

Elder Financial Abuse, Guardianship Litigation, and the Pre-Death Will Contest

By

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I. Elder Financial Abuse – The Perfect Storm.

A. We're getting older.

1. In 1900, there were 3,080,498 older persons (age 65 and over) that made up 4.1% of the population. By 2010, that number has grown to 40,228,712 (13% of the population). By 2050, that number is projected to grow to 88,546,973 (20.2% of the population). There will be a sharp increase from 2010 to 2030 as the “baby boom” generation reaches age 65.
2. Persons reaching age 65 now have an average life expectancy of 18.6 years (19.8 for women and 17.1 for men). A child born in 2007 can expect to live 77.9 years, about 30 years longer than a child born in 1900 (while much of this is due to reduced death

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rates for children, there has also been a sharp decline in death rates for persons age 65-84).

3. 72% of older men are married, but only 42% of older women are married. 42% of older women are widows. In 2008, there were over four times as many widows (8.8 million) as widowers (2.2 million).
4. In 2008, 30.5% (11.2 million) of all non-institutionalized older persons lived alone. 50% of older women live alone. Only 28.9% of women over age 75 live with a spouse.
5. In 2008, more than 50% of all older persons lived in just nine states: California (4.1 million), Florida (3.2 million), New York (2.6 million), Texas (2.5 million), Pennsylvania (1.9 million), and Illinois, Ohio, Michigan, and New Jersey (each over 1 million).²

B. The Scourge of Dementia.

1. The most common forms of dementia are Alzheimer's disease and vascular (post-stroke) dementia, with Alzheimer's estimated at 60-80 percent of all dementia cases. With Alzheimer's and other dementia, the transfer of information at the 100 trillion synapses in the brain deteriorates, and then the synapses themselves decline and die. There is no current treatment to slow or stop this deterioration.
2. 5.3 million Americans have Alzheimer's, the vast majority of which are elder persons (13% of elder persons have Alzheimer's). By 2050, this number will quadruple to 19 million. Every 70 seconds, someone in America develops the disease. By 2050, someone will develop the disease every 33 seconds. Women have higher rates of dementia than men, but this appears to be largely due to the fact that women live longer than men. In 2000, there were 411,000 new cases of the disease. In 2010, this increased to 454,000, and by 2050 will increase to 959,000.
3. By 2025, the following states are projected to have the highest number of persons with Alzheimer's (which largely tracks the size of the population of elder persons): California (660,000), Florida (590,000), Texas (470,000), New York (350,000), Pennsylvania (280,000), Ohio (250,000), and Illinois (240,000).³

C. The Burden of Dementia Care.

1. Almost 11 million Americans provide unpaid care to a person with dementia, usually to a family member. In 2009, they provided 12.5 billion hours of unpaid care valued at over \$144 billion calculated at a rate of \$11.50 per hour. The average time spent was 21.9 hours per week, or 1,139 hours per year. Caregivers to persons with

² *A Profile of Older Americans: 2009*, published by the Administration on Aging, U.S. Department of Health and Human Services.

³ *2010 Alzheimer's Disease Facts and Figures* published by the Alzheimer's Association. Internal citations are omitted.

Alzheimer's or dementia provide more hours of care compared to other forms of disability. The amount of hours provided increases as the disease worsens. Some family caregivers who live with the person with dementia provide supervision and help 24 hours a day, 7 days a week, due to risk of wandering and other safety concerns.

2. Unpaid caregivers in several states provided care in 2009 valued at several billion dollars: California (\$16 billion); Florida (\$8.37 billion); Georgia (\$5.19 billion); Illinois (\$5 billion); Michigan (\$5.27 billion); New Jersey (\$4.2 billion); New York (\$9.43 billion); North Carolina (\$4.67 billion); Ohio (\$5.69 billion); Pennsylvania (\$6.34 billion); Texas (\$11.1 billion).
3. 60% of unpaid caregivers are women, and 94% are caring for a relative. 21% of caregivers live in the same household as the person with dementia. Most (72%) of caregivers are between ages 35-64. Only 15% of caregivers are 1 hour or more away from the person with dementia; the vast majority are less than 1 hour away.
4. More than 40% of family caregivers rate the emotional stress of caregiving as high or very high. About 1/3 of family caregivers have symptoms of depression. Many spend at least 46 hours per week providing care.
5. Family caregivers disproportionately rate their health as poor and believe that caregiving has made their own health worse. They are more likely to have high levels of stress hormones, reduced immune function, slow wound healing, new hypertension, and new coronary heart disease.
6. Family caregivers have difficulty at work and economic strain because of caregiving responsibilities. Two-thirds had to go to work late, leave early, or take time off; 14% had to take a leave of absence from work; 10% had to reduce their hours or take a lower position; and 10% had to quit work entirely or take early retirement. Caregivers to persons with Alzheimer's are 68% more likely to reduce their work hours or quit work. The recent economic downturn has aggravated these work-related problems for caregivers.
7. 49% of family caregivers for persons with dementia have higher out-of-pocket costs than other caregivers. 13% of family caregivers have had to increase the amount of their own care-related spending due to changes in the economic situation of the person receiving care, and as a result, 65% of those caregivers have had difficulty paying for their own needs and 63% have had difficulty saving for their own retirement.⁴

D. The Next Generation Wants (Needs) Money. Economic factors will place extraordinary pressure on younger generations, and may lead to temptation to engage in elder financial abuse. Those financial pressures can include the following:

⁴ Id.

1. As of October 2010, the U.S. unemployment rate was 9%. There is a possibility of long-term unemployment or underemployment.
2. Affect of market losses on retirement savings and pension plans.
3. Political backlash against public pensions arising out of a toxic political climate and “pension envy”.
4. High rate of debt, especially among members of Generation X.
5. Inability of members of Generation X to replace their pre-retirement income.
6. Uncertainty of long term Social Security benefits.
7. The shift in pension coverage from defined benefit (traditional pension) plans to defined contribution plans.
8. Younger workers who reach retirement and are not able to maintain their working standard of living.
9. Increase in number of years spent in retirement due to increased life expectancy.⁵

E. Lack of Basic Estate Planning.

1. Half of Americans lack even the most basic estate planning documents, including a financial power of attorney.⁶ Many are deterred by the legal cost, and believe that only people with significant assets need consider any estate planning.⁷
2. Only 48% of older persons have a financial power of attorney.⁸
3. Nearly one in five Americans has personally experienced problems after the death or incapacitation of a loved one due to a lack of an estate plan or an improperly prepared plan, including conflicts over asset distribution.⁹

F. Prevalence of Elder Financial Abuse.

1. According to the National Center on Elder Abuse, between 1 and 2 million older Americans have been injured, exploited, or mistreated by a care provider.¹⁰ As few as 1 in 25 cases of elder financial abuse are reported, meaning there may be as many as 5 million financial abuse victims each year.

⁵ *Retirement Income: Intergenerational Comparisons of Wealth and Future Income* published by the U.S. General Accounting Office (GAO-03-429).

⁶ *Americans Lack Basic Estate Plans* by Ahlea Ebeleing, Forbes.com, March 1, 2010.

⁷ Id.

⁸ Id.

⁹ *Estate Planning Survey*, Lawyers.com, May 24, 2004.

¹⁰ Fact Sheet, National Center on Elder Abuse, 2005.

2. As an example of the growing nature of the problem, elder financial abuse in Hawaii alone has increased by 110% over the past two years.¹¹
3. In September 2010, the U.S. Government Accountability Office (GAO) issues a report title *Guardianships: Cases of Financial Exploitation, Neglect, and Abuse of Seniors*. The GAO was asked by the Senate Special Committee on Aging to (a) verify whether allegations of abuse, neglect, or exploitations by guardians are widespread; (b) examine the facts and circumstances surrounding cases of abuse by guardians, including whether inadequate communication between courts and federal agencies placed victims at further risk; and (c) proactively test selected state guardian certification processes.
4. The GAO's report included the following:
 - a. The GAO identified hundreds of allegations of financial exploitation by guardians in 45 states and the District of Columbia.
 - b. In 20 selected closed cases, the GAO found that guardians stole or improperly obtained \$5.4 million in assets from 158 incapacitated victims. The guardians in these cases came from diverse professional backgrounds (such as licensed social workers and medical professionals, professional guardians, public guardians, attorneys, and CPAs), and were overseen by local courts in 15 states and the District of Columbia.
 - c. Courts are failing to adequately screen potential guardians, appointing persons with criminal convictions or significant financial problems to manage high-dollar estates.
 - d. Courts are failing to oversee guardians once appointed, allowing abuse of vulnerable seniors and their assets to continue.
 - e. Court and federal agencies do not communicate effectively or at all with each other about abusive guardians, allowing the guardians to continue abusing the victim and/or others.
 - f. Only 13 states offer guardianship certification. Only 3 of those states conduct credit checks on applicants for guardianship certification.
 - g. There is no public, private, or non-governmental organization that systematically tracks the total number of guardianships or allegations of exploitation by guardians. Many courts do not even track the guardianships they are responsible for mentoring.

G. Abuse of Guardianship Litigation and the Failure of the Probate Courts.

¹¹ *Elderly Fraud Cases in Hawaii Exploding*, www.kitv.com, November 13, 2010.

1. Prolonged incapacity and other factors, including greed and a sense of entitlement by certain family members, will give rise to an increase in attempts to divert assets prior to death in a manner that frustrates a decedent's estate plan. In many cases, the diversion of funds will be accomplished through the use (and abuse) of powers of attorney during the prolonged incapacity. Fiduciary litigation is increasing, and it is expected that pre-death litigation over assets will increasingly arise in the context of: (a) challenges to exercise of authority under powers of attorney; (b) adult guardianship litigation; and (c) pre-death will contests.
2. Practitioners are mostly familiar with guardianship and conservatorship litigation as something to be avoided through the use of durable powers of attorney and advance medical directives; the occasional uncontested suit where a disabled child becomes a disabled adult; or where the named agent under a power of attorney passes away without a successor.
3. Increasingly, however, we are being called upon to deal with cases of elder financial abuse. These cases commonly arise through abuses of powers of attorney, or by undue influence being placed on affluent elderly persons to make unusually generous "gifts" to family and caretakers. In many cases, the guardianship action is the shield used to protect the elderly adult from harm – a "defensive" suit designed to safeguard assets, appoint trustworthy persons or institutions to manage finances, revoke powers of attorney in the hands of wrongdoers, and recover assets wrongfully taken.
4. Even more disturbing, however, is a recent trend in "offensive" or attack incapacity suits. One example of an attack incapacity suit: a child, alienated from an elderly affluent parent and likely to be disinherited, seeks control of the parent's assets to frustrate the parent's estate plan by draining its assets. Another example is the child, angry about being excluded from the parent's lifetime giving, seeking to block generosity to other family members or charities or to compel "gifts" to himself against the will of the parent. In even more distasteful circumstances, the child may seek to restrict the parent's lavish lifestyle or to limit expensive care so as to preserve a future inheritance.
5. Wrongdoers and anxious potential heirs have discovered that it may be possible to distort a guardianship action into a vehicle to further their selfish goals. Regrettably, there is also no apparent shortage of lawyers that will facilitate these attacks. These suits are offensive in that they are being used as a sword rather than a shield, converting court processes designed to protect elderly persons into a tool for depriving elderly persons of control over their own property. Practitioners will be called upon to defend their clients and their estate plans from attack and to help preserve their clients' rights to determine the use of their own assets.
6. In March 2010, the National Center for State Courts issued a report titled *adult Guardianship Court data and Issues* based on an extensive online survey. The report includes the following conclusions:

- a. Quality data on adult guardianship filings and caseloads is generally lacking. The absence of accurate caseload measures is widespread.
 - b. The demand for adult guardianships is increasing in a sizeable proportion of jurisdictions.
 - c. The lack of professional guardians in local jurisdictions places added strain on the public guardianship system. In localities lacking public guardians, the court is increasingly reliant on family and friends to serve as guardians.
 - d. Securing and retaining family and friends to act in the capacity of guardian is problematic. Fewer friends and family are willing or able to serve as guardians.
 - e. There is considerable need for additional public and private professional guardians. The greatest need for training is for family and friends serving as guardians.
 - f. Guardianship monitoring efforts by the courts are generally inadequate. Courts have insufficient staffing and resourced to effectively monitor guardianships.
7. Other organizations have strongly complained about court appointment of professional guardians and the fees incurred by professional guardians.¹²
 8. The National Center on Elder Abuse at the U.S. Administration on Aging noted the following efforts underway by the criminal justice system to improve response to elder abuse¹³:
 - a. State Attorney General offices and district attorneys are setting up specialized elder abuse investigation and prosecution units.
 - b. Communities are creating multi-disciplinary teams composed of professionals from law enforcement, ombudsman, health, and adult protective services to collaborate on elder abuse cases.
 - c. Fiduciary abuse specialist teams involving accountants, FBI, insurance claims detectives, and other specialists are playing an increasingly important role in pursuing financial abuse cases.
 9. A new program is being developed to train doctors and medical professionals to detect financial vulnerability in older persons, incorporating medical professionals into an early warning system for regulators trying to stop financial predators. The effort is the result of collaboration among the North American Securities Administrators Association (state securities regulators), the Investor Protection Trust and the Investor Protection Institute, and the National Adult Protective Services

¹² See, e.g. *Protecting Our Citizens from unlawful and Abusive Guardianships and Conservatorships*, National Association to Stop Guardian Abuse, November 2009.

¹³ www.ncea.aoa.gov

Association, and has the support of important national medical associations. So far, 22 states and the District of Columbia have provided funding for the program.¹⁴

H. Spotting Elder Financial Abuse.

1. **What is Elder Financial Abuse?** The term elder financial abuse can encompass several types of conduct, including:
 - a. Taking money or property from an elder person or the person's home, bank accounts, or trusts.
 - b. Selling or transferring the elder person's property against their wishes or best interests.
 - c. Forging an elder person's signature.
 - d. Getting an elder person to sign a deed, will, or power of attorney through deception, coercion, or undue influence.
 - e. Using the elder person's credit cards for unauthorized purchases.
 - f. Using the elder person's property or possessions without permission.
 - g. Promising an elder person lifelong care in exchange for money or property and not following through on the promise.
 - h. Failing to provide agreed upon services to the elder person.
 - i. Confidence crimes, scams, and fraud.
 - j. Misusing the elder person's power of attorney.
 - k. Creating or changing will, trusts, and beneficiary designations for the benefit of the abuser.¹⁵
2. **Why Elder Persons are Targets.**
 - a. Elder persons control over 70% of the nation's wealth.
 - b. Failure to appreciate value of assets or financial lack of sophistication.
 - c. Disabilities and dependence on others for help.
 - d. Predictable patterns of behavior.

¹⁴ *In the Examination Room, An Effort to Prevent Elder Financial Abuse*, Diana B. Henriques, The New York Times, November 17, 2010.

¹⁵ http://www.preventelderabuse.org/elderabuse/fin_abuse.html; www.sbcounty.gov/brochures/docs/105.pdf

- e. Reluctance to pursue claims against abusers due to illness or embarrassment.
- f. Possibility of death before pursuing claims against abusers.
- g. Ineffectiveness of testimony due to memory failures.
- h. Inability to navigate technology.¹⁶

3. **Who Commits Elder Financial Abuse?**

- a. Family members, who may be motivated by any of the following factors:
 - i. Substance abuse, gambling, or financial problems.
 - ii. Impatience with receiving “rightful inheritance”.
 - iii. Fear of losing inheritance to medical and other costs, poor relationship with elder person, other family members with a better relationship to elder person, or charitable inclination of elder person.
 - iv. Sense of entitlement due to family relations or providing of care.
 - v. Hostility towards and desire to disinherit other family members.
- b. Caretakers.
- c. Strangers met in public or at the home.
- d. Professional accountants, bankers, lawyers, and doctors hired by the elder person, through:
 - i. Overcharging for services.
 - ii. Deceptive or unfair business practices.
 - iii. Abuse of positions of trust.
- e. Predators who seek out vulnerable elder persons to exploit, for example:
 - i. Younger romantic interest running a “sweetheart scam”.
 - ii. May seek employment as personal care attendants, companion, counselors, etc. to gain access to elder person.¹⁷

4. **Risk Factors for Elder Financial Abuse.**

- a. Living alone; isolation; loneliness.

¹⁶ Id.

¹⁷ Id.

- b. Recent losses.
- c. Physical or mental disabilities.
- d. Lack of familiarity or sophistication with financial matters.
- e. Family members who are unemployed or have substance abuse problems; especially where such persons live with the elder person.
- f. Lack of oversight of financial matters.¹⁸

5. Indicators of Elder Financial Abuse.

a. Financial Indicators.

