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ATTORNEY RESPONSIBILITY AND CLIENT INCAPACITY

*Raymond C. O'Brien**

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INTRODUCTION

In and of itself, the aging of the American population poses no ethical or legal issue for the American attorney. Indeed, at least for attorneys working with wealth management, estate devolution, and the ever-changing state and federal tax codes, the accumulation of years is often accompanied by an accumulation of wealth and attorney employment options. Wealth creates the indispensable milieu for a productive attorney-client relationship. But, the accumulation of years can bring less attractive options. As Ralph Waldo Emerson concluded in his essay *Circles*: "Nature abhors the old, and old age seems the only disease; all others run into this one."¹ Physical and mental

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1. RALPH WALDO EMERSON, *Circles in THE COLLECTED WORKS OF RALPH WALDO EMERSON VOL. II ESSAYS: FIRST SERIES* 177, 188 (Alfred R. Ferguson, et al., Harv. Univ. Press 1979).

disabilities accompany human years, often bringing with them a mental capacity that is insufficient to safeguard of person and property, prompting the creation of mechanisms to effectively transfer decision-making authority to other persons or institutions.

Increasingly, attorneys are asked to provide legal services to clients under circumstances that suggest that the client's mental capacity is diminished or absent. Examples would include, most commonly, the preparation and execution of a last will and testament. The formalities of due execution are easily and objectively satisfied by the seasoned attorney. However, particularly in regard to an aging population, the attorney must also confront the more subjective intention of the client: Whether the client has the necessary capacity for execution; whether the client is being unduly influenced by another; or whether the client is executing the last will and testament while under a delusion. Each of these subjective tests involving client capacity has a corresponding legal pedigree delineating what must be done to establish validity. Each requires the attorney to be sensitive to personality issues involving the client and often the client's family and beneficiaries.

In addition to last wills and testaments, larger numbers of clients are requesting attorneys to prepare and execute durable powers of attorney, which will transfer decision-making authority to another person in the event that the principal becomes incapacitated in the future. Such an arrangement is meant to avoid the appointment of a guardian or a conservator, which would avoid court costs and presumptively, management by strangers to the principal. All three arrangements—durable powers, guardianships and conservatorships—“spring” into action because of the incapacity of the principal. How does a court, usually upon petition of a family member, prove incapacity of the principal? Does the client possess limited capacity? And how does an attorney determine if the principal possessed capacity to execute the durable power? If the durable power lacks effectiveness because the principal was incapacitated at the time of execution then, upon petition, a court may appoint a guardian or a conservator. But, as with the durable power, what proof is necessary to establish the incapacity of the principal so that the appointment is valid?

An attorney's relationship with his or her client is governed by rules of professional responsibility. Each state licenses its attorneys to practice and each state has its own rules of professional conduct. The American Bar Association publishes Model Rules of Professional Responsibility and these model rules illustrate the issues that arise in the context of an attorney and a client's capacity. Overall, the rules govern when an attorney may withdraw from providing services to a client, when an attorney for the client may consult with persons or entities able to take necessary action, issues of confidentiality, and making a good faith effort to apply the law to the needs of the client.

Admittedly, the attorney-client relationship does not occur in a vacuum and the model rules seldom address the complex personal issues that arise. Often the attorney performs services for the client within the context of a blended family. That is, the attorney serves in a fiduciary capacity with multiple members of one family, drafting and executing documents, providing legal advice and representation in multiple settings, managing assets or distributing support payments. In addition, an attorney receives financial compensation for providing the client with services, compensation that would be absent if the attorney withdrew from providing those legal services. Many of the cases to be discussed in this Article occur in the context of blended families or occur in tandem with the attorney who provided services to the client and is also receiving substantial compensation as a result of those services rendered. Likewise, many of the attorney-client relationships described in this Article span the course of many years and not just the time involved in the individual decision.

This Article suggests what an attorney should consider when representing a client suspected by the attorney of having diminished capacity, anticipating diminished capacity, or a client anticipating a response to the legal dilemmas posed by aging. So too, this Article suggests what an attorney should consider when retained by the family members of an allegedly incapacitate person. After providing demographics regarding aging, this Article will specifically address the attorney-client relationship in the context of the Model Rules of the American Bar Association. Next, this Article will integrate the attorney's responsibility regarding the proper execution of a Last Will and Testament, including the issues of capacity and undue influence. Then this Article will discuss the process of determining incompetency of an adult is sufficient for appointment of a guardian or conservator. This Article will provide illustrations from current cases, applicable professional conduct parameters, and commentary from practitioners offering guidelines for working with clients of diminished capacity. Overall, this Article seeks to provide usable practice parameters for attorneys working with an ever-increasing segment of the American population, the elderly.

I. DEMOGRAPHICS

A. *Case in Point*

In 1914 a baby girl was born in rural Tennessee, as one of twelve children; her parents named her Ellen.² When she was twenty-two years old,

2. *In re Conservatorship of Groves*, 109 S.W.3d 317, 322 (Tenn. Ct. App. 2003).

she married and she and her husband remained in Tennessee throughout their lives together. Her husband suffered a fall when he was in his late seventies. While convalescing after the fall, he transferred a \$100,000 certificate of deposit to his brother, Glendon, stipulating in an oral agreement with the brother that the brother would take the money and care for him and Ellen as long as they lived. The agreement was secret because the husband wanted to qualify for Medicaid assistance and did not want the money to be collateral for his health care expenses. Glendon performed as expected and one year later the husband died. It was then that Glendon took possession of his sister-in-law Ellen's remaining money and real estate, moving Ellen into his home with him and his wife. While living in the brother's home, Ellen executed a power of attorney³ and a Last Will and Testament,⁴ both in favor of her brother-in-law, Glendon, and prepared by an attorney-friend of Glendon.

After one year of living in Glendon's home Ellen's friendship with her brother-in-law and his wife ended amidst allegations that the brother-in-law alienated Ellen from her family, that he stole from her, and that he unduly influenced her. Then Ellen suffered a fall and Glendon moved her into a nursing home where her niece Cheryl Travis visited her in person or by phone. While in the nursing home, Ellen's relationship with Glendon Groves and his wife continued to be estranged even further.⁵ Throughout this time, Ellen's niece frequently came to visit her in the nursing home and offered to take Ellen to live with her. The brother refused to move Ellen from the nursing home, asserting that Ellen was incompetent. He then petitioned the court to be appointed as her conservator,⁶ in part to prevent the niece from removing Ellen from the home. Glendon's petition occurred when Ellen was eighty-four years old, was resentful for being in a nursing home, and was angry with Glendon and his wife. Ellen's niece argued against Glendon's appointment as conservator, asserting that Ellen was sufficiently competent to make her own decisions, such as leaving the nursing home and moving into the niece's home. A contest then ensued in court to determine if there was sufficient clear and convincing evidence that Ellen was sufficiently incompetent, so as to permit appointment of a conservator.

3. For a discussion of the validity of the power of attorney and Ellen's ability to revoke it, see *infra* at Part IV.B.

4. For a discussion of undue influence and impact on a Last Will and Testament, see *infra* at Part III.B.

5. *Conservatorship of Groves*, 109 S.W.3d at 324-25.

6. *Id.* at 325.

In response to Glendon's petition to be appointed as Ellen's conservator, the trial court was required to determine if Ellen possessed the capacity to manage her own personal and financial affairs. A local attorney was appointed as the guardian *ad litem* for Ellen and after a trial by judge, the court concluded that, among other things, Ellen possessed sufficient capacity because, "(1) she 'retains the ability of long term memory,' (2) she is 'able to express her will and make decisions,' and (3) she is 'capable of . . . making decisions as to where she wants to live.'"⁷ Glendon appealed the trial court's ruling leaving the appeals court to make a determination of Ellen's competency.

The Court of Appeals of Tennessee responded to Glendon's appeal with an insightful analysis of the demographics of growing older in twenty-first century America. The court began its opinion with an acknowledgement that personal autonomy is "one of the bedrock principles of a free society."⁸ This personal autonomy is challenged, partially or totally, whenever a person: "[L]acks the ability to absorb information, to understand its implications, to correctly perceive the environment, or to understand the relationship between his or her desires and actions. A person is likewise incapacitated when he or she cannot control his or her actions or behavior."⁹

This generic definition of capacity is complemented with the admonition that adult persons are presumed to be sane and capable and the force of this presumption "does not wane as a person ages."¹⁰ Furthermore, the burden to rebut the presumption of capacity rests upon any challenger to prove by clear and convincing evidence that the person over whom the conservatorship is sought is a disabled person according to the state's statutory definition.¹¹ Difficulties occur because Tennessee's conservator statutes do not define incapacity and do not identify any particular illness or

7. *Id.* at 327. The client's ability to make decisions is the focus of inquiry. Capacity to make a decision involves (1) the ability to make a choice, (2) understand information presented that pertains to the decisions to be made, (3) appreciate the significance of this information with regard to one's current circumstances, and (4) rationally use that information to arrive at a decision. Barry Edelstein, *Challenges in the Assessment of Decision-Making Capacity*, 14 J. AGING STUD. 423, 425 (2000).

8. *Conservatorship of Groves*, 109 S.W.3d at 327.

9. *Id.* at 329 (citing Lawrence A. Frolik, *Statutory Definitions of Incapacity: The Need for a Medical Basis*, in *OLDER ADULTS' DECISION-MAKING AND THE LAW* 40 (Michael Smyer et al. eds., 1996)).

10. *Conservatorship of Groves*, 109 S.W.3d at 330. Capacity is not all or nothing; a person may have capacity to perform a particular task, but not another. Capacity is also situational and contextual. And capacity is not static but can fluctuate from moment to moment. *See id.* at 333-34.

11. *Id.* at 330.

conditions deemed to be disabling or incapacitating.¹² The lack of specificity prompts the court to warn that participants in conservatorship proceedings involving elderly persons should avoid the subtle influences of ageism and the double standards that accompany it. “The aging process, by itself, is not a disabling condition, and being elderly is not tantamount to being disabled. The popular notion that the aging process entails progressing decline in capacity or competence vastly oversimplifies a complex process that affects an extraordinarily large and diverse group of persons.”¹³

When seeking to dispel the myth that the aging process is always accompanied by poor physical and mental health, the court reports that:

[Seventy-five percent] of persons between 65 and 74 years of age and 65% of persons 75 years of age and over report that they are in good health. Ninety-five percent of persons over 65 years of age and 80% of persons over 80 years of age are not affected by significant cognitive impairment. . . . Thus, a vast majority of the elderly are not experiencing a progressing physical or mental decline.¹⁴

Nonetheless, as the court then acknowledges, persons over the age of 65 experience the greatest incidence of chronic conditions.

