REPRESENTING CLIENTS WITH DIMINISHED CAPACITY

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"There are few subjects about which so little can certainly be known as the operation of the human mind." Alston v. Boyd, 25 Tenn. 504 (Tenn. 1846)

Deciding what to do when questions of client capacity arise is not for the fainthearted. There are no safe harbors for two primary reasons. First, the notion of capacity is an elusive, amorphous abstraction that, in practice, cannot be divorced from the complexities of the real life situation. Second, none of the rules and authorities give the lawyer adequate guidance for assessing capacity or deciding how to proceed if doubts exist. Some rules are Delphic at best.
Jan Ellen Rein, "Ethics and the Questionably Competent Client: What the Model Rules Say and Don't Say," 9 Stanford Law & Policy Review 241 (1998)

I. The Multiple Dimensions of "Capacity"

A. Terminology

1) Some use the term "competence" to describe legal status and "capacity" to refer to medical/psychological assessments

2) Some use "legal capacity" and "clinical capacity"

B. The Legal Landscape (Does the Client have Legal Capacity?)

1) Legal determination as opposed to a medical or psychological determination

2) Criminal law and civil law ramifications

3) Capacity is *presumed*

4) Capacity may be determined on a "sliding scale"

5) Civil Law: "Task Specific"

a) Capacity to enter into or continue the attorney-client relationship

b) Capacity to engage in certain transactions
   A) Make a will
   B) Make a gift
   C) Execute a revocable trust
   D) Execute an irrevocable trust
   E) Execute a durable financial power of attorney

F) Execute a health care power of attorney/living will/advance directive
G) Enter into a binding contract
H) Make binding decisions about personal care or financial matters
I) Participate in legal proceedings or mediation/arbitration

6) Lawyers and other professionals can take steps to "maximize" or "enhance" their clients' capacity

7) In extreme cases, lawyers & other professionals may need to take "protective action"

8) Model Rules of Professional Conduct ("MRPC") (ABA 2002)
Rule 1.2: Scope of Representation
Rule 1.4: Communications
Rule 1.6: Confidentiality of Information
Rules 1.7 – 1.9: Conflicts of Interest
Rule 1.14: Client with Diminished Capacity
Rule 1.16: Declining or Terminating Representation

9) ACTEC Commentaries on the Model Rules of Professional Conduct (See Appendix for ACTEC Commentary on MRPC 1.14)

10) NAELA Aspirational Standard for the Practice of Elder Law

11) American Bar Association/American Psychological Association, *Assessment of Older Adults with Diminished Capacity:*
A Handbook for Lawyers
A Handbook for Judges
A Handbook for Psychologists

12) Restatement (3d) of the Law Governing Lawyers

13) State Laws, Cases (including malpractice cases), and Ethical Rules

14) ABA and State Bar Opinions
ABA Legal Ethics Opinion 96-404 (issued under a prior version of MRPC 1.14)

15) Flowers & Morgan, *Ethics in the Practice of Elder Law* (ABA)

16) AARP, *Protecting Older Investors: The Challenge of Diminished Capacity* (2011)

B. The Medical/Psychological Landscape (Diagnosis and Treatment)

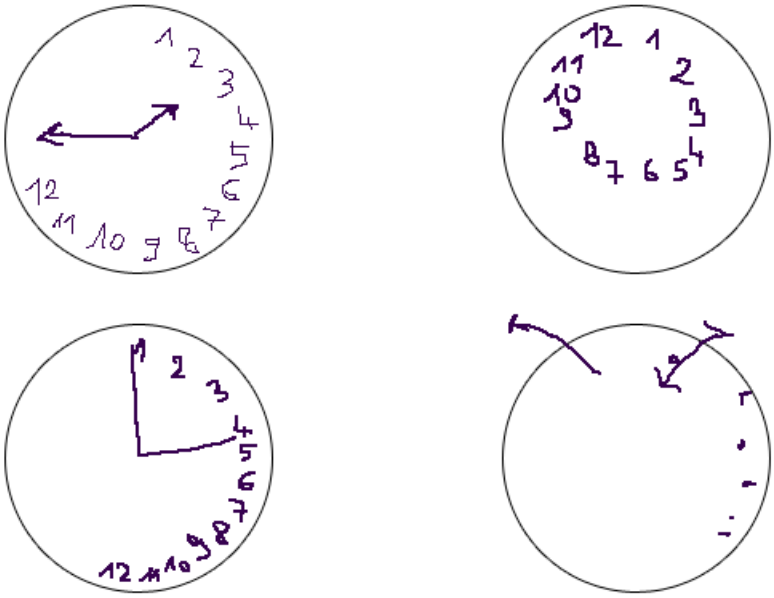
1) Capacity usually is not an "on/off" situation
    a) May be temporary
    b) May be situational
    c) May be partial
    d) May be treatable, reversible

2) Personal physician evaluations and forensic evaluations:

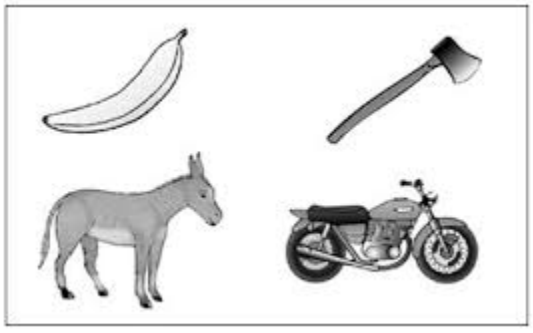
    a) Evaluators use numerous capacity assessment test and tools (e.g., Mini-Mental State Exam and Modifed MMSE; Clock Drawing test; Mini-Cog; Naming Test; Financial Capacity Indicator, etc.)
        See: National Institute on Aging's 2013 searchable database of over 100 "Instruments to Detect Cognitive Impairment in Older Adults"

        Clock-Drawing Test: Step 1: Give patient a sheet of paper with a large (relative to the size of handwritten numbers) predrawn circle on it. Indicate the top of the page.
        Step 2: Instruct patient to draw numbers in the circle to make the circle look like the face of a clock and then draw the hands

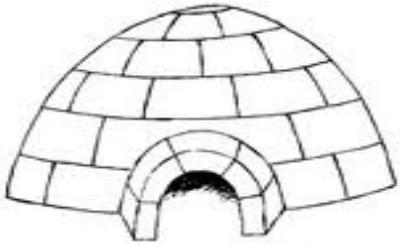
of the clock to read [e.g. “1:45” or “10 minutes to 11”].



Naming Tests (Boston Naming Test, Philadelphia Naming Test. etc.):



Cultural issues:



Generational issues:

b) American Bar Association/American Psychological Association, *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers*, p. 33, lists the following as possible evaluators: physicians, geriatricians, geriatric psychologist, forensic psychologist or psychiatrist, neurologist, neuro-psychologist, geriatric assessment team; referrals from local Area Agency on Aging, American Psychiatric Association, American Psychological Association

3) American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders (DSM)*

a) DSM-5 released in May 2013

b) DSM-5 adds 15 new mental health conditions:

Hoarding disorder; caffeine withdrawal; cannabis withdrawal; gambling disorder; excoriation (skin-picking) disorder

"For further research" topics include "Internet use gaming disorder"

c) Used for diagnosis, prescribing treatments, insurance

d) Replaces the term "dementia" with the term "neurocognitive disorder." Each disorder is now further refined into "mild" (which does not interfere with "capacity for independence in everyday activities") or "major" degrees of impairment.

4) "Grisso Model" of forensic evaluation: Commonly used 5-step model for forensic assessment:

a) Functional component: focuses on ability to perform specific task
b) Causal component: diagnosis of what is causing the incapacity
c) Person-in-situation component: examination of the context (e.g., complex estate planning vs. "simple" will)
d) Conclusory component: some controversy as to whether expert should opine
e) Remediative component

5) Functional component

a) Cognitive functioning: understanding, memory, reasoning, planning, etc. (e.g., knowing electric bill needs to be paid)

b) Behavioral functioning: actually performing the task at hand (e.g., paying the electric bill by check or online)

c) Everyday functioning:

1) Activities of Daily Living (ADLs): bathing, toileting, eating, transferring, dressing

DISTINGUISH the physical inability to take care of oneself from decision-making capacity >>

2) Instrumental Activities of Daily Living (IADLs): manage finances; manage healthcare; managing home; functioning in the community

d) Emotional/psychological functioning

6) Causal component:

Nearly 10% of people who are diagnosed with "dementia" do not actually have dementia. Some conditions that mimic dementia are sometimes referred to as "reversible dementia"

- In 2012, “Danish researchers revisited the records of nearly 900 patients thought to have dementia and discovered that 41 percent of them had received faulty diagnoses. Alcohol abuse and depression were the most common problems mistaken for dementia.” *Why You May Want to Avoid a Dementia Test*, C. Aschwanden, The Washington Post, December 16, 2013.

- 7) The current global “cost” of dementia is $600 billion. World-wide rates of dementia are predicted to triple by 2050

  a) More than 70% of cases will be individuals in poor countries with scant access to health care

  b) In December, 2013, the world leaders at the G8 Summit set a goal for finding a cure or effective treatment of dementia by 2025

POSSIBLE CAUSES OF PERCEIVED “INCAPACITY”

a) Delirium and confusion:

   1) may be temporary and treatable (particularly if identified early)

   2) possible temporary causes: drug interactions, electrolyte imbalance, dehydration or malnutrition, infection, impaired vision or hearing, myocardial problems, vitamin B-12 or folic acid deficiency, vitamin D deficiency, pain, trauma, stress, depression, anxiety, recent loss; antihistamines; hypoglycemia; build-up of toxins prior to dialysis

   3) manifestations: decreased awareness of surroundings (disorientation; wandering attention; inability to stay focused): poor thinking skills and poor memory of recent events; rambling; difficulty understanding speech; behavioral changes (restlessness, disturbed sleep, irritation, agitation, combative behavior)

   4) may exist on its own or may be in conjunction with dementia

5) onset is fairly quick and the symptoms are variable, even over the course of a day

b) "Mental illness": mood or thought disorders
   1) manic and bipolar disorders
   2) paranoia

c) Intellectual or developmental disorder ("mental retardation")

d) Physical illness or frailty: vision, hearing, etc.

e) Organic brain damage: injury, disease, etc.

f) Alcohol or drug dependency

g) Depression:
   1) Centers for Disease Control (CDC) cites this as the most common mental disorder that affects older adults

   2) 80% of people with depression can be treated

h) Dementia ("Neurocognitive Disorder")
   1) Dementia is not a disease but rather an association of symptoms associated with a general decline in mental ability

      Affects 1% of people age 60-64; 30-50% of those over age 85

      One in three seniors dies with some form of dementia

   2) Risk Factors:
      Advancing age; family history; the "Alzheimer's Gene" (Apolipoprotein E-e4 Gene); poor education; poor physical condition

   3) Stages of Dementia (Global Deterioration Scale)
      Stage One: No Cognitive Decline
         (Includes healthy people without dementia)

Stage Two: Very Mild Cognitive Decline

Normal forgetfulness associated with aging

Stage Three: Mild Cognitive Decline

Increased forgetfulness; difficulty concentrating; drop in work performance; may get lost more often; difficulty finding the right words

Lasts an average of 7 years

- Stages One – Three = "No Dementia"

Stage Four: Moderate Cognitive Decline

Decreased memory of recent events; issues with managing finances or going new places alone; trouble finishing complex tasks accurately; difficulty; difficulties in socializing which may result in withdrawal from family and friends

Lasts an average of 2 years

- Stage Four = "Early-Stage Dementia"

Stage Five: Moderately Severe Cognitive Decline

Major memory problems, such as not remembering one's address or knowing what time of day it is; need assistance with basic activities such as dressing, bathing

Lasts an average of 1 ½ years

Stage Six: Severe Cognitive Decline (Middle Dementia)

Forgets names of loved ones, little memory of recent events; need extensive assistance; difficulty completing sentences or even counting to ten backwards; decreased ability to speak; incontinence

Lasts an average 2 ½ years

- Stage Five – Six = ""Mid-Stage Dementia"

Stage Seven: Very Severe Cognitive Decline

Requires assistance with almost every activity; almost no ability to speak or communicate; often loses psychomotor skills (e.g. ability to walk)

Lasts an average 2 ½ years

- Stage Seven = “Late Dementia"

4) Dementia may be caused by over 70 diseases and conditions:

Alzheimer’s disease accounts for 60-80% of dementia (5 million Americans in 2013; expected to triple by 2050);

Vascular dementia (occurring after a stroke) is second most common (about 10% of dementias);

Other types include Parkinson’s disease, dementia with Lewy bodies; frontotemporal dementia; Creutzfeldt-Jakob disease; Huntington’s disease

One type, Normal Pressure Hydrocephalus, is sometimes correctable

- Often two or more different causes may coexist (“mixed dementia”)
  - The most common combination of dementias is Alzheimer’s disease and vascular dementia

5) Alzheimer’s Disease

a) Alzheimer’s disease is not strictly a memory disorder; it affects many other mental processes such as the ability to focus, organize thoughts, and make sound judgments

b) Alzheimer’s disease can affect emotions and personality as well as cognition

c) Some people will live with the disease 15-20 years or more

d) The progressive accumulation of the protein fragment beta-amyloid (plaques) outside neurons in the brain and twisted strands of the protein tau (tangles) inside neurons result in the damage and death of neurons

6) 10 Warning Signs (Alzheimer's Association website)
    1) Memory loss that disrupts daily life
    2) Challenges in planning or solving problems
    3) Difficulty completing familiar tasks, at home, at work, at leisure
    4) Confusion with time or place
    5) Trouble understanding visual images or spatial relationships
    6) New problems with words in speaking or writing
    7) Misplacing things and losing the ability to retrace steps
    8) Decreased or poor judgment
    9) Withdrawal from work or social activities
    10) Changes in mood and personality

7) July 2013 Alzheimer's Association conference: Leading Alzheimer's researchers are suggesting that "subjective cognitive decline," which is people's own sense that their memory and thinking skills are slipping even before others have noticed, is a potentially valid early clinical indicator of the onset of Alzheimer's disease.

8) Client "early-warning signs":
    1) Missed appointments
    2) Frequent calls to office
    3) Confusion about instructions
    4) Repetition
    5) Difficulty recalling past decisions

C. What is "Diminished Capacity"?

1. Early English law: "Idiots" ("born fools") vs. "Lunatics" (capable of regaining capacity)
    a) The King could seize the land of an idiot but only administer the land of a lunatic

2. **MRPC 1.14 (2002)**: "When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, …"

Comment 6: "In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as:

- the client's ability to articulate reasoning leading to a decision,
- variability of state of mind and ability to appreciate consequences of a decision;
- the substantive fairness of a decision; and
- the consistency of a decision with the known long-term commitments and values of the client.

3. **Uniform Guardianship and Protective Proceedings Act** (1998):
   Sec. 102(5): "Incapacitated person" means an individual who, for reasons other than being a minor, is unable to receive and evaluate information or make or communicate decisions to such an extent that the individual lacks the ability to meet essential requirements for physical health, safety, or self-care, even with appropriate technological assistance.

4. **Uniform Probate Code** (Testamentary Capacity)
   Sec. 2-501: "An individual 18 or more years of age who is of sound mind may make a will."
   Former O.C.G.A. § 53-2-21(b): A testator must have a "decided and rational desire," which was defined as "decided, as distinguished from the wavering, vacillating fancies of a distempered intellect, and rational, as distinguished from the ravings of a madman, the silly pratings of an idiot, the childish whims of imbecility, or the excited vagaries of a drunkard."

5. States' guardianship statutes incorporate:
   a) *Functional component*
   Conn. Stat. § 45A-644: "incapable of caring for oneself" and "incapable of handling one's affairs"
   (c) "Incapable of caring for one's self" or "incapable of caring for himself or herself" means that a person has a mental, emotional or physical condition that results in such person being unable to receive and evaluate information or make or communicate decisions to such an extent that the person is unable, even with appropriate assistance, to meet essential requirements for personal needs.

(d) "Incapable of managing his or her affairs" means that a person has a mental, emotional or physical condition that results in such person being unable to receive and evaluate information or make or communicate decisions to such an extent that the person is unable, even with appropriate assistance, to perform the functions inherent in managing his or her affairs, and the person has property that will be wasted or dissipated unless adequate property management is provided, or that funds are needed for the support, care or welfare of the person or those entitled to be supported by the person and that the person is unable to take the necessary steps to obtain or provide funds needed for the support, care or welfare of the person or those entitled to be supported by the person.

b) *Causal component*:

Ala. Code § 26-2A-20(8): "Incapacitated person" means "Any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, physical or mental infirmities accompanying advanced age, chronic use of drugs, chronic intoxication, or other cause (except minority)…."

c) *Vulnerability*

12 Del. Code § 3901: "…such person is in danger of substantially endangering the person's own health, or of becoming subject to abuse by other persons or of becoming the victim of designing persons;"

d) *Cultural or Religious Norms*

Ark. Code Ann. § 28-65-101(5): "(C) Nothing in this chapter shall be construed to mean a person is incapacitated for the sole reason he or she relies consistently on treatment by spiritual means through prayer alone for healing in accordance with his or her religious tradition and is being furnished such treatment."

II. ROLE OF THE LAWYER IN REPRESENTING A CLIENT WITH DIMINISHED CAPACITY

A. MRPC 1.14 (2002): A Study in Contrasts (Autonomy vs. Protection)

1. Maintaining the Norm:

MRPC 1.14(a): "When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a *normal* client-lawyer relationship with the client."

MRPC 1.2: Client directs the representation

MRPC 1.2, Comment 4: "[4] In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

ABA Op. 96-404: "A client who is making decisions that the lawyer considers to be ill-considered is not necessarily unable to act in his own interest, and the lawyer should not seek protective action merely to protect the client from what the lawyer believes are errors in judgment."

MRPC 1.14 Comment 4: "If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client."

MRPC 1.4: Maintaining communication

MRPC 1.14 Comment 2: "Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication."

MRPC 1.6: Lawyer maintains client confidences

MRPC 1.14(c): "Information relating to the representation of a client with diminished capacity is protected by Rule 1.6…."

MRPC 1.14 Comment 3: "The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege."

Note that no case examining the attorney-client *evidentiary privilege* has confirmed this MRPC statement.

Lawyer's file should reflect why the family member's participation is "necessary" and that lawyer made this determination prior to allowing the family member to participate

NOTE: **GA Rule 1:14 Comment 3** states this differently: "The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, *the lawyer should consider such participation in terms of its effect on the applicability of the attorney-client evidentiary privilege.*"

Rule 1.7- 1.9: Lawyer avoids conflicts of interest

ABA Op. 96-404: The obligation to maintain a normal attorney-client relationship "implies that the lawyer should continue to treat the client with attention and respect, attempt to communicate and discuss relevant matters, and continue as far as reasonably possible to take action consistent with the client's directions and decisions."

Conn. Informal Ethics Op. 97-17 (Lawyer who represents client in a personal injury case who suffered a traumatic brain injury is concerned that client may be unable to comprehend the consequences of her actions):

"Your first requirement is to provide a normal client-lawyer relationship. A primary aspect of a normal client-lawyer relationship is maintaining communications with the client. You have made repeated efforts to communicate with the client and should continue to do so in a

reasonable fashion. See Rule 1.4. Even though your client has told you that she would send “written instructions” to you regarding her case, which have yet to come, she needs to be informed that her arbitration may be dismissed due to the lack of action in the matter. Presumably, you have already made it clear to her that you are not representing her in regards to her first accident. Your client still deserves your attention and respect.

A fairly recent interpretation of Rule 1.14 is ABA Formal Opinion 96-404 (8/2/96) which provides the basis of this opinion and copy of this opinion is attached hereto. The most difficult task is determining whether under Rule 1.14(b) you must take protective action with respect to your client. You must believe that your client cannot act in her own best interests, but this should not be based upon what you believe are ill-considered judgments alone. If you feel that you have doubts about your client's ability to act in her own best interests, it may be appropriate to seek guidance from an appropriate diagnostician. You have already attempted to discuss this matter with your client's parents and this discussion is permitted provided it is limited to your observations and conclusions of your clients' behavior, capacity and appropriate protective action.

Before you attempt any protective action, you must determine that other, less drastic, solutions are not available….

After a thorough review of the situation, your professional judgment may lead you to believe that protective action is necessary. This could mean applying for the appointment of a conservator (voluntary or involuntary) or guardian ad litem.

While Rule 1.14 does allow a lawyer to take protective action on behalf of a client, it is not a mandate a lawyer must follow. Obviously, many lawyers would feel uncomfortable filing for protective action for their client. Termination of representation is permissible, but must be performed “without material adverse effect on the interests of the client”. Rule 1.16(b). For a discussion of Rule 1.16 see Informal Opinion 93-07. While the undesirability of filing for protective action may lead some to search for the provisions of Rule 1.16(b), a withdrawal from a client at this time probably occurs when the client needs representation most. Another lawyer may have the same communication problems that you are experiencing. The ABA opinion states that it is a better course of action for lawyers to stay with the representation and seek appropriate

> protective action, although this does not prohibit withdrawal.
> In conclusion, if you are representing a client with a disability which falls under Rule 1.14, your first and foremost obligation is to maintain a normal attorney-client relationship, which would include maintaining communications with your client. Prior to taking any protective action, you should determine that other less drastic solutions are not available. If filing for a protective action is the only avenue available, it should be as limited as possible. Finally, the Rules do provide that an attorney can withdraw from representation, but this is not a preferred course of action."

North Carolina 98 Formal Ethics Opinion 16 (Jan, 1999): Lawyer was asked by the husband of his allegedly incapacitated wife to investigate why she had been removed from the family home. The lawyer met with the wife, who indicated that she wanted the lawyer to represent her and that she wanted to go home to live with her husband rather than becoming a ward of the state. Although the lawyer noticed abnormalities in the wife's behavior, he also noted extended periods of lucidity and a consistent desire on her part not to have a guardian appointed for her. At the hearing, the state Department of Social Services (DSS) claimed the lawyer had "no standing or authority" to object on behalf of the wife. The wife testified at the hearing and could not identify the lawyer as her lawyer but did express a desire to be returned to the family home. A guardian was appointed for the wife and the lawyer appealed on her behalf. DSS objected to the lawyer's continued representation of the wife, who had now been declared "incompetent". The Formal Ethics Opinion cited Rule 1.14 and stated that "if [the lawyer] is able to maintain a relatively normal client-lawyer relationship and [the lawyer] reasonably believes that Wife is able to make adequately considered decisions in connection with her representation, [the lawyer] may continue to represent her alone without including the guardian in the representation." The Opinion also stated that the "lawyer owes the duty of loyalty to the client and not to the guardian or legal representative of the client, particularly if the lawyer concludes that the legal guardian is not acting in the best interest of the client."

2. On the Other End of the Spectrum: Emergency situations: Exploitations, Scams, Elder Abuse

a) **MRPC 1.14(b):** "When the lawyer reasonably believes that the client:

-has diminished capacity;

-is at risk of substantial physical, financial or other harm unless action is taken; *and*

-cannot adequately act in the client's own interest

the lawyer *may* take reasonably necessary protective action…."

b) **MRPC 1.14 Comment (9):** "In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with *imminent and irreparable harm*, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client."

3. **Overlap of MRPC 1.6 and MRPC 1.14**:

MRPC 1.14(b): "… the lawyer may take reasonably protective action, , *including consulting with individuals or entities that have the ability to take action to protect the client* and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

MRPC 1.14(c): "…When taking protective action pursuant to paragraph (b), the lawyer is *impliedly authorized* under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests."

Even if the client does not have diminished capacity:

MRPC 1.6(b): (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) *to prevent reasonably certain death or substantial bodily harm*;
(2) to prevent *the clie*nt from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from *the client's commission* of a crime or fraud in furtherance of which the client has used the lawyer's services;

COMPARE:

Georgia RPC 1.6(b)(1): A lawyer may reveal information covered by paragraph (a) which the lawyer reasonably believes necessary:

i. to avoid or prevent harm or substantial financial loss to another as a result of client criminal conduct *or third party criminal conduct* clearly in violation of the law;

ii. to prevent serious injury or death not otherwise covered by subparagraph (i) above;

New Hampshire Ethics Committee Advisory Op. # 2014-15/5: "Can an Attorney Disclose Confidential Client Information, Over a Client's Objection, to Protect the Client from Elder Abuse or Other Threats of Substantial Bodily Injury?"

Client with diminished capacity: "More important, if the client or lawyer discusses ongoing elder abuse during consultations with an outside specialist, the information may trigger a reporting obligation that does not apply to the attorney. A report to law enforcement, of course, may be a consequence that the client vehemently opposes. It may also result in an involuntary change in living arrangements, guardianship and even the arrest and prosecution of a close family member. These steps may protect the client, but there may also be less

draconian measures that provide similar protection with less disruption. *Before bringing third parties into the situation, therefore, the attorney should attempt to determine whether reporting obligations will be triggered, or whether the attorney-client privilege will be waived.*"

"In sum, Rule 1.6(b) (1)*–even in the absence of diminished capacity–* may also authorize an attorney to use or disclose confidential client information, over the client's objections, in order to prevent substantial harm to the client from occurring or continuing."

B. Navigating the murky waters between a "normal attorney-client relationship" and taking "reasonably necessary protective action": the client with "borderline" capacity

CASE STUDY #1

The grandson of Leonora Jones has made an appointment for her with you to discuss changing her estate plan. When Leonora and the grandson (George) arrive at your office, you note that Leonora appears shaky and frail. She insists that "Georgie" remain in your office with her. You converse with Leonora for a bit about her family. Leonora seems very confused as to how many children and grandchildren she has. She becomes very emotional and tells you, "They are all trying to steal my money from me, except for my dear Georgie. They can't wait until I die." George explains that Leonora has decided to devise a substantial sum of money to a testamentary trust for the care of her five pet Cavalier King Charles Spaniels. Leonora adds that "Georgie" will take care of the dogs and, in return, he will have whatever money is left over when the last of the dogs dies.

1. Can a client with diminishing capacity enter into or remain in an attorney-client relationship? New Client vs. Existing Client

A. *New Client*

a. Client must have capacity to enter into a contract

b. **MRPC 1.14, Comment 6** factors (the first three) should be explored in the initial interview:

1) the client's ability to articulate reasoning leading to a decision [to come to you for counsel],

2) variability of state of mind and ability to appreciate consequences of a decision;
3) the substantive fairness of a decision

c. Speak with the client alone; explore the reasons for the consultation; etc. (see below for more details about lawyers assessing capacity).

d. Some states allow an individual under guardianship to enter into an attorney-client relationship in limited circumstances:

O.C.G.A. § 29-4-20(a): "In every guardianship, the ward has the right to: (5) Individually or through the ward's representative or legal counsel, bring an action relating to the guardianship…."

At the outset of the action, consider asking the judge to approve the attorney-client relationship

CASE STUDY #2 (Part 1)

Suppose instead that three years ago Leonora consulted you and together you and she put into place an estate plan that would divide her estate equally among her children. Last year you drafted for her a durable financial power of attorney naming her grandson George as her agent. Leonora and George appear in your office and the scenario described in Case Study #1 ensues. You are saddened during this most recent visit to see how much Leonora's physical and emotional states have declined. You are worried that Leonora has "lost it." You are also concerned about her apparent dependence on George, his apparent eagerness to handle her affairs, and his apparent happiness at being appointed trustee and remainder beneficiary.

B. *Existing client whose capacity has diminished*

1. Under traditional agency law, doesn't the principal-agent relationship terminate automatically when the principal becomes incapacitated?

1) Restatement (3d) of the Law Governing Lawyers, § 31, cmt. e expressed disapproval of this rule: "If representation were terminated automatically, no one could act for the client until a guardian is appointed, even in pressing situations."

2) The Restatement (3d) of Agency, § 3.08 (2006) contains a new rule, "Loss of Capacity" that will mitigate the harsh rule of the older Restatements.

2. **MRPC 1.14** seems to presume continued representation. **ACTEC Commentaries to MRPC 1.14**:

Person With Diminished Capacity Who Was a Client Prior to Suffering Diminished Capacity and Prior to the Appointment of a Fiduciary. A lawyer who represented a client before the client suffered diminished capacity may be considered to continue to represent the client after a fiduciary has been appointed for the person. Although incapacity may prevent a person with diminished capacity from entering into a contract or other legal relationship, the lawyer who represented the person with diminished capacity at a time when the person was competent may appropriately continue to meet with and counsel him or her.

3. May a lawyer whose existing client's capacity becomes diminished withdraw from representation?

a. **MRPC 1.16:**

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client; …

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement; ….

b. **MRPC 1.16, Comment 6**:

[6] If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 1.14.

c. **ABA Op. 96-404** (examining an earlier version of MRPC 1.14): "On the other hand, while withdrawal in these circumstances solves the lawyer's dilemma [of no longer being authorized to act for an incapacitated individual], it may leave the impaired client without help at a time when the client needs it most. The particular circumstances may also be such that the lawyer cannot withdraw without prejudice to the client. For instance, the client's incompetence may develop in the middle of a pending matter and substitute counsel may not be able to represent the client effectively due to the inability to discuss the matter with the client. Thus, without concluding that a lawyer with an incompetent client may never withdraw, the Committee believes the better course of action, and the one most likely to be consistent with Rule 1.16(b), will often be for the lawyer to stay with the representation and seek appropriate protective action on behalf of the client."

d. What if Georgie has convinced Leonora to hire another lawyer and you receive a letter from that lawyer asking for the return of her files?

Mass. Bar Ethics Op. 04-1 (2004): "A lawyer discharged by a client should normally turn over the client's file to a new attorney when requested to do so. When circumstances indicate that the client may not have had the capacity to make an adequately considered decision to discharge the lawyer, the lawyer should take further steps to ascertain whether the discharge represents the client's real wishes. Moreover, if the lawyer concludes that the client did not have such capacity and if the lawyer reasonably believes that the client is at risk of substantial harm, physical, mental, financial, or otherwise, the lawyer may consult with family members in order to protect the client's interests and may disclose confidential information of the client to family members, but only to the extent necessary to protect client's interests."

4. When you initially enter into the attorney-client relationship, consider using an engagement letter that anticipates your client's possible incapacity: e.g., advance consent to consult with certain family members.

> **ACTEC Commentary to MRPC 1.14**: "As a matter of routine, the lawyer who represents a competent adult in estate planning matters should provide the client with information regarding the devices the client could employ to protect his or her interests in the event of diminished capacity, including ways the client could avoid the necessity of a guardianship or similar proceeding…. A lawyer may properly suggest that a competent client consider executing a letter or other document that would authorize the lawyer to communicate to designated parties (e.g., family members, health care providers, a court) concerns that the lawyer might have regarding the client's capacity."

Assume that you decide to continue your attorney-client relationship with Leonora:

2. Does the client have the capacity to enter into the transaction at issue?

A. Don't forget:

a) Differing transactions have differing levels of capacity
e.g., testamentary capacity vs. capacity to contract

b) Different states have different levels of capacity for the same transaction:

> O.C.G.A. §53-12-23: "A person has capacity to create an inter vivos trust to the extent that such person has legal capacity to transfer title to property inter vivos. A person has capacity to create a testamentary trust to the extent that such person has legal capacity to devise or bequeath property by will."
>
> N.C.G.S.A. § 36C-6-601: "The capacity required to create, amend, revoke, or add property to a revocable trust or to direct the actions of the trustee of a revocable trust, is the same as that required to make a will."

c) Client must have capacity at the time the transaction is entered into

1) Even a client who has been placed under a guardianship may retain some capacity – e.g., testamentary capacity ("lucid interval")

3. Does the lawyer have a duty to assess the client's capacity?

A. **General rule: ACTEC Commentaries to MRPC 1.14:** "If the testamentary capacity of a client is uncertain, the lawyer should exercise particular caution in assisting the client to modify his or her estate plan. The lawyer generally should not prepare a will, trust agreement, or other dispositive instrument for a client who the lawyer reasonably believes lacks the requisite capacity. On the other hand, because of the importance of testamentary freedom, the lawyer may properly assist clients whose testamentary capacity appears to be borderline. In any such case the lawyer should take steps to preserve evidence regarding the client's testamentary capacity."

1. Sullivan v. Sullivan, 273 Ga. 130, 539 S.E.2d 120 (2000): On July 31, 1997, less than two weeks before Client Leo's death, his lawyer went to his home bearing two wills she had prepared, reflecting slightly different alternatives but both reflecting his basic plan. The lawyer was concerned about Leo's increasingly perilous mental and emotional condition and his capacity to make a will. She asked to meet with Leo alone and found him to be very confused about his family situation and his estate plan. The lawyer then told Leo's wife, Sarah, of her concerns. The lawyer was then surprised when, in just a few minutes, Sarah entered the living room with Leo dressed and seated in a wheelchair. Sarah stated that she did not care if the will was contested, it had to be signed that day, that it was "now or never." Leo executed the will under the lawyer's supervision. The lawyer then returned to her office and memorialized her concerns in a document she entitled "Memo to File in Anticipation of Litigation." At trial, the lawyer testified that she thought that Leo's capacity was in the "grey area" but she believed that if he was going to sign the will, she needed to do so that day. The jury found that Leo had lacked testamentary capacity and been the victim of Sarah's undue influence.

2. Vignes v. Weiskopf, 42 So. 2d 84 (Fla. 1949): Even though testator was found to have lacked testamentary capacity, Florida court did not fault the attorney who supervised the execution of the codicil. The

client was in a great deal of pain and under the influence of several strong medications, including "cobra venom." The court observed:

> "Had the attorney arrogated to himself the power and responsibility of determining the capacity of the testator, decided he was incapacitated, and departed, he would indeed have been subjected to severe criticism when, after the testator's death, it was discovered that because of his presumptuousness the last-minute effort of a dying man to change his will had been thwarted."

B. Duty to make reasonable inquiry:

1. In re Hughes Revocable Trust, 2005 WL 2327095 (Mich. App. 2005): The attorney had "a responsibility to assess his client's mental capacity." Lawyer in this case had been told that the testator was often confused. When he met with the testator and her husband, the husband did all the talking. The court criticized the attorney for making no attempt to determine the testator's capacity.

2. San Diego Op. 1990-3 (1990): "A lawyer must be satisfied that the client is competent to make a will and is not acting as a result of fraud or undue influence…. The attorney should schedule an extended interview with the client without any interested parties present and keep a detailed and complete record of the interview."

3. Logotheti v. Gordon, 414 Mass. 308, 607 N.E.2d 715 (1993): "An attorney owes to a client, or a potential client, for whom the drafting of a will is contemplated, a duty to be reasonably alert to indications that the client is incompetent or is subject to undue influence and, where indicated, to make reasonable inquiry and a reasonable determination in that regard. An attorney should not prepare or process a will unless the attorney reasonably believes the testator is competent and free from undue influence."

4. Norton v. Norton, 672 A.2d 53 (Del. 1993) (dicta): Lawyer who drafted the will did not meet with the testator until the day he came to the hospital to present her with a document drafted at the direction of one of the testator's children that left her estate primarily to that child. "Although the question of testamentary capacity was not the principal focus of this appeal, we take the occasion to emphasize the

importance for a lawyer who drafts a will, particularly for an aged or infirm testator, to be satisfied concerning competence and to make certain that the instrument as drafted represents the intentions of the testator…. [D]irect communication which precedes drafting of the instrument should be the norm if the lawyer is to discharge his obligation of assessing testamentary competence."