- i. Activity inconsistent with physical ability, such as ATM use.
- ii. Numerous withdrawals, especially in round numbers.
- iii. Transfers between bank accounts.
- iv. Increased credit card activity.
- v. Withdrawals (i.e. from CDs) that incur penalties.
- vi. Beneficiary designation changes.
- vii. Addition of signatories to accounts.
- viii. Title changes to property.
- ix. New mortgages or home equity lines.
- x. Financial confusion.
- xi. Large gifts inconsistent with established giving patterns.
- xii. Unpaid bills, eviction notices, or notices to discontinue utilities.
- xiii. Missing bank statements, cancelled checks, and financial information; ceasing of delivery of financial mail to elder person's home.
- xiv. Missing property.
- xv. Suspicious signatures on checks and legal documents.

b. Estate Planning.

¹⁸ Id.

- i. Changes to powers of attorney.
- ii. Changes to wills and trusts.
- c. **Caregivers.**
 - i. Unwillingness to discuss routine matters.
 - ii. Isolation of elder person from visits or calls.
 - iii. Increased concern with elder person's finances.
 - iv. Purports to speak for the elder person, even when elder person is present.
 - v. No financial means of support other than income from elder person.
 - vi. Not hired through reputable agency.
 - vii. Lack of references.
 - viii. Lack of criminal background check.
 - ix. Lack of employment contract.
 - x. Lack of regular review of caregiver incurred expenses.
- d. **Social Indicators.**
 - i. New "best friends".
 - ii. Level of care is inconsistent with financial status and resources.
 - iii. Unwillingness to discuss routine matters.
 - iv. Fatigue and depression.
 - v. Unwillingness to take visits or calls.¹⁹

II. Guardianship Litigation.

A. Select Ethical Considerations.

1. The incapacity (or potential incapacity) and mental decline of persons that are the subject of guardianship proceedings create uniquely difficult challenges to the ability of attorneys to comply with their professional ethical obligations. Special care must be taken by attorneys representing clients in this area.

¹⁹ Id.

2. Forty-six states and the District of Columbia have adopted the Model Rules of Professional Conduct (MRPC). Accordingly, this outline will focus on the MRPC as opposed to the Model Code. There are significant variations in the state specific versions of the MRPC, and state law should be carefully reviewed. Those state variations are not discussed in this outline.
3. Because the MRPC and comments do not provide sufficient guidance regarding the professional responsibilities of trusts and estates lawyers, The American College of Trust and Estate Counsel (ACTEC) has issued commentaries on the MRPC. References to the ACTEC Commentaries on the MRPC are taken from the Fourth Edition of the Commentaries, issued in 2006. Although the ACTEC Commentaries are useful, they do not deal comprehensively with the unique ethical challenges of guardianship litigation.
4. **Person with Diminished Capacity as a Prospective Client.**
 - a. Elder persons that are the subject of guardianship proceedings will seek to retain counsel to defend against the guardianship action and retain control over their person and property. This is especially true where mental decline is in an early stage, or where the guardianship suit is being brought offensively and for improper purposes by disappointed or greedy future heirs.
 - b. As a threshold matter, the lawyer must determine whether the client has the requisite capacity to enter into an attorney-client relationship. Can an attorney reasonably comply with the duty to provide information to and consult with a client with diminished capacity? The concept of “informed consent” is essential to the operation of many other ethics rules. If the client lacks the capacity to give informed consent, it is difficult to see how the lawyer can satisfy the requirements of the ethics rules.
 - i. “Informed consent” means agreement by the client after the lawyer communicates adequate information and explanation about material risks of and reasonably available alternatives to the proposed course of conduct.²⁰
 - ii. The client must have the capacity to make decisions about the objectives of the representation, and the lawyer must abide by the client’s decision.²¹ The lawyer can only limit the scope of the representation with the informed consent of the client.²²
 - iii. The lawyer must keep the client reasonably informed, consult with the client about the representation, and explain matters to the client.²³
 - iv. The lawyer must communicate information about fees charged to the client.²⁴

²⁰ MRPC 1.0(e).

²¹ MRPC 1.2(a).

²² MRPC 1.2(c).

²³ MRPC 1.4.

- v. With certain narrow exceptions, the lawyer cannot disclose confidential information without informed consent.²⁵
 - vi. Informed consent is required to waive conflicts of interest.²⁶
 - vii. **Comment:** State statutes provide for court appointment of counsel for the subject of guardianship proceedings. Does court appointment of counsel cure ethical concerns at the outset of the representation? Does it resolve ongoing concerns during the representation?
- c. Care is required during the screening process and initial interview with prospective clients. Even if the representation is ultimately declined, the lawyer will be restricted from using or revealing information learned in the consultation (subject to the narrow exceptions under MRPC 1.9 for former clients).²⁷ Also, a lawyer that has had discussions with a prospective client (or the lawyer’s firm) cannot represent another client with interests “materially adverse” to the prospective client in the same or “substantially related” matter, if the lawyer received information that could be “significantly harmful” to the prospective client, subject to certain exceptions under MRPC 1.18(d). Consideration should be given to a client screening process that identifies any warning signs about a prospective client’s capacity.

5. Existing Client with Diminished Capacity.

- a. MRPC 1:14 provides as follows with respect to an existing client with diminished capacity:
 - i. 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.
 - ii. 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.
 - iii. Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph

²⁴ MRPC 1.5.
²⁵ MRPC 1.6.
²⁶ MRPC 1.7
²⁷ MRPC 1.18(b).

(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.

- b. The ACTEC Commentaries to this section are instructive on several common scenarios, and provide in relevant parts as follows:

“Implied Authority to Disclose and Act. Based on the interaction of subsections (b) and (c) of MRPC 1.14, a lawyer has implied authority to make disclosures of otherwise confidential information and take protective actions when there is a risk of substantial harm to the client. Under those circumstances, the lawyer may consult with individuals or entities that may be able to assist the client, including family members, trusted friends, and other advisors. However, in deciding whether others should be consulted, the lawyer should also consider the client’s wishes, the impact of the lawyer’s actions on potential challenges to the client’s estate plan, and the impact on the lawyer’s ability to maintain the client’s confidential information. In determining whether to act and in determining what action to take on behalf of a client, the lawyer should consider the impact a particular course of action could have on the client, including the client’s right to privacy and the client’s physical, mental and emotional well-being. In appropriate cases, the lawyer may seek the appointment of a guardian ad litem, conservator or guardian or take other protective action.”

“Risk and Substantiality of Harm. For the purposes of this rule, the risk of harm to a client and the amount of harm that a client might suffer should both be determined according to a different scale than if the client were fully capable. In particular, the client’s diminished capacity increases the risk of harm and the possibility that any particular harm would be substantial. If the risk and substantiality of potential harm to a client are uncertain, a lawyer may make reasonably appropriate disclosures of otherwise confidential information and take reasonably appropriate protective actions. In determining the risk and substantiality of harm and deciding what action to take, a lawyer should consider any wishes or directions that were clearly expressed by the client during his or her competency. Normally, a lawyer should be permitted to take actions on behalf of a client with apparently diminished capacity that the lawyer reasonably believes are in the best interests of the client.”

“Disclosure of Information. ABA Informal Opinion 89-1530 (1989) stated the authority of the attorney to disclose confidential and non-confidential information as follows: [T]he Committee concludes that the disclosure by the lawyer of information relating to the representation to the extent necessary to serve the best interests of the client reasonably believed to be disabled is impliedly authorized within the meaning of Model Rule 1.6. Thus, the inquirer may consult a physician concerning the suspected disability.”

“Determining Extent of Diminished Capacity. In determining whether a client’s capacity is diminished, a lawyer may consider the client’s overall circumstances

and abilities, including the client’s ability to express the reasons leading to a decision, the ability to understand the consequences of a decision, the substantive appropriateness of a decision, and the extent to which a decision is consistent with the client’s values, long-term goals, and commitments. In appropriate circumstances, the lawyer may seek the assistance of a qualified professional.”

“Lawyer Representing Client with Diminished Capacity May Consult with Client’s Family Members and Others as Appropriate. If a legal representative has been appointed for the client, the lawyer should ordinarily look to the representative to make decisions on behalf of the client. The lawyer, however, should as far as possible accord the represented person the status of client, particularly in maintaining communication. In addition, the client who suffers from diminished capacity may wish to have family members or other persons participate in discussion with the lawyer. The lawyer must keep the client’s interests foremost. Except for disclosures and protective actions authorized under MRPC 1.14, the lawyer should rely on the client’s directions, rather than the contrary or inconsistent directions of family members, in fulfilling the lawyer’s duties to the client. In meeting with the client and others, the lawyer should consider the impact of a joint meeting on the attorney client evidentiary privilege.”

“In cases involving clients of doubtful testamentary capacity, the lawyer should consider, if available, procedures for obtaining court supervision of the proposed estate plan, including substituted judgment proceedings.”

- c. The lawyer will often have valuable information about the capacity of the client, and must carefully consider the ethical duty of confidentiality when approached by family members for information or when contemplating the right course of action to protect a client with diminished capacity.
 - i. MRPC 1.6 provides in part that a lawyer cannot reveal information relating to the representation unless the client gives informed consent (which the client may lack the capacity to deliver), or to the extent the lawyer “reasonably believes necessary” to prevent “reasonably certain death” or “substantial body harm”, or “to comply with other law or a court order”. This rule does not expressly contemplate disclosure of confidential information to protect the client from financial abuse. However, Rule 1:14(c) allows a lawyer taking protective action (such as commencement of guardianship proceedings) to reveal information about the client but only to the extent reasonably necessary to protect the client's interests. This is a difficult line to define, and easy to cross.
 - ii. The ACTEC Commentaries provide as follows with respect to client confidences:

“Client Who Apparently Has Diminished Capacity. As provided in MRPC 1.14, a lawyer for a client who has, or reasonably appears to have, diminished

capacity is authorized to take reasonable steps to protect the interests of the client, including the disclosure, where appropriate and not prohibited by state law or ethical rule, of otherwise confidential information. See ACTEC Commentary on MRPC 1.14, ABA Inf. Op. 89-1530 (1989), and ALI, *Restatement (Third), The Law Governing Lawyers*, §24, §51 (2000). In such cases the lawyer may either initiate a guardianship or other protective proceeding or consult with diagnosticians and others regarding the client's condition, or both. In disclosing confidential information under these circumstances, the lawyer may disclose only that information necessary to protect the client's interests. MRPC 1.14 (c)."

- iii. A court order should be considered for the protection of the lawyer.
- d. The Model Rules do not expressly address withdrawal of representation where the client has lost capacity. However, under MRPC 1.16(b), a lawyer may withdraw where the representation has been "rendered unreasonably difficult by the client" or for "other good cause". Upon withdrawal, the incapacity of the client will present challenges for the lawyer carrying out his duty on withdrawal to give reasonable notice to the client and take such other steps reasonably practicable to protect the client's interests. In addition, if litigation has already commenced the lawyer cannot withdraw without court approval, and must continue the representation if ordered by the court.²⁸
 - i. **Comment:** Consideration should be given as to whether the circumstances and the ethics rules require affirmative steps by the withdrawing lawyer (such as filing guardianship proceedings) beyond notice of withdrawal, such as in the case of potential or actual elder financial abuse.
- e. A lawyer withdrawing from representation of a client with diminished capacity must be careful not to take subsequent representation that is adverse to the former client. Under MRPC 1.9, a lawyer cannot represent another person in the same or a substantially related matter in which that person's interest are materially adverse to the interests of the former client (unless there is informed consent in writing, which cannot be obtained from a former client that lacks capacity).
 - i. The ACTEC Commentaries under MRPC 1:14 address the common scenario of the lawyer being asked to represent the fiduciary for a client that has lost capacity:

"May Lawyer Represent Guardian or Conservator of Current or Former Client? The lawyer may represent the guardian or conservator of a current or former client, provided the representation of one will not be directly adverse to the other. See ACTEC Commentary on MRPC 1.7 and MRPC 1.9. Joint representation would not be permissible if there is a significant risk that the representation of one will be materially limited by the lawyer's

²⁸ MRPC 1.16(d).

responsibilities to the other. See MRPC 1.7(a)(2). Because of the client's, or former client's, diminished capacity, the waiver option may be unavailable. See MRPC 1.0(e) (defining informed consent)."

"Lawyer Retained by Fiduciary for Person with Diminished Capacity. The lawyer retained by a person seeking appointment as a fiduciary or retained by a fiduciary for a person with diminished capacity, including a guardian, conservator, or attorney-in-fact, stands in a lawyer-client relationship with respect to the prospective or appointed fiduciary. A lawyer who is retained by a fiduciary for a person with diminished capacity, but who did not previously represent the disabled person, represents only the fiduciary. Nevertheless, in such a case the lawyer for the fiduciary owes some duties to the disabled person. See ACTEC Commentary on MRPC 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer). If the lawyer represents the fiduciary, as distinct from the person with diminished capacity, and is aware that the fiduciary is improperly acting adversely to the person's interests, the lawyer may have an obligation to disclose, to prevent, or to rectify the fiduciary's misconduct. See MRPC 1.2(d) (providing that a lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent)."

"As suggested in the Commentary to MRPC 1.2, a lawyer who represents a fiduciary for a person with diminished capacity or who represents a person who is seeking appointment as such, should consider asking the client to agree that, as part of the engagement, the lawyer may disclose fiduciary misconduct to the court, to the person with diminished capacity, or to other interested persons."

"Person With Diminished Capacity Who Was a Client Prior to Suffering Diminished Capacity and Prior to the Appointment of a Fiduciary. A lawyer who represented a client before the client suffered diminished capacity may be considered to continue to represent the client after a fiduciary has been appointed for the person. Although incapacity may prevent a person with diminished capacity from entering into a contract or other legal relationship, the lawyer who represented the person with diminished capacity at a time when the person was competent may appropriately continue to meet with and counsel him or her. Whether the person with diminished capacity is characterized as a client or a former client, the lawyer for the fiduciary owes some continuing duties to him or her. See Ill. Advisory Opinion 91-24 (1991) (summarized in the Annotations following the ACTEC Commentary on MRPC 1.6 (Confidentiality of Information)). If the lawyer represents the person with diminished capacity and not the fiduciary, and is aware that the fiduciary is improperly acting adversely to the person's interests, the lawyer has an obligation to disclose, to prevent, or to rectify the fiduciary's misconduct."

“Wishes of Person With Diminished Capacity Who Is Under Guardianship or Conservatorship When the Fiduciary is the Client. A conflict of interest may arise if the lawyer for the fiduciary is asked by the fiduciary to take action that is contrary either to the previously expressed wishes of the person with diminished capacity or to the best interests of the person, as the lawyer believes those interests to be. The lawyer should give appropriate consideration to the currently or previously expressed wishes of a person with diminished capacity.”

6. Representing Other Persons in Guardianship Litigation against Former or Current Clients.

- a. Notwithstanding that MRPC 1:14 allows the lawyer to take certain action with respect to a client under a disability including in some circumstances filing guardianship proceedings, the lawyer must carefully consider the ethics rules when asked to represent another person for the purpose of bringing guardianship proceedings against a current or former client. The ethical questions are many and difficult, suggesting that the best practice may be to decline the representation. The unavailability of meaningful consents will make these issues more difficult to comfortably resolve.
- b. Is the guardianship action “substantially related” to your prior representation and “materially adverse” such that the representation would be barred under MRPC 1.9?
- c. Is your client really a former client, or is your client really a current client? Is that line blurred? Do you have a termination letter? MRPC 1.7 prohibits direct adversity to a current client.
- d. Can you undertake the representation without violating the confidentiality provisions of MRPC 1.6?
- e. Would the representation create a conflict of interest under MRPC 1.8, for example in the case of representing a spouse, child, or other family member in guardianship proceedings against a current client?
- f. Will the lawyer be called as a witness?

B. Pre-Litigation Information Gathering and Discovery.

1. A critical early stage of this type of litigation is the collection of information about financial assets. There are several potential tools for obtaining information.
2. **Land Records.** Searching land records is a low-cost mechanism for making initial determinations as to whether property has been improperly diverted. Many jurisdictions have free online search engines for land records. Although there is an additional cost, a well-conducted professional title exam may reveal transfers of real property that will have a significant impact on future litigation, and which may

provide the basis for a restraining order or preliminary injunction on assets, or for the appointment of a temporary conservator.