More than one-half (54.5%) of persons 65 years of age and older report having at least one disability, and more than one-third (37.7%) report having at least one severe disability. In contrast, approximately three out of every four (73.6%) persons 80 years of age and over report at least one disability, and more than one-half (57.6%) report one or more severe disabilities.¹⁵

Among the chronic conditions affecting elderly persons is dementia.

Surveys have established that approximately 10% of persons 65 years old or over have mild dementia and that 5% are severely demented. In comparison, nearly one-half of persons 85 years old or over have some form of dementia, and in 15 to 25% of these persons, the dementia is severe.¹⁶

12. *Id.* at 331. For a decision utilizing state statutory areas establishing competency see *In re Guardianship and Conservatorship of Sim*, 403 N.W.2d 721, 731 (Neb. 1987).

13. *Conservatorship of Groves*, 109 S.W. 3d at 331-32.

14. *Id.* at 332 (citing FRANK B. HOBBS & BONNIE L. DAMON, U.S. DEP'T. OF COMMERCE & U.S. DEP'T. OF HEALTH & HUMAN SERVS., 65+ IN THE UNITED STATES (1996), <http://www.census.gov/prod/1/pop/p23-190/p23-190.pdf>).

15. *Conservatorship of Groves*, 109 S.W.3d at 332.

16. *Id.* at 336-37. *But see* Mary Helen McNeal, *Slow Lawyering: Representing Seniors in Light of Cognitive Changes Accompanying Aging*, 117 PENN ST. L. REV. 1081,

The classification of dementia can depend on its cause.

Alzheimer's disease is the single most common cause of dementia, accounting for between 60 and 70% of the cases. Current estimates are that 10% of persons 65 years-old and older and over one-half of persons over 85 years old have Alzheimer's disease or some other form of dementia and that the prevalence of the disease doubles every five years beyond the age of 65.¹⁷

Many persons with Alzheimer's disease manifest non-cognitive symptoms.¹⁸

In addressing the petition for appointment of a conservator for Ellen, the Court of Appeals of Tennessee examined the testimony of six clinicians, Ellen's personal physician, and various laypersons.¹⁹ "Considered together,

1098 (2013) (reporting that a small but recent study of healthy persons age 50 to 79 found no significant differences in the logical consistency of older and younger individuals). Other scholars reach similar conclusions, suggesting that seniors are adaptive in choosing decision-making strategies and, therefore, remain able to make appropriate decisions. See Darrell A. Worthy et al., *With Age Comes Wisdom: Decision-Making in Younger and Older Adults*, 22 PSYCHOL. SCI. 1375, 1379 (2011).

17. *Conservatorship of Groves*, 109 S.W. 3d at 338. ("The course of the illness can be broken into stages. During the first stage, memory impairment is the most prominent symptom. During the second state, the symptoms that may emerge include impairments in language, performing everyday learned activities, recognizing the familiar, and perceiving the world as it is. In addition, impairments in executive functions with regard to personal hygiene, dressing, social etiquette, and self-control in the presence of strong feelings such as anger, frustration, or fear become prominent. During the third stage, the physical impairments associated with Alzheimer's disease become apparent. Many persons become incontinent or mute and lose the ability to walk unaided."). *Id.* at 339.

18. *Id.* at 339.

19. For a discussion of examining medical witnesses called to testify as to capacity see generally E. David Griffith, *Interrogating Medical Witnesses as to Mental Capacity*, 23 COLO. LAW. 2753 (1994); Adam F. Streisand & James Edward Spar, *A Lawyer's Guide to Diminished Capacity and Effective Use of Medical Experts in Contemporaneous and Retrospective Evaluations*, 33 ACTEC J. 180 (2007). State statutes may require that the evidence of a person's incapacity include the oral testimony or sworn written statement of one or more qualified professionals. See, e.g., *In re Bailey*, 771 S.W.2d 779, 780 (Ark. 1989). Some courts are skeptical of medical testimony. See, e.g., *Berry v. Safe Deposit & Trust Co. of Balt.*, 53 A. 720, 725 (Md. 1902) ("The tendency of the medical expert to involve in mystery the simplest unscientific facts, and to cloud them in bewildering technical nomenclature, and then to deduce the most irrelevant conclusions from them, is notorious, and is frequently exhibited in trials at nisi prius; and it is consequently apparent that these medical experts are no better qualified to draw correct

these clinicians' reports paint a picture of an elderly woman whose functional capacity is significantly compromised and whose decision-making capacity is significantly impaired and progressively deteriorating."²⁰ Using this testimony the court was then tasked with applying the law of the state in the context of the demographics recited. The court ruled that there was sufficient clear and convincing evidence of Ellen's functionality and decision-making capacities to conclude that she was significantly impaired and probably has been since she first fell at age eighty-three.²¹

Having concluded that a conservator should be appointed for Ellen, the court remanded the case for a determination of who should be appointed conservator of Ellen.²² Then the court addressed the validity of the *inter vivos* transfer of the land owned by Ellen and her now deceased husband to Glendon,²³ assessing whether there was undue influence exerted by Glendon over Ellen's husband when the husband gifted the certificate of deposit to Glendon, and whether Ellen's transfer of her personal property to Glendon during her lifetime was free from undue influence.²⁴ No mention was made as to the validity of the Last Will and Testament executed by Ellen during her lifetime naming Glendon as beneficiary.²⁵ Because the court has adjudicated Ellen as incompetent, she may not be able to revoke it due to lack of testamentary capacity.²⁶ But this is far from certain, and no Last Will and Testament is operative until the death of the testator. In addition, Ellen may have limited capacity sufficient for revocation of the old will.²⁷

B. Parallel Data

The demographics recited by the Court of Appeals of Tennessee's 2003 decision are confirmed in more recent statistics. Medical advances continue

inferences from everyday transactions and nonscientific premises that is the ordinary man of average common sense.").

20. *Conservatorship of Groves*, 109 S.W. 3d at 340.

21. *Id.* at 343. The court's decision complied with Tennessee statute, which requires the court to find that there is clear and convincing evidence that the subject person is a disabled person who is in need of a conservator's supervision, protection, and assistance. *Id.*

22. *Id.* at 343-44.

23. *Id.* at 324.

24. *Id.* at 344-55.

25. *Id.* at 324 (discussing the execution of the will).

26. For a discussion of capacity in the context of a Last Will and Testament see *infra* at Part III. A.

27. For a discussion of limited capacity see *infra* Part IV. C.

to provide Americans with the ability to live longer.²⁸ By 2030, it is estimated that almost one-fifth of the American population will be age 65 or older.²⁹ Indeed, the number of persons over the age of 90 tripled in the last 30 years and will quadruple in the next 40 years.³⁰ Other sources provide similar statistics:

Forty million Americans (13 percent of the population) are over the age of 65; by 2050, this number is projected to more than double to 88.5 million (20 percent). In addition, 5.7 million Americans (1.8 percent) are over the age of 85; by 2050, this number is projected to more than triple to 19 million (4.4 percent). Fifty percent of individuals over 85 will need assistance with daily functioning, and their home care can cost from \$55,000 to \$75,000 a year and up to \$180,000 annually for nursing home care.³¹

Among those aging are many persons with Alzheimer's disease.³² In 2011, more than five million Americans were estimated to have Alzheimer's disease.³³ The Alzheimer's Association estimates that 17% of all women reaching age 65—and 9% of all men—will succumb to Alzheimer's at some point during their lifetimes.³⁴ They also found that people age 65 and older with Alzheimer's survive an average of four to eight years after a diagnosis of the disease, but some will live as long as twenty years after diagnosis.³⁵

As persons age they will require an increasing amount of care. Payment will come from personal resources, health and long term care insurance, and increasingly, Medicare and Medicaid. The Genworth 2013 Cost of Care

28. Michael Kruger, Statute Note: *Only Terri Knows for Sure: A Comparison of Utah and Florida Advance Medical Directive Statutes*, 8 J.L. & FAM. STUD. 465 (2006). "One of the greatest advancements in the twentieth century was the exponential growth in medical knowledge and its accompanying technology, including life-saving and life-sustaining medical procedures."

29. See ADMIN. ON AGING, www.aoa.gov/aoaroot/aging_statistics/index.aspx (last visited Nov. 25, 2013).

30. See U.S. DEP'T. OF COMMERCE, BUREAU OF THE CENSUS, CENSUS BUREAU RELEASES COMPREHENSIVE ANALYSIS OF FAST-GROWING 90-AND-OLDER POPULATION, Nov. 17, 2011, http://www.census.gov/newsroom/releases/archives/aging_population/cb11-194.html.

31. Russell N. Adler, Peter J. Stauss & Regina Kiperman, *America's Long-Term Care Crisis*, 152 TRUSTS & ESTATES 44 (July 2013).

32. See generally 2011 ALZHEIMER'S ASS'N, ALZHEIMER'S DISEASE FACTS AND FIGURES (2011), www.alz.org/downloads/Facts_Figures_2011.pdf (last visited Nov. 25, 2013).

33. *Id.* at 12.

34. *Id.* at 14.

35. See *id.* at 23.

Survey reports that 70% of individuals over the age of 65 will need some form of long term care during their lifetimes.³⁶ Since 2004, long term health care costs have risen at the rate of 4.7 to 47%, depending on the type of care.³⁷ “Nationwide, the average annual cost of a nursing home is approximately \$90,000. In some major metropolitan areas, the cost can exceed \$200,000 a year.”³⁸ The growing number of elderly persons prompts some sociologists to suggest the development of a “sandwich generation” of persons who will simultaneously care for their own minor children and their aging parents.³⁹

A 1998 U.S. Department of Labor opinion poll found that 44% of Americans believe it likely that within the next ten years they would be responsible for the care of an elderly parent or relative. Other surveys have found that 22.4 million U.S. households are currently providing informal care to a relative or friend age fifty or older or have done so in the past twelve months.⁴⁰

II. ATTORNEY RESPONSIBILITY

When the Court of Appeals of Tennessee ruled on the petition to establish a conservatorship for Ellen,⁴¹ the court’s decision encompassed an array of attorney-client involvement. Groveton’s personal attorney had prepared a Last Will and Testament for Ellen to sign;⁴² this same attorney prepared two quitclaim deeds conveying three tracts of real property to Glendon and his wife and Ellen had signed these;⁴³ and when Glendon petitioned the court to be appointed Ellen’s conservator,⁴⁴ an attorney was appointed to serve as

36. *Compare Cost of Care Across the United States*, GENTWORTH (2013), <https://www.genworth.com/corporate/about-genworth/industry-expertise/cost-of-care.html>. “Fifty percent of individuals over 85 will need assistance with daily functioning, and their home care can cost from \$55,000 to \$75,000 a year and up to \$180,000 annually for nursing home care.” Adler, *supra* note 31.

