ESTATE PLANNING FOR THE CRITICALLY ILL CLIENT

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In 1990-91, she worked as a Supreme Court Fellow for Chief Justice William H. Rehnquist. Before she began teaching law, she practiced as an associate attorney at the Atlanta firm of Hansell & Post, 1981-84. Prior to attending law school, Radford taught English and French at two Atlanta high schools.

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I. INTRODUCTION

Representing critically ill clients is both challenging and rewarding. Someone who is near death is, by definition, either mentally or physically frail, or possibly both. Therefore, near-death testamentary changes run the risk of being challenged for lack of testamentary capacity and undue influence. In anticipation of these challenges, attorneys need to follow their standard best practices and be extra cautious to document their files in case they are ever called to testify to prove their client had capacity. Given the current pandemic, meeting with the client and executing documents in conformance with best practices is increasingly difficult.

II. COUNSELING A CRITICALLY ILL PATIENT AND THEIR FAMILY

A. Identify client

It is common for family members or friends of a critically ill individual to reach out to an estate planning attorney. Following said conversation, the attorney should contact the critically ill individual, the potential client, to confirm his or her wishes. If possible, meet with the potential client alone and in person (or Zoom). Ask open-ended questions to confirm that the information previously provided by the potential client's family member or friend aligns with the client's wishes. For example, instead of asking "do you want your assets distributed in equal shares to your children," ask, "how would you want your assets distributed at your passing?"

Prepare an engagement letter that defines the legal relationship and scope of representation. Confirm whether you have the client's authorization to speak with other family members or third parties. Discuss what information should and should not be provided to parties other than the client. The amount of information provided to family members may vary based on the client and the family situation. Some families will benefit from increased transparency while in other families increased transparency will cause more conflict.

B. Assess 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.[2]

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.[3] 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.[4]

The terms "capacity" and "competency" are used differently in different states. In some states, c*ompetency* refers to the mental ability and cognitive capabilities required to execute a legally recognized act rationally. The determination of incompetence is a judicial decision, i.e., decided by the court.[5] An individual adjudicated by the court as incompetent is referred to as *de jure incompetent*. In those states, *capacity* is determined by a physician, often (although not exclusively) by a psychiatrist, and not the judiciary.[6] Capacity refers to an assessment of the individual's psychological abilities to form rational decisions, specifically the individual's ability to understand, appreciate, and manipulate information and form rational decisions.[7] The patient evaluated and found by a physician to lack capacity to make reasoned medical decisions is referred to as *de facto incompetent*, i.e., incompetent in fact, but not determined to be so by legal procedures.[8]

In other states, the term *capacity* is used to define the legal ability of an individual to enter into a binding transaction (e.g., make a will, sign a contract, marry).

> 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.

1. Lawyer's Duty to Assess Capacity

a. In re Hughes Revocable Trust, 2005 WL 2327095 (Mich. App. 2005): The 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. The attorney had a "responsibility to assess his client's mental capacity."

b. San Diego County Bar Association Ethics Opinion 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."

c. Logotheti v. Gordon, 607 N.E.2d 1015, 1018 (Mass. 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."

d. Norton v. Norton, 672 A.2d 53 (Del. 1996) (dicta): The 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."

C. Assess undue influence

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.[9]

Unfortunately, many times the individuals the client trusts are the ones exerting undue influence. Most states recognize that some kind of presumption for undue influence arises from the presence of some elements of undue influence.[10] Four states recognize a presumption of undue influence when the contestant proves that the testator and the influencer had a confidential relationship and the influencer received unconscionable benefits from the testator's post-death distribution plans.[11] Twenty-two states recognize a presumption of undue influence when the contestant shows the testator had a confidential relationship with the influencer, who in turn procured post-death benefits from the testator that were unconscionable.[12] Generally, the presumption arises when there is a confidential relationship between the testator and the person encouraging death-bed 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).

Practitioners recognize that attorneys-in-fact are *not* immune from unduly influencing the principal-testator they have been selected to protect.[13] 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.[14] As a reminder, undue influence analysis 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."[15] That is, undue influence is not limited only to wills but also to will substitutes.