5. Persinger v. Holst, 248 Mich. App. 499, 639 N.W.2d 594 (2001): Lawyer was contacted by two former clients about drafting a will and power of attorney for a widow to whom the clients were not related. Lawyer met with the widow, drafted both documents and supervised their execution. The power of attorney named one of the former clients as agent and the will named him as the sole beneficiary of her estate. The former client used the POA to divert money and property to himself. A conservator was appointed for the widow four months after she had signed the documents and the conservator sued the lawyer for legal malpractice. The court refused to find the lawyer liable. "In this case, defendant [the lawyer] made reasonable inquiry into Fuite's [the widow's] understanding of the nature and legal effect of the power of attorney that she requested before its execution. Although Fuite was subsequently adjudicated incompetent, at the time she executed the power of attorney defendant exercised reasonable professional judgment with regard to its execution. Further, even if defendant was mistaken, "mere errors in judgment by a lawyer are generally not grounds for a malpractice action." [citation omitted] This is not a case where defendant had actual knowledge that Fuite was incompetent. Similarly, the record fails to reveal overt or unmistakable signs of incompetency, or other extraordinary circumstances that would reasonably lead defendant to conclude that Fuite was incapable of understanding the nature and consequences of her actions."

4. How does a lawyer assess a client's capacity?

A. Common-sense approach – "I know it when I see it."

1) Avoid stereotype of "ageism": Would you reach a different conclusion if your client were age 35 instead of 85?

2) Avoid value judgments: Bad judgment is not the same as lack of judgment

3) **ACTEC Commentaries to MRPC 1.14:** "In determining whether a client's capacity is diminished, a lawyer may consider:

- the client's overall circumstances and abilities, including the client's ability to express the reasons leading to a decision,
- the ability to understand the consequences of a decision,
- the substantive appropriateness of a decision, and
- the extent to which a decision is consistent with the client's values, long-term goals, and commitments."

B. Observable signs of possible diminished capacity: American Bar Association/American Psychological Association, *Assessment of Older Adults with Diminished Capacity:A Handbook for Lawyers*, pp. 14-18; "Capacity Worksheet for Lawyers," pp. 23-26)

Cognitive signs:

1) Short-term memory loss (client forgets your name or purpose of visit);
2) Difficulty in communication (repeated difficulty finding words; frequent shifting to unrelated topic; but don't rule out a hearing disorder)
3) Comprehension problems (difficulty repeating back simple concepts)
4) Lack of mental flexibility (but sheer stubbornness is not necessarily a sign of diminished capacity)
5) Calculation problems (inability to do simple math)
6) Disorientation as to time, space, or location

Emotional signs:

1) Significant unexplainable distress (but don't discount fact that clients are often in varying stages of grief)
2) "Inappropriateness" (laughing when discussing spouse's death)

Behavioral signs

1) Delusions (paranoia)
2) Hallucinations ("Who is that girl sitting next to you?")
3) Poor grooming/hygiene

B. Should lawyers use common capacity-measuring tests such as the Mini-Mental State Exam?

American Bar Association/American Psychological Association, *Assessment of Older Adults with Diminished Capacity:A Handbook for Lawyers*, pp. 21-22 lists several reasons why lawyers should not use these instruments: lack of training; limited yield of information; over-reliance; false negatives and positives; lack of specificity to legal incapacity

C. Referrals and consultations with experts and others: **MRPC 1.14, Comment 6:** "In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician."

1) Consultations with family members: **ABA Op. 96-404**: "There may also be circumstances where the lawyer will wish to consult with the client's family or other interested persons who are in a position to aid in the lawyer's assessment of the client's capacity as well as in the decision of how to proceed. Limited disclosure of the lawyer's observations and conclusion about the client's behavior seems clearly to fall within the meaning of disclosures necessary to carry out the representation authorized by Rule 1.6. It is also implicitly authorized by Rule 1.14 as an adjunct to the permission to take protective action. The lawyer must be careful, however, to limit the disclosure to those pertinent to the assessment of the client's capacity and discussion of the appropriate protective action. This narrow exception in Rule 1.6 does not permit the lawyer to disclose generally information relating to the representation.

2) Private lawyer consultation with an evaluator: client is not identified so client consent is not necessary; lawyer usually pays for this as it is a service to the lawyer

3) Suggest that client have a complete medical exam

4) Formal forensic capacity evaluation:

a) Disadvantages: trauma, expense, time; difficulty in convincing client or family members of the necessity

b) Advantage: strong evidence if later needed to defend a transaction (e.g., defend against an attack on testamentary capacity)

c) HIPPA requires that the clinician get the client's consent to share the results with the lawyer

d) Lawyer's referral letter: see sample in American Bar Association/American Psychological Association, *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers*, Appendix 2

e) Remember that the assessment of "legal capacity" still ultimately rests with the lawyer

> Lovett v. Estate of Lovett, 250 N.J. Super. 79, 593 A.2d 382 (1991): Testator was age 75 and suffering from weakened memory. He initially had executed a complicated tax-planning will, but the testator decided that he wanted only a simple will. His children sued the lawyer for malpractice, claiming among other things that the lawyer should have insisted that their father have a psychiatric evaluation before signing the will. The court held that the lawyer had not breached his duty of care. "Although I agree that a lawyer has an obligation not to permit a client to execute documents if he or she believes that client to be incompetent, I am not satisfied that the proofs establish that in 1985 Lovett [Testator] was incompetent or that Thomas [his lawyer] should have concluded that he was. No direct proofs regarding Lovett's competency in 1985 were presented…. The fact that Lovett wanted a simple will in spite of having a substantial estate does not suggest incompetency; nor did his age. The fact that Lovett's memory was not as strong as it had been, although a factor to be considered, was far from sufficient to warrant Thomas' refusal to act or to require him to insist that Lovett obtain a psychological exam. Circumstances which would justify a suggestion from a lawyer that a client be psychiatrically evaluated as a prerequisite to signing legal documents would be rare. This was not such a circumstance."

5) Who are appropriate evaluators?

American Bar Association/American Psychological Association, *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers*, p. 33, lists the following: physicians, geriatricians, geriatric psychologist (geropsychologist), forensic psychologist or psychiatrist, neurologist, neuro-psychologist, geriatric assessment team; referrals from local Area Agency on Aging, American Psychiatric Association, American Psychological Association

6) Suppose the evaluator's report reveals that the client is in the early stages of Alzheimer's disease?

Wilson v Lane, 274 Ga. 492, 614 S.E.2d 88 (2005): "Regardless of the stigma associated with the term 'Alzheimer's,' however, that testimony does not show how [the testator] would have been unable to form a rational desire regarding the disposition of her assets." See also Pope v. McWilliams, 280 Ga. 741, 632 S.E.2d 640 (2006), Curry v. Sutherland, 279 Ga. 489, 614 S.E.2d 756 (2005), Bishop v. Kenny, 266 Ga. 231, 466 S.E.2d 581 (1996).

7) Suppose that, prior to the evaluation, your client told you that if the evaluation revealed that she had dementia, she would seriously consider committing suicide? (The report indicates "mild dementia").

MRPC 1.4 requires a lawyer to keep the client "reasonably informed" of the status of any matter that the lawyer is handling for the client.

MRPC 1.4, Comment 7: "In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client."

Restatement (3d) of Law Governing Lawyers, § 24, cmt.c: "A lawyer may properly withhold from a disabled client information that would harm the client, for example when showing a psychiatric report to a mentally-ill client would be likely to cause the client to attempt suicide, harm another person, or otherwise act unlawfully."

D. What can lawyer do to maximize or enhance client capacity?

1) Multiple short meetings
    a) Ask the same questions and look for consistency
2) Time of day ("Sundowner's Syndrome")
3) Bright lighting and minimum background noise and interruptions
4) Speak clearly while facing client
5) Speak slowly and give client plenty of time to think before expecting a response
    a) Don't finish the client's sentences for her
6) Avoid using legal terms without explaining them
7) Draw diagrams
8) Use larger font in documents
9) Offer the client alternatives to the client's desired course of action
    a) Ask the client to reiterate those alternatives to you and why she has or has not chosen one
10) Allow clients ample time to review documents, both in advance and in the lawyer's office
11) Meet at client's home or facility in which client is residing
12) Without disclosing confidential information, consult with family members or caregivers as to how best to communicate with the client; when is best time to talk with client; how medications affect client, etc.

5. Is the lawyer liable to third parties for allowing a client to enter into a transaction for which the client may not have capacity?

CASE STUDY #2 (Part 2)

After extensive consultation with Leonora and a private conversation with a diagnostician whose judgment you trust, you decided that Leonora met the relatively low threshold for testamentary capacity. You also determined that she comprehended the consequences of the decision to leave much of her estate for the care of her dogs (and eventually to George), so you drafted a will that included a testamentary trust for her that carried out that plan. Leonora dies a few months later and her children challenge the probate of the will on the ground that she lacked testamentary capacity. They also sue you for legal malpractice for facilitating the execution of her will under these circumstances. What result?

A. Moore v. Anderson, Zeigler, Disharoon, Gallagher & Gray, 135 Cal. Rptr. 2d 888 (2003): Children of testator sued law firm that assisted the testator in altering his estate planning documents, alleging that the lawyers should have realized that the testator's capacity was questionable due to pain, illness and medications. Although recognizing that in some cases an attorney does owe a duty to non-clients, the court held that "an attorney preparing a will for a testator *owes no duty to the beneficiary of the will or to the beneficiary under a previous will* to ascertain and document the testamentary capacity of the client." Court said that a holding to the contrary could compromise the lawyer's duty of loyalty to his client. "The attorney who is persuaded of the client's testamentary capacity by his or her own observations and experience, and who drafts the will accordingly, fulfills that duty of loyalty *to the testator*. In so determining, the attorney should not be required to consider the effect of the new will on beneficiaries under a former will or beneficiaries of the new will." See also, Chang v. Lederman, 90 Cal. Rptr. 3d 758 (2009).

B. Charfoos v. Schultz, 2009 WL 3683314 (Mich. App. 2009) (unpublished op.): Attorney drafted will that left 70% of estate to testator's new wife. Children sued attorney for malpractice. Court refused to consider extrinsic evidence that testator lacked capacity and the attorney knew that when the will was drafted. "Because Herb is deceased, the question of his competency at the time the documents were executed must be resolved in his absence. Further, there is a similar incentive on the part of disgruntled beneficiaries to fabricate evidence regarding the decedent's competency. Finally, at its heart, this remains a case about the intent of the decedent. Plaintiffs' claim is structured as a question of Herb's competence and defendant's knowledge of Herb's competence, but their alleged damages would be dependent on the fact that defendant's alleged error thwarted Herb's intent, of which there is no intrinsic evidence." Children also claimed that the attorney had violated Michigan's version of MRPC 1.14 by failing to take protective action. The court stated that a violation of the MRPCs would not give rise to a legal malpractice action.

C. Logotheti v. Gordon, 414 Mass. 308, 607 N.E.2d 715 (1993): Heir of testator successfully challenged the will based on lack of testamentary capacity. Heir then sued the lawyer who drafted the will, alleging that the lawyer's negligence had resulted in the heir incurring counsel fees and other expenses in the will contest. The court held that while the lawyer owed a duty to his client to make a reasonable inquiry into the client's capacity, the lawyer owed no duty to the heirs of the testator.

C. Does the lawyer have any other responsibility to a client who is exhibiting diminishing capacity? (Protective Action)

CASE STUDY #2 (Part 3)

Two months after you supervised the execution of Leonora's will, Leonora and George return to your office. It is obvious to you that Leonora's condition has worsened substantially. She says little during the meeting and often appears to be staring blankly into space. George does all the talking. Periodically he looks to Leonora and says, "That is what we decided, isn't it. Grandmama?" Leonora responds, "Yes, Georgie, anything you say." George tells you that Grandmama has decided to establish immediately an irrevocable trust for the dogs, rather than wait until she dies. He makes it clear that if you won't draft this trust, he will take Grandmama to another lawyer who will. It becomes apparent to you during the conversation that George has taken complete control over Leonora's finances and most likely is already transferring her assets to himself using the power of attorney you drafted a last year.

1. Recall that MRPC allows the lawyer to take "protective action" in certain circumstances:

MRPC 1.14(b): "When the lawyer reasonably believes that the client:

-has diminished capacity;

-is at risk of substantial physical, financial or other harm unless action is taken; **and**

-cannot adequately act in the client's own interest

the lawyer *may* take reasonably necessary protective action…."

In the Matter of Clark, 202 N.C. App. 151 (2010): The guardian of a woman who had suffered severe brain injury as the result of an accident hired lawyers to represent the woman in her lawsuit against those who caused the accident and to aid in setting up a Special Needs Trust with any recovered funds. The parties settled the accident litigation, but then the husband of the woman sought to have her guardianship terminated or, alternatively, to have him appointed to replace the current guardian. One of the lawyers had cause to believe that the husband's motive in urging his wife to terminate the guardianship was to allow himself access to the settlement funds. The lawyer objected to the termination of the guardianship but withdrew his objection when the parties agreed that the bulk of the settlement funds would

be placed into an irrevocable Special Needs Trust. The husband and wife then objected to the fees the lawyer had charged and sought to have the lawyer sanctioned because he had failed to maintain a "normal attorney-client relationship" with the woman. The court refused to sanction the lawyer, citing subsection (b) of Rule 1.14. The appellate court noted that the trial court had found "as a fact that [the lawyer] genuinely believed that Mr. Clark was attempting to obtain control over Ms. Clark's personal injury settlement for his own purposes and that it would not be in Ms. Clark's best interests for her competency to be restored… As long as Ms. Clark's competency had not been restored, [the lawyer] had a duty to exercise his best judgment on behalf of his client, which is exactly what the trial court found that he did."

2. What is "reasonably necessary protective action"?

MRPC 1.14 Comment 5: "… consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decisionmaking tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client."

MRPC 1.14 Comment 7: "If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests."

3. **ABA Legal Formal Ethics Opinion 96-404** (examining an earlier version of MRPC 1.14):

> "A client who is making decisions that the lawyer considers to be ill-considered is not necessarily unable to act in his own interest, and the lawyer should not seek protective action merely to protect the client from what the lawyer believes are errors in judgment."
>
> "Although not expressly dictated by the Model Rules, the principle of respecting the client's autonomy dictates that the action taken by a lawyer who believes the client can no longer adequately act in his or her own interest should be the action that is reasonably viewed as the least restrictive action under the circumstances."
>
> "The nature of the relationship and the representation are relevant considerations in determining what is the least restrictive action to

protect the client's interests. Even where the appointment of a guardian is the only appropriate alternative, that course, too, has degrees of restriction. For instance, if the lawyer-client relationship is limited to a single litigation matter, the least restrictive course for the lawyer might be to seek the appointment only of a guardian ad litem, so that the lawyer will be able to continue the litigation for the client. On the other hand, a lawyer who has a long-standing relationship with a client involving all of the client's legal matters may be more broadly authorized to seek appointment of a general guardian or a guardianship over the client's property, where only such appointment would enable the lawyer to fulfill his continuing responsibilities to the client under all the circumstances of the representation."

4. What are "less restrictive actions"?

   Participants in the 1994 Fordham "Conference on Ethical Issues in Representing Older Clients" compiled this list:

   1. Involve family members;
   2. Use of durable Powers of Attorney;
   3. Use of revocable trusts;
   4. Use of a "time out" to allow for cooling off, clarification, or improvement of the situation, or improvement of circumstances;
   5. Referral to private case management;
   6. Referral to long-term care ombudsman;
   7. Use of church or other care and support systems;
   8. Referral to disability support groups;
   9. Referral to social services or other governmental agencies, such as consumer protection agencies (keeping in mind the risk that this may trigger investigation and intervention)

   Ore. Op. 1991-41: A lawyer "must reasonably be satisfied that there is a need for protective action and must then take the least restrictive form of action sufficient to address the situation. If, for example, Client is an elderly individual and Attorney expects to be able to end the inappropriate conduct simply by talking to Client's spouse or child, a more extreme course of action such as seeking the appointment of a guardian would be inappropriate."

5. Seeking a guardianship for the client:

MRPC 1.14 Comment 7: If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

ABA Op. 96-404 (examining an earlier version of MRPC 1.14) made these pronouncements:

a. Consider seeking a limited guardianship or conservatorship "allowing the client to continue managing his personal affairs."

b. The lawyer herself may file the petition for guardianship. However, "a lawyer with a disabled client should not attempt to represent a third party petitioning for a guardianship over the lawyer's client." (This would create a conflict of interest prohibited by MRPC 1.7.) (See discussion below of Dayton Bar Association v. Parisi.)

> "We emphasize, however, that this does not mean the lawyer cannot consider requests of family and other interested persons and be responsive to them, provided the lawyer has made the requisite determination on his own that a guardianship is necessary and is the least restrictive alternative. The lawyer must also have made a good faith determination that the third person with whom he is dealing is also acting in the best interests of the client. In such

circumstance, the lawyer may disclose confidential information to the limited extent necessary to assist the third person in filing the petition, and may provide other appropriate assistance short of representation."

c. The lawyer may recommend or support the appointment of a particular person as guardian without violating Rule 1.7:

"A lawyer who is petitioning for a guardianship for his incompetent client may wish to support the appointment of a particular person or entity as guardian. Provided the lawyer has made a reasonable assessment of the person or entity's fitness and qualifications, there is no reason why the lawyer should not support, or even recommend, such an appointment. Recommending or supporting the appointment of a particular guardian is to be distinguished from representing that person or entity's interest, and does not raise issues under Rule 1.7(a) or (b), because the lawyer has but one client in the matter, the putative ward."

But see: Cal. Formal Op. 1989-112 (1989): Seeking a guardianship for a client, even if in the client's best interest, would be a conflict of interest. San Francisco Op. 99-2: Criticizes the above opinion and takes opposite approach.

d. The lawyer may represent the person whom the lawyer supported to be guardian after the guardianship is established:

"Once a person has been adjudged incompetent and a guardian has been appointed to act on his behalf, the lawyer is free to represent the guardian. However, prior to that time, any expectation the lawyer may have of future employment by the person he is recommending for appointment as guardian must be brought to the attention of the appointing court. This is because the lawyer's duty of candor to the tribunal, coupled with his special responsibilities to the disabled client, require that he make full disclosure of his potential pecuniary interest in having a particular person appointed as guardian. See Rules 3.3 and 1.7(b). The lawyer should also disclose any knowledge or belief he may have concerning the client's preference for a different guardian."

e. The lawyer should rarely seek to have herself appointed as guardian:

> "[T]he Committee cautions that a lawyer who files a guardianship petition under Rule 1.14(b) should not act as or seek to have himself appointed guardian except in the most exigent of circumstances, that is, where immediate and irreparable harm will result from the slightest delay."

6. Selected court opinions on seeking a guardianship or conservatorship for a current or former client:

a) The "nightmare client": Cheney v. Wells, 23 Misc.3d 61, 877 N.Y.S.2d 605 (2008): Ms. Wells was a difficult client. One of the many lawyers who had tried to work with her told the court, "It is almost impossible to adequately describe the nightmare of representing Ms. Wells." Her most recent lawyer sought to withdraw in the midst of litigation against Ms. Wells, telling the court that she could not represent Ms. Wells without violating her own ethical responsibilities. The court examined New York's ethical rules, MRPC 1.14, and the Restatement (3d) of the Law Governing Lawyers and concluded that there was "no ethical impediment" to the lawyer seeking a limited guardianship for Ms. Wells solely for the purpose of defending her in the litigation and that the lawyer could disclose to the court that would impose the guardianship whatever confidential information would be necessary to prove the need for a guardian. (The attorney was not appointed as the limited guardian.)

b) Some lawyers are well-intentioned… but some are "nightmare lawyers"

> Dayton Bar Association v. Parisi, 131 Ohio St. 3d 345, 965 N.E.2d 268 (2012): Lawyer Parisi (who had been practicing law since 1982) represented 93-year-old woman who claimed she was being held against her will in a nursing home. The lawyer herself initially filed for a guardianship for the client, including with the petition an affidavit from a health professional of a diagnosis of dementia. Later the lawyer withdrew her own petition and filed a petition on behalf of the woman's niece. The lawyer was found to have violated MRPC

1.7 in representing both the niece and the proposed ward. The court stated:

> "Indeed, the far-reaching and life-altering consequences of an incompetency determination—involving a judicial determination that a mental or physical illness or disability has left a person so mentally impaired that the person is incapable of taking proper care of the person's self or property—create an inherent conflict between the proposed ward and the applicant for guardianship, even if guardianship is ultimately in the proposed ward's best interest."

The court (citing ABA Op. 96-404) found that the protective action provisions of MRPC 1.14 do not abrogate the basic duties that a lawyer owes her client, including the duty not to represent another person who interests are adverse to those of her client. Two other actions exacerbated this matter. First, the lawyer had her client sign a power of attorney appointing the lawyer as her agent seven weeks *after* the lawyer filed the guardianship petition. Second, when she thought that the guardianship petition might be dismissed, the lawyer, acting as the client's agent, paid $18,000 in fees to herself from the client's funds.

In re Eugster, 166 Wash.2d 293, 209 P.3d 435 (2009): Lawyer Eugster (who had been practicing law since 1970) was employed by Marion Stead when she became dissatisfied with her son Roger's actions as trustee of a supplemental needs trust set up for her. Eugster completely revised her estate plan. Among other things he created a revocable trust of which he and Roger were successor trustees and named himself as her agent under a power of attorney. Eugster then met with Roger and apparently was persuaded of Roger's good faith. Eugster wrote the following to Marion:

> Roger has been a good and dutiful son to you. I have to be honest about this. You can be proud of Roger. He is not acting to protect himself or to take things from you. He has been acting to ensure that you are taken care of, your bills are paid, your assets are protected, and that you do not have to have unwanted concerns for your welfare as you grow older. Frankly, you should be very proud of Roger.

Marion then sought counsel from another lawyer because she wasn't sure whether Eugster was representing her interests or Roger's. The

new lawyer wrote Eugster, terminating both his representation of Marion and his authority to act under the power of attorney. Eugster then filed a petition for guardianship over Marion, naming himself as "Attorney/Petitioner" and Roger as co-Petitioner. Even though he had supervised Marion's execution of a will, a trust and a power of attorney three months earlier, and even though he had had no contact with her for two months, he expressed his opinion to Roger that Marion lacked competence and was a vulnerable senior. The guardian ad litem for Marion in the guardianship proceeding interviewed 14 witnesses, all of whom stated unequivocally that she was capable of handling her own affairs. The court concluded that no guardianship was necessary. Marion spent $13,500 defending against the imposition of the guardianship. In a disciplinary proceeding, the Washington State Bar Association Disciplinary Board found by a "clear preponderance of the evidence" that Eugster had engaged in seven disciplinary violations, including failing to abide by his client's directions; disclosing confidential information; using information relating to his representation of her to her disadvantage; conflict of interest by representing another person with materially adverse interest; filing the guardianship petition without reasonable investigation; and not surrendering the client's file and papers to her new lawyer. The Board recommended disbarment but the Supreme Court reduced the sanction to an 18-month suspension plus restitution of the costs incurred by Marion in defending herself in the guardianship proceedings.

Matter of Brantley, 260 Kan. 605, 920 P2d 433 (1996): Lawyer Brantley (who had been practicing law since 1970) began representing Mary Storm in 1983, following the death of her personal lawyer. He represented her in three real estate transactions. In 1989, Brantley was contacted by Mary Storm's stepson, Pfenninger, who expressed concern that Mary Storm was dissipating her assets by giving or lending them to her own son. Pfenninger told Brantley that he had already secured the agreement of Bank to serve as Mary's conservator. Brantley did not meet with Mary (other than one phone conversation) but prepared a petition for voluntary conservatorship. He also did not investigate the purported dissipation of the assets. Mary apparently signed the petition, which Brantley had an office employee take to Mary at the nursing home. "Brantley candidly admits that, at this time, he was representing the conservatee, Mary

Storm; her step-son, Ralph Pfenninger; and the conservator, Security State Bank, all in the same proceeding." Brantley then assisted the bank in preparing to auction off most of Mary's personal property. Neighbors noticed that her property was being boxed up and they notified her grandson who helped Mary retain a lawyer to halt the pending auction and terminate the voluntary conservatorship. The same day that the voluntary conservatorship was terminated, Brantley asked a different judge to issue a Temporary Order restraining the "conservatee" from disposing of her estate. He did not mention that the conservatorship had been dissolved nor did he notify Mary Storm of his action. Three days later, Brantley filed an Involuntary Petition for Conservatorship in which he identified himself as attorney of the Pfenninger, the petitioner. Brantley had not consulted with Mary Storm about filing this petition that was adverse to her interest. The petition "stated that Mary Storm was 'completely disoriented as to person, place and time as noted in the letter of Daniel R. Dunn, M.D. marked Exhibit A attached hereto and made a part hereof.' In fact, there was no Exhibit A attached to the petition, there was not in existence any letter from Dr. Dunn, Respondent Brantley never contacted Dr. Dunn to request such a letter, and Respondent Brantley candidly admitted that he made up the language supposedly 'noted in the letter.'" Mary moved to have Brantley disqualified. Instead, the magistrate judge (without notifying the attorneys) visited Mary at the nursing home. The judge then ordered Mary's own attorney to be discharged from representing her. The attorney was reinstated. A partial conservatorship was imposed and a new conservator appointed. Then Brantley, representing the discharged conservator, presented bills for the services of himself and the discharged conservator. Mary moved to live with her son in Alaska and the conservatorship was eventually transferred to Anchorage, but Brantley and Pfenninger continued to try to monitor it and to gain access to confidential information. Eventually bar disciplinary proceedings were brought against Brantley, with the following result:

"A majority of the Hearing Panel conclude that the following noted violations of the Model Rules of Professional Conduct, Supreme Court Rule 226 [1995 Kan. Ct. R. Annot. 245], were established by clear and convincing evidence.

2. MRPC 1.1 Competence [1995 Kan. Ct. R. Annot. 251]- Respondent failed to provide competent representation to his clients in the following particulars: (a) failure to fully investigate the claims of

improper transfers from the account of Mary Storm and the threatened dissipation of her assets prior to initiating conservatorship proceedings; (b) failure to personally interview a client for whom a conservatorship proceeding was proposed; (c) permitting his client conservator to proceed with sale related activities in regard to Mary Storm's personal property before a court order had been entered directing such sale, which activity resulted in unwarranted expense to Mary Storm; (d) obtaining an ex parte order in a closed involuntary conservatorship proceeding, all in connection with a planned involuntary conservatorship proceeding not yet filed; (e) preparing and causing to be filed a Petition for Involuntary Conservatorship relying on a non-existent medical report, which is herein characterized as incompetence only because there is insufficient evidence to establish a violation of MRPC 3.3 Candor Toward the Tribunal [1995 Kan. Ct. R. Annot. 311].

3. MRPC 1.2 Scope of Representation [1995 Kan. Ct. R. Annot. 255]-Respondent failed to abide by his client Mary Storm's decisions concerning the representation.

4. MRPC 1.4-Communication [1995 Kan. Ct. R. Annot. 263]-Respondent failed to keep his client, Mary Storm, reasonably informed.

5. MRPC 1.5 Fees [1995 Kan. Ct. R. Annot. 268]-Respondent failed to communicate the basis or rate of the fee to the client, Mary Storm, who was ultimately responsible therefore, and caused her estate to be charged for legal services rendered to adversarial persons.

6. MRPC 1.7 Conflict of Interest [1995 Kan. Ct. R. Annot. 275]-Respondent represented Security State Bank and Ralph Pfenninger in matters adverse to his client, Mary Storm, without consulting and without consent.

7. MRPC 1.9 Conflict of Interest [1995 Kan. Ct. R. Annot. 281]-Respondent, after undertaking to represent Mary Storm, later represented others in substantially related matters in which interests were materially adverse to her, all without her consent after consultation.

8. MRPC 1.14 Client Under Disability [1995 Kan. Ct. R. Annot. 293]-Respondent failed to reasonably maintain a normal client-lawyer relationship with Mary Storm when he believed her to be under a disability.

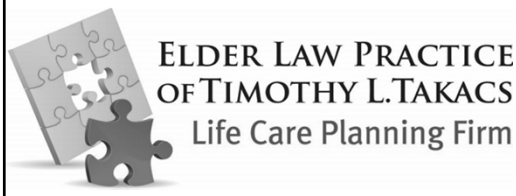
9. MRPC 3.3 Candor Toward the Tribunal [1995 Kan. Ct. R. Annot. 311]-Respondent made statements and allegations to the magistrate

court which he knew, or should have known, to be false. In addition, he made false statements to the magistrate court without making reasonable and diligent inquiry, as above noted, into the true facts.

10. MRPC 8.4 Misconduct [1995 Kan. Ct. R. Annot. 340]-As a result of the foregoing conclusions, Respondent has violated the rules of professional conduct and has engaged in conduct prejudicial to the administration of justice."

The Disciplinary Administrator recommended to the panel a suspension of Brantley's license for a period of time, such as 6 months, and that he pay restitution to Mary. The panel, in a split decision, recommended published censure. The Supreme Court agreed with the recommendation for published censure and also assessed costs against Brantley and restitution of the fees that Mary's conservator had paid to him and the former conservator.

Caring for the Elder in the Practice of Law



Life Care Planning: The New Elder Law

Tim Takacs
Certified Elder Law Attorney

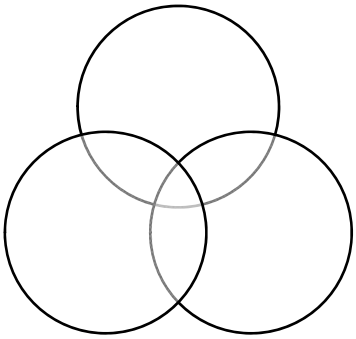
www.tn-elderlaw.com
www.elderlaweducation.com

Fundamentals: The Five Principles

1. The care of an older person can be planned.
2. Care planning takes place across three domains: legal, financial, and personal.
3. Care must be elder-centered.
4. Fundamental planning goal: Find, get, and pay for good care.
5. Care is a resource that must be applied along a continuum as and when needed.

The Three Care Planning Domains

1. Legal
2. Financial
3. Personal



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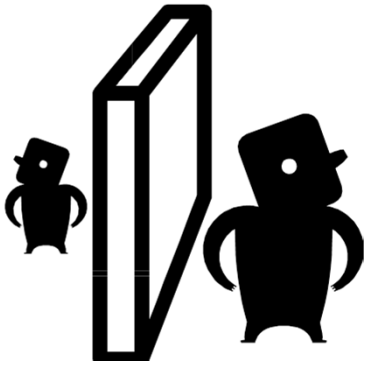
Caring for the Elder in the Practice of Law 3

Who Needs to Plan?

<u>The Great Divide</u>

- HOPs
  - Legal
  - Financial
- UnHOPs
  - Legal
  - Financial
  - Personal



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The Continuum of Care

HOPs | **UnHOPs**

Functional Limitations

1. Decline in function results in a loss of independence (dependence).
2. Can result in a health care crisis.
3. Can result in a caregiver crisis.
4. Can result in a financial crisis.

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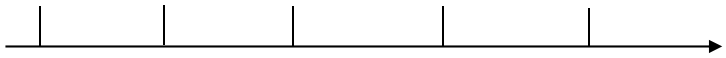
Caring for the Elder in the Practice of Law 5

The Continuum of Care

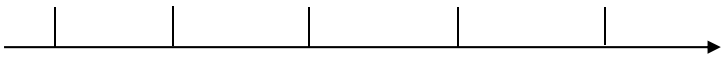
HOPs | **UnHOPs**

Functional Limitations



Meeting Needs / Levels of Care

Home Sweet Home



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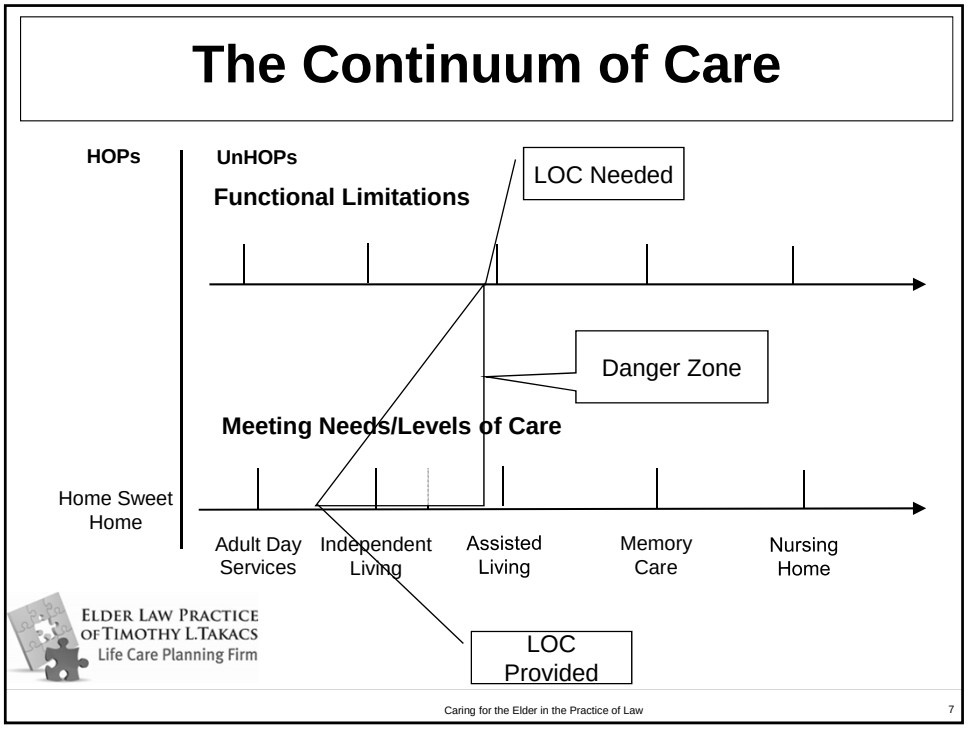
Caring for the Elder in the Practice of Law 6


The Continuum of Care
HOPs
UnHOPs
Functional Limitations
LOC Needed
Danger Zone
Meeting Needs/Levels of Care
Home Sweet Home
Adult Day Services
Independent Living
Assisted Living
Memory Care
Nursing Home
LOC Provided
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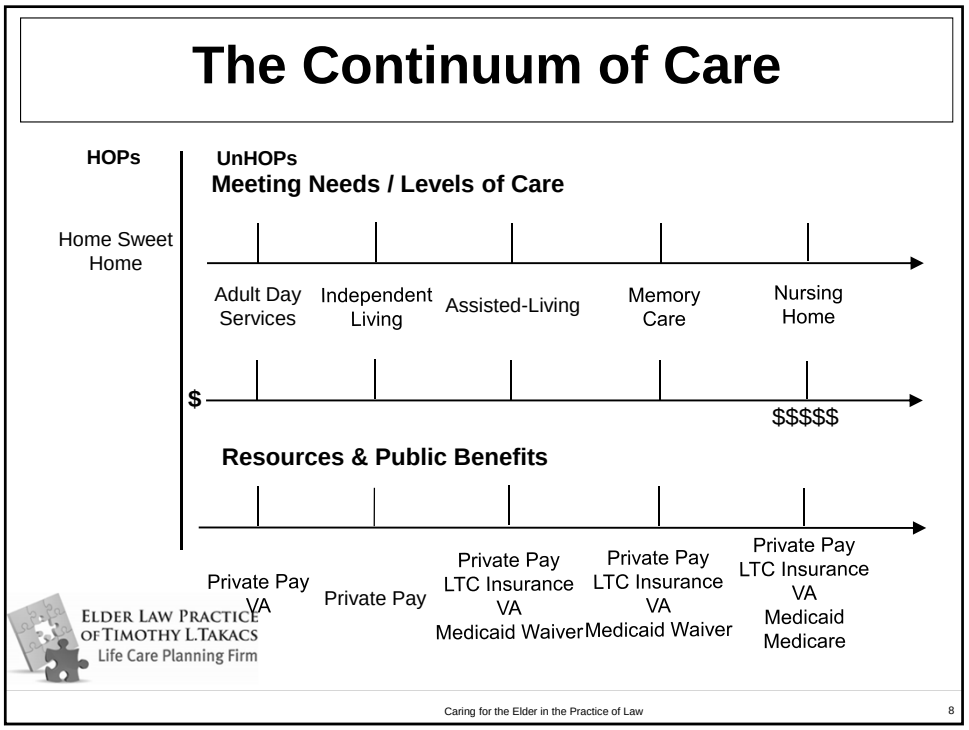
The Continuum of Care
HOPs
UnHOPs
Meeting Needs / Levels of Care
Home Sweet Home
Adult Day Services
Independent Living
Assisted-Living
Memory Care
Nursing Home
$
$$$$$
Resources & Public Benefits
Private Pay VA
Private Pay
Private Pay LTC Insurance VA Medicaid Waiver
Private Pay LTC Insurance VA Medicaid Waiver
Private Pay LTC Insurance VA Medicaid Medicare
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Planning for Long-Term Services and Supports

- Who needs to plan for a nursing home stay?
- Who needs to plan for chronic illness care?

