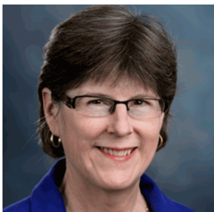
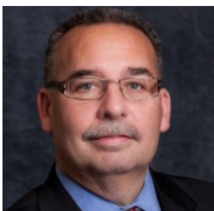
POSSESSION IS NINE-TENTHS OF THE LAW ISN'T IT? THE ETHICAL, LEGAL, AND PRACTICAL CONSIDERATIONS INVOLVING THE FINANCIAL EXPLOITATION OF SENIORS (PART 1)

STUART C. BEAR is a partner, shareholder, and the president of Chestnut Cambronne PA and holds a national reputation for providing the highest level of succession planning services for individuals and businesses; including single individuals, married couples, domestic partnerships, blended families, and seniors. His practice specializes in wills, trusts, disability planning, powers of attorney, living wills, asset protection, and Medical Assistance planning. A native of Superior, Wisconsin, Stuart received his B.A. from the University of Minnesota, Phi Beta Kappa, and his J.D. from William Mitchell College of Law.



MARY F. RADFORD is a Professor of Law Georgia State University. She joined the College of Law faculty in 1984. Her teaching areas are Wills, Trusts & Estates; Estate Planning; and Law & the Elderly. She was the president of the American College of Trust & Estate Counsel (ACTEC) in 2011-12. She served as the reporter for the Georgia Trust Code Revision Committee (2005-10), the Georgia Guardianship Code Revision Committee (1997-2004) and Georgia Probate Code Revision Committee (1992-96) of the State Bar of Georgia. She was the principal draftsperson for Georgia's newly enacted Trust, Guardianship, and Probate Codes. She was the 2004 Chair of the AALS Section on Donative Transfers, Fiduciaries, and Estate Planning. She is the author Georgia Trusts & Trustees; Guardianships & Conservatorships in Georgia; the sixth and seventh editions of Redfearn: Wills & Administration in Georgia; and numerous law review articles. Radford frequently gives presentations on estate planning and guardianship topics at local, national, and international seminars. In 2009, she was awarded the Verner S. Chaffin Career Service Award by the Fiduciary Law Section of the State Bar of Georgia. In 2002, she was awarded the Treat Award for Excellence by the National College of Probate Judges.



FRANCIS J. (FRANK) RONDONI is a Partner and Shareholder at Chestnut Cambronne PA. Frank has been a trial attorney and litigator for more than 35 years, with a diverse practice. He concentrates his practice in the areas of Commercial Litigation, Estate Litigation, Class Action Litigation, Tort Litigation, Personal Injury, Business Representation, and Governmental Representation. Frank's Civil Trial work represents about 90 percent of his time. Frank is a frequent lecturer on topics such as Trial Tactics, Evidence, Emerging Case Law, and Estate Litigation. Frank sits on the Hennepin County Criminal Justice Task Force (CJTF). He is a member of the Minnesota State Bar Association, the Minnesota Association for Justice, the Hennepin County Bar Association, and is the current President of the Suburban Hennepin County Prosecutors Association (SHCPA). Frank is an Arbitrator for the American Arbitration Association, has an AV rating with Martindale Hubbell, and has been named a Minnesota Super Lawyer by Super Lawyers magazine.

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I. DEATH BED CHANGES TO ESTATE PLAN

CASE STUDY: You Don't Need to Know.

Rose, an elderly woman, lived at home alone. Rose's two children live out of state and only visit during the holidays. Her children insisted Rose move to an assisted living facility where she would not have to worry about maintaining her house and yard, but Rose wanted to live at home.

One fall afternoon, a young man named Jack approached Rose's door offering to rake leaves and remove snow during the coming winter. Rose was ecstatic; she could continue living at home and would not have to worry about maintaining her yard and risking an injury.

Rose became increasingly frail and even more dependent on Jack. Soon Jack began helping Rose with other tasks, including cleaning the

inside of her house, driving her to various appointments and running various errands.

After Rose died, and curious about the amount they would inherit, Rose's children reached out to financial institutions where she had assets. Rose's children find out Jack took Rose an attorney to execute a power of attorney and will. Over a six-month-period, Jack liquidated Rose's assets. Rose's children discovered her will left everything to Jack.

A. The Need for Testamentary Capacity

As a threshold matter, a testator must have testamentary capacity to make a will. This includes knowing the nature and extent of his or her property, who will take that property, and the plan for disposing of property in that way. See, e.g., In re Estate of Kottke, 6 P.3d 243, 246 (Alaska 2000); In re Estate of Gallavan, 89 P.3d 521, 522 (Colo. App. 2004); Norwest Bank Minn. N., N.A. v. Beckler, 663 N.W.2d 571, 579 (Minn. Ct. App. 2003).

Testamentary capacity is a relatively low bar to meet. So low, in fact, that not even a death bed change to a will creates the presumption that the testator did not have testamentary capacity. See, e.g., Don F. Vaccaro, Annotation, Solicitation of Testator to Make a Will of Specified Bequest as Undue Influence, 48 A.L.R.3d 961 § 9 (2016); Colleen F. Carew et al., Testamentary Capacity—Conditions That May Affect Testator's Capacity—Old Age, Ill Health, Physical Weakness—"Deathbed" Will Not Presumptively Invalid, 2 Harris N.Y. Estates: Probate Admin. & Litig. § 24:245 (6th ed. 2015); Romualdo P. Eclavea et al., Opportunity to Change Will; Deathbed Will, 64 Cal. Jur. 3d Wills § 176 (2015). However, such death bed changes are closely scrutinized and often invite legal challenges precisely because the will is made in such close proximity to the death of the testator such that it would not be unreasonable to question whether the testator really did understand what effect his will or changes to his will might mean. See Carew, supra; American Bar Association, Family Legal Guide, ch. 16, 3 (3rd ed. 2004), http://www.americanbar.org/content/dam/aba/migrated/publiced/practical/books/family_legal_guide/ chapter_16.authcheckdam.pdf. Someone who is near death by definition is either mentally or physically frail, or possibly both. Therefore, near death testamentary changes run the risk of being challenged for lack of testamentary capacity. For example, an estranged, previously disinherited, son is given an inheritance in an equal share to his siblings after a deathbed change to his father's will. Siblings may be further encouraged to contest a deathbed will under similar circumstances, particularly when the bequest is to an individual who would not normally be the subject of the decedent's bounty.

B. Undue Influence

The Boomer Project recently conducted online interviews with 523 seniors and 1,279 adult caregivers, to determine the most common fears among elderly adults.[1] The top ten fears of elderly adults were:

1. Loss of independence;
2. *Declining health* (emphasis added);
3. Running out of money;
4. Not being able to live at home;
5. Death of a spouse or other family member;
6. Inability to manage their own activities of daily living;
7. Not being able to drive;
8. Isolation or loneliness;
9. Strangers caring for them; and
10. Fear of falling or hurting themselves.

Any individual, including a child, friend, neighbor or predator, can exploit these fears to get what they want from an elderly individual. For example, a child threatens to stop caring for their elderly parent and take them to a nursing home unless their parent updates their will to leave that child an increased percentage of the estate.

Often times, when an individual is near death, they are particularly vulnerable to influence or suggestion. In fact, because of this proximity to death and the uncertainty as to the existence of testamentary capacity, a child, caregiver, or beneficiary of the original will should be on the lookout for undue influence, or persuasion by a third party that substitutes the wishes of the party or another for those of the testator so that the testator produces and/or executes a will he or she otherwise would not have. Michael J. Cote, Under Influence in Execution of Will, 36 Am. Jur. Proof of Facts 2d 109, § 1 (2015). Most states recognize that some kind of presumption for undue influence arises from the presence of some elements of undue influence.[2] Eunice L. Ross & Thomas J. Reed, Undue Influence, Will Contests § 7:10 (2d ed.). Generally, the presumption arises when

there is a confidential relationship between the testator and the person encouraging deathbed changes to the will, typically along with suspicious circumstances and/or when a third party acquires "unconscionable" benefits as a result (i.e., the new beneficiary suddenly inherits most of the testator's property in the revised will; also, when the new beneficiary has attempted to isolate the testator from family members and/or original will beneficiaries). See id.