3. **Discovery from Agents.** The conduct of agents under powers of attorney will become an important issue in most contested guardianship proceedings. If the agent under a durable power of attorney is acting properly, the court may not be willing or able to appoint a conservator for the incapacitated person under state statutes that defer to powers of attorney and promote the least restrictive alternative to providing for the well-being of the incapacitated person. If the agent has acted improperly, the action of the agent can encourage a court to invalidate powers of attorney in favor of conservatorship, and will impact how the court views competing candidates seeking control over the financial assets of the incapacitated person.
4. **Uniform Power of Attorney Act.**
 - a. The National Conference of Commissioners on Uniform State Laws (NCCUSL) completed the Uniform Power of Attorney Act (UPOAA) in 2006, with the purpose of addressing the nationwide concern about significant gaps in state laws concerning powers of attorney, and also because of the numerous non-uniform provisions of state law had caused great divergence and confusion in the states. This problem was aggravated by the portability of the population and their wealth across state lines.
 - b. The UPOAA attempts to enhance the usefulness of durable powers of attorney while protecting the principal, the agent, and those who deal with the agent.
 - c. NCCUSL has recognized the potential for abuse of powers of attorney as part of the larger elder financial abuse problem, and has attempted to strike the appropriate balance of the competing concerns:
 - i. “Protecting the principal from potential abuse under the UPOAA is multi-faceted and provides the following: mandatory as well as default fiduciary duties for the agent; liability for agent misconduct; broad standing provisions for judicial review of the agent’s conduct; and, the requirement of express language to grant certain authority that could dissipate the principal’s property or alter the principal’s estate plan. Mandatory duties include acting in good faith, within the scope of the authority granted and according to the principal’s reasonable expectations (or, if unknown, the principal’s best interest). The UPOAA also contains a number of default duties that can be varied in the power of attorney such as preservation of the principal’s estate plan (subject to certain qualifications) and the duty to cooperate with the person who has the principal’s health-care decision making authority.”²⁹
 - ii. “Incapacitated individuals are, unfortunately, uniquely vulnerable to financial abuse, but the surrogate decision making needs of our aging society are greatly aided by the use of powers of attorney by trustworthy agents.

²⁹ NCCUSL - UPOAA Summary: http://www.nccusl.org/Update/uniformact_summaries/uniformacts-s-upoaa.asp.

Naturally, third parties such as banks and insurances companies are concerned about potential fraud. The UPOAA balances the competing interests at stake with reforms that enhance the usefulness of durable powers while at the same time protecting the principal, the agent, and those who deal with the agent. It should be enacted in every state as soon as possible.”³⁰

- d. The UPOAA has been enacted in Colorado, Idaho, Maine, Maryland, Nevada, New Mexico, the U.S. Virgin Islands, Virginia, and Wisconsin. The UPOAA has been introduced in Minnesota, Ohio, and West Virginia.
- e. Several provisions of the UPOAA relate directly to guardianship litigation, including provisions concerning incapacity, nominations of guardians, the duty of agents to disclose information, judicial relief, the accountability of agents, and the powers of the agent which may be subject to abuse.
- f. **Definition of Incapacity.**

- i. UPOAA Section 102 (part):

“Incapacity” means inability of an individual to manage property or business affairs because the individual: (a) has an impairment in the ability to receive and evaluate information or make or communicate decisions even with the use of technological assistance; or (b) is: (i) missing; (ii) detained, including incarcerated in a penal system; or (iii) outside the United States and unable to return.

- ii. NCCUSL Comment:

“Incapacity” replaces the term “disability” used in the Uniform Durable Power of Attorney Act in recognition that disability does not necessarily render an individual incapable of property and business management. The definition of incapacity stresses the operative consequences of the individual’s impairment—inability to manage property and business affairs—rather than the impairment itself. The definition of incapacity in the Act is also consistent with the standard for appointment of a conservator under Section 401 of the Uniform Guardianship and Protective Proceedings Act as amended in 1997.

- g. **Conservators and Guardians.**

- i. UPOAA Section 108:

(a) In a power of attorney, a principal may nominate a [conservator or guardian] of the principal’s estate or [guardian] of the principal’s person for consideration by the court if protective proceedings for the principal’s estate or person are begun after the principal executes the power of attorney. [Except for good cause shown or disqualification, the court shall

³⁰ Id.

make its appointment in accordance with the principal's most recent nomination.]

- (b) If, after a principal executes a power of attorney, a court appoints a [conservator or guardian] of the principal's estate or other fiduciary charged with the management of some or all of the principal's property, the agent is accountable to the fiduciary as well as to the principal. [The power of attorney is not terminated and the agent's authority continues unless limited, suspended, or terminated by the court.]

ii. NCCUSL Comment:

Section 108(b) is a departure from the Uniform Durable Power of Attorney Act which gave a court-appointed fiduciary the same power to revoke or amend a power of attorney as the principal would have if not incapacitated. *See* Unif. Durable Power of Atty. Act § 3(a) (1987). In contrast, this Act gives deference to the principal's choice of agent by providing that the agent's authority continues, notwithstanding the later court appointment of a fiduciary, unless the court acts to limit or terminate the agent's authority. This approach assumes that the later-appointed fiduciary's authority should supplement, not truncate, the agent's authority. If, however, a fiduciary appointment is required because of the agent's inadequate performance or breach of fiduciary duties, the court, having considered this evidence during the appointment proceedings, may limit or terminate the agent's authority contemporaneously with appointment of the fiduciary. Section 108(b) is consistent with the state legislative trend that has departed from the Uniform Durable Power of Attorney Act. *See, e.g.,* 755 Ill. Comp. Stat. Ann. 45/2-10 (West 1992); Ind. Code Ann. § 30-5-3-4 (West 1994); Kan. Stat. Ann. § 58-662 (2005); Mo. Ann. Stat. § 404.727 (West 2001); N.J. Stat. Ann. § 46:2B-8.4 (West 2003); N.M. Stat. Ann. § 45-5-503A (LexisNexis 2004); Utah Code Ann. § 75-5-501 (Supp. 2006); Vt. Stat. Ann. tit. 14, § 3509(a) (2002); Va. Code Ann. § 11-9.1B (2006). Section 108(b) is also consistent with the Uniform Health-Care Decisions Act § 6(a) (1993), which provides that a guardian may not revoke the ward's advance health-care directive unless the court appointing the guardian expressly so authorizes. Furthermore, it is consistent with the Uniform Guardianship and Protective Proceedings Act (1997), which provides that a guardian or conservator may not revoke the ward's or protected person's power of attorney for health-care or financial management without first obtaining express authority of the court. *See* Unif. Guardianship & Protective Proc. Act § 316(c) (guardianship), § 411(d) (protective proceedings).

Deference for the principal's autonomous choice is evident both in the presumption that an agent's authority continues unless limited or terminated by the court, and in the directive that the court shall appoint a fiduciary in accordance with the principal's most recent nomination (*see* subsection (a)). Typically, a principal will nominate as conservator or guardian the same

individual named as agent under the power of attorney. Favoring the principal's choice of agent and nominee, an approach consistent with most statutory hierarchies for guardian selection (*see* Unif. Guardianship & Protective Proc. Act § 310(a)(2) (1997)), also discourages guardianship petitions filed for the sole purpose of thwarting the agent's authority to gain control over a vulnerable principal. *See* Unif. Guardianship & Protective Proc. Act § 310 cmt. (1997). *See also* Linda S. Ershow-Levenberg, *When Guardianship Actions Violate the Constitutionally-Protected Right of Privacy*, NAELA News, Apr. 2005, at 1 (arguing that appointment of a guardian when there is a valid power of attorney in place violates the alleged incapacitated person's constitutionally protected rights of privacy and association).

h. Agent's Duties.

i. UPOAA Section 114:

- (a) Notwithstanding provisions in the power of attorney, an agent that has accepted appointment shall:
 - (1) act in accordance with the principal's reasonable expectations to the extent actually known by the agent and, otherwise, in the principal's best interest;
 - (2) act in good faith; and
 - (3) act only within the scope of authority granted in the power of attorney.
- (b) Except as otherwise provided in the power of attorney, an agent that has accepted appointment shall:
 - (1) act loyally for the principal's benefit;
 - (2) act so as not to create a conflict of interest that impairs the agent's ability to act impartially in the principal's best interest;
 - (3) act with the care, competence, and diligence ordinarily exercised by agents in similar circumstances;
 - (4) keep a record of all receipts, disbursements, and transactions made on behalf of the principal;
 - (5) cooperate with a person that has authority to make health-care decisions for the principal to carry out the principal's reasonable expectations to the extent actually known by the agent and, otherwise, act in the principal's best interest; and
 - (6) attempt to preserve the principal's estate plan, to the extent actually known by the agent, if preserving the plan is consistent with the principal's best interest based on all relevant factors, including:
 - (A) the value and nature of the principal's property;
 - (B) the principal's foreseeable obligations and need for maintenance;
 - (C) minimization of taxes, including income, estate, inheritance, generation-skipping transfer, and gift taxes; and
 - (D) eligibility for a benefit, a program, or assistance under a statute or regulation.

- (c) An agent that acts in good faith is not liable to any beneficiary of the principal's estate plan for failure to preserve the plan.
- (d) An agent that acts with care, competence, and diligence for the best interest of the principal is not liable solely because the agent also benefits from the act or has an individual or conflicting interest in relation to the property or affairs of the principal.
- (e) If an agent is selected by the principal because of special skills or expertise possessed by the agent or in reliance on the agent's representation that the agent has special skills or expertise, the special skills or expertise must be considered in determining whether the agent has acted with care, competence, and diligence under the circumstances.
- (f) Absent a breach of duty to the principal, an agent is not liable if the value of the principal's property declines.
- (g) An agent that exercises authority to delegate to another person the authority granted by the principal or that engages another person on behalf of the principal is not liable for an act, error of judgment, or default of that person if the agent exercises care, competence, and diligence in selecting and monitoring the person.
- (h) Except as otherwise provided in the power of attorney, an agent is not required to disclose receipts, disbursements, or transactions conducted on behalf of the principal unless ordered by a court or requested by the principal, a guardian, a conservator, another fiduciary acting for the principal, a governmental agency having authority to protect the welfare of the principal, or, upon the death of the principal, by the personal representative or successor in interest of the principal's estate. If so requested, within 30 days the agent shall comply with the request or provide a writing or other record substantiating why additional time is needed and shall comply with the request within an additional 30 days.

ii. NCCUSL Comment (Part):

Two default duties in this section protect the principal's previously-expressed choices. These are the duty to cooperate with the person authorized to make health-care decisions for the principal (subsection (b)(5)) and the duty to preserve the principal's estate plan (subsection (b)(6)). However, an agent has a duty to preserve the principal's estate plan only to the extent the plan is actually known to the agent and only if preservation of the estate plan is consistent with the principal's best interest. Factors relevant to determining whether preservation of the estate plan is in the principal's best interest include the value of the principal's property, the principal's need for maintenance, minimization of taxes, and eligibility for public benefits. The

Act protects an agent from liability for failure to preserve the estate plan if the agent has acted in good faith (subsection (c))...

Subsection (h) codifies the agent's common law duty to account to a principal (*see* Restatement (Third) of Agency § 8.12 (2006); Restatement (First) of Agency § 382 (1933)). Rather than create an affirmative duty of periodic accounting, subsection (h) states that the agent is not required to disclose receipts, disbursements or transactions unless ordered by a court or requested by the principal, a fiduciary acting for the principal, or a governmental agency with authority to protect the welfare of the principal. If the principal is deceased, the principal's personal representative or successor in interest may request an agent to account. While there is no affirmative duty to account unless ordered by the court or requested by one of the foregoing persons, subsection (b)(4) does create a default duty to keep records.

The narrow categories of persons that may request an agent to account are consistent with the premise that a principal with capacity should control to whom the details of financial transactions are disclosed. If a principal becomes incapacitated or dies, then the principal's fiduciary or personal representative may succeed to that monitoring function. The inclusion of a governmental agency (such as Adult Protective Services) in the list of persons that may request an agent to account is patterned after state legislative trends and is a response to growing national concern about financial abuse of vulnerable persons. *See* 755 Ill. Comp. Stat. Ann. 45/2-7.5 (West Supp. 2006 & 2006 Ill. Legis. Serv. 1754); 20 Pa. Cons. Stat. Ann. § 5604(d) (West 2005); Vt. Stat. Ann. tit.14, § 3510(b) (2002 & 2006-3 Vt. Adv. Legis. Serv. 228). *See generally* Donna J. Rabiner, David Brown & Janet O'Keeffe, *Financial Exploitation of Older Persons: Policy Issues and Recommendations for Addressing Them*, 16 J. Elder Abuse & Neglect 65 (2004). As an additional protective counter-measure to the narrow categories of persons who may request an agent to account, the Act contains a broad standing provision for seeking judicial review of an agent's conduct. *See* Section 116 and Comment.

i. Judicial Relief.

i. UPOAA Section 116:

(a) The following persons may petition a court to construe a power of attorney or review the agent's conduct, and grant appropriate relief:

- (1) the principal or the agent;
- (2) a guardian, conservator, or other fiduciary acting for the principal;
- (3) a person authorized to make health-care decisions for the principal;
- (4) the principal's spouse, parent, or descendant;

- (5) an individual who would qualify as a presumptive heir of the principal;
- (6) a person named as a beneficiary to receive any property, benefit, or contractual right on the principal's death or as a beneficiary of a trust created by or for the principal that has a financial interest in the principal's estate;
- (7) a governmental agency having regulatory authority to protect the welfare of the principal;
- (8) the principal's caregiver or another person that demonstrates sufficient interest in the principal's welfare; and
- (9) a person asked to accept the power of attorney.

(b) Upon motion by the principal, the court shall dismiss a petition filed under this section, unless the court finds that the principal lacks capacity to revoke the agent's authority or the power of attorney.

ii. NCCUSL Comment:

The primary purpose of this section is to protect vulnerable or incapacitated principals against financial abuse. Subsection (a) sets forth broad categories of persons who have standing to petition the court for construction of the power of attorney or review of the agent's conduct, including in the list a "person that demonstrates sufficient interest in the principal's welfare" (subsection (a)(8)). Allowing any person with sufficient interest to petition the court is the approach taken by the majority of states that have standing provisions. *See* Cal. Prob. Code § 4540 (West Supp. 2006); Colo. Rev. Stat. Ann. § 15-14-609 (West 2005); 755 Ill. Comp. Stat. Ann. 45/2-10 (West 1992); Ind. Code Ann. § 30-5-3-5 (West 1994); Kan. Stat. Ann. § 58-662 (2005); Mo. Ann. Stat. § 404.727 (West 2001); N.H. Rev. Stat. Ann. § 506:7 (LexisNexis 1997 & Supp. 2005); Wash. Rev. Code Ann. § 11.94.100 (Supp. 2006); Wis. Stat. Ann. § 243.07(6r) (West 2001). *But cf.* 20 Pa. Cons. Stat. Ann. § 5604 (West 2005) (limiting standing to an agency acting pursuant to the Older Adults Protective Services Act); Vt. Stat. Ann. tit.14, § 3510(b) (2002 & 2006-3 Vt. Adv. Legis. Serv. 228) (limiting standing to the commissioner of disabilities, aging, and independent living).

In addition to providing a means for detecting and redressing financial abuse by agents, this section protects the self-determination rights of principals. Subsection (b) states that the court must dismiss a petition upon the principal's motion unless the court finds that the principal lacks the capacity to revoke the agent's authority or the power of attorney. Contrasted with the breadth of Section 116 is Section 114(h) which narrowly limits the persons who can request an agent to account for transactions conducted on the principal's behalf. The rationale for narrowly restricting who may request an agent to account is the preservation of the principal's financial privacy. *See* Section

114 Comment. Section 116 operates as a check-and-balance on the narrow scope of Section 114(h) and provides what, in many circumstances, may be the only means to detect and stop agent abuse of an incapacitated principal.

j. **Hot Powers.**

i. UPOAA Section 201 (Part):

(a) An agent under a power of attorney may do the following on behalf of the principal or with the principal's property only if the power of attorney expressly grants the agent the authority and exercise of the authority is not otherwise prohibited by another agreement or instrument to which the authority or property is subject:

(1) create, amend, revoke, or terminate an inter vivos trust;

(2) make a gift;

(3) create or change rights of survivorship;

(4) create or change a beneficiary designation;

(5) delegate authority granted under the power of attorney;

(6) waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan; [or]

(7) exercise fiduciary powers that the principal has authority to delegate[;
or

(8) disclaim property, including a power of appointment].

ii. NCCUSL Comment (Part):

This section distinguishes between grants of specific authority that require express language in a power of attorney and grants of general authority. Section 201(a) enumerates the acts that require an express grant of specific authority and which may not be inferred from a grant of general authority. This approach follows a growing trend among states to require express specific authority for such actions as making a gift, creating or revoking a trust, and using other non-probate estate planning devices such as survivorship interests and beneficiary designations. *See, e.g.*, Cal. Prob. Code § 4264 (West Supp. 2006); Kan. Stat. Ann. § 58-654(f) (2005); Mo. Ann. Stat. § 404.710 (West 2001); Wash. Rev. Code Ann. § 11.94.050 (West Supp. 2006). The rationale for requiring a grant of specific authority to perform the acts enumerated in subsection (a) is the risk those acts pose to the principal's property and estate plan. Although risky, such authority may nevertheless be necessary to effectuate the principal's property management and estate

planning objectives. Ideally, these are matters about which the principal will seek advice before granting authority to an agent.

5. **Suit for Accounting at Equity.** An accounting is a type of equitable relief that may be ordered by a court against any fiduciary. In an accounting action, the agent generally has the burden of proving that his actions were proper. A commissioner in chancery may be appointed to oversee the accounting.