37. *See 2010 Prudential Long Term Cost Study*, PRUDENTIAL FIN., INC., (2010), www.prudential.com/media/managed/LTCCostStudy.pdf.

38. Bernard A. Krooks & Michael Gilfix, *The High Cost of Aging*, 151 TRUSTS & ESTATES 43 (Jan. 2012).

39. *See* Paula L. Clark, “*What Shall We Do With Dad?*” *Guardianship Reform in Idaho and Its Implications for the Elderly*, 36 IDAHO L. REV. 269, 273 (2000).

40. *Id.*

41. *See In re Conservatorship of Groves*, 109 S.W.3d 317 (Tenn. Ct. App. 2003).

42. *Id.* at 324.

43. *Id.*

44. The Uniform Probate Code distinguishes between a conservator and a guardian, but often states apply either term to similar responsibilities. For sake of clarity, the

Ellen's guardian ad litem.⁴⁵ Increasingly, attorneys are involved in elder law. "Clients consulting with elder and estate planning attorneys for estate planning documents will likely receive a 'package' of five documents: a will, a trust (revocable or irrevocable), a health care power, a durable power of attorney, and a living will."⁴⁶ Obviously, the attorney must make a determination of whether the client possesses sufficient legal capacity to perform the specific legal transaction required, such as making a will, buying real estate, executing a trust, or making a gift.⁴⁷

The American Bar Association recommends that attorneys proceed cautiously when working with a client of suspected diminished capacity.⁴⁸ Section 1.14(b) of the American Bar Association's Model Rules of Professional Conduct, Seventh Edition, stipulates that:

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, include consulting with individuals or entities

Uniform Probate Code defines a guardian as someone responsible for an incapacitated person pursuant to appointment by a parent, spouse, or by the court. The term includes a limited, emergency, and temporary substitute guardian but not a guardian ad litem. *See* UPC § 5-102(3). Likewise, a conservator means a person who is appointed by a court to manage the estate of a protected person, to include a limited conservator. *See* UPC § 5-102(1). The Uniform Guardianship and Protective Proceedings Act (1997/1998), which has been substantially adopted into the Uniform Probate Code, provides similar definitions. Likewise, the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (2007) provides corresponding definitions.

45. *Conservatorship of Groves*, 109 S.W. 3d at 325. The guardian ad litem offered little assistance to Ellen at the trial court hearing, declining to make a recommendation as to a choice for a conservatorship. *Id.* at 326.

46. Robert Whitman, *Capacity for Lifetime and Estate Planning*, 117 PENN ST. L. REV. 1061 (2013).

47. *See, e.g., In re Guardianship of Fowler*, 371 N.E.2d 1345 (Ind. Ct. App. 1978) (holding that gift by donor was void because the donor was suffering from delusion and the intervivos gift was motivated by this delusion).

48. *See* A.B.A. & AM. PSYCHOL. ASS'N, ASSESSMENT OF OLDER ADULTS WITH DIMINISHED CAPACITY: A HANDBOOK FOR LAWYERS (2005), <http://www.apa.org/pi/aging/resources/guides/diminished-capacity.pdf>. The attorney may develop concerns about the client's capacity when communicating with the client. The ABA Model Rules of Professional Conduct, Seventh Edition, Section 1.4(b) specifies that "a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Such conversations may prompt concerns.

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.

Commentary states that reasonably protective action could include:

[C]onsulting 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. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decisionmaking autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.⁴⁹

These considerations complement more general efforts to protect older persons from abusive exploitation,⁵⁰ but they remain vague, especially in the context of confidentiality and the lack of objective standards.

A South Dakota Supreme Court decision is illustrative of what an attorney should avoid when providing protective action for a client reasonably believed to be incapacitated.⁵¹ Despite her misgivings about the client's mental capacity, a South Dakota attorney drafted trust documents for a client and the client signed them. Thereafter, legal disagreements arose between the client and the attorney and the client refused to sign some documents presented to him by the attorney. As a result, the attorney filed a petition under Section 1.14(b) of the Model Rules requesting that the attorney be

49. MODEL RULES OF PROF'L CONDUCT R. 1.14(b) cmt. (2011); *see Cruver v. Mitchell*, 656 S.E.2d 269, 271 (Ga. Ct. App. 2008) (holding that it was in the best interest of the ward to appoint the county conservator rather than her children to care for her property).

50. *See, e.g.*, NAT'L COMMITTEE FOR THE PREVENTION OF ELDER ABUSE, <http://www.preventelderabuse.org> (last visited Nov. 25, 2013); *see also* A.B.A. COMMISSION ON LAW & AGING, <http://www.abanet.org/aging> (last visited Nov. 25, 2013). For an illustration of the abusive conduct committed by a conservator appointed to care for his mother see MERYL GORDON, *MRS. ASTOR REGRETS: THE HIDDEN BETRAYALS OF A FAMILY BEYOND REPROACH* (2008) (detailing the abuse of Brook Astor, the 105 years-old society heiress and socialite). Subsequently her son was convicted of theft and abusive conduct. John Eligon, *Mrs. Astor's Son Guilty of Taking Tens of Millions*, N.Y. TIMES, Oct. 9, 2009, at A1.

51. *In re Discipline of Laprath*, 670 N.W.2d 41 (S.D. 2003).

appointed the client's guardian, alleging that the client was incompetent. The attorney sought appointment for a limited time during which the legal matters would be settled and the client's business operations streamlined. In addition, the attorney requested attorney fees in conjunction with these services, although the attorney had already accepted a \$3,100 retainer from the client.⁵²

Because Rule 1.14(b) says that a lawyer "may" seek appointment of a guardian under certain circumstances, the attorney argued that in seeking to be appointed as guardian for a client she suspected to be incompetent, she was following the option provided by Rule 1.14(b). The attorney argued that the Model Rule makes her decision regarding guardianship discretionary based on emergency circumstances as she determined and not subject to discipline. But the state supreme court disagreed, holding that seeking the appointment of a guardian for a client must be distinguished from seeking to be the guardian, and the court cautioned that a lawyer who files a guardianship petition under Rule 1.14(b) should not act as or seek to have himself or herself appointed guardian except in the most exigent of circumstances, that is, where immediate and irreparable harm will result from the slightest delay.⁵³ The court ruled that:

In this matter [the attorney] drafted documents for and had them signed by a client that she considered incompetent. She took positions adverse to her client's interests and contrary to his wishes. When he objected, she alleged that he was incompetent and filed a petition requesting that she be appointed his guardian. She believed that Rule 1.14 (Client under a Disability) mandated her to seek her own appointment, something the rule clearly does not require. Her client, who had not given his consent to her filing the petition, discharged her. When his court appointed attorney filed a motion to dismiss [the attorney's] petition, she resisted. [The attorney's] actions, at a minimum, violated Rules 1.2 (Scope

52. *Id.* at 50.

53. *Id.* at 58. Courts may appoint any competent person as guardian of an incapacitated person and the selection is of the person best able to meet the best interests of the incapacitated person, regarding the ward's health care, comfort and maintenance. *See, e.g.,* Cruver v. Mitchell, 656 S.E.2d 269 (Ga. Ct. App. 2008) (appointing a county conservator rather than children of ward as conservator); *In re* Estate of Bragdon, 875 A.2d 697 (Me. 2005) (reciting rules regarding selection of conservator and holding that in making a choice as to guardianship the court is to select the one best qualified among those willing to serve).

of Representation), 1.7 and 1.8 (Conflict of Interest), and 1.14 (Client Under a Disability).⁵⁴

Petitioning for the appointment of a guardian under Model Rule 1.14(b) is rare and extreme. More common are those cases when the attorney is confronted by a client that the attorney suspects is demonstrating diminished capacity or, in the context of undue influence, is functioning under the control of another person. Thus, the attorney must distinguish between a lack of capacity for execution of legal documents and when a client is being unduly influenced by a third party. In this regard the Model Rules offer little guidance on how to proceed and the attorney must look to judicial decisions and practice guidelines to function within ethical and legal parameters.

When assessing the client's legal capacity, the attorney may begin with the presumption that the client is presumed competent.⁵⁵ The Court of Appeals of Tennessee made this point in the case involving the petition for a conservatorship of Ellen. "Because of the importance of autonomy, it is well-settled that the law presumes that adult persons are sane, rather than insane, and capable, rather than incapable, to direct their personal affairs until satisfactory evidence to the contrary is presented. Mental or physical impairment should never be presumed."⁵⁶ Furthermore, the "force of these presumptions does not wane as a person ages."⁵⁷ A practicing attorney needs also to be aware that there are separate tests for capacity in the execution of a Last Will and Testament, making an *inter vivos* gift, execution of a trust, a durable power of attorney, a health care directive, or to revoke any of these mentioned.⁵⁸ If the attorney concludes that there is a substantial

54. *Id.* at 61.

55. *See, e.g.*, *Gilmore v. Brown*, 44 S.E.2d 16 (Va. 1947) (holding that mental capacity must be judged at the time the action is taken and holding in this case that mental capacity was sufficiently present to execute a valid Last Will and Testament); *see also In re Estate of Raney*, 799 P.2d 986 (Kan. 1990) (holding that specific circumstances may take away capacity). Three states make the presumption of capacity irrefutable through statute permitting pre-mortem probate. The three states are Arkansas, North Dakota, and Ohio. *See* Lisa M. Stern, *An Ounce of Prevention*, 147 TRUSTS & ESTATES 41, 42 (Aug. 2008).

56. *In re Conservatorship of Groves*, 109 S.W.3d 317, 329-330 (Tenn. Ct. App. 2003). And this presumption of capacity must be rebutted by clear and convincing evidence to the contrary. *See, e.g.*, *In re Guardianship of Reyes*, 731 P.2d 130 (Ariz. Ct. App. 1986) (holding that the significant loss of liberty accompanying appointment of a conservatorship requires clear and convincing evidence of incapacity of principal).

57. *In re Conservatorship of Groves*, 109 S.W.3d at 330.

