiction involving *inter vivos* versus testamentary dispositions.

Specifically excluded in the pre-2001 law's court powers regarding protected persons are all dispositions made by will according to: (1) the statutory provisions governing power to make wills; (2) authority of a court to conduct the affairs of a protected person; and (3) voidability of sales, encumbrances, and transactions undertaken by protected persons.[9] This is because a will is ambulatory and does not "speak" until death. At the time of death, a will may be set aside if the testator is shown to have been incompetent at the execution of the will or induced into signing by fraud, undue influence, or coercion.[10]

Historically, courts of protection (regarding guardianships and conservatorships) have avoided making findings as to the protected person's testamentary capacity. This offers one explanation as to why the Code, pre-CUGPPA, excluded the power to make a will for a disabled person from the otherwise plenary powers of the conservatorship scheme. It also clarifies why inventive estate planners have found it difficult to invoke the existing protective jurisdiction of the court to obtain premortem determinations of testamentary capacity.[11]

The Code provided, in pertinent part:

> . . . the court has for the benefit of this person and members of his household, all the powers of his estate and affairs which he could exercise if present and not under disability, *except the power to make a will*. These powers include . . . power to make gifts . . . [and] to create revocable or irrevocable trusts of property of the estate which may extend beyond his disability or life. . . .[12] (*Emphasis added.*)

Thus, the former Code adopted an expanded Colorado perspective on the Uniform Probate Code II ("UPC II")[13] on the question of the limited gifting powers of the conservator.

The 2001 CUGPPA

The CUGPPA contains specific authorization for a conservator to make a will.[14] This represents an explicit and affirmative statement of the Colorado legislature effecting a clear expansion and new direction of conservatorship authority in state law.[15] The CUGPPA thus affirms the fundamental civil rights of allegedly incapacitated persons or those allegedly in need of protection.[16] Such persons might not otherwise execute a valid will pursuant to substantial testamentary capacity criteria set forth in a seminal Colorado case, *Breeden v. Stone*.[17] However, the CUGPPA consistently endows such persons with a mechanism to devise their estates.

CRS § 15-14-411 facilitated for such persons a fulfillment of one of the Code's underlying purposes: to discover and make effective the intent of a decedent in distribution of his or her property.[18] The Code should be construed liberally to effect such purposes.[19] The CUGPPA also empowers a conservator to access, and to take into account, the protected person's estate plan in the context of "investing an estate, selecting assets . . . for distribution, and invoking powers of revocation or withdrawal . . . exercisable by the conservator."[20] The CUGPPA is part of the current Code.

Worth noting in this connection is an observation about a directive consistently expressed throughout the National Conference of Commissioners on Uniform State Laws' version of an updated uniform conservator-guardian statute, the Uniform Guardianship and Protective Proceeding Act ("UGPPA"), adopted in 1999. That pertinent section of the UGPPA Comments (issued to guide interpretation of the UGPPA) states, "Such access is essential for the conservator to carry out the obligation . . . *to consider the protected person's views when making decisions*." (*Emphasis added.*) Thus, the ascertainment and consideration of the protected person's views and desires is a touchstone mandate, consistently expressed throughout both the uniform law and Colorado's version of it, the CUGPPA, including at CRS § 15-14-411(3):

> The court, in exercising or in approving, *a conservator's exercise* of the powers listed in . . . this section, shall consider primarily the *decision the protected person would have made*, to the extent that the decision can be ascertained. To the extent the decision cannot be ascertained, the court shall *consider the best interest of the protected person*. (*Emphasis added.*)

Nevertheless, the last sentence of CRS § 15-14-411(3) is unique to Colorado and is not part of the UGPPA. Also added to CRS § 15-14-411(3)(g) were the words, "including the best interest of the protected person." Presumably, the relevant issue is the intent of the protected person just prior to the time he or she lost capacity.

As indicated above, Colorado's version of this particular statute was modified from the UGPPA, such that Colorado has a best-interest standard instead of a strict substituted-judgment standard. The purpose of that particular change was to avoid Internal Revenue Service challenges to court-approved gifts and to afford the courts greater flexibility in oversight of conservator management of a protected person's assets. For instance, in Colorado, if the decision the protected person would have made cannot be ascertained, gift approval becomes dependent on such things as a history of gifting or demonstration of the protected person's tax motivations.[21] Examples include a tax-plan will or a trust for a minor.