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Caring for the Elder in the Practice of Law 10

Traditional Role of an Elder Law Attorney

Asset Protection Planning aka Medicaid Planning

- Understand estate
- Review estate planning documents
- Determine suitable Medicaid plan
- Implement Medicaid plan
- Apply for Medicaid
- Prevent Medicaid estate recovery

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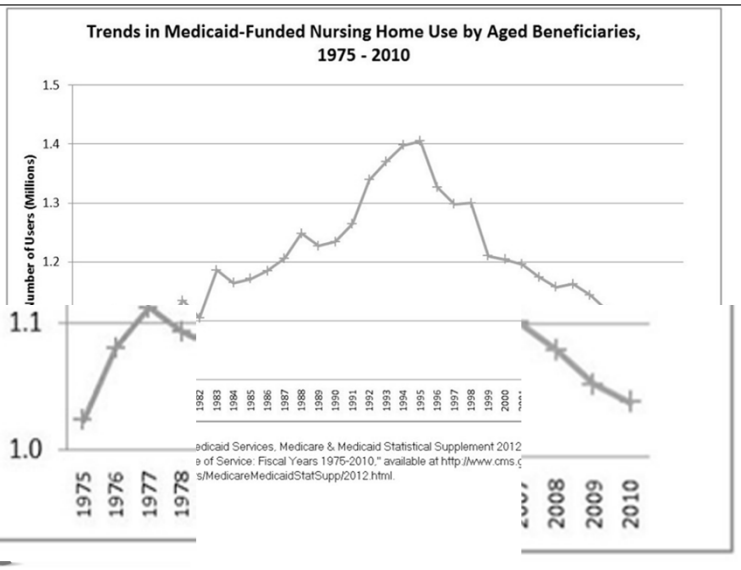
Caring for the Elder in the Practice of Law 11

Trends in Nursing Home Use



Caring for the Elder in the Practice of Law 12

Chronic Illness in America

- More than a quarter of all Americans and two out of three older Americans suffer from multiple chronic conditions.
- One-third of U.S. health care budget ($1 trillion+ annually) is spent on this population. Among health care costs for older Americans, 95% is spent on chronic diseases.
- Despite advances in care and increased spending, more than half of patients still don't receive appropriate care.
- Our health care system is structured primarily to deliver acute care.

Caring for the Elder in the Practice of Law 13

Role of the Elder-Centered Law Practice

- Represents the patient
- How the ECLP contributes to improving chronic illness care
  - Education
  - Advice
  - Support
  - Ongoing care assessment, coordination, and monitoring
  - Liaison and intercession with the health care community
  - Intervention and advocacy
  - Access to sources for payment of health care and long-term services and supports
- Accountability

Caring for the Elder in the Practice of Law 14

What Decisions Do Caregivers Need to Make?

Five Core Problematic Areas

1. How and when to access help
2. Considering residential care placement (timing, preferences, guilt, access, quality, costs)
3. Legal matters (POAs, managing finances, driving)
4. Non-dementia care
5. Back-up plan if caregiver can't continue

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Caring for the Elder in the Practice of Law 15

Life Care Planning Goals

- Focus on LIFE needs FIRST
- Quality of Life and Care
- Appropriate Surrogate Decision-Making
- Paying for Care: Public Benefits and Resources
- Find, get, and pay for good care

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Life Care Planning Firm

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Components of a Life Care Plan

- Attorney & ECC meet with client and family to tease out worries & goals
- Information gathered about
  - Health care needs
  - Resources (caregivers, $$, property, income, public benefits: anything & everything available for elder's support)
  - Current estate plan
  - Client/family preferences
  - Other resources, public and private, that could be accessed, now or in the future

1/18/2016 17

Components of a Life Care Plan

- Establishes surrogate decision makers if not already in place
- Creates estate plan that may include special needs trust or other discretionary trust
- LCP law firm assembles care team and begins meeting to design effective holistic plan

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Components of a Life Care Plan

- Over time, the LCP firm monitors continuing eligibility for government assistance based on changes in government programs and clients' circumstances
- Makes adjustments to the estate plan and care plan as needed

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Elder Care Coordinator

- Conducts assessment
- Gathers information about health care and current physical and psychosocial needs
- Investigates care options and advises on community resources

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Our Approach: Fundamental Concepts

1. Find, get and pay for good care
2. Facilitate care decisions
3. Manage resources
4. Access benefits
5. Protect wealth
   - For the Elder
   - Surplus (?) for heirs

Caring for the Elder in the Practice of Law 21

Getting Started in Life Care Planning

by Tim Takacs[1]

"I need to come in right away," Susan told one of our elder care coordinators who took her call. Her mother has cerebral palsy and her father, who had been caring for her mother in their home, had a stroke and was undergoing rehabilitation at the hospital. Susan had hired round-the-clock caregivers for her mother and it was costing a fortune. She didn't think the money would last for very long and she did not know what to do. Should her parents live with her? Susan had investigated putting an elevator into her own home and bringing Mom and Dad there.

"What should I do with my parents' home?," she asked. "What if my dad doesn't get well enough to look after Mom again? How can I afford the caregivers to take care of Mom and a nursing home for Dad?" A successful local bankruptcy attorney, Susan really felt the need to get things planned out. She had 50 million questions running around in her head and was searching for the answer to each one. Our elder care coordinator (ECC) scheduled a first meeting for Susan, who came in and hired us for a Life Care Plan on behalf of her parents.

Still, Susan was worrying about getting answers to all her questions. Anxious and frustrated, she called our elder care coordinator about her dad's progress in the rehab hospital. What was the next step? What should she do if he goes back home? How long could he afford to stay in the nursing home? Again 50 million unknowns.

Our ECC told her the only thing she needed to concentrate on today was making sure her dad got to the skilled nursing facility to continue his therapy. The nursing facility was close to their home. If he had to stay there it was convenient; the facility took Medicaid if the couple needed it; and we know the people at the nursing home. They have a reputation for providing good care and taking care of our clients.

That was Susan's next step, our ECC counseled her, and the only thing she needed to get done. All the other scenarios would play out during the weeks and months ahead—if they ever came to pass at all. Frank and Edith had enough money to last for years and pay for everything. Later, at our next meeting, Susan remarked, "Hiring you guys was worth

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every penny. Just the peace of mind you have given me. Letting me know I only had one job for now and that was getting my dad in that nursing home and I didn't have to try and plan months in advance. You've made all the difference in the world for me."

An Opportunity for Elder Law Attorneys

Frank and Edith are two of more than 100 million Americans for whom chronic conditions are a fact of life. Over 145 million people - nearly half the population - suffer from asthma, depression and other chronic conditions. Almost 48 million Americans report a disability related to chronic illness. Twenty-five percent of U.S. adults have multiple chronic conditions, and the percentage of adults with two or more chronic conditions increases with age. Among older adults, forty-three percent three or more illnesses and 23 percent have more than five.[2] Regrettably, as people age, they must prepare for the likelihood of future impairment and their need for long-term care. Loss in a person's ability to function day-to-day is a natural part of the aging process, and those losses become more severe as people get older. Of the one out of five elders who have attained age 85, more than half are impaired and need long-term care—that is, the personal assistance that enables them to perform daily routines such as eating, bathing, and dressing. [3]

The prevalence of physical and mental disability among the elderly is growing rapidly along with America's aging population. The number of Americans who will suffer functional disability due to arthritis, stroke, diabetes, coronary artery disease, cancer, or cognitive impairment is expected to increase at least 300 percent by 2049.[4] The challenge for our society is how we are going to the manage the care of these increasing numbers of disabled elderly persons.

How do elders with chronic conditions obtain care and manage their illnesses today? About 85 percent of elders who need long-term care receive it from family and friends; few receive assistance from paid professionals or aides because of quality or financial concerns.[5] Caregivers perform complex medical tasks, including medication administration, and er-

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[2] Improving Chronic Illness Care, "Our Approach," http://www.improvingchroniccare.org (accessed Dec. 30, 2015). Chronic illness is not a new problem. See, for example, *Chronic Care in America: A 21st Century Challenge* (Institute for Health & Aging: University of California, San Francisco 1996).

[3] Financing Long-Term Care for the Elderly (U.S. Congr. Budget Off. April 2004).

[4] *See* Health, United States, 2013 (U.S. Centers for Disease Control and Prevention 2014) (available at http://www.cdc.gov/nchs/data/hus/hus13.pdf); C. Boult et al*., Decreasing disability in the 21st century: the future effects of controlling six fatal and non-fatal conditions*, Am J Public Health 86(10):1388-93 (1996), *cited by* AHRQ Research in Action, *Preventing Disability in the Elderly with Chronic Disease* (April 2002).

[5] K. Donelan et al., *Challenged To Care: Informal Caregivers In A Changing Health System*, Health Affairs (July/August 2002).

rors can result. Shirley Loflin, a caregiver whose writing has appeared on the Web site of the Rosalynn Carter Institute for Caregiving, writes: "Caring for another's every need, making life or death decisions, being on call 24/7 and dealing with many unknowns is a tough, demanding, and in some instances, an isolated, thankless job."[6]

In an October 2010 report, *Averting the Caregiving Crisis: Why We Must Act Now*, the Institute reported:

- An estimated 65.7 million Americans have provided unpaid assistance to an adult or child with functional or cognitive limitations.
- They comprise 80-90 percent of the long-term care provided at home to more than nine million elderly or disabled individuals.
- A typical caregiver provides an average of 21 hours of free care per week, amounting to an estimated $375 billion worth of services annually.
- Approximately six million adults over age 65 need daily assistance, and that number is expected to double by 2030.

What can be done to support caregivers? For elders with ineffective or insufficient caregiver support, what can be done to prolong their independence?

In its *Quality Chasm Report*, the Institute of Medicine has called for a transformation of the U. S. health care delivery system to correct the deficiencies in the current management of persons who suffer from these chronic illnesses.[7]

These deficiencies include:

- Rushed practitioners not following established practice guidelines
- Lack of care coordination
- Lack of active follow-up to ensure the best outcomes
- Patients inadequately trained to manage their illnesses

Why is care for chronic conditions so deficient? The Quality Chasm Report attributes the quality gap to (1) the increased demands on medical care from the rapid increases in chronic disease prevalence and the complexity of the underlying science and technology; and (2) the inability of the system to meet these demands because of our poorly organized delivery system and constraints in using modern information technology.

Many managed care and integrated delivery systems have taken a great interest in correcting the many deficiencies in current management of these illnesses. Overcoming these deficiencies will require nothing less than a transformation of health care, from a system that is essentially

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[6] *See* Karen Orloff Kaplan & Ira Byock, *Caregiving, Living on the Edge: Baby Boomers Faced With Caregiving Dilemma*, http://athealth.com/topics/caregiving/ (accessed Jan. 26, 2015).

[7] *Crossing the Quality Chasm: A New Health System for the 21st Century* (Institute of Medicine, March 2001).

reactive–responding mainly when a person is sick–to one that is proactive and focused on keeping a person as healthy as possible.[8]

In defining six aims for transforming healthcare in America, the Institute of Medicine Quality Chasm Report declared patient-centeredness a central feature of quality, along with safety, promptness, effectiveness, efficiency, and equity.

Historically, patient-centeredness has been perceived as the assessment of needs and preferences to consider those social and cultural factors which affect the clinical encounter or compliance with treatment. The consensus among health care providers, however, is that patients have an active role to play in defining and reforming healthcare, particularly in chronic disease management, where patients provide the majority of care in day-to-day management of their illness. According to the Improving Chronic Illness Care program, "patient-centeredness may be a first principle that can provide a lens to focus action, and as such can be used as the guide for achieving all six aims."[9]

With support from the Robert Wood Johnson Foundation, the Center for Health Studies has developed the Chronic Care Model[10]—a guide to chronic care improvement—that is useful to diverse health care organizations wanting to improve the care of their patients with chronic illness. Critical to improving chronic care outcomes is engaging the "informed, activated patient" to promote better self-management of chronic illness. Unfortunately, as the Center's director Dr. Edward Wagner acknowledged at a conference at the University of Washington, patient education, which is a necessary component of the Model, is nearly non-existent.[11]

Seeking the Elder-Centered Law Practice

Twenty-five years ago I decided to devote my professional life to being an elder law attorney. Like many of you, I am sure, I began by learn-

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[8] *See* Improving Chronic Illness Care (ICIC) program of the Robert Wood Johnson Foundation, http://www.improvingchroniccare.org (accessed Dec. 30, 2015).

[9] Improving Chronic Illness Care, *Practice Change, Assessment*, *PACIC Survey*, http://www.improvingchroniccare.org/index.php?p=PACIC_survey&s=36 (accessed Dec. 30, 2015).

[10] *See* http://www.improvingchroniccare.org/index.php?p=The_Chronic_Care_Model&s=2 for a description of the Chronic Care Model, developed by Dr. Edward H. Wagner at the MacColl Institute for Healthcare Innovation, Center for Health Studies, Group Health Cooperative, and leader of ICIC; and E. H. Wagner, *Improving Chronic Illness Care: Translating Evidence into Action*, Health Affairs (Nov/Dec 2001).

[11] Improving Chronic Illness Care, *Resource Library*, "Research in Improving Chronic Illness Care,"2004 Epidemiology, Biostatistics and Clinical Research Methods Summer Session co-sponsored by the Seattle Veterans Affairs Epidemiologic Research and Information Center (ERIC) and the University of Washington, http://www.improvingchroniccare.org/index.php?p=Chronic_Illness_Care_Lecture_Series&s=1196 (accessed Dec. 30, 2015).

ing at the feet of other elder law attorneys. What I learned, in 1991, was that elder law was really synonymous with Medicaid planning, and that after I tried out this asset-focused practice for awhile I was not satisfied with the answers or, better, non-answers I was unable to give to our families who had questions about the long-term care system that they were thrust into and didn't know how to make their way through.

Our families had questions I could not answer: The skilled nursing facility is telling us that Momma needs this therapy and not that one—what does that mean and which one should we choose? How do we talk to the doctor and the therapist about what is wrong with Daddy? What are Dad's residential options now that his health has improved but he can't return home? How do we take care of Mom during the day while both of us work? My husband has been diagnosed with X, Y, and Z—what are the likely outcomes for him? As his wife, what can and should I do for him? Can I take care of him at home? What support services are available to me?

These aren't legal questions, but as an elder law attorney who aspired to the "holistic" approach I needed to do better than reply, "I can't help you with those questions…but I can help you save the money from the nursing home."

I realized that to change my elder law practice I had to change the way I thought about the practice of elder law. Instead of Medicaid planning, I began to think about my practice as planning for disability, and then, finally, as "life care planning."

I began to learn more and more about aging and long-term care and long-term services and supports. We developed a paradigm we call the "Elder Care Continuum." In our office, we think about the elder care continuum as a timeline on which our client-elder is moving toward the end of his life. The ideal for all of us is to "age in place." That invariably means the elder who lives in his own home, independently and successfully with no assistance needed, until he keels over dead in his living room or in his bed.

Some people have the good fortune to depart this life in this manner, but many do not. Instead, they may have Alzheimer's or Parkinson's disease, or suffered a disabling stroke, or become frail, or otherwise have found themselves moving along the Elder Care Continuum. They find that they need assistance with activities of daily living. That means they need to plan for their long-term care needs.

What does life care, or long-term care, planning mean? I describe long-term care planning as our discovering the client-elder's place on the Elder Care Continuum and then figuring out what we need to do to find, get, and pay for good care for the client, both now and in the future. That is not as easy as it sounds, but for an elder-centered law practice, it

is the essence of what we do.[12] Our clients need to get good care when and where they need it, and they need to know how to pay for it. They need to be the "informed, activated patient"—the necessary partner with the health care community that will make the Chronic Care Model work.

Here is our opportunity as elder law attorneys. Attaining this objective for our clients requires expanding an elder law practice beyond the traditional, narrow Medicaid focus.

An Integrated Approach to Long-Term Care Planning

The issue that typically brings many elders and their families into the elder law attorney's office is financing the cost of nursing home care. Despite their concerns about saving money, however, almost without exception the families that come to the Elder Law Practice tell us that their primary goal is to promote the good health, safety, well-being, and quality of life of their loved one, wherever she lives -- whether she is at home, in assisted-living, or in a nursing home.

To be honest, they don't put it quite that way. They tell us: we want to take care of Mom. They just don't know how to do that. They have experienced firsthand the deficiencies in care described in the Quality Chasm Report. Like Susan, our clients' daughter, discovered once she and her parents found themselves in the long-term care system, our families don't know what to do. Who can they turn to for help in taking care of their loved ones?

At the 2002 NAELA Institute, I first presented professionally to our colleagues on the "Life Care Plan." As articulated in our Life Care Plan, our philosophy at the Elder Law Practice elevates client quality of life and care above all other goals of the planning process. [13] Apparently, my presentation and subsequent articles I've written and presentations I have given about Life Care Planning and the Elder-Centered Law Practice have resonated with many attorneys who have become dissatisfied with the emphasis on Medicaid asset protection that has traditionally dominated the practice of elder law. For example, in 2006 the Life Care Planning Law Firms Association was formed by 20 firms; by 2014, the Association had grown to almost 100 member firms.[14] In September 2015, the Association will convene its 10th Annual Meeting in Pittsburgh.

As Medicaid spending continues to squeeze federal and state budgets,

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[12] For a presentation on life care planning at *Special Needs Trust*, the seminar produced annually by the Stetson University College of Law, I said that I define what I do in 12 words, all of one syllable: "I help folks find, get, and pay for good long-term care."

[13] *See* Timothy L. Takacs, *The Life Care Plan: Integrating a Healthcare-Focused Approach to Meeting the Needs of Your Clients and Families Into Your Elder Law Practice*, NAELA Quarterly (Winter 2003); Maya Bazar, *Life Care Planning in an Elder Law Practice: How Does It Work?*, The ElderLaw Report (April 2014).

[14] Life Care Planning Law Firms Association, http://www.lcplfa.org.

while eligibility and services are further restricted, I believe that the future of elder law lies with transforming the practice from Medicaid planning to the integrated practice approach championed by the National Academy of Elder Law Attorneys since the organization was founded in 1988:

> Under this holistic approach [says NAELA], the elder law practitioner handles general estate planning issues and counsels clients about planning for incapacity with alternative decision making documents. The attorney will also assist clients in planning for possible long-term care needs, including nursing home care. Locating the appropriate type of care, coordinating private and public resources to finance the cost of care, and working to ensure the client's right to quality care are all part of the elder law practice.[15]

Not many elder law attorneys include as a part of their fee-generating services "locating the appropriate type of care" and advocating—and intervening, if necessary—to "ensure the client's right to quality care." Few elder law attorneys are equipped by virtue of education and experience to ascertain what long-term care is appropriate, know what long-term care services are available in their communities, recognize deficiencies in long-term care, and understand how to advocate for good long-term care.

Finding and Hiring Your Elder Care Coordinator

We elder law attorneys cannot do this type of planning ourselves. To become specialists in long-term care planning, we need to hire persons who specialize in long-term care for the elderly. To some, that person may be called a "geriatric care manager." In our LCP practices, we call this non-lawyer professional an Elder Care Coordinator (ECC, for short). In your community, and mine, this person could be a registered nurse working in a home health care agency, an administrator of an assisted-living facility, a long-term care ombudsman, a hospital discharge planner, or a social worker at the VA skilled nursing facility—in short, anyone who has the education, experience, and passion to serve elderly persons who need and seek long-term services and supports and who is able to work independently to help clients and their families access resources and solve acute health care and extended long-term care problems.

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[15] Originally from NAELA, *What Is Elder Law?*, http://www.naela.org/public/whatisEL.htm (no longer accessible); see *Why an Elder Law or Special Needs Law Attorney?*, http://www.naela.org/Public/About/Consumers/Why_and_Elder_Law_Attorney_is_a_Good_Choice/Public/About_NAELA/Fact_Sheets/Why_an_Elder_Law_Attorney_is_a_Good_Choice.aspx (accessed Dec. 30, 2015).

Making the decision to change one's practice model and then hire the right person to be your ECC is what I call a "leap of faith." Seventeen years ago, I hired my first Elder Care Coordinator. She walked into my office on a sales call as director of Kelly Assisted Living in Nashville, and when she left, she and I had agreed that we would talk more about how she would be care coordinator in my elder law practice. Before I hired her as an employee, Joanne and I had several conversations about this very subject. Would she be contract labor or would she be an employee? Would she bill separately for her services or would her services be integrated within the total package of services that we would offer to our clients?

To take my practice in the direction I wanted to go, towards an integrated approach to meeting the long-term care needs of our clients, I realized that to refer clients to independent geriatric care managers or to bill clients separately for our firm's ECC services was not going to work. If the ECC were not an employee, I would have no control over how and when or even whether those services are provided. As Washington elder law attorney Rajiv Nagaich emailed me (in 2005) asking for this presentation, "From a personal standpoint, I have been working with two GCMs on a contract basis, but their absence from my office makes for a difficult partnership." If the Elder Care Coordinator[16] were an employee who bills the client separately for her services, especially if billed hourly, I foresaw that few clients would appreciate their value and would decline to utilize those services.

You will find as you go down this road that you will be tempted to refer the work out to a freelance geriatric care manager. Do not succumb to this temptation. Otherwise, when your clients come to your office, you will still be the Medicaid planning lawyer and "life care planning" will consist of your instructing the client to retain the freelance GCM to answer those other questions you and your firm cannot or will not answer. Although the client, should she take up your recommendation, will be better served, in my experience first you must make the investment to move yourself to an Elder-Centered Law Practice model. That's called "risk," the leap of faith—integrating care coordination in your firm costs *you* money—that will provide the initial motivation to make this model of practice work for you.

If you are already making money in a Medicaid planning practice, you have an advantage of a built-in clientele as well as a steady stream of continuing work for your ECC. (Not to mention the financial wherewithal to hire a ECC.) My sense of the landscape, however, is that it is not the

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[16] To avoid blurring the distinction between an employee of the elder law firm and an independent geriatric care manager, we call our non-lawyer health care professionals "Elder Care Coordinators." In the Nashville community, we get no push-back from independent GCMs, to whom we refer regularly.

financially comfortable Medicaid planners who are looking to change their practice to Life Care Planning. Rather, it is the attorney newer to elder law without a large, established client base or presence in the community who sees this as an opportunity.

If you are among the latter, and not the former, take heart. In 1998, when I hired my first ECC, she was my second employee. My first employee was (and is) my office manager and legal assistant Lisa. Joanne started out working three days a week, but if she had been full time, her salary would have been about the same as what I was taking home. Although by then most of what I was doing was "elder law," which I defined as Medicaid planning and estate planning (wills and powers of attorney), by no means was I making a fortune in elder law practice.

In 1999 I hired a Medicare specialist who also does the firm's marketing and public relations. At her choice, Bonnie worked and still works three days a week. Today (2015), in addition to Bonnie and Lisa, I have two ECCs, two public benefits specialists, three office assistants, and another attorney (Barbara McGinnis, who joined the practice in 2011 after 20 years working in the Nashville area as a geriatric nurse practitioner, among other things).

My purpose is not to brag about how well we are doing financially, but to show you what you might expect if you too make the leap of faith. Although I am doing well, it does take a significant investment and commitment to practice life care planning. But when Medicaid "goes away," as many NAELA members fear, the Medicaid planners in NAELA will have nothing to do. Nonetheless, people will still get older and they will still need long-term care. Our Elder Law Practice will be here to help them find, get, and pay for good long-term care. And I will continue to get enormous professional and personal satisfaction in my life's work. When asked what I do, I tell people "I help you take care of your mom." What higher calling can there be?

What Do Our Elder Care Coordinators Do?

We are very aggressive when it comes to letting the world know what we do in our care coordination model of elder law practice. When Joanne first hired on, there were many days that I never saw her, when she never came in to the office at all. What she did for most of her first six months was to call on her contacts in the health care and long-term care community and let them know where she was now, and what we are doing at the Elder Law Practice.

What you will find when you hire your first ECC and get him or her out in the long-term care community is that the image that community has of you will not be as of a "Medicaid planner" but as an organization that has the same goal as they do: to promote the good health, safety, well-being, and quality of life of their resident or patient—your client. When

our ECCs visit our clients outside the home—at nursing facilities, assisted living facilities, or wherever they happen to be—and among our ECCs at least one of them is out of the office nearly everyday—the facility knows that we are all in the same business: helping our families take care of someone's mother, or father, or spouse, or other loved one. That's a powerful message your firm is projecting within the community.

The Elder Law Practice is a part of this long-term care community. Because that community knows we are serious about the number one goal of the Life Care Plan—to promote the good health, safety, well-being, and quality of life of our client at all times—we get results when it is necessary for us to advocate and intervene on behalf of a client who is not getting good care.

A client had recently completed his therapy in the skilled nursing facility after suffering a stroke, which affected his ability to feed himself and take food and water by mouth. When his wife and daughters first came into our office, they reported to us that he had been losing weight. His food trays were returned to the kitchen almost untouched, even though the family claimed he retained his appetite. At the nursing home, he was labeled a "feeder." We were concerned that the facility had written him off. One of our ECCs paid a visit to the facility's director of nursing and "reminded" her that we are watching out for him. The staff spent more time with him at meals, he gained weight, and his general health improved.

Fortunately, few of our interventions are literally as life-saving as we perceived this one to be. Everyday, though, our ECCs are working to improve the lives of our clients.

As a part of their Life Care Plan, one of our ECCs is assigned to help our clients and their families with their long-term care concerns. At the Elder Law Practice, the client's ECC functions as the point of contact for the family and assists in coordinating services to help families take care of their loved ones.

Here are some things our Elder Care Coordinators do:

The ECC who is assigned to a client will conduct a care assessment in the client's home to identify care and related problems and assist in solving them. That might include arranging in-home help or other services. Our ECCs have extensive knowledge about the costs, quality, and availability of resources in the community. Often, as a result of an in-home assessment, we will recommend that sitter services be put in place and provide the family with a list of providers, and, if necessary, actually help with the making of arrangements for care in the home.

Our ECCs do not provide health care, long-term care, or companion services to our clients. Otherwise, we could be classified as health care providers and therefore subject to state licensing requirements. Our engagement agreement for the Life Care Plan explicitly excludes these ser-

vices. Nor will our ECCs accompany clients at doctor appointments or tour residential care facilities with family members. Geriatric care managers may do that, and if clients want those services, our ECCs will recommend and work with the clients' GCMs.

The ECC will coordinate health care and long-term care providers. Recently, one of our cases began with reports from the wife, who had suffered a stroke a few months before, that her husband, who has end-stage renal disease, was suffering delusions and becoming aggressive. It was becoming more difficult for her and her family to meet his needs at home. After an in-home assessment of him, our ECC contacted several health care facilities about arranging an evaluation to determine whether or not he was suitable for inpatient services. He was evaluated and admitted to the hospital, and his medications were adjusted and monitored.

While the family was undergoing this crisis, our ECC was talking almost daily with the facility in order to identify the most appropriate placement for our client following discharge. His medical and long-term care needs dictated that he could no longer live at home, and he went to a residential facility. We then helped him apply for and obtain public benefits to pay for his care. Meanwhile, we will monitor the long-term care needs of his wife, also our client, who is still living at home. And we do all of this for one fee, which is paid at the outset of the representation, and for an annual renewal fee after the initial one- or two-year representation ends.

Of course, for this family it was the health care crises that both spouses were suffering that brought them into our office in the first place. They did not know what to do. Plainly, their problems were not just "how do we pay the nursing home."

VA Disability Compensation, Pension, and Healthcare: An Introduction

Drew N. Early

February 13, 2016

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"We are dealing with veterans, not procedures -- with their problems, not ours."

Omar Bradley, 1947
Administrator , U.S. Veterans Administration

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Context

- VA is the **second largest Cabinet Agency** in the US Government.

- As of January 4, 2016, the VA reports there are 164, 335 claims pending with the VA.
- The VA reports there are 332,220 appeals pending.

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Context (continued)

- VA had made a pledge to stem that growth by FY 2015.

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VA Compensation

- Administered by the Veterans Benefits Administration
- Purpose: to administer monetary benefits to eligible veterans and family members
- 2nd largest organization within the VA
  - Largest portion ($69 Billion) of VA's budget.

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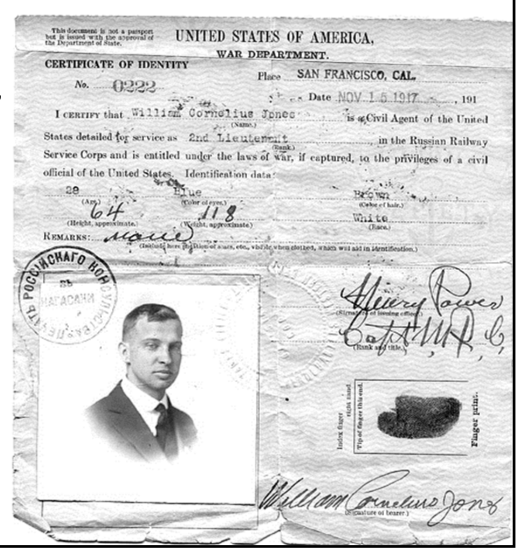
VA Eligibility

- Who's a veteran?
  - Formally: Title 10, not 11 or 32
    - Title 10 = Active Duty
  - But also: NOAA, USPHS, USCG, et al
  - See 38 CFR 3.7


This document is not a passport but is issued with the approval of the Department of State.

UNITED STATES OF AMERICA,
WAR DEPARTMENT.

CERTIFICATE OF IDENTITY

No. 0222

Place SAN FRANCISCO, CAL.

Date NOV 15 1917, 191

I CERTIFY that William Cornelius Jones (Name.) is a Civil Agent of the United States detailed for service as 2nd Lieutenant (Rank) in the Russian Railway Service Corps and is entitled under the laws of war, if captured, to the privileges of a civil official of the United States. Identification data:

28 (Age.) Blue (Color of eyes.) Brown (Color of hair.)

64 (Height, approximate.) 118 (Weight, approximate.) White (Race.)

REMARKS: none (Include here position of scars, etc., visible when clothed, which will aid in identification.)

Henry Power (Signature of issuing officer.)

Capt. A.M.R.C. (Rank and title.)

Finger print.

William Cornelius Jones (Signature of bearer.)

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VA Eligibility

- Then…. the character of the Discharge and In Line of Duty:
  - Barred to: Conscientious Objector who refused military duty, deserters, alien who had requested release, resignation by an officer for good of service
  - Honorable <u>characterization</u> of Service
    - Honorable Discharge is binding on VA,
    - as is Bad Conduct or Dishonorable Discharge
  - VA gets to make the characterization:
    - Administrative Procedures Act
- And not incarcerated…

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Veterans Benefits Administration

Regionally organized:

- Compensation claims: local VARO
- Dependency and Indemnity Compensation and Pension:

  Philadelphia. Milwaukee, St. Paul
- Fiduciary Administration: One of 6 Hubs

VARO Atlanta

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Veterans Benefits Administration

Benefits administered by VBA:

⟹ • Compensation
- Pension
- Education (including vocational training)
- Loans and Insurance (VA Mortgage)
- Special allowances for handicapped assistance
- Dependency and Indemnity Claims

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Veterans Benefits Administration

⟹ • Compensation:
- flows to the Veteran
- governed by 38 USC 11

- Dependency and Indemnity Compensation
  - flows to eligible family member(s)
  - governed by 38 USC 13
  - may result in further entitlements

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Compensation

- Arises from **service connected** event and veteran still suffers from that event.
- Disability: 0 – 100%; unlike SSDI:
  - "0" is not necessarily a bad thing…
    - Provides for priority w/in VA Health Care
    - Service connection established
  - ⟹ $134.00 (10%) – $2,906/mo. (100%)
  - w/ Special Monthly Compensation
    - up to $8,318/mo.
- Eligible for SSDI as well!

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Service Connection

- A very powerful tool for benefits
- No claimant can have both service connected and non-service connected benefits *based on the same veteran*
- Assets or income ***never*** matter in service connected claims

Always pursue service-connection, if possible:
- higher potential payouts than pension
- also leads to greater VA health prioritization

Compensation

- Tax-Free
- Rating either Permanent or Temporary
  - Specified by rating decision
  - Service-connection protected at 10 years
  - Rating protected at 20 years
- Special Monthly Compensation:
  - Catastrophically disabled veteran or
  - loss of use or actual loss of limb, creative organ, blindness, deafness, aphonia
  - Will be awarded a SMC code: K through S

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Understanding Compensation Rate Tables

Ratings Based on Average Impairment in Earning Capacity	**0% to 100% in Increments of 10**
0%	Non-compensable, unless in multiples
10%	Starts paying money
30%	Pays additional for each dependent, higher priority for VA health care
40% for one condition with (70% total for multiple conditions)	May file for unemployability, bumping up to 100%
50%	Highest VA healthcare priority
60% for one condition	May file for unemployability, bumping up to 100%
100%	Not necessarily maximum, due to Special Monthly Compensation
100% P & T protected after 10 years	

Compensation

- Can always seek upgrade of SC condition, once established
- May lead to benefits to eligible spouse:
  - Dependency and Indemnity Compensation: $1,254/mo.