6. **Disclosure from Trustees.**

- a. Due to the increased use of trusts, the conduct of trustees will become an important issue in many contested guardianship proceedings. If the trustee under a funded revocable lifetime trust is acting properly, the court may not be willing or able to appoint a conservator for the incapacitated person under state statutes that promote the least restrictive alternative to providing for the well-being of the incapacitated person. If the trustee has acted improperly, the action of the trustee can encourage a court to favor conservatorship, will impact how the court views competing candidates seeking control over the financial assets of the incapacitated person, and will determine the extent to which the court gives a conservator control over trusts.
- b. **The Uniform Trust Code.** The Uniform Trust Code (“UTC”) is a codification of the law of trusts prepared by The National Conference of Commissioners on Uniform State Laws (“NCCUSL”). The goal of the UTC is uniformity of trust law across the country.
- c. The UTC, with state specific variations, has been enacted in Alabama, Arizona, Arkansas, District of Columbia, Florida, Kansas, Maine, Missouri, Michigan, Nebraska, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Virginia, and Wyoming. The UTC has been introduced in New Jersey.
- d. **Qualified Beneficiaries.** The concept of the “qualified beneficiary” is important to understand. A “qualified beneficiary” is a beneficiary who, on the date the beneficiary’s qualification is determined: (a) is a distributee or permissible distributee of trust income or principal; (b) would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in subparagraph (a) terminated on that date without causing the trust to terminate; or (c) would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date. Certain charitable organizations are also treated as qualified beneficiaries for charitable trusts.
- e. **Revocable Trusts.** An attempt to compel disclosure about a revocable trust created by the respondent in a guardianship action will be complicated by the fact that while the trust is revocable and the grantor holding the power to revoke has capacity, the trustee only owes its fiduciary duties (including the duty to disclose) to the grantor.

- f. **Disclosure Obligations of the Trustee.** The UTC imposes several distinct duties to provide information to beneficiaries, located in Section 813:
- i. **Duty to keep reasonably informed:** A trustee must keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests.
 - ii. **Duty to respond to requests for information:** Unless unreasonable under the circumstances, a trustee must promptly respond to a beneficiary's request for information related to the administration of the trust.
 - iii. **Duty to provide a copy of the trust instrument:** A trustee...upon request of a beneficiary must promptly furnish to the beneficiary a copy of the entire trust instrument. (Note that where there is suspicion of fraudulent changes to trusts, it may be necessary to obtain copies of revoked or superseded trust agreements.)
 - iv. **Duty to notify of acceptance of trusteeship:** A trustee...within 60 days after accepting a trusteeship must notify the qualified beneficiaries of the acceptance and of the trustee's name, address, and telephone number.
 - v. **Duty to notify of trust existence and beneficiary rights:** A trustee...within 60 days after the date the trustee acquires knowledge of the creation of an irrevocable trust, or the date the trustee acquires knowledge that a formerly revocable trust has become irrevocable, whether by the death of the settlor or otherwise, must notify the qualified beneficiaries of the trust's existence, of the identity of the settlor or settlors, of the right to request a copy of the trust instrument, and of the right to a trustee's report.
 - vi. **Duty to notify of change in compensation:** A trustee...shall notify the qualified beneficiaries in advance of any change in the method or rate of the trustee's compensation.
 - vii. **Duty to provide reports:** A trustee must send to the distributees or permissible distributees of trust income or principal, and to other qualified or nonqualified beneficiaries who request it, at least annually and at the termination of the trust, a report of the trust property, liabilities, receipts, and disbursements, including the source and amount of the trustee's compensation, a listing of the trust assets and, if feasible, their respective market values. Upon a vacancy in a trusteeship, unless a co-trustee remains in office, a report must be sent to the qualified beneficiaries by the former trustee. A personal representative, [conservator], or [guardian] may send the qualified beneficiaries a report on behalf of a deceased or incapacitated trustee.
 - viii. **Almost Total Lack of Uniformity.** "Despite the UTC's goal of uniformity, among the...enacting jurisdictions almost no two state versions of the UTC disclosure rules are the same ...Much of the variation reflects the serious

policy debate as to which of the disclosure obligations, if any, should be mandatory (regardless of the terms of the trust), which should be default rules that are subject to override by the settlor, and which should be “grandfathered” and only apply to trusts that become irrevocable after the date that the UTC is enacted. Some states have gone beyond the UTC’s text with creative and potentially useful variations – the ability to name a surrogate to receive notice on behalf of a beneficiary, changing obligations before and after the death of a surviving spouse, detailed statutory reporting regimes, enhanced disclosures to the state attorney general for charitable trusts, and good faith exceptions to the trustee’s duties. While there is little doubt that the significant state by state variations in the UTC disclosure provisions are well-intentioned, often useful, and reflect legitimate policy differences concerning the relationship between trustees and beneficiaries, the almost total lack of uniformity creates risks especially for institutional trustees that often operate with standardized and automated practices and procedures.”³¹

C. Discovery after Commencing Suit.

1. In contested conservatorship proceedings, extensive discovery regarding assets and land records will facilitate discovery of fraud, theft, or misuse of assets. The handling of assets will have a significant impact on the court’s selection of fiduciaries, and other issues. Discovery of medical records can be useful not just to establish the incapacity, but also to challenge fraudulent post-incapacity contracts, deeds, gifts, and estate planning documents. Balancing against the interest and uses of financial and medical evidence are the interests of the allegedly incapacitated adult in the privacy of financial and personal matters. In some cases, litigation may be brought for improper motives, such as to pressure an ailing parent to compel large gifts, to frustrate estate planning, to harass for other personal benefit, or as a forum to attack another sibling or other family member. The court will need to balance its need for information with the invasiveness, disruption, burden, and expense of discovery.
2. Items of potential interest in determining financial matters include without limitation the following:
 - a. Personal financial statements prepared by any banker, accountant, or other.
 - b. Individual income tax returns and gift tax returns.
 - c. Copies of any wills and trusts and related documents.
 - d. List of names and contact information for all professional contacts, including lawyers, bankers, accountants, and investment advisors.
 - e. List of named beneficiaries in other contracts, such as insurance contracts, investment accounts, and bank accounts.

³¹ Fitzsimons, Navigating the Trustee's Duty to Disclose, *Probate and Property Magazine*, Vol. 23, No. 1, January 2009.

- f. All original statements from banks, financial institutions, IRAs, and brokerage accounts.
- g. List of original investment in all assets, including insurance/annuity contracts, IRAs, stocks, bonds, mutual funds, and real estate.
- h. All original cancelled checks, deposit clips, broker advices and supporting invoices, or other documentation for any disbursements.
- i. Brokerage firm agreements and applications.
- j. Original credit card account statements.
- k. Credit reports.
- l. List of any property received by gift or inheritance.
- m. Life insurance policies, including cash surrender values and loan information.
- n. Documents evidencing ownership of real property.
- o. Real property and personal property appraisals.
- p. Documents relating to notes receivable.
- q. List of safe deposit boxes, their locations, and exact contents.
- r. List of storage facilities, their locations, and exact contents.
- s. Documents evidencing ownership of tangible personal property, oil and gas interests, and other miscellaneous assets.
- t. List of ownership interests in any equipment.
- u. Statements and reports from all benefit plans.
- v. Stock option documents.
- w. Documents evidencing charitable transfers.
- x. Partnership agreement, trust agreement, and related Form K-1s.
- y. All documents related to gifting to descendants or others, including documents related to education savings or qualified tuition programs.
- z. Account statements from all financial institutions.

D. **Compelling Production of Estate Planning Documents.**

1. Family members involved in guardianship litigation may find it desirable to seek to compel production of the current and earlier versions of the estate planning documents of the allegedly incapacitated adult. Dramatic changes in estate planning documents during period of incapacity may give rise to inferences about the actions of family members. In an increasing number of cases, parties are abusing the guardianship proceedings for the purposes of commencing the contest to the estate plan before the death of the testator.
2. Parties seeking to compel production of wills and revocable trusts may have to navigate several legal principles that may frustrate the ability to compel the production of some or all of the respondent's estate planning documents.
3. **Inconsistent with Capacity Standard for Guardianship?**
 - a. The standard of capacity for guardianship purposes is generally a "functional standard" that focuses on the ability to manage assets and financial affairs and provide for support during lifetime.
 - b. For example, this functional standard is utilized in the Uniform Probate Code. Part 5 of the Uniform Probate Code is called the "Uniform Guardianship and Protective Proceedings Act (1997)". The comments to this Act are instructive as to the focus on the ability of the respondent to function:

"Prefatory Note to Parts 1-4: The 1997 revision bases the definition of incapacitated person on functional abilities, recognizing that a person may have the capacity to do some things while needing help with others. Before a guardian may be appointed for an adult...the individual must be determined to be incapacitated...If assistive technology is available that may enable the individual to receive and evaluate information or to make or communicate decisions, then the individual may not be an "incapacitated person"."

"Comment to Section 5-102: "This definition [of an incapacitated person] emphasizes the importance of functional assessment and recognizes that the more appropriate measure of a person's incapacity is the measurement of the person's abilities...This definition is designed to work with the concepts of least restrictive alternative and limited guardianship or conservatorship – only removing those rights that the incapacitated person cannot exercise, and not establishing a guardianship or conservatorship if a lesser restrictive alternative exists."

"Comment to Section 5-311: "A guardian may be appointed only when no less restrictive alternative will meet the respondent's identified needs. The clear and convincing evidence standard for the appointment of a guardian is new to the Act, but mandated by the Constitution and strongly recommended by many commentators on guardianship."

- c. Required reports by the guardian *ad litem* may not include a report on the estate plan. Required medical reports will not include the estate plan. The required statutory factors the court must consider in determining the need for a guardian or conservator may not include consideration of the estate plan.

4. Relevance.

- a. Although legal relevance is a fairly low evidentiary standard, there are many grounds for arguing that estate planning information is irrelevant to guardianship proceedings. However, the court will be strongly inclined in favor of receiving as much information as possible so that it can carry out its role as the protector of incapacitated persons. In addition, information about the estate plan is arguably relevant to the determination of the powers to be granted to the conservator with respect to the creation, modification, revocation, and funding of trusts, whether to revoke or limit powers of attorney, and other financial matters.³²
- b. The appointment of a conservator does not generally eliminate the capacity to execute a will. *See, e.g. Gilmer v. Brown*, 186 Va. 630, 637 (1947) (“These decisions are in accord with the general rule that, in the absence of a controlling statute, the mere fact that one is under a guardianship does not deprive him of the power to make a will...[m]ental weakness is not inconsistent with testamentary capacity. A less degree of mental capacity is requisite for the execution of a will than for the execution of contracts and the transaction of ordinary business. One may be capable of making a will yet incapable of disposing of his property by contract or of managing his estate... The condition of being unable, by reason of weakness of mind, to manage and care for an estate, is not inconsistent with capacity to make a will”).
- c. The capacity to execute a trust is the same as that to execute a will.³³
- d. *In the Matter of Guardianship of York*, 1986 Wash. App. LEXIS 3161 (1986).
 - i. The Washington Court of Appeals addressed this issue and concluded that the trial court erred by compelling production of a will in the context of guardianship proceedings.
 - ii. A daughter contested guardianship proceedings for her parents on the grounds that she did not receive formal notice of the proceedings.
 - iii. The daughter also asked the court to compel the production of her parents’ wills so that she could determine if the appointed guardian had exercised undue influence on the parents and was therefore unfit to serve as guardian.
 - iv. The trial court ordered the appointed guardian to provide the daughter with copies of the wills.

³² *See generally* “Involuntary Disclosure or surrender of will prior to testator’s death”, 75 ALR 4th 1144.

³³ Uniform Trust Code, Section 601.

- v. The parents' attorney moved for reconsideration, refusing to produce the wills on the basis of attorney client privilege. In response, the trial court modified its ruling and ordered the turning over of the wills to the guardian, who was to disclose whether she was receiving a substantial interest under the will.
- vi. The parents appealed, arguing that an attorney should never be required to divulge the contents of the will prior to death.
- vii. In reversing the trial court's order compelling turning over of the will, the Washington appellate court stated as follows:

“The trial court has no authority to either (1) generally compel production of the wills or (2) order release of the wills to Ms. Taylor as the Yorks' guardian. First, a will has no legal significance before the testator's death, nor is it an asset of the ward's estate. This, prior to the initiation of probate proceedings, a court has no jurisdiction to compel surrender of a will at the guardian's request....

Second, while a client is alive, his or her communications with an attorney concerning preparation of a will remain privileged....

Finally, without the consent of the testator, disclosure of a will prior to the testator's death violates the Code of Professional Responsibility.”

- 5. **Rights to Information.** Descendants may not have a right to information about estate plans while the testator is alive, competent, and holding the power to revoke trusts, under several commonly understood legal principles, such as (a) wills do not “speak” until death; (b) a living person has no heirs; and (c) there is no forced heirship in American law. Also, so long as there is capacity and the power to revoke the trust, only the grantor has rights as a trust beneficiary, which includes the right to information.³⁴

E. **Jurisdiction and Forum Shopping.**

- 1. Generally, the guardianship suit is filed where the incapacitated person resides, is located, or where the person resided before becoming a patient, voluntarily or involuntarily, in a hospital or a resident in a nursing home, convalescent home, assisted living facility, or other similar institution. If the suit concerns a nonresident with real property in the state, the suit may be able to be filed where the real property is located.
- 2. **Kidnapping and Forum Shopping.** It may be necessary to keep regular track of the physical location of the respondent. This may be best accomplished through a guardian *ad litem*. A wrongdoer, facing a challenge to an attempt to take control of assets through conservatorship proceedings, may seek to remove the respondent from the jurisdiction and file proceedings in another jurisdiction covertly. In the event of

³⁴ See, e.g. Uniform Trust Code, Sections 813 and 603.

relocation, it will be necessary to monitor the court filings in the other jurisdiction. In the event another suit is filed, it may be possible to ask the other jurisdiction to stay its proceedings on principles of comity or other reasons (i.e. you cannot change residence without mental capacity, etc.), and facilitate retained jurisdiction by the original court if that is desirable.

3. **The Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act.**

- a. The UAGPPJA was approved by NCCUSL in 2007, and deals narrowly with jurisdictional issues. Due to increasing population mobility, cases involving simultaneous and conflicting jurisdiction over guardianship are increasing. Even when all parties agree, steps such as transferring a guardianship to another state can require that the parties start over from scratch in the second state. Obtaining recognition of a guardian's authority in another state in order to sell property or to arrange for a residential placement is often impossible. The goal of the UAGPPJA is to effectively address these problems.³⁵
- b. The UAGPPJA has been enacted in Alabama, Alaska, Arizona, Colorado, Delaware, District of Columbia Illinois, Iowa, Maryland, Minnesota, Montana, Nevada North Dakota, Oklahoma, Oregon, South Carolina, Tennessee, Utah, Virginia, Washington, and West Virginia. The UAGPPJA has been introduced in Connecticut, Florida, Hawaii, Kentucky, Nebraska, and Vermont.
- c. The NCCUSL Prefatory Notes to the UAGPPJA provide a useful and concise overview of the purposes and structure of the Act.
- d. **“The Problem of Multiple Jurisdiction.** Because the United States has 50 plus guardianship systems, problems of determining jurisdiction are frequent. Questions of which state has jurisdiction to appoint a guardian or conservator can arise between an American state and another country. But more frequently, problems arise because the individual has contacts with more than one American state. In nearly all American states, a guardian may be appointed by a court in a state in which the individual is domiciled or is physically present. In nearly all American states, a conservator may be appointed by a court in a state in which the individual is domiciled or has property. Contested cases in which courts in more than one state have jurisdiction are becoming more frequent. Sometimes these cases arise because the adult is physically located in a state other than the adult=s domicile. Sometimes the case arises because of uncertainty as to the adult=s domicile, particularly if the adult owns a second home in another state. There is a need for an effective mechanism for resolving multi-jurisdictional disputes. Article 2 of the UAGPPJA is intended to provide such a mechanism.”³⁶
- e. **“The Problem of Transfer.** Oftentimes, problems arise even absent a dispute. Even if everyone is agreed that an already existing guardianship or conservatorship should be moved to another state, few states have streamlined

³⁵ NCCUSL Summary: http://www.nccusl.org/Update/uniformact_summaries/uniformacts-s-agppja.asp

³⁶ NCCUSL, Prefatory Note to UAGPPJA.

procedures for transferring a proceeding to another state or for accepting such a transfer. In most states, all of the procedures for an original appointment must be repeated, a time consuming and expensive prospect. Article 3 of the UAGPPJA is designed to provide an expedited process for making such transfers, thereby avoiding the need to re-litigate incapacity and whether the guardian or conservator appointed in the first state was an appropriate selection.”³⁷

- f. **“The Problem of Out-of-State Recognition.** The Full Faith and Credit Clause of the United States Constitution requires that court orders in one state be honored in another state. But there are exceptions to the full faith and credit doctrine, of which guardianship and protective proceedings is one. Sometimes, guardianship or protective proceedings must be initiated in a second state because of the refusal of financial institutions, care facilities, and the courts to recognize a guardianship or protective order issued in another state. Article 4 of the UAGPPJA creates a registration procedure. Following registration of the guardianship or protective order in the second state, the guardian may exercise in the second state all powers authorized in the original state’s order of appointment except for powers that cannot be legally exercised in the second state.”³⁸

- g. **“The Proposed Uniform Law and the Child Custody Analogy.** Similar problems of jurisdiction existed for many years in the United States in connection with child custody determinations. If one parent lived in one state and the other parent lived in another state, frequently courts in more than one state had jurisdiction to issue custody orders. But the Uniform Law Conference has approved two uniform acts that have effectively minimized the problem of multiple court jurisdiction in child custody matters; the Uniform Child Custody Jurisdiction Act (UCCJA), approved in 1968, succeeded by the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), approved in 1997. The drafters of the UAGPPJA have elected to model Article 2 and portions of Article 1 of their Act after these child custody analogues. However, the UAGPPJA applies only to adult proceedings. The UAGPPJA is limited to adults in part because most jurisdictional issues involving guardianships for minors are subsumed by the UCCJEA.”³⁹

- h. **“The Objectives and Key Concepts of the Proposed UAGPPJA.** The UAGPPJA is organized into five articles. Article 1 contains definitions and provisions designed to facilitate cooperation between courts in different states. Article 2 is the heart of the Act, specifying which court has jurisdiction to appoint a guardian or conservator or issue another type of protective order and contains definitions applicable only to that article. Its principal objective is to assure that an appointment or order is made or issued in only one state except in cases of emergency or in situations where the individual owns property located in multiple states. Article 3 specifies a procedure for transferring a guardianship or

³⁷ Id.