Will-Making Power of CRS § 15-14-411

CRS § 15-14-411's statutory protocol for the making of a protected person's will states, in pertinent part, that: (1) after notice to interested persons and on express authorization of the court, a conservator may "make, amend, or revoke the protected person's will";[22] and (2) in making, amending, or revoking the protected person's will, a conservator must comply with CRS §§ 15-11-502 or -507,[23] which prescribe, respectively, procedures and requisites for will execution and will revocation. The statute further states:

> The court, in exercising or in approving, a conservator's exercise of the powers listed in . . . this section, shall consider primarily the decision the protected

person would have made, to the extent that the decision can be ascertained. To the extent the decision cannot be ascertained, the court shall consider the best interest of the protected person. The court shall also consider . . . [a]ny other factors the court considers relevant, *including the best interest of the protected person*.[24] (*Emphasis added.*)

Specifically with respect to CRS § 15-14-411(3), the 2002 Comment to the concomitant subsection of the UGPPA[25] states, in pertinent part:

. . . decisions by the conservator under this section must be based primarily on the decision that the protected person would have made, if of full capacity. The protected person's personal values and expressed desires, past and present, are to be considered when making decisions. *Carrying out the protected person's intent or probable intent* is a major theme of this article. In this regard, the section probably confirms what is already the law. (*Emphasis added.*)

In essence, CRS § 15-14-411 codifies what is established as model uniform law in prescribing conservator ascertainment of the protected person's testamentary wishes as an important component of exercise of the will-creation power.

Hypothetical Case Study

To illustrate the issues involved in preparation of a will for individuals lacking testamentary capacity, this article uses the fictional study of Carl Berger, an 82-year-old widower and Colorado resident. Neighbors called the police to report foul odors coming from Berger's apartment after he refused to allow them in. Following an investigation of self-neglect, which resulted in a court hearing, Adult Protective Services was appointed temporary guardian for Berger.

On gaining access to Berger's apartment via a police "welfare check," the responding officer had reported that Berger was living in deplorable conditions. Newspapers and magazines were stacked to the ceiling; the kitchen was filthy; rotting food was littered throughout the apartment; and there was evidence of rodent infestation. A cursory medical evaluation revealed that Berger suffered from malnutrition and paranoid ideation.

Over the previous few months, Berger was picked up on several occasions wandering in the neighborhood wearing only a T-shirt, bright fuscia boxer shorts, and socks. Berger's neighbors, who were interviewed by social services, said he always was extremely frugal, even preferring to "borrow" neighbors' newspapers rather buy his own. A neighbor also mentioned that Berger was extremely secretive about his finances and had mentioned worries that government agents might take his money.

The probate court appoints an attorney for Berger.[26] From documents Berger discloses, the attorney learns that Berger has accumulated a sizeable estate exceeding $1 million. Berger's only apparent heir is his orphan nephew, David Schultz, who attends college in Colorado. As Berger and his attorney confer, Berger speaks fondly of David and says David consistently visits and calls him. Berger has contributed financial support to David's education over the years. Although Berger recalls having some second cousins who live on the West Coast, he says he has lost contact with them over the years and remembers neither their names nor addresses.

Berger insists that his attorney prepare a will that leaves all his assets to his nephew David. The attorney has reason to believe that Berger may not have capacity to create a will and requests that Berger submit to an examination by his primary-care physician. Berger complies, and the

physician reports that although Berger sometimes appears to be alert and oriented, he suffers from dementia, most likely Alzheimer's. After Berger scores six out of a possible thirty on a "Mini-Mental State Examination," the doctor expresses concerns that Berger's cognitive deficits and delusional thinking may render him incapable of validly executing a will.[27]

Concerned about the legal and ethical issues in creating a will for Carl Berger, his attorney petitions the court pursuant to CRS § 15-14-411, requesting appointment of a special conservator for the specific purpose of preparing Berger's will. The petition is supported by an affidavit from a social worker, as well as a doctor's letter that complies with Colorado Probate Rule 27.1. Notice of the petition for the appointment of special conservator is sent to the nephew. After an evidentiary hearing, the court appoints a respected estate-planning attorney, John Smith, as special conservator, granting him authority to prepare a will for Berger.