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Service Connection

Disability must be proved to arise from service

- "As least as likely as not" as standard
- Not arising from misconduct
- Three ways to establish
  - Certain conditions and diseases are **presumed** by VA to arise due to service
  - Direct or secondarily-related
  - As a result of VA medical malpractice ("1151 claim")

Bataan Death March Survivor

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Service Connection

Presumptive conditions for service connection:

- ALS (Lou Gehrig's disease)—all veterans
- Agent Orange: requires VN "boots on the ground"
  - Diabetes (Type II), Prostate Cancer, and Spina bifida for affected children of those vets
  - Parkinson's and Ischemic Heart Disease recently added:
    - Final Rule in Federal Register August 31, 2010
  - Also includes specific units in DMZ, South Korea for a period in 1968-1971

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Service Connection

Presumptive conditions for service connection:

- "boots on the ground" for the presumption of Agent Orange exposure means:
  - Just that! Boots <u>on</u> the ground, not
    - flying over (USAF out of Guam or Thailand) , with one recent exception: some C-123 aircraft
    - adjacent land mass

- *<u>Haas v. Peake</u>*, 525 F.3d 1168 (Fed. Cir. 2008): Brown water and Blue water Navy distinctions
  - VA rulemaking, therefore **VA chooses**
  - Blue water—no presumption
  - Brown water (i.e.) riverine—grant presumption

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Service Connection

Presumptive conditions for service connection:

- Chronic diseases:
  - manifesting to a degree of 10% within presumptive period
  - diseases listed in 38 USC 1101(3), 38 CFR 3.309(a)
- Radiogenic diseases:
  - various cancers
  - presumption only available to "atomic veteran"
    - POWs at, or occupiers of, Hiroshima or Nagaski
    - Present at named atomic tests (Greenhouse *et al*).
    - Service with certain duties at named atomic facilities (i.e. Area K25, Oak Ridge National Lab)

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Service Connection

Presumptive conditions for service connection:

- Tropical diseases:
  - manifesting to a degree of 10% within one year
  - Former POWs:
  - diseases that manifest to a degree of 10% or more
  - no minimum period of status as POW for certain conditions, e.g. hypertension, anxiety
  - certain other conditions require at least 30 days of status as POW, e.g. malnutrition, cirrhosis
- Exposure to mustard gas
- Special rules for Persian Gulf War w/ undiagnosed chronic conditions ("Gulf War Syndrome")

Former POW
North Korea

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Service Connection

Presumptive conditions for service connection:

- PTSD:
  - governed by 38 CFR 3.304(f) w/ significant amendments and internal VA provisions as found in M21-1MR
    - Diagnosis of PTSD
    - Evidence of Stressor in Service
    - Medical evidence of link between stressor and diagnosed PTSD

      "a link, established by medical evidence, between current symptoms and an in-service stressor". *Cohen v. Brown*, 10 Vet. App. at 138
  - Stressor **presumed** for combat

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Service Connection

Camp LeJeune, 1953-1987: Rule in development for:

Kidney Cancer

Liver Cancer

Non-Hodgkin Lymphoma

Leukemia

Multiple Myeloma

Scleroderma

Parkinson's Disease

Aplastic Anemia / Myelodysplastic Syndromes

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Service Connection

- Direct or Secondary Connection:
  - Medical diagnosis of current disability
  - Medical or lay evidence of occurrence or aggravation of disease or injury in service
  - Medical evidence of link or nexus between the in-service occurrence and the current disability

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VA Disability

Proving non-presumptive conditions:

- Arose in service
- Documented in service records or other medical records
- May be supported by affidavits or non-medical records
- Can use independent medical opinion (IMO) to assist in substantiating claim.

How can you know it's documented?

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VA Disability

- Look at the VA file (known as Claims File or "C"-file)
  - Hard copy file kept at local VARO
  - Request copy using VA form 3288
  - Takes 4-5 months to receive

Figure 3. Image of Improperly Stored and Commingled Veteran Information

Source: VA OIG, CACI scanning facility's rear storage area, Newnan, GA; January 2015

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VA Disability

- Alternate sources of Documentation:
  - Other Service Records
    - Unit Records and Logs
    - Flight Records and Manifests
    - Military Treatment Facilities
  - Contemporaneous documents:
    - Photographs, tape recordings, etc.
    - Police Reports
    - Ambulance Reports and civilian Hospital records
    - News Articles
  - Corroboration by witnesses
  - And the list goes on….

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Service Connection

- Direct or Secondary Connection:
  - Medical diagnosis of current disability
    - Current = presently existing
    - Chronic or continuity of symptomology
  - Medical or lay evidence of occurrence or aggravation of disease or injury in service
  - Medical evidence of link or nexus between the in-service occurrence and the current disability

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Service Connection

- Direct or Secondary Connection:
  - Medical diagnosis of current disability
  - Medical or lay evidence of occurrence or aggravation of disease or injury in service
    - Accident, injury, disease
    - On duty, off duty BUT **must be in Line of Duty**:
      - No DUIs
      - No injuries during commission of a crime
      - No illicit drug use
  - Medical evidence of link or nexus between the in-service occurrence and the current disability

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Service Connection

- Direct or Secondary Causation:
  - Medical diagnosis of current disability
  - Medical or lay evidence of occurrence or aggravation of disease or injury in service
  - "Medical evidence of link or nexus between the in-service occurrence and the current disability":
    - Established by VA exam
    - independent medical authority (not limited to MD or DO)

⟹

- Standard of proof for this element is "at least as likely as not". *Ortiz v. Principi*, 274 F3d 1361 (Fed. Cir. 2001)

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Service Connection

- Direct Service Connection and related presumptions:
  - Presumption of Soundness: upon entry into active duty.
    - VA must rebut.
  - Service Connection by Aggravation:
    - Condition noted upon entry
    - Presumption of service connection extended if condition worsened on active duty.
    - Aggravation is a medical conclusion.

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Service Connection

Secondary Service Connection

- A disability that is the result of another service-connected condition.
- Examples:
  - Vet takes medication for SC tuberculosis which results in hearing loss.
  - SC physical impairment results in depression.
  - ⟹ SC knee condition results in hip displacement.
  - Neuropathy as a result of SC diabetes.

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Related Service Connection

- Injury or death caused by VA Health Care or VA Vocational Rehab: "Proximate Cause"
- Veteran may pursue FTCA claim for medical malpractice:
  - Filed with VA Regional Counsel as admin claim
  - Litigated in Federal Court
- Veteran may file for relief under Section 1151
  - If awarded, compensation of disability treated as if it were service-connected; not actual SC status
- Significant implications: differing relief and deadlines between the claims

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VA Disability Ratings

Governed by 38 CFR 4-series

- Statutory (it is what it is…)
  - Tinnitus is only 10%, period
  - Feet: 0, 10, 20, 30, 50% only
- Bilateral factor for both limbs/extremities
- No "Pyramiding"—adding individual components all related to one disability.
  - No compensation more than once for same disability.
  - Highest rating prevails.

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VA Disability Ratings

- Results in a single rating or
- Combined rating for multiple service-connected disabilities
- A combined rating is not a sum of the single ratings!
- It is a rating that reflects the **cumulative impact** of the disabilities on the veteran

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VA Disability Ratings

Notional Veteran: 30% for x; 10% for y, 10% for z, 10% for a, 0% for b.

Result is combined rating of **50%**

- Take highest disability and assess remaining capability = 70%
- Takes next highest disability and its impact on the remaining capability = 63%
- 70 to 63 to 57 to 51.
- VA rounds to nearest increment of 10.

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VA Disability Ratings

- Alternative path to Total Disability payment
- Veteran's:
  - Combined rating is 70% or higher and at least one of the veterans individual disabilities is rated at 40% or
  - Veteran has a single disability rated at 60% and
  - Veteran is incapable of Substantial Gainful Activity
- Seek a grant of Total Disability Individual Unemployability (TDIU) –pays at the 100% rate
- VA is required to consider Social Security determinations

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Service Connection

- Disability Ratings:
- Can appeal the amount of the awarded rating or that a rating was denied.
- once rating is granted, SC is established.
  - if condition then worsens, then simply advise VA and get new rating, based upon supporting evidence.

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Veterans Benefits Administration

- Compensation:
  - flows to the Veteran
  - governed by 38 USC 11

⟹ • Dependency and Indemnity Compensation
  - flows to eligible family member(s)
  - governed by 38 USC 13
  - may result in further entitlements

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Dependency and Indemnity Compensation

- Flows to eligible family member(s)
  - $1254/mo, plus stipend for dependents
  - Also provides for CHAMPVA healthcare

- Veteran's death due to service connected disability or
- The service connected disability materially contributed to cause of death or
- Veteran had been rated at 100% rate for last 10 years.

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Veterans Benefits Administration

Benefits administered by VBA:

- Compensation
- ⟹ Pension
- Education (including vocational training)
- Loans and Insurance (VA Mortgage)
- Special allowances for handicapped assistance
- Dependency and Indemnity Claims

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VA Improved Pension

- Tiered benefit:
  - Improved Pension
  - w/ Housebound
  - w/ Aid and Attendance
- Medical need: relating to above
- Assets: (notionally $80K for 80 y/o or less)
- Income: not to exceed pension limits after allowable exclusions (IVAP)

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Basic Improved Pension Rules

At least 90 days of active military service (generally, 24 months for enlistments after September 7, 1980)

At least one day of wartime service (combat service not required)

Totally & permanently disabled, or attained age 65

Within income limits to qualify for this benefit, from $1072/mo. to $1,788/mo.

Proposed Rule as to Assets

- Jan 23, 2015: VA issues PR on asset transfers.
- Proposed 3 year lookback period, w/ penalties for transfers.
- Proposed alignment analogous to Medicaid CSRA
- Notice and Comment closed on March 24, 2015. 867 comments received.
- Awaiting Agency review/response, then publication of Final Rule.

Tangential Considerations

- Survivor benefits
  - Acting in Place of Veteran: "Substitution"
  - Accrued Benefits on behalf of Veteran
- VA Fiduciary Program
  - Administration of VA benefits to veterans who have been adjudicated to lack capacity
  - Requires appointment of Federal Fiduciary
  - non-VA POAs are not recognized

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Veterans Health Administration (VHA)

- Hospitalization:
  - VAMC Atlanta
  - VAMC Augusta
  - VAMC Dublin
- Outpatient Clinics
  - CBOCs—area based clinics

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Veterans Health Administration

- Prescriptions
- Medical devices and assistance equipment
- Nursing home
  - VA managed
  - Contract
- In-home support
  - Respite care
  - Palliative Care
  - Home based
  - Hospice

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Veterans Health Administration

8 priorities for enrollment, in order:

1. 50% or greater SC or unemployable due to SC
2. 30%-40% SC
3. POWs, Purple Heart, medically discharged
4. Aid and Attendance or Housebound vets
5. VA pension or Medicare vets
6. WWI vets or vets in combat operations after Nov 11, 1998 and 0% SC vets
7. Income below poverty threshold levels
8. Income above threshold levels but w/in 10%

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Veterans Health Administration

Enrollment and treatment:

- VA Form 10-10 EZ (available online),
- VAMC (VA Medical Center—the VA hospital)
  - VAMC Atlanta
  - VAMC Augusta
  - VAMC Dublin
- CBOCs (VA local clinics)

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National Cemetery Administration

- Burial Plots
  - Note: Does not include Arlington
- Headstones and Markers
- Memorial certificate
- Flags and burial allowance

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Georgia Dep't of Veteran Services

- State veterans homes
  - Milledgeville and Augusta
- State representatives within each county
- State veterans cemeteries
  - Milledgeville and Glenville
- other benefits—drivers' license, licensing fees

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We salute and honor all our veterans and their surviving spouses by:

- Providing effective options
- Educating to make informed decisions
- Understanding the impact of decisions
- Facilitating the decisions
- Accommodating change, as circumstances change over time

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Adult Guardianships, Conservatorships & Litigation[1]

By: David L. McGuffey, CELA

[1] This paper was originally prepared for and presented at the National Aging & Law Institute, held in Washington, D.C., November 8-10, 2012. It has been updated for a presentation at the 2015 NAELA Annual Conference in Orlando, Florida, on May 14, 2015. Copyright is retrained by the author.

What is a Guardianship or Conservatorship?

The primary purpose of a guardianship or conservatorship is to protect a class of citizens who are incapable of fully protecting themselves.[2] Guardianships and conservatorships are court proceedings which, when approved, implement the concept

[2] *In re Conservatorship of Smith*, 655 N.W.2d 814 (Minn. App. 2003); *In re Link*, 713 S.W. 2d 487 (Mo. 1986).

of *parens patriae*.[3] They include "front end" procedures (associated with due process when the petition is considered) and "back end" procedures (associated with guardian oversight).[4]

"Conservatorship proceedings provide a forum for determining whether a person's ability to remain autonomous has become impaired. Even though these proceedings are intended to promote the best interests of the vulnerable elderly,[5] they carry with them the real possibility of displacing the elderly person's ability to make even the most basic decisions for themselves and to live their lives unfettered by the control of others. Persons who are the subject of a conservatorship face a substantial loss of freedom, that resembles the loss of freedom following a criminal conviction." *In re Conservatorship of Groves*, 109 S.W.3d 317, 329 (citations omitted).[6]

In Georgia,[7] the guardianship process is the exclusive method for appointing a guardian other than a guardian ad litem. O.C.G.A. § 29-4-1(b).[8] The conservatorship process is

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[3] "Under this doctrine, the King, as father (parent) of the country, is responsible for caring for those citizens who cannot care for themselves." *See* M.F. Radford, *Guardianships and Conservatorships in Georgia*, § 1-1 (Chattahoochee Legal Press 2005) (hereinafter "Radford"). Reform of State guardianship laws, and updated notions of due process, began to emerge following the U.S. Supreme Court's decisions in *In re Gualt*, 387 U.S. 1 (1967) (a juvenile delinquency proceeding), and *Specht v. Pattterson*, 386 U.S. 605 (1967) (a mental illness commitment proceeding). The uniform conclusion was "where the state undertakes to act in *parens patriae*, it has the inescapable duty to vouchsafe due process and due process requires that the infirm person be fully advised of his rights and accorded each of them unless knowingly and understandingly waived." *In re Link*, *supra*, at 494. In K. Glen, *Changing Paradigms: Mental Capacity*, *Legal Capacity*, *Guardianship and Beyond*, 44. Colum. Human Rights L. Rev. 93 (2012), the writer briefly traces the history of guardianship law from Roman times.

[4] N. Karp and E. Wood, *Guardianship Monitoring: A National Survey of Court Practices* (AARP 2006), at 2.

[5] O.C.G.A. § 29-4-1(c). "Guardians and caregivers have long experienced the tension of protecting individuals who are incapacitated, primarily elders and people with disabilities, while respecting their autonomy." E. Cashmore, *Guarding the Golden Years: How Public Guardianship for Elders Can Help States Meet the Mandates of Olmstead*, 55 B.C. L. Rev. 1217 (2014).

[6] "Guardianship is a powerful legal tool that can bring good or ill for an increasing number of vulnerable people with cognitive impairments, affording needed protections yet drastically reducing fundamental rights." *Guardianship Monitoring*, *supra*, at 1.

[7] The guardianship process is "similar" in most States, but procedural rules vary. Although reference is made throughout this paper to cases from other States, the rules in Georgia and Tennessee are used as a discussion template.

[8] Although the guardianship process is the exclusive method for appointing a guardian, the Georgia mental health code provides for short term involuntary detainment in a health care facility. O.C.G.A. § 37-3-41 et seq. An involuntary detainment is not tantamount to an adjudication of incompetence; it is designed to protect individuals with an emergent mental health disorder from harm. A non-judicial detainment requires completion of "Form 1013" by a physician (hence, it is known as a "1013 procedure"). Form 1013 must be completed by a physician, psychologist, clinical social worker, or clinical nurse specialist in psychiatric/mental health. The certificate expires in 7 days. A judicial order for evaluation is authorized pursuant to O.C.G.A. § 37-3-41(b). An involuntary patient may apply to be transferred to voluntary status. O.C.G.A. § 37-3-24. Detainment without judicial intervention cannot exceed 5 days. O.C.G.A. § 37-3-64. Detainments in excess of 5 days require certification from the chief medical officer of the facility, supported by the opinions of 2 physicians, or a physician and psychologist who personally examined the patient; their recommendation must be filed with a petition for hearing in a court of

the exclusive means for appointing a conservator, except a conservator for the estate of an individual who is missing or believed to be dead. O.C.G.A. § 29-5-1(b).

A ward has the right to: (1) a qualified guardian who acts in the best interest of the ward; (2) A guardian who is reasonably accessible to the ward; (3) Have the ward's property utilized to provide adequately for the ward's support, care, education, health, and welfare; (4) Communicate freely and privately with persons other than the guardian, except as otherwise ordered by a court of competent jurisdiction; (5) Individually, or through the ward's representative or legal counsel, bring an action relating to the guardianship, including the right to file a petition alleging that the ward is being unjustly denied a right or privilege granted by this chapter and Chapter 5 of this title and including the right to bring an action to modify or terminate the guardianship pursuant to the provisions of Code Sections 29-4-41 and 29-4-42; (6) The least restrictive form of guardianship assistance, taking into consideration the ward's functional limitations, personal needs, and preferences;[9] and (7) Be restored to capacity at the earliest possible time. O.C.G.A. § 29-4-20.[10] The appointment of a guardian is not a determination regarding the right of the ward to vote. The appointment of a guardian is not a determination that the ward lacks testamentary capacity. O.C.G.A. § 29-4-20.

Terminology

Terminology is sometimes confusing. At times, the terms “guardian” and “conservator” are used interchangeably. Georgia formerly used the term “guardian of the person” to describe a fiduciary making personal decisions and “guardian of the property” to describe the fiduciary making financial decisions.[11] Tennessee describes a guardian as a fiduciary appointed for a minor, while conservator describes a fiduciary appointed for a disabled adult.[12]

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competent jurisdiction. O.C.G.A. § 37-3-81. Generally, jurisdiction is in the Probate Court for adults, O.C.G.A. § 15-9-30(a)(9) and Juvenile Court for minors, O.C.G.A. § 15-11-55(e). Detained patients retain all rights and privileges. O.C.G.A. § 37-3-140. They have a right to counsel. O.C.G.A. § 37-3-141. A detained patient may petition a court for a writ of habeas corpus. O.C.G.A. § 37-3-148.

[9] This is a different approach from how guardianships were handled no more fifty to sixty years ago. “In the nineteenth and first half of the twentieth century, however, the primary social and legal policy for persons with intellectual and psycho-social disabilities was institutionalization. Beginning with well-intentioned experimental schools, economic and other forces led quickly to "custodial asylums with reduced emphasis on educating residents and returning them to community life. By the beginning of the twentieth century, poor farms or almshouses were also a significant aspect of state provision for people with intellectual disabilities.” Glen, *Changing Paradigms*, *supra*, 44 Colum. Human Rights L. Rev. at 104.

[10] See also O.C.G.A. § 29-5-20 for rights relating to a conservatorship. Each of these rights makes litigation a possibility if the ward alleges mistreatment.

[11] The Alabama Supreme Court, in *Sears v. Hampton,* 143 So.3d 151 (Ala. 2013) differentiated the two offices as follows: “A guardianship concerns the control over health, support, education or maintenance of an incapacitated person, whereas a conservatorship is usually limited to control over the property and finances of a protected person.”

[12] In Tennessee, the term guardian applies to a fiduciary appointed for a minor, while the term conservator is used to describe the fiduciary appointed for an adult. T.C.A. § 34-1-101(4) and (10).

Georgia now distinguishes the terms, with "guardian" describing the fiduciary making personal decisions and "conservator" describing the fiduciary making decisions regarding property and finances.[13] *See also* Uniform Adult Guardianship and Protective Proceedings Act, § 102(2) (defining conservator) and § 102(3) (defining guardian). Although some find use of the term pejorative, in most instances, the subject of a guardianship or conservatorship is referred to as the "ward."[14]

Who is the client?

The initial inquiry in every representation is to identify the client.[15] Whether an action is contested or uncontested, the petitioner's interests are generally adverse those of the alleged ward.[16] For that reason, it is unlikely that an attorney would represent both the petitioner and the ward.[17] Nonetheless, in some States Rule 1.14 of the Rules of Professional Conduct permits (or requires) protective action on behalf of a client where the lawyer reasonably believes the client has diminished capacity. In some States, this includes seeking the appointment of a guardian. *See, e.g.*, Georgia Rules of Professional Conduct, Rule 1.14(b).[18]

In Mr. Jones' case, one question is whether you explore the possibility of having mom sign a power of attorney and/or advance directive.[19] If you do, then have you become mom's attorney by preparing documents for her signature? What do you do if mom asks what the documents mean? Does explaining the documents constitute giving mom legal advice? Can you give mom legal advice after speaking with Mr. Jones about the possibility of filing a guardianship petition? If you do speak with mom about executing

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[13] O.C.G.A. § 29-1-1(2) (defining conservator); O.C.G.A. § 29-1-1(7) (defining guardian). To avoid confusion, the new terms – e.g., conservator rather than guardian of property -- are used in describing cases that predate the change in terminology.

[14] R. Fleming and L. Davis, *Elder Law Answer Book, Third Ed.* (Aspen 2012), Q. 11:7

[15] F. Johns, *Guardianship Adjudications Examined within the Context of the ABA Model Rules of Professional Conduct*, 37 Stetson L. Rev. 243, 246 (2007).

[16] Even where the petitioner believes he or she is advocating for the ward, the interests are still deemed to be adverse because the guardianship and conservatorship process involves transferring legal rights from the alleged ward to a fiduciary against a backdrop presumption that every individual has legal capacity. The adversarial nature of these conflicting concepts creates a "conflict of interest," which is the second inquiry a lawyer must make after identifying the client. *Guardianship Adjudications Examined within the Context of the ABA Model Rules, supra*, p. 246-247.

[17] The Court found the conduct of one petitioner's attorney "extremely perplexing" where he filed motions allegedly on behalf of the ward in the *Groves* case. "It is similarly unclear how Mr. Meeks could simultaneously represent both Ms. Groves and Ms. Travis and Proctor because their positions regaring Ms. Groves' capacity – judged by the papers filed on their behalf – were patently inconsistent and opposed." *In re Conservatorship of Groves*, 109 S.W.3d 317, 346.

[18] Fleming and Davis indicate that, even where permitted, it may not be advisable for the ward's attorney to file a petition. "It is critically important to confirm that there is no less invasive alternative. It is also important that the attorney confirm that the client's original goals are not frustrated by the proceeding, that no confidences or secrets are impermissibly disclosed, and that the attorney is certain that the facts clearly support the action." *Elder Law Answer Book*, Q. 11:16.

[19] Has she become a prospective client? *See* Model Rules of Professional Conduct, Rule 1.18.

those documents and she declines to sign them, can you still represent Mr. Jones in a guardianship action against mom?

The difficulty in resolving these issues is acknowledged (without being resolved) in J. Krauskopf et al., *Elderlaw: Advocacy for the Aging, Second* (West1993), § 9.7. "The attorney who practices elder law is often presented with a difficult problem in determining who is actually the client. When the attorney is contacted by an adult daughter to establish a guardianship for her mother because the daughter believes the mother to be incapacitated, the attorney should consider whether he or she has a duty to the mother. Under most circumstances, the duty of the attorney is predominately to the daughter/proposed guardian and will involve advocating the guardianship on behalf of the daughter client and educating her about the rights, powers, duties and responsibilities of her position." The lines are even more blurry when the attorney was hired to protect family wealth. *Id*. "Can the attorney represent the family, or are the interests so disparate that an inherent conflict of interest prevents multiple representation of the parties?"

Rule 1.7(a) of the Georgia Rules of Professional Conduct provides: "A lawyer shall not represent or continue to represent a client if there is a significant risk that the lawyer's own interests or the lawyer's duties to another client, a former client, or a third person will materially and adversely affect the representation of the client." Rule 1.7(c)(2) provides that informed consent to joint representation is not possible if the representation "includes the assertion of a claim by one client against another client represented by the lawyer in the same or substantially related proceeding." Comment 7 explains subsection (c)(2): Paragraph (c)(2) prohibits representation of opposing parties in the same or a similar proceeding including simultaneous representation of parties whose interests may conflict, such as co-plaintiffs or co-defendants. An impermissible conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party.

Rule 1.14 (which varies from State to State) addresses situation where the attorney-client relationship has attached and the client has diminished capacity. Georgia's Rule 1.14 provides as follows:

a. When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
b. When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that

have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.[20]

c. Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

The ACTEC Commentaries to Rule 1.14 address situations where the lawyer is hired to represent the fiduciary and where the lawyer represents a client with diminished capacity.[21] The ACTEC commentaries indicate that if the lawyer did not previously represent the alleged ward, then the client is the fiduciary; the lawyer may nonetheless owe certain duties to the disabled person. If the lawyer represented an individual with diminished capacity prior to the incapacity, then the lawyer may continue to represent the client. In some cases, a lawyer may represent the guardian or conservator of a former client if the representation is not directly adverse. The commentaries indicate this is not possible if there is a significant risk that joint representation of one would materially limit obligations owed to the other. Although the commentaries do not offer any examples, situations where the representation "might" not be adverse include representing the individual who was designated by the client as guardian or conservator if the person to be appointed indicates that he or she will follow the wishes of the former client. The best practice would likely involve bringing the matter to the Court's attention and allowing the Court to determine whether continued representation is possible after full disclosure.

Initiating the Action and Overview

The Petition

A Guardianship or Conservatorship is initiated by filing a petition. National College of Probate Judges ("NCPJ") Standard 3.3.1 indicates the petition should be as simple as possible to obtain, complete, and process. It should be verified and require at least the following information: (1) a description of the nature and extent of the functional limitations in the respondent's ability to care for him- or her-self; (2) representations that less intrusive alternatives to guardianship have been examined; and (3) the guardianship powers being requested.

Essential elements of a Georgia petition appear at O.C.G.A. § 29-4-10(b) for a guardianship petition, and O.C.G.A. § 29-5-10(b) for a conservatorship petition.[22] In Tennessee, the essential elements of a conservatorship petition appear at T.C.A. § 34-3-

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20 NAELA Aspirational Standard E.7 indicates that guardianship should be the last resort.
21 http://www.actec.org/public/Commentaries1.14.asp.
22 The standard form including these elements is Form 12, available at www.gaprobate.org.

104. *See also* Uniform Guardianship and Protective Proceedings Act (Article 5 of the Uniform Probate Code) (hereinafter "UGPPA"), § 5-304(b).[23]

A Georgia petition must be verified and signed by a co-petitioner, or must be presented with the affidavit of an examining physician, psychologist, or licensed clinical social worker who examined the alleged ward within 15 days prior to the filing of the petition. O.C.G.A. § 29-4-10(c).

Emergency Petitions

O.C.G.A. § 29-4-14 provides for the appointment of an emergency guardian in certain cases. The emergency petition may be filed by any interested person, including the proposed ward. O.C.G.A. § 29-4-14(a). The Petition must state jurisdictional facts, the name, address and county of domicile of the proposed ward and the petitioner, the reasons for the emergency petition, as well as a statement of the reasons why a regular petition is not appropriate. The facts must establish an immediate and substantial risk of death or serious physical injury, illness or disease unless the emergency petition is granted. O.C.G.A. § 29-4-14(b)(4). The court must review the petition for probable cause. O.C.G.A. § 29-4-15(a). If there is no probable cause for the petition, then it must be dismissed. If there is probable cause, then a hearing must be held not sooner than three days nor later than five days after the petition is filed. The court must order evaluation of the proposed ward and have all pleadings served on him or her, but an emergency guardian is appointed, with or without prior notice to the ward, to respond to the immediate threatened risk. O.C.G.A. § 29-4-15(c)(5). The emergency guardianship terminates within 60 days, unless earlier terminated by dismissal or appointment of a guardian.[24]

Emergency petitions are disfavored due to the ex parte nature of the proceeding. In *In the Interest of Farr*, 322 Ga. App. 55 (2013), a hospital sought appointment of an emergency guardian for Claudine Farr, a patient.[25] The Petition and attached affidavits alleged Farr "was incapacitated by reason of end stage Parkinson's disease, diabetes mellitus, recurring infections, contracted extremities and respiratory failure to the extent that she lacked sufficient capacity to make or communicate significant responsible decisions concerning her health or safety, and that there was an immediate, clear and substantial risk of death or serious physical injury, illness, or disease unless an emergency guardian is appointed." Farr's son objected to the petition and the Court noted "the only apparent emergency identified by [the hospital] was the hospital's desire

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23 http://www.law.upenn.edu/bll/archives/ulc/upc/final2005.pdf.

24 *See* O.C.G.A. §§ 29-5-14 through 29-5-16 relating to emergency conservators. The test with respect to conservators is whether there is an immediate and substantial risk of irreparable waste or dissipation of the proposed ward's property. O.C.G.A. § 29-5-14(b)(4).

25 It is worth noting that no individual may be appointed as guardian who is an owner, operator or employee of a long-term care or other caregiving institution or facility at which the adult is receiving care, unless related to the adult by blood, marriage, or adoption. O.C.G.A. § 29-4-2(b)(3). Thus, although the hospital might be an interested person capable of filing a petition, unless the Court found it was not providing care, then it should be ineligible to serve as guardian.

to transfer Farr out of its acute-care facility and into what it believed to be a more appropriate facility" for nursing home care. The probate court denied the petition for an emergency petition, rather than a petition for a permanent guardian, because the so-called emergency was not the type described in O.C.G.A. § 29-4-14(b)(4). The probate court's decision was affirmed.[26]

Who can file a Petition?

In Georgia, any interested person or persons,[27] including the proposed ward, may file a petition for the appointment of a guardian or conservator. O.C.G.A. § 29-4-10(a); § 29-5-10(a). In Tennessee, a petition for the appointment of a guardian may be filed by any person having knowledge of the circumstances necessitating the appointment of a guardian. T.C.A. § 34-3-102.[28]

Standard Forms

Some States have standardized forms used in guardianship and conservatorship proceedings. Standard Georgia forms are found at www.gaprobate.org. Standard Tennessee forms appear on the Hamilton County, Tennessee, website for the Clerk and Master at http://www.hamiltontn.gov/courts/ClerkMaster/Forms/default.htm. In most instances, lawyers may modify or deviate from standard forms if they disclose any changes made to the standard form.

Initial Screening

After the petition is filed, an initial screening should occur to divert inappropriate petitions. NCPJ Standard 3.3.2; O.C.G.A. § 29-4-11(a); O.C.G.A. § 29-5-11(a). In Georgia, the initial screening is based on the petition and is performed by the Court. "The probate judge must review it to determine whether there is probable cause to believe that the adult actually is in need of a guardian."[29] If the court determines there is no probable cause, then the petition is dismissed. O.C.G.A. § 29-4-11(b); O.C.G.A § 29-5-11(b).

Notice

Notions of due process permeate the notice requirements in each State's guardianship statute. In Georgia, if there is probable cause for the petition, the Court must give the respondent notice of the action, serving all pleadings on the respondent. O.C.G.A. § 29-4-11(c); O.C.G.A. § 29-5-11(c). The notice must: (1) be personally served; (2) inform the ward that a petition has been filed and that the ward has a right to attend any hearing and if a guardian is appointed that the ward may lose important rights including control

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[26] The court cited *In re Holloway*, 251 Ga. App. 892 (2001), where an emergency guardian was appointed (although that discussion is dicta and not germane to the appeal). In that case, appointment of an emergency guardian was warranted because an 86 year old fell and required emergency surgery and family disputes prevented her children from making a decision.

[27] "Interested person" means any person who has an interest in the welfare of a minor, ward, or proposed ward, or in the management of that individual's assets and may include a governmental agency paying or planning to pay benefits to that individual. O.C.G.A. § 29-1-1(9).

[28] In most states, any interested person can file the petition. *Elder Law Answer Book*, Q. 11:15.

[29] Radford, *supra*, § 4-3; *citing* O.C.G.A. § 29-4-11(a).

over management of his or her person or property; (3) inform the ward of the time and place for submitting to an evaluation; and (4) inform the ward of his or her right to counsel and that counsel shall be appointed within two days of service unless the proposed ward indicates that he or she has retained counsel. O.C.G.A. § 29-4-11(c)(1); O.C.G.A § 29-5-11(c)(1).

In addition to the alleged ward, the following persons must be served with the petition: (1) the ward's spouse, (2) all children (if there are no children, then at least two other relatives or friends if there are no relatives), (3) any person nominated as guardian by the ward, and (4) any person nominated by the ward's spouse, child or parent to serve as guardian. O.C.G.A. § 29-4-11(c)(3); O.C.G.A. § 29-5-11(c)(3). Service by mail is permitted for these individuals.

Guardian Ad Litem

Assuming probable cause exists for the petition to move forward, a guardian ad litem may be appointed. O.C.G.A. § 29-4-11(c)(4); T.C.A. § 34-1-107; NCPJ Standard 3.3.4. The National College of Probate Judges refers to this individual as a "court visitor." The role of the guardian ad litem is to act as the eyes and ears of the court. Radford, *supra*, § 9-2.[30] Although the guardian ad litem is "to represent the interests" of the alleged ward, O.C.G.A. § 29-9-2(a), he or she is prohibited from representing the ward as counsel. O.C.G.A. § 29-9-3.[31]

In Tennessee, the guardian ad litem has the following statutory duties:

> (A) Verify that the respondent and each other person required to be served or notified was served or notified;
> (B) Consult with the respondent in person as soon as possible after appointment;
> (C) If possible, explain in language understandable to the respondent the:
> > (i) Substance of the petition;
> > (ii) Nature of the proceedings;
> > (iii) Respondent's right to protest the petition;
> > (iv) Identity of the proposed fiduciary; and
> > (v) Respondent's rights as set forth in § 34-3-106; and
>
> (D) Determine if the proposed fiduciary is the appropriate person to be appointed.[32]

If a fiduciary is sought to manage the alleged ward's property, then the guardian ad litem must also investigate the:

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[30] The guardian ad litem is, by definition, "not an advocate for the respondent." Tenn. Code Ann. § 34-1-107(d)(1). The guardian ad litem's primary duty is to the court with the focus of that duty being "to determine what is best for the respondent's welfare." *In re Allen*, -- S.W.3d --, 2010 Tenn. App. LEXIS 810 (Tenn. Ct. App. Dec. 29, 2010).

[31] There is a distinct difference between the role of the attorney as an advocate and a guardian ad litem. Comment to UGPPA § 5-115. A case involving a minor, *In the Interest of W.L.H.*, 314 Ga. App. 185 (2012), indicates that the purpose of a guardian ad litem in civil cases is to act for a person who is not *sui juris*. At least in the context tof that litigation, the apparent distinction between guardian ad litem and attorney ad litem is that the guardian ad litem stands in the shoes of the ward.

[32] These duties largely mirror those in UGPPA § 5-305(c) and (d).

(A) Nature and extent of the respondent's property;
(B) Financial capabilities of the proposed fiduciary; and
(C) Proposed property management plan.

To some extent, the guardian ad litem's role is to further due process by ensuring that appropriate disclosures are made and that all parties adhere to the process. The guardian ad litem also serves a protective role by ensuring that significant information is brought to the court's attention if not otherwise disclosed by the parties (e.g., whether the nominated conservator is currently mired in bankruptcy proceedings). Finally, although the guardian ad litem is not the ward's advocate, he or she can ensure that the alleged ward's voice is heard. For example, if the alleged ward expresses a choice regarding who should serve as guardian or conservator, the guardian ad litem might include that information in his or her report to the court.

Legal Counsel

The constitution provides that no State shall deprive any person of life, liberty, or property, without due process of law. Arguably, due process requires appointment of counsel in the guardianship process.[33] In Georgia, legal counsel must be appointed unless the alleged ward retains his or her own attorney. Some States do not require the appointment of counsel because it would add an additional layer of cost in situations where the alleged ward might not be able to pay. After consulting with probate judges and numerous attorneys, this protective rule was intentionally retained when Georgia revised its guardianship code in 2005. *See* Radford, *supra*, § 4-3.