³⁸ Id.

³⁹ Id.

conservatorship proceedings from one state to another state. Article 4 deals with enforcement of guardianship and protective orders in other states. Article 5 contains an effective date provision, a place to list provisions of existing law to be repealed or amended, and boilerplate provisions common to all uniform acts.”⁴⁰

- i. **“Key Definitions (Section 201).** To determine which court has primary jurisdiction under the UAGPPJA, the key factors are to determine the individual’s “home state” and “significant-connection state.” A “home state” (Section 201(a)(2)) is the state in which the individual 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 appointment of a guardian. If the respondent was not physically present in a single state for the six months immediately preceding the filing of the petition, the home state is the place where the respondent was last physically present for at least six months as long a such presence ended within the six months prior to the filing of the petition. Section 201(a)(2). Stated another way, the ability of the home state to appoint a guardian or enter a protective order for an individual continues for up to six months following the individual’s physical relocation to another state.

A “significant-connection state,” which is a potentially broader concept, means the state in which the individual has a significant connection other than mere physical presence, and where substantial evidence concerning the individual is available. Section 201(a)(3). Factors that may be considered in deciding whether a particular respondent has a significant connection include:

- the location of the respondent’s family and others required to be notified of the guardianship or protective proceeding;
- the length of time the respondent was at any time physically present in the state and the duration of any absences;
- the location of the respondent’s property; and
- the extent to which the respondent has other ties to the state such as voting registration, filing of state or local tax returns, vehicle registration, driver’s license, social relationships, and receipt of services.

A respondent in a guardianship or protective proceeding may have multiple significant-connection states but will have only one home state.”⁴¹

- j. **“Jurisdiction (Article 2).** Section 203 is the principal provision governing jurisdiction, creating a three-level priority; the home state, followed by a significant-connection state, followed by other jurisdictions:

⁴⁰ Id.

⁴¹ Id.

- *Home State*: The home state has primary jurisdiction to appoint a guardian or conservator or issue another type of protective order.
- *Significant-connection State*: A significant-connection state has jurisdiction to appoint a guardian or conservator or issue another type of protective order if on the date the petition was filed:
 - the respondent does not have a home state or the home state has declined jurisdiction on the basis that the significant-connection state is a more appropriate forum; or
 - the respondent has a home state, a petition for an appointment or order is not pending in a court of that state or another significant-connection state, and, before the court makes the appointment or issues the order (i) a petition for an appointment or order is not filed in the respondent's home state; (ii) an objection to the court's jurisdiction is not filed by a person required to be notified of the proceeding; and (iii) the court in this state concludes that it is an appropriate forum under the factors set forth in Section 206.
- *Another State*: A court in another state has jurisdiction if the home state and all significant-connection states have declined jurisdiction because the court in the other state is a more appropriate forum, or the respondent does not have a home state or significant-connection state.

Section 204 addresses special cases. Regardless of whether it has jurisdiction under the general principles stated in Section 203, a court in the state where the respondent is currently physically present has jurisdiction to appoint a guardian in an emergency, and a court in a state where a respondent's real or tangible personal property is located has jurisdiction to appoint a conservator or issue another type of protective order with respect to that property. In addition, a court not otherwise having jurisdiction under Section 203 has jurisdiction to consider a petition to accept the transfer of an already existing guardianship or conservatorship from another state as provided in Article 3.

The remainder of Article 2 elaborates on these core concepts. Section 205 provides that once a guardian or conservator is appointed or other protective order is issued, the court's jurisdiction continues until the proceeding is terminated or transferred or the appointment or order expires by its own terms. Section 206 authorizes a court to decline jurisdiction if it determines that the court of another state is a more appropriate forum, and specifies the factors to be taken into account in making this determination. Section 207 authorizes a court to decline jurisdiction or fashion another appropriate remedy if jurisdiction was acquired because of unjustifiable conduct. Section 208 prescribes additional notice requirements if a proceeding is brought in a state other than the respondent's home state. Section 209 specifies a procedure for resolving jurisdictional issues if petitions are pending in more than one state.

The UAGPPJA also includes provisions regarding communication between courts in different states, requests for assistance made by a court to a court of another state, and the taking of testimony in another state. Sections 104-106.”

- k. **“Transfer to another State (Article 3).** Article 3 specifies a procedure for transferring an already existing guardianship or conservatorship to another state. To make the transfer, court orders are necessary from both the court transferring the case and from the court accepting the case. The transferring court must find that the incapacitated or protected person is physically present in or is reasonably expected to move permanently to the other state, that adequate arrangements have been made for the person or the person’s property in the other state, and that the court is satisfied the case will be accepted by the court in the other state. To assure continuity, the court in the transferring state cannot dismiss the local proceeding until the order from the state accepting the case is filed with the transferring court. To expedite the transfer process, the court in the accepting state must give deference to the transferring court’s finding of incapacity and selection of the guardian or conservator. Much of Article 3 is based on the pioneering work of the National Probate Court Standards, a 1993 joint project of the National College of Probate Judges and the National Center for State Courts.”⁴²
 - l. **“Out of State Enforcement (Article 4).** To facilitate enforcement of guardianship and protective orders in other states, Article 4 authorizes a guardian or conservator to register these orders in other states. Upon registration, the guardian or conservator may exercise in the registration state all powers authorized in the order except as prohibited by the laws of the registration state.”⁴³
 - m. **“International Application (Section 103).** Section 103 addresses application of the Act to guardianship and protective orders issued in other countries. A foreign order is not enforceable pursuant to the registration procedures under Article 4, but a court in the United State may otherwise apply the Act as if the foreign country were an American state.”⁴⁴
- F. **Customary Remedies.** The court generally has very broad powers to act in the best interests of an incapacitated person. In most cases, the remedies available to the court (assuming the circumstances and proof justify the granting of relief) can include any of the following:
- 1. Appointment of a limited or plenary (full) guardian of the person and conservator for property, and defining the powers and duties of the guardian and conservator. In determining the need for a guardian or a conservator and the powers and duties of any needed guardian or conservator, the court will look for the “least restrictive alternative” (the relief that preserves the independence of the incapacitated person to the greatest extent possible), and will consider (a) the development of the

⁴² Id.

⁴³ Id.

⁴⁴ Id.

- respondent's maximum self-reliance and independence and (b) the availability of less restrictive alternatives, including advance directives and durable powers of attorney.
2. Revocation, suspension, or modification of powers of attorney and advance medical directives.
 3. Certain powers of conservators may require specific court approval, such as the power to make gifts, disclaim interests in property, and revoke or amend trusts.
 4. Bond and surety for fiduciaries.
 5. Compensation of fiduciaries.
 6. Approval of plans for living arrangements and medical treatment.
 7. Revocation of voting rights and driving privileges.
 8. Payment of Social Security and other retirement benefits to conservator.
 9. HIPAA matters.
 10. Payment of attorneys' fees incurred in the proceedings.

G. **Extraordinary Remedies.** The facts of the case, the protective nature of the proceedings, other provisions of the guardianship statutes and applicable law may in some circumstances extend the power of the court to protect the incapacitated adult from abuse.

1. **Constructive Trust.** A court may impose a constructive trust to return property to the conservatorship estate, to prevent fraud, to remedy a wrong, to prevent unjust enrichment, and to avoid an unconscionable result. The imposition of a constructive trust may require a high degree of proof (i.e. clear and convincing). The proponent of the constructive trust generally bears the burden of proof.
2. **Money Judgment** in favor of the incapacitated person's estate in the amount of any assets wrongfully taken.
3. **Invalidation of Deeds and Contracts.** The court's authority to invalidate post-incapacity deeds and contracts may not be expressly provided for in the guardianship statutes. However, a court may be willing to invalidate post-incapacity deeds and contracts on proof of incapacity and in order to protect the incapacitated adult from abuse. Because of the protective nature of the proceedings, such actions are generally permissible under the court's general powers and the court's protective power. Due process concerns should be addressed (i.e. notice and an opportunity to be heard for any persons affected by the invalidation of deeds and contracts).
4. **Invalidation of Wills.** The court's authority to invalidate post-incapacity wills may not be expressly provided for in the guardianship statutes. Arguably the court has the

authority to invalidate post-incapacity wills in order to protect the incapacitated adult from abuse. This may especially be the case where the alleged will is executed after the conservatorship proceedings are filed and the protection of the incapacitated adult is before the court – and even more so where the procuring of the will is done in violation of the court’s orders. Due process concerns should be addressed (i.e. notice and an opportunity to be heard for any persons affected). A court may prefer an alternative approach – such as creation and funding of a trust and elimination of any probate estate, thereby rendering provably fraudulent wills ineffective. This may be due to certain wills doctrines, such as the notion that a will is ambulatory and does not “speak” until the death of the testator. There are also strategic concerns in litigating the will contest prior to death – including the strain on the incapacitated adult, and concern that an incapacitated adult may consume significant assets for care during the period of incapacity, which may impact the cost-benefit analysis of bringing the will contest prior to death when the value of the amount at issue can be determined with better certainty.

5. **Creation of Wills and Trusts and Substituted Judgment.** In some states, the court may have the authority to permit a conservator to prepare a will for the incapacitated person, and the court may have the authority to order the creation and funding of a trust for the incapacitated adult. The authority may be found (explicitly or implicitly) in the statutory powers of the conservator. The power may also be available under the doctrine of “substituted judgment”, although that doctrine has not been recognized by courts in every state. Due process concerns must be resolved when asking the court for any relief that would affect the beneficiaries under the incapacitated person’s estate plan.
 - a. In *Americans for the Arts v. National City Bank* (855 N.E.2d 592 (Indiana Court of Appeals 2006)), National City Bank as conservator petitioned the court for the creation of two large charitable remainder annuity trust to hold 3.8 million shares of Eli Lilly Company stock on behalf of the sole surviving grandchild of Eli Lilly, and then successfully defended itself against a surcharge action based on lack of diversification of Eli Lilly Company stock as a result of protective provisions in the newly created trusts.
 - b. In *In re Guardianship of Lillian Glasser* (2007 WL 867783 (N.J. Super Ct. 2007)), which involved competing guardianship proceedings in two states brought by the two children of Lillian Glasser while she was alive, the court set aside a later estate plan that benefited one of the children disproportionately, and adopted an earlier estate plan that treated the children equally.
 - c. Recently in *Murphy v. Murphy* (No. A115177, June 26, 2007), the California First District Court of Appeals in San Francisco held that where a conservator has been appointed for an incapacitated person and the court approves an estate plan for the incapacitated person under substituted judgment during the person’s lifetime, later challenges to the estate plan after the person dies are barred. Under this decision, challenges to the estate plan being presented to the court must be raised before the testator dies, and will be barred after death when the will actually “speaks”.

6. **Protections for Incapacitated Adult in Structure of Trusts.** If the court is asked to impose a trust to hold the assets of an incapacitated adult, careful consideration should be given to structuring the trust terms so as to offer maximum protections for the incapacitated person. The protections may include the following:
 - a. The trust should be for the sole benefit of the incapacitated person during the person's lifetime.
 - b. At the person's death, distribution should be made in accordance with the person's most recent pre-incapacity estate plan, or, if none, to the person's heirs at law.
 - c. Accounting to a court or court official.
 - d. Careful selection of fiduciaries, and adequate bond with surety.
 - e. Revocable by the person upon regaining capacity.
 - f. Court approval of all trust terms, with notice to all interested parties (and a guardian *ad litem* for incapacitated adult).

H. Select Tactical Considerations.

1. **Intervention.** Non-family beneficiaries under estate planning documents (for example, a charity) may seek to intervene in conservatorship proceedings to protect the estate plan from abuse. Intervention should be permitted where the party seeking to intervene can demonstrate an interest. However, because of the narrow category of persons entitled by statute to notice of conservatorship proceedings, there may be circumstances where the non-family beneficiary does not receive notice of the proceedings.
2. **Restraining orders and preliminary injunctions.** Temporary restraining orders and preliminary injunctions should be considered as a mechanism for protecting assets while conservatorship proceedings are pending.
 - a. Obtaining a *temporary restraining order* (TRO) will require significant proof, including proof of irreparable harm in the absence of the TRO. A TRO is a short-term solution. Because conservatorship litigation can be lengthy when contested, a preliminary injunction may be preferable.
 - i. A court in Hawaii granted a TRO requiring a respondent to remain in the state while proceedings for appointment of a guardian were ongoing, and upon respondent's motion for reconsideration, the court cited cases involving harassment and abuse in supporting the TRO as proper and not violating constitutional rights. *In re Guardianship of Carlsmith*, 151 P.3d 717 (Haw. 2007).

- b. A ***preliminary injunction*** is obtained after notice to adverse parties. The purpose of the injunction is to preserve assets while the litigation is pending. However, because of the unique nature of conservatorship proceedings, the factors may weigh in favor of injunctions. Injunctions should consider a well-defined but narrow category of distributions that may be made without court-approval, for example those expenses necessary for the direct care of the incapacitated adult. Consider dollar limits, and a well-defined category of permissible distributions (i.e. consider prohibiting distributions to compensate family members for “services”, and limit payment to disinterested non-family third party care providers, etc.).
 - i. *Giulietti v. Giulietti*, 784 A.2d 905 (Conn. App. 2001) Son attempted to obtain injunction freezing his parents’ assets in connection with conservatorship proceedings. The court found that the son’s request for an injunction was an attempt to frustrate the parents’ ability to withdraw or transfer assets as they desired rather than a true concern over their ability to manage affairs. After testimony as to the harmful effect on the parents’ personal and business activities, the court found irreparable harm to the parents and enjoined the son from pursuing any freeze of the parents’ assets.
 - ii. In order to obtain a temporary injunction, the court must be satisfied of the movant’s equity, and this requires the court to examine the movant’s rights and the existence of impending irreparable injury. Courts of equity will not make use of the extraordinary writ of injunction to preserve mere doubtful or possible rights. There must be some reasonable apprehension of loss to the plaintiff before the court will interfere. *Brown v. Brown*, 109 S.E. 815 (W. Va. 1921). A temporary injunction is an extraordinary equitable remedy. The court will need to carefully balance the harm from restricting the freedom of an allegedly incapacitated person with the risk of harm from possible financial abuse.
 - iii. Courts will generally apply some variation of the following factors in deciding whether to grant a temporary injunction:
 - (a) the likelihood of irreparable harm to the plaintiff if the preliminary injunction is denied;
 - (b) the likelihood of harm to the defendant if the requested relief is granted;
 - (c) the likelihood that the plaintiff will succeed on the merits; and
 - (d) the public interest.
- 3. ***Lis Pendens***. If the incapacitated adult owns any real property, consideration may be given to recording a memorandum of *lis pendens* (“litigation pending”) in the land records where any property is located. The purpose of the *lis pendens* is to put any future purchasers on notice of the litigation, and subject title to the property to the litigation. A *lis pendens* can have the practical effect of preventing sale of real

property to third party purchasers because of the inability to convey unencumbered title to the purchaser.