Smith meets with Berger and confirms that he has a thirty-year-old will that leaves his estate to an old girlfriend whom he has not seen in decades. Berger reiterates that he genuinely desires to leave his estate to his nephew David. Interviews with acquaintances corroborate that, even prior to the onset of symptoms of dementia, Berger repeatedly expressed his wishes to leave his estate to David. Smith prepares the will, reviews it with Berger, and formally executes the will as special conservator.[28]

Smith then submits a verified petition to the probate court for approval of the will. The petition describes Smith's interview of the protected person and other best efforts to ascertain Berger's testamentary intent. The petition references interviews with Berger's friends and neighbors regarding his relationship with David.

After considerable effort, Smith locates Berger's California cousins and issues to them written notice of the upcoming hearing on the petition for approval of the will. The California relatives file an objection contesting the will, asserting that Berger lacked testamentary capacity and that the will was a product of the nephew's undue influence.

Despite the California relatives' objection, David (through his own lawyer) requests that the court consider the petition in strict accordance with the criteria of CRS § 15-14-411. The subjects of the objection, and the rest of the hypothetical involving Berger, will be discussed in the remainder of this article.

Standard for Review of CRS § 15-14-411 Wills

The statutory mandate under CRS § 15-14-411 affords the courts broad latitude to delineate the parameters and procedures of a conservator's will-making power. However, the statute provides no guidance concerning the court's powers to adjudicate issues of testamentary capacity or undue influence. The following discussion refers to the hypothetical example of Berger to illustrate the application of principles involving testamentary capacity and undue influence, along with the special conservator's role.

Testamentary Capacity

A deceased's expression of intent may be effectuated only by the rule of law.[29] An underlying policy of the Code is to "discover and make effective the intent of a decedent in distribution of his property."[30] Those policy principles of the Code must be read and considered in the context of CRS § 15-14-411.

In analyzing Berger's will, which the special conservator submitted for court approval, the issue is whether it comports with Berger's intent, based on consideration of the decision he would have made if he had full capacity. The answer is premised on whether that decision can be ascertained without resorting to the default criteria set forth in CRS § 15-14-411.[31] For example, it would take into account the consistency with which he expressed his testamentary wishes and the history of familial relations and contacts, which were described in the affidavits appended to Smith's petition for approval of the will.[32]

CRS § 15-14-411 fundamentally intends to permit and enable those persons who would lack one or more elements of testamentary capacity to effectuate their testamentary intent. This applies whether the intent is ascertained by clear expression, as in Berger's case, or determined by consideration of the best interest of the protected person and the other factors set forth in CRS § 15-14-411(3).[33]

The threshold question for the court is whether the decision the protected person would have made can be ascertained. If the answer is yes, that is the end of the inquiry. Pursuant to the plain language of CRS § 15-14-411(3), the protected person's ascertained decision must be the primary consideration of the court in "approving a conservator's exercise of the power" to make a will for the protected person. However, if the answer is no, "to the extent the decision cannot be ascertained,"[34] the court moves on to the "default" considerations of the person's best interest as well as additional statutory factors.

Based on the foregoing analysis, which conceives of a protocol for court review discernable directly from the language of the statute, the testamentary capacity of the protected person is irrelevant.[35] Otherwise, there would be no need for or purpose to the specific authorization for a conservator to make a will for a protected person pursuant to CRS § 15-14-411. Based on the CUGPPA history and rationale behind it, the will-making authority of CRS § 15-14-411 was designed precisely for protected persons who lack elements of testamentary capacity.