Practitioners recognize that attorneys-in-fact are not immune from unduly influencing the principal-testator they have been selected to protect. See generally Jane A. Black, The Not-So-Golden Years: Power of Attorney, Elder Abuse, and Why Our Laws Are Failing A Vulnerable Population, 82 St. John's L. Rev. 289 (2008). Rather, financial exploitation has become one of the leading types of elder abuse and it is often done at the hands of attorneys-in-fact. See id. at 291. If undue influence is found, then the death bed will may be determined invalid in whole or in part, and property may pass according to the original will, or intestate succession. See e.g., In re Carother's Estate, 150 A. 585, 586 (Pa. 1930); Estate of Hamilton v. Morris, 67 S.W.3d 786, 795 (Tenn. Ct. App. 2001).

As a reminder, undue influence analysis likewise also applies to lifetime transfers (including deeds, gifting, etc.) such as when the third party "deprives the donor of free agency in order to obtain a post-death benefit." Ross & Reed, supra, § 9:9. That is, undue influence is not limited only to wills but also to will substitutes. Note, however, that each state has its own definition as what constitutes the impairment of free agency. Id. § 9.9 n.1 (listing state definitions for Colorado, Connecticut, Indiana, Iowa, Kansas, Massachusetts, Maine, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New York, New Carolina, Ohio, South Carolina, Tennessee, and Texas).

C. When Undue Influence Becomes Criminal

Relatedly, many states have implemented specific financial exploitation laws aimed at combating undue influence against vulnerable adults (in deathbed situations and beyond) in their criminal codes and/or as part of adult protection rules and regulations.[3] These laws differ significantly among jurisdictions, and punishments range from felony convictions in criminal codes to adverse agency findings in rules and regulations. See id. Historically, states often omit caregivers, attorneys-in-fact, and family members from these statutes and rules due to the presumption that family members and fiduciaries will care for the elder notwithstanding research to the contrary. See id. Many states are quickly catching up to enact or amend statues to specifically address the growing problem of financial exploitation of vulnerable adults.

Prominent cases of undue influence rising to the criminal level include those of Mark McCay in Texas and Randy Ray Richardson in Oregon. McCay was charged with, and convicted of, attempted theft after he induced an incapacitated 88-year-old woman to sign on her death bed a will he had written that benefitted him. McCay's second will failed because of a technicality involving witness signatures. More importantly, the Texas Court of Appeals found the indictment of attempted theft against McCay was sufficient *even though* the State did not plead lack of testamentary capacity or undue influence. McCay v. State, No. 05-12-01199-CR, 2015 WL 5247081, at *3 (Tex. App. Sept. 9, 2015), petition for discretionary review filed (Oct. 2, 2015). The court reasoned, "These terms [of "testamentary capacity" and "undue influence"] . . . are rooted in the civil law and are meaningful in probate proceedings. In a criminal proceeding, the State can prove the accused attempted to appropriate property unlawfully in many ways. One of those ways is by proving the owner did not give effective consent." Similarly, Richardson was convicted by a trial court for first-degree aggravated theft and obtaining execution of a document by deception in another death-bed will signing. State v. Richardson, 288 P.3d 995, 996 (2012). However, the Oregon Court of Appeals reversed Richardson's conviction because of a hearsay error committed by the lower court. Id. at 998.

II. DISPUTED TRANSFER OF AN INCAPACITATED OR ELDERLY RELATIVE

CASE STUDY: Granny-Snatching

Eleanor has three children; her oldest child, Mike, lives out of state and visits every Christmas for a day or two. Eleanor's two daughters live in the same town and see her at least every other day. Mike contacts Eleanor one cold winter day (as mom lives in Minnesota), and suggests that at his expense, he take her down to Arizona for a couple weeks to "defrost." Eleanor willingly accepts this invitation.

Instead of getting on a flight to Arizona, Mike flies Eleanor to his hometown. Mike e-mails his sisters alleging they have been abusing mom for years; however there has been no evidence of

any abuse. Shortly thereafter, Eleanor's accounts are closed, and her assets are reestablished in accounts owned jointly with Mike. Mike will not allow his sisters to visit mom, and he took away her cell phone. The sisters believe Mike is brainwashing mom and prohibiting her from making decisions on her own.

A. The Hardship of Clandestine Transfers

The end of an elder's life is difficult for families to manage, and conflicts may arise among the elder's loved ones. Sometimes, these relationships may be so tumultuous that one of these people may actually induce the elder to leave their residence in one state to come join the person in another state without the knowledge of the others. This inducement to move, pejoratively termed "granny-snatching," makes determining jurisdiction for guardianships difficult, expensive, and sometimes even harmful to the elder where the snatcher aims to financially exploit the elder, often further resulting in abuse or neglect as well.

B. Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act

1. Jurisdictional Priorities and Notice

Enacted in 45 states,[4] the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA) establishes jurisdiction priorities for guardianship proceedings. *See* Unif. Adult Guardianship & Protective Proceedings Jurisdiction Act § 203 (2011) [hereinafter UAGPPJA]. The Act grants default jurisdiction to the probate court of the home state, which is defined as the state in which the elder "was physically present, including any period of temporary absence, for at least six consecutive months immediately before the filing of a petition for a protective order or the appointment of a guardian." Id. § 201(a)(2). The Act also allows a home state to be found, in the alternative, where the elder has been present for a six-month period that ends within six months of the filing of such petition. Id.

If the elder has no home state, then the state with which the elder has a "significant connection" is selected. Id. § 203(1), (2)(A). In addition to requiring more than "mere physical presence," the finding of a significant connection depends on four factors under the UAGPPJA:

1. The location of the respondent's family and other persons required to be notified of the guardianship or protective proceeding;
2. The length of time the respondent at any time was physically present in the state and the duration of any absence;
3. The location of the respondent's property; and
4. The extent to which the respondent has ties to the state such as voting registration, state or local tax return filing, vehicle registration, driver's license, social relationship, and receipt of services.

Id. § 201(b). For example, the Arizona Court of Appeals provided a quick analysis on "home state" and "significant connection" in Woestman v. Russell, 356 P.3d 319, 321 (Ariz. Ct. App. 2015). The court determined that the protected person had no home state where he had "claimed to be from Montana, provided police addresses in three different states, and [had] a criminal history involving offenses in six different states." Id. As such, Arizona was found to be a significant-connection state because the protected person had been involved in a car accident, retained an attorney, and has family that maintains residence there. Id. That is, pursuant to Arizona's UAGPPJA, Arizona was found to have jurisdiction for a conservatorship proceeding as a significant connection state. Id.

Note that a guardianship may still be sought in a significant-connection state when the elder does have a home state. Id. § 203(2)(B). However, the significant-connection state will have jurisdiction only where a guardianship petition has not been filed in the home state prior to or during the significant-connection state's proceeding and no objection to the significant-connection state's jurisdiction has been filed. Id. § 203(2)(B)(i)–(ii). Indeed, the jurisdiction of the significant-connection state is further checked by section 206's "appropriate forum" safeguards, which allow the significant-connection state to consider, among other factors, "whether abuse, neglect, or exploitation of the respondent has occurred or is likely to occur and which state could best protect the respondent from the abuse, neglect, or exploitation" and "the length of time the respondent was physically present in or was a legal resident of this or another state." Id. §§ 203(2)(B)(iii), 206(c).

Likewise, any court may pick up jurisdiction, if deemed appropriate, where it has been declined by the home state and/or the significant-connection state. Id. § 203(3). Section 204 also provides a safety valve to possible jurisdiction problems by allowing "special jurisdiction" to courts without section 203 jurisdiction specifically for provisional or temporary orders. Section

208 further protects the jurisdiction of the home state by requiring notice if a petition was brought in a non-home-state to "those persons who would be entitled to notice of the petition if a proceeding were brought in the [elder's] home state." Note that once jurisdiction is established, that court has "exclusive and continuing" jurisdiction until the court terminates the proceeding. Id. § 205.

2. Transferring Jurisdiction or Enforcing Original Guardianship Order When Travel is Not Clandestine

Relatedly, article 3 provides for the transfer of jurisdictions that would terminate jurisdiction in one state in favor of another. See id. §§ 205, cmt.; 301. Again, notice is required when the petition for transfer is filed with the original state. Id. § 301(b). The court then determines whether:

1. The protected person is physically present in or is reasonably expected to move permanently to the other state, or the protected person has a significant connection to the other state considering the factors in Section 201(b);
2. An objection to the transfer has not been made or, if an objection has been made, the objector has not established that the transfer would be contrary to the interests of the protected person; and
3. Adequate arrangements will be made for management of the protected person's property.

Id. § 301(d). If these factors are present, then the court issues a provisional order granting the transfer to the state while directing the guardian to petition the other state to accept the original guardianship. Id. § 301(e). The petition to the other state is also accompanied by notice to entitled persons. Id. § 302(b).