4. **Temporary Conservator.** Because a temporary conservator takes actual possession of the assets, the appointment of an independent temporary conservator (with corresponding suspension of powers of attorney) may be more effective than an injunction in preventing misuse of assets while the conservatorship proceedings are pending. The court cannot appoint a temporary conservator without making a finding of incapacity after following the statutory procedures.
5. **Dealing with Alleged Post-Incapacity Gifts.** An issue that frequently arises in contested conservatorship proceedings is whether the court should invalidate alleged gifts due to incapacity, fraud, or abuse. The measure of capacity to execute a deed of gift is sufficient mental capacity to understand the nature of the transaction and the effect that the gift may have on the future financial security of the donor.⁴⁵ The donee has the burden of proving intent to make a gift. The determination of the validity of gifts will vary in the event there is proof of, or a presumption of, undue influence with respect to the gift. The court may also be concerned with (a) the potential Medicaid disqualification consequences of questionable gifts and (b) gift taxes imposed on the incapacitated person.

III. The Capacity Standard, the Strain of Litigation, and the Problem of the Self-Fulfilling Prophecy.

- A. **Capacity Standard.** The standard for capacity is generally a “functional standard” that focuses on the ability to manage assets and financial affairs and provide for support during her lifetime.
- B. **Burden of Proof and Presumptions.** In order to prevail and have the court appoint a guardian or conservator, the petitioner must prove by clear and convincing evidence that respondent is both (1) incapacitated (as defined in the applicable statute) and (2) in need of a guardian or conservator, or both. Generally, a person alleging incapacity has the burden of proof, although the court may not apply the customary burden of proof in guardianship proceedings due to the special nature of the proceedings.
- C. **The Problem of the Self-Fulfilling Prophecy.** A virulent strain of incapacity suits has turned the traditional understanding of guardianship and conservatorship litigation on its head. In these suits, children aggressively pursue declarations of incapacity against a still-living parent to ensure the preservation or ‘fair’ distribution of the parent’s assets. The prosecutors of these suits aggressively seize upon and exaggerate the significance of minor natural incidents of aging as evidence of mental deterioration to justify their efforts. However, neuroscience suggests that the stress of the litigation can place such strain upon the mental state of an aging defendant that the suit itself may transform a specious allegation meriting dismissal into a reality requiring action.

⁴⁵ Restatement 3d Property (Wills and Other Donative Transfers), Section 8.1.

- D. Most clients, other than the genetically gifted few, will see some deterioration in their mental capacity as they grow older, and lapses in memory, sickness, fatigue, and increases in idiosyncratic behavior provide welcome ammunition for the attacker. It is often at the early stages of mental decline that the attack is commenced. Not every decline in mental capacity justifies a finding of legal incapacity or the appointment of a guardian or conservator. The appointment of a guardian and conservator strips away a person's legal rights, and, appropriately, the law has imposed heavy burdens of proof and high evidentiary standards that must be clearly met before the court may deprive a person of his personal freedom or control over his property. Where mental decline has started, however, defending against the attack suit is complicated because the strain of the litigation itself may accelerate the mental decline, possibly past the threshold where the court will appoint a guardian or conservator. In this sense, the attack incapacity suit may be a self-fulfilling prophecy: by suing to declare someone legally incapacitated the wrongdoer may bring about the incapacity itself.
- E. **Dementia.** Dementia is the loss of memory and other intellectual capabilities to a degree sufficient to impair function. It is one of the primary reasons why individuals may become unable to manage their finances, or unable to perform activities of daily living, or both. Dementia has many causes. Some may be treatable, such as tumors, subdural hematomas, normal pressure hydrocephalus, Vitamin B12 deficiency, liver disease, syphilis, fungal meningitis, toxins, uremia, myxedema, hypercalcemia, subacute bacterial endocarditis, or lung cancer. At present, unfortunately, a high percentage of patients with dementia cannot be effectively treated, including those with Alzheimer's, repeated strokes, Huntington's chorea, or Creutzfeldt-Jacob disease. Substantial and growing evidence suggests that stress may contribute to dementia. Litigation is stressful, particularly to the elderly, and most especially when the litigants are blood relatives, as they often are in conservatorship and guardianship proceedings. In such circumstances, it must be considered whether the litigation itself could aggravate whatever degree of intellectual impairment may exist in the defendant at the outset. In the simplest terms - litigation is stressful, stress impairs memory, and therefore, litigation impairs memory.
- F. **Dementia's Natural History.** Dementia is a common problem, affecting an estimated 8% of those over 65.⁴⁶ Usually, dementia develops only gradually. Before dementia is clinically apparent, degenerative changes may well have been developing in the nervous system over a course of years.⁴⁷ Moreover, symptoms of dementia may be present for years before the diagnosis is made.⁴⁸ Stress is "a state of physiological or psychological strain caused by adverse stimuli, physical, mental, or emotional, internal or external, that tend to disturb the functioning of an organism and which the organism naturally seeks to avoid."⁴⁹ Since litigation is by design an adversarial proceeding, it seems axiomatic to assume it is stressful, at least to the actual litigants. Certainly the anecdotal observations

⁴⁶ Fratiglione, L, et al., "Worldwide prevalence and incidence of dementia," 15 *Drugs Aging* 365-375 (1999).

⁴⁷ Atti, A.R., et al., "Late-life body mass index and dementia incidence: Nine-year follow-up data from the Kungsholmen project," 56 *J. Am. Geriatr. Soc.* 111-116 (2008) at 111, citing Braak, H., et al., "Neuropathological hallmarks of Alzheimer's and Parkinson's diseases," 117 *Prog. Brain Res.* 267-285 (1998).

⁴⁸ Id. at 111, citing Backman, L., et al., "Cognitive impairment in preclinical Alzheimer's disease: A meta-analysis," 19 *Neuropsychol.* 520-531 (2005).

⁴⁹ *Dorland's Medical Dictionary*, 30th ed. (2003) at 1772.

of litigators support that conclusion. To understand the possible effects of litigation stress upon memory, it is necessary to develop a measure of understanding of how memory works and how it is impaired. Much remains to be learned on this score. Much is already understood, however, and work continues.

- G. The Hippocampus.** The hippocampus is a bilateral subcortical structure in the brain's temporal lobe. It has a variety of functions, but the one best documented, and most pertinent to this discussion, is its importance in learning and memory. The hippocampus plays a critical role in the consolidation of short-term into long-term explicit memory. Short-term or "primary" or "active" memory refers to the ability to hold a small amount of information in the mind in an active, readily available state for a short period of time. Long-term or "explicit" memory refers to a mechanism for storing, managing and retrieving information permanently. One can think of long-term memory as conscious factual memory, such as recalling what month it is.⁵⁰ When the hippocampus is damaged, even subtly, explicit memory deficits often arise.⁵¹
- H. The Impact of Stress.** It has long been understood that stress is associated with overactivation and dysregulation of the autonomic nervous system and of the hypothalamus-pituitary-adrenal cortex ("HPA") axis. The autonomic nervous system is that part of the peripheral nervous system (i.e., the nervous system exclusive of the brain and spinal cord) which controls visceral functions such as heart rate, digestion, and respiration. The HPA axis is a major part of the neuroendocrine system that controls reactions to stress and regulates many body processes, including digestion, the immune system, mood and emotion, sexuality, and energy storage and expenditure. The HPA axis also plays a role in coronary heart disease, infection, and accelerated aging.⁵²
- I. Glucocorticoids.** In stressful situations, the body secretes glucocorticoids, powerful hormones that, among many other functions, play an integral role in the body's so-called "fight or flight" response. Glucocorticoids, made in the adrenal glands, mobilize energy; increase cardiovascular tone; suppress nonessential functions such as growth, tissue repair, and reproduction; and potentiate aspects of immunity.⁵³ Our adrenals synthesize and release these remarkable compounds under stressful circumstances because their effects may be literally life-saving. In appropriate and widely varying circumstances, glucocorticoids also have great therapeutic value and are regularly prescribed to treat a wide range of disorders. As with so many other substances needed for survival, however, and of most if not all medications, blood levels of glucocorticoids need to be maintained within a relatively narrow range. In health, the body has a variety of mechanisms designed to do just that. The mechanism we have to maintain glucocorticoid levels within the proper range can be likened to a thermostat that triggers the furnace to kick on

⁵⁰ Sapolsky, R.M., "Glucocorticoids and hippocampal atrophy in neuropsychiatric disorders," *57 Arch. Gen. Psych.* 925-935 (2000) at 925-926, citing Squire, L., *Memory and Brain*, New York, New York, Oxford University Press, Inc. (1987).

⁵¹ *Id.*

⁵² Wang, H-X, et al., "Personality and lifestyle in relation to dementia incidence," *72 Neurology* 253-259 (2009) at 253, citing McEwen, B.S., "Protective and damaging effects of stress mediators," *338 N. Engl. J. Med.* 171-179 (1998).

⁵³ Sapolsky, R.M., *supra*, n. 50, *57 Arch. Gen. Psych.* 925-935 (2000) at 925.

in cold weather and to shut down in warm. When glucocorticoid levels fall too low, the body makes more. When they rise too high, production is suspended and existing stores are metabolized. Beneficial through glucocorticoids are, excessive levels, especially when present over extended periods, can have deleterious consequences. These are numerous, and include hypertension, diabetes, amenorrhea, impotence, muscle wasting, ulcers, and immune suppression, among other effects. More important for the purposes of this article, glucocorticoids can adversely affect the nervous system, and disrupt learning and memory. The variety and magnitude of these effects upon nervous system function are substantial.

- J. The hypothalamus, whose role in memory is pivotal, has high concentrations of receptors for glucocorticoids. Receptors are compounds on the surfaces of cells that are able to bind to hormones brought to them by the circulation. Once bound, the hormone can enter the cell and affect its function. The rich concentration of receptors for glucocorticoids on the cells of the hypothalamus makes that organ more susceptible to the effects of glucocorticoids, including toxic effects from excessive steroidal levels.⁵⁴ For example, glucocorticoids impair synaptic plasticity. Synapses are junctions between processes of two adjacent neurons (nerve cells), forming the place where nervous impulses are transmitted from one neuron to another. Synaptic plasticity refers to the synapse's ability to change in strength, and it is one of the neurochemical foundations of learning and memory.⁵⁵ Impairing synaptic plasticity impairs memory. Since the hypothalamus is more susceptible to high levels of glucocorticoids than structures less richly endowed with receptors for these hormones, glucocorticoid-related impairment of synaptic plasticity will be more pronounced there than in other areas of the nervous system.
- K. The human brain is characterized by elaborate neural networks. It is thought that, at an anatomic level, man's intellectual superiority over lower animals is in part a function of the sheer number and intricacy of the neural networks in the brains of humans as compared with those of primates. Most of the receptive surfaces of neurons are comprised of dendrites, the threadlike extensions of the neuron's cytoplasm that bring information to it. Dendritic processes arborize in complex fashion and play a critical role in the communication function of the nervous system. Glucocorticoids can cause atrophy in dendritic processes. Prolonged stress decreases numbers of apical dendritic branch points and the length of apical dendrites in the hippocampus of rodents and of nonhuman primates. This effect is glucocorticoid-dependent and in rodents can emerge after a few weeks of glucocorticoid overexposure. Such atrophy correlates with impaired explicit

⁵⁴ McEwen, B., "Re-examination of the glucocorticoid hypothesis of stress and aging," 93 *Prog. Brain Res.* 365-383 (1992); Sapolsky, R., "Glucocorticoids, stress, and exacerbation of excitotoxic neuron death," 6 *Semin. Neurosci.* 323 (1994).

⁵⁵ Sapolsky, R.M., *supra*, n. 50, 57 *Arch. Gen. Psych.* 925-935 (2000) at 925, citing McEwen, B., and Sapolsky, R., "Stress and cognitive function," 5 *Curr. Opin. Neurobiol.* 205-211 (1995). *See also*, Sapolsky, R.M., "Why stress is bad for your brain," 273 *Science* 749-750 (1996), citing Munck, A., et al., "Physiological functions of glucocorticoids in stress and their relation to pharmacological actions," 5 *Endocr. Rev.* 25-44 (1984).

memory.⁵⁶ With the abatement of the stress or of glucocorticoid exposure, dendritic processes regrow.⁵⁷

- L. Neurotrophins are a family of proteins that induce survival, development and function of neurons. Glucocorticoids have adverse effects on levels and efficacy of neurotrophins, especially brain-derived neurotrophic factor, that normally play a role in the maintenance of normal dendritic arborization.⁵⁸ Glucocorticoids can also compromise the ability of neurons to survive a variety of neurologic insults. It has been theorized that prolonged exposure to glucocorticoids, though not actually directly neurotoxic, sensitizes neurons to extremely mild insults.⁵⁹
- M. The ability to draw valid analogies between animal models and humans is limited. Nowhere is it that axiom more true than in the central nervous system. Nevertheless, scientists have long performed animal experiments to shed light on human biology. Exposing the brains of rodents to excessive levels of glucocorticoids causes adverse effects, especially in the hippocampus. A few days of stress or glucocorticoid overexposure may compromise the ability of hippocampal neurons to survive seizures or ischemia, the deprivation of blood flow to tissue. Over the course of weeks, excess glucocorticoid reversibly causes atrophy of hippocampal dendrites, whereas over months glucocorticoid overexposure can cause permanent loss of hippocampal neurons.⁶⁰ Chronic stress leads to functional and structural changes in the nervous system, especially along the limbic-hypothalamic-pituitary-adrenal axis.⁶¹ A few studies suggest that similar effects occur in the brains of primates.⁶² There is also now some evidence that glucocorticoids induce damage in humans as well.⁶³
- N. Glucocorticoids increase excitatory amino acid (EAA) neurotransmitters concentrations in the synapses of the hippocampus. This increase seems to mediate glucocorticoid-induced atrophy. This is known because pharmacological blockade of the release of such excitatory neurotransmitters or of their receptors prevents the atrophy.⁶⁴ When the HPA axis is activated, glucocorticoid hormones are released. HPA activation also seems to lead to degeneration of the hippocampus in both animals and humans.⁶⁵ Since the HPA axis controls reactions to stress, it seems reasonable to associate stress with hippocampal degeneration and hence with impairment of hippocampal function. HPA hyperactivity is

⁵⁶ Sapolsky, R.M., *supra*, n. 50, at 926.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Crowe, M., et al., "Personality and risk of cognitive impairment 25 years later," 21(3) *Psych. and Aging* 573-580 (2006) at 573, citing Sapolsky, R.M., "Why stress is bad for your brain," *supra*, n. 55, 273 *Science* 749-750 (1996).

⁶¹ McEwen, B.S., "Effects of adverse experiences for brain structure and function," 48 *Biol. Psychiatry* 721-731 (2000), cited in Wilson, R.S., et al., "Proneness to psychological distress is associated with risk of Alzheimer's disease," 61 *Neurology* 1479-1485 (2003) at 1483.

⁶² Uno, H., et al., 9 *J. Neurosci.* 1705 (1989); Sapolsky, R., et al., *ibid.* 10, 2897 (1990); Magarinos, A., et al., *ibid.* 16, 3534 (1996).

⁶³ Sapolsky, R.M., "Why stress is bad for your brain," *supra*, n. 10, 273 *Science* 749-750 (1996).

⁶⁴ Sapolsky, R.M., *supra*, n. 50, 57 *Arch. Gen. Psych.* 925-935 (2000) at 926.

⁶⁵ Crowe, M., et al., *supra*, n. 60, 21(3) *Psych. and Aging* 573-580 (2006) at 573, citing Sapolsky, R.M., "Why stress is bad for your brain," *supra*, n. 55, 273 *Science* 749-750 (1996) and Sapolsky, R.M., "Depression, antidepressants, and the shrinking hippocampus," 98 *Proc. Nat'l Acad. Sci. USA* 12320-12322 (2001).

found in those diagnosed with Alzheimer's, in whom the hippocampus is selectively damaged.⁶⁶ In some individuals, high levels of glucocorticoids are found in the blood as a result of disease. It is instructive to consider what has been observed in these experiments of nature.