Bearing significantly on these considerations are fundamental rules of statutory construction. First, in enacting a statute, it is presumed that the legislature intends to comply with "the constitutions of the state of Colorado and the United States."[36] This was a fundamental consideration underlying the entire CUGPPA.[37] It also must be presumed that "a result feasible of execution is intended."[38]

Second, a court must avoid a statutory construction that defeats the obvious legislative intent of the statute. A court must give effect to the plain and ordinary meaning of language of the statute.[39]

Third, the section that imports consideration of testamentary capacity, CRS § 15-11-501 ("sound mind" to make a will), is *omitted* from the conservator's compliance requirements set forth in CRS § 15-14-411(2). There is a presumption that the legislature enacts statutory sections with knowledge of those already in existence.[40] Therefore, the omission of CRS § 15-11-501 from the prerequisites of CRS § 15-14-411 for a conservator-made will must be regarded as deliberate.

The considerations of statutory construction and the plain language of the statute itself support the notion that the testamentary capacity of the protected person is not a prerequisite for the creation of his or her valid will pursuant to CRS § 15-14-411(1)(g). Therefore, an objection to such will based on the protected person's lack of testamentary capacity is irrelevant as a matter of law and must be rejected.

To impose testamentary capacity of the protected person as a prerequisite to a will's validity in this statutory context

would be to engraft onto CRS § 15-14-411 an additional requirement the legislature did not intend, either in that statute or in the entire scheme of the CUGPPA. Instead, excluding the question of testamentary capacity from the analysis as irrelevant furthers the basic intent of the CUGPPA to expand and enforce recognition of the civil liberties of protected persons to retain their right to testamentary disposition of property. In Berger's case, his cognitive impairments do not compromise his fundamental right to dispose of his assets at death as he desires.

Undue Influence

In the abstract, undue influence affecting a will drawn pursuant to CRS § 15-14-411 is conceivable. However, there must be some *prima facie* showing of such influence in an objection before the issue of a petition to approve a will created pursuant to CRS § 15-14-411 can be joined.

Undue influence is subtle and must be discerned more by inference from circumstantial evidence than by direct evidence.[41] In Berger's case, no evidence has been offered, as a matter of law, from which inferences may be drawn that David unduly influenced Berger in his expression to Smith of his testamentary wishes. Further, there has been no threshold showing of undue influence "actively concerning" the preparation or execution of the will.

For a successful contest of a premortem will, Berger's contesting relatives conceivably would have the burden to show that David had somehow unduly influenced Smith in either the making of the will or in his independent assessment of the *reliability* of Berger's expressions of testamentary intent to benefit David. Those would be threshold requirements in this context for a *prima facie* showing of undue influence.

Of equivalent consequence is the protective procedure, by which the will was drawn, which precludes undue influence as a matter of law. Berger has, for his protection: (1) his own counsel, appointed by the court, who has no interest or relationship regarding David; (2) Smith, as special conservator charged by the court with a specific task, which he is duty-bound to carry out with full credibility and integrity; and (3) oversight of the court, by the very review taking place and activated pursuant to Smith's petition to approve the will. The court may review, in summary fashion, the viability of those safeguards.

Role of Special Conservator

In making a will for a protected person, a special conservator is statutorily required to attempt to ascertain the decision the protected person would have made were he or she not incapacitated.[42] However, because the protected person is incapacitated, his or her current wishes are suspect and need to be viewed critically. It is important for the special conservator to: (1) evaluate what decisions the protected person would have made in the absence of any incapacity; and (2) carefully justify the protected person's current wishes, to show that they are neither driven nor tainted by his or her current incapacity. A formal cognitive evaluation may be invaluable, and may even be necessary, to this process.[43]

Because the special conservator—not the protected person—is making the will, the special conservator has enormous power. Thus, in a post-mortem will contest involving a conservator-created will, attacks are likely to be directed toward the special conservator (the scrivener). Such an attack probably will focus on whether the special conservator properly did his or her job, rather than on the testator and the traditional grounds for a will contest.

The special conservator can minimize the likelihood that his or her work is subject to future attack. The special conservator should seek approval by the court of the will document itself. In addition, he or she must follow the procedures for its execution, as required by statute.[44] The special conservator in Berger's case has followed all of these guidelines.

Notice and Binding Effect of Court Orders

If a court entered an order regarding the validity of Berger's will in a voluntary protective proceeding, it is not clear whether such an order would protect the will in the event of an attack by Berger's heirs after his death. The answer depends on considerations of collateral estoppel and judicial notice.