58. *See* Whitman, *supra* note 46, at 1074 (listing the criteria for legal capacity in six different legal transactions); William R. Fatout, *Capacity of Incapacitated Persons: Marriage, Wills, Contracts, Deeds and Trusts*, 48 J. OF IND. ST. B. ASS'N, RES GESTAE 25

likelihood that the client is, or has become, incapacitated, then the attorney is confronted with the professional dilemma of how to proceed and the attorney faces difficult options when deciding how to proceed. Two practicing attorneys advised that “the lawyer should always act on the side of caution, with the informed consent model of advocacy guiding the lawyer with difficult decisions . . . the language of the [Model Rules] does not give the lawyer an open-ended license to substitute her judgment for the client’s. Rather, the lawyer should act only when absolutely necessary to do so.”⁵⁹

The first option available to an attorney is to establish an objective basis of the incapacity; the American Bar Association Model Rules only refer to incapacity as a result of “minority, mental impairment or for some other reason.”⁶⁰ And the American Bar Association offers only general advice to attorneys working with clients in their publication *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers*.⁶¹ The *Handbook* suggests that attorneys use “markers” to establish an objective guideline to indicate emotional, cognitive, and behavioral signs suggesting diminished incapacity.⁶² Such an approach seems similar to suggested timelines for management of an estate,⁶³ or to Comment 6 to Section 1.14 of the Model Rules. Comment 6 instructs an attorney to consider and balance the following when determining the extent of a client’s diminished capacity: (1) the client’s ability to articulate reasoning leading to a decision; (2) variability of state of mind and the ability to appreciate consequences of a

(2004) (discussing statutes and cases involving legal incapacity); Adam F. Streisand & James Edward Spar, *A Lawyer’s Guide to Diminished Capacity and Effective Use of Medical Experts in Contemporaneous and Retrospective Evaluations*, 33 ACTEC J. 180 (1997) (listing the legal criteria for several different types of decisional capacity); RESTATEMENT (THIRD) OF PROPERTY and RESTATEMENT (THIRD) OF TRUSTS (providing state criteria for capacity for wills and inter vivos instruments); for a suggested uniform test of capacity among all types of transactions see Whitman, *supra* note 46, at 1076-77.

59. Daniel L. Bray & Michael D. Ensley, *Dealing with the Mentally Incapacitated Client: The Ethical Issues Facing the Attorney*, 33 FAM. L. Q. 329, 348 (1999). The authors suggest that the attorney has several options, including: (1) talking to a client’s family member or physician; (2) initiating a guardianship proceeding; (3) taking other protective action such as an emergency guardianship; and (4) withdrawal.

60. MODEL RULES OF PROF’L CONDUCT R. 1.14(a) (2011); *see also* David A. Green, “I’m OK—You’re OK”: *Educating Lawyers to “Maintain a Normal Client-Lawyer Relationship” with a Client with a Mental Disability*, 28 J. LEGAL PROF. 65 (2003-04) (recommending that there be more guidance for attorneys).

61. A.B.A. & AM. PSYCHOL. ASS’N, *supra* note 48.

62. *Id.* at 13.

63. *See* G. Scott Budge, *Grief and Estate Settlement*, 151 TRUSTS & ESTATES 18 (Aug. 2012).

decision; (3) substantive fairness of a decision; and (4) consistency with the client's known long-term commitment and values.⁶⁴ These recommendations suggest keeping proper records and written descriptions of client behavior.

Overall, when working with the client the attorney should strive to make the client comfortable in the legal setting. The client's ability to demonstrate cognitive ability should be:

[F]ree of extraneous factors that could negatively affect cognitive function . . . [including] (1) environmental circumstances, such as poor lighting, distracting noises, and suboptimal acoustics; (2) client factors, such as acute emotional stress, medication side effects, and excessive sleepiness due to pre-evaluation insomnia; and (3) examiner factors, including an examination technique that provokes unnecessary anxiety or otherwise fails to evoke a reasonably representative performance.⁶⁵

One practicing attorney suggests utilizing the five areas of cognitive function used in the Mini-Mental State Examination.⁶⁶ This approach suggests demonstrating to witnesses at the time of execution of legal documents that the client was aware of (1) orientation, (2) registration, (3) attention and calculation, (4) recall and language.⁶⁷ The process would consist of asking the client certain questions as part of the procedure to "demonstrate that the client has general knowledge of the nature and extent of his assets by listing the general nature and extent of his assets and the approximate value of his estate. The client should also tell the witnesses the names of those family members who would be the natural objects of his bounty."⁶⁸ Likewise, another practicing attorney suggests seeking guidance

64. See Ivan Taback & Vanessa L. Maczko, *A Touchy Dilemma*, 151 TRUSTS & ESTATES 18 (Feb. 2012).

65. Adam F. Streisand & James E. Spar, *A Lawyer's Guide to Diminished Capacity and Effective use of Medical Experts in Contemporaneous and Retrospective Evaluations*, 33 ACTEC J. 180, 182-183 (2007) (explaining the use of the test and how to evaluate a client's performance).

66. See Lisa M. Stern, *An Ounce of Prevention*, 147 TRUSTS & ESTATES 41, 42 (Aug. 2008) (the examination is often used by health care professionals to assess mental status).

67. Proper capacity at the time of execution is conclusive. One court defines the issue: "The question in the case is not whether Bright's disease in its usual course may or may not induce mental incapacity, but, if that were a fact to be conceded, whether in this particular case at the time of making of the will that result had been reached so that the patient was then mentally so incapacitated as to be unable to make a valid deed or contract." *Horner v. Buckingham*, 64 A. 41, 43 (Md. 1906) (holding that testator possessed capacity at time of execution).

68. *Id.* at 43.

from a third-party diagnostician under appropriate circumstances.⁶⁹ The diagnostician serves to assess capacity and should not be confused with the attorney's option of initiating protective action if the attorney thinks that the client is at risk of substantial physical, financial or other harm.⁷⁰

If an attorney questions a client publically so as to establish a baseline of capacity or seeks to initiate protective action, the attorney jeopardizes maintaining a normal attorney-client relationship mandated by Model Rule §1.14(a).⁷¹ And if the attorney consults with diagnosticians or family members, that attorney risks violating Model Rule §1.6(a), which provides: "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by [confidentiality exceptions listed in (b)]."⁷² The attorney has little recourse in Model Rule §1.14(c), which impliedly authorizes attorneys taking protective measures under Section 1.14(b) to reveal information about the client, but only to the extent reasonably necessary to protect the client's

69. See Ivan Taback & Vanessa L. Maczko, *A Touchy Dilemma*, 151 TRUSTS & ESTATES 18, 20 (Feb. 2012) (suggesting that Comment 6 to Model Rule 1.14 of the American Bar Association permits this).

70. *Id.* at 21 (suggesting that Model Rule 1.14(b) and subsequent Comment 5 permit this intervention); *but see In re Guardianship of Henderson*, 838 A.2d 1277 (N.H. 2003) (holding that it was inappropriate to appoint a guardian for a client at the suggestion of the attorney).

71. MODEL RULES OF PROF'L CONDUCT R. 1.14(a) (2001): When a client's capacity to make adequately considered decision 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.

72. See *id.* at R. 1.6(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 client 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; (4) to secure legal advice about the lawyer's compliance with these Rules; (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the clients; or (6) to comply with other law or a court order.

interests. Comments to Section 1.14(c) indicate minimal guidance for an attorney seeking to establish an objective basis for a client's capacity without concomitantly seeking to take protective measures.⁷³ And the attorney may not withdraw from representing the client, once representation has commenced, unless the representation will result in a violation of the Rules, or there is no material adverse effect on the interests of the client, the representation has been rendered unreasonably difficult by the client, or other good cause for withdrawal exists.⁷⁴

To protect the responsible attorney, beneficiaries of a client's estate plan, and the attorney's client from the effects of any future decreasing capacity, one practicing attorney recommends creating "senior trusts."⁷⁵ Such trusts are designed to provide protection against the possibility of a senior becoming emotionally or psychologically vulnerable to the influence of a third party as a result of a disability.⁷⁶ Such trusts would also insulate a client's assets from the client's potential incompetency. Specifically, the attorney would assist the competent client to execute a trust of named assets that will become irrevocable and non-modifiable when the client either dies or becomes disabled.⁷⁷ Then, so as to avoid the imposition of a gift tax whenever the trust became irrevocable, the attorney would provide for the appointment of a special trustee to assume the role of a co-trustee whenever an event occurred that made the trust irrevocable. This special trustee would have to join with the client who created the trust in any decisions involving gifts to third persons.⁷⁸

73. See, e.g., ABA Comm. on Ethics & Prof'l Responsibility Informal Op. 1530 (1989) (the attorney may consult with client's physician concerning client's medical condition when client is unable to do so); Me. Ethics Op. 84 (1988) (attorney may inform client's son of father's mental incapacity so long as the son has no adverse interest in father's affairs); Neb. Ethics Op. 94 (1991) (attorney may disclose client's confidential communications to the extent necessary to protect client's best interests).

74. See MODEL RULES OF PROF'L CONDUCT R. 1.16 (2001).

75. Ceclia R. Clark, *A Senior Trust*, 147 TRUSTS & ESTATES 29 (June 2008).

76. *Id.* at 30.

77. *Id.*

78. *Id.* "To be certain that a taxable gift will be avoided after Dec. 31, 2009, the clients' trusts need to be structured as both (1) grantor trusts under subpart E; and (2) incomplete gifts under the principles expressed in Treas. Regs. Section 25.2511-2(b)." *Id.* at 31. The client is considered as retaining a power over the property held in trust because the client must act in tandem with the special trustee and thus, "the grantor's limited power of appointment, exercisable jointly with the special trustee, is considered to be held by the grantor for gift tax purposes." *Id.* at 32.

III. LAST WILL AND TESTAMENT

A. Testamentary Capacity

There are two specific issues that often arise in the context of clients with diminished capacity and testamentary dispositions: incapacity at the time of the execution of the Last Will and Testament and undue influence. Unless a state permits pre-mortem probate, thereby making all intentionalities irrefutable, the client's attorney must be attentive to these two issues when preparing the Will and then executing the document.⁷⁹

Regarding incapacity, a person is presumed to be sane, and thus able to perform actions that manage and control property and life decisions; the judicial test for testamentary capacity is minimal.⁸⁰ Most courts recognize a test for capacity existing at the time of the execution of a Last Will and Testament based on the Restatement (Third) of Property.⁸¹ The test consists of four factors. The testator must be able to understand in a general fashion: (1) the nature and extent of his or her property; (2) the natural objects of his or her bounty; (3) the nature of this transaction by which property is being disposed; and (4) be able to relate the above three elements to one another and forming an orderly disposition of the property.⁸² This formulation is based on an accumulation of opinions and experience from the days of the Roman Empire in the earliest centuries of the common age when testamentary wishes were entrusted to the Vestal Virgins, through the

79. See, e.g., N.D. CENT. CODE § 30.1-08.1-01 (2012): "Any person who executes a will . . . may institute a proceeding . . . for a judgement declaring the validity of the will as to the signature on the will, the required number of witnesses to the signature and their signatures, and the testamentary capacity and freedom from undue influence of the person executing the will."