Generally, the other state will grant a provisional order accepting the guardianship as long as there is no objection and the guardian is eligible to serve as such in that state. Id. § 302(d); see also Sears v. Hampton, 143 So. 3d 151, 157 (Ala. 2013) (concluding that the accepting court is only to decide whether the provisional order from the transferring court is to be accepted, not to appoint a new or different guardian). The original state terminates the guardianship only after receiving a provisional order and necessary documentation from the accepting court. Id. § 301(f). The accepting state, likewise, issues a final order after receiving the order for termination from the original court. Id. § 302(e). From there, within 90 days, the accepting state can modify the guardianship as necessary to conform with state laws. Id. § 302(f).

Indeed, this process can apply even when the accepting state has not adopted the UAGPPJA. In re Guardianship of Louise D., 3 N.Y.S.3d 918, 919–20 (N.Y. Sur. 2015) (approving transfer to non-adoptee-state Florida from New York where the above process had been followed and the appropriate factors found). Also acceptance of a foreign guardianship may actually be in the laws of non-adoptee states. Kurt M. Simatic, Someone's Afoot: Wisconsin's Foreign Guardianship Transfer Law, 95 Marq. L. Rev. 1083, 1103 (2012) ("A petition for the receipt and acceptance of a foreign guardianship in Wisconsin is appropriate if the foreign ward resides in Wisconsin or intends to move to Wisconsin.").

Where a transfer is inappropriate, article 4 provides for registration of a foreign guardianship upon petition and notice from the guardian. UAGPPJA § 401. Registration gives the guardian the power to enforce the guardianship and the powers it grants in a state without jurisdiction. See id. § 403(a).

C. Possible Loopholes and Outcomes

While the UAGPPJA's adoption has been nearly universal, the handful of states that have not adopted it remain as loopholes that could continue to perpetuate "granny-snatching." The protections of UAGPPJA do not apply in states where the Act has not been enacted. Brittany Griffin Smith, Note, Granny Snatching and Personal Jurisdiction—An Argument for A New Federal Interpleader, 100 Ky. L.J. 411, 412–13 (2012). However, even in these states, the traditional analysis of jurisdiction may nonetheless maintain personal jurisdiction where the snatching takes place after a petition in the non-adoptee-state has been filed. See In re Guardianship of Graham, 963 So. 2d 275, 279 (Fla. Dist. Ct. App. 2007). At Chestnut Cambronne, we were successful in establishing jurisdiction in Minnesota, where the elder had been domiciled, even though she had been taken to Michigan—a non-adoptee state.

III. REPRESENTING A CLIENT WHOSE CAPACITY APPEARS TO BE DIMINISHED

CASE STUDY: My Overly Helpful Home Health Care Aide.

Mrs. Neusbaum is a very old client of yours that you have known for more than two decades and you last updated her Will and other estate planning documents about 10 years ago. Mrs. Neusbaum is

a widow with no living children, but has all of her life been close to her two nieces and was leaving her entire estate to her two nieces.

Mrs. Neusbaum comes into your office with her home health aide, Matilda, who Mrs. Neusbaum promptly introduces to you as the daughter she never had and in whom she now has complete trust. Mrs. Neusbaum goes on to announce that she wants to update all of her estate planning documents, leaving everything to Matilda, who smiles sweetly throughout the whole process.

Concerned, you ask to speak to Mrs. Neusbaum alone and she says no, I want my Matilda with me and I want her to be present during all our discussions. Based on your experience, you have very significant concerns both relative to capacity, and more importantly, the relationship of capacity and undue influence. You consider the following:

1. Drafting Mrs. Neusbaum a new will with the concern she might go elsewhere;
2. Refusing to draft the will;
3. Insisting meeting with Mrs. Neusbaum alone;
4. Scheduling a time for Mrs. Neusbaum to come back to your office and calling her nieces; or
5. Calling Adult Protection.

A. Option 1: Draft the Will

MRPC Rule 1.2 states, "A lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued.

B. Option 2: Decline to Draft the Will

1. Clients with Diminished Capacity

MRPC 1.14 provides as follows:

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

2. Assessing the Client's Capacity

MRPC 1.14, Comment 6: "In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as:

1. the client's ability to articulate reasoning leading to a decision;
2. variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and
3. the consistency of a decision with the known long-term commitments and values of the client.
4. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician."

3. Does the Client Have the Capacity to Enter into the Desired Transaction?

1. Differing transactions have differing levels of capacity (e.g., testamentary capacity vs. capacity to contract.)
2. Different states have different levels of capacity for the same transaction:
3. O.C.G.A. §53-12-23: "A person has capacity to create an inter vivos trust to the extent that such person has legal capacity to transfer title to property inter vivos. A person has capacity to create a testamentary trust to the extent that such person has legal capacity to devise or bequeath property by will."
4. N.C.G.S.A. § 36C-6-601: "The capacity required to create, amend, revoke, or add property to a revocable trust or to direct the actions of the trustee of a revocable trust, is the same as that required to make a will."
5. Client must have capacity at the time the transaction is entered into. Even a client who has been placed under a guardianship may retain some capacity—e.g., testamentary capacity ("lucid interval").

4. Lawyer's Duty to Assess Capacity

1. In re Hughes Revocable Trust, 2005 WL 2327095 (Mich. App. 2005): The attorney had "a responsibility to assess his client's mental capacity." Lawyer in this case had been told that the testator was often confused. When he met with the testator and her husband, the husband did all the talking. The court criticized the attorney for making no attempt to determine the testator's capacity.
2. San Diego Op. 1990-3 (1990): "A lawyer must be satisfied that the client is competent to make a

will and is not acting as a result of fraud or undue influence. . . . The attorney should schedule an extended interview with the client without any interested parties present and keep a detailed and complete record of the interview.

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

4. Norton v. Norton, 672 A.2d 53 (Del. 1993) (dicta): Lawyer who drafted the will did not meet with the testator until the day he came to the hospital to present her with a document drafted at the direction of one of the testator's children that left her estate primarily to that child. "Although the question of testamentary capacity was not the principal focus of this appeal, we take the occasion to emphasize the importance for a lawyer who drafts a will, particularly for an aged or infirm testator, to be satisfied concerning competence and to make certain that the instrument as drafted represents the intentions of the testator. . . . [D]irect communication which precedes drafting of the instrument should be the norm if the lawyer is to discharge his obligation of assessing testamentary competence."

5. Steps To Maximize or Enhance the Client's Capacity

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

C. Option 3: Insist on Meeting Alone

Although Mrs. Neusbaum has already stated she wants Matilda to be present during all conversations, contact her following the meeting to insist she come into the office alone or offer to meet at her house when Matilda is not present.

D. Options 4 and 5: Contacting Family Members or Adult Protection

1. Confidentiality

MRPC 1.6 provides as follows:

(a) 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 paragraph (b).

MRPC 1.14 provides as follows:

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant

to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

2. Lawyer's Duty to Take Protective Action

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

> A client who is making decisions that the lawyer considers to be ill-considered is not necessarily unable to act in his own interest, and the lawyer should not seek protective action merely to protect the client from what the lawyer believes are errors in judgment.
>
> Although not expressly dictated by the Model Rules, the principle of respecting the client's autonomy dictates that the action taken by a lawyer who believes the client can no longer adequately act in his or her own interest should be the action that is reasonably viewed as the least restrictive action under the circumstances.
>
> The nature of the relationship and the representation are relevant considerations in determining what is the least restrictive action to protect the client's interests. Even where the appointment of a guardian is the only appropriate alternative, that course, too, has degrees of restriction. For instance, if the lawyer-client relationship is limited to a single litigation matter, the least restrictive course for the lawyer might be to seek the appointment only of a guardian ad litem, so that the lawyer will be able to continue the litigation for the client. On the other hand, a lawyer who has a long-standing relationship with a client involving all of the client's legal matters may be more broadly authorized to seek appointment of a general guardian or a guardianship over the client's property, where only such appointment would enable the lawyer to fulfill his continuing responsibilities to the client under all the circumstances of the representation.

IV. KNOW WHO YOUR CLIENT IS

CASE STUDY: What Do You Mean I'm Impaired?

Attorney gets a call one afternoon from a longtime client, Alex, whose elderly mother was arrested for driving under the influence. According to Alex, mom was driving home from bingo, lost control of the vehicle, and struck a stop sign. The police arrested her for driving while under the influence.

Alex indicates there is a question as to whether or not mom was impaired as a result of alcohol, or her new prescription medications, or possibly a combination of both. Alex has questions regarding how to get mom out of jail, and how to defend mom on these charges. Mom was charged with driving under the influence 30 years ago.