David could cite *Bennett College v. United Bank of Denver, N.A.*[45] for the proposition that collateral estoppel, also known as issue preclusion, bars relitigation of an issue that was determined at a prior proceeding. The *Bennett College* case would apply if the following four prongs are met:

1. The issue precluded is identical to an issue actually determined in the prior proceeding.

2. The party against whom estoppel is sought was a party to or was in privity with a party to a prior proceeding.

3. There was a final judgment on the merits in the prior proceeding.

4. The party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding.[46]

After Berger's death, the case would be a contested formal testacy proceeding. According to the first prong of the *Bennett College* collateral estoppel analysis, the issue before the court in Berger's case would be the validity of his will. The *Bennett College* court emphasized that "[t]he issue on which preclusion is asserted must have been actually litigated and necessarily adjudicated in the prior proceeding."[47]

The broad scope of permissible orders in a voluntary protective proceeding might include the power to adjudicate the validity of the protected person's will. Thus, if the issue was "actually litigated and necessarily adjudicated," the issues would be identical. Conversely, if the original protective proceeding involved only issues of incapacity, and not specifically

testamentary capacity, collateral estoppel would not be available to bar litigation of the testamentary capacity issue at a later hearing.

The second prong requires the identity or privity of parties. Essential to the court's determination as to whether there is a nexus between parties to the first action and those to the second action will be their involvement in both proceedings. All interested persons, as defined in the Code, must be given proper notice of the voluntary protective proceeding. Notice requirements for both voluntary protective proceedings and formal testate proceedings are substantially similar.[48] Thus, the heirs should be considered parties to the prior proceeding for purposes of collateral estoppel.[49]

The third prong requires that a final judgment on the merits must have been entered in the prior proceeding. The broad scope of permissible orders in voluntary protective proceedings is relevant here. There would appear to be a wide range of issues on which the court could enter a "final judgment on the merits," such as the power to render a judgment with regard to the validity of a will.

The final prong requires that the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior proceeding. Full and fair opportunity to be heard naturally depends on proper notice to persons interested in the issue, including heirs and earlier devisees at the juncture of the petition for approval of the conservator-created will. *Bennett College* is instructive on this issue:

> Factors determinative of whether a party has been given full and fair opportunity to litigate include whether the remedies and procedures in the first proceeding, or the proceeding itself, is substantially different from the proceeding in which collateral estoppel is asserted . . . ; whether the party in privity in the first proceeding has sufficient incentive to vigorously assert or defend the position of the party against which collateral estoppel is asserted . . . ; and the extent to which the issues are identical. . . .[50] (*Citations omitted.*)

The issues to be determined in a voluntary protective proceeding typically would be dissimilar from those that would be determined in a formal probate proceeding regarding the validity of a will. However, if in the original proceeding, the court specifically made findings of testamentary capacity and that the will was not a product of undue influence, the parties arguably would have had a full and fair opportunity to litigate these issues in the prior proceeding. Thus, an objection based on collateral estoppel might be well taken.

If all four prongs of the *Bennett College* analysis could be met in the protective proceeding on the petition for approval of the will for Berger, the California relatives could be collaterally estopped from challenging the will after Berger's death as to the issues previously determined. This might include such issues as capacity, undue influence, mistake, and fraud.

Limits to Pre-Mortem Will Contest

A will operates only upon the death of the testator,[51] at which time probate of the will occurs. Pursuant to CRS § 15-12-407, undue influence and lack of testamentary capacity are issues to be raised formally by contestants to probate of a will.[52] Survival of a devisee is a prerequisite to a devise, and estate plans are not accelerated to suit the whims of heirs who wish to take while the testator is alive. Therefore, to object to a will drawn pursuant to CRS § 15-14-411, based on allegations of undue influence and lack of testamentary capacity, is an attempt to interpose issues that statutorily lack ripeness, irrespective of whether an issue of material fact could be formulated.