III. ESTABLISHING THE ESTATE PLAN

Like most clients, critically ill individuals often reach out to have a will prepared, and do not mention a power of attorney or health care directive, which may be of greater importance.

A. Will

CASE STUDY

Lois calls frantically asking for your assistance in preparing a will for her husband, James. Lois and James just met with the doctor and the doctor believes James will not survive past the weekend. James and Lois own a home jointly, have a joint checking and savings account, and James has a pension and retirement account that lists Lois as the primary beneficiary.

Determine whether a will is needed for the client's assets to be distributed according to their wishes. In first marriages with all common children it is possible assets will pass to the surviving spouse as joint owner or primary beneficiary. Alternatively, the laws of intestate succession may align with the client's wishes. If it is determined a will is not necessary, the client can spend their final moments with family knowing their wishes will be followed.

Another important consideration is updating beneficiary designations. While it is possible to draw up, review, and execute a will in a short amount of time, it may take considerable time to obtain, complete, and submit beneficiary designation forms. Companies have different policies regarding accepting beneficiary forms signed prior to death but received and processed after death.

In certain instances the only probate asset an individual has is their homestead. In states that authorize

Transfer on Death Deeds it is important to inform the client the deed is not effective until recorded, which may take longer than usual because of the pandemic.

B. Power of attorney

A power of attorney (POA) is a legal document in which an individual (the principal) authorizes a third party (the agent or attorney-in-fact) to manage his or her property as if it were his or her own property. Many states have a statutory form that may be obtained online. The POA is effective while the principal is living; upon death, the agent's authority terminates. If the critically ill individual does not have capacity, a conservator would need to be appointed to manage the individual's assets. Given the client's prognosis and the length of time required to be appointed by the Court, this may not be a viable option.

C. Health care directive

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.[16] The health care directive (HCD) is commonly referred to as the health care power of attorney, living will, or health care proxy. The HCD serves three main roles, it: (1) nominates a client's health care agents, (2) sets forth a client's wishes about his or her medical care, and (3) contains a Health Insurance Portability and Accountability Act (HIPAA) release, which allows medical professionals to disclose a client's medical information to his or her health care agents.

Most states have a suggested statutory HCD form, but many forms exist in each community, including Honoring Choices and 5 Wishes. The balance between the different forms is about specificity versus centralized authority. The medical profession highly regards the client's exact words and directions. The downfall of such a form is the client often will stall out on the execution of such a labor-intensive form. A shorter form that has sweeping powers and appoints an agent to act for the client in all capacities is easier for the client to comprehend and sign. What is lost is evidence of the actual character of the client to reflect upon when tough choices are made.

Many states statutorily empower select family members to make treatment decisions on behalf of an incapacitated person when no HCD exists.[17] These are called "surrogate decision-making" or "family decision-making" statutes.[18]

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.[19] Meanwhile, a minority of states require "clear and convincing evidence" a la Cruzan to show the person's actual wishes.[20] 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.[21] Most of these statutes allow a "best interests" standard as a fallback to the substituted judgment standard.[22]

The tension between surrogate decision-making statutes and HCDs is an important one: the two function as alternatives, not concurrently. In other words, if the incapacitated person has an HCD, 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.[23] In those 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.

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).[24] 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.[25]

In cases where no surrogate decision-making statute operates, 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.[26] Indeed, these states generally outline health care decision-making standards in their guardianship statutes.[27]

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 an HCD. 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 the Quinlan, Tschumy, and Saikewicz cases, states also vary in what authority a guardian (or a guardian ad litem) has in the decision-making process, so careful attention must be paid to the individual 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 client may avail themselves of the protections provided by both statute and common law; other states make no mention of this cumulative nature.[28] Therefore, careful analysis is necessary to ensure that the right appointment is sought and that client expectations can be appropriately managed.

D. POLST.

A "Physician Order for Life-Sustaining Treatment" (POLST) is a medical order that results from conversations between a patient who has a serious illness or frailty and the patient's physician concerning the patient's end-of-life care.[29] POLSTs are currently endorsed by statute, regulations, or clinical consensus in 16 states and exist in some form in every state.[30] POLSTs deal with end-of-life and other medical care by creating a set of specific medical orders in line with the patient's wishes that will be followed by other health care professionals in a medical crisis or end-of-life situation. The medical orders decrease the need for interpretation and translation of a patient's wishes as stated in the patient's health care directive and also decrease the variability in treatment courses followed by different medical professionals.

