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BRITNEY SPEARS: A CAUTIONARY TALE ABOUT CONSERVATORSHIPS

Written by Francine D. Ward

Britney Spears is in the news again! This time she has her posse chanting #FreeBritney all over social media. What is this movement all about? And why should average Americans care?

In 2008, due to #BritneySpears widely publicized emotional and mental breakdown due to her substance abuse problem her family petitioned the court for conservatorship. This was done not only to protect Britney but her innocent minor children from her poor parenting decisions. The court agreed that she and her small children needed protection from Britney and the court-appointed a fiduciary. In California, that person is called a conservator. In some other states, it's called a guardian. The conservator was put in place to manage Britney's legal, financial, and medical affairs. The conservatorship has been in place since 2009, despite the fact that she has been a working performer.

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Britney Spears has a huge fan base, and they have let their voices be heard. Many have spoken against the conservatorship, complaining it has been in place too long. There have even been statements from some of the attorneys who were involved in Britney's conservatorship over the years, placing doubt as to whether the conservatorship over Britney Spears and her estate should remain in place.

There have also been voices to the contrary. Those who believe Britney is not competent to manage her affairs. Her father is among them. He believes the conservatorship is necessary to protect both Britney and her children from further harm. If you've been watching the news lately, you have seen an outbreak of court proceedings. The purpose: to determine if the conservatorship should be terminated. If so, Britney Spears will once again be allowed to control her medical and financial decisions.

WHAT IS CONSERVATORSHIP?

A conservatorship is a court-approved arrangement where a judge appoints a person or organization to manage the affairs of an individual unable to do so themselves. Many people who suffer from mental health challenges or disabilities, dementia, or extreme physical disabilities require the help of someone who can make informed decisions for them. That said, a conservatorship is a drastic step and should be approached with great care.

Sometimes conservatorship is a permanent condition, and sometimes it is not meant to be. If the incapacitated person demonstrates their ability to manage their own affairs, the conservatorship is often lifted. Medical evidence testimony, and/or other evidence must show by clear and convincing evidence that the individual is able to provide properly for his or her personal needs. If this is proved, courts will often terminate the conservatorship.

Some people see Britney Spears as high-functioning and assume she is capable of handling her affairs. Outward appearances are often deceiving. That's for the judge to decide.

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POWERS OF ATTORNEY

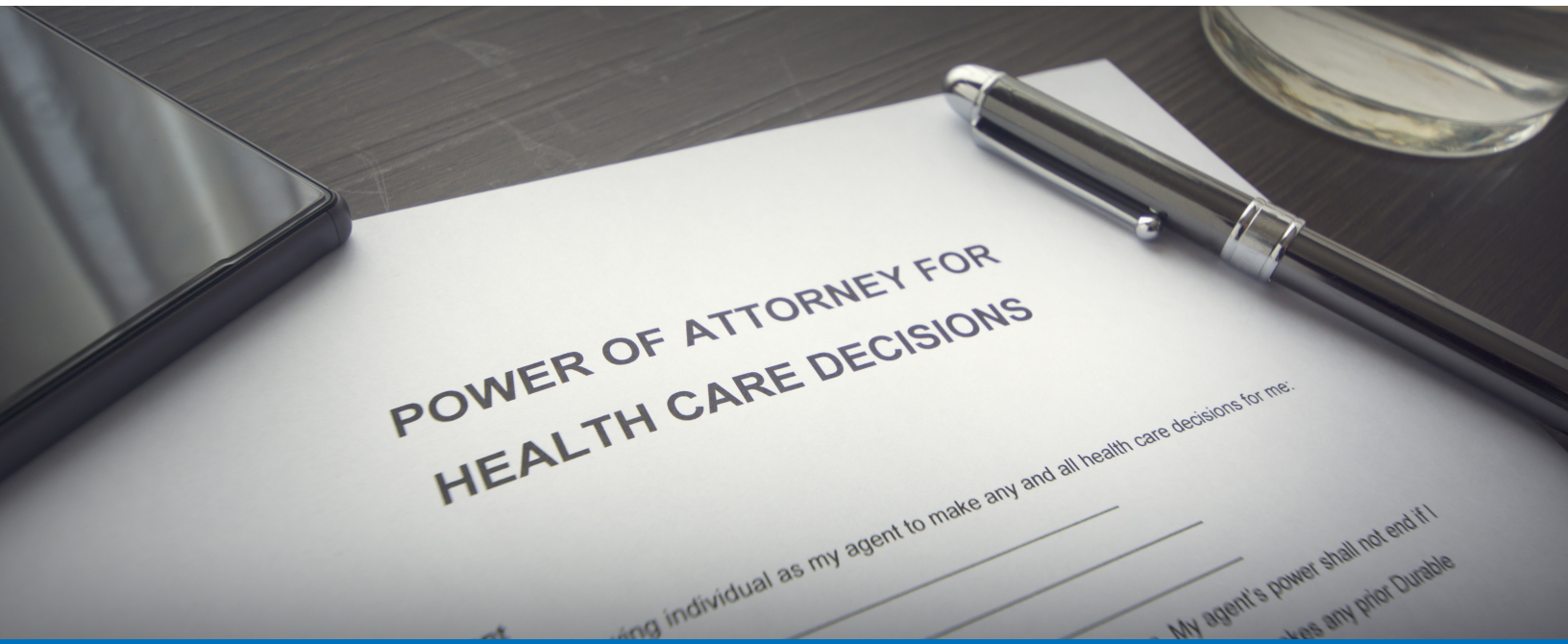
There are alternatives to conservatorship, whereby a person gets to choose who manages her affairs if she cannot. Legal documents, such as durable powers of attorney, healthcare directives, and Health Insurance Portability and Accountability Act (HIPAA) authorizations make that possible. Through the use of these documents, an individual can ensure that only the people they choose to manage their affairs will be able to do so. The creation of these estate documents is almost always significantly less expensive than a court proceeding. Court proceedings can be costly, protracted, and embarrassing. With these alternative legal documents, they can be customized. For example, with a power of attorney and the health care directive, you get to decide which powers your agent will have. Also, you can retain the power to terminate or revoke the power your agents have over you.