Nonetheless, a will for court approval pursuant to CRS § 15-14-411 is an instrument and action entirely different from a will contest. Such a will, therefore, is encompassed by a different statutory scheme than that addressing submission of a will for probate. Although a CRS § 15-14-411 proceeding differs procedurally and substantively from a post-mortem probate proceeding, as a practical matter, the results may be the same where proper notice is provided and objections are asserted based on capacity, undue influence, mistake, or fraud.

In enacting CRS § 15-14-411, the legislature presumably intended to confer on district courts authority to approve conservator-created wills prior to the protected person's death.[53] CRS § 15-14-411(3) expressly authorizes courts to approve a

conservator's exercise of powers, including the power to make, amend, or revoke a protected person's will.[54] Nevertheless, as of this writing, no Colorado appellate court has addressed the jurisdiction of courts sitting in probate to adjudicate "pre-mortem will contests" or approvals requested pursuant to CRS § 15-14-411 (1)(g).

In Berger's case, court approval of the will made by Smith does not preclude the objectors from attempting to challenge probate of that will at Berger's death. However, their objections to the preparation of the pre-mortem will—alleged grounds circumscribed by statute to formal testacy proceedings—are premature, irrelevant, and beyond the scope of the mandate of CRS § 15-14-411. The objections present a statutorily and factually groundless challenge to Berger's fundamental right to attempt to effectuate a testamentary disposition by an instrument the CUGPPA explicitly contemplates and authorizes for that purpose under CRS § 15-14-411. The court therefore should reject such challenges.

Will Contest After Testator's Death

CRS § 15-14-411 does not require that the will should be drafted based on input from people who actually knew the protected person prior to onset of dementia or other incapacity. No such requirement is imposed, either, for validity of a will made and executed by a testator in the conventional scenario, without a conservator.

Initially, CRS § 15-14-411(2) requires compliance with CRS § 15-11-502.[55] In Berger's case, the will in question fully complies with CRS § 15-11-502 in that it: (1) is in writing; (2) was signed "in the testator's name by some other individual in the testator's conscious presence and by the testator's direction;"[56] and (3) was witnessed in accordance with CRS § 15-11-502(1)(c). It would not make sense to apply the requirements of the *Breeden* standards to the protected person, because it is presumed that he or she lacks, or has questionable, testamentary capacity.[57]

Court approval is required to effectuate the will.[58] As noted earlier, CRS § 15-14-411(3) mandates court consideration "primarily" of the decision the protected person would have made, to the extent that decision can be ascertained. Only where it cannot be determined does the statute mandate court consideration of additional factors, particularly the best interest of the protected person. As set forth in special conservator Smith's affidavit, he considered Berger's best interest in making the will. Further, Berger's expression of testamentary wishes was repeatedly unequivocal. Thus, Smith has complied fully with the requirements of CRS § 15-14-411.

Judicial Notice

If the court entered an order regarding the validity of a will in a protective proceeding, it is possible that such an order could be the subject of judicial notice pursuant to C.R.E. 201 in a subsequent will contest.[59] By judicial notice of the prior order, the heirs' attack on the will could be foreclosed.

Traditionally, the use of judicial notice by Colorado courts has been circumspect. Although C.R.E. 201 is identical to F.R.E. 201, its interpretation is not governed by federal court cases, which have taken a more liberal approach to judicial notice.[60] The Colorado Supreme Court has held that C.R.E. 201

> is a codification of existing case law . . . and has traditionally been used *cautiously* in keeping with its purpose to bypass the usual fact-finding process only when the facts are of such common knowledge that they cannot reasonably be disputed.[61] (*Emphasis added; citation omitted.*)

Further, this holding ". . . may well constitute a limitation on the applicability of federal rule interpretation"[62] and may make a judicial notice argument more difficult. If, in a subsequent will contest involving Berger's will, David attempted to assert judicial notice of the prior finding of the court in the pre-mortem hearing as to Berger's lack of testamentary capacity, the California relatives may be able to argue successfully that Colorado's narrow construction of judicial notice precludes its application in the will contest.