80. See *In re Wurm*, 360 N.E.2d 12, 16-17 (Ind. Ct. App. 1977) (Staton, J., dissenting) (reciting a liberty interest of managing your own property and of caring for yourself as an inalienable right under the state constitution and should only be lost of the citizen cannot protect self or property).

81. See, e.g., *In re Estate of Scott*, 119 P.3d 511, 516 (Colo. App. 2004).

82. RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 8.1(b) (2003); see also *In re Estate of Scott*, 119 P.3d 511 (Colo. App. 2004) (incorporating the Restatement test by requiring the testator to: (1) Understand the nature of his act; (2) know the extent of his property; (3) understand the proposed testamentary disposition; (4) know the natural objects of his bounty; and (5) the will represents his wishes).

deliberations of the English common law beginning one-thousand years later.⁸³

Even though today's courts may rely upon ancient formulations of legal testamentary capacity, they nonetheless utilize contemporary mental health terms. Current state statutes define capacity in the context of decisional capacity, rather than functional capacity. For example, Wyoming defines an incompetent person as an "individual who, for reasons other than being a minor, is unable unassisted to properly manage and take care of himself or his property as a result of medical conditions of advanced age, physical disability, disease, the use of alcohol or controlled substances, mental illness, mental deficiency or intellectual disability."⁸⁴ The decisive element in each of the state statutes involves management and care of self and property; state statutes seem focused on person and property and at least one state mandates a time element to establish incapacity.⁸⁵ The effect is not to

83. *See, e.g.*, EUNICE L. ROSS & THOMAS J. REED, *WILL CONTESTS* § 2.4 (2d ed. 2013) (citing to Roman law precedent); for a discussion of the history of standards for capacity see Whitman, *supra* note 46, at 1063-67.

84. WYO. STAT. § 3-1-101(a)(ix) (2011).

85. *See, e.g.*, WIS. STAT. ANN 54.950 (8)(2008) (lacking the ability to manage property and business affairs); W. VA. CODE § 39B-1-102(5) (2012) (inability to manage property or business affairs); UTAH CODE § 75-1-201 (lacking sufficient understanding or capacity to make or communicate responsible decisions); TEX. ESTATES CODE § 1002.017(2) (an adult substantially unable to care for personal physical affairs or manage financial affairs); 20 PA. CONS. STAT. § 5501 (unable to manage finances or to meet essential requirements for physical health and safety); OKLA. STAT. § 1-111 (A)(12)(b) (lacks capacity to communicate responsible decisions regarding health, safety, or finances); OHIO REV. CODE § 5101.60(I) (any person unable to make reasonable decisions concerning self or resources); N.D. CENT. CODE § 30.1-26-01 (lacks capacity to make or communicate responsible decisions concerning residence, education, medical treatment, legal affairs, vocation, finance); N. M. STAT. § 45-5-101(F)(1978) (demonstrates over time partial or complete functional impairment over personal affairs or financial affairs or both); N.J. STAT. § 3B:1-2 (2013) (lacks sufficient capacity to govern self and manage affairs); N.H. REV. STAT. § 464-A:2 XI (2009) ("all evidence of inability must have occurred within 6 months prior to the filing of the petition and at least one incidence of such behavior must have occurred within 20 days of the filing of the petition for guardianship. Isolated instances of simple negligence or improvidence, lack of resources or any act, occurrence or statement of that act, occurrence or statement as the product of an informed judgement shall not constitute evidence of inability to provide for personal needs or to manage property."); NEV. REV. STATS. § 162A.070(1) (2009) (has an impairment in the ability to receive and evaluate information or to make or communicate decisions even with the use of technological assistance); COLO. REV. STAT. § 15-14-702(5) (2011) (inability to manage business or property because of an inability to receive

consider the functional impairment, but rather the decisive impairment that may or may not result from the functional disability.

When a Last Will and Testament is submitted for probate, the testator is dead and unable to be evaluated at that time in person. But when the court considers a petition for the appointment of a conservator or a guardian, the client is living and an assessment may be made at the time of the hearing. Thus, establishing capacity after the death of the client is a greater challenge even when the law states that capacity is presumed. Witnesses present at the time of execution are meant to provide some assessment of the client's capacity at the time of execution. However, as demonstrated in an early Maryland decision, witnesses and the circumstances they relate can prompt uncertainty.⁸⁶

In the decision of *Berry v. Safe Deposit & Trust Co. of Baltimore*, the Last Will and Testament was prepared by an attorney who served as a vice president of the Safe Deposit & Trust Company. The execution of the will was directed by the attorney and the attorney was one of three witnesses present at the execution.⁸⁷ Execution took place on February 10, 1899 and the testator died one month later at the age of 78.⁸⁸ Collateral relatives with standing contested the will, arguing that the decedent lacked the mental capacity to execute a valid will. To support their allegation they offered, "a number of independent and disconnected incidents in the life of the testator that had occurred both before and after the execution of the will."⁸⁹ During the course of the trial, the plaintiffs' attorney asked one of the witnesses whether the testator's "manner impressed the witness as being silly,"⁹⁰ seeking thereby to suggest that the testator lacked capacity. But the court dismissed any conjecture on the part of the witness, stating, "it is very easy to say of a dead man that at some period in his life he impressed a witness as being silly; and if the validity of wills is made dependent on such

and evaluate information or make or communicate decisions even with the use of technological assistance); ARIZ. REV. STAT. § 14-5101(1) (2012) (lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person).

86. *Berry v. Safe Deposit & Trust Co. of Balt.*, 53 A. 720 (Md. 1902).

87. *Id.* at 722.

88. *Id.* at 721.

89. *Id.* at 723. Plaintiffs provided information that the testator had been addicted to excessive smoking thirty years prior to execution of the Last Will and Testament, and that he had borrowed a large sum of money, and his walk was "less elastic, and degenerated into a shuffling gait." *Id.* at 724.

90. *Id.* at 724.

impressions, it would not be difficult to vacate any will. . . .”⁹¹ Furthermore, the court refused to allow testimony from medical experts concerning testator’s “silliness” since “those inferences were founded on data which furnished no legal basis for such inferences.”⁹² The court then stated the rule that “if the facts did not warrant the introduction of expert testimony because of the reasons heretofore assigned, then the purpose for which such testimony was offered could not make it admissible.”⁹³ While not true in every case involving testamentary capacity, the court in this case was quite adamant in restricting the testimony of witnesses to facts rather than inferences. The court wrote: “The rules of evidence cannot be applied too rigidly . . . and the legal standard of testamentary capacity must be kept clearly and sharply distinct from the speculative vagaries of dogmatic experts. The common sense of judges, and of jurors, too, if a case is submitted to them, must interpose to arrest such groundless assaults on wills.”⁹⁴

When attorneys are suspicious that a client may not possess proper testamentary capacity at the time of the execution of the will, the attorney must be mindful of the practical suggestions seeking to avoid later contest.⁹⁵ When Ellen executed the Last Will and Testament that benefitted her brother-in law a number of issues arose. The first concern is that the will was prepared by an attorney friend of the beneficiary, assumedly at the behest of the beneficiary. Second, that Ellen was isolated from friends and family in the home of the beneficiary, and because of conduct of the beneficiary. Third, that Ellen’s functional condition had already deteriorated to the point that she could not live on her own any more. And lastly, that Ellen’s will ignore her living relatives, natural object of her bounty. And obviously Ellen was susceptible to the influence of her brother-in-law.

91. *Id.*

92. *Berry v. Safe Deposit & Trust Co. of Balt.*, 53 A. 720, 726 (Md. 1902).

93. *Id.* Other courts have been supportive of this conclusion. *See, e.g. Horner v. Buckingham*, 64 A. 41, 43 (Md. 1906): “It must be shown by facts. If a person has always shown through many years a high degree of mental soundness, in fact through his entire life, a jury ought not to be permitted to pronounce him insane, merely because a medical expert can be found who will testify that he is affected with a disease that may eventually produce insanity, without other facts being shown that tend to prove that his speech or conduct is such as reasonably warrant the conclusion.”

94. *Id.* at 728.

95. *See supra* Part II.

B. Undue Influence

The vagaries of age may prompt an adult's susceptibility to incapacity and undue influence; similarly, functional incapacity may prompt decisional incapacity. Statutes often refer to a testator's "weakness of mind" when defining undue influence,⁹⁶ incorporating symptoms such as depression, dementia, impaired judgment, loneliness and grief. A Colorado decision illustrates a pattern that appears in many cases involving undue influence.⁹⁷ In that case, it was alleged that the testator had:

[F]or some years indulged in the excessive use of drugs and alcoholic liquors to the extent that his mind and body was diseased, so that he had lapses of memory, fits of unconsciousness and insane delusions, and for such reasons he was unable to clearly discern and comprehend the objects of his bounty on the date of the making of the will.⁹⁸

Not all of the facts in other cases are so scintillating. Many testators simply grow old, suffering from "hardening of the arteries of the brain, arteriosclerotic heart, high blood pressure and faulty kidney elimination."⁹⁹ Many testators simply become disappointed over the life choices of their logical objects of bounty.¹⁰⁰ Or they become lonely because of the death of those closest to them, becoming dependent on others for care and emotional support.¹⁰¹

Susceptibility of the testator begins the inquiry into undue influence. Accompanying this is always suspicious circumstances. For example, the testator's pattern of estate distribution is markedly divergent from the past, often benefitting persons not mentioned in previous wills or codicils. This was a pattern evidenced by Ellen Groves, the subject of the Tennessee

96. See, e.g., CAL. CIV. CODE § 1575: "Undue influence consists: 1. In the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him; 2. In taking an unfair advantage of another's weakness of mind; or 3. In taking a grossly oppressive and unfair advantage of another's necessities or distress."

97. *Davis v. Davis*, 170 P. 208 (Colo. 1917).

98. *Id.* at 209.

99. *Ofstad v. Sarconi*, 252 P.2d 94, 95 (Colo. 1952).

100. See, e.g., *Haynes v. First Nat'l State Bank of New Jersey*, 432 A.2d 890 (N.J. 1981) (grandmother reduces the bequest to two of her grandchildren from \$4 million to \$20,000 because of life choices they made).