- O. **Harvey Cushing.** Harvey Cushing was a famous American neurosurgeon active in the early years of the last century. Among other accomplishments, Cushing was the first to describe the syndrome named in his honor. Cushing's syndrome arises from certain tumors that secrete hormones that cause an increase in cortisol in the blood. Cortisol is a glucocorticoid that promotes gluconeogenesis, and plays a role in fat and water metabolism. It also affects muscle tone and the excitation of nerve tissue, among many other functions. More important here, elevated levels of cortisol, as seen in Cushing's syndrome, lead to loss of hippocampal volume.⁶⁷ Cushing's syndrome is associated with explicit memory deficits.⁶⁸ Among Cushingoid individuals, the extent of glucocorticoid hypersecretion correlates with the extent of hippocampal atrophy, and with the extent of impairment in hippocampal-dependent cognition. In other words, the higher the levels of cortisol, the more damage there is to brain function. As noted above, the hippocampus is rich in glucocorticoid receptors. Hence, the hippocampus, and as a result its function, is particularly vulnerable to the effects of excessive levels of cortisol. In the caudate nucleus, in contrast, a part of the corpus striatum with few glucocorticoid receptors, no atrophy occurs.⁶⁹
- P. Starkman and his team of investigators studied patients with Cushing syndrome whose disorder was estimated to have gone undiagnosed for 1 to 4 years. MRI indicated no change in total intracranial volume in these subjects but demonstrated bilateral hippocampal atrophy, expressed as a percentage of total intracranial volume. The authors failed to image a control group – that is, a group of individuals similar in relevant particulars to the subjects of the study but without Cushing's syndrome. They did compare subjects with published norms derived from healthy age matched individuals, however. Twenty-seven percent of subjects had hippocampal volumes below the volume defined by 95% confidence intervals as normal. Once again, the severity of the effect appeared to be proportionate to the severity of the hypercortisolemia.⁷⁰ Equally intriguing, hippocampal volume increased bilaterally after the hypercortisolism abated. The increase averaged a significant 3% (10% in one case) and was predicted by the extent to which cortisol levels normalized after surgery. In one subject, unfortunately, surgery did not reverse the hypercortisolism; in this individual, hippocampal volume

⁶⁶ Crowe, M., et al., *supra*, n. 60, 21(3) *Psych. and Aging* 573-580 (2006) at 573, citing Busciglio, J., et al., "Stress, aging and neurodegenerative disorders: Molecular mechanisms," 851 *Ann. N.Y. Acad. Sci.* 429-443 (1998).

⁶⁷ Sapolsky, R.M., *supra*, n. 50, 57 *Arch. Gen. Psych.* 925-935 (2000) at 927; Starkman, M., et al., 32 *Biol. Psychiatry* 756 (1992).

⁶⁸ Whelan, T., et al., "Neuropsychological deficits in Cushing's syndrome," 168 *J. Nerv. Ment. Dis.* 753-763 (1980).

⁶⁹ Sapolsky, R.M., "Why stress is bad for your brain," *supra*, n. 55, 273 *Science* 749-750 (1996).

⁷⁰ Starkman, M., et al., "Hippocampal formation volume, memory dysfunction, and cortisol levels in patients with Cushing's syndrome," 32 *Biol. Psychiatry* 756-764 (1992); Sapolsky, R.M., *supra*, n. 50, 57 *Arch. Gen. Psych.* 925-935 (2000) at 927.

decreased after surgery. The hypercortisolism of Cushing's syndrome seems to be accompanied by reversible bilateral hippocampal atrophy in both sexes.⁷¹

- Q. Cushing's syndrome is an experiment of nature. The experiments of humans are often conducted on animals. One such set of experiments exposed rodents for weeks to months to levels of glucocorticoids characteristic of major stress. The investigators observed that hypothalamic neurons were killed. They also noted explicit memory deficits and impaired synaptic plasticity in the hippocampus. In both rodents and primates, exposure to stress itself, as by restraint or aversive learning tasks, can likewise cause loss of hypothalamic neurons. Manipulations that reduce lifelong glucocorticoid exposure such as adrenalectomy (the surgical removal of the adrenal glands) or behavioral manipulations that chronically decrease glucocorticoid concentrations decrease neuron loss in the aging hippocampus, and protect from some of the cognitive deficits of aging.⁷²
- R. It has long been believed that neurogenesis, the generation of new neurons, is not possible in adults. Relatively recently, however, this theory has been disproved. Of particular interest here, neurogenesis in adult animals turns out to be especially pronounced in a part of the hippocampus called the dentate gyrus. When stimulated by manipulations such as environmental enrichment, neurogenesis there has been observed in rodents, nonhuman primates, and humans. There is evidence that such new neurons can support the function of the hippocampus.⁷³ Both stress and glucocorticoids, however, inhibit that neurogenesis.⁷⁴ This seems to be physiologically significant, in that the decreased neurogenesis in aged rats is eliminated by removing the elevated glucocorticoid levels typical of aging. A shrinking hippocampus corresponds to deficits in consolidation of long term memory, as well as elevated levels of cortisol.⁷⁵ Others have also found that the extent of hippocampal atrophy of hypercortisolism, and of deficits in explicit memory, all covary in Cushing's syndrome.⁷⁶ Chronic stressful experience, then, is associated with structural changes in the hippocampus and with impairment in hippocampally mediated forms of learning and memory in animals and in humans.⁷⁷
- S. **Diastolic Hypertension.** Just as stress tends to raise levels of glucocorticoids in blood, it also raises blood pressure. A paper published recently suggests that, after adjusting for

⁷¹ Sapolsky, R.M., *supra*, n. 50, 57 *Arch. Gen. Psych.* 925-935 (2000) at 927.

⁷² Sapolsky, R.M., *supra*, n. 50, 57 *Arch. Gen. Psych.* 925-935 (2000) at 926.

⁷³ *Id.*

⁷⁴ *Id.*, citing Reagen L. & McEwen, B., "Controversies surrounding glucocorticoid-mediated cell death in the hippocampus," 13 *J. Chem. Neuroanat.* 149-158 (1997); and Gould, E. et al., "Learning enhances adult neurogenesis in the hippocampal formation," 2 *Nat. Neurosci.* 260-265 (1999).

⁷⁵ Golomb, J., et al., "Hippocampal formation size in normal human aging: A correlate of delayed secondary memory performance," 1 *Learn. Mem.* 45-54 (1994); Lupien, S., et al., "Cortisol levels during human aging predict hippocampal atrophy and memory deficits," 1 *Nat. Neurosci.* 69-73 (1998), cited in Sapolsky, R.M., *supra*, n. 50.

⁷⁶ Starkman, M., et al., *supra*, n. 70, 32 *Biol. Psychiatry* 756-764 (1992).

⁷⁷ Wilson, R.S., et al, 61 *Neurology* 1479-1485 (2003) at 1479, citing Lupien, S.J., et al., "Stress-induced declarative memory impairment in healthy elderly subjects: Relationship to cortisol reactivity," 82 *J. Clin. Endocrinol. Metab.* 2070-2075 (1997); Payne, J.D., et al. "The effects of experimentally induced stress on false recognition," 10 *Memory* 1-6 (2002); Frodl, T., et al., "Hippocampal changes in patients with a first episode of major depression," 159 *Am. J. Psychiatry* 1112-1118 (2002); Sheline, Y.I., et al., "Hippocampal atrophy in recurrent major depression," 93 *Proc. Nat'l. Acad. Sci. USA* 3908-3913 (1996).

demographic and environmental characteristics, risk factors, depressive symptoms and anti-hypertensive medications, higher diastolic blood pressure levels are associated with impaired cognitive status. An increment of 10 mm of mercury (Hg) in diastolic blood pressure was associated with 7% higher odds of cognitive impairment. No independent association was identified between impaired cognitive status and systolic blood pressure or pulse pressure, however.⁷⁸ Similarly, there is an Italian cross-sectional survey where each 10-mm Hg increment in diastolic blood pressure was associated with a 29% higher odds for cognitive impairment.⁷⁹ A Swedish study indicated that each standard deviation difference in diastolic blood pressure values was associated with a 45% higher likelihood of low cognitive function.⁸⁰ The famous Framingham Study also suggested that elevated blood pressures were linearly correlated with higher likelihoods of impaired cognitive functioning in patients receiving no antihypertensive medications.⁸¹

T. **Psychological Stress.** The stress of litigation is not physical, but psychological, although that distinction matters little. In studies in both humans and animals, psychological stress is related to degenerative processes in the hippocampus.⁸² Investigators have demonstrated explicit memory deficits in Cushing's syndrome, depression and post-traumatic stress disorder. Hippocampal atrophy of the magnitude found in these disorders can give rise to such cognitive deficits.⁸³ Several other lines of evidence suggest that stress impair intellectual function by damaging the hippocampus.

1. Various investigators have suggested that psychological distress may affect the risk of developing Alzheimer's disease in old age.⁸⁴
2. Forms of learning and memory mediated by the hippocampus are selectively influenced by stressful experience.⁸⁵

U. Proneness to distress is selectively related to decline in episodic memory, which is primarily mediated by the hippocampal formation.⁸⁶ Higher levels of cortisol are often

⁷⁸ Tsivgoulis, G., et al., "Association of higher diastolic blood pressure levels with cognitive impairment," 73 *Neurology* 589-595 (2009) at Abstract.

⁷⁹ Cacciatore, F., et al., "The role of blood pressure in cognitive impairment in an elderly population," 15 *J. Hypertens.* 135-142 (1997).

⁸⁰ Kilander, L., et al., "Hypertension is related to cognitive impairment: A 20-year follow-up of 999 men," 31 *Hypertension* 780-786 (1998).

⁸¹ Elias, M.F., et al., "Untreated blood pressure level is inversely related to cognitive functioning: The Framingham Study," 138 *Am. J. Epidemiol.* 353-364 (1993).

⁸² Wang, H-X, et al., *supra*, n. 52, 72 *Neurology* 253-259 (2009) at 253, citing Gallagher, M., et al., "Hippocampal neurodegeneration in aging," 274 *Science* 484-485 (1996) and Sapolsky, R.M., "Depression, antidepressants, and the shrinking hippocampus," *supra*, n. 20, 98 *Proc. Nat'l Acad. Sci. USA* 12320-12322 (2001).

⁸³ Sapolsky, R.M., *supra*, n. 50 (abstract).

⁸⁴ Wilson, R.S., et al., *supra* n. 77, 61 *Neurology* 1479-1485 (2003) at 1479, citing Lupien, S.J., et al., "Increased cortisol levels and impaired cognition in human aging: implications for dementia and depression in later life," 10 *Rev. Neurosci.* 117-139 (1999); Rasmusson, A.M., et al., "Downregulation of BDNF mRNA in the hippocampal dentate gyrus after re-exposure to cues previously associated with footshock," 27 *Neuropsychopharmacology* 133-142 (2002).

⁸⁵ Gould, E. and Tanapat, P., "Stress and hippocampal neurogenesis," 46 *Biol. Psychiatry* 1472-1479 (1999); Sapolsky, R.M., *supra*, n. 5, cited in Wilson, R.S., et al., *supra*, n. 77, 61 *Neurology* 1479-1485 (2003) at 1483.

present in those with depression, and depressed persons tend to have less hippocampal volume that matched control participants.⁸⁷

V. **Interleukin-6.** Research on the proinflammatory cytokine interleukin-6 (IL-6) has provided further evidence that psychological distress may contribute to cognitive impairment. Cytokines are proteins secreted by white blood cells that act as chemical messengers, stimulating or inhibiting the growth and activity of various immune cells in response to disease. IL-6 is often present inside and around the beta-amyloid plaques that are a hallmark feature of brains affected by Alzheimer's disease, and IL-6 appears to promote inflammatory neuronal damage.⁸⁸ Depression and anxiety are both associated with greater production of IL-6, suggesting the importance of psychological distress.⁸⁹

W. **Does Litigation Aggravate Dementia?** There does not appear to be any empiric data on glucocorticoid or IL-6 levels or diastolic blood pressures in litigants. It does not seem unrealistic, however, to suggest that litigants find litigation stressful. After all, the very fact that suit is filed means that a controversy exists of sufficient magnitude to justify assuming the costs and risks of trial – a controversy that, presumably, the parties were unable to resolve peaceably between themselves. Cross-examination is designed to discredit the witness and expose inconsistencies or weaknesses in his story. Adverse witnesses are called, in the hearing of the litigant, to contradict what he has sworn to. Depositions take hours, and sometimes days. Discovery typically takes months; it can take years. Trial itself may well last for days or even weeks. After prolonged effort and substantial investment of both financial and psychological capital, the decision-maker can reject the litigant's position and find for his opponent. The loser faces a choice between accepting an outcome he has labored mightily to avoid, or to face yet more cost, and more risk, including the uncertainty of appeals. It would seem almost impossible that an individual in such circumstances would not experience stress, and therefore synthesize higher levels of glucocorticoids and experience hypertension, if only transiently. The deleterious effects of glucocorticoids upon the hippocampus, and upon memory, are independent of the identity of the stimulus to hormone synthesis. There would seem to be good reason, then, to believe that that litigation impairs memory, and thus that subjecting someone to civil process may well aggravate any existing mental deficiencies.

X. **Conclusion.** The need to defend against an attack incapacity suit can place an elderly person in the position of having to demonstrate adequate memory and self-care capabilities to assure the court that a guardian and conservator are unnecessary. This can mean responding to hostile questions machined by an expert specially trained to manipulate language, being immersed in a wholly foreign environment with unknown rules, and answering questions designed to undermine confidence. While specific

⁸⁶ Wilson, R.S., et al., *supra*, n. 77, 61 *Neurology* 1479-1485 (2003) at 1483, citing Squire, L.R., "Memory and the hippocampus: A synthesis from findings with rats, monkeys, and humans," 99 *Psychol. Rev.* 195-231 (1992).

⁸⁷ Crowe, M., et al., *supra*, n. 60, 21(3) *Psych. and Aging* 573-580 (2006) at 573, citing Sheline, Y.I., et al., *supra*, n. 32, 93 *Proc. Nat'l. Acad. Sci. USA* 3908-3913 (1996).

⁸⁸ Crowe, M., et al., *supra*, n. 60, 21(3) *Psych. and Aging* 573-580 (2006) at 573, citing Papassotiropoulos, A., et al., "Genetics of interleukin 6: Implications for Alzheimer's disease," 22 *Neurobio. Aging* 863-871 (2001).

⁸⁹ Crowe, M., et al., *supra*, n. 60, 21(3) *Psych. and Aging* 573-580 (2006) at 573, citing Kiecolt-Glaser, J.K., et al., "Psychoneuroimmunology and psychosomatic medicine: Back to the future," 64 *Psych. Med.* 15-28 (2002).

empiric data is lacking, it is unrealistic to think anyone could endure this situation without considerable stress. To complicate an already difficult task, the elderly person is physiologically programmed to respond to this stress in ways that, however helpful to our cave-dwelling ancestors confronting large and dangerous animals, are of much less certain benefit in court. In particular, human physiology may respond to the stress of trial in a fashion that may impair memory and create the impression in the mind of the fact-finder that the claim of incapacity is true – the self-fulfilling prophecy.

- Y. For practitioners, being aware of the potential physiological impact of litigation stress on the elderly subject of an attack incapacity suit can inform the representation – the timing of hearings, the scope and nature of discovery, and whether to explore alternatives to trial. As the baby boomers age holding a large accumulation of wealth and practitioners are seeing an increase in attack incapacity suits, there are also broader policy questions that should be asked and resolved. Why hasn't there been a specific scientific study on the affect of litigation on capacity? Should our society do one? Are we afraid of what we might learn? And in the area of guardianship and conservatorship, is the current civil litigation model the right model, or should there be an alternative that allows the court to carry out its duty to protect the incapacitated in a way that does not aggravate incapacity and allow for abuses?
- Z. The answers to those questions, unfortunately, do not have easy answers. For now, practitioners will continue to plan to avoid guardianship litigation, and hopefully consider the strain of the litigation itself when advising their clients on how to respond when it does arise.

IV. The Pre-Death Will Contest.

A. Problems with the Traditional Will Contest.

1. Traditionally, a will could not be contested prior to the death of the testator because a will is ambulatory and does not speak until the testator's death, and a living person has no heirs with standing to bring a claim.
2. Post-death will contests can be frivolous and are used to force settlement that departs from the testator's intent. The "American Rule" with respect to attorneys' fees has allowed the spread of frivolous litigation due to a lack of the possibility of fee-shifting to a party that contests a will unsuccessfully. Will contests place serious financial strain on the estate assets. This risk to the estate assets has resulted in payment in settlement of frivolous claims, resulting in distribution of estate assets to persons not intended by the testator to be beneficiaries.
3. Suits may be used by a disappointed heir to embarrass the testator and the testator's beneficiaries.
4. Wills may be invalidated due to technical errors in the formalities of execution, despite clear intent by the testator, and without an opportunity to correct technical errors.

5. Determinations are burdened by arguably antiquated presumptions, procedures, and traditions that may frustrate the consideration of important evidence and frustrate the intent of the testator.
6. Risk of judges and jurors imposing their own beliefs about the fair distribution of assets, rather than deferring to the freedom of the testator to dispose of property as the testator sees fit, even if unusual. The wishes of the testator may not be given proper weight.
7. Because the testator is not available to testify, the fact finder must rely on inferior and indirect evidence, inferences, and speculation.
8. The evidentiary problems, and the burden placed on the proponent of the will to prove capacity, give a tactical advantage to persons bringing frivolous claims.
9. Witnesses may be dead or unavailable. Evidence may be outdated or unavailable.⁹⁰

B. Advantages of Pre-Death Probate and Contests.

1. Greater certainty for the testator. Ability to preclude later contests, financial drain on the estate, and harassment of favored heirs.
2. Testator is available to testify and personally defend against challenges. All other relevant evidence will be available and contemporaneous. Witness memories are fresh.
3. The testator can testify as to intent, eliminating the need to reconstruct intent after death.
4. Testator can testify as to the meaning of confusing wording.
5. Errors in the formalities of execution can be identified, and there is an opportunity to correct errors.
6. Judge and jury less likely to be motivated by their own beliefs about the fair distribution of assets.
7. The circumstances of any disinheritance can be more fully explored.
8. May deter frivolous contests brought as “strike suits” due to elimination of evidentiary advantages for contestants and availability of best evidence. Elimination of frivolous suits could preserve scarce judicial resources.