LIVING TRUSTS

Creating a revocable living trust and proper titling of your assets in the name of that trust is another alternative to conservatorship. Like a power of attorney, as long as you are alive and competent, you are in control. If you become incapacitated (as defined by your trust), then the person that you chose as agent will step in. The agent is the one who will manage your accounts and property generally without court intervention or oversight.

Hopefully the court will do what is not only best for Britney Spears but what is in the best interest of her children. Whatever the outcome, each of us can and should take steps today to ensure that the unfortunate experiences that she has endured are not repeated in our own lives. Working with an experienced estate planning attorney is crucial to achieving this goal.

With proper planning, you can ensure that your important legal rights are protected today and well into the future.



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WHAT IF I CANNOT FIND MY ORIGINAL ESTATE PLANNING DOCUMENTS?

Written by Francine D. Ward

As an attorney with an estate planning practice, I have received more than a few calls from the family members of former clients. The communication has gone something like this, “Hi Ms. Ward, this is XXX. My mother XYZ passed away recently, and we cannot find her estate planning documents. Despite our best efforts, neither her will nor her trust is anywhere to be found. I recall that you prepared her estate documents a few years ago, but my siblings and I are unable to find the originals. Please tell me that you have the originals stored at your office?”

Sadly, my response is always, ‘I’m sorry, I never keep originals.’ Losing original documents can be problematic for clients. That’s why I stress the importance of keeping their documents in a safe and secure place. Although some attorneys do store client documents, that practice has become less and less popular among lawyers. Many law offices are going green by storing only digital copies of legal documents. Consequently, they rightly place responsibility for the safe keeping of original documents on the client.

So what happens when the bank, title company, or court requests your original legal documents, and no one can find them?

Wills

State laws differ on how to handle a missing will. Customarily, if a document is lost or has been destroyed (e.g., in a house fire or flood), there are legal avenues for allowing a copy to be used in lieu of the original.

Several states follow the common law principle that, when a deceased person’s last will and testament cannot be found, the presumption is that the will was intentionally destroyed or revoked by the testator (deceased person). This is especially true if there is evidence that the deceased person had the will in their possession before they died. However, that presumption can be overcome with clear and convincing evidence to the contrary. Such evidence might include testimony from the deceased person’s lawyer, family, or close friends. Statements that might suggest recent changes that were made to the will. In other cases, evidence of a recent fire or flood that destroyed the will may be useful to rebut the presumption that the will maker intended to revoke the will.