101. See, e.g., *Celia R. Clark, A Senior Trust*, 147 TRUSTS & ESTATES 29 (June 2008) (describing a 73 year-old man who had suffered the loss of his wife and thereafter befriended a neighbor, to whom he gave almost all of his assets).

decision previously discussed.¹⁰² After becoming seriously ill and then moving into the home of her brother-in-law and his wife, Ellen executed “a new will that left the bulk of her estate” to them.¹⁰³ Concomitantly, the beneficiaries of her new will made Ellen’s family and friends unwelcome in their home and isolated Ellen from their care and support.¹⁰⁴ Ellen was forced to rely more heavily on the people benefitting under her will and her family believed she had been “brainwashed” by them.¹⁰⁵

The facts surrounding the execution of Ellen’s Last Will and Testament are not uncommon. In one Colorado decision, the state’s highest court was asked to decide if there was sufficient evidence of undue influence to permit the case to go to the jury to establish validity of the provisions.¹⁰⁶ The facts recounted in the decision illustrate how an attorney may participate in conduct that contributes to an eventual contest of the will based on undue influence. The testatrix had executed a will that bequeathed her property to her grandchildren; three years later she became ill and “she was continually in a state of mental confusion, disoriented, incoherent; was very deaf; could not hear without the aid of a hearing device; but apparently could understand lip reading.”¹⁰⁷ These conditions made her susceptible to influence from others. It was then that her son brought his personal attorney to see his mother and he directed his attorney to prepare a will for his mother that revised her estate plan, replacing her granddaughter with her four children.¹⁰⁸ The mother-testatrix executed the will while under an oxygen tent and while she was under the management and influence of her son, one of the beneficiaries of the new will. She died three months later and the will was offered for probate.

The existence of this second will was not known to other members of the family until the night of the testatrix’s burial. When the will was presented for probate by the testatrix’s son, it was challenged by a daughter of the testatrix as being the product of the son’s undue influence over his mother. The daughter brought the contest on behalf of her child, who was the sole beneficiary under the previous will of the testatrix. The facts alleged by the daughter are consistent with other undue influence decisions:

[T]he will was prepared by the proponent’s attorney [the son] according to instructions given to him by the proponent; that the

102. *See supra* Part I. A.

103. *In re* Conservatorship of Groves, 109 S.W.3d 317, 324 (Tenn. Ct. App. 2003).

104. *Id.*

105. *Id.*

106. *Ofstad v. Sarconi*, 252 P.2d 94 (Colo. 1952).

107. *Id.* at 96.

108. *Id.*

attorney never conferred with the testatrix prior to the drawing of the will; that there was a confidential relationship between testatrix and proponent; that the weakened mental and physical condition of the testatrix made her susceptible to the influence of proponent; that proponent at the time of the execution of the will directed testatrix to do whatever proponent's attorney told her to do; that the will as prepared was directly opposite to decedent's previous testamentary disposition in favor of her granddaughter; that the proposed will disclosed that its terms were favorable to proponent, as against the former will.¹⁰⁹

The court held that the facts in the case were sufficient for the issue of undue influence to be submitted to the jury, the opinion admitting that, "the very nature of undue influence is such that it is rarely susceptible of direct or positive proof, and must therefore rest upon circumstantial evidence."¹¹⁰ But, the court continues,

[T]here are many circumstances from which [undue influence] may be inferred, namely, confidential relationship; preparation of the will under the direction of one enjoying the confidence of the testatrix; where the proponent will enjoy benefits from the proposed will; when, at the time of execution of the will, the testatrix was fatally ill, mentally and physically; and then the fact that the execution of the will was by the proponent kept secret from other members of the family.¹¹¹

The factual elements illustrated by the Colorado decision are most important in advising attorneys. Each of these factual elements—changed testamentary plan, susceptibility, benefitting from a confidential relationship, secrecy, and withholding material facts from persons with standing—offer instructive advice to attorneys working with clients with diminished capacity. It is not sufficient to be aware of the legal issues involved in undue influence;¹¹² the practicing attorney must avoid the

109. *Id.*

110. *Id.*

111. *Id.* at 97; *see also* *Davis v. Davis*, 170 P. 208, 212 (Colo. 1917): "Evidence to show undue influence must be largely in effect circumstantial. It is an intangible thing which only in the rarest instances is susceptible of what may be termed direct or positive proof. The difficulty is also enhanced by the fact universally recognized that he who seeks to use undue influence does so in privacy." *Id.*

112. For an excellent summary of the legal analysis involved in issues of undue influence, *see* *Haynes v. First Nat'l State Bank of New Jersey*, 432 A.2d 890 (N.J. 1981) (permitting the issue of undue influence to be submitted to a jury and detailing the legal parameters of what the jury must consider).

circumstances that almost always precipitate contest of the Will. As one court noted, “[t]he only positive and affirmative proof required is of facts and circumstances from which the undue influence may be reasonably inferred.”¹¹³ It is the responsibility of the attorney to ensure that the facts and circumstances precipitating allegations of undue influence do not arise.¹¹⁴

IV. CONSERVATORS, GUARDIANS AND DURABLE POWERS OF ATTORNEY

A. Statutory Distinctions

The American Bar Association’s Annotated Model Rules of Professional Conduct permit an attorney, when he or she reasonably believes that the client has diminished capacity, is at risk of substantial physical or financial harm, and cannot protect his or her own interests to take reasonable protective action, including seeking the appointment of a guardian ad litem, conservator, or guardian.¹¹⁵ The fact that the Model Rules uses three terms, guardian ad litem, conservator, and guardian, indicates that states may use words interchangeably or there is inconsistent meaning among the states. The Uniform Probate Code distinguishes between a conservator and a guardian, but often states fail to follow the responsibilities to each in the Uniform Probate Code.¹¹⁶

In an effort to provide a standard for responsibilities, the Uniform Probate Code defines a guardian as someone responsible for an incapacitated person pursuant to appointment by a parent, spouse, or by the court.¹¹⁷ The term includes a limited, emergency, and temporary substitute guardian but not a guardian ad litem.¹¹⁸ At least as far as the Uniform Probate Code is concerned, a guardian “shall make decisions regarding the ward’s support, care, education, health and welfare.”¹¹⁹ It is not the responsibility of the guardian to manage the assets of the ward, only to “expend money of the

113. *Davis v. Davis*, 170 P. 208, 213 (Colo. 1917); *see also In re Guardianship of Macak*, 871 A.2d 767 (N.J. Super. 2005) (holding that a person of limited capacity may be subject to undue influence).

114. *But see* DAVID MARGOLICK, *UNDUE INFLUENCE: THE EPIC BATTLE FOR THE JOHNSON& JOHNSON FORTUNE* (1993) (describing the failed efforts of Nina Zagat, an attorney with the New York law firm of Shearman & Sterling, to avoid any will contest over the estate of Seward Johnson).

115. A.B.A. MODEL RULES OF PROF’L CONDUCT R. 1.14(b) (2011).

116. UNIF. PROBATE CODE § 5-102.

117. *Id.* at § 5-102(3).

118. *See id.*

119. *Id.* at § 5-314.

ward that has been received by the guardian for the ward's current needs for support, care, education, health, and welfare."¹²⁰ The conservator provides the asset management.

Under the terms of the Code a conservator means a person who is appointed by a court to manage the estate of a protected person, to include a limited conservator.¹²¹ The Uniform Guardianship and Protective Proceedings Act (1997/1998), which has been substantially adopted into the Uniform Probate Code, provides similar definitions, as does the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (2007). These uniform codes designate a conservator as the person responsible for management of the property of the ward, not the person of the ward himself or herself. Specifically the conservator must "determine how the estate of the protected person which is subject to the laws of this state must be managed, expended, or distributed to or for the use of the protected person, individuals who are in fact dependent upon the protected person, or other claimants."¹²² A court has the power, which may be exercised directly or through a conservator "over the estate and business affairs of the protected person which the person could exercise if the person were an adult, present, and not under conservatorship or other protective order."¹²³

120. *Id.* at § 5-314(b)(3).

121. *See id.* at § 5-102(1).

122. *Id.* at § 5-402(2). Specifically the conservator may do the following: (1) make gifts, except as otherwise provided in Section 5-427(b); (2) convey, release, or disclaim contingent and expectant interest in property, including marital property rights and any right of survivorship incident to joint tenancy or tenancy by the entireties; (3) exercise or release powers of appointment; (4) create revocable or irrevocable trust of property of the estate, whether or not the trust extends beyond the duration of the conservatorship, or revoke or amend a trust revocable by the protected person; (5) exercise rights to elect options and change beneficiaries under insurance policies and annuities or surrender the policies and annuities for their cash value; (6) exercise any rights to an elective share in the estate of the protected person's deceased spouse and to renounce or disclaim any interest by testate or intestate succession or by transfer inter vivos; and (7) make, amend, or revoke the protected person's will. *Id.* at § 5-411(a); *see also Id.* at § 5-425(b), listing twenty-five specific powers of a conservator in administration; *see also In re Medworth*, 562 N.W.2d 522 (Minn. App. 1997) (holding that a conservator has the least amount of power to provide for the best interest of the principal).

123. UNIF. PROBATE CODE § 5-410(2). Courts must be guided by what the protected person would have done, considering: (1) the financial needs of the protected person and the needs of individuals who are in fact dependent on the protected person for support and the interest of creditors; (2) possible reduction of income, estate, inheritance, or other tax liabilities; (3) eligibility for government assistance; (4) the protected person's previous pattern of giving or level of support; (5) the existing estate plan; (6) the

And there is another option available to transfer management responsibilities over persons or property. Some adults, mindful of the need to plan for later incapacity, execute durable powers of attorney, which eliminate the need of court-appointed guardians and yet legally delegate management responsibility to another person.¹²⁴ The principal must be competent to execute a valid power of attorney,¹²⁵ but if valid the agent appointed under a durable power may do the following: (1) create, amend, revoke, or terminate an *inter vivos* trust; (2) make a gift; (3) create or change rights of survivorship; (4) create or change a beneficiary designation; (5) delegate authority granted under the power of attorney; (6) waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan; (7) exercise fiduciary powers that the principal has authority to delegate; or (8) disclaim property, including a power of appointment.¹²⁶ Of course because the principal is competent when the power is executed, the principal may add or delete powers granted to the attorney,¹²⁷ but, unless otherwise stated in the instrument, state statutes will define the scope of the powers.¹²⁸

Powers under a durable power of attorney, guardianship or conservatorship cease upon the death of the protected person.¹²⁹ For

protected person's life expectancy and the probability that the conservatorship will terminate before the protected person's death; and (7) any other factors the court considers relevant. *Id.* at § 5-411(c).

124. See UNIF. DURABLE POWER OF ATTORNEY ACT (2006) (adopted into the Uniform Probate Code as Article 5B). The Act provides for the appointment of an agent to manage some or all of the principal's property upon execution of the power of attorney or at some future event or contingency, such as the principal's incapacity. UNIF. PROBATE CODE § 5B-108(b).