A typical POLST statute provides the process for establishing the POLST, the participants in the process, and the effect of the POLST, and may include a sample POLST form. POLSTs begin with a conversation or series of conversations between an attending physician and a patient who has “-decision-making capacity.” If the patient lacks decision-making capacity, the POLST may be consented to and signed by an “"authorized person”" (e.g., anyone who may otherwise consent to the patient's medical treatment, such as a “"do not resuscitate”" order (DNR) on behalf of a patient).

The POLST form is typically executed when the patient “has a serious illness or condition and the attending physician's reasoned judgment is that the patient will die within the next 365 days.” However, if the patient has been diagnosed with “dementia or another degenerative, progressive disease or condition that attacks the brain and results in impaired memory, thinking, and behavior,” the POLST may be executed at any time. The order contains detailed instructions on whether the patient should be resuscitated, whether antibiotics should be administered, whether comfort measures should be used, etc.

Ideally, the POLST is printed on a brightly colored form (pink) that is easily available at the patient's home (so that emergency medical technicians can access it) and that travels with the patient to any medical institution.

Studies have shown that POLST forms have been found to garner higher adherence by medical

personnel than traditional advance directives and to convey a patient's end-of-life preferences more accurately than the patient's own health care directive.[31]

IV. AMENDING ESTATE PLANNING DOCUMENTS

A. Contesting validity of amendment

CASE STUDY:

In 2005, Pa Joad and Ma Joad establish a joint trust to distribute their estate to their children in equal shares, omitting their son, Tom, who was in prison. The main asset of the Joad's estate was the family farm worth approximately $1 million. In 2007, Tom was released from prison and moved in with his parents. In 2010, the Joads amend their trust to give Tom, who worked on the farm for the previous three years, the right to purchase the farm. In 2015, Pa Joad became ill and his four other children, not including Tom, tried to move Pa into a nursing home. Pa died a few months later. In 2020, Ma contacts you to update her trust to give the farmland outright to Tom upon her passing.

If there are major changes in the distribution of an individual's estate from previous versions of their will/trust, it is possible that an individual who was subsequently omitted or whose share was reduced will challenge the validity of the amended document, especially if he or she had a copy of previous versions of the documents. Likewise, a prior will that is similar to the new one is obviously of great help.

The attorney should do all that is necessary to provide context to the change in case there is litigation after the client passes:

1. Get to know the client. This means finding out the 'why' of every bequest or devise and duly recording the reasons.
2. Determine the client's mental state. Doctors have a simple mental status examination for this purpose. In the difficult case, verify that the client knows where he or she is, the date and time, the client's date and place of birth, and some memory test of present and past events. Ask about close relatives and determine the testator's attitude toward them. This can be done unobtrusively so the lawyer is satisfied that the client is oriented.
3. Take extensive notes. Remember, the attorney will be able to testify eloquently on behalf of the deceased client at a trial contesting the will.
4. Interview the client more than once. Avoid having the will signed on the same day as the first interview. Two or more client interviews tend to bolster the attorney's credibility.
5. Interview the client when no one else is present.
6. Probe for fears, anxieties, and unnatural reactions.
7. Discuss generally the testator's assets and take accurate notes, because one of the essential requirements of testamentary capacity is knowing the extent and value of one's property.
8. Ask the client about previous physical or mental problems and the names of the treating physicians or other professionals. Identify all drugs the client is taking. Determine if there have been any hospitalizations within the past year and whether there are any expected in the near future.
9. Determine if an earlier will exists and why changes are being made. Are the changes reasonable under the circumstances? Any beneficiary in an earlier will is a potential will contestant.[32]

B. Updating beneficiary designations

For individuals with trusts, it is important to confirm that assets were properly titled into the trust and that the trust is listed as the beneficiary on certain accounts. If the critically ill individual is an existing client and this has already been completed, the update may only consist of an amendment or restatement.

For individuals with wills, the attorney should confirm the client's assets prior to the signing and

obtain as many change of beneficiary forms prior to the signing as possible.