In addition, if all interested parties to the will (e.g., heirs) agree that a photocopy of the will is the correct

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version, the probate court will likely permit submission of the will. But, if there are disagreements as to the validity of the photocopy, it will be rejected. If the copy is rejected and no original is to be found, the state's laws of intestacy will govern how the property is distributed. If the testator intended to disinherit certain family members, under the laws of intestacy this will be unlikely.

Equally as important is making sure your executor, trustee, and agents know how and where to locate your documents. Making sure they know where to look can make probate or the trust administration more efficient.

Financial Power of Attorney

A durable financial power of attorney is a legal document that allows you to name someone to act on your behalf in legal and financial matters (an agent) should you become incapacitated (unable to manage your own affairs). Generally, it is best practice for the agent to provide an original signed and notarized power of attorney document for it to be accepted by a financial institution, entity, or individual. In some states, an accompanying acceptance document must also be signed by the agent, notarized, and presented with the power of attorney document for the power to be valid. States that have enacted the Uniform Power of Attorney Act of 2006 typically allow a digital copy or photocopy of a properly signed power of attorney to be used in place of the original.

Other states may require that the power of attorney specifically state that a photocopy has the same force as the original for the document to be accepted. Because state laws may differ in this regard, a best practice is to be sure to keep your original signed power of attorney documents somewhere safe, and if you want a photocopy to also be valid, include language to that effect in your power of attorney. Check with an estate planning attorney who practices in your state to make sure you understand what your state's law requires.

If your state law does not allow a copy of your power of attorney to be used in place of the original, your agent may have to seek a judicial determination that the copy of your power of attorney can be used. However, if the judge declines to make that determination, your agent may be required to seek a guardianship or conservatorship over you to be able to make decisions on your behalf. Therefore, you should store your power of attorney documents carefully so that they are available to your agent if and when the agent needs to use them.

Trust

Generally, because trusts are private documents, most states don't require that they be recorded or registered. For that reason, if you can get all the trust beneficiaries to accept a photocopy as a true copy of the grantor's most recently executed trust, that may be sufficient.

The problem may be getting them all to agree. In that case you may need to seek court intervention. A time consuming and costly venture.

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Healthcare Directives

Copies of healthcare directives, or living wills are almost always as acceptable as an original. Because so many different medical professionals can be involved in the care of a single patient, it becomes impractical for each professional to have to verify that the healthcare directive is an original whenever the agent must make a decision.

Nevertheless, when differences arise regarding the care of the person who made the healthcare directive, the original legal document may be required to settle any disputes. If a bona fide dispute arises and individuals or healthcare providers cannot determine whether a copy of a healthcare directive is the most recent or should be honored, a judge may need to rule on the issue to provide direction to the incapacitated person's medical providers and loved ones.

Safeguard Your Documents

The bottom line is keep your documents in a safe place. Also, make sure those responsible to assist you know where to locate the documents. As a culture we are increasingly becoming more digitized. That said, keeping the originals safe is important. There is no better way to prove intent than presenting a signed, witnessed, and notarized original document. Each state is different, so understanding your state's laws is crucial.

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CONSIDERATIONS WHEN SELECTING A MARK FOR FEDERAL REGISTRATION

Written by Francine D. Ward

The most important step in the trademark process is selecting a mark that can likely be protected. You should exercise great care when starting this process. Contrary to popular belief on Google, it's not as simple as, "I like this word, symbol, or phrase, and so I want to use it."

Not every word, phrase, design, or symbol is registrable with the United States Patent and Trademark Office ("USPTO"). Nor is every trademark legally protectable. That is, some marks don't function as trademarks and even if they do, you can't register them. Often, parties new to the world of trademarks and to the application and registration process choose marks without understanding the law. They select trademarks for their products or services that may be difficult or even impossible to register. And even if they can register the mark, the mark might be too weak to be sufficiently protected.