Conclusion

To the extent CRS § 15-14-411 makes lack of testamentary capacity irrelevant to proper creation and court approval of a protected person's will, lack of testamentary capacity cannot become a relevant basis for objection to probate of a will. Undue influence accordingly is left as the sole major basis to contest such a will, but even its legitimacy is put into question (if not diminished) by the oversight prescribed by CRS § 15-14-411. Moreover, there is no jurisdiction to address such formal testacy issues until the will in question becomes operative at the death of the testator/protected person.

In the hypothetical scenario described in this article, the testamentary decision Berger would have made can be ascertained, and the will prepared and executed by Smith conforms to that decision. Moreover, the will serves Berger's best interests and even complies with the other "default" considerations of CRS § 15-14-411(3).

The risk of undue influence is minimized by the redundant protections of: (1)

the court's review; (2) court-appointed counsel for Berger; and (3) a court-appointed special conservator. Nonetheless, undue influence still could be the basis for a challenge. Court approval of the will in the hypothetical discussed in this article is warranted pursuant to CRS § 15-14-411. Berger's will-creation scenario constitutes a prime example of exactly how CRS § 15-14-411 should operate, in service to the true intent of the legislature in enacting the CUGPPA and to the fundamental rights of protected persons.

NOTES

1. This article uses the general term "testator" to refer to both a testator and a testatrix.

2. The Colorado Probate Code is codified at CRS §§ 15-10-101 e*t seq.*

3. CRS §§ 15-14-101 *et seq. See also* CRS § 15-17-102.

4. Note 2, *supra*. CRS § 15-14-101 through -433. *See also* CRS § 15-17-103.

5. *E.g., Cowan v. Cowan*, 254 S.W.2d 462 (Tex.Ct.App. 1952).

6. Uniform Probate Code ("UPC") § 407(3).

7. Wade, *Wade-Parks Colorado Law of Wills, Trusts and Fiduciary Administration* (Denver, CO: CBA–CLE, 2001) (*hereafter*, "*Wade-Parks*") at § 44.24. *See also In the Matter of Jones*, 401 N.E.2d 351 (Mass. 1980) (authorizing creation of revocable and irrevocable charitable remainder trusts for protected person who had no will); *In re Guardianship and Conservatorship of Garcia*, 631 N.W.2d 464 (Neb. 2001).

8. *Wade-Parks, supra*, note 7 at 44-41, referring to CRS § 15-14-408(4) (1995) (superseded).

9. CRS § 15-14-408(4) (1995) (superseded).

10. *Matter of Estate of Anderson*, 671 P.2d 165 (Utah 1983).

11. Langbein, "Living Probate: The Conservatorship Model," 77 *Mich. L.Rev.* 63 (1978).

12. CRS § 15-14-408 (1995) (superseded).

13. The UPC II was the first wholesale repeal and reenactment of the UPC and was adopted in 1999.

14. CRS § 15-14-411(1)(g).

15. *See* CRS §§ 15-14-101 and -17-103. Colorado repealed and reenacted CRS Parts 1-4 of Article 14, Title 15 (effective Jan. 1, 2001).

16. *See generally* Glatstein *et al.*, "Highlights of Colorado's New Guardianship and Conservatorship Laws," 30 *The Colorado Lawyer* 5 (Jan. 2001).

17. *Breeden*, 992 P.2d 1167 (Colo. 2000) (Sound mind "includes the presence of the *Cunningham* factors [the four factors of *Cunningham v. Stender*, 255 P.2d 977 (Colo. 1953)] *and* the absence of insane delusions that materially affect the will. . . ." (*Emphasis in original.*)).

18. CRS § 15-10-102(2)(b).

19. CRS § 15-10-102(1).

20. CRS § 15-14-418(4) (effective Jan. 1, 2001). However, the 2002 Comment to the parallel subsection of the UPC II (1998), § 5-418(d), which does not differ consequentially from CRS § 15-14-418(4), states, "[a]ccess to the estate plan also facilitates, where appropriate, the filing of a petition with respect to the protected person's estate as authorized by Section 5-411."