Alex has questions about mom's driver's license. Alex has been worried about her driving for quite some time and questions whether mom should be driving at all. Derek inquires as to whether or not mom could or should get her license back at this point, irrespective of the alcohol/prescription drug related charges.

A. Elderly Prescription Drug and Alcohol Use

Older adults are the largest users of prescription medication, yet with advancing age they are more vulnerable to adverse reactions to the medications they are taking.[5] A survey in the United States of a representative sampling of 2206 community-dwelling adults, aged 62 through 85 years, was conducted by in-home interviews and use of medication logs between 2010 and 2011.[6] At least one prescription medication was used by 87 percent and five or more prescription medications were used by 36 percent of the individuals surveyed. Id. Additionally, 35 percent of those surveyed used over-the-counter medications. Id.

The young-old (ages 66-74) have been found to be more adherent to medication regimens than middle-aged older adults, but after age 75, older adults present decreased comprehension of medication instructions and adherence. Id. Living arrangements influence the older person's ability to manage medications, and older adults who live alone were found to be more prone to medication errors. Id.

Over recent decades alcohol consumption has increased among those who are older than 65 years.[7] Alcohol is more toxic in the aging organism because of changes in its metabolism, distribution and elimination, which lead to central nervous system effects at lower levels of intake; also, aging organs such as brain and liver are more sensitive to the toxicity of alcohol. *Id*. Also, elderly people take more drugs, and ethanol and these drugs may interact; therefore, alcohol consumption can modify serum drug concentrations and their

toxicity. Id. For these reasons, alcohol should be used in moderation, especially among those of older age. Id.

B. Statutes

Many states have a particular section of the Driving Under the Influence ("DUI") code that pertains to driving under the influence of drugs. Typically, the elements of DUI are driving or operating a motor vehicle and being under the influence of alcohol or a controlled substance.

Some states have implemented a list of controlled substances within their DUI statutes. For example, under Kentucky Revised Statutes Annotated §1 89A.010(1)(d): A person shall not operate or be in physical control of a motor vehicle anywhere in this state while the presence of [any Schedule I controlled substance except marijuana, Alprazolam, Amphetamine, Buprenorphine, Butalbital, Carisoprodol, Cocaine, Diazepam, Hydrocodone, Meprobamate, Methadone, Methamphetamine, Oxycodone, Promethazine, Propoxyphene, and Zolpidem] is detected in the blood, as measured by a scientifically reliable test, or tests, taken within two hours of cessation of operation or physical control of a motor vehicle.

In many states, the fact that the drug was prescribed by a doctor is not a defense. For example, under California Vehicle Code Section 23630, the fact that any person charged with driving under the influence of any drug or combined influence of alcoholic beverages and any drug in violation of Section 23152 or 23153 is, or has been entitled to use, the drug under the laws of this state shall not constitute a defense against any violation of the sections.

C. Case Law

Involuntary intoxication is not a defense when someone knowingly takes prescription medication. For example, in State v. Kain, Appellant was arrested for DUI after the arresting officer smelled alcohol and administered a field sobriety test, which Appellant failed. See 24S.W.3d 816, 817 (Tenn. Crim. App. 2000). Appellant asserted that he had three drinks from 6:30 to about 10:00 pm and that at about 11:15 he took two diet pills. Id. at 818. Appellant argued that the trial court should have recognized involuntary intoxication as a defense. Id. In this regard, Appellant made two claims. Id. The first is that the defense of involuntary intoxication is applicable to all criminal prosecutions and is not specifically excluded by the statutes prohibiting driving under the influence. Id. Additionally, Appellant argued that even though driving under the influence is interpreted as a strict liability offense, involuntary intoxication can still be asserted as a defense, because, as a general defense, it "operates to relieve criminal culpability irrespective of the presence of intent." Id. The court held that with the law in Tennessee being that driving under the influence of a drug or intoxicant is a strict liability offense, a defendant whose intoxication results from knowingly ingesting a prescription drug and alcohol cannot avail himself of the involuntary intoxication defense. Id. at 819.

Additionally, toxicologists are not required to prove the degree of impairment or amount of drugs present in an individual's system. For example, in Hoffman v. State, Appellant was found to have violated his community control because he was driving under the influence. See 743 So.2d 130, 131 (4th DCA 1999). Appellant drove into a truck which was parked on the outside lane of the road with its flashers on. Id. The arresting officer administered a roadside sobriety test and based on the facts of the accident, the officer's observation, and Appellant's poor performance on the sobriety test, the officer arrested Appellant for DUI. Id. The breathalyzer indicated no presence of alcohol, but a urine test reflected the presence of Prozac, Soma, and Xanax, all of which were legally prescribed to Appellant. Id. The court found that it was unnecessary for the toxicologist to be able to estimate the degree of impairment or the amount of drugs in the Appellant's system. Id.

V. WHAT TO DO WHEN THERE IS NO HEALTH CARE DIRECTIVE

CASE STUDY: What Do You Mean I Can't Make This Decision?

James and Katie are married, and both have three young children from previous marriages. James' three children, Joe, Matt, and Nicole, do not get along with Katie. Shortly after the marriage, Katie made it very clear she only cared about her children and not incorporating them into their new family.

James' three children noticed after Katie's mother was diagnosed with dementia, Katie would not let any other friends or family members see her. James told his children he wants his life to be preserved at all costs because of his religious beliefs. Fearing Katie would treat their father similarly to her mother, James' children urged him to get a

health care directive naming the three of them as his health care agents.

Unfortunately, James failed to do so. James became ill and fell into a coma. The care providers took the position that James' three children and Katie must unanimously make medical decisions. Katie, caring only about the inheritance she is about to receive, and traveling the world with the pool boy, says that James did not want to be kept alive by artificial means.

A. Health Care Directives Generally

In response to various court rulings on the right to refuse life-sustaining treatment, (see, e.g., Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261 (1990); In re Quinlan, 355 A.2d 647 (NJ 1976), all fifty states (and Washington D.C.) have passed laws providing for advance health care directives (including living wills and health care powers of attorney). Diana Anderson, CELA, Review of Advance Health Care Directive Laws in the United States, the Portability of Documents, and the Surrogate Decision Maker When No Document Is Executed, NAELA J., Fall 2012, at 183. Each state's law differs but they are generally consistent in allowing an elder with mental capacity to make his end-of-life care decisions known, documented, and generally enforceable when he or she does become incapacitated. See id. These directives also provide immunity from civil wrongful death lawsuits and from ethics boards complaints to doctors who follow them when withdrawing life-sustaining treatment. Catherine J. Jones, Decision-making at the End of Life, 63 Am. Jur. Trials 1, § 27 (2015).

As important as it is to have an advance directive, clients should be aware that there is still a risk that doctors, hospitals and other health care providers may not always follow these directives. In Doctors Hospital of Augusta, LLC v. Alicea, 299 Ga. 315, 788 S.E.2d 392 (2016), a doctor caused a patient to be hooked up to a ventilator even though the patient's agent under her health care power of attorney had made it clear that the patient wanted no life-sustaining procedures to be applied. When the agent sued, the trial court granted summary judgment for the doctor and the hospital. The Supreme Court of Georgia reversed the grant of summary judgment. The Supreme Court pointed out that "a clear objective of the Act [that allows health care advance directives] is to ensure that in making decisions about a patient's health care, it is the will of the patient or her designated agent, and not the will of the health care provider, that controls."

B. Family Decision-Making Statutes

Additionally, 43 states[8] statutorily empower select family members to make treatment decisions on behalf of an incapacitated person when no health care directive exists. Id. at 194; American Bar Association Commission on Law and Aging, Default Surrogate Consent Statutes (2014), http://www.americanbar.org/content/dam/aba/administrative/law_aging/2014_default_surrogate_consent_statutes.authcheckdam.pdf (ABA Comm'n L. & Aging). These statutes are called "surrogate decision-making" or "family decision-making" statutes. Aaron N. Krupp, Health Care Surrogate Statutes: Ethics Pitfalls Threaten the Interests of Incompetent Patients, 101 W. Va. L. Rev. 99, 108–09 (1998).

Generally, these "devolved" surrogates must make treatment decisions based on the "substituted judgment" standard, or what the incapacitated person's probable wishes would be if they could make the decision for themselves. Charlie Sabatino & Erica Wood, American Bar Association, Surrogate Decision-Making and Advance Directives—Nuts and Bolts, National Aging and Law Conference (2010), http://www.americanbar.org/content/dam/aba/migrated/aging/pdfs/nalc_sur_d_m.authcheckdam.pdf.