Before filing a trademark or service mark application, you should consider the following:

(1) whether the mark you want to register is registrable, and

(2) how difficult it will be to protect your mark based on the strength of the mark selected. The job of the USPTO is to register trademarks. It's your responsibility, as the mark owner, to handle enforcement. The USPTO can provide general information for educational purposes, but it's not allowed to offer legal advice. The USPTO cannot tell you how to choose a mark that can be

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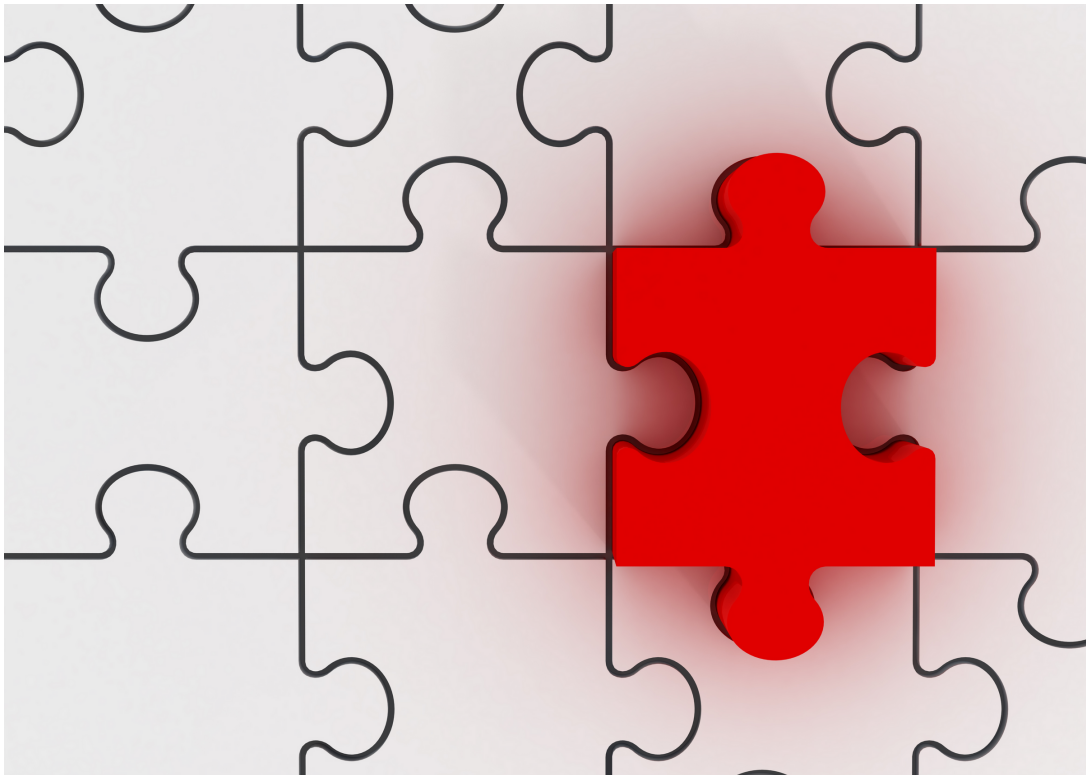
protected, nor how to file your application. There is a hierarchy of what trademark law considers a strong mark as opposed to what is deemed a weak trademark.

1. Fanciful or Coined – This type of trademark is inherently distinctive and will likely receive trademark protection. Example: Google®, Xerox®, Nike®
2. Arbitrary – This type of trademark is also inherently distinctive and will likely receive trademark protection. Example: Apple® for computers, Dominos® for pizza
3. Suggestive –This type of trademark is also distinctive, however often the registrant must prove that it is suggestive and not descriptive. Example: PetSmart® for retail stores featuring products for pets
4. Descriptive – there is a presumption that descriptive marks receive no protection, unless secondary meaning is shown. Example: Best Buy® has acquired distinctiveness over
5. Generic - Never protected by trademark. Example: aspirin, cellophane, escalator

Most often this analysis requires a lawyer who is skilled and competent in Trademark Law. A review and understanding of how



the USPTO and courts have analyzed these cases is instructive.
When considering trademark protection, make sure you choose a mark that can be protected.

That's your job or the job of the trademark lawyer you hire.

Before you file an application, make sure your trademark is strong. A strong mark is a distinctive mark. The more distinctive the trademark, the more likely it can be protected. That, so long as it's not likely to be confused with an existing registered mark or a prior-filed pending application. The most common reason for refusing registration is a "likelihood of confusion."

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