125. See *Thames v. Daniels*, 544 S.E.2d 854 (S.C. Ct. App. 2001) (holding that the principal possessed the proper capacity to execute a valid power of attorney); *Rawlings v. John Hancock Mut. Life Ins. Co.*, 78 S.W.3d 291 (Tenn. Ct. App. 2001) (court applied the Second Restatement test of whether the grantor knew what he or she was doing and could act in a reasonable manner).

126. UNIF. PROBATE CODE § 5B-210(a).

127. See Ruth A. Phelps, *Driving Miss Daisy*, 150 TRUSTS & ESTATES 18 (July 2011) (suggesting specific powers to be included in a power of attorney).

128. See generally *Smith v. Wells Fargo Bank*, 991 A.2d 20 (D.C. 2010) (interpreting limits placed on a valid power of attorney); *Franzen v. Northwest Bank of Colorado*, 955 P.2d 1018 (Colo. 1998) (en banc) (court interpreted new state statute limiting attorney's power to revoke a trust).

129. See *In re Guardianship of Hollenga*, 852 N.E.2d 933 (Ind. Ct. App. 2006) (applying state statute specifying when a power is cancelled).

example, the Uniform Probate Code provides that upon death of the principal:

[T]he conservator shall deliver to the court for safekeeping any will of the protected person which may have come into the conservator's possession, inform the personal representative or beneficiary named in the will of the delivery, and retain the estate for delivery to the personal representative of the decedent or to another person entitled to it.¹³⁰

Therefore, upon the death of the principal, the court, a personal representative or beneficiary begins the process of estate administration or probate.¹³¹

Attorneys are almost always involved in the drafting and execution of these documents. In addition, they represent clients in petitions seeking to establish a conservatorship or guardianship. They also represent clients in contests to resist appointment. As we will explain, because the hearing to discuss the sufficiency of the clear and convincing evidence for appointment is civil in nature, persons alleged to be incapacitated are not entitled to an attorney. Nonetheless, if the court appoints a guardian ad litem to represent the person then representation by counsel will follow as part of the best interest of that client. Attorneys must be attentive to functional versus decisional incapacity, limited and unlimited guardianship, the selection of persons tasked by the court to provide evidence, the selection of an appropriate guardian or conservator, review and evaluation of the conservator during the conservatorship, and the smooth transition from the conservatorship to probate upon the death of the ward. Each of these elements will be illustrated in the material that follows.

B. Evidentiary Basis for Appointment

Prior to a court appointing a guardian or a conservator, and prior to the commencement of a durable power of attorney, there must be a "management competency test."¹³² This test involves a person's "ability to manage, or improvident disposition, or dissipation of property, or

130. UNIF. PROBATE CODE § 5-428(a).

131. For an explanation of estate administration and probate see UNIF. PROB. CODE Art. II.

132. *In re Conservatorship of Hester*, 989 So.2d 986, 989 (Miss. Ct. App. 2008) (evidence supported statutory test for the appointment of a conservatorship); *see also In re Estate of Wood*, 533 A.2d 772 (Pa. Super. Ct. 1987) (holding that adult of limited capacity was still competent when she could state where her money was located and could choose a financial representative).

susceptibility to influence or deception by others, or other similar factors.”¹³³ One state statute provides that: “Isolated instances of simple negligence or improvidence, lack of resources, or any act, occurrence, or statement, if that act, occurrence, or statement is the product of an informed judgment, shall not constitute evidence of inability to provide for personal needs or to manage property.”¹³⁴ The test is to determine if someone should be appointed to manage the person, his or her property, and to what extent, total or limited. Such an appointment involves constitutional issues of liberty and due process. Legislatures and courts must be sensitive to providing clear and convincing evidence.

The facts in many of the cases prompting court intervention are eerily similar: “Emma was a seventy-six-year-old woman . . . [and] there is evidence that Emma was capable of performing basic tasks of self-preservation, the evidence support the conclusion that Emma was incapable of managing her own affairs by reason of advanced age and mental weakness.”¹³⁵ She had relied on her live-in son to manage her affairs, but he:

[U]tilized her front yard as a used car lot for his business [Glen’s Auto Sales] . . . [her] home fell into a state of exceptional disrepair . . . the area surrounding the house was littered with garbage and cluttered with old items that most people would consider junk.¹³⁶

When her other son attempted to intervene in her affairs she told him that “he was not welcome in her home” and this prompted him to file the conservatorship petition concerning his mother.¹³⁷ The petition went to trial and the court considered the testimony of the woman’s primary physician, who stated that, “she is somewhat uncertain at times of her business affairs.”¹³⁸ A guardian ad litem was appointed for the woman and he reported to the court that she is not now nor has she probably ever been capable of managing her own financial affairs.¹³⁹ At the conclusion of the testimony the court appointed the son as the conservator of his mother and the woman appealed this decision, in part because of the testimony of the

133. *Conservatorship of Hester*, 989 So.2d at 989 (citing to MISS. CODE § 93-13-251 (2004)).

134. IDAHO CODE § 15-5-101(a)(3), cited in Paul L. Clark, “*What Will We Do With Dad?*” *Guardianship Reform in Idaho and Its Implications for the Elderly*, 36 IDAHO L. REV. 269, 280 (2000).

135. *Conservatorship of Hester*, 989 So.2d at 989-90.

136. *Id.* at 988.

137. *Id.*

138. *Id.*

139. *Id.*

physicians. But the appellate court affirmed. When it did so the court relied upon the state's conservatorship statute. There was a requirement in the statute that two physicians make a written certificate regarding the condition of the ward and file this with the clerk of the court,¹⁴⁰ but the physicians' certificates are not conclusive of incapacity. "The point to be stressed is that it is the *chancellor* who determines whether the ward is rendered incapable of managing his or her own estate due to advanced age, physical incapacity, or mental weakness."¹⁴¹ The medical reports submitted were part of overall sufficient evidence to support the chancellor's appointment of a conservatorship. The decision illustrates the necessity of clear and convincing evidence and that the evidence must be taken as a whole, there is no single objective test establishing sufficient diminished capacity and subsequent appointment of a conservator or guardian.

State statutes often mandate a professional evaluation.¹⁴² For example, under Article V, part 3, of the Uniform Guardianship and Protective Proceedings Act, prior to judicial appointment of a guardian:

[T]he court may order a professional evaluation of the respondent and shall order the evaluation if the respondent so demands.¹⁴³ If the court orders the evaluation, the respondent must be examined by a physician, psychologist, or other individual appointed by the court who is qualified to evaluate the respondent's alleged impairment. The examiner shall promptly file a written report with the court.¹⁴⁴

Evaluations are part of the clear and convincing evidence necessary prior to appointment of the guardian and, although they pose a significant intrusion into a person's personal privacy and liberty, courts have permitted them in civil proceedings. The Fourth Amendment would bar similar requirements in the case of criminal allegations not supported by probable cause.

Before a conservator may be appointed, the court must determine that there is sufficient clear and convincing evidence that a person "lacks ability

140. *In re Conservatorship of Hester*, 989 So.2d 986, 990 (Miss. Ct. App. 2008), citing MISS. CODE § 93-13-255.

141. *Conservatorship of Hester*, 989 So.2d at 990.

142. *See, e.g.*, ARK. CODE § 28-65-212.

143. *See, e.g., In re Bailey*, 771 S.W.2d 779 (Ark. 1989) (holding that state statute defining evaluation means a professional assessment of the abilities of a person and the impact of any impairments on the individual's capability to meet the essential requirements for his health and safety or to manage his estate).

144. The Act has been substantially incorporated into the Uniform Probate Code and the pertinent portion appears at UNIF. PROB. CODE § 5-306.

to manage his financial resources.”¹⁴⁵ Likewise, if a guardian is to be appointed for a person, and this is separate from a person to manage the property of a person, then there also must be clear and convincing evidence of mental incompetence.¹⁴⁶ Because a person’s fundamental right to liberty is threatened, clear and convincing evidence is required. Courts are sensitive to establishing that each case must be decided upon its particular facts and that a person may possess sane and normal action even though it is not the caliber of what it once was.¹⁴⁷ All the decisions seek to balance accommodating unique behavior against destructive behavior. One older court decision described this balance:

Men of sound mind are frequently spendthrifts. Such have the full right to use, enjoy, waste, and destroy their property, and it is nobody’s business or right to interfere. Some men waste their all in gambling and dissipation, but cannot be pronounced insane in

145. *See, e.g., In re Conservatorship of Leonard*, 563 N.W.2d 193 (Iowa 1997) (holding there was insufficient evidence to support the imposition of an involuntary conservatorship); *Strauss v. Strauss*, 755 S.W.2d 742 (Mont. Ct. App. 1988) (quoting state statute and holding that man suffering from psychiatric disorder was clearly and convincingly sufficiently disabled to support appointment of a conservator); *In re Guardianship of Reyes*, 731 P.2d 130 (Ariz. Ct. App. 1986) (holding there must be clear and convincing evidence that adult cannot make responsible decisions concerning his personal safety or personal needs).

146. *See, e.g., Cruver v. Mitchell*, 656 S.E.2d 269 (Ga. Ct. App. 2008) (holding that the state conservator statute allows appointment of a conservator only if a court finds an adult lacks sufficient capacity to make or communicate significant responsible decisions concerning the management of his or her property); *In re Blochowicz Guardianship*, 280 N.W. 438 (Neb. 1938) (interpreting state statute and holding that a person is incompetent whenever a person is incapable of understanding and acting with discretion in the ordinary affairs of life); *In re Wurm*, 360 N.E.2d 12, 15 (Ind. Ct. App. 1977) (holding that test of a person’s incompetency should involve a person’s total physiology, both physical and mental); and some states provide specific areas to use in positing incapacity, *see, e.g., In re Guardianship and Conservatorship of Sim*, 403 N.W.2d 721 (Neb. 1987) (referencing NEB. REV. STAT. § 30-2619.01).