In Tennessee, an attorney ad litem may be appointed on the request of the respondent or on the recommendation of the guardian ad litem. T.C.A. § 34-1-125.[34] The duties of an attorney ad litem and a guardian ad litem, while overlapping somewhat, are different; therefore, appointment of an attorney ad litem is not a substitute for the guardian ad litem. *See In re Allen*, -- S.W.3d --, 2010 Tenn. App. LEXIS 810 (Tenn. Ct. App. Dec. 29, 2010).

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[33] Legal counsel must not confuse their role with that of the guardian ad litem. When an attorney is appointed for the alleged ward, the purpose for counsel is to advocate for the client's expressed wishes and not to determine their best interests. *Gross v. Rell*, 304 Conn. 234 (2012). The appointment of counsel may (or may not) be required for the ward, but no other participant has a right to appointed counsel in an adult guardianship proceeding. *See In re Protective Proceedings of Freddy A.*, 2012 Alas. LEXIS 46 (March 28, 2012), where the court affirmed the trial court's refusal to appoint counsel for the ward's mother in a petition to modify the terms of her son's guardianship.

[34] There is, however, no requirement that an attorney be appointed in all Tennessee cases. In *In re Trout*, 2009 Tenn. App. LEXIS 693 (October 15, 2009), one of the grounds for appeal was failure to appoint counsel for the alleged ward. There, counsel for another party requested appointment of an attorney and the court properly rejected that request. Ms. Trout, when questioned by the guardian ad litem, requested appointment of an attorney, but failed to do so until the trial had started and the court declined to delay the hearing given the exigencies of her circumstances. That decision was affirmed on appeal, in part, because Ms. Trout was previously informed of her right to secure representation and she had failed to do so.

An interesting dilemma in guardianship cases is whether the alleged ward has authority to enter into an attorney-fee agreement. A law firm allegedly hired by the ward after the petition was filed was disqualified in *In re Allen*. There, relying on prior case law,[35] the court found that a lawyer's authority to represent a client must be demonstrated when challenged. The law firm allegedly representing the ward also appeared on behalf of an adult child who filed a competing petition for conservatorship. The entry of appearance was filed after the court appointed a guardian ad litem, whom it chose to ignore. "Knowing full well that the Ward's fate was in the court, that the Ward's doctor of longstanding was opining that the Ward could not care for his person and his property, and that the court had entered an order appointing an attorney ad litem the Freeman attorneys interviewed the Ward and accepted a check drawn on the Ward's account for their potential retainer without so much as acknowledging the court's or attorney's existence." These facts were sufficient to disqualify the law firm from representing the ward without reaching the alleged conflict of interest between the ward and adult child.

In *Levenson v. Oliver*, 202 Ga. App. 157 (1991), distinguishable because it involves restoration of rights after a guardianship was established, a dispute erupted over attorney's fees. The case began when the Department of Family & Children's Services filed a petition to restore Ingeborg Rath's rights. Attorney Louis Levenson filed an entry of appearance for Rath and a demand for jury trial. Meanwhile, reports were returned to the court from the guardian and court appointed physician and applied psychologist, all supporting restoration of Rath's rights. Apprently Levenson submitted a bill in the amount of $6,301.25 approximately two weeks prior to a court order restoring Rath's personal rights, but extending the conservatorship; Rath's conservator objected to the attorney fee bill. Among other reasons for the objection, the conservator stated that Levenson's bill was more than half the amount in Rath's estate and that "a reasonable attorney fee would be $3,000." The probate court apparently agreed and awarded Levenson fees in the amount of $3,500. Levenson's appeal was rejected and the decision below was affirmed. "We find no authority which authorizes an incapacitated adult to hire an attorney without permission from the court or the legal guardian. The purpose of appointing a guardian for an incompetent is to protect the incompetent from personally wasting his estate or allowing others to do so. It would be illogical to appoint a guardian to oversee the estate of an incompetent, and then allow the incompetent to hire attorneys and have the attorneys act without express permission from the guardian or the court. Thus, where a guardian is appointed, no one except the guardian can act for or on behalf of the incompetent without express authority or appointment."[36] Because there was seeming acquiescence to Levenson's representation of Rath, with only the value of services being challenged, the probate court's award of $3,500 was affirmed.

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35 *In re Ellis*, 822 S.W.2d 602 (1991).

36 *Citing Matter of Estate of Kutchins*, 169 Ill. App.3d 637, 523 NE2d 1025 (1988)

The lesson seems to be, at least after probable cause for a hearing is established, that attorney fee agreements should be approved by the court.[37]

Court Initiated Evaluations

Typically, medical or psychological testimony is required before a guardian or conservator may be appointed.[38] This testimony, which is often provided by affidavit, may be different from evidence secured by a party litigant; parties may supplement the court mandated pre-hearing examination with other medical or psychological evidence. This distinction is illustrated in *Ex parte Casey*, 2012 Ala. LEXIS 7 (January 20, 2012). In *Casey*, a 74 year old, Jo Ann, filed for divorce in 2008. Her husband defended, alleging she lacked capacity and that the divorce petition was the product of undue influence. Although the delay is unexplained, James (Senior), her husband, filed a petition for letters of guardianship and conservatorship in January 2010, prior to the hearing on the divorce petition. Initially the probate court appointed Dr. Paul Roller, a geriatric physician, to examine Jo Ann and file a report. Dr. Roller's appointment did not preclude later examinations by Dr. Rebecca Jones and Dr. Olga Belotserkovskaya.[39]

In Georgia, a post-petition examination by a physician, psychologist or licensed clinical social worker is required.[40] "The court shall appoint an evaluating physician who shall be a physician licensed to practice medicine under Chapter 34 of Title 43, a psychologist licensed to practice under Chapter 39 of Title 43, or licensed clinical social worker ...." O.C.G.A. § 29-4-11(d)(1). The evaluator must explain the purpose of the evaluation. The ward may remain silent. Anything said by the ward during the evaluation is privileged and inadmissible. The ward's legal counsel may attend the evaluation, but may not participate. O.C.G.A. § 29-4-11(d)(2). A written report must be filed with the court within seven (7) days after the evaluation and served on the proposed ward, his or her counsel and the guardian ad litem, if any. O.C.G.A. § 29-4-11(d)(4). Hearsay does not appear to be an issue since the court has specific authority to consider the evaluation report and any response filed by the proposed ward. O.C.G.A. § 29-4-12(d)(4); § 29-5-12(d)(4).

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[37] Assuming the alleged ward is capable of voicing a preference concerning lawyers, allowing the ward to select his or her lawyer is entirely consistent with the ward's right to select a guardian or conservator. It would seem that good cause would be necessary to deny a ward's motion to retain a specific lawyer.

[38] In *Conservatorship of G.H.*, 227 Cal. App. 4th 1435 (Cal. App. 2014), the trial court was reversed for terminating a proceeding in favor of petitioner where the ward failed to submit to a mental examination. Essentially, a guardianship was imposed without the examination and without an evidentiary hearing which was an abuse of discretion.

[39] *Ex parte Casey*, while illustrative of the use of multiple examinations, dealt with whether a guardianship should have been transferred to another court.

[40] In *In re Estate of Davis*, 2014 Ga. App. LEXIS 806 (Ga. App. November 21, 2014), it was error to dismiss a petition without evaluation after finding sufficient probable cause to warrant filing of the petition. In *Davis*, the Court appointed a social worker to perform the evaluation. The social worker went to the jail, where the putative ward was being held, and the ward refused the evaluation unless his attorney was present. On appeal, the Court held that once a finding of probable cause is made, the probate court "shall" order an evaluation. Dismissal without the required evaluation was error.

In Tennessee, an examination conducted within ninety days prior to the petition is sufficient, but a post-petition examination may be ordered on motion by the petitioner, the respondent, the adversary counsel, the guardian ad litem, or by the Court on its own initiative. T.C.A. § 34-3-105 (a). Each physician's or psychologist's sworn report shall contain the following: (1) The respondent's medical history; (2) A description of the nature and type of the respondent's disability; (3) An opinion as to whether a conservator is needed and the type and scope of the conservator with specific statement of the reasons for the recommendation of conservatorship; and (4) Any other matters as the court deems necessary or advisable. T.C.A. § 34-3-105(c).

Additional Court Screening

In Georgia, the court should review the report from the court ordered examination to determine whether probable cause exists for a hearing. O.C.G.A. § 29-4-12(a). If there is no probable cause to support a finding that the ward is in need of a guardian or conservator, the petition is dismissed. O.C.G.A. § 29-5-12(b).

It does not necessarily follow that a guardianship or conservatorship will be imposed following a medical, psychological, or other finding of incapacity. In *McCallie v. McCallie*, 660 So.2d 584 (Ala. 1995), Jackie McCallie filed a petition for guardianship and his brother, David, filed a petition to dismiss; David alleged that, while their mother lacked capacity, he held a power of attorney so no guardianship was necessary. Thus, a lack of capacity was apparently stipulated by the parties. The court nonetheless dismissed the petition. Jackie appealed, arguing that the stipulation of incapacity required imposition of a guardianship. In affirming, the court held that a guardian is appointed only when there is a finding that a basis for a guardianship has been established. In that case, with the existence of a power of attorney, the necessity of a guardianship was not established notwithstanding the stipulation.[41] See also *Cruver v. Mitchell*, 289 Ga. App. 145 (2008), discussed *infra*.

Hearing

If probable cause of impairment remains following the court initiated evaluation, then a hearing must be scheduled. O.C.G.A. § 29-5-12(c)(1). In Georgia, a trial by jury may be demanded in counties where the population exceeds 96,000 and the judge has been a practicing attorney for at least 7 years. O.C.G.A. § 15-9-121. The rules of evidence applicable in all civil cases apply. O.C.G.A. § 29-5-12(c)(3). The standard of proof is clear and convincing evidence of the need for a guardianship or conservatorship. O.C.G.A. § 29-5-12(c)(4).[42]

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[41] "Most states have added threshold requirements for guardianship intervention – most commonly a finding that the guardianship is necessary to provide for the essential needs of the individual." *Assessment of Older Adults, supra*, p. 7.

[42] In *Autry v. Beckham*, 2014 Ark. App. 692 (Ark. Ct. App. 2014), the trial court imposed a guardianship without requiring a professional evaluation or taking any professional evidence of incapacity. Although the issue was not raised below, the Court found that without the required professional evaluation, there was no evidentiary basis for the guardianship. Thus, the decision below was clearly erroneous. In *Losh v. McKinley*, 86 So.3d 1150 (Fla. App. 2012), a trial court was reversed after finding that a 93 year old widow lacked capacity. Two out of three examining doctors found that she was

In Tennessee, the respondent has the right to: (1) On demand by respondent or the guardian ad litem, a hearing on the issue of disability; (2) Present evidence and confront and cross-examine witnesses; (3) Appeal the final decision on the petition; (4) Attend any hearing; and (5) Have an attorney ad litem appointed to advocate the interests of the respondent. T.C.A. § 34-3-106. The hearing must be held on the petition not less than seven (7) or more than sixty (60) days after service of the petition or appointment of a guardian ad litem, whichever is later. T.C.A. § 34-1-108(a). The standard of proof is clear and convincing evidence that a conservatorship is necessary. T.C.A. § 34-1-126.

The right to a formal hearing may be waived unless required by statute. In *Conservatorship of Deidre B.*, 180 Cal. App.4th 1306 (2010), the ward's appointed counsel consented to reestablishment of a conservatorship and waived the conservatee's right to a formal hearing.[43] On appeal, the court found no error in accepting counsel's stipulation. The court indicated that a remedy still exists if the conservatee later suggests that the stipulation was improperly made; the conservatee could request a rehearing in light of the court's continuing jurisdiction.

Presence of the Ward

The ward's presence at the hearing is a due process right that may be waived. This issue was litigated in *Conservatorship of John L.*, 105 Cal. Rptr.3d 424 (Cal. 2010). There, an individual with an alleged mental illness was the subject of a proceeding under California's Lanterman-Petris-Short Act (LPS Act or Act; Welf. & Inst. Code, § 5000 et seq.).[44] John L.'s counsel waived his right to appear at the hearing. Specifically, his appointed counsel reported: "Your [H]onor, I have visited with him at Telecare Choices. Recently he was here. He had requested a writ which he took off calendar. At any rate Mr. L[.] is doing much better. We discussed the conservatorship and on Friday then he wished to put it over until yesterday so that he could think about it. When we met he indicated that at this time he was not contesting the conservatorship. He did not want to be present in court. So we would ask the court to excuse his presence." After receipt of this report, the hearing went forward and a conservatorship was established.

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quite able to make her own decisions with her insight and judgment intact. The third recommended a limited guardianship. A fourth doctor examined Mrs. Losh after a conflict of interest arose and recommended a limited guardianship covering property management and gifts. However, that doctor indicated Mrs. Losh was alert, fully oriented, very well aware of circumstances and that she had an excellent general knowledge. At the hearing, Mrs. Losh testified in detail about her family, personal finances, property, health status and prescribed medications. At the conclusion of the hearing, the court expressed concern over Mrs. Losh's vulnerability to undue influence and her ability to manager her property in the future. The Court of appeals reversed, finding that the evidence was not clear and convincing that Mrs. Losh lacked capacity. Although the trial court was well-meaning, "in our present day paternalistic society we must take care that in our zeal for protecting those who cannot protect themselves we do not unnecessarily deprive them of some rather precious individual rights."

[43] In California, the reestablishment hearing is governed by the same rules that govern an initial establishment hearing.

[44] The LPS Act authorizes the establishment of a conservatorship of a person who is gravely disabled as a result of a mental disorder. A conservatorship established under the LPS Act can last up to one year and authorizes involuntary detention, evaluation and treatment.

In reviewing the decision below, the court found that procedures for establishing a conservatorship include a number of requirements pertaining to notice, hearing and trial rights, and other matters. In evaluating what due process requires, the court found that the answer must be viewed in context. "Because of the broad spectrum of concerns to which the term must apply, flexibility is necessary to gear the process to the particular need; the quantum and quality of the process due in a particular situation depend upon the need to serve the purpose of minimizing the risk of error. In conservatorship cases, we balance three factors to determine whether a particular procedure or absence of a procedure violates due process: the private interests at stake, the state or public interests, and the risk that the procedure or its absence will lead to erroneous decisions." In John L.'s case, there was no denial that he informed his counsel that he did not wish to be present for the hearing. Accordingly, the court was authorized to balance the respective policy concerns and there was no error in waiving his presence and the court was not required to, essentially, take the case to him to ensure his presence at the hearing.

The Georgia code similarly allows the ward or the ward's counsel to waive the ward's presence at the hearing. O.C.G.A. § 29-4-12(d)(1); § 29-5-12(d)(1).

Issues Typically Contested

Risk Factors

Guardianship includes inherent risk. Risk carries with it the possibility of litigation. The following list of risk factors was developed by the Arizona Supreme Court Probate Committee:[45]

1. No family members.
2. Large estate.
3. Unprotected assets – unrestricted or non-bonded assets.
4. Dispute among parties, whether family or professional fiduciary.
5. Late or no inventory.
6. Late or no accountings.
7. Late or no annual guardianship reports.
8. Inaccurate record keeping, no automation.
9. No record keeping.
10. Unacceptable accounting practices.
11. Disproportionate or unusually large transactions.
12. Checks returned with insufficient funds or late charges.
13. Use of ATM or gift cards.
14. Guardianship only appointed but handling assets.

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[45] Listed with citation at http://www.ncsc.org/sitecore/content/microsites/future-trends-2012/home/Better-Courts/1-7-Probate-DCM.aspx.

15. Health, business or personal problems of fiduciary – professional or family fiduciary.
16. Financial difficulty of fiduciary, tax liens, judgments or bankruptcy.
17. Difficulty in acquiring bond, especially with a professional fiduciary.
18. Failure to renew bond, pay premium or bond revoked.
19. For the professional, failure to renew license.
20. Disciplinary action by a professional licensing agency – family or professional.
21. Questionable fiduciary.
22. Questionable attorney.
23. Fiduciary with limited experience.
24. Singular responsibility and control of information by fiduciary.
25. Poor or no supervision of staff by professional fiduciary principal.
26. Ignore request by court, including orders to show cause.
27. Pattern of rebuffing requests for information by parties or attorneys.
28. No court appointed attorney.
29. Petition to withdraw by attorney.
30. Unauthorized gifts or loans.
31. Large fees – especially in relationship to overall assets and tasks accomplished.
32. No notice to interested parties or lack of documentation.
33. Pattern of complaints against fiduciary.
34. Fiduciary exclusively uses one vendor instead of a pool of vendors.
35. Transfer between bank accounts, especially near inventory or accounting due dates.
36. Professional fiduciary does not maintain written policies and procedures.
37. Expenditures not appropriate for client's level of care and market rate for services.
38. Payment of interest or penalties in accounting summaries in addition to bank charges for insufficient funds.
39. Fiduciary not visiting client when appointed as guardian.

Many of these risk factors can be eliminated with pre-appointment investigations of potential fiduciaries. The Maricopa County Probate Court developed and piloted a Probate Evaluation Tool which allows court investigators to designate each new guardianship or conservatorship case as low, moderate or high risk. Other courts require potential guardians and conservators to complete a questionnaire[46] and undergo a criminal background check[47] for the purpose of minimizing risk. Completion of an asset management plan, Georgia's Standard Form 58, also minimizes risk by front-loading a spending plan.

Standing

"The doctrine of standing invokes whether a particular litigant is entitled to have a court decide the merits of a dispute or of particular issues." *In re Conservatorship of*

46 http://www.co.bibb.ga.us/ProbateCourt/Forms/QualificationsQuestionnaire.pdf.
47 http://www.co.bibb.ga.us/ProbateCourt/Forms/ConsentCriminalCheck.pdf.

Carnahan, 2011 Tenn. App. 113 (2011). The issue of standing may arise in the guardianship itself, or in related proceedings. In *Groves*, once the trial court determined that Ms. Groves had capacity (a finding that was reversed on appeal), the petitioner had no standing to set aside gifts of real estate and personal property. *Groves*, at 348.

Intervention

An interested party might seek to intervene in the proceeding.[48] The petition may or may not be granted. In *White v. Heard*, 225 Ga. App. 351 (1997), the adult children of Elizabeth Bosch petitioned for appointment of a guardian for Elizabeth. Her grandson moved to intervene, contending a guardian was unnecessary. The trial court denied his motion and, on appeal, the court affirmed after finding that intervention as a right is only permitted where a statute grants an unconditional right to intervene. No such statute authorized the grandson's intervention.

Jurisdiction and Venue

In some States, such as Georgia, venue includes a jurisdictional element. Subject matter jurisdiction is in the probate court, but venue is limited to the county where the alleged ward is domiciled or where he or she is found.[49] In Tennessee, the action must be brought in a court exercising probate jurisdiction or any other court of record of any county in which there is venue; venue is the county of residence of the alleged disabled person. T.C.A. § 34-3-101. *See also* UGPPA § 5-108.[50]

Failure to meet technical requirements

Although a deficient petition should be dismissed by the court, one which fails to meet the statutory criteria outlined above is subject to objection and may be dismissed. In *Wilson v. James*, 260 Ga. 234 (1990), the court reviewed a petition listing stepchildren instead of children as the persons to be notified of the petition. The court held that because there was no compliance with the notice requires of the code, the appointment

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[48] *See* Rules of Civil Procedure, Rule 24 (O.C.G.A. § 9-11-24). Any person shall be permitted to intervene when a statute confers an unconditional right to do so, or when the applicant claims an interest relating to the property or transaction which is the subject matter of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties. Permissive intervention is possible when a statute confers a conditional right to intervene, or when an applicant's claim or defense and tha main action have a question of law or fact in common.

[49] In *In re Hodgman*, 269 Ga. App. 34 (2004), venue should have been in Fulton County, the county of the proposed ward's residence, but was waived by all parties to permit venue in the county where the ward was found. *See* O.C.G.A. § 29-4-80(a) indicating the a guardianship may be removed to the county where the ward resides.

[50] Where there is no jurisdiction, the conservatorship is void ab initio. *Gross v. Rell*, 304 Conn. 234 (Conn. 2012). In Gross, a New York resident was subjected to a conservatorship while visiting in Connecticut. He was admitted to a hospital for medical treatment and, while there, a hospital employee filed a petition for conservatorship. He was then placed in a nursing home where he was threatened and assaulted by his roommate. Defendants in the subsequent action for damages alleged a quasi-judicial remedy defense. In finding that the court appointed attorney's quasi-judicial defense is limited to situations where he is carrying out a court order, one judge stated the attorney's conclusion that there was no basis for objecting to the involuntary conservatorship "completely blows my mind." Ultimately a writ of habeas corpus was granted, terminating the conservatorship, before the action for damages was filed.

of a guardian was void. The *Wilson* court cited *Edwards v. Lampkin*, 112 Ga. App. 128 (1965), *aff'd* 221 Ga. 486 (1965), which held that failure to provide the notice required under the guardianship statute prevents the court from acquiring the necessary jurisdiction to appoint a guardian.

Should a Guardian or Conservator Be Appointed?: The Standard

"The criteria for finding incapacity differ among states, but in all states, the law starts with the presumption of capacity."[51] While outdated standards required a finding that the alleged ward was an idiot, lunatic, person of unsound mind, or spendthrift, modern guardianship law focuses on medical and functional criteria.[52] Today, the most common paradigm involves a two pronged inquiry: (1) Is there a disabling condition; and (2) A finding that the condition causes an inability to adequately manage personal and/or financial affairs.[53] In addition, most states require a finding that the guardianship is necessary to protect the alleged ward, and that no less restrictive means of doing so is available.[54]

One book suggests that there are six pillars for a capacity assessment: medical condition; cognition; everyday functioning; values and preferences; risk and level of supervision; and means to enhance capacity.[55] The pillars feed a five step judicial determination of capacity consisting of screening the case; gathering information; conducting a hearing; making a determination and ensuring oversight. In making

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[51] *Assessment of Older Adults with Diminished Capacity: A Handbook For Lawyers*, p. 7 (ABA/APA 2005); *see also Langston v. Allen*, 268 Ga. 733 (1997) ("Mental or physical impairment is never presumed."); *In re Groves*, *supra*, at 329 ("it is well-settled that the law presumes that adult persons are sane, rather than insane, and capable, rather than incapable."). "No adult shall be presumed to be in need of a guardian unless adjudicated to be in need of a guardian...." O.C.G.A. § 29-4-1(e).

[52] *Assessment of Older Adults with Diminished Capacity*, *supra*, at 7. *See also* J. Karlawish, *Measuring Decision-Making Capacity in Cognitively Impaired Individuals*, 16 Neurosignals 91, 92 (2008) (the essential characteristic is that someone lacking capacity, whether the judgment is medical or legal, "can no longer choose for himself"), available at http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2717553/.

[53] *Id*. *See also In re Groves*, *supra*, at 331 ("the pivotal inquiry involves not merely the diagnosis but also the effect that the illness, injury, or condition has had on the capacity of the person for whom a conservatorship is sought.").

[54] Cashmore notes that some scholars believe *Olmstead v. L.C. ex rel Zimring*, 527 U.S. 581 (1999), requires no guardianship at all. "Instead, they advocate for supported decision making, where trusted family members or other providers make suggestions to a person with cognitive limitations rather than becoming the guardian for that person. The individual retains the ability to make the final decision." *See* Cashmore, 55 B.C.L. Rev. , supra, at 1235. This is a nonsensical interpretation of *Olmstead*, at least when it concerns property management. It is akin to negotiating with a child regarding whether its property play in a busy street. The premise of a guardianship, under modern standards, is that decision-making capacity is impaired or lost. Third parties, such as banks, investment brokers, purchasers of real estate, business partners and others must have someone with authority to act, who can execute contracts or relieve them of liability when property is distributed and that cannot be given by an individual without capacity.

[55] American Bar Association, American Psychological Assoc., and National College of Probate Judges, *Judicial Determination of Capacity of Older Adults in Guardianship Proceedings*, available at http://www.americanbar.org/content/dam/aba/migrated/aging/docs/judgesbooksum.authcheckdam.doc.

determinations, the book suggests that judges should categorize the alleged ward's ability and offers three possibilities: (1) If minimal or no diminished capacity, use less restrictive alternatives; (2) If severely diminished capacities on all fronts, use plenary guardianship; and (3) If mixed strengths and weaknesses, use limited guardianship.[56]

Careful examination of the circumstances in each case is particularly important because an individual's sense of self-worth may be intertwined with independence. An elder's "ability to exercise this control and to maintain their dignity often forms the basis for their self-esteem and their belief in their continuing viability as a person. Thus, the loss of status as an autonomous member of society can intensify any disability that an elderly person may have." *In re Groves*, *supra*, at 328.

Uniform Guardianship and Protective Proceedings Act

The UGPPA provides that a limited or unlimited guardian may be appointed only upon a finding, by clear and convincing evidence that the respondent is an incapacitated person and that the respondent's needs cannot be met by less restrictive means. The UGPPA defines an "incapacitated person" as "an individual who, for reasons other than being a minor, is unable to receive and evaluate information or make or communicate decisions to such an extent that the individual lacks the ability to meet essential requirements for physical health, safety, or self-care, even with appropriate technological assistance." UGPPA § 5-102(4).

Georgia

"The court may appoint a guardian for an adult only if the court finds the adult lacks sufficient capacity to make or communicate significant responsible decisions concerning his or her health or safety." O.C.G.A. § 29-4-1(a). The threshold inquiry for a conservatorship is similar. "The court may appoint a conservator for an adult only if the court finds the adult lacks sufficient capacity to make or communicate significant responsible decisions concerning the management of his or her property." O.C.G.A. § 29-5-1(a). This is the basic finding necessary for the appointment of a guardian or conservator. The focus is solely on decision-making capacity rather than on a diagnosis. Radford, *supra*, § 4-1.[57]

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[56] *Id*. One writer suggests developing a better working relationship between the legal and medical communities to ensure judges get the most useful information, noting that medical professionals completing reports often do not understand medical-legal relationships. R. Denton, *Wings: The Challenges of Submitting Competent Medical Evidence of Incapacity in Guardianship Proceedings*, 27 Utah Bar. J. 44 (May/June 2014).

[57] The most common model in determining capacity measures an individual's abilities in understanding, appreciation, choice and reasoning. *Karlawish*, *supra*, at 93. *See also* P. Moberg & K. Kniele, *Evaluation of Competency: Ethical Considerations for Neuropsychologists*, 13 Applied Neuropsychology 101, 103 (2006). There is, no single measure the may act as a capacitor. "There appears to be a shared belief that decision-making capacity is a multidimensional construct reliant on a combination of intact cognitive abilities including attention, orientation, memory, general intellectual functioning, problem solving and abstract reasoning." *Id*., at 104.

In Georgia, a finding of criminal insanity or incompetence to stand trial does not trigger a presumption that guardianship is necessary. O.C.G.A. § 29-4-1(2). Similarly, a finding that an individual requires treatment for (1) alcohol, drug or substance abuse, (2) mental illness, or (3) mental retardation does not trigger a presumption that guardianship is necessary. *Id*. Professor Radford notes that "Patients with dementia, delirium, schizophrenia, bipolar affective disorder, and other psychiatric conditions may be capable of making responsible decisions." Radford, *supra*, § 4-1, n.10. [58]

A "Good Samaritan" argument, without more, is insufficient to support a guardianship. The court has no duty to appoint a guardian simply for convenience or to derive a benefit for the ward. In *In re Roscoe*, 242 Ga. App. 440 (2000), there was no abuse of discretion where the court refused to appoint a guardian for the purpose of allowing a child to gain health insurance through the petitioner's health policy. "[T]here was no basis for the appointment of a guardian other than to obtain an isolated but desirable benefit for the child."

Conversely, after a petition is filed, the focus is on the alleged ward's condition, not the success or failure of others in providing support for the ward. If the adult lacks sufficient capacity to make or communicate significant responsible decisions concerning his or her health or safety, then a guardian should be appointed. "The inquiry focuses on the condition and best interest of the adult, not on whether the adult's family to date has been able to act successfully on her behalf without a guardianship." *Cruver v. Mitchell*, 289 Ga. App. 145 (2008).[59]

Loss of executive function or judgment will support imposition of a conservatorship. In *In re Cochran*, 314 Ga. App. 188 (2012), the alleged ward, Ms. Cochran, appealed imposition of a conservatorship. Apparently, Cochran enjoyed participating in foreign lotteries (e.g., scams). Beginning in 2007, the Department of Human Services began receiving reports that Cochran and her husband had spent as much as $100,000 on various lotteries and sweepstakes.[60] Family members sought and secured an emergency conservatorship to protect Cochran. However, on the day the emergency conservatorship expired, Cochran went to the bank to wire $52,000; ostensibly the wire was to pay taxes after receiving word that she won an alleged multi-million dollar lottery. The bank refused to authorize the wire, so Cochran went to a different branch and withdrew $52,000. The bank then notified the Department, which filed a second petition for emergency conservatorship. Subsequent to the Department's involvement,

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58 "Capacity usually is task-specific rather than a general construct. The existence of physical or mental illness per se does not mean that a patient lacks capacity. Rather, capacity is determined by whether an individual has specific abilities, regardless of diagnosis." S. Soliman, *Evaluating older adults's capacity and need for guardianship*, 11 Current Psychiatry 39, 40 (April 2012).

59 In the absence of a power of attorney and/or advance directive, the court's holding is likely appropriate. However, if those documents exist, then it is doubtful that a guardianship is "necessary" where the caregiver support was successful.

60 Testimony at trial indicated that Cochran may have spent between $600,000 to $700,000 over a 6 or 7 year period.

Cochran refused to see her personal physician (citing embarrassment), but agreed to meet with a psychologist. The psychologist filed a report indicating that Cochran lacked capacity to make responsible decisions regarding management of her property. A court appointed social worker arrived at the same conclusion. A conservatorship was imposed and Cochran appealed. On appeal, the judgment was affirmed. Although the court agreed that evidence that Cochran played suspect lotteries, alone, would not support a guardianship,[61] there was evidence that she was a serial victim of scams and that she suffered from a cognitive deficit, which lead to significant financial losses. This evidence was sufficient to support the necessity of a conservator to protect Cochran's assets.

Tennessee

"The appointment of conservators in Tennessee no longer hinges on a determination of incompetency. For the past ten years, conservatorship proceedings have focused on the capacity of the person for whom a conservator is sought. Conservators may now be appointed only for persons who are disabled. Tenn. Code Ann. § 34-1-101(7) defines a "disabled person" as any person eighteen (18) years of age or older determined by the court to be in need of partial or full supervision, protection and assistance by reason of mental illness, physical illness or injury, developmental disability, or other mental or physical incapacity." *In re Conservatorship of Carnahan,* 2011 Tenn. App. 113 (2011). [62]

"As the law now stands, the threshold question in every conservatorship proceeding is whether the person for whom a conservator is sought is disabled or incapacitated.[63] If the answer is no, the trial court cannot appoint a conservator. If, however, the answer is yes, the court must then determine whether the person is fully or partially incapacitated and whether the incapacity is temporary or permanent. The trial court must also

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61 "[A] person of perfectly sound mind, capable of understanding that the lotteries might be a fraud, nevertheless might choose to play the lotteries as escapist fantasy and fun." However, the cumulative evidence showed that Cochran was incapable of reasoning that the lotteries were likely scams. The psychologist who interviewed Cochran testified that she had a loss of cognitive process of judgment and consequences; Cochran concluded one lottery was not a scam because "he called." In another case, Cochran gave out her bank account information after allegedly winning a $57 million lottery, but she could not recall who she gave the information to or the name of the lottery. At trial, she testified that she was supposed to meet a man from Jamaica after the hearing who was delivering a lottery check and two cars. When asked if she thought the man was truthful, her response was "well, you can never tell." Value judgments are addressed in *Moberg & Kniele*, *supra*, at 108, where they indicate that a patient's decision to donate his or her life savings to "Save the Whales" may appear ill-advised, but if the patient demonstrates an understanding of the cost: benefit analysis, then an evaluator must respect the patient's wish.

62 Prior to 1993, a judicial determination of incompetence was required. See also *Thompson v. Tennessee*, 134 S.W.3d 168 (2004), a criminal case, where the court observed that disability, rather than incompetence was the standard. In that case, the court recounted that Thompson's conservatorship had been terminated several months earlier because the court found it was no longer necessary.

63 Although the term "disability" is defined by statute, the term "incapacitated" is not. In *In re Conservatorship of Groves*, 109 S.W.3d 317 (2003), the court noted that capacity is situational and contextual. It is not an abstract, all or nothing proposition. In involves a person's actual ability to engage in a particular activity. A person may be incapacitated with regard to one task or activity while retaining capacity in other areas because the skills necessary in one situation may differ from those required in another. Capacity is a fluid concept and may change over time or with the situation.

determine, based on the nature of the incapacity, whether the disabled person requires full-time supervision, protection, or assistance or whether partial supervision, protection, or assistance will suffice. If the trial court determines that the disabled person requires any sort of supervision, protection or assistance, it must enter an order appointing a conservator and must specifically "enumerate the powers removed from the respondent and vested in the conservator." Tenn. Code Ann. § 34-3-107(2). Any power not specifically vested in the conservator remains with the person for whom the conservator has been appointed." *In re Conservatorship of Carnahan,* 2011 Tenn. App. 113 (2011).

While it may excite the vigilance of the court, advanced age, by itself, does not provide grounds for appointed a conservator or limited guardian. *In re Groves, supra* at 331, n.32.[64]

Evidence of extensive alcohol and drug abuse might support a conservatorship. In *In re Hutchson*, 2009 Tenn. App. LEXIS 238 (April 13, 2009), a conservator was appointed for a 43 year old former investment advisor after the court heard of substance abuse leading to "manifestations of psychosis, which is, in fact, disorganization - - hallucinations, delusions, and disorganizations." Opposing testimony was offered by an expert hired by the respondent. Unfortunately, the respondent took the stand as well and, apparently, his testimony tipped the scales in favor of a conservatorship.

Where the alleged ward has a complete lack of knowledge concerning his or her assets and liabilities, a conservatorship may be appropriate. In *In re Conservatorship of Trout*, 2009 Tenn. App. LEXIS 693 (October 15, 2009), an 83 year old ward appealed the imposition of a conservatorship. Although other evidence supported the trial court's finding, the most compelling evidence was her lack of knowledge concerning assets and liabilities, including "no apparent understanding that she had $ 60,000 in credit card debt or the ramifications of taking on a $ 200,000 30-year mortgage." In Trout, the court found the alleged ward's lack of understanding was so beyond her ability that the decisions being made were obviously those of an individual who exerted dominion and control over her.

Dismissal

If the Court determines no guardian or conservator should be appointed, then the case is dismissed. "No guardian shall be appointed for an adult within two years after the denial on the merits of a petition for the appointment of a guardian for the adult unless

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[64] In *In re Guardianship and conservatorship of Steelman*, 846 N.W. 2d 529 (Iowa C. App. 2014), the husband of a ward challenged the sufficiency of the evidence in establishing a voluntary guardianship for his wife. The Court of Appeals affirmed, finding that Shirley (the ward) "demonstrated confusion as to her age and has numerous, occasionally contradictory, powers of attorney, she was unable to advise the court of her medical conditions even though she is prescribed medication. On at least one occasion, significant confusion existed as to who was in charge of her affairs and had the power to act in her best interests."

the petitioner shows a significant change in the condition or circumstances of the adult." O.C.G.A. § 29-4-1(d). See O.C.G.A. § 29-5-1(d) for conservators.