Meanwhile, a minority of states require "clear and convincing evidence" ala Cruzan to show the person's actual wishes. Id. For example, Alabama normally requires the substituted judgment standard but requires clear and convincing evidence of the person's actual desires in cases of withdrawal of life-sustaining treatment. Ala. Code § 22-8A-11(c); see also, e.g., Fla. Code §§ 765.205(1)(b), 765.401(3). Most of these statutes allow a "best interests" standard as a fall-back to the substituted judgment standard. Sabatino & Wood, supra; see also e.g., Fla. Code § 765.205(1)(b).

The tension between surrogate decision-making statutes and health care directives is an important one: the two function as alternatives, not concurrently. In other words, if the incapacitated person has a health care directive, then the family members empowered by a decision-making statute will not have authority to make health care decisions for the incapacitated person. Instead, the power to refuse life-sustaining treatment on behalf of the incapacitated person rests with the person's selected health care agent. Aaron N. Krupp,

supra, 108–09. In those seven states that do not have surrogate decision-making statutes, there would be no competing powers of consent. However, as stated above, the practitioner should still be aware of their jurisdiction's judicial review policies notwithstanding the health care agent's obvious claim for consent.

C. No Directive and No Surrogate Statute

Despite the fact that most Americans have definitive plans in mind for the end of their life, many have not actually drafted health care directives. Jones, supra, § 38. Additionally, there may be issues with a health care directive being recognized in a state different from the one it was drafted in—or lack of health care directive reciprocity. See Anderson, supra, at 192–93. In states without a surrogate decision-making statute,[9] the patient without a health care directive (or without an effective one if a reciprocity issue arises) is subject to the same issues Quinlan and Cruzan faced. Jones, supra, § 38.

Generally, the court is not involved unless a family member wishes to disrupt the status quo and withdraw life-sustaining treatment (recall that doctors are exposed to liability for withdrawing treatment absent a health care directive, and this liability encourages them to continue treating the patient). Jones, supra, § 38. While courts do generally prefer that these end-of-life decisions be decided by the family and the doctor, a number of jurisdictions require judicial review of either all decisions to withdraw life-sustaining treatment or such decisions under specific circumstances. Karl A. Menninger, Proof of Basis for Refusal or Discontinuation of Life-Sustaining Treatment on Behalf of Incapacitated Person, 40 Am. Jur. Proof of Facts 3d 287, § 16 (2015); see also U.S. Congress, Office of Technology Assessment, Life Sustaining Technologies and the Elderly 120–22 (1987).

For example, Minnesota and Massachusetts—both states without surrogate decision-making statutes—require review of all decisions to withdraw life-sustaining treatment. Menninger, supra (citing Superintendent of Belchertown State School v. Saikewicz, 370 N.E.2d 417 (Mass. 1977); In re Conservatorship of Torres, 357 N.W.2d 332 (Minn. 1984)); see also In re Guardianship of Tschumy, 853 N.W.2d 728, 745 (Minn. 2014). In fact, Massachusetts holds a "substituted judgment" hearing to make this determination. Matter of R.H., 622 N.E.2d 1071, 1076 (Mass. App. Ct. 1993). In other states, specific circumstances triggering review of the decision to withdraw life-sustaining treatment include pregnancy (In re A.C., 573 A2d 1235 (Dist. Col. App. 1990)) and minors (In re E.G., 549 N.E.2d 322 (Ill. 1989)). Menninger, supra.

In cases where no surrogate decision-making statue operates—as in Minnesota and Massachusetts—cases are often brought by guardians seeking to have health care decision-making powers granted to them so that life-sustaining treatment can be withdrawn. See, e.g., Saikewicz, 370 N.E.2d at 419, 435 (noting that petitions for the appointment of both a guardian and a guardian ad litem had been filed and granting authority to make health care decisions to guardian ad litem); Tschumy, 853 N.W.2d at 745 (finding guardian could have such authority); Matter of Quinlan, 355 A.2d 647, 651 (N.J. 1976) (appointing guardian but allocating authority to the joint decision-making power of the guardian, family, and the physician under the oversight of the hospital ethics committee). Indeed, these states generally outline health care decision-making standards in their guardianship statues.[10]

As a result, in states without family surrogate statutes, the appointment of a guardian (or guardian ad litem) may be necessary to assert the withdrawal of life-sustaining treatment absent a health care directive. Again, judicial review standards vary greatly by state, so practitioners are encouraged to weigh the financial and emotional costs of attempting to withdraw life-sustaining treatment. Additionally, as noted by the differing results of Quinlan, Tschumy, and Saikewicz, states also vary in what authority a guardian (or a guardian ad litem) has in the decision-making process, careful attention must be paid to the state's developed law. Note also that the determination of state law and the interpretation of statutes in relation to the common law is also diverse among states as some choose to provide that statutes are cumulative of common law so that the elder may avail themselves of the protections provided by both statute and common law; other states make no mention of this cumulative nature. See Jones, supra, § 38 n.99. Therefore, careful analysis is necessary to ensure that the right appointment is sought and that client expectations can be appropriately managed.

VI. UNAUTHORIZED PRACTICE OF LAW

CASE STUDY: I'm a Financial Adviser and I'm Here To Help You.

Luke is considered the most helpful financial adviser in his small farm town. Luke & Associates

strives to put its customers first, going the extra mile for each and every customer. Kristin, a long-time customer of Luke & Associates has two children, a son who farms and a daughter who lives in the city. Kristin recently visited with Luke, and Luke told her about a former client where dad died, leaving his farm to his two children, which required a probate procedure. The seemingly happy children were soon pitted against each other as both wanted to farm the land. As a result, the children do not speak to each other and their relationship is beyond repair; in Luke's words, all because of probate. The children ended up having to sell the farm, which had been in the family for over 150 years.

Upon hearing this story, Kristin wanted to know what could be done to avoid probate and prevent the family from losing the farm. Luke suggested that she establish all of her bank accounts as joint tenants with rights of survivorship with her daughter and draft a transfer on death deed naming her two children as the beneficiaries.

What was not known to Luke, not that it makes any difference, is that Kristin had long ago established a Will giving everything to her son, as he had helped dad farm the land for 30 years and her daughter lived in the cities and had minimal contact with the family. Luke offered up one bit of legal advice, although he said Kristin should not quote him: he said that "it's far better to set up assets in joint ownership arrangements and payable on death designations, since there is a much lower legal standard to meet, than the higher standard to do a Will." But again, he said "don't quote him on that."

A. Unauthorized Practice of Law

Generally speaking, the unauthorized practice of law includes the following activities: 1) preparing legal documents, including deeds, mortgages, leases, trust instruments, wills, etc.; 2) interpreting or expressing legal advice and opinions; 3) preparing or trying cases in front of a court or judge; 4) rendering a service that requires the use of legal knowledge or skill; or 5) using the titles of "lawyer," "attorney," or "esquire." The American Bar Association compiled a list of the definitions by state which can be found at http://www.americanbar.org/content/dam/aba/migrated/cpr/modeldef/model_def_ stat utes.authcheckdam.pdf.

Given the multifaceted work financial advisers do with clients every day, it could be easy to unintentionally cross into areas outside the bound of their profession.[11] For example, an adviser who is retained to assist with financial planning during a divorce may have to contend with areas such as insurance policies, retirement planning, taxes, and other things that might arise. Id. Despite their responsibility to give clients options, however, advisers must be careful not to deviate into legal advice and opinion. Id.

Certified Public Accountants ("CPAs") have to be even more careful, since they are afforded a special exception when it comes to their practice. Id. Treasury Circular 230 gives CPAs the authority to represent clients before the IRS, allowing them to analyze and interpret how tax laws apply to clients and consult with their clients about their interpretations of the law. Id. CPAs need to be wary that their legal advice only extends to tax law and not other areas such as estate planning. Id.

B. Fiduciary Duties of Financial Advisers

The Department of Labor's conflict of interest final rule and related exemptions will protect investors by requiring all who provide retirement investment advice to plans, plan fiduciaries and IRAs to abide by a "fiduciary" standard—putting their clients' best interest before their own profits.[12] This final rulemaking fulfills the Department's mission to protect, educate, and empower retirement investors as they face important choices in saving for retirement in their IRAs and employee benefit plans. Id. Prior to the new rule, only Registered Investment Advisers ("RIAs") were expected to act as fiduciaries. Financial advisers previously operated under a "suitability" standard, a duty to take steps to ensure an investment was suitable for a client, and were able to skirt around the fiduciary requirement by offering "only education" and not broach the "advice" threshold.[13]

Now that the fiduciary standard applies to all advisers when providing recommendations about 401(k) and IRA accounts, current methods of conflicted compensation for brokers are now "prohibited" as they are not conducive to a "best interest" environment. Id. However, there is an exemption to conflicting payment structures or "prohibited transactions" that allows the adviser to continue working with the client even if compensation increases known as the "Best Interest Contract Exemption." Id. Formerly, brokers might have steered clients to products like load mutual funds or

annuities that rendered higher commissions after the sale, and since brokers were previously held to a "suitability" standard of care—not a fiduciary standard—they were not required to offer the "best product," only a suitable one. Id.