147. *See, e.g., In re Guardianship of Hyde*, 176 N.W.2d 234 (Neb. 1970) (holding that 73 year-old man who had suffered a paralytic stroke was capable of sane and normal action and that petitioners had not met the burden of proof for the appointment of a guardian); *see also Schaefer v. Schaefer*, 52 P.3d 1125 (Or. Ct. App. 2002) (holding that there was insufficient clear and convincing evidence to overcome the presumption of competency); *Nelson v. Stueve*, 821 P.2d 439 (Or. App. 1991) (holding that being an alcoholic is not sufficient clear and convincing evidence of incapacity); *Lewis v. Lewis*, 20 S.E.2d 107 (S.C. 1942) (holding that clear and unequivocal allegations are necessary to establish incapacity).

the proper sense of the word. That unsoundness of mind, that lunacy which we are inquiring after in this issue, is such an unsoundness of mind as is evidenced by a total absence of sufficient capacity (mentally) to attend to the ordinary business of life. When one is entirely incapable of caring for, controlling, and managing his own person and property, he is in the eye of the law a lunatic, requiring a guardian.¹⁴⁸

C. Limited Guardianships

Commentators on the effects of guardianship often lament the “civil death” of a ward occasioned by the appointment of a guardian of the person or of a conservator of the property.¹⁴⁹ One prolific commentator on disability law laments that, “[a]t best, guardianship will provide personal care and property management that an individual with a disability alone cannot handle. At worst, it will deprive that individual of decision-making authority that he or she *does* have the capacity to handle, and will, at the same time, create the opportunity for personal or financial abuse.”¹⁵⁰ To address this all or nothing aspect of guardianship some commentators have advocated for a form of limited guardianship, which permits offering an individual limited assistance.¹⁵¹ This substitute for total control by a guardian has been characterized as supported decision-making.¹⁵²

148. *Robertson v. Lyon*, 24 S.C. 266, 267 (S.C. 1886) (holding that there was sufficient evidence to confirm finding of jury that person was incapacitated).

149. *See, e.g.*, Michael L. Perlin, “*Striking for the Guardians and Protectors of the Mind*”: *The Convention on the Rights of Persons with Mental Disabilities and the Future of Guardianship Law*, 117 PENN. STATE L. REV. 1159, 1166 (2013) (discussing the impact of the Convention on the Rights of Persons with Disabilities).

150. *Id.* at 1171; for a discussion of the all or nothing approach to powers of a guardian; *see also* Rose Mary Bailly & Charis B. Nick-Torok, *Should We Be Talking?—Beginning a Dialogue on Guardianship for the Developmentally Disabled in New York*, 75 ALB. L. REV. 807 (2012); Debra H. Kroll, *To Care of Not to Care: The Ultimate Decision for Adult Caregivers in a Rapidly Aging Society*, 21 TEMP. POL. & CIV. RTS. L. REV. 403 (2012).

151. *See, e.g.*, Leslie Salzman, *Guardianship for Persons with Mental Illness—A legal and Appropriate Alternative?*, 4 ST. LOUIS U. J. HEALTH L. & POL’Y 279 (2011); Jennifer L. Wright, *Guardianship for Your Own Good: Improving the Well-Being of Respondents and Wards in the USA*, 33 INT’L J. L. & PSYCHIATRY 350 (2010).

152. *See* Nina A. Kohnm, Jeremy A. Blumenthal & Amy T. Campbell, *Supported Decision-Making: A Viable Alternative to Guardianship*, 117 PENN ST. L. REV. 1112, 1120 (2013).

“Supported decision-making occurs when an individual with cognitive challenges is the ultimate decision-maker but is provided support from one or more persons who explain issues to the individual and, where necessary, interpret the individual’s words and behavior to determine his or her preferences.”¹⁵³

Increasingly state legislatures have accommodated the degrees of incapacity an individual may experience, and “numerous recognize in their guardianship statutes that mental capacity is not always an ‘all or nothing phenomenon.’”¹⁵⁴ For example, Idaho’s code stipulates that a judge is to encourage the development of maximum self-reliance and independence in the incapacitated person and only issue orders necessitated by the incapacitated person’s actual mental and adaptive limitations.¹⁵⁵ Provisions similar to those in Idaho may be found in additional states and uniform legislation, such as the Uniform Guardianship and Protective Proceedings Act (1997) and the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (2007), the latter of which having been adopted into the Uniform Probate Code as Article 5A.¹⁵⁶ The prior Act, the 1997 legislation, which has been substantially adopted into the Uniform Probate Code, creates a presumption in favor of limited guardianship. In specifying the elements of the petition, the petitioner may apply for the appointment of a limited or an unlimited guardian for an individual.¹⁵⁷ Then, in addition to specifying why the guardianship is necessary, the Code provides that if “an unlimited guardianship is requested, the [petitioner must state] the reason why limited guardianship is inappropriate and, if limited guardianship is requested, the powers to be granted to the limited guardian.”¹⁵⁸

153. *Id.* at 1120. For a Canadian model of supported decision-making see *Representation Agreement*, NIDUS, http://www.nidus.ca/?page_id=50/ (last visited Dec. 23, 2013).

154. Debra H. Kroll, *To Care or Not to Care: The Ultimate Decision for Adult Caregivers in a Rapidly Aging Society*, 21 TEMP. POL. & CIV. RTS. L. REV. 403, 435 (2012); see, e.g., ME. REV. STAT. tit. 18-A, § 5-105 (2011); N.M. STAT. § 45-5-304 (2009); and R.I. GEN. LAWS § 33-15-2 (2011).

155. See IDAHO CODE § 15-5-304(a).

156. The UGPPA is a comprehensive act addressing all aspects of guardianship and protective proceedings for both minors and adults. The latter act, the UAGPPJA has a much narrower scope, addressing only jurisdiction and related issues in adult proceedings. UNIF. PROB. CODE, Art. 5A, at Pref. Note.

157. See UNIF. PROBATE CODE § 5-304(a).

158. *Id.* at § 5-304(b)(7)-(8); for a sample petition for limited guardianship see Meta S. David, Note, *Legal Guardianship of Individuals Incapacitated by Mental Illness: Where Do We Draw the Line?*, 45 SUFFOLK U. L. REV. 465, 487-96 (2012); see also *In re*

D. Appointment of Counsel

At any hearing to appoint a guardian for individual, state statutes require that the petitioner be present at the hearing; in addition, the proposed guardian must be present if this is another individual.¹⁵⁹ “The respondent shall attend and participate in the hearing, unless excused by the court for good cause shown.”¹⁶⁰ And any other person may request permission to participate in the hearing upon approval of the court upon a showing that this is in “the best interest of the respondent.”¹⁶¹ But there is no constitutional requirement for an attorney to be present at the guardianship hearing. Unlike criminal proceedings, a petition for guardianship is a civil proceeding and thus devoid of the right-to-counsel argument discussed in criminal decisions such as of *Gideon v. Wainwright*.¹⁶² Nonetheless, as has been explained throughout this Article, establishing incapacity and the appointment of a guardian or conservator result in diminishment of liberty and property.¹⁶³ And there are judicial opinions holding that due process and equal protection require the appointment of an attorney each time a petition is heard to appoint a guardian for an allegedly incapacitated person.¹⁶⁴ Subsequent decisions continued to hold that even when appointing a temporary guardian state law requires the appointment of an attorney to represent the interests of the person alleged to be incompetent. That is, any person alleged to be incapacitated is entitled to be represented

Guardianship of Macak, 871 A.2d 767 (N.J. Super. 2005) (holding that a person of limited capacity may be subject to undue influence of others).

159. UNIF. PROBATE CODE § 5-308(a).

160. *Id.*

161. *Id.* at § 5-308(b).

162. 372 U.S. 335 (1963) (holding that the Sixth Amendment guaranteed a right to an attorney in a criminal felony trial); *but see* *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975) (holding that there is no constitutional basis for confinement of mentally ill persons involuntarily if they pose no danger and can live safely alone).

163. *See generally* Leslie Salzman, *Rethinking Guardianship (Again); Substituted Decision Making as a Violation of the Integration Mandate of Title II of the Americans With Disabilities Act*, 81 U. COLO. L. REV. 157 (2012); *In re* Guardianship of Hedin, 528 N.W.2d 567, 582-83 (Iowa 1995) (holding that due process and equal protection require increased procedural protections when processing petitions for guardianship); also commentators have found support for greater protection in international law. *See, e.g.*, Michael L. Perlin, “*Striking for the Guardians and Protectors of the Mind*”: *The Convention on the Rights of Persons with Mental Disabilities and the Future of Guardianship Law*, 117 PENN ST. L. REV. 1159 (2013).

164. *See, e.g.*, *In re* Fey, 624 So.2d 770 (Fla. Dist. Ct. App. 1993).

by counsel in proceedings to determine capacity and to determine whether a guardian should be appointed over his person or property.¹⁶⁵ But appointment will vary from state-to-state and the lack of a constitutional mandate permits the lack of uniformity among jurisdictions and among clients.

CONCLUSION

Current statistical models reveal that the number of persons approaching a time when many will experience disabilities is rapidly rising. Some of these persons will only experience functional disabilities, debilitating conditions that are restricted to the functioning of physical activities. But an increasing number of persons will confront decisional disabilities, a sudden or gradual incapacity of the mind that impairs judgment and imperils person and property. Increasingly, attorneys will become involved in legal transactions encompassing marriage, inter vivos gifts, creation of trusts, execution of trust powers, execution of a Last Will and Testament, revocation and revival of wills, and execution of powers of attorney and health care directives. And these legal transactions are complicated by the existence of blended families, where the attorney serves in a fiduciary capacity for many members of the same family, each with separate expectations.

The American Bar Association Model Rules of Professional Conduct offer general guidance as to how an attorney should proceed when asked to represent or working with a client in a representative capacity. The Model Rules use cautionary language of when an attorney believes the client has a mental impairment or diminished capacity. When the occasion arises the Model Rules admonish the attorney to take reasonably necessary protective action, but the attorney is limited in what may be revealed, what action may be taken, and how to make a good faith effort. And admittedly, the attorney's position is further complicated by the financial remuneration that accompanies representing the client in any legal transaction.

This Article suggests that the attorney must be very attentive to establishing an objective strategy in each attorney-client transaction. In addition to the Model Rules, the Article offers instructive strategies for dealing with clients, tests to be used, and how to create legal structures that will protect a client's interests in the years to come. This Article also describes the issues that will arise as clients become increasingly incapacitated, whether they are willing to admit this or not. In recent decades legislatures and courts have provided better guidance on what

165. See *Martinez ex rel. Smith v. Cramer*, No. 4D13-405, 2013 WL 4006526 (Fla. Dist. Aug. 7, 2013) (applying FLA. STAT. § 744.331(2)(a) (2012)).

constitutes sufficient clear and convincing evidence of sufficient decisional incapacity to warrant the appointment of a guardian or a conservator. The appointment, scope, and supervision of these appointments are discussed in the Article in connection with the Uniform Probate Code and related uniform acts.

Americans can be confident that medical technology will continue to provide innovations that will permit those with sufficient means to prolong their lives. With this longevity comes increasing incidence of mental incapacity. And those who are likely to live the longest will require an increasing level of legal assistance. Mindful of the needs of a client, the demands of the profession, and the attorney's common sense, today's attorneys must be attentive to the opportunities of tomorrow.