Who should be appointed as Guardian or Conservator?

"To appoint a conservator under Tenn. Code Ann. § 34-3-103, the trial court must make two determinations: (1) what is in the best interest of the disabled person considering all relevant factors and (2) who, under the prioritized list, is the appropriate conservator. Crumley, 1997 Tenn. App. LEXIS 774, 1997 WL 691532, at *3." *In re Conservatorship of Carnahan, 2011 Tenn. App. 113 (2011).* In Tennessee, the prioritized list is as follows: (1) The person or persons designated in a writing signed by the alleged disabled person;[65] (2) The spouse of the disabled person; (3) Any child of the disabled person; (4) Closest relative or relatives of the disabled person; and (5) Other person or persons. T.C.A. § 34-3-103. Ultimately, though, there is no right to serve as fiduciary; the Court names the fiduciary if one is appointed. T.C.A. § 34-3-107. If the court declines to appoint the individual nominated by the ward, good cause must be shown. T.C.A. § 34-6-104(b). The rule in Georgia is essentially the same. *See* Radford, *supra*, § 4-5.[66] Of note, if the alleged ward is present, a Georgia court should consider any person suggested by the proposed ward. O.C.G.A. § 29-4-12(d)(6); § 29-5-12(d)(6).[67]

In Georgia, a guardian must be an individual, but a conservator may be any person.[68] A guardian or conservator with a conflict of interest may not be appointed unless the

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[65] O.C.G.A. § 29-4-3(e). In *Koshenina v. Buvens*, 130 So.3d 276 (Fla. App. 2014), it was error to fail to determine whether the ward was competent at the time she made a preneed designation of her husband as guardian. The ward's siblings had petitioned to become guardian after observing injuries the ward sustained while in a 24/7 facility. Her husband then produced the preneed designation, which the court failed to rule upon. Failing to determine whether the ward was competent at the time was error requiring remand. There is a rebuttable presumption the ward was competent at the time. If so, then the standard in appointing a guardian was not what was in the ward's best interests; rather, the standard is whether appointment of the selected guardian is contrary to the best interests of the ward. The standard is different because the ward's preneed selection of a guardian is entitled to deference.

[66] "No one person is entitled to serve as the guardian of an adult. The court must choose as guardian of an adult that person who best serves the adult's interest. The revised Code includes a preference list that the court may consider in making the selection but also makes it clear that the court may disregard someone who has preference on that list in favor of someone who has a lower preference or no preference." Radford, *supra*, § 4-5. In some states, there is not even a right to preference. *See Salter v. Johnston*, 98 So.3d 1130 (Mss. Ct. App. 2012) (Mississippi laws concerning conservatorships give no preference to an individual's next of kin).

[67] Cashmore argues that challenges arise when an individual is incapable of making his or her own decisions, but does not have a close friend or relative who can provide informal support or take on the role of guardian. In those cases, a public guardian should serve. *See* Cashmore, *Guarding the Golden Years*, *supra*, at 1221. In *In re Guardianship & Conservatorship of Pates*, 823 N.W. 2d 881 (Minn. Ct. App. 2012) the ward testified at trial that she preferred one son, Abraham, as her conservator. Another son, David, was appointed instead. The trial court's decision to reject the ward's request was affirmed with the court of appeals finding "that Abraham Younkin's appointment is not in Pate's best interests and that David Younkin is the most suitable and qualified person to serve as Pates' conservator is supported by the record and is not clearly erroneous."

[68] Compare O.C.G.A. § 29-4-2(a) with O.C.G.A. § 29-5-2. An exception exists for Public Guardians and for the Department of Human Resources. Fleming and Morgan argue the "power of the [financial] fiduciary is significant – meaning the court should give careful scrutiny to the qualifications of the

Court finds that the conflict is insubstantial or that, despite the conflict, appointment of the nominated individual is in the ward's best interests. O.C.G.A. § 29-4-2(c).[69] In Tennessee, the code expressly finds that "no personal representative of an estate, any part of which is distributable to a disabled person, except a parent, spouse, child, grandchild, grandparent or sibling of the disabled person, shall be appointed the fiduciary for the disabled person until the personal representative has first settled its accounts as personal representative." T.C.A. § 34-1-120.

The court's decision making process for departing from the statutory preference list is demonstrated in *In re Moses*, 273 Ga. App. 501 (2005). There, competing petitions for guardianship were filed by Wyomia Moses's children and her sister.[70] The children, Caris and Joseph, argued that Caris should be appointed guardian and that Joseph should be appointed conservator. Wyomia's sister, Shirley Smith, argued that neither child was fit to serve because they failed to provide for their mother, Wyomia did not trust them and alleged that they had conveyed Wyomia's real property to themselves. There was an allegation that Joseph slapped Wyomia. At the hearing, Wyomia testified that she was afraid of her children and that she wanted her sister to serve as her guardian. A handwriting expert reviewed the deeds conveying Wyomia's real property from her to her children and found that the signatures on the deeds were not Wyomia's. The trial court found that Wyomia "is aware of her circumstances, can enthusiastically express opinions about her living arrangements and social preferences, and should be allowed to make certain decisions for herself." A limited guardianship was imposed appointing the sister to provide medical care and make medical decisions. The county guardian was appointed as conservator because the court found it best to appoint a neutral professional. The children appealed, arguing that the court should have followed the statutory preferences listed in the code and that any expression of preference by Wyomia was void because she was found to be incompetent. On appeal, the court rejected the children's argument and affirmed the decision below. Appointment of the county guardian was appropriate because the evidence showed the existence of an actual conflict of interest between Wyomia and her children. As for who should be guardian, the court affirmed the trial court's finding that Wyomia was competent to make certain decisions, such as expressing a preference regarding who should be her guardian.[71]

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proposed fiduciary." R. Fleming and R. Morgan, *Standards for Financial Decision-Making: Legal, Ethical, and Practical Issues*, 2012 Utah L. Rev. 1275 (2012).

69 A guardian must promptly disclose a conflict of interest. O.C.G.A. § 29-4-24. In *Ray v. Stewart*, 287 Ga. 789 (2010), appointment of a guardian ad litem was sufficient to resolve potential conflicts where the same person served as conservator and as executrix of the ward's estate. In *In re Estate of McKitrick*, 326 Ga. App. 702 (2014), the Court upheld a probate court's finding that a conflict was insubstantial and there was no evidence of harm to the ward where the appeal failed to include a transcript. Without a transcript, the appellate court must presume the evidence was as the probate court found it.

70 "Competing conservatorship petitions, while infrequent, are entirely consistent with the conservatorship statutes. It should be expected that intra-family disagreements can arise regarding who should act as conservator for an impaired family member." *In re Groves*, *supra*, 345.

71 In *Johnson v. Mitchell*, 2013 Ark. App. 498 (Ark. Ct. App. 2013), the Court appointed a granddaughter, over the objection of the ward's daughter, after finding that the granddaughter had been raised by the ward, had participated in her care, had lived with the ward, had been named as agent under

In *Cruver v. Mitchell*, 289 Ga. App. 145 (2008), the court refused to appoint petitioners, the daughters of Addie Bee Mitchell, as conservators; instead, the county conservator was appointed. The evidence at trial showed that the daughters removed their mother from the Medicaid program out of fear that her estate would be subject to an estate recovery claim. "At the hearing, the probate court and Mitchell's court-appointed lawyer expressed concern about appellants' opt-out decision, questioning whether the decision served Mitchell's best interest and whether, without the guaranteed Medicaid payments, Mitchell would have enough money to meet her needs. Mitchell's lawyer also queried whether appellants recognized the various tax consequences of their decision." Other evidence showed that the daughters planned to sell the ward's property to family members to generate income, but presented no evidence showing that such a decision was wise or that Mitchell would have sufficient future funds without Medicaid. The court also observed that the daughters, as heirs, had a conflict of interest. Under these circumstances, the court was justified in departing from the statutory preference list.[72]

In *In re Estate of Kaufmann*, 327 Ga. App. 900 (2014), a ward filed a petition for restoration of his rights. The matter went to medication, where a settlement was reached agreeing the guardianship and conservatorship would continue, that both the current guardian and conservator would resign and the Court would appoint a new guardian and conservator. The settlement called for both the ward and the existing guardian (his son) to submit names to the guardian ad litem who would then make a recommendation to the probate court. After receiving the guardian ad litem's report, the probate court appointed a new conservator but retained the existing guardian notwithstanding the settlement. The ward appealed, arguing the probate court erred by modifying the terms of the settlement agreement. The probate court indicated it had statutory requirements that trump the settlement agreement which, in this case, caused it to retain the current guardian. On appeal, the decision below was affirmed, citing O.C.G.A. § 29-4-3(b).

In *Morris v. Knight*, 1 So.3d 1236 (Fla. App. 2009), three competing petitions were filed for guardianship over 97 year old Estelle Barker. Two were filed by family members and one was filed by a neighbor. After considering the relative involvement of each in Barker's life, the Court rejected the statutory preference in favor of family members and appointed Knight as guardian, Barker's neighbor. On appeal, the court found there is a statutory preference in favor of family, but the inquiry does not end there. The statute

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a power of attorney, health care directive and as representative of the ward's estate. These appointments were made while the ward had capacity. The court also noted that the ward was angry with the daughter prior to incapacity because the daughter did not attend the funeral of the ward's husband and the daughter tried to force the ward to move to Florida. The trial court was affirmed.

[72] In *In re Boyd*, 99 A.3d 226 (Del. 2014), the Court removed the ward's son as attorney-in-fact and appointed a third-party conservator where the attorney-in-fact failed to cooperate with a Medicaid application. The son arranged for his mother's Social Security to be paid to the nursing home, but refused to cooperate in paying her pension, keeping the pension funds for himself. The Court found that as attorney-in-fact he had a duty of loyalty to his mother and that it was in her best interests to see that she paid for her medical care. Thus, the court did not err in finding that the son breached his fiduciary duty, or in appointing the third-party conservator.

does not mandate the appointment of a family member as guardian. The best interest of the ward trumps other considerations in the appointment of a guardian and Knight was best positioned to serve. [73]

In *DeNunzio v. Denunzio*, 151 Conn. App. 403 (Conn. App. 2014), competing petitions for conservatorship were filed by the parents of a disabled adult. Although witnesses agreed that both parents wanted what was best for their child, expert testimony was allowed which included a doctor's opinion that the father should be the conservator. Ordinarily, opinion evidence regarding the ultimate issue for the trier of fact is prohibited. However, in determining who should be the conservator " the best interests of a conservatoree must always be a consideration and a guide in examining statutory factors." In this case, the opinion of the pediatrician, who was familiar with the conservatee's case, was helpful in addressing the child's needs. The Court found, "[i]n light of [the pediatrician's] history with this family, it cannot be reasonably disputed that she is intimately familiar not only with Douglas' medical needs, but also with the ways in which the parties have responded to those needs over the years." Thus, the following opinion regarding who should be conservator was admissible: "[Douglas] is very impressionable and the [plaintiff's] repeated requests for testing and ongoing interventions concern her, and that she is of the opinion that the [plaintiff] is not the best person to be [Douglas'] conservator." The mother also challenged admission of the guardian ad litem's opinion that the father should be the conservator. In permitting the guardian ad litem's opinion, the Court stated:

> "[T]he function of a guardian ad litem is to make recommendations to the court as to the best interests of the party or parties which the guardian has been appointed to represent. A guardian ad litem could not discharge these duties unless the guardian was allowed to make a decision as to what the best interests of the represented party required and to communicate that decision to the court. In this case, the report of the guardian ad litem was thorough, logical and professional. The recommendations of the guardian [ad litem] were supported by his investigation and by the evidence presented to the Probate Court. The court finds that the Probate Court was justified in considering the opinion of the guardian ad litem in reaching its decision that

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[73] The family members who petitioned for conservatorship were cousins, who were apparently substantially uninvolved in Barker's life prior to filing the guardianship petition. Knight, on the other hand " has known Barker since he was a child visiting his grandmother who lived across the street from Barker in the 1960s. Knight is a former U.S. Marine and retired sanitation worker for the City of West Palm Beach. .... Knight began stopping by to bring Barker coffee and food, to visit with her, and to wash her clothes and clean her house. When Barker's doctor made the decision to place Barker in a nursing home, Knight continued to visit her there six days a week for two hours each day. Knight testified that he intends to continue visiting Barker, washing her clothes, and bringing her snacks whether he is appointed guardian or not." Similarly, appointment of a third-party guardian was affirmed in *In re Holloway*, 251 Ga. App. 892 (2001). There the probate court ruled that none of the ward's children were qualified to act as her guardian "because each has in some way recently acted in such a way as to call into question whether his or her judgment as to [the ward] would be clouded by or influenced by his or her disdain for or mistrust of one or more siblings."

> [the defendant], rather than [the plaintiff], should be appointed as conservator of Douglas' person and estate."

Structure of the Guardianship or Conservatorship

In Tennessee, the Court has an affirmative duty to ascertain and impose the least restrictive alternatives upon the disabled person that are consistent with adequate protection of the disabled person and the disabled person's property. T.C.A. § 34-1-127. Similarly, in Georgia, "all guardianships ordered pursuant to this chapter shall be designed to encourage the development of maximum self-reliance and independence in the adult and shall be ordered only to the extent necessitated by the adult's actual and adaptive limitations after a determination that less restrictive alternatives to the guardianship are not available or appropriate." O.C.G.A. § 29-4-1(f).[74]

The practical import of this directive is that appointment of a guardian is simply the beginning. Once a finding is made, the court must determine, on a case by case basis, the extent of the ward's functional ability. Even in dementia cases, the progression of dementia is gradual and a limited conservatorship may be appropriate as the alleged ward gradually loses the ability to perform activities of daily living. Further, where the ward put other measures in place, such as a power of attorney or advance directive, permitting continuation of those structures is likely appropriate absent a showing of abuse.[75]

Core Standard 1.1 from the Third National Guardianship Summit: Standards of Excellence (October 2011) supports this concept by providing that guardians shall develop and implement plans for meeting the needs of the person and that the plan shall emphasis a "person-centered philosophy." The phrase person centered planning process is defined as:

> One which is led by the individual receiving services and (1) includes people chosen by the individual; (2) Provides necessary support to ensure that the individual has a meaningful role in directing the process; (3) Occurs at times

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[74] "In general, the court should find that no less intrusive alternative, including a limited guardianship, is appropriate before selecting and appointing a plenary guardian." Commentary to NCPJ Standard 3.3.2. In *Searle v. Bent*, 137 So.3d 1028 (Fla. App. 2013), a daughter filed a petition for guardianship, alleging her mother was the victim of financial abuse. She filed a verified affidavit calling into question a power of attorney and other estate planning documents. The ward appealed, contending the estate planning documents provided a less restrictive alternative than a guardianship. However, because the validity of those documents was called into question (without the necessity of a definitive ruling on their validity), the court did not err in finding the documents did not establish a less restrictive alternative. One writer described the traditional (old) guardianship model as "binary." *See* K. Glen, *Changing Paradigms: Mental Capacity, Legal Capacity, Guardianship and Beyond*, 44. Colum. Human Rights L. Rev. 93 (2012). Glen notes that incapacity was viewed as a defect that deprived an individual of the ability, and consequently the legal right, to make choices. *Id.*, at 94. The modern model, generally in use today, is a functional model and views capacity as a shifting network of values and circumstances. The new paradigm leads to tailored or limited guardianships.

[75] In Tennessee, a conservatorship does not automatically terminate a power of attorney, although the conservator has the same right to revoke the power that was held by the ward. T.C.A. § 34-6-104(a).

> and locations of convenience to the individual; (4) Reflects cultural considerations of the individual; (5) Includes strategies for solving conflict or disagreement within the process, including any conflict of interest concerns; (6) Offers choices to the individual regarding the services and supports they receive and from whom; (7) Includes a method for the individual to request updates to the plan as needed.

If the ward's condition improves, then it may become necessary to convert a plenary guardianship into a limited guardianship. In *In re Estate of Fallos*, 386 Ill. App.3d 831 (2008), a ward filed a petition to terminate his guardianship. In 1984, Fallos was injured in a motor vehicle collision that left him partially paralyzed, semi-spastic and confined to a wheelchair. He also suffered from paralysis of the diaphragm, which made it difficult for him to speak or be understood. In 2005, Fallos fell, suffered a hip fracture and was not found for several days. A plenary guardianship was established following a hearing, with a supportive recommendation from the guardian ad litem. By 2006, Fallos sent correspondence to the court indicating that he had made progress communicating with handwriting and that the guardian was not doing a good job. Nonetheless, the status quo was maintained. By 2007, Fallos's handwriting had further improved and there was an indication that the State would provide him with a voice device to improve communication. Fallos also volunteered to submit to a psychiatric evaluation. Fallos's court appointed attorney filed a petition to terminate the guardianship. Although there was evidence that Fallos was mentally sharp, the guardian objected to termination of the guardianship because Fallos might fall again if left unattended at home. After considering the evidence, the trial court denied Fallos' motion. When his motion to reconsider was denied, an appeal followed and the trial court's decision was reversed. The standard in considering whether a plenary guardianship is appropriate is whether the ward's capacity to perform the tasks necessary for the care of his person or the management of his estate has been demonstrated by clear and convincing evidence. ... The ward's capacity to perform the tasks necessary for the care of his person or management of his estate does not mean the ward must literally and physically have the capacity to care for himself, wash himself, feed himself, move himself, et cetera. Rather the phrase, capacity to perform the tasks necessary for the care of his person or management of his estate, includes the ward's sufficient understanding or capacity to make or communicate responsible decisions concerning the care of his person. Because Fallos could make decisions and manage his care, the case was remanded with direction to modify the plenary guardianship.

Pre-existing Debt

In *Conservatorship of Parker*, 228 Cal. App. 4th 803 (Cal. Ct. App. 2014), the ward was involved in a real estate transaction prior to his incapacity. Parker, the ward, provided financing for a real estate development with his partner, Boothby, providing sweat equity. In 2004, Parker tried to carve Boothby out of the partnership, using a lawyer to redrafts the development agreement to exclude Boothby. In 2005, Boothby sued Parker and his attorney, taking a judgment for $325,000 in economic damages and $350,000 in punitive damages. After the tortious conduct was committed, but before the judgment

was taken, a conservatorship was established for Parker. Post-judgment, the conservator defended Boothby's attempt to collect, claiming that payment of the judgment would impair the conservator's ability to provide for the ward's necessities of life. The court of appeals affirmed the probate court's order that the conservator nonetheless pay the judgment, plus interest. The debt arose when the tort was committed, not the date the judgment was taken. Therefore, it was a valid claim against the ward's estate. "There is no claim or evidence that the conservators failed, neglected or refused to furnish suitable support to Parker, and we decline to speculate whether this may occur at some unknown time in the future. The only thing that is certain at this point is that Parker breached his fiduciary duty to Boothby in 2004, he incurred a debt to Boothby at that time, and the conservators must pay Parker's pre-conservatorship debt to Boothby."

Multi-State Cases

In *Bogert v. Morrison*, 972 So.2d 905 (Fla. App. 2007), competing petitions for guardianship and conservatorship were filed over 71 year old Joseph Morrison. Morrison resided in New Jersey with his long-time companion and girlfriend (Bogert) when, in February, 2006, he fell while on a tip to Reno, Nevada and became incapacitated. He returned to New Jersey, where he was cared for until his children removed him to Florida in April, 2006, without Bogert's knowledge or consent. Bogert filed a petition for guardianship and conservatorship in New Jersey on April 25, 2006, prior to the time his children filed a similar petition in Florida. Although Bogert appeared in the Florida proceeding, on August 9th, she filed a motion to dismiss the Florida proceeding in light of a New Jersey court order finding that New Jersey had jurisdiction because Morrison was a New Jersey resident. The trial court denied Bogert's motion and appointed Morrison's daughter as his guardian and conservator. On appeal, the trial court's decision was reversed– "in general, ... the court which first exercises its jurisdiction acquires exclusive jurisdiction to proceed with that case. This is called the principle of priority." Although the principal or priority is discretionary in multi-state proceedings, a trial court should stay proceedings when prior proceedings are pending in a court of another state unless there are special circumstances that would justify a denial of the stay.

A foreign conservator may petition to have the conservatorship transferred to Georgia pursuant to O.C.G.A. § 29-5-125.[76] The required elements of the petition are set forth in the Code. The petition may also include a petition to modify the terms of the conservatorship. O.C.G.A. § 29-5-125(c). The ward must be personally served with the petition. O.C.G.A. § 29-5-126(a). Notice and a copy of the petition must be delivered to the foreign court along with a request that certain facts be certified. The court must hold a hearing on the petition if one is requested and, prior to acceptance, the court must find that the conservator is presently in good standing with the foreign court and that the transfer is in the best interests of the ward. O.C.G.A. § 29-5-128.[77]

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[76] The procedure for accepting a foreign guardianship is substantially similar and appears at O.C.G.A. § 29-4-80 et seq.

[77] In Sears v. Hampton, 143 So.3d 151, the Alabama Supreme Court found that the transfer procedure makes it possible to transfer a guardianship or conservatorship without re-litigating the issue

Transfer of a Georgia conservatorship to a foreign court is governed by O.C.G.A. § 29-5-130.[78] If there is no procedure in the foreign court for transfer, the Georgia court may require that a petition for conservatorship be filed in the foreign jurisdiction. The required elements of the Georgia petition for transfer appear in O.C.G.A. § 29-5-131. Notice must be given to interested parties and, if a hearing is requested, the motion must be granted. Prior to approving transfer, the Court must find that the conservator is in good standing and that transfer is in the best interests of the ward. O.C.G.A. § 29-5-134(a).

A foreign conservator may sell property in Georgia upon compliance with O.C.G.A. § 29-5-135. That section provides:

> Any foreign conservator of a ward who resides in any other state and who is authorized to sell and convey property of the ward may sell property of the ward which is in this state, under the rules and regulations prescribed for the sale of real estate by conservators of this state, provided that the foreign conservator must file and have recorded in the court or other proper court, at the time of petitioning for sale, an authenticated copy of the letters of appointment and must also file with the court or other proper authority bond with good and sufficient security, in double the value of the property to be sold, for the faithful execution of the conservatorship as provided by law.

In *Hetman v. Schwade*, 317 S.W.3d 559 (Ark. 2009), a Pennsylvania guardianship was established in 2000, prior to the time Alexandra Vicari was moved to Arkansas. The Pennsylvania guardianship was terminated without an accounting on April 27, 2007. After that time, the Arkansas court ordered the guardian to file an accounting, including one for time periods relating to the Pennsylvania guardianship. That decision was reversed on appeal. The Arkansas court had no jurisdiction to inquire into the propriety of the Pennsylvania guardianship case. The lesson learned is to request an accounting prior to transfer of the guardianship case if an accounting is appropriate.

Tennessee has adopted the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act. *See* T.C.A. § 34-8-101 et seq.

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of incapacity or the appropriateness of the guardian. Until the transfer is accepted, under the Alabama statute the receiving court must accept the transferred guardianship before considering other issues such as whether a different guardian should be appointed. There is a 90 day period after the guardianship is accepted during which the court can consider whether a modification is appropriate. An attempt to modify the guardianship prior to acceptance, especially if the guardian or conservator is changed, "can have grave implications, because law enforcement would be unable to determine which letters of guardianship were correct for the protected person's residence, and financial institutions would not be able to determine which letters of conservatorship to honor for financial transactions."

[78] The procedure for transferring a Georgia guardianship is substantially similar and appears at O.C.G.A. § 29-4-90 et seq.

Presenting the Case and Development of Evidence

Burden of Proof

"In conservatorship cases, it is the petitioner's burden to prove by clear and convincing evidence that the proposed ward is a "disabled person." *In re Conservatorship of Groves*, 109 S.W.3d 317, 330 (Tenn. Ct. App. 2003). With this heightened standard of proof, the evidence should produce "a firm belief or conviction regarding the truth of the factual propositions sought to be established by the evidence" in the fact-finder's mind. *In re Conservatorship of Carnahan*, 2011 Tenn. App. 113 (2011). Clear and convincing evidence is required due to the value society places on individual autonomy and self-determination. *Id*.

Rules

Be mindful of procedural and other rules. For example, in Georgia, only the following persons have a right of appeal: the Ward, the ward's personal representative or guardian ad litem, or the petitioner. Accordingly, if an interested party merely objects, or intervenes, without filing a cross petition, then the intervener or objector's appeal will be dismissed. *See Twitty v. Akers*, 218 Ga. App. 467 (1995).

Similarly, a guardian ad litem may presume that he or she represents the Ward. In Georgia, the rules specifically provide that a guardian ad litem cannot represent a ward. For that reason, any pleading filed by a guardian ad litem allegedly for the ward should be scrutinized.

Gathering Evidence: Discovery

Informal and formal discovery are available in Georgia guardianship cases. Informal discovery includes interviewing witnesses and dumpster diving for available information, both from friendly parties and from public sources. For example, deeds are a matter of public record; therefore, if proof of inappropriate conduct included land transfers made under undue influence, then copies of the inappropriate deeds could be secured using informal discovery.

Informal discovery is not rule-bound and may begin at any time. "The starting point though is usually with the leads given by the client. The client may have some idea of the identity of other witnesses or involved parties. The client can give you information about where the occurrence in question took place to permit a viewing of the scene. The client may also turn over documents that reference other documents in the possession of third parties that might be obtained on request. Beyond these client-directed sources, think in terms of finding relevant people, documents and tangible evidence using common sense and any real-world experiences. So how do you decide what to look into? Go back and look at how you first analyzed the case, the seeds of where you need to conduct informal discovery are planted there."[79]

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[79] C. Rose, *The Informal Discovery Process*, available online at http://beyondthebar.westlegaledcenter.com/legal-skills/trial-advocacy/informal-discovery-process/. In

The formal rules permit depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property for inspection and other purposes; physical and mental examinations; and requests for admission. O.C.G.A. § 9-11-26(a). Generally, the scope of discovery reaches "any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." O.C.G.A. § 9-11-26(b).

Medical records are likely relevant in guardianship or conservatorship and can be secured using Rule 34 (O.C.G.A. § 9-11-34).Rule 34(c)(1) authorizes issuance of a request to produce to a non-party. Where medical records are sought, parties must comply with the privacy rules associated with the Health Insurance Portability and Accountability Act of 1996 (HIPAA), 42 USC § 1320(d) and 45 CFR § 160-164. The rules authorize parties to access medical records when a qualified protective order has been entered. 45 C.F.R. § 164.512(e). A "qualified protective order" is defined as one that: (A) Prohibits the parties from using or disclosing the protected health information for any purpose other than the litigation or proceeding for which such information was requested; and (B) Requires the return to the covered entity or destruction of the protected health information (including all copies made) at the end of the litigation or proceeding. 45 C.F.R. § 164.512(e)(1)(v).

Medical and mental examinations may be compelled under Rule 35.

Telling Your Client's Story

Every case has a story. "If we are to be successful in presenting our case we must not only discover its story; we must become good storytellers as well. Every trial, every . . . argument for justice is a story."[80] It should be humanity in the raw.

The story must be compelling. How you tell your client's story will turn on whether you are prosecuting or defending the guardianship case. The story should have a theme (presumably built around the legal issues outlined in this paper). Your theme must tell the fact finder why a decision in your client's favor is critical; the consequences must matter.

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at least one instance, care should be taken to review local rules and precedent: ex parte interviews by opposing counsel with the ward's treating physician.

[80] Gerry Spence, *Win Your Case*, 86 (St. Martin's Press 2005).

Your client's story should create a live event for the fact finder, drawing the fact finder into the circumstances of your client's case. The story should be broken down into elements.[81] Eliminate unnecessary elements that confuse the fact finder or diminish the impact of the story. Also, keep in mind that, unlike traditional story-telling your only opportunity to speak is during opening and closing. For that reason, must you know how to tell your client's story, but you must also know how to orchestrate the evidence to accomplish your story telling goals.

The following storytelling pointers appear on the Wheel Council website:[82]

1. Plant your feet and get a comfortable, confident posture to begin.
2. Take a breath and make eye contact with a friendly face before beginning.
3. Eliminate "uhs" by pausing periodically when you are speaking.
4. Image the story in your mind and describe what you see.
5. Focus on perceptual details (colors, sounds, tastes, smells, movements).
6. If you rock or move your hands in a repetitive way, make the movements fit with the story's rhythm.
7. Surprise the audience with a few dramatic or sudden movements.
8. Be yourself and speak from your heart.

One story telling website, in discussing the use of metaphors, suggests that you follow the "ten-year old rule." Ask yourself if you could explain your story to a ten year old. If the answer is "no," then rework your story.[83]

In the case of Mr. Jones, the story might begin with Mr. Jones taking the stand and recounting his relationship with his mother. His relationship might be a close relationship, or it might be a story where he was distant and has been pulled back into her life due to the present situation. Mr. Jones might recount how his mother has lived independently for years, making her own decisions, or he might recount how she has relied on a support structure that has crumbled. In either case, the story should provide the court with a base-line for evaluating the present circumstances as you apply the law to the facts. The story should inform the court of changes that have occurred in the putative ward's life which impair her decision-making ability. What is different from when the putative ward was able to live independently? What is going on in mom's life that makes a guardianship or conservatorship appropriate at this time? What danger has she been exposed to? What are the decisions she struggles with?

The story in *In re Groves* was particularly compelling. Ellen Groves, an 88 year old widow, had no children. During her marriage, she was a virtual slave to her husband and "had no happy life whatsoever." As frailty crept up on Ellen and her husband (R.C.), they

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81 See How to tell a story: Quick-learn story-telling techniques, at http://www.youtube.com/watch?v=mOA8mUflH-Q.

82 http://www.wheelcouncil.org/storytellers.html.

83 http://www.lifehack.org/articles/lifehack/what-storytellers-can-teach-you-about-how-to-learn-faster.html.

began relying on help from others in attempting to remain independent and at home. In particular, they relied on R.C.'s brother, Glendon Groves.

In 1994, after R.C. fell and broke three ribs, he and Glendon devised a scheme to protect R.C.'s resources from depletion paying for medical expenses. The scheme, which the *Groves* court described as Medicaid fraud, allegedly included conveying assets to Glendon for safe-keeping. When R.C. became ill, requiring medical assistance, a Medicaid application was filed without disclosing the conveyances, or the existence of other assets.

After R.C. died in 1995, Ellen continued living at home with support from Glendon and his wife. Other relatives were discouraged from visiting, effectively isolating Ellen. By 1997, following a fall and fractured spine, Ellen was completely dependent on Glendon and his wife. They moved her into their home, providing her meals, lodging and care. After about three months, Ellen allegedly decided to give her real property to Glendon. Deeds were prepared by Glendon's lawyer and Ellen signed them while sitting in a rocking chair on Glendon's front porch.

Harmony at Glendon's home was short-lived, however. Less than a year after Ellen conveyed away her property , Glendon and his wife placed Ellen in a nursing home. They claimed she had become hostile and paranoid. Ellen was upset by this decision, expressing herself, and Glendon began visiting the nursing home less frequently. Around this time, two nieces, Marlene Proctor and Cheryl Travis, began visiting. Ellen told them that Glendon and his wife had taken all of her money and placed her in a nursing home.

On March 11, 1998, Glendon filed a petition for conservatorship over Ellen. Ms. Proctor and Ms. Travis filed and objection and cross-petition alleging that Glendon took Ellen's funds for his own use. During the course of the litigation, six clinicians examined Ellen, collectively reporting that her functional capacity was significantly compromised, that her decision-making capacity was significantly impaired and that she was progressively deteriorating. Against this background, the court was called upon to determine (1) whether a conservatorship should be imposed and (2) whether Glendon should be required to disgorge the conveyed assets.

The story in *Groves* drove the result. The story in your case should do the same.

Witnesses, generally

In *In re Cash*, 298 Ga. App. 110 (2009), lay testimony formed the basis of the court's decision to impose a guardianship and conservatorship. The sons of Louise Altobellis Cash, a 94 year old resident at an assisted living facility, filed a petition alleging that Ms. Cash suffered from memory problems and that she could not make or communicate significant responsible decisions. Specifically, she refused to move to a floor in the assisted living facility that would afford her 24-hour assistance and supervision, and was refusing to pay bills she incurred for private nursing care. One of Ms. Cash's sons,

Julian, testified that he received calls from his mother's creditors regarding her failure to pay bills, including those for private care his mother had received. Julian apparently related hearsay (without objection)[84] that he spoke with the ALF's executive director about billing issues and that, during that conversation, other behavioral issues were related. Several months later, Julian received a copy of an eviction notice Sunrise had sent to his mother. He again spoke with Sunrise's executive director, who discussed with him the behavioral incidents and other issues that led to a planned eviction. Julian testified that when his mother entered the ALF six years earlier, she was able to walk, but that she was now confined to a wheelchair. Because of her physical condition, his mother had hired a number of sitters to stay with her during the overnight hours, but she had fired most of them and "she's gotten to the point where it's hard to get a sitter to stay with her all night." Accordingly, the ALF had asked Mrs. Cash to move to a different floor of the facility, which would provide nursing care 24 hours a day, but she refused to move. Finally, Julian testified that his mother owned two furnished residences, worth a significant amount of money, but that she had failed to insure either of the structures. It is evident that the court relied on Julian's testimony, and the court appointed evaluator, in imposing the conservatorship because the only other witness was a psychiatrist Mrs. Cash retained to provide an opposing opinion.

In re Cash demonstrates the power of lay testimony.[85] Under the evidence rules, unless otherwise limited by the evidence rules, every person is competent to be a witness. O.C.G.A. § 24-6-601. Lay witnesses may testify regarding facts and circumstances within their personal knowledge. O.C.G.A. § 24-6-602. In guardianship cases, lay witness testimony will be relevant concerning the ward's background, observed changes in condition, observed ability or inability to carry out daily tasks, observed behavior, and information regarding relationships and family history. Lay witnesses may also authenticate documents, such as a power of attorney, advance directive or written designation selecting a guardian or conservator.[86]

Lay witnesses should be prepared. Without proper instruction, they may get off-track, assuming that disagreements with the ward are relevant (value judgments), rather than the alleged ward's ability or inability to make and communicate significant decisions.[87]For example, in *In re Hutcheson*, *supra*, the alleged ward had an affair. Circumstances

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84 Mrs. Cash argued on appeal that the decision below was premised on hearsay evidence and must be reversed. The court rejected that argument, presuming that the probate judge "sifted the wheat from the chaff and relied only on proper evidence in making its findings."

85 The *Groves* court and *In re L.M.R.*, *supra*, likewise confirm the value of lay testimony. "The medical and psychological testimony, coupled with lay testimony, paints a clear and compelling picture." *Groves*, at 343.

86 In *Yates v. Rathburn*, 984 So.2d 1189 (Ala. App. 2007), lay testimony was presented regarding the ward's condition and care, regarding powers of attorney, and regarding the ability of the nominated guardian to serve as such. On appeal, the probate court's decision to appoint a guardian other than the ward's husband was affirmed; in light of the evidence presented, it was not an abuse of discretion.

87 "An evaluation of decision-making capacity focuses chiefly on the process a person uses to make a decision and only secondarily on the decision itself." *In re Groves*, at 336.

related to the affair may be relevant in illustrating erratic behavior, but value judgments on the affair are not relevant.