There are ten things to consider about the new fiduciary rule[14]:

1. The new rule applies only to retirement accounts, not tax accounts. If you have taxable accounts with your adviser, he or she may not have to act as a fiduciary with respect to those accounts. If you have a traditional stockbroker with just a Series 7 license the "advice" they give need only be suitable. Plus, they can still get a commission on the sale of investments and insurance products in taxable accounts.
2. Advisers who are RIAs regulated by the SEC already have to act as fiduciaries, in the best interest of clients, with respect to investment accounts, including IRAs. And RIAs who give advice to 401(k) plan participants are already regulated by the Labor Department under a law commonly referred to as ERISA. The new rule extends ERISA to include retirement accounts other than employer-sponsored retirement plans, such as IRAs and Roth IRAs.
3. Advisers can still receive commissions on the sale of investment and insurance inside an IRA if they can demonstrate that the investment or insurance product is in the client's best interest. Be prepared to sign a lot of paperwork.
4. Investors should expect or require four things from their adviser: 1) affirm fiduciary status in their advisory agreement in writing, 2) estimate in writing all fees and expenses for the upcoming year and an accounting of the prior year's fees and expenses the client paid and the broker/adviser or firm received, 3) provide a list of conflicts and a written description of how conflicts are managed, and 4) affirm there will be no proprietary produces or principal trading.
5. Expect to see more no-load investments and products.
6. In some cases, advisers will charge more for their advice.
7. An adviser may "fire" their small retirement account clients.
8. Don't fret if there are fewer advisers serving investors after the rule is fully implemented. Going forward there will be a greater number of true advisers relying on better technology providing higher-quality advice.
9. Worst case scenario—short-term inconvenience.
10. Best case scenario—higher quality service.

C. SEC Regulatory Notice 17-11

On March 30, 2017, the SEC issued Regulatory Notice 17-11, which adopts FINRA Rule 2165 (Financial Exploitation of Specified Adults) and amends FINRA Rule 4512.[15] The adoption of Rule 2165 and the amendment to Rule 4512 relating to financial exploitation of seniors will be effective February 5, 2018.

1. FINRA Rule 4512

The amendment to Rule 4512 requires advisers to make a reasonable effort to obtain the name and contact information of a trusted contact person. If the adviser believes their client is victim of financial exploitation they can contact the trusted person:

> (a) Each member shall maintain the following information:
>
> (1) for each account:
>
> (A) customer's name and residence;
>
> (B) whether customer is of legal age;
>
> (C) name(s) of the associated person(s), if any, responsible for the account, and if multiple individuals are assigned responsibility for the account, a record indicating the scope of their responsibilities with respect to the account, provided, however, that this requirement shall not apply to an institutional account;
>
> (D) signature of the partner, officer or manager denoting that the account has been accepted in accordance with the member's policies and procedures for acceptance of accounts;
>
> (E) if the customer is a corporation, partnership or other legal entity, the names of any persons authorized to transact business on behalf of the entity; and
>
> (F) subject to Supplementary Material .06, name of and contact information for a trusted contact person age 18 or older who may be

contacted about the customer's account; provided, however, that this requirement shall not apply to an institutional account.

2. FINRA Rule 2165

Rule 2165 allows, but does not require, advisers to place a temporary hold on a disbursement of funds if they reasonably believe someone over the age of 65 is the victim of financial exploitation. The adviser is required to notify the contact person within two days of the temporary hold unless they believe this person is involved in the financial exploitation.

(a) Definitions

(1) For purposes of this Rule, the term "Specified Adult" shall mean: (A) a natural person age 65 and older; or (B) a natural person age 18 and older who the member reasonably believes has a mental or physical impairment that renders the individual unable to protect his or her own interests.

(2) For purposes of this Rule, the term "Account" shall mean any account of a member for which a Specified Adult has the authority to transact business.

(3) For purposes of this Rule, the term "Trusted Contact Person" shall mean the person who may be contacted about the Specified Adult's Account in accordance with Rule 4512.

(4) For purposes of this Rule, the term "financial exploitation" means:

(A) the wrongful or unauthorized taking, withholding, appropriation, or use of a Specified Adult's funds or securities; or

(B) any act or omission by a person, including through the use of a power of attorney, guardianship, or any other authority regarding a Specified Adult, to:

(i) obtain control, through deception, intimidation or undue influence, over the Specified Adult's money, assets or property; or

(ii) convert the Specified Adult's money, assets or property.

(b) Temporary Hold on Disbursements

(1) A member *may* place a temporary hold on a disbursement of funds or securities from the Account of a Specified Adult if:

(A) The member reasonably believes that financial exploitation of the Specified Adult has occurred, is occurring, has been attempted, or will be attempted; and

(B) The member, not later than two business days after the date that the member first placed the temporary hold on the disbursement of funds or securities, provides notification orally or in writing, which may be electronic, of the temporary hold and the reason for the temporary hold to:

(i) all parties authorized to transact business on the Account, unless a party is unavailable or the member reasonably believes that the party has engaged, is engaged, or will engage in the financial exploitation of the Specified Adult; and

(ii) the Trusted Contact Person(s), unless the Trusted Contact Person is unavailable or the member reasonably believes that the Trusted Contact Person(s) has engaged, is engaged, or will engage in the financial exploitation of the Specified Adult; and

(C) The member immediately initiates an internal review of the facts and circumstances that caused the member to reasonably believe that the financial exploitation of the Specified Adult has occurred, is occurring, has been attempted, or will be attempted.

(2) The temporary hold authorized by this Rule will expire not later than 15 business days after the date that the member first placed the temporary hold on the disbursement of funds or securities, unless otherwise terminated or extended by a state regulator or agency of competent jurisdiction or a court of competent jurisdiction, or extended pursuant to paragraph (b)(3) of this Rule.

(3) Provided that the member's internal review of the facts and circumstances under paragraph (b)(1)(C) of this Rule supports the member's reasonable belief that the financial exploitation of the Specified Adult has occurred, is occurring, has been attempted, or will be attempted, the temporary hold authorized by this Rule may be extended by the member for no longer than 10 business days following the date authorized by paragraph (b)(2) of this Rule, unless otherwise terminated or extended by a state regulator or agency of competent jurisdiction or a court of competent jurisdiction.

(c) Supervision

(1) In addition to the general supervisory and record-keeping requirements of Rules 3110, 3120, 3130, 3150, and Rule 4510 Series, a member relying on this Rule shall establish and maintain written supervisory procedures reasonably designed to achieve compliance with this Rule, including, but not limited to, procedures related to the identification, escalation and reporting of matters related to the financial exploitation of Specified Adults.

(2) A member's written supervisory procedures also shall identify the title of each person authorized to place, terminate or extend a temporary hold on behalf of the member pursuant to this Rule. Any such person shall be an associated person of the member who serves in a supervisory, compliance or legal capacity for the member.

(d) Record Retention

Members shall retain records related to compliance with this Rule, which shall be readily available to FINRA, upon request. The retained records shall include records of: 1) request(s) for disbursement that may constitute financial exploitation of a Specified Adult and the resulting temporary hold; 2) the finding of a reasonable belief that financial exploitation has occurred, is occurring, has been attempted, or will be attempted underlying the decision to place a temporary hold on a disbursement; 3) the name and title of the associated person that authorized the temporary hold on a disbursement; 4) notification(s) to the relevant parties pursuant to paragraph (b)(1)(B) of this Rule; and (5) the internal review of the facts and circumstances pursuant to paragraph (b)(1)(C) of this Rule.

VII. CLIENT JUST DIED OR IS INCAPACITATED; FAMILY MEMBERS OR CAREGIVERS ARE EMPTYING THE HOUSE

CASE STUDY: It Must Be Mine Because I Have It.

Gordon has three children, Charlie, Adam, and Fulton. In late September, the three children helped Gordon move to a nursing home facility. They agree to go over to their father's house over Thanksgiving weekend when Charlie and Adam are back in town to clean the house before putting it up for sale.