V. EXECUTING ESTATE PLANNING DOCUMENTS

A. Remote online notarization

Certain states allow remote online notarization for estate planning documents. With remote online notarization (RON), face-to-face contact can be satisfied online using audiovisual technology such as a webcam; the signer can be in another town, another state or even another country.[33] Below is a step-by-step description of a typical remote online notarization:

1. The signer contacts the notary or a RON service provider to request a remote online notarization.
2. The signer's document is sent to the notary so it can be signed and notarized. Typically, the document is uploaded in an electronic format such as PDF to the online technology platform used to perform the notarization.
3. The signer's identity is screened according to the requirements of the notary's commissioning state. This may include answering questions based on the signer's personal and credit history (KBA), verifying the signer's identification documents online (credential analysis), the notary remotely viewing the signer's ID during the notarization, or other RON identification methods set by statute.
4. During the remote online notarization, the notary and the signer communicate online using audiovisual technology—for example, via webcam. The notary and signer do not meet face-to-face.
5. Once the signer's identity has been verified and all other requirements for the notarization have been completed, both the signer and the notary must sign the document and the notary's seal attached. For electronic documents, this requires electronic signatures and an electronic version of the notary's seal.
6. The notary records any required information for the notary's journal records. The notary must typically also retain an audio and video recording of the notarization session.
7. The remotely notarized document is returned to the signer.[34]

B. Minimal statutory requirements

CASE STUDY:

You get a call from your client, Henry, one week before your scheduled signing meeting, stating his illness has progressed, and he is now in the hospital. Because of the pandemic, the hospital is limiting visitations to family members only. Henry requests that his documents be emailed to his son, William, who will print the documents and bring them to the hospital for Henry to execute. Henry's will devises everything to William and his sister, Vivienne, omitting his third child, Lola.

Prior to the pandemic, clients would typically go to the attorney's office to execute their documents in the presence of two disinterested witnesses and a notary. The attorney would confirm the client had capacity to execute the documents and ensure the documents were executed in compliance with state law.

Following the above formalities may not be an option for critically ill clients, especially during the pandemic. If the client is in the hospital, confirm whether a hospital employee is able and willing to serve as a witness or notary. The attorney should research the minimal statutory requirements to ensure the documents are valid under state law. For example, in Minnesota a will must be signed in the presence of two witnesses; an interested person may serve as a witness.[35] In response to the pandemic, Minnesota adopted the Harmless Error Rule, which removed the requirement that a will be signed in the presence of two witnesses provided the will was executed on or after March 13, 2020, but before February 15, 2021.[36]

If the client is executing the documents outside the attorney's physical presence, it is advisable for the attorney to participate remotely in the execution process by telephone or preferably by an audio-visual app (e.g., Microsoft Teams, Zoom, Skype). Even if the attorney cannot serve as a notary or witness, he or she is able to speak with the client to assess capacity and document his or her file, in case the client's capacity is ever questioned.

VI. STANDBY GUARDIANSHIP

CASE STUDY:

Barbara Keller is a single mother of six-year old Agatha. Agatha's father disappeared soon after Agatha's birth and his parental rights have been terminated. Barbara has been holding down a part-time job and Barbara's best friend, Kate, has been helping to care for Agatha in her home, along with her own two minor children. Sadly, Barbara has been diagnosed with an aggressive cancer and has only been given a few months to live. Barbara's illness is progressing to the point that she may soon no longer be able to make important decisions regarding Agatha's welfare, although she still wants to stay involved in Agatha's care. Barbara and Agatha have moved in with Kate. Kate has expressed her willingness to become Agatha's guardian after Barbara's death. Barbara's mother, who has never approved of Barbara's "lifestyle," has also expressed an interest in taking over Agatha's care after Barbara's death, in order to be sure that Agatha is brought up in a "stable, religious household."