The GTLA Trial Practice Manual[88] indicates that the following general instructions are appropriately given to any client or witness who will be testifying:

- You, as a client or witness in a lawsuit, have a very important job to do, since, in order for the fact finder to make a correct and wise decision, it must have all of the evidence put before it truthfully.
- You already know that you take an oath in court to tell nothing but the truth. But there are two ways to tell the truth: One is in a halting, stumbling, hesitant manner, which makes the fact finder doubt that you are telling all of the facts in a truthful way; the other is confident and straightforward, which makes the fact finder have more faith in what you are saying. You help yourself, the party you are testifying for, the judge, and the jury by giving your testimony in this last way.

In addition, the following suggestions are offered for witnesses:

- Visit the courtroom prior to the hearing.
- Dress appropriately for court.
- Don't memorize what you are going to say.
- Assume you're being watched at all times and act accordingly.
- Look at the fact finder when testifying and speak clearly.
- Listen to the questions, especially on cross examination; if you need to have the question repeated, then ask.
- Do not offer "snap" answers. Think first, then answer.
- Explain your answer if necessary.
- Answer directly and simply. Answer only the question asked, and then stop. Do not volunteer information not actually asked.
- If your answer was wrong or unclear, correct it immediately.
- If there is an objection, stop talking immediately and wait until the judge has ruled.
- Stick to the facts.
- Always be polite.
- Do not exaggerate.
- Do not argue with the other attorney.

In preparing the direct examination, the three cardinal rules in drafting a line of questions for witnesses: simplicity, brevity and preparation.[89] Complicated questions tend to confuse the issues. Once you have prepared your direct examination, sharing the

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88 Trial Practice Manual, 3rd Ed. (GTLA 2000).

89 E.J. Imwinkelried, *Evidentiary Foundations*, § 1.02[2] (LexisNexis 2002).

essence of the guardianship process with the witness, as well as the direction questions may take will likely help the witness focus on relevant facts.

Witnesses are subject to cross examination. O.C.G.A. § 24-6-611(b). They should be instructed to tell the truth. They should answer the question that is asked, but are not required to volunteer information beyond the scope of the question and are not required to speculate. During cross examination, a witness may be impeached by disproving facts testified to by the witness. O.C.G.A. § 24-6-612. The state of a witness's feelings toward the parties and the witness's relationship to the parties may be proved for consideration by the fact finder. O.C.G.A. § 24-6-622. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, subject to the following limitations: (1) The evidence may refer only to character for truthfulness or untruthfulness; and (2) Evidence of truthful character shall be admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise. O.C.G.A. § 24-6-608. Credibility of the witness is determined by the trier of fact. O.C.G.A. § 24-6-620.

If a witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences must be limited to those opinions or inferences which are: (1) Rationally based on the perception of the witness; (2) Helpful to a clear understanding of the witness's testimony or the determination of a fact in issue; and (3) Not based on scientific, technical, or other specialized knowledge appropriate for expert testimony. O.C.G.A. § 24-7-701.

The court may call witnesses, including experts, on its own motion and may interrogate them. O.C.G.A. § 24-6-614.

In a conservatorship or guardianship or protective proceeding, a court in this state may permit a witness located in another state to be deposed or to testify by telephone or audiovisual or other electronic means. T.C.A. § 34-8-106(b).

Use of Expert Witnesses

Expert witnesses may be used where scientific, technical or other specialized knowledge would assist the finder of fact if (1) The testimony is based upon sufficient facts or data; (2) The testimony is the product of reliable principles and methods; and (3) The witness has applied the principles and methods reliably to the facts of the case which have been or will be admitted into evidence before the trier of fact. O.C.G.A. § 24-7-702(b). However, prior to testifying, on the motion of a party, the court may hold a hearing to determine whether the witness qualifies as an expert and whether the witness's expert testimony satisfies the above requirements. O.C.G.A. § 24-7-702(d). Facts relied on by an expert need not be admissible if they are of a type reasonably relied upon by experts in the particular field of that expert. O.C.G.A. § 24-7-703.[90] An opinion is not

[90] In *Kuelbs v. Hill*, 2010 Ark. App. 427 (May 12, 2010), the trial court allowed testimony from an evaluating doctor who spoke with various family members and received, possibly relying on, prior medical

objectionable simply because it embraces the ultimate issue to be decided. O.C.G.A. § 24-7-704(a).

Expert testimony may be presented at trial, by deposition and, under certain circumstances, by affidavit or by reading from medical records. Testimony may be developed to support or defend a conservatorship.[91]

When preparing for direct examination or cross examination, lawyers should be aware of the "rules" that apply to experts in developing their opinions. For example, an evaluator making a capacity decision should conduct a detailed interview, conduct neuropsychological testing, perform a functional ability assessment, and review the relevant legal standards.[92] If an expert makes a diagnosis or offers an opinion, the expert's profession or discipline likely has printed criteria associated with reaching that diagnosis or opinion. Ask the expert about the criteria and what facts, tests or other data support his or her opinion.[93] An expert who fails to follow the standard applicable to his or her profession will lack credibility. His or her opinion may be discounted or disregarded. Thus, lawyers presenting expert testimony should ensure their experts follow the rules, and those opposing the use of an expert should test the expert's methodology to determine whether there were any shortcomings.

Documents

Documents that may be relevant at trial include medical and mental health records, financial records, title documents, and other written information bearing on the issues at bar.

In Georgia, a medical narrative is not subject to a hearsay objection if the narrative has been signed and dated by an examining or treating licensed physician, dentist, orthodontist, podiatrist, physical or occupational therapist, doctor of chiropractic, psychologist, advanced practice registered nurse, social worker, professional counselor, or marriage and family therapist. It shall be admissible and received in evidence insofar as it purports to represent the history, examination, diagnosis, treatment, prognosis, or interpretation of tests or examinations, including the basis therefor, by the person signing the report, the same as if that person were present at trial and testifying as a

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documentation. The evaluator concluded that the ward was "belligerent, angry and beyond any degree of reason." He diagnosed the ward with bipolar disorder, severe with psychotic features. The court's refusal to strike the evaluator's testimony was affirmed on appeal.

91 For example, in opposing evidence submitted by the court appointed evaluator, the respondent presented testimony from a psychiatrist/hospitalist in *In re Hutcheson*, 2009 Tenn. App. LEXIS 238 (April 13, 2009).

92 *Moberg & Kniele*, *supra*, at 110.

93 The expert's entire file is typically discoverable. If an expert is deposed, the deposition notice should require the expert to bring his or her entire file, including everything that was relied on in reaching his or her opinions. When taking a discovery deposition, trial counsel should ask what opinions were reached, exhausting that line of questioning by asking "are there any other opinions" until the answer is no. For each opinion proffered, trial counsel should take the same tact in asking about each fact, test or other data which supports each opinion.

witness if an adverse party has given notice of an intent to introduce the narrative at least 60 days prior to trial. O.C.G.A. § 24-8-826.

Upon the trial of any civil proceeding involving injury or disease, the patient or the member of his or her family or other person responsible for the care of the patient shall be a competent witness to identify bills for expenses incurred in the treatment of the patient upon a showing by such a witness that the expenses were incurred in connection with the treatment of the injury, disease, or disability involved in the subject of litigation at trial and that the bills were received from: (1) A hospital; (2) An ambulance service; (3) A pharmacy, drugstore, or supplier of therapeutic or orthopedic devices; or (4) A licensed practicing physician, dentist, orthodontist, podiatrist, physical or occupational therapist, doctor of chiropractic, psychologist, advanced practice registered nurse, social worker, professional counselor, or marriage and family therapist. O.C.G.A. § 24-9-921(a).

Writings used to refresh recollection are available to opposing counsel; opposing counsel may introduce relevant portions in evidence. O.C.G.A. §24-6-612.

Documentary evidence transmitted from another state to a court of this state by technological means that do not produce an original writing may not be excluded from evidence on an objection based on the best evidence rule. T.C.A. § 34-8-106(c). Similarly, the current Georgia evidence code, at O.C.G.A. § 24-7-24, provides that court (or other State documents) from outside Georgia may be admitted when certified. The revised evidence code, effective January 1, 2013, is more closely aligned with the Tennessee rule and provides: “By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this Code section... Evidence that a document authorized by law to be recorded or filed and in fact recorded or filed in a public office or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.” O.C.G.A. § 24-9-901(b)(7); § 24-9-902 (documents under seal).

Admissibility, Objections and Foundation

All relevant evidence is admissible except as otherwise provided by law. O.C.G.A. § 24-4-402. The term "relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. O.C.G.A. § 24-4-401. Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading to a jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. O.C.G.A. § 24-4-403.

Irrelevant evidence, or evidence which is prohibited, should not be admitted if a proper objection is made.[94] In some cases, evidence is conditionally admissible and foundation must be laid. Foundation is required to authenticate evidence, to show its relevance and, in a conceptual sense to respond to objections.

In admissible evidence should be excluded; when it is offered, opposing counsel should object to its introduction. An objection does not preserve an issue for appeal unless properly made.[95] Objections to the admission of evidence must be timely and must state the specific grounds for the objection. O.C.G.A. § 24-1-103(a)(1).[96] An objection to a ruling excluding evidence must include an offer of proof. O.C.G.A. § 24-1-103(a)(2). Common objections include: (1) the question was ambiguous or unintelligible; (2) argumentative; (3) asked and answered; (4) assuming facts not in evidence; (5) beyond the scope (of direct or cross); (6) compound question; (7) calls for a conclusion; (8) immaterial; (9) incompetent; (10) irrelevant; (11) lack of personal knowledge; (12) leading; (13) narrative; and (14) nonresponsive. Trial practice handbooks are helpful in explaining the appropriate use and basis for each objection.[97]

Certain communications are privileged such as (1) Communications between husband and wife; (2) Communications between attorney and client; (3) Communications between psychiatrist and patient; (4) Communications between licensed psychologist

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94 In *Kortner v. Martise*, 312 Conn. 1 (Conn. 2014), a jury verdict was reversed where a conservator, later replaced by a personal representative after the ward's death, objected to evidence that sexual conduct was consensual in a civil sexual battery case. A letter defendant sought to admit was marked as an exhibit although there was a ruling that it was not admissible. The letter was not introduced as evidence or referred to by counsel for either party during the trial. When the exhibits were given to the jury, it was given to them by mistake. There was evidence the jury considered it when returning a verdict for the defendant; one juror mentioned being confused by it and the judge offered no explanation. The trial court denied plaintiff's motion for new trial, finding the plaintiff waived any objection by reviewing exhibits prior to their submission to the jury. On appeal, that decision was reversed. Inadvertent error in failing to object to delivering a previously excluded document to the jury was not waiver. Because there was evidence that the ward had capacity to consent to sex, allowing the jury to consider the excluded letter constituted harm and a new trial should have been granted.

95 Where no objection is made, "[p]arties cannot use non-jurisdictional errors committed during trial as their ace-in-the-hole should the trial's outcome not be to their liking." *In re Groves*, *supra*, at 350. Rule 46 (O.C.G.A. § 9-11-46) indicates that formal objections to rulings or orders of the court are unnecessary. It is sufficient that a party, at the time of the ruling or order, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor.

96 The rules of evidence differ from State to State, including the appropriate manner of preserving an objection for appeal. One attorney suggests that a proper objection includes the following elements: (1) the objection must be timely; (2) must state the specific ground of inadmissibility; (3) must identify the party against whom it is inadmissible; (4) must identify the part of the evidence that is inadmissible; and (5) must object to the general unrestricted offer of evidence when it is admissible only for a limited purpose. R. Moses, *Legal Objections Used in Courtroom Trials*, http://criminaldefense.homestead.com/CondensedObjections.html.

97 Ray Moses includes a list of 70 "basic generic objections" in *Legal Objections Used in Courtroom Trials*, *supra*. *See also* C. Montz, *Trial Objections from Beginning to End: The Handbook for Civil and Criminal Trials*, 29 Pepperdine L. R. 243 (2002), available at http://digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?article=1321&context=plr.

and patient;[98] (5) Communications between a licensed clinical social worker, clinical nurse specialist in psychiatric/mental health, licensed marriage and family therapist, or licensed professional counselor and patient; (6) Communications between or among any psychiatrist, psychologist, licensed clinical social worker, clinical nurse specialist in psychiatric/mental health, licensed marriage and family therapist, and licensed professional counselor who are rendering psychotherapy or have rendered psychotherapy to a patient, regarding that patient's communications; and (7) Communications between accountant and client as provided by Code Section 43-3-32.

Evidence which requires authentication or identification is admissible if supported by a finding that the matter in question is what its proponent claims. O.C.G.A. § 24-9-901(a).

Hearsay is a common objection. "Hearsay" means a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. O.C.G.A. § 24-8-801(d).[99] An objection claiming evidence is hearsay should not be sustained if there is a proper exception to the rule prohibiting hearsay, or if the evidence is offered for a reason other than to prove the truth of the matter asserted. The following are, by definition, not subject to the hearsay rule: (1) prior inconsistent statements of witnesses; and (2) opposing party admissions. O.C.G.A. § 24-8-801(d). The following are exceptions to the hearsay rule: (1) present sense impressions; (2) excited utterances; (3) then existing mental, emotional or physical condition; (4) statements for the purpose of medical diagnosis; (5) recorded recollection; (6) records of regularly conducted activity; (7) the absence of a record of regularly conducted activity; (8) public records and reports; (9) records of vital statistics; (10) absence of a public record or entry; (11) Records of religious organizations; (12) Marriage, baptismal, and similar certificates; (13) Family records; (14) Records of documents affecting an interest in property; (15) Statements in documents affecting an interest in property; (16) Statements in ancient documents; (17) Market reports and commercial publications; (18) Learned treatises; (19) Reputation concerning personal or family history; (20) Reputation concerning boundaries or general history; (21) Reputation as to character; (22) Judgment of previous conviction; (23) Judgment as to personal, family, or general history or boundaries. O.C.G.A. § 24-8-803. Additional exceptions apply when the declarant is unavailable. For example, testimony given in a prior proceeding or in a deposition is admissible if there was an opportunity to develop testimony direct, cross or re-direct examination. O.C.G.A. § 24-8-804. Unlike the former rule in Georgia, hearsay is legal evidence and is admissible if no objection is made. O.C.G.A. § 24-8-802.

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98 In Cooksey v. Landry, 295 Ga. 430 (2014), in his dissent, Justice Benham noted that Georgia law does not provide for the appointment of a guardian to act on behalf of an incompetent patient to determine whether to invole or waive the psychiatrist-patient privilege.

99 In *Shen v. Parkes*, 100 So.3d 1189 (Fla. App. 2012), a trial court relied on written reports in a contested guardianship action where there was a hearsay objection. No testimony was offered and, as a result, the decision was reversed because it was based on inadmissible hearsay.

Anticipating Appeals

Standard of Review

"[A] petition for the appointment of a conservator requires the lower court to make legal, factual, and discretionary determinations[,] each of which requires a different standard of review. [Cit.]. On appeal, a trial court's factual findings are presumed to be correct, and we will not overturn those factual findings unless the evidence preponderates against them. [Cit.]. For the evidence to preponderate against a trial court's finding of fact, it must support another finding of fact with greater convincing effect. [Cit.]. We review a trial court's conclusions of law under a de novo standard upon the record with no presumption of correctness. [Cit.]. We review discretionary determinations under an abuse of discretion standard." *In re Conservatorship of Carnahan,* 2011 Tenn. App. 113 (2011).

In Georgia, the following persons are entitled to an appeal: the ward, and the petitioner.[100] O.C.G.A. § 29-4-70. The ward's counsel, representative or guardian ad litem may appeal for the ward. *Id*. Appeals to superior court are de novo unless the parties agree to limit the issues presented. *Id*. An emergency guardian may be appointed during the pendency of the appeal. Decisions within the court's discretion, such as selection of the guardian after finding that one is needed, are reviewed under the abuse of discretion standard. *In re Moses*, 273 Ga. App. 501 (2005).[101]

Waiver

In *Williams v. Estate of Cole*, 393 Ill. App.3d 771 (2009), a daughter filed a petition to impose a conservatorship over her mother. She also filed a motion to compel an independent medical exam and to produce documents. Her mother promptly presented her own medical reports, supporting an absence of disability. The trial court accepted those reports, denied the daughter's discovery requests and dismissed the petition. On appeal, the daughter was deemed to have waived her right to appeal the discovery issue by failing to cite any supportive case law in her brief.

Post Appointment "Back-End" Issues

Backend procedures include posting of bond and monitoring the guardian and conservator by requiring the filing of reports.[102] For example, within sixty (60) days following appointment of a Tennessee fiduciary who manages property, a sworn inventory must be filed containing a list of the property of the minor or disabled person, together with the approximate fair market value of each property and a list of the source, amount and frequency of each item of income, pension, social security benefit or

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100 *See Twitty v. Akers*, 218 Ga. App. 467 (1995), dismissing appeal of adult children who did not file a petition.

101 *See also Phillipy v. O'Reilly*, 95 Ark. App. 264 (2006) finding that a nonparty to the proceeding below had no standing to appeal the guardianship order.

102 A guardian may be required to give bond. O.C.G.A. § 29-4-30(a). *See also* O.C.G.A. § 29-5-40 through § 29-5-44.

other revenue. T.C.A. § 34-1-110. Annual accountings are due within sixty (60) of each anniversary of the appointment. T.C.A. § 34-1-111. A fiduciary who mismanages an estate may be removed. T.C.A. § 34-1-123.

Backend issues also include decision-making for the ward. Unless the court's order specifies that rights are retained, appointment of a guardian removes the following rights: (1) contract marriage; (2) make, modify or terminate contracts;[103] (3) consent to medical treatment; (4) establish a residence or dwelling place; (5) change domicile; revoke a revocable trust established by the ward' and (7) bring[104] or defend any action at law or equity, except an action relating to the guardianship. O.C.G.A. § 29-4-21(a).[105] The power to take these actions is vested in the guardian. O.C.G.A. § 29-4-23, although some actions require court approval (e.g., changing domicile).

In making decisions, "a guardian shall make decisions regarding the ward's support, care, education, health, and welfare. A guardian shall, to the extent feasible, encourage the ward to participate in decisions, act on the ward's own behalf, and develop or regain the capacity to manage the ward's personal affairs. To the extent known, a guardian, in making decisions, shall consider the expressed desires and personal values of the ward. A guardian shall at all times act as a fiduciary in the ward's best interest and exercise reasonable care, diligence, and prudence." O.C.G.A. § 29-4-22(a).

Modification

The court may modify the guardianship by adjusting the duties or powers of the guardian, as defined in Code Sections 29-4-22 and 29-4-23, or the powers of the ward,[106] as defined in Code Sections 29-4-20 and 29-4-21, or by making other appropriate adjustments to reflect the extent of the current capacity of the ward or other circumstances of the guardianship. O.C.G.A. § 29-4-41(a). Modifications which further increase the guardian's powers or restrict the ward's rights must be supported by clear and convincing evidence. Petitioners which decrease the guardian's powers or that restore powers to the ward must be supported by a preponderance of the evidence. O.C.G.A. § 29-4-41(d). Modifications must be in the ward's best interests. O.C.G.A. § 29-4-41(c).

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103 A guardian is not personally responsible for the ward's expenses or contracts. O.C.G.A. § 29-4-22(c)(1) and (2). Guardians sometimes ask whether they are liable if the ward hurts someone. Although a guardian might be responsible for his or her own negligence, a guardian is not personally liable for the act or omissions of the ward. O.C.G.A. § 29-4-22(c)(3).

104 In *Butler v. Doe*, 328 Ga. App. 431 (2014), a ward's guardian filed suit against a teacher for personal injuries alleging the teacher failed to supervise the ward. In *State Farm Mutual Automobile Insurance Company v. Myers*, 316 Ga. App. 152 (2012), a guardian filed suit (losing on coverage issues) after a ward was a victim of sexual battery while riding in the backseat of a car. In *Moore v. Stewart*, 315 Ga. App. 388 (2012), guardians filed suit alleging damages following a motor vehicle collision.

105 *See also* O.C.G.A. § 29-5-21. Of note, however, mere appointment of a guardian does not revoke the powers of an agent under an advance directive. O.C.G.A. § 29-4-21(b) and § 29-5-21(b).

106 For conservators, *see* O.C.G.A. § 29-5-22 (obligations) and § 29-5-23 (authority) and § 29-5-71 (modification).

Use (and misuse) of Funds

The conservator is bound to use funds for the benefit of the ward and may be removed for misuse or mismanagement.[107] Further, a transaction favoring a conservator at the ward's expense may be set aside. Similarly, a conservator may be estopped from claiming a survivorship interest in property after accepting the office. In *Suntrust Bank, Middle Ga., N.A. v. Harper*, 250 Ga. App. 300 (2001), the court held that a guardian was estopped from claiming an interest in a CD due to a conflict of interest. "The law will not permit a guardian to act in such a way that his own personal interest may come in conflict with the interest of his ward with respect to the estate of the latter in his charge. A guardian owes a duty of undivided loyalty to his ward and must not place himself in a position where his own personal interests conflict or may conflict with the interests of his ward. The purpose of this loyalty rule is to ensure that a ward receives the unbiased and uninfluenced judgment of his guardian and to eliminate even a hint of suspicion as to the guardian's actions. Since this loyalty rule is a preventative measure, it is not necessary that the guardian shall have gained from the transaction, in order to find that he is disloyal. If the dealing presented a conflict of interest and consequent temptation to the guardian, equity will provide a remedy at the option of the ward or his estate regardless of gain or loss to the guardian." *See also Moore v. Self*, 222 Ga. App. 71 (1996) (if Ms. Self intended to claim title to the jointly held accounts and real property as the survivor after her mother's death, she should not have applied for and accepted the [conservatorship]).

Evidence that funds might be used for a purpose other than the ward's benefit will also justify refusal to appoint a petitioner as conservator. *See Cruver v. Mitchell*, 289 Ga. App. 145 (2008).

The case of *Stalker v. Pierce*, 953 N.E.2d 1094 (Ind. App. 2011), illustrates a guardian's potential liability for imposing her own values on the ward in disposing of property. Pierce, the guardian, disapproved of Stalker's (her ward's) living conditions. She considered the condition of his home to be a threat to his well-being. She required him to move out of his home, even though it was not condemned, so it could be rehabilitated. A hearing occurred in 2006 where it was reported that Stalker was making progress toward rehabilitating his home. One week later, without court approval, Pierce had the home demolished. Stalker was not given prior notice. Pierce then sought leave to sell the vacant property. Her petition was approved and the property was sold for $37,500. Pierce then proposed spending down the proceeds because Stalker was on Medicaid and food stamps. Two year after Stalker's home was demolished, Pierce filed a petition for leave to resign as guardian.[108] Stalker's brother and Mental Health of America were appointed as successor guardians. When Pierce filed a final accounting, it was approved

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107 Similar rules apply to attorneys-in-fact and would support an action to recover funds. *See* T.C.A. § 34-6-7.; O.C.G.A. § 10-6-25. For a review of standards applicable to conservators, *see* R. Fleming and R. Morgan, *Standards for Financial Decision-Making: Legal, Ethical, and Practical Issues*, 2012 Utah L. Rev. 1275 (2012).

108 In Georgia, resignation is accomplished using the procedure outlined in O.C.G.A. § 29-4-50. A successor guardian is appointed using the procedure in O.C.G.A. § 29-4-51 and O.C.G.A. § 29-4-61.

without hearing. Stalker objected, alleging that Pierce breached her fiduciary duty. The court refused to award a judgment against Pierce and an appeal followed. The court found that Pierce owed Stalker a duty to protect and preserve his property and a duty of loyalty; both duties were breached. Pierce also violated Stalker's due process rights by having the home demolished without giving him notice and an opportunity to object. The court of appeals found Pierce liable to Stalker for damages due to her breach and her violation of Stalker's due process rights. The case was remanded for a determination of damages.

An absconding guardian or fiduciary may be cited to appear before the judge relative to the performance of his or her duties or any other matter related to the probate court pertaining to such person. O.C.G.A. § 15-9-35.

Retention of assets owned by the ward prior to imposing a conservatorship, without more, is not grounds for alleging abuse. "A conservator may retain the property received by the conservator on the creation of the conservatorship, including, in the case of a corporate fiduciary, stock or other securities of its own issue, even though the property may not otherwise be a legal investment and shall not be liable for the retention, except for gross neglect." O.C.G.A. § 29-5-31(a). Investments consistent with O.C.G.A. § 29-5-32 are authorized and, when that code section is followed, a conservator is not liable for those investments except in cases of gross neglect. O.C.G.A. § 29-5-32. "In making investments and in acquiring and retaining those investments and managing property of the ward, the conservator shall exercise the judgment and care, under the circumstances then prevailing, that a prudent person acting in a like capacity and familiar with such matters would use to attain the purposes of the account. In making such investment decisions, a conservator may consider the general economic conditions, the anticipated tax consequences of the investments, the anticipated duration of the account, and the needs of the ward and those entitled to support from the ward." O.C.G.A. § 29-5-34(a). Within these guidelines, with court approval, the conservator may make any investment. O.C.G.A. § 29-5-34(b).

Recovering Property

In *Groves, supra*, the Court observed that an action to recover property should be brought after the conservatorship is established. There are at least two reasons why this is so. First, the action becomes unnecessarily confused if a claim for recovery of property is included when considering the initial petition. Second, the court acquires jurisdiction of the ward's property after making a finding that a conservatorship is warranted.

After a conservator is appointed, the ward has no power to convey property and any attempt to do so is void. *Beavers v. Weatherly*, 250 Ga. 546 (1983). In *Beavers*, the ward executed quitclaim deeds to a guardian (who was later removed for failing to file returns). The guardian then conveyed the property to a purchaser. The subsequent guardian sought to cancel the deeds. In affirming the trial court's decision to cancel the deeds, the court held: "After a person has been adjudicated incompetent to the extent that he is incapable of managing his estate and the affairs of such person are vested in a

guardian, the power of such person to contract is entirely gone. Any contract made by such a person when his affairs are in the hands of a guardian is not merely voidable, but absolutely void. Such is the case in this instance, and the subsequent conveyance of the same real estate to a third party cannot validate the void deed."

After a conservator is appointed, the conservator may bring suit to set aside a deed on the ground that the deed was executed by the guardian's ward while the ward was incompetent. *Loftis v. Johnson*, 249 Ga. 794 (1982). A conservator may also bring an action to set aside a suspicious transaction, particularly one involving a confidential relationship. *In re Groves*, at 351-354.

In *In re McCool*, 267 Ga. App. 445 (2004), competing petitions were filed to impose a guardianship and conservatorship for Kathleen McCool. The petition of Deborah Graham, Kathleen's granddaughter sought to have herself appointed as emergency and permanent guardian and conservatorship. Kathleen's daughter, Betty Tolbert, objected to Graham's petition, contending that Graham had transferred and depleted Kathleen's assets. During a hearing, Graham admitted that she used $100,000 of Kathleen's funds to purchase an annuity (taking a commission), and that other funds were moved into Graham's name to qualify Kathleen for Medicaid. Graham did not deny that the funds belonged to Kathleen; despite her attempt at home-made Medicaid planning, at least $353,000 in assets were listed on Graham's petition as belonging to Kathleen. Following the hearing, the Probate Court ordered Graham to "turn over every penny of Ms. McCool's estate" (which apparently amounted to $454,000) to the county administrator who was appointed conservator. Graham refused and a contempt citation was entered. Following a hearing on the contempt citation, the court ordered Graham to turn over the funds within 30 days or face incarceration. On appeal, the court's ability to incarcerate Graham was reversed (because the order was indefinite as to the amount of funds to be returned and because of the length of the incarceration), but the order to return Kathleen's funds was affirmed. The end result, which is similar to *Groves*, is that the Probate Court acquires jurisdiction over the ward's funds upon establishment of the conservatorship and has authority to order them returned.[109]

Accountings

Each year, within 60 days of the anniversary date of qualification, every conservator must file a verified return consisting of a statement of receipts and expenditures from the preceding year. O.C.G.A. § 29-5-60(a). The conservator must also file an updated

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[109] Graham argued that the Probate Court lacked jurisdiction to determine ownership of property and that the case should have been transferred to Superior Court for that purpose. However, her the verified petition was an admission *in judicio* and was binding, thus resolving the issue of ownership. A similar result was reached in *In re Fennell*, 300 Ga. App. 878 (2009). There, the Probate Court ordered the ward's daughter to turn over a certificate of deposit to the conservator; due to her admission at trial that the funds really belonged to her mother, but she was holding them to prevent her brother from gaining access to them, the Probate Court had jurisdiction to require delivery of the funds to the conservator.

management plan.[110] An interested party may object to the accounting or the Court, on its own motion, can require original documents that support the return. If no objection is filed within 30 days after the return is filed, then the Court shall record the return within 60 days after its filing. The recorded return is prima-facie evidence of its correctness. O.C.G.A. § 29-5-60(c). If there is an objection to the return, or if the Court determines that the conservator may have wasted property of the ward, the court shall hold a hearing or take other action as the court deems appropriate. *Id*.If the Court finds that the conservator is liable to the ward, the court shall enter a judgment against the conservator and any surety in the amount of such liability. O.C.G.A. § 29-5-63.[111]

In *Rudolph v. Rosecan*, 39 Fla. L. Weekly D 2460 (Fla. App. 2014), the father, acting as conservator, of a 22 year old autistic man sought a ruling that the mother was not an interested party and was not entitled to annual accountings. "The guardian's motion asserted that the mother consistently served frivolous objections to accountings and sought the father's personal financial or estate planning information pertaining to trusts he established for the son." The Court found that she was not an interested party because she had no right or interest in financial decisions made for her son.

Removal of Guardian

A guardian or conservator may be removed if the court finds that he or she is not acting in the ward's best interests.[112] *In re Longino*, 281 Ga. App. 599, 636 S.E.2d 683 (2006), *cert. denied*, 2007 Ga. LEXIS 92 (Ga. 2007). In *Longino*, the ward's son was serving as conservator. Following his appointment, he apparently had a disagreement with Smith Barney over its handling of a trust which held approximately $2,000,000 in assets. In an attempt to revoke the trust, the conservator filed papers with the court which included "a "Petition to Invalidate Documents," an "Agreed Order" to be entered by the court, and an attached "Agreement" signed by all three of the ward's children including Mr. Longino." After reviewing the papers, the court cited Mr. Longino to appear and

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110 O.C.G.A. § 29-5-30(a). The plan must be filed within two months following appointment. An updated plan should be filed with each annual accounting. O.C.G.A. § 29-5-30(c).

111 In *Knox v. Dean*, 205 Cal. App. 4th 417 (Cal. App. 2012), there were allegations of waste and elder abuse where a successor conservator alleged, among other matters, that a former conservator allowed individuals to live rent-free in apartments owned by the ward's estate. An in-home caregiver who was paid $4,200 provided a written declaration that she had never met the ward or provided care services. In *Kozinski v. Stabenow*, 39 Fla. L. Weekly D. 2302 (Fla. App. 2014), the court found that an action for surcharge against the conservator is a personal action requiring service and notice.

112 O.C.G.A. § 29-4-40(a)and § 29-5-70(a) permit the court to hold a hearing on the petition of an interested party or on the court's own motion if it appears the ward is being denied a right or privilege. O.C.G.A. § 29-4-52 authorizes a hearing on revocation or suspension of guardianship upon the petition of any interested person. After investigating the allegations, the court may revoke or suspend the guardian's letters, require additional security, reduce or deny compensation or impose other sanctions, and may issue any other order appropriate under the circumstances. O.C.G.A. § 29-4-52(b). The ward or any interested person acting for the ward has a cause of action exists against the guardian if there has been a breach of fiduciary duty. O.C.G.A. § 29-4-53. A trust is imposed on any traceable misapplied assets. *Id*. In *In re Hinkhouse*, 840 N.W. 2d 728 (Iowa Ct. App. 2013), a mother was removed as guardian for failing to cooperate with mental health providers after her son's community-based placement was unsuccessful and after he was arrested for arson.

show why he should not be removed as conservator. "The court considered evidence that, as part of his efforts to void the trust or move the trust assets from Smith Barney to another financial management company, Mr. Longino used or intended to use his conservatorship authority to place himself in the position of sole trustee of the trust. His conduct placed Mr. Longino in a position adverse to his service as conservator; in addition, other conduct caused the court to find that he was not acting in the ward's best interest. Based on these findings, Mr. Longino's letters of conservatorship were revoked and the decision was affirmed on appeal.[113]

Do You Report Your Client?

What happens if you represent Mr. Jones in filing a petition for conservatorship and he spends funds in an unauthorized manner?[114] Can you report him? The answer to this question requires analysis of Rules 1.2, 1.3, 1.4, 1.6, 1.7, 1.16, 2.1, 3.3 and 4.1.[115] Essentially, the lawyer cannot assist a client, or provide advice to a client, that would further unlawful conduct. While a lawyer has a duty of confidentiality, a lawyer also has a duty to be truthful in dealing with others and with the court. The lawyer cannot assist in preparing a deceptive report to the court.[116] At a minimum, the lawyer may need to consider withdrawing from the representation if Mr. Jones persists in using funds in an unauthorized manner. NAELA Aspirational Standard B.6 indicates that the attorney may have a duty to report a fiduciary who acts contrary to the principal's interests.[117]

Changing the Ward's Residence

In *Bivins v. Rogers*, 147 So.3d 549 (Fla. App. 2014), a ward's son sought leave to relocate his father from Florida to Texas. The son indicated that most of the ward's family lived in Texas so the move was in the ward's best interests. The guardian, who is not identified, objected. The court found that after imposition of a guardianship, only the guardian has standing to change the ward's residence. Accordingly, the petition was denied. In affirming, the Court of Appeals held that an interested party does not have standing to petition for a change in residence.

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113 In *Karem v. Bryant*, 370 S.W. 3d 867 (Ky. 2012), the conservator, who was the son of the ward, was removed and ordered to file accountings after commingling funds from settlement of a motor vehicle collision which paid his father's estate and his mother's guardianship.

114 "The law will not permit a guardian to act in such a manner that his own personal interest may come in conflict with the interest of his ward." *Allen v. Wade*, 203 Ga. 753 (1948).

115 Comment 11 to Rule 1.2 indicates that where a lawyer represents a fiduciary, the lawyer may be charged with special obligations in dealing with a beneficiary. Restatement 3rd of the Law Governing Lawyers, §51 indicates that a lawyer representing a fiduciary owes a duty to the principal.

116 In *Stine v. Dell'Ossa*, 230 Cal. App. 4th 834 (Cal. App. 2014), discussed *infra*, attorneys were sued for malpractice after failing to inform the court of assets owned by the ward, which were later misappropriated by the original conservator.

117 Comments to Restatement 3rd of the Law Governing Lawyers, § 51, indicate that the lawyer's duty to non-clients exists "only when the beneficiary of the client's fiduciary is not reasonably able to protect its rights. That would be so, for example, when the fiduciary client is a guardian for a beneficiary unable (for reasons of youth or incapacity) to manage his or her own affairs." Thus, a lawyer who chooses to stand idle and watch the guardian or conservator commit abuse may have liability for his inaction.

Visitation

In *In re D.R.*, 2008 Del. Ch. LEXIS 250 (September 5, 2008), a guardianship was imposed and the ward's granddaughter was appointed guardian. Unfortunately, the granddaughter did not get along with her mother, who was the ward's daughter. Visitation became difficult for the daughter and that issue, among others, was raised in a petition alleging that the granddaughter was unfit to continue serving as guardian. To resolve this conflict, the court appointed a co-guardian "for the limited purpose of facilitating communication and visitation between the ward and her family."