The day before Thanksgiving, Charlie and Adam get into town and head over to their father's house to start cleaning. When they arrive they see the house has been completely emptied of all furniture and contents. Charlie and Adam are livid with Fulton for removing the contents of the home. When confronted, Fulton said he had earned the property after taking care of Gordon for the past five years.

The end of life for an elder can put family members, caregivers, and agents at odds with each other. Sometimes, these disagreements—even when well-intentioned—give rise to caregivers or family members emptying the house of the incapacitated or deceased elder. Notwithstanding the emotional pain family members may experience, this emptying can be tantamount to financial exploitation of the elder and probably necessitates the seeking of guardianship/conservatorship[16] to restore the items to the house or the elder's estate.

A. Legitimate Emptying

Remember that the emptying of the house may be appropriate in some circumstances. Generally, executors (or personal representatives) of estates are required to preserve the estate for distribution. Paul M. Coltoff et al., Duties and Liabilities of Representative in General, 34 C.J.S. Executors and Administrators § 274 (2015); see, e.g., In re Estate of Skelly, 725 N.Y.S.2d 666, 668 (N.Y. App. Div. 2001) (finding representative had not preserved the estate where his delay in probating the will resulted in vandalism and damage to property); In re Padezanin, 937 A.2d 475, 481 (Pa. Super. Ct. 2007) (citing Pa. Cons. Stat. Ann. § 3311) (providing that a representative may take possession of even real estate). In other words, theoretically, a representative emptying a house in order to provide for the safekeeping of the items in it could fall within this duty.

For living elders, similar authority is conferred to guardians. See, e.g., Colo. Rev. Stat. § 15-14-401(1)(a); Mass. Gen. Laws Ann. ch. 190B, § 5-423(a)(1); Mo. Stat. Ann. § 475.130(1). Further, an attorney-in-fact may also be authorized by the elder to manage and care for property such that emptying the house would be justified under the power of attorney agreement. See John A. Borron, Durable Power of Attorney, 3 Mo. Prac., Probate Forms Manual, Form 6.1 (2d ed. 2015). In short, some instances of emptying the house by these agents may be legitimate efforts to preserve the property by protecting it from vandalism or other dangers.

B. Illegitimate Emptying

However, there are significant issues when the family member bearing the authority to legitimately empty a house is not the one emptying the house. Indeed, the absence of authority by any family member to take possession of the property (i.e., the elder has become incapacitated and has no power of attorney agreement) does not justify the removal of this property as the property still belongs to the elder. Nonetheless, it is a common occurrence.

1. Criminal and Administrative Penalties

Just as undue influence can be shoehorned into theft as an "unlawful taking of property of another," so too can the removal of property from an elder's home. See, e.g., In re Michael C., No. F047924, 2005 WL 3471797, at *1 (Cal. Ct. App. Dec. 20, 2005) (finding theft conviction appropriate where grandson had taken knife from his grandmother's residence). Beyond this, as stated in section one, the removal of property may also fall under the definition of financial exploitation if the incapacitated adult falls under the appropriate statutory definition. For example, Illinois defines financial exploitation as the "misappropriation of the assets or resources of an elderly person or a person with a disability contrary to law, including . . . misappropriation of assets or resources by . . . conversion." 755 Ill. Comp. Stat. § 5/2-6.2.

Meanwhile, other states, like Alabama, vaguely determine "financial exploitation" in their criminal codes based on the value of "property taken." See Ala. Code § 13A-6-195(a). In fact, 36 states have statutes that criminalize financial exploitation. Hansen et al., supra. Likewise, a majority of states have adult protective services laws providing civil penalties where there was an "illegal, attempted illegal, or unlawful use of a vulnerable adult's property, assets, or funds" or where such illegal conduct was an "immoral" use of the elder's assets. Id. The exact definitions and penalties among states vary, but the general theme is that these financial exploitation statutes (whether criminal or civil) are broad enough to include removal of property from the home, even where the definition of theft might fall short.

2. Guardianship Proceedings

Because guardians are required to protect and preserve property of an incapacitated individual, a concerned family member should consider petitioning for guardianship of the elder when such "self-help" occurs. Because theft can happen quickly, emergency guardianship may be more appropriate. See, e.g., Ky. Rev. Stat. § 387.740(1) (authorizing an emergency appointment of a guardian or conservator where "it appears that there is danger of . . . damage or dissipation to his property if immediate action is not taken."). This quick action can stop the exploitation from occurring by granting a concerned family member the authority to take possession of the property.

Lastly, as a reminder, financial exploitation is often carried out by guardians or those with authority. See supra, Part I.B. In other words, the emptying of the house by the attorney-in-fact, the guardian, or the personal representative may in fact be illegitimate. In this instance, a petition to remove the guardian would be appropriate. Fla. Stat. § 744.474(1)(c) (providing removal is appropriate where guardian has abused his power). When that removal occurs, the original guardian is required to transfer the property in his care over to the new guardian. See, e.g., Fla. Prob. Rules, R. 5.660(c). In short, these guardianship proceedings, together with the above criminal and administrative proceedings, can help stop the illegitimate removal of property and possibly even reverse it.

VIII. TRANSACTIONAL ATTORNEYS HANDLING CASES THAT REQUIRE A LITIGATOR

CASE STUDY: Generous "Gift" to Decedent's "Best Friend."

You are representing the personal representative of the estate, Mr. Joe Fabeetz, and it is a somewhat complicated matter. Joe Fabeetz's father died without a Will, and died owning significant rare and expensive art, interests in a number of different businesses, some of which were minority interests, real estate in his own name, vehicles and precious metals that are the subject of a number of competing claims of both friends and family.

As part of this, you realize that the Joe Fabeetz's father also had a habit of lending money, and in fact had lent nearly $500,000 to his "best friend." Because Joe Fabeetz's father died rather unexpectedly, and because he was dealing with a friend, the documentation evidencing the loan is skimpy at best.

The decedent's "best friend" refuses to return any of the money claiming it was not a loan. The estate, clearly believing that it is a loan, commences a suit

on behalf of the estate against the decedent's friend to collect the money.

The case is venued in probate court, and the attorney defending the case for borrower defends it in probate court without having actual knowledge of the policies and procedures for litigating in probate court. It becomes clear that he is a transactional probate lawyer, and really well outside of his comfort zone. This results in incomplete discovery, failure to follow procedural rules, failure to timely file required probate notices, and greatly hampers your ability to resolve what you now litigation process has resulted in significant unnecessary fees and costs to the estate.

A. Options

1. Follow Case Through to the End

Move forward with the discovery obtained and make the best argument with the evidence available.

2. Motion for Sanctions

If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee. Fed. R. Civ. P. 11 (c)(1).

Rule 11(b) states:

> By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

1. It is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
2. The claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
3. The factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
4. The denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates. Id. at (c)(2).

3. Bring in a Neutral Third Party

Bringing in a neutral third party is often more efficient in terms of time and cost than litigation.

a. Mediation

Mediation is effective when opposing counsel have an amicable relationship and are open to negotiation. Mediation is not legally binding, and any settlement reached is an agreement between the parties.

b. Arbitration

Arbitration is more formal than mediation and the final decision may be binding or non-binding.

4. Have a Candid Conversation with Counsel

Opposing counsel likely knew that previous counsel was out of their comfort zone and made mistakes that even an attorney with minor litigation experience would avoid. Correcting the errors made by previous counsel may be as simple as having a conversation with opposing counsel. As mentioned previously, clients are best served when opposing counsel is professional and opposing counsel may make extend a courtesy by allowing further discovery or correct any other mistakes made by previous counsel.

B. Competence

MRPC 1.1 states:

> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Comment [1]: In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, the relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study

the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

C. Legal Malpractice

1. Elements

In general, to prove a legal malpractice claim, the client must establish that: 1) the existence of an attorney-client relationship; 2) a breach of duty by the attorney; 3) damage to the client; and 4) the damages were the proximate result of the attorney's breach. Ryan Contracting Co. v. O'Neill & Murphy, LLP, 883 N.W.2d 236, 242 (Minn. 2016)

2. Damages Occur Upon Signing of Documents

Security Bank & Trust Company v. Larkin, Hoffman, Daly & Lindgren, Ltd., 2017 WL 2063013 (Minn. Ct. App. 2017):

In 2009, decedent Gordon Savoie sought estate-planning assistance from respondent law firm Larkin, Hoffman, Daly & Lindgren, who drafted a revocable trust and will for Savoie. The trust directed that approximately 45 percent of the undistributed estate be distributed to a beneficiary who was more than 37.5 years younger than Savoie, but did not contain a provision for a generation-skipping trust or other mechanism for avoiding a generation-skipping tax.