Standby guardianship legislation allows a parent or guardian who suffers from a progressively chronic or irreversibly fatal illness to ensure the current, effective appointment of a guardian of the person or property of his or her minor children to act sometime in the future during the lifetime of the parent, without affecting existing parental rights. The primary motivation behind the introduction of such legislation has been the proliferation of degenerative, incurable diseases, such as HIV/AIDS, cancer, multiple sclerosis, and muscular dystrophy among individuals with minor children. The need is particularly acute for single parents, typically single mothers caring for their children alone.[37]

In most states, prior to 1997, a parent could not have a guardian appointed for her child without relinquishing her own parental rights. Standby guardianship laws were a reaction to two growing demographic trends in the 1980s and1990s: the surge of single parenthood and the AIDS epidemic. According to the Pew Research Center's analysis of 2010 Census statistics, almost 25% of U.S. children under the age of 18 live with a single parent. The vast majority of these single parents are women.

In March 2020, UNAIDS issued a report showing that AIDS remains the world's leading cause of death for women in their childbearing years. Mothers with fatal AIDS-related illnesses were often faced with only two choices during their remaining lifetimes: either relinquish custody and control and their parental rights so that another person could be appointed the child's guardian or retain those rights and depend upon a friend or relative who had no legal authority to make important decisions concerning the child's welfare. Additionally, although most states allow a parent to nominate a testamentary guardian for a child, the nomination does not take effect until after the parent's death and, in many states, is subject to the court's authority to choose someone other than the nominee.

Since 1997, over 30 states have enacted some type of standby guardianship statute. The Uniform Guardianship and Protective Proceedings Act (UGPPA) (1997) contains provisions for the appointment of a standby guardian that have been adopted in five states and the District of Columbia. The approaches in the states vary in many ways, including primarily: 1) who may use a standby guardianship; and 2) the degree to which a court is involved.

All states that have standby guardianship laws allow the parent of a minor child to take advantage of the opportunity to appoint a standby guardian to care for the child jointly with the parent while the parent

is still alive. The parent must be either the only surviving parent of the child or the only parent whose parental rights have not been terminated. If there is another surviving parent whose parental rights are intact, some states allow that parent to consent to the appointment of the standby guardian. Some states extend the right to appoint to the child's legal custodian, guardian, or primary caretaker.

The UGPPA also allows the parent of an unmarried adult child or an adult's spouse to appoint a standby guardian for the adult if the appointing parent or spouse "believes [the adult] is an incapacitated person." As noted in the Comment to UGPPA Sec. 302, "this section is very useful, especially for parents of developmentally disabled children. . . . This section is also useful for a spouse of an individual stricken by Alzheimer's disease, when the spouse no longer is able to care for the Alzheimer's victim."

The designation of a standby guardian does not affect the parent's legal rights and responsibilities. The standby guardianship statutes usually contemplate a "triggering event" that will cause the appointment to become effective. While not required in some states, all state guardianship statutes provide a mechanism by which the court will actually appoint the standby guardian or confirm the appointment. The opportunity to be heard by the court provides an added safety mechanism to ensure that the testamentary guardian nominated by the parent in the parent's will is the individual whom the court eventually appoints to serve as permanent guardian. As described by Joshua S. Rubenstein:

> A mechanism for the judicial appointment of a standby guardian by the court during the lifetime of a parent or guardian is a necessary statutory feature. The ability to settle issues relating to a child's custody as early as possible provides peace of mind to a parent or legal guardian. It also permits the preservation of the testimony of the parent or guardian, particularly when the parent's or guardian's choice of standby guardian does not seem like a natural choice (e.g., when the surviving parent or guardian is allegedly unfit).

Some states and the UGPPA require that notice of the filing of a standby guardianship petition be given to the minor if the minor is of a certain age (14 or 12 years old).

Some of the state standby guardianship statutes provide provisions for the revocation of the designation or the renunciation by the designated standby guardian.

VII. CONCLUSION

While planning for critically ill clients typically involves an expedited process, the process should be more involved than an initial telephone call followed by a signing meeting. The attorney should meet or speak with the client individually on multiple occasions before executing the documents. The attorney should be cognizant of the potential for litigation and document their file accordingly to ensure the client's wishes are followed.

Notes

1 The authors wish to thank Ryan M. Prochaska, Esq., Chestnut Cambronne PA, for his invaluable assistance in writing this article.

2 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).

3 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. § 24:246 (6th ed. 2021); Romualdo P. Eclavea et al., Opportunity to Change Will; Deathbed Will, 64 Cal. Jur. 3d Wills § 176 (2021).