21. CRS § 15-14-411(3).

22. CRS § 15-14-411(1)(g).

23. CRS § 15-14-411(2).

24. CRS § 15-14-411(3) and (3)(g).

25. UGPPA § 5-411(c).

26. For a general discussion of client capacity and the attorney's responsibilities, *see* Walker, "Diminished Client Capacity: Ethical Considerations for Attorneys," 33 *The Colorado Lawyer* 125 (Aug. 2004).

27. For a discussion of capacity issues and information on the Mini-Mental State Examination, *see* Spiegle and Crona, "Legal Guidelines and Methods for Evaluating Capacity," 32 *The Colorado Lawyer* 65 (June 2003).

28. The execution formalities of CRS § 15-12-502 were satisfied.

29. *E.g.*, CRS § 15-10-102(2)(b).

30. CRS § 15-10-102(2)(b).

31. CRS § 15-14-411(3)(a) through (g).

32. CRS § 15-14-411(3).

33. *E.g.*, financial needs of protected person and any dependents, tax considerations, eligibility for government assistance, a previous pattern of giving or level of dependent support, any existing estate plan, life expectancy, and any other factor the court deems relevant, including the person's best interests.

34. CRS § 15-14-411(3).

35. "Lack of testamentary capacity" is defined by the *Breeden* standards, *supra*, note 17, as including the presence of the *Cunningham* factors, *supra*, note 17, *and* the absence of insane delusions that materially affect the will.

36. CRS § 2-4-201(1)(a).

37. *See* Glatstein *et al., supra*, note 16.

38. CRS § 2-4-201(1)(d).

39. *People v. Dist. Ct., 2d Jud. Dist.*, 713 P.2d 918 (Colo. 1986).

40. *Rodriguez v. Nurseries, Inc.*, 815 P.2d 1006 (Colo.App. 1991).

41. *Blackman v. Edsall*, 68 P. 790 (Colo. 1902).

42. CRS § 15-14-411(3).

43. *See* Spiegle and Crona, *supra*, note 27.

44. CRS § 15-14-411(2), referring to CRS §§ 15-11-502 or -507.

45. *Bennett College*, 799 P.2d 364, 366 (Colo. 1990).

46. *Id.*

47. *Id.*

48. *See* CRS § 15-10-401 and C.R.C.P. 57. *See also Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478 (1988).

49. *Id.*

50. *Bennett College*, *supra*, note 45 at 369.

51. *Heinneman v. Colorado College*, 374 P.2d 695 (Colo. 1962).

52. *See* Tucker and Swank, "Ante-Mortem Probate," 17 *CBA Probate & Trust Law Section Newsletter* 1 (Sept. 1996).

53. The heading of CRS § 15-14-411 is "Required Court Approval."

54. CRS § 15-14-411(1)(g). Further support for the inference that the legislature conferred such authority is found in the protocol set forth in that section. CRS § 15-14-411(3) prescribes primarily the decision that the protected person would have made for the court's consideration in rendering such approval.

55. Compliance with CRS § 15-11-507 also is required. That statute addresses revocation and is not applicable to this discussion.

56. CRS § 15-11-502.

57. *Breeden, supra*, note 17.

58. CRS § 15-14-411(1)(g) and (3).

59. For an overview of judicial notice in Colorado, *see* Burtzos, "Effective Use of Judicial Notice," 32 *The Colorado Lawyer* 47 (Jan. 2003).

60. *See Legouffe v. Prestige Homes, Inc.*, 634 P.2d 1010 (Colo.App. 1981), *rev'd*, 658 P.2d 850 (Colo. 1983) (when Colorado rule of evidence is identical to federal rule, Colorado courts will not necessarily rely on federal court interpretations of federal rule). *See also St. Louis Baptist Temple, Inc. v. Fed. Deposit Ins. Co.*, 605 F.2d 1169 (10th Cir. 1979) (federal court decision interpreting F.R.E. 201).

61. *Legouffe, supra*, note 60 at 853 (Colorado Supreme Court did not look to federal courts' expansive interpretations of F.R.E. 201 and made clear that judicial notice should be used cautiously by Colorado courts).

62. Jacobson and Bucholtz, *Colorado Rules of Evidence*, annot., 6th ed. rev. (Littleton, CO: Colo. Legal Pub. Co., Inc., 1995) at § 4-II (Rule 201). ■