After Savoie's death, appellant Security Bank & Trust commenced a malpractice action against Larkin Hoffman alleging that because Larkin Hoffman failed to advise Savoie of the tax implications of a generation-skipping tax, he missed opportunities to provide for alternative estate dispositions to avoid the tax, such as using sophisticated estate planning techniques to reduce the size of his estate, or arranging a different tax-payment methodology to shift the burden of the generation-skipping tax and as a result of Larkin Hoffman's negligence, the estate had been required to pay approximately $1.654 million in generation-skipping transfer taxes.

Larkin Hoffman moved for judgment on the pleadings arguing the bank lacked standing to pursue a malpractice action because no damages had occurred before Savoie's death, so that no cause of action for legal malpractice accrued during his lifetime, and therefore no cause of action existed to which the personal representative might succeed.

The district court dismissed the matter on the pleadings concluding that the bank lacked standing to sue as personal representative because: 1) any cause of action for malpractice based on the failure to advise Savoie about the possibility of a generation-skipping tax on his estate did not cause compensable damage before his death; so that 2) no malpractice action accrued before he died; and 3) a cause of action for legal malpractice that does not accrue before death does not survive. Security Bank appealed.

Pursuant to Minnesota Probate Code, "Except as to proceedings which do not survive the death of the decedent, a personal representative of a decedent domiciled in this state at death has the same standing to sue and be sued . . . as the decedent had immediately prior to death." Minn. Stat. § 524.3-703(c). Under the survival statute, a personal representative may generally maintain a suit for legal malpractice against the decedent's lawyer. Prof'l Fiduciary, Inc. v. Silverman, 713 N.W.2d 67, 71 (Minn. App. 2006), review denied (Minn. July 19, 2006).

The Minnesota Supreme Court has noted, different jurisdictions have articulated three alternative thresholds for determining when a cause of action for malpractice accrues: 1) under the traditional "occurrence" rule, which assumes that nominal damages occur, the cause of action accrues, and the statute of limitations starts to run, at the time of the negligent act; 2) the "discovery" rule, under which the cause of action accrues when the plaintiff knew or should have known of the injury; and (3) the "damage" rule, under which the cause of action accrues "when 'some damage has occurred as a result of the alleged malpractice.' " Antone v. Mirviss, 720 N.W.2d 331, 335-36 (Minn. 2006) (quoting Herrmann v. McMenomy & Severson, 590 N.W.2d 641, 643 (Minn. 1999)). Minnesota adheres to the rule requiring "some damage" to occur for a cause of action to accrue. Id. at 338. Dalton, 280 Minn. at 154, 158 N.W.2d at 585 (quotation omitted).

On appeal, the Minnesota Court of Appeals concluded that because Savoie incurred "some damage" at the time that he signed the will and trust, he had a cause of action for legal malpractice that accrued at that time based on the advice given to him by his attorneys. And after his death, that cause of action survived to the personal representative of his estate by operation of the survival statute. See Minn. Stat. § 524.3-703(c).

Therefore, Security Bank as personal representative had standing to assert a claim for legal malpractice based on allegedly negligent advice.

In reaching this conclusion, the Court noted that different jurisdictions have addressed this issue with varying approaches. The Texas Supreme Court has held that no legal bar existed to prevent the personal representative of an estate from maintaining a legal-malpractice action against the decedent's estate planning attorneys. Belt v. Oppenheimer, Blend, Harrison & Tate, Inc., 192 S.W.3d 780 (Tex. 2006); see also Estate of Schneider v. Finmann, 933 N.E.2d 718 (N.Y. 2010) (holding that the personal representative has sufficient privity with a decedent's attorney to maintain a legal-malpractice action for damages resulting from negligent estate planning, which allegedly caused enhanced estate-tax liability). On the other hand, the Virginia Supreme Court has held that a cause of action for estate-planning malpractice did not come into existence during the testator's lifetime because the alleged injury, increased taxation of the estate, arose only after her death. Rutter v. Jones, Blechman, Woltz & Kelly, P.C., 568 S.E.2d 693 (Va. 2002); see also Jeanes v. Bank of Am., N.A., 295 P.3d 1045 (Kan. 2013) (holding that a claim for legal malpractice based on negligent estate planning did not accrue until after the decedent's death). Our resolution of this issue is consistent with the majority viewpoint that the estate succeeds to the legal malpractice action of the deceased client. See Mallen, supra, § 36:9, at 1295

Notes

1 The Boomer Project (http://www.boomerproject.com).

2 Six jurisdictions hold that a presumption of undue influence can never be raised: the District of Columbia, Indiana, Iowa, Montana, North Dakota and West Virginia. See, e.g., Farner v. Farner, 480 N.E.2d 251 (Ind. Ct. App. 1985); Matter of Estate of Dankbar, 430 N.W.2d 124 (Iowa 1988); Stanton v. Wells Fargo Bank Mont., N.A., 152 P.3d 115 (Mont. 2007); Matter of Estate of Polda, 349 N.W.2d 11 (N.D. 1984); Cale v. Napier, 412 S.E.2d 242 (1991). Note that Wisconsin recognizes an inference of undue influence but not necessarily a presumption. In re Estate of Drexler, 664 N.W.2d 683 (Wis. Ct. App. 2003).

3 Hansen, Kevin E.; Hampel, Jonathan; Reynolds, Sandra L.; and Freeman, Iris C. (2016) Criminal and Adult Protection Financial Exploitation Laws in the United States: How Do the Statutes Measure Up to Existing Research?,» Mitchell Hamline Law Review*:* Vol. 42 : Iss. 3, Article 3.

4 States that have not enacted the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act include Florida, Kansas, Michigan, Texas, and Wisconsin. Uniform Law Commission, Adult Guardianship and Protective Proceedings Jurisdiction Act Summary, http://www.uniformlaws.org/Act.aspx?title=Adult%20Guardianship%20and%20Protective%20Proceedings%20Jurisdiction%20Act (last visited May 2, 2017).

5 Karen Dorman Marek; Lisa Antle. "Patient Safety and Quality: An Evidence-Based Handbook for Nurses." (2008).

6 Qato DM, Wilder J, Schumm LP, et. al. "Changes in Prescription and Over-the-Counter Medication and Dietary Supplement Use Among Older Adults in the United States, 2005 vs 2011." JAMA Intern Med 2016; 176:473.

7 Meier P., Seitz HK. "Age, alcohol metabolism and liver disease." Curr Opin Clin Nutr Metab Care. 2008 Jan, 11(1):21-6

8 Only Massachusetts, Minnesota, Nebraska, New Hampshire, New Jersey, Rhode Island, and Vermont have not enacted surrogate decision-making statutes. ABA Comm'n L. & Aging.

9 See supra, note 3.

10 Mass. Gen. Laws ch. 190B, § 5-309(a) (substituted judgment followed by best interest standard); Minn. Stat. Ann. § 524.5-313(4)(i) (modified substituted judgment standard); Neb. Rev. Stat. § 30-2628(a)(3) ("intent of the ward expressed prior to incompetency"); N.J. Stat. § 3B:12-56(d) ("consistent with the wishes of the ward" followed by best interests standard); R.I. Gen. Laws § 33-15-29 (best interests standard); Vt. Stat. tit. 14, § 3069 ("The wishes, values, beliefs, and preferences of the person under guardianship shall be respected to the greatest possible extent in the exercise of all guardianship powers."). Note that New Hampshire does not define the health care decision-making authority of guardians by statute. American Bar Association Commission on Law and Aging, Health Care Decision-Making Authority: What is the Decision-Making Standard? (2015), http://www.americanbar.org/content/dam/aba/administrative/law_aging/What_is_the_Decision_Making_Standard.authcheckdam.pdf. To understand standards by which guardians, health care agents, and surrogates are held across states, see generally *id*.

11 Cordel, Joseph. Financial Adviser. "Toeing the Line." December 2014.

12 U.S. Department of Labor. "Fact Sheet: Department of Labor Finalizes Rule to Address Conflicts of Interest in Retirement Advice, Saving Middle Class Families Billions of Dollars Every Year." (2016).

13 Menickella, Brian. "How the DOL's Fiduciary Rule Will Impact Your Retirement Accounts." Forbes. 6 June 2016.

14 Powell, Robert. "New rules force financial advisers to do what's best for their clients." USA Today. 6 April 2016.

15 Regulatory Notice 17-11. Financial Industry Regulation Authority. March 30, 2017.

16 As terminology differs among states, "guardianship" will be used to convey control over the incapacitated person's property.