In *In re Estate of Wertzer*, 2014 Ga. App. LEXIS 734 (Ga. App. November 12, 2014), the parents of an incapacitated adult were divorced. The mother had custody. In 2013, the father filed a petition in superior court to modify visitation. In response, the mother filed a petition for guardianship and the father intervened seeking to continue and extend visitation. After the mother was appointed guardian, she filed a petition to dismiss the father's petition relating to visitation, claiming the probate court had no authority to set visitation. The probate court rejected the mother's position and "issued an order granting the father supervised visitation with Sierra during the third weekend of each month. The probate court slightly extended the hours of the Saturday visits, but denied the father's request for overnight visitation and for an extended visitation period during the summer." The mother appealed arguing, among other matters, the court exceeded its authority and that the order improperly impedes her duties as guardian. The court of appeals rejected her argument finding that the probate court has power to establish a set visitation schedule.[118]

Disputes over Health Care

Health care disputes can crop up while a petition is pending, or later, as an administration issue. The most famous case is *Schiavo*. Terri Schiavo suffered a cardiac arrest on February 25, 1990, secondary to a potassium imbalance.[119] She was 27 years old. By the time paramedics arrived and restored her heart beat, she had suffered brain damage and slipped into a coma. Eventually Terri emerged from her coma, but she remained in a persistent vegetative state (PVS). She did not have an advance directive. Terri's husband, Michael, was appointed as Terri's guardian.

After an initial challenge to Michael's status as guardian, Terri's parents (the Schindlers) were excluded from participating in her care. Litigation resumed in earnest when, in 1998, Michael filed a petition for authorization to remove Terri's PEG tube.[120]

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[118] The Court of appeals cited *Mitchum v. Manning*, 304 Ga. App. 842 (2010), which also permitted vitiation.

[119] B. Winick, *A Legal Autopsy of the Lawyering in Schiavo: A Therapeutic Jurisprudence/Preventative Law Rewind Exercise*, 61 U. Miami L. Rev. 595 (2007). Background facts are related at pages 602 through 605.

[120] "Percutaneous endoscopic gastrostomy is an endoscopic medical procedure in which a tube (PEG tube) is passed into a patient's stomach through the abdominal wall, most commonly to provide a means of feeding when oral intake is not adequate." http://en.wikipedia.org/wiki/Percutaneous_endoscopic_gastrostomy.

Conflicting evidence was presented by Michael and by the Schindlers regarding Terri's end of life wishes, although the Schindlers admitted that their alleged conversations with Terri took place while she was a child. The presiding judge found that Terri was in a PVS with no hope of regaining consciousness and granted the motion to discontinue life support. This ruling was the first in a lengthy legal battle which included three trips to the U.S. Supreme Court. Terri died on March 31, 2005.

While the focus of this article is not the *Schiavo* case, the case is worth noting since it began as a guardianship case and because of its notoriety. Michael, as guardian was required to petition for authority to terminate life support. Notice was given to interested parties. A hearing was held, where interested parties were afforded the opportunity to present evidence. Ultimately, the court was charged with determining what was in Terri's best interests.[121]

The standard applicable to surrogates making end of life decisions appears in *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261 (1990). There, the court rejected a substituted judgment approach in favor of a narrower standard allowing States to require clear and convincing evidence of the ward/patient's wishes.[122] In explaining the liberty interest of incompetent patients to refuse care, the Court stated:

> The choice between life and death is a deeply personal decision of obvious and overwhelming finality. We believe Missouri [**2853] may legitimately seek to safeguard the personal element of this choice through the imposition of heightened evidentiary requirements. It cannot be disputed that the Due Process Clause protects an interest in life as well as an interest in refusing life-sustaining medical treatment. Not all incompetent patients will have loved ones available to serve as surrogate decisionmakers. And even where family members are present, "there will, of course, be some unfortunate situations in which family members will not act to protect a patient." *In re Jobes*, 108 N.J. 394, 419, 529 A.2d 434, 447 (1987). A State is entitled to guard against potential abuses in such situations. Similarly, a State is entitled

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121 Florida law provides for the application of a substituted judgment test by the guardian, in the best interests of the ward. *See* J. Wolfson, *Schiavo's Lessons for Health Attorneys When Good Law Is All You Have: Reflections of the Special Guardian Ad Litem to Theresa Marie Schiavo*, 38 J. Health Law 535 (2005). An Issue Brief on Standards for Making Medical Decisions was developed as part of the Third National Guardianship Summit (2011), http://www.guardianshipsummit.org/wp-content/uploads/2011/07/Issue-Brief-Medical-Decision-Making-final1.pdf.

122 "The transition of patient self-determination regarding health care decision-making from a common-law principle stemming from the law of battery to one of constitutional imperative has important implications for the guardianship system. It is clear from *Cruzan* itself that all persons, including those with severe impairments, enjoy the personal liberty interests involved when medical treatment is at issue. This necessarily implies that a court-appointed guardian is obligated to ensure that the ward's own preferences are reflected in every health care-related decision the guardian makes, in every context, unless doing so is impossible or an exception to the principle of self-determination regarding health care exists in a particular situation." K. Dayton, *Standards for Health Care Decision-Making: Legal and Practical Considerations*, 2012 Utah L. Rev. 1329 (2012).

> to consider that a judicial proceeding to make a determination regarding an incompetent's wishes may very well not be an adversarial one, with the added guarantee of accurate factfinding that the adversary [***244] process brings with it. *See [*282] Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 515-516. Finally, we think a State may properly decline to make judgments about the "quality" of life that a particular individual may enjoy, and simply assert an unqualified interest in the preservation of human life to be weighed against the constitutionally protected interests of the individual. ....In sum, we conclude that a State may apply a clear and convincing [***246] evidence standard in proceedings where a guardian seeks to discontinue nutrition and hydration of a person diagnosed to be in a persistent vegetative state. We note that many courts which have adopted some sort of substituted judgment procedure in situations like this, whether they limit consideration of evidence to the prior expressed wishes of the incompetent individual, or whether they allow more [**2855] general proof of what the individual's decision would have been, require a clear and convincing standard of proof for such evidence.[123]

In a *Schiavo*-like proceeding, a trial court was forced to choose which divorced parent would be appointed as guardian for their twenty-two year old daughter. In *In re L.M.R.*, 2008 Del. Ch. LEXIS 255 (January 24, 2008), "L" was in a PVS secondary to a heroin overdose. She was pregnant at the time and her life was extended to permit the birth of her child. Thereafter, the court was called upon to determine which parent would be L's guardian. Her mother testified that L would not want to live in a vegetative state and indicated that if she was appointed guardian, she would remove artificial means for preserving L's life, including hydration and tube feeding. L's father, on the other hand, expressed a desire to take L home and provide life prolonging care. The court considered lay testimony from four sources (L's mother, father, an uncle and a boyfriend), the fact that she was reading a book on death with dignity and the fact that she overdosed before determining that L would not have wanted to live in a PVS. Specifically, the court heard evidence described as follows:

> Testimony of L.'s mother provides the clearest window into L.'s wishes in this situation. According to her testimony, in 2005 she and L. were watching a program about another individual [*14] in a persistent vegetative state, Terri Shiavo. I take judicial notice of the fact that Terri Shiavo was a Florida resident reported to be in a persistent vegetative state, who was the subject of a struggle between her guardian and other relatives over withdrawal of nutrition and hydration in conditions similar to L.'s. The matter became one of national interest and was widely reported in news media several years ago.

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123 In *In re Guardianship of Tschumy*, 834 N.W. 2d 764 (Minn Ct. App. 2013), the Court held that court approval is not required to disconnect life support from a permanently unconscious ward where a prior statutory grant of medical consent had been given to the guardian, and where no interested party has objected.

> .... According to L.'s mother, after watching the program on Terri Shiavo, she and L. expressed that they would wish never to be maintained artificially as Terri Shiavo was at that time, given nutrition and water through a tube prolonging a persistent vegetative state. According to the petitioner, L. and her mother made reciprocal promises that they would ensure that neither would endure such a fate. Because of the similarity of the circumstances involving Terri Shiavo discussed by L. and her mother, and L.'s current condition, I find this very compelling evidence that L. would wish to refuse the treatment that is preserving her in a persistent vegetative [*15] state today.
>
> L.'s father argues that the mother's testimony is not credible because, according to him, L. was living with him during that period, and was unlikely to have been watching a television program with her mother. He also points out that he and his wife watched news coverage of the Shiavo case with L., and that L. did not make such a statement to either of them. ....
>
> The petitioner and L.'s uncle, K.W., also testified to a separate conversation in which L. represented that she would never want to live with her life artificially supported and that surviving on life support, with others caring for her, would be "gross." [*17] While less specific than the first conversation testified to by L.'s mother, Mr. W.'s testimony is corroborative of that account. Finally, L.'s boyfriend, N.C., testified via deposition that L. once told him that she would not want to live on artificial life-support. He also testified, however, that she was intoxicated and depressed at the time, so I put little weight into this testimony.

Other, less final, health care decisions arise in guardianship cases. In *Conservatorship of Carol K.*, 188 Cal. App.4th 123 (2010), the court addressed the question “when should the state intervene to care for the nondangerous mentally ill?” The issue was whether a conservatorship should have been established to facilitate nursing home care and the administration of antipsychotic medications for Carol. Medical testimony showed that Carol had on at least 10 occasions, lost community housing. Carol's paranoia about abuse by staff, coupled with her refusal to take antipsychotic medication, resulted in frequent failed placements. He also testified Carol had 13 admissions to the mental health treatment center in 15 years. Her last placement lasted only a month. Other testimony showed that she refused food and water, ending up dehydrated and hospitalized. Given this evidence, the trial court’s determination that Carol was gravely disabled and in need of a conservatorship was affirmed.

In *Kuelbs v. Hill*, 2011 Ark. App. 628 (October 26, 2011), a case appealed at least four times, the court affirmed the circuit court, including an order authorizing the forced administration of antipsychotic medication; it was alleged that the medication was in the ward’s best interests and could prevent harm to herself and others.

In *In re Estate of Wertzer*, 2014 Ga. App. LEXIS 734 (November 12, 2014), the Court required the guardian (mother of an incapacitated adult), to confer with the ward's father on all important matters relating to the ward. The guardian was also required to inform the ward's father of the wards medical condition, residence and to inform him of any serious illness. The court of appeals affirmed the order in so far as it required the guardian to inform the father of the ward's condition, but reversed to the extent "confer" means the guardian was required to consult with the father regarding decisions, or to the extent it meant the father had any right to direct decision-making.

In *Kennedy v. Kennedy*, 845 N.W. 2d 707 (Iowa 2014), a mother served as guardian for her 21 year old son with intellectual disabilities. After he admitted wanting to have sex with his girlfriend, his mother secured a restraining order against the girlfriend and arranged for an involuntary vasectomy. Her son challenged that action, attempting to have his mother removed as guardian. The probate court found that the conservator did not violate guardianship law by having the vasectomy performed without court approval and allowed her to continue as guardian. An appeal was granted even though the vasectomy was complete because the issue was capable of reoccurring. The Court of Appeals held that the guardian did violate the guardianship statute. After reviewing case law on sterilization procedures, the Court held "we would have serious doubts about the constitutionality of a statute that allowed a guardian to arrange for a ward to undergo a vasectomy without any court involvement." However, by the time the appeal was heard, the ward no longer sought modification of the guardianship and only sought a ruling on whether a court order should be required prior to an involuntary vasectomy. Thus, the court of appeals declined to disturb the probate court order regarding the guardianship.[124]

Divorce

The traditional rule is that divorce is a personal action that cannot be brought (initiated) by a guardian; the traditional rule did, however, permit defense of a divorce action brought by the other spouse. The traditional rule was changed in Georgia with adoption of the 2005 Guardianship Code. O.C.G.A. § 29-4-23(b)(4) provides the probate court may grant the guardian the right to "bring an action for the divorce of the ward based on any of the grounds listed in Code Section 19-5-3, except on the ground that the marriage is irretrievably broken."[125]

In *Karbin v. Karbin*, 2012 IL 112815; 977 N.E.2d 154 (Ill. 2012), the Court overruled *In re Marriage of Drews*, 115 Ill. 2d 201 503 N.E.2d 339, 104 Ill. Dec. 782 (1986), which prohibited a guardian from filing a divorce action. In re-examining its prior decision, the

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124 *See Guardianship of L.H.*, 84 Mass. App. Ct. 711 (2014) (affirming order of antipsychotic drug).

125 Permitted grounds include intermarriage within prohibited degrees of consanguinity; mental incapacity at time of marriage; impotency; force, menace, duress or fraud in obtaining the marriage, pregnancy of wife by another man, adultery after marriage, willful and continued desertion, conviction of a crime of moral turpitude with a sentence of two years or longer, habitual intoxication, cruel treatment, incurable mental illness, or habitual drug addiction. *See* O.C.G.A. § 19-5-3.

Court noted that adoption of a no-fault divorce statute makes it difficult "to accept the view that the decision to divorce is qualitatively different from any other deeply personal decision, such as the decision to refuse life-support treatment or the decision to undergo involuntary sterilization.... Thus, there is no reason why the guardian should not be allowed to use the substituted-judgment provisions found in section 11a-17(e) of the Probate Act to make all types of uniquely personal decisions that are in the wards's best interests, including the decision to seek a dissolution of marriage." Further, the court found that permitting the competent spouse the option of terminating a marriage, without granting the same right to the protected spouse, creates an inequality. The Court went on to hold:

> Whether a guardian is initiating, responding to, or continuing a dissolution action, the interests of the ward that may require protection remain constant, regardless of the procedural posture of the case. Because under the Probate Act the guardian must always act in the best interests of the ward, when a guardian decides that those best interests require that the marriage be dissolved, the guardian must have the power to take appropriate legal action to accomplish that end. We therefore find no compelling reason to treat a guardian's decision to seek court permission to institute a dissolution action on behalf of a ward any differently from the multitude of other innately personal decisions which may be made by guardians on behalf of their wards, including undergoing involuntary sterilization or ending life-support measures. All of these decisions made by guardians without knowing a ward's wishes are just as personal—if not more so—than the decision to seek a divorce. All also may implicate the ward's moral and religious beliefs. The provisions of our Probate Act cannot be so arbitrary as to empower a plenary guardian to make decisions with respect to all these matters except for the decision to end a marriage. Either the guardian can act in the best interests of the ward for all personal matters, or for none at all.

A different result was reached in *McGee v. McGee*, 998 N.E. 2d 270 (2013). A guardian filed a petition for dissolution of marriage, on behalf of the husband-ward, alleging the marriage was irretrievably broken. The wife countered arguing the marriage was never irretrievably broken. The trial court granted the petition and the wife appealed. On appeal the court found that the right to dissolve a marriage is a statutory right, not a common law right. Therefore, it can only be brought in a manner authorized by statute. Neither the marriage dissolution statute nor the guardianship statute provides a means for a guardian to file a divorce petition. Therefor the court erred in granting the petition.[126]

In *In re Guardianship of O'Brien*, 847 N.W. 2d 710 (Minn. Ct. App. 2014), the opposite issue was before the court. Michael, a 27 year old ward with a serious persistent mental disorder, started dating a 20 year old. After seeing her for

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126 *See also Tillman v. Tillman*, 2013 Ind. App. LEXIS 326 (July 3, 2013).

approximately 2 years, Michael petitioned the court for a judgment that he had the right to marry. His parents, the guardians, opposed the petition. The trial court granted a summary determination denying Michael's petition. On appeal, the summary determination was reversed. Marriage is a constitutional, fundamental right; it is limited only by the individual's capacity to enter into that contract. Further, a guardianship should be limited. The burden of proof was on those opposing the petition, and their evidence should be supported by expert testimony. The issue was not whether Michael had behavioral problems, but whether he had "mental capacity to comprehend the meaning, rights, or obligations of marriage." Because the trial court made no findings regarding Michael's capacity to enter into marriage, the case was reversed and remanded.

Estate Planning

In some circumstances, estate planning for the conservatee is permitted. O.C.G.A. § 29-5-23; § 29-5-36.[127] In *Murphy v. Murphy*, 164 Cal. App.4th 376 (2008), the court reviewed California's history permitting estate planning for a conservatee. The court's primary function under the substituted-judgment statute is to make a decision (as the conservatee would if able) on the basis of information furnished to it.

In *Hall v. Kalfayan*, 190 Cal. App. 4th 927 (2010), Carlyle Hall filed a legal malpractice suit against the conservator's attorney for failing to complete an estate plan for the ward, Ms. Turner. Hall had known Ms. Turner since the 1960s and was instrumental in identifying self-neglect and having a conservatorship established. During the course of interviews with Ms. Turner, comments were made that she wanted to leave more than half of her estate to Turner (she had no living spouse or children) and less than half to her niece. A living trust was prepared and the process was initiated to have the trust approved by the court. Ms. Turner died before the trust was approved, and Hall received nothing. Hall sued alleging that Kalfayan's failure to timely perform his duties had deprived him of the majority of Ms. Turner's estate. The trial court granted the attorney's motion for summary judgment based on the absence of any duty to Hall. The court of appeals affirmed. The attorney's duty was solely to the conservator, not to potential beneficiaries.

In *Zagorski v. Kaleta*, 404 Ill. App.3d 75 (2010), the court affirmed a trial court decision authorizing amendment of a trust to change the successor trustee and contingent

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[127] O.C.G.A. § 29-5-29(a)(8) permits revocation of a trust. O.C.G.A. § 29-5-29(c)(8) permits creation of a trust and § 29-5-29(c)(10) permits estate planning for the ward. O.C.G.A. § 29-5-36 provides that estate planning, as permitted under the previously cited code sections, authorizing transfers outright, or in trust. The Code requires notice to interested parties and a finding that the ward will probably remain in need of a conservator throughout his or her lifetime. The Code appears to contemplate planning for surplus assets only. The court must find that the contemplated transfers are those that a competent, reasonable person in the ward's circumstances would make. There must not be any evidence that the ward would not adopt the plan. The substituted judgment rule is not specifically adopted in the Georgia rule, but the standard is substantially similar. It is unclear whether the Georgia rule permits Medicaid planning for the ward since the court must specifically find that the assets are not required for the ward's probable expenses for support, care, education, health or welfare before authorizing estate planning.

beneficiary. In doing so, the Court held that statutory provisions authorizing estate planning by the conservator were not limited to tax planning. A contrary result was reached in *In re Guardianship of E.N.*, 877 N.E.2d 795 (Ind. 2007), where the court found that gifts of substantially all of the ward's estate were not authorized under the estate planning statute; the statute's reference to tax planning indicated that the legislature intended gifts under the annual exclusion amount. Further, a gift of substantially all of the ward's estate would have the effect of rewriting his or her Will, which is not authorized.

Fees

A conservator is entitled to compensation. In Georgia, the default compensation is two and one-half percent commission on all sums of money received by the conservator on account of the estate, except on money loaned by and repaid to the conservator, and 2 1/2 percent commission on all sums paid out by the conservator. O.C.G.A. § 29-5-50(a)(1). Other compensation is permitted in some circumstances. A conservator who failed to make annual returns as required forfeits his or her commission. Expenses are allowed in addition to fees. O.C.G.A. § 29-5-51.A petition for additional compensation may be granted as the court deems reasonable after appointment of a guardian ad litem and hearing. O.C.G.A. § 29-5-52.

Typically, attorney's fees and guardian or conservator's fees must be approved by the court if they are paid from the ward's estate. They must be reasonable; the determination of what is or is not reasonable, however, should not turn solely on an arbitrary decision that the ward cannot afford services. In *Sun Valley Group, Inc. v. Mallet*, 233 Ariz. 29 (Ariz. Ct. App. 2013), a ward had an illiquid estate valued at approximately $811,000. The fee requested by the conservator was $96,859.60, plus $28,501.64 in legal fees. The probate court found the services provided were reasonable, necessary and in the best interests of the ward, but nonetheless cut the fee request in half because the ward could not afford to pay. The Court of Appeals reversed. In Arizona, probate courts are required to follow guidelines in determining the reasonableness of fee requests. Those guidelines require courts to consider: (1) the result, specifically whether benefits were derived from the efforts, and whether probable benefits exceeded costs, (2) whether the Professional timely disclosed that a projected cost was likely to exceed the probable benefit, (3) the professional's skill and expertise, (4) the character of the work and skill required, (5) the work actually performed and the time required, (6) the customary fees and usual time expended for like services,[128] and (7) the risks and responsibilities associated with the work. While counsel has a duty to consider the cost-benefit of the representation and refrain from wasting the estate, the court could not reject a fee request without considering the guidelines, based solely on its opinion that the ward could not afford to pay.

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[128] In *Hook v. Rego*, 98 So.3d 183 (Fla. App. 2012) a trial court decision was reversed after the trial court reduced a certified elder law attorney's fee from $250 per hour to $200 per hour and the only evidence of record indicated that her hourly rate was reasonable and customary.

In *In re Estate of McKitrick*, 326 Ga. App. 702 (2014), the Court held that an ambiguous fee agreement was an hourly agreement, rather than a flat-fee agreement, because that interpretation was the one which would uphold the contract in whole and in every part. The contract failed to mention the hourly rate. The probate court set that rate at $45 out of court and $60 in court, borrowing from the public defender's fee schedule. The court of appeals reversed the probate court's determination regarding hourly rate, indicating that parole evidence, such as a billing statement, might establish the hourly rate.

Standby Guardians

A designating individual may appoint a standby guardian who would serve under certain circumstances. For minors, the standby guardian would serve upon a health determination that the designating individual is unable to care for the minor due to the individual's physical or mental health, as certified by a health care professional. See O.C.G.A. § 29-2-9 and § 29-2-10. No judicial intervention is required, but the standby guardian is required to file with the county probate court a copy of the standby guardianship designation. Bond is not required. Designation of a standby guardian does not relieve the parent of any support obligation. O.C.G.A. § 29-2-10. The statutory form used to designate a standby guardian for a minor appears at § 29-2-11. A designation of standby guardianship may be revoked by destruction or obliteration of the designation, or by giving written notice. O.C.G.A. § 29-2-12.

Malpractice

In *Stine v. Dell'Ossa*, 230 Cal. App. 4th 834 (Cal. Ct. App. 2014), a demur was sustained by the trial court after a successor conservator filed a malpractice action.[129] The original conservator misappropriated $1 million dollars from the conservatorship. When the petition was filed, the original conservator represented most assets were in a trust and, therefore, were not subject to the bonding requirement. Real property and individual retirement accounts in the name of the ward were not disclosed to the court. It appeared that the original conservator's attorneys monitored and/or assisted the original conservator with the management of the real property and retirement accounts, but did not report them to the court. The successor conservator brought a claim against the attorneys for the original conservator for failing to disclose assets in the conservatorship, thereby triggering the requirement for a bond. When the successor conservator sued, the attorneys alleged there was no attorney-client relationship upon which a suit could be based, and that the original conservator's "unclean hands" were a defense. The Court of Appeals rejected each defense and reversed the trial court's decision to sustain the demur. The fiduciary exception permits a successor conservator to maintain a suit notwithstanding the absence of an attorney-client relationship. With regard to the unclean hands, the successor conservator was blameless. While it would be unfair to allow the original conservator to profit from his wrongdoing, the successor conservator did not participate in that conduct. The successor steps into his shoes" only

[129] A demur is a pleading still used in some jurisdictions, but not currently in use in Georgia. It is a kin to a motion to dismiss for failure to state a claim. A demur admits, provisionally, for purposes of testing the pleading, all material facts properly pleaded.

to the extent of his fiduciary authority; she does not step into the morass created by his personal malfeasance.

The End: Termination Issues

The proper goal of a guardianship is to terminate it. "In every guardianship, the ward has a right to be restored to capacity at the earliest possible time." O.C.G.A. § 29-4-20(a)(7). A petition to terminate a guardianship may be filed by any interested person, including the ward or on the court's own motion. O.C.G.A. § 29-4-42(a).[130] A multi-layered probable cause evaluation, similar to the one required for the appointment of a guardian is required. If there is probable cause for a hearing, the standard of proof is a preponderance of the evidence. O.C.G.A. § 29-4-42(c).

As a rule, the authority of a guardianship or conservator terminates either upon the ward's death or when earlier terminated. O.C.G.A. § 29-4-42(e) (death automatically terminated the guardianship). However, the duties of the guardian continue until he or she is released by the Court.[131] O.C.G.A. § 29-4-43 requires the filing of a final status report by the guardian and a final return by the conservator. In *In re Estate of Haring*, 314 Ga. App. 770 (2012), the executor of Clorina Haring's estate petitioned for a final accounting from the conservator, who had served for five and a half years prior to Ms. Haring's death. Evidence showed that Ms. Haring and the conservator began living together in 1974. In 2001, conservator and Ms. Haring's son petitionerd to have a conservator appointed because Ms. Haring developed Alzheimer's and was no longer competent to care for her affairs. The conservator was appointed and bonded, filing annual reports as required. The conservator served until Ms. Haring died on December 26, 2006. In April, 2007, the executor petitioned for an accounting, alleging failure to deliver money to the estate. At a two day hearing where 15 people testified, the evidence showed that when McQuien became Haring's guardian and conservator, Haring had approximately $250,000 in cash and certificates of deposit (CDs), and when she died, she had $70,000 left." In establishing how the funds were used, the evidence showed that Ms. Haring's son wanted to put Ms. Haring in a nursing home. The conservator, on the other hand,

> said that as long as he was alive and able to care for her, he would not do that. McQuien paid a sitter $8.50 an hour to stay with Haring while he was at work. During his 67-month conservatorship, McQuien wrote checks to the sitter totaling $140,282, and paid her additional sums in cash. The sitter testified that McQuien kept track of her hours and paid her at least weekly. Haring testified that he paid the sitter more often than weekly when she needed it. She took Haring for rides in Haring's car, which two experts

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130 O.C.G.A. § 29-5-72 (conservatorships).

131 *Hoyt v. Goyer*, 107 So.3d 1085 (Ala. 2012) ("The administration of a protected person's estate is not closed until there is a final settlement.... it does not automatically terminate upon the protected person's death or even when an administrator is appointed for that person's post-death estate").

> testified was therapeutic for Alzheimer patients. McQuien also wrote checks to himself and for cash during this period that totaled $82,888, and testified that he used some of that to pay the sitter in cash and the rest for food and other household expenses. He also testified that the source of Haring's certificates of deposit was the $725 monthly rent payments he made to Haring from 1974 to 1998, which Haring never spent. In 2005, he asked Haring's sons to cash in some certificates because the money in Haring's checking account was "getting low," but they refused, so he cashed in other CDs for $43,000.

The evidence showed the cost of institutional care would have been $40,000 to $70,000 per year. The cost of an hourly sitter through an agency would have been $14.50 to $15.00 per hour at the time. Testimony was presented that Alzheimer's patients did better mentally and cognitively when kept at home instead of in an institution. A social worker who visited two to three times each month testified that the conservator provided wonderful care. Haring was always clean, dressed and sitting on a sofa instead of left in her bed. Haring was vibrant and animated during the social worker's visits. Based on the evidence, the probate court found the conservator spent less money than it would have cost to care for Haring in a licensed facility and that the funds spent were reasonable. There was no evidence that the conservator converted Haring's funds for personal use. The petition was denied and the conservator was discharged without further liability.[132]

In *F.W. v. B.W. (In re F.W.)*, 824 N.W. 2d 561 (Iowa Ct. App. 2012), the ward's wife was appointed as guardian for her 73 year old husband. Approximately nine months later, the ward's counsel moved for termination of the guardianship. Medical evidence showed the ward "had some mental impairments such as slowed processing speed and poor memory, but concluded F.W. was not in need of guardianship or conservatorship." Further, the ward provided lucid and rational testimony in support of his petition. The court found the ward made a prima facie showing of some decision-making capacity, which shifted the burden of proof to the ward's wife. Because she failed to prove the requisite incompetence to warrant maintenance of the guardianship, the court of appeals affirmed dissolution of the guardianship.[133]

In *In re Guardianship of Bostrom*, 2014 Minn. App. Unpub. LEXIS 158 (March 3, 2014), the Court of Appeals affirmed denial of a petition to terminate a guardianship. There, the ward 'was ill with a psychotic disorder secondary to a traumatic brain injury, which grossly impaired her judgment, behavior, capacity to recognize reality, or to reason or understand, so that she posed a substantial likelihood of causing physical harm to herself or others." She was involuntarily committed in 2007 and 2009 due to

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[132] The court then went on to award attorney's fees to the conservator. Both rulings were upheld on appeal.

[133] *See also In re Rosenberg*, 211 Md. App. 305 (2013), where the Court indicated the initial burden of proof in terminating a guardianship is preponderance of evidence. After that evidence is presented, the burden of proof shifts to the party seeking to continue the guardianship.

behavioral issues secondary to her condition. In 2011, the guardianship was imposed. In May, 2012, she was again committed after a finding that she refused to take her medication and had engaged in outbursts and belligerent actions. Three months later, the ward petitioned for termination of the guardianship. The trial court denied her request, finding that she continued to have an organic brain injury which impaired her behavior, judgment and capacity to recognize reality. Notwithstanding unrebutted testimony that the ward was able to meet her own personal needs, the trial court did not abuse its discretion in light of her recent treatment history.

Handbooks and Resources for Guardians

Various handbooks exist to assist guardians and conservators in fulfilling their duties:

Georgia & Tennessee

Handbook for Guardians and Conservators of Adults:
http://www.gaprobate.org/forms/HANDBOOK+FOR+GUARDIANS-Final-3.pdf
Handbook for Conservators for Minors in Georgia:
http://www.gaprobate.org/forms/HANDBOOK+FOR+MINORS+-+final.pdf

Other States

Florida: http://www.flcourts18.org/PDF/gurardianship_rev1-07.pdf.
Utah: http://www.utcourts.gov/howto/seniors/docs/Manual_Only.pdf

Updates: This paper includes cases from a Lexis search in the State Court Cases library. The following search was used: HEADNOTES(guardian or guardianship or conservator or conservatorship) and CORE-TERMS(guardianship or conservatorship) and date(geq (4/1/2012) and leq (1/20/2015)). If the results are updated, then the date restrictions should be modified accordingly.

Exhibit A

Guardianship Statutes

Alabama		ALA CODE. §§26-2-2 to -55; 26-2A-1 to -160; 26-2B-101 to -503; 26-3-1 to -14; 26 -5-1 to -54; 26-8-1 to-52; 26-8-20 to -25; 26-9-1 to -5 and -7 to -19.
Alaska		ALASKA STAT. §§13.26.001 to .410; 13.27.010 to .495.
Arizona		ARIZ.REV.STAT. §§14-5101 to -5704; 14-12101 to -12503.
Arkansas		Guardians generally: Arkansas Code Annotated 28-65-101 et seq., Uniform Veterans' Guardianship Act: 28-66-101 et seq. Conservators for the Aged and Disabled: 28-67-101 et seq.
California		Probate Code §1400, et seq, §1500, et seq, §1800, et seq. & §2100, et seq. (Guardianship-Conservatorship Law)
Colorado		COLO.REV.STAT. §§15-14-101 to -745; 15-14.5-101 to -503.
Connecticut		CONN.GEN.STAT. §§45a-591 to -602; 45a-644 to -705a.
Delaware		DEL.CODE.ANN. §§3901-3997; 39A-101 to -402.
District of Columbia		DC.CODE.ANN. §§21-1501 to-1507; 21-2001 to -2098; 21-2401.1 to -2405.3.
Florida		FLA.STAT.ANN. §§744.101 to .715; 747.01 to .052
Georgia		O.C.G.A. § 29-1-1 et seq.
Hawaii		HAW.REV.STAT.ANN. §§551-1 to -2; 551-21 to -64; 551A-1 to -9; 551D-1 to – 7.
Idaho		IDAHO CODE ANN. §§15-5-101 to -107; 15-5-301 to -603.
Illinois		20 ILL.COMP.STAT.ANN. 3955/1 to /36. 755 ILL.COMP.STAT.ANN. 8/101 to /505.
Indiana		IND.CODE.ANN. §§12-10-7-1 to -9; 29-3-1-1 to -13-3.
Iowa		IOWA CODE §§231E.1 to .13; 633.551 to .682; 633.706; 633.708 to .722.
Kansas		KAN.STAT.ANN. §§59-3051 to-3097; 74-9601 to -9606.
Kentucky		KY.REV.STAT.ANN. §§210.290; 387.010 to .990; 388.190 to .390.
Louisiana		LA.REV.STAT.ANN. §§9:1021 to:1034; 13:3421 to:3445. LA.CODE.CIV.PROC.ANN. art. 4542 to art. 4569.
Maine		ME.REV.STAT.ANN. §§5-101 to -105; 5-301 to -964.
Maryland		Estates & Trusts Volume Sections 13-201 (property) and 13-701 (person)
Massachusetts		MASS.GEN.LAWS ch.190B, §§ 5-101 to -431
Michigan		MICH.COMP.LAWS §§700.5101 to .5520
Minnesota		MINN.STAT. §§252A.01 to .21; 524.5-101 to -903.
Mississippi		MISS.CODE.ANN. §§43-47-13; 93-13-1 to -281
Missouri		MO.REV.STAT. §§473.730; .743;.747; .750; 475.010 to .480
Montana		MONT.CODE.ANN. §§72-5-101 to -638
Nebraska		NEB.REV.STAT.ANN. §§30-2601 to -2672
Nevada		NEV.REV.STAT.ANN. §§159.013 to 161.030; 253.150 to .250
New Hampshire		N.H.REV.STAT.ANN. §§464-A: 1 to :47; 547-B:1 to :8.
New Jersey		NEW JERSEY: N.J.S.A. 3B:12-1 ET SEQ., NJ COURT RULE 4:86
New Mexico		N.M.STAT.ANN. §§28-168-1 to -6; 45-5-101 to -617
New York		N.Y.MENTAL HYG.LAW §§81-01 to -44. N.Y.SOC.SERV.LAW §§473-d to 473-e.

North Carolina		N.C.GEN.STAT. §§34-1 to-18; 35A-1101 to -1362
North Dakota		N.D.CENT.CODE §§30.1-26-01 to -30-06.
Ohio		Ohio Revised Code Chapter 2111: uardians/Conservatorships O.R.C. 2111.021
Oklahoma		OKLA STAT. tit.30 §§1-101 to 6-102
Oregon		OR.REV.STAT. §§125.005 to .852
Pennsylvania		PA.CONS.STAT. §§5501 to 5555
Rhode Island		R.I.GEN.LAWS §§ 33-15-1 to -47; 33-16-1 to -35
South Carolina		S.C.CODE ANN. §§62-5-101 to -716
South Dakota		S.D. CODIFIED LAWS §§29A-5-101 to -509
Tennessee		T.C.A. § 34-1-101 et seq.
Texas		Texas Probate Code Sections 601 - 905
Utah		UTAH CODE ANN. §§62A-14-101 to -111; 75-5-101 to -504; 75-5b-101 to -503
Vermont		VT.STAT.ANN. tit.14, §§2602 to 3121
Virginia		VA. CODE ANN. §§2.2-711 to -713; 37.2-1000 to -1109
Washington		WASH.REV. CODE ANN. §§2.72.005 to .900; 11.88.005 to 11.92.190
West Virginia		W.VA.CODE ANN. §§44A-1-1 to 44A-5-9; 44C-1-1 to 44C-5-3.
Wisconsin		Chapter 54, Wis. Stats.
Wyoming		WYO.STAT.ANN. §§3-1-101 to 3-6-119

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