4 See Carew, supra.

5 Id.

6 Id.

7 Id.

8 Id.

9 Michael J. Cote, Under Influence in Execution of Will, 36 Am. Jur. Proof of Facts 2d 109, § 1 (2020).

10 Eunice L. Ross and Thomas J. Reed, Undue Influence, Will Contests § 7:10 (2d ed.) (June 2020).

11 Id. (CT, KY, MS, UT).

12 Id. (AL, AK, AZ, AR, CA, DE, FL, GA, HI, ID, IL, KS, MA, MI, MS, MO, NM, OK, SD, TN, VT, WV).

13 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).

14 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).

15 Ross and Reed, supra, § 9:9.

16 Catherine J. Jones, Decisionmaking at the End of Life, 63 Am. Jur. Trials 1, § 38 (2021).

17 Only Massachusetts, Minnesota, Missouri, and Rhode Island have not enacted surrogate decision-making statutes. Default Surrogate Consent Statutes, ABA Comm'n L. & Aging (2019).

18 Aaron N. Krupp, Health Care Surrogate Statutes: Ethics Pitfalls Threaten the Interests of Incompetent Patients, 101 W. Va. L. Rev. 99, 108–09 (1998).

19 Charlie Sabatino and Erica Wood, American Bar Association, Surrogate Decision-Making and Advance Directives—Nuts and Bolts, National Aging and Law Conference (2010).

20 Id.

21 Ala. Code § 22-8A-11(c); see also, e.g., Fla. Code §§ 765.205(1)(b), 765.401(3).

22 See Sabatino and Wood, supra; see also e.g., Fla. Code § 765.205(1)(b).

23 See Aaron N. Krupp, supra, 108–09.

24 See Jones, supra, § 38.

25 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 (2021); see also U.S. Congress, Office of Technology Assessment, Life Sustaining Technologies and the Elderly, OTA-BA-306, 120–22 (1987).

26 See, e.g., Superintendent of Belchertown State Sch. v. Saikewicz, 370 N.E.2d 417, 419, 435 (Mass. 1977) (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); In re Guardianship of Tschumy, 853 N.W.2d 728, 745 (Minn. 2014) (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).

27 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) To understand standards by which guardians, health care agents, and surrogates are held across states, see generally id.

28 See Jones, supra, § 38 n.99.

29 POLSTs may be referred to by other names and acronyms, including Physician Orders for Scope of Treatment (POST), Medical Order for Life-Sustaining Treatment (MOLST), Medical Orders for Scope of Treatment (MOST), or simply "Portable Medical Order." For more information about POLSTs, see http://www.polst.org (the website for the National POLST paradigm) and www.gapolst.org (the website for the Georgia POLST Collaborative). See also POLST Legislative Guide, issued by the National POLST Paradigm Task Force in February, 2014 (updated 2019), at https://polst.org/wp-content/uploads/2020/11/2020-POLST-Legislative-Guide.pdf

30 See http://www.polst.org. Most other states are now considering POLST legislation or regulations.

31 Patricia A. Bomba, Marian Kemp, and Judith S. Black, POLST: An Improvement over Traditional Advance Directives, 79 Clev. Clinic J. Med. 457 (July 2012).

32 John L. Carroll and Brian K. Carroll, Avoiding the Will Contest, 8 Prob. & Prop., May/June 1994 at 61-62.

33 David Thun, The State of Remote Online Notarization, Notary Bulletin (Nov. 19, 2019), available at https://www.nationalnotary.org/notary-bulletin/blog/2019/11/the-state-of-remote-online-notarization.

34 David Thun, How to Perform A Remote Online Notarization, Notary Bulletin (Dec. 16, 2019) (updated Jan. 11, 2021), available at https://www.nationalnotary.org/notary-bulletin/blog/2019/12/how-to-perform-a-remote-online-notarization?content_type=1&position=2&NNAID=153336141.

35 Minn. Stat. § 524.2-502(3).

36 Minn. Stat. § 524.2-503(b).

37 Joshua S. Rubenstein, Standby Guardianship Legislation – Summer 2019, 12 Est. Plan. & Community Prop. L. Jnl. 287.