⁹⁰ See generally, Aloysius A. Leopold & Gerry W. Beyer, *Ante-Mortem Probate: A Viable Alternative*, 43 Ark. L. Rev. 131, 1990; Adam F. Streisand, *Rumors of Their Death Are Greatly Exaggerated: The Pre-Death Will Contest and Other Strategies in Conservatorship Litigation*, California Trusts and Estates Quarterly, Vol. 12, Issue 1 (Spring 2006); New York City Bar, Comment on Permitting Pre-Mortem Probate in the State of New York; Charles Huberty, *No Good Deed Goes Unpunished: the Impact of New Jersey Court Rule 4:42-9(A)(3) on Attorney Fees in Estate Litigation*, Rutgers Law Review, Vol. 60:3 (2008).

9. The impact of the “shame factor” by being forced to contest a will directly to the testator, and the fear of disinheritance.⁹¹

C. Potential Disadvantages and Other Concerns.

1. Possible waste of judicial resources because a testator may still revoke a will that has been approved by the court; frequent changes to wills may mean frequent litigation. The testator may die with no assets, rendering court approval meaningless.
2. Court order may not bind all potential contestants due to births and deaths after the proceedings. Risk of repetitive litigation as identity of heirs changes.
3. Fear of offending the testator, or risk of disinheritance, may deter good faith and valid contests to wills.
4. Risk of post-death claims based on alleged undue influence on the testator or fraud at the time of the proceedings.
5. Risk that another state will not recognize or give effect to a pre-death proceeding in the event of a change in domicile prior to death of the testator, or with respect to out of state real property.⁹²
6. Damage to family relations.
7. Heirs, who would not be willing to initiate litigation, may be willing to fully participate in adversarial litigation commenced by the testator.
8. Heirs are forced to make decisions about litigation without knowing the value of the estate at death, and cannot make a good determination of the economics of the potential litigation.
9. Privacy concerns for the testator.⁹³
10. Due process concerns.

D. State Statutes

1. In response to the potential for abuse of traditional will contests, certain states have allowed for the pre-death probate of wills and trusts, including, Arkansas, Alaska, Delaware, Nevada, North Dakota and Ohio. Time and application of these statutes will determine whether the pre-death probate of wills will lead to judicial efficiency and deter abusive contests.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

2. **Arkansas.**

a. **Ark. Code. Ann. § 28-40-201. Title.**

This subchapter shall be known and may be cited as the “Arkansas Ante-Mortem Probate Act of 1979”.

b. **Ark. Code. Ann. § 28-40-202. Action for declaratory judgment.**

- i. Any person who executes a will disposing of all or part of an estate located in Arkansas may institute an action in the circuit court of the appropriate county of this state for a declaratory judgment establishing the validity of the will.
- ii. All beneficiaries named in the will and all the testator's existing intestate successors shall be named parties to the action.
- iii. For the purpose of this subchapter, the beneficiaries and intestate successors shall be deemed possessed of inchoate property rights.
- iv. Service of process shall be as in other declaratory judgment actions.

c. **Ark. Code. Ann. § 28-40-203. Court findings -- Effect.**

- i. If the court finds that the will was properly executed, that the testator had the requisite testamentary capacity and freedom from undue influence at the time of execution, and that the will is otherwise valid, it shall declare the will valid and order it placed on file with the court.
- ii. A finding of validity pursuant to this subchapter shall constitute an adjudication of probate. However, such validated wills may be modified or superseded by subsequently executed valid wills, codicils, and other testamentary instruments, whether or not validated pursuant to this subchapter.

3. **Alaska.**

a. **Alaska Stat. § 13.12.530. Establishment of will validity before death.**

A testator, a person who is nominated in a will to serve as a personal representative, or, with the testator's consent, an interested party may petition the court to determine before the testator's death that the will is a valid will subject only to subsequent revocation or modification.

b. **Alaska Stat. § 13.12.535. Establishment of trust validity before death.**

If at least one of the trustees of a trust is a qualified person, the settlor or a trustee of the trust may petition the court to determine before the settlor's death that the

trust is valid and enforceable under its terms, subject only to a subsequent revocation or modification of the trust.

c. Alaska Stat. § 13.12.540. Venue.

- i. The venue for a petition under AS 13.12.530 is
 - (a) the judicial district of this state where the testator is domiciled; or
 - (b) if the person who executed the will is not domiciled in this state, any judicial district of this state.
- ii. The venue for a petition under AS 13.12.535 is the judicial district where the trust is registered. The venue for proceedings involving a trust that is not registered in this state is
 - (a) any place in this state where the trust could have been properly registered;
or
 - (b) the location established by the rules of court.

d. Alaska Stat. § 13.12.545. Contents of petition for will validity.

A petition under AS 13.12.530 must contain

- i. a statement that a copy of the will has been filed with the court;
- ii. a statement that the will is in writing;
- iii. a statement that the will was signed by the testator, or was signed in the testator's name by another person in the testator's conscious presence and at the testator's direction;
- iv. in the case of a witnessed will, a statement that the will was signed by at least two individuals, each of whom signed within a reasonable time after witnessing the signing of the will or the testator's acknowledgment of the signature on the will;
- v. in the case of a holographic will, a statement that the signature and material portions of the will are in the testator's handwriting;
- vi. a statement that the will was executed with testamentary intent;
- vii. a statement that the testator had testamentary capacity;
- viii. a statement that the testator was free from undue influence and duress and executed the will in the exercise of the testator's free will;

- ix. a statement that the execution of the will was not the result of fraud or mistake;
 - x. the names and addresses of the testator, the testator's spouse, the testator's children, the testator's heirs, the personal representatives nominated in the will, and the devisees under the will;
 - xi. if minors, the ages of the testator's children, the testator's heirs, and the devisees under the will, as far as known or ascertainable with reasonable diligence by the petitioner;
 - xii. a statement that the will has not been revoked or modified; and
 - xiii. a statement that the testator is familiar with the contents of the will.
- e. **Alaska Stat. § 13.12.550. Contents of petition for trust validity.**

A petition for trust validity under AS 13.12.535 must contain

- i. a statement that a copy of the trust has been filed with the court;
- ii. a statement that the trust is in writing and was signed by the settlor;
- iii. a statement that the trust was executed with the intent that it be enforceable in accordance with its terms;
- iv. a statement that the settlor had the legal capacity to enter into and establish the trust;
- v. a statement that the settlor was free from undue influence and duress and executed the trust in the exercise of free will;
- vi. a statement that execution of the trust was not the result of fraud or mistake;
- vii. the names and addresses of the settlor, the settlor's spouse, the settlor's children, the settlor's heirs, and the parties in interest as defined in AS 13.36.390;
- viii. the ages of the settlor's children, the settlor's heirs, and the parties in interest as defined in AS 13.36.390 who are minors so far as known or ascertainable with reasonable diligence by the petitioner;
- ix. a statement that the trust has not been revoked or modified; and
- x. a statement that the settlor is familiar with the contents of the trust.

f. **Alaska Stat. § 13.12.555. Declaration by court.**

The court may declare a will or trust to be valid and make other findings of fact and conclusions of law that are appropriate under the circumstances. After the testator's death, unless the will is modified or revoked after the declaration, the will has full legal effect as the instrument of the disposition of the testator's estate and shall be admitted to probate upon request.

g. **Alaska Stat. § 13.12.560. Binding effect of declaration.**

A person, whether the person is known, unknown, born, or not born at the time of a proceeding under AS 13.12.530 -- 13.12.590, including a person who is represented by another person under AS 13.06.120, is bound by the declaration under AS 13.12.555 even if, by the time of the testator's death, the representing person has died or would no longer be able to represent the person represented in the proceeding under AS 13.12.530 -- 13.12.590.

h. **Alaska Stat. § 13.12.565. Hearing and notice.**

i. After the petition under AS 13.12.530 or 13.12.535 is filed, the court shall fix a time and place for a hearing. The petitioner shall notify the spouse, the children, and the heirs of the testator or settlor in the manner established by AS 13.06.110.

ii. In addition to the notice required by (a) of this section, in proceedings involving a petition under AS 13.12.530, the petitioner shall notify the testator, the personal representatives nominated in the will, and the devisees under the will in the manner established by AS 13.06.110.

iii. In addition to the notice required by (a) of this section, in proceedings involving a petition under AS 13.12.535, the petitioner shall notify the settlor and the parties in interest in the manner established by AS 13.06.110. Notice may be given to other persons. In this subsection, "party in interest" has the meaning given in AS 13.36.390.

i. **Alaska Stat. § 13.12.570. Burden of proof.**

A petitioner under AS 13.12.530 or 13.12.535 has the burden of establishing prima facie proof of the execution of the will or trust. A person who opposes the petition has the burden of establishing the lack of testamentary intent, lack of capacity, undue influence, fraud, duress, mistake, or revocation. A party to the proceeding has the ultimate burden of persuasion as to the matters for which the party has the initial burden of proof.

j. **Alaska Stat. § 13.12.575. Change to will after declaration.**

After a declaration of the validity of a will under AS 13.12.555, a testator may modify a will by a later will or codicil executed according to the laws of this state

or another state, and the will may be revoked or modified under AS 13.12.507, 13.12.508, or another applicable law.

k. Alaska Stat. § 13.12.580. Change to trust after declaration.

After a declaration of validity under AS 13.12.555, a trust may be modified, terminated, revoked, or reformed under AS 13.36.340 -- 13.36.365, or another applicable law.

l. Alaska Stat. § 13.12.585. Confidentiality.

- i. A notice of the filing of a petition under AS 13.12.530 -- 13.12.580, a summary of all formal proceedings under AS 13.12.530 -- 13.12.580, and a dispositional order or a modification or termination of a dispositional order relating to a proceeding under AS 13.12.530 -- 13.12.580 shall be available for public inspection. Except as provided in (b) and (c) of this section, all other information contained in the court records relating to a proceeding under AS 13.12.530 -- 13.12.580 is confidential.
- ii. The records that are confidential under (a) of this section may be made available to
 - (a) the petitioner and the petitioner's attorney;
 - (b) interested persons who have appeared in the proceedings, interested persons who have otherwise submitted to the jurisdiction of the court, and the attorneys, guardians, and conservators of the interested persons;
 - (c) the judge hearing or reviewing the matter; and
 - (d) a member of the clerical or administrative staff of the court if access is essential for authorized internal administrative purposes.
- iii. For good cause shown, the court may order the records that are confidential under (a) of this section to be made available to a person who is not listed in (b) of this section.

m. Alaska Stat. § 13.12.590. Definitions.

In AS 13.12.530 -- 13.12.590,

- i. "qualified person" has the meaning given in AS 13.36.390;
- ii. "testator" means a person who executes a will as a testator;
- iii. "trust" means a revocable or irrevocable trust.

n. **Alaska Stat. § 13.06.120. Pleadings; when parties bound by orders; notice.**

In any proceedings involving trusts, nonprobate assets, or estates of decedents, minors, protected persons, or incapacitated persons brought under AS 13.06 -- AS 13.36 or AS 13.38, including any judicially supervised settlements and any nonjudicial proceedings and settlements, the following apply:

- i. interests to be affected shall be described in pleadings that give reasonable information to owners by name or class, by reference to the instrument creating the interests, or in other appropriate manner;
- ii. persons are bound by orders binding others in the following cases:
- iii. orders binding the sole holder or all co-holders of a power of revocation or a general or nongeneral power of appointment, including one in the form of a power of amendment, bind other persons to the extent their interests, as objects, takers in default, or otherwise, are subject to the power;
- iv. to the extent there is no conflict of interest between them or among persons represented, orders binding a conservator bind the person whose estate the conservator controls; orders binding a guardian bind the ward if no conservator of the estate has been appointed; orders binding a trustee bind beneficiaries of the trust in proceedings to probate a will establishing or adding to a trust, to review the acts or accounts of a prior fiduciary, and in proceedings involving creditors or other third parties; orders binding a personal representative bind persons interested in the undistributed assets of a decedent's estate in actions or proceedings by or against the estate; and orders binding an agent having authority to act with respect to the particular questions or dispute bind the principal; if there is no conflict of interest and no conservator or guardian has been appointed, a parent may represent the minor child;
- v. an unborn person, a minor, an incapacitated person, or a person whose identity or location is unknown or not reasonably ascertainable who is not otherwise represented is bound by an order to the extent the interest is adequately represented by another party having a substantially identical interest in the proceeding;
- vi. with regard to interests given upon the happening of a certain event to persons who comprise a certain class, orders binding the living persons who would constitute the class, if the event had happened immediately before the commencement of the proceeding, bind all members of the class;
- vii. with regard to an interest given to a living person when the same interest or a share of the interest is to pass to the surviving spouse or to persons who are or might be the distributees, devisees, heirs, or issue of the living person upon the happening of a future event, orders binding the living person bind the surviving spouse, distributees, devisees, heirs, or issue of the living person;

- viii. with regard to interests given to a person or a class of persons, or to both, upon the happening of a future event, if the same interest or a share of the interest is to pass to another person or class of persons, or to both, upon the happening of an additional future event, orders binding the living person or class of persons who would take the interest upon the happening of the first event bind the persons and classes of persons who might take on the happening of the additional future event;
- ix. if a person is designated by a trust instrument to represent and bind a born or unborn beneficiary of the trust and receive a notice, information, accounting, or report for the beneficiary, then the beneficiary is bound by an order binding the designated person; in this subparagraph,
 - (a) the settlor may make the designation in the trust instrument, in a separate document, or by a trust protector authorized in the trust instrument to make the designation;
 - (b) except as otherwise provided in this subparagraph, a person designated under (i) of this subparagraph may not represent and bind a beneficiary while the designated person is serving as trustee;
 - (c) except as otherwise provided in this subparagraph, a person designated under (i) of this subparagraph may not represent and bind another beneficiary if the designated person also is a beneficiary, unless the designated person was named by the settlor, is the beneficiary's spouse, or is a grandparent or descendant of a grandparent of the beneficiary or the beneficiary's spouse; in this sub-subparagraph, "spouse" means the individual to whom the beneficiary is married and with whom the beneficiary is living, and a physical separation primarily for education, business, health, and similar reasons does not prevent the individual from being considered to be living with the beneficiary;
- x. a person representing another person under (2)(A) -- (F) of this section and a person designated under (2)(G)(i) of this section are not liable to the beneficiary whose interests are represented, or to a person claiming through that beneficiary, for an action or omission to act made in good faith;
- xi. notice is required as follows:
 - (a) notice as prescribed by AS 13.06.110 shall be given to every interested person or to one person who can bind an interested person as described in (2)(A), (B), or (D) -- (G) of this section; notice may be given both to a person and to another person who may bind the person;
 - (b) notice is given to unborn persons, a minor, an incapacitated person, or a person whose identity or location is unknown or not reasonably ascertainable, and persons who are not represented under (2)(A), (B), or (D) -- (G) of this section, by giving notice to all known persons whose

interests in the proceedings are substantially identical to those of the unborn persons, the minor, the incapacitated person, or the person whose identity or location is unknown or not reasonably ascertainable;

xii. at any point in a proceeding, a court may appoint a guardian ad litem to represent the interest of an unborn person, a minor, an incapacitated person, or a person whose identity or address is unknown or not reasonably ascertainable, if the court determines that representation of the interest otherwise would be inadequate; if not precluded by conflict of interests, a guardian ad litem may be appointed to represent several persons or interests; the court shall set out its reasons for appointing a guardian ad litem as a part of the record of the proceeding.

4. **Delaware - 12 Del. Code Ann. § 3546.** Under this section, a trustee notifies a person contesting trust of the trust's existence, the trustee's name and address, whether the person is a beneficiary, and the time allowed for commencing a challenge to the trust. The person contesting the trust has only 120 days from receiving notice to initiate a contest to the trust, and after that time is barred by statute from bringing the contest.

5. **Nevada.**

a. **Nev. Rev. Stat. § 30.040. Questions of construction or validity of instruments, contracts and statutes.**

- i. Any person interested under a deed, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.
- ii. A maker or legal representative of a maker of a will, trust or other writings constituting a testamentary instrument may have determined any question of construction or validity arising under the instrument and obtain a declaration of rights, status or other legal relations thereunder. Any action for declaratory relief under this subsection may only be made in a proceeding commenced pursuant to the provisions of title 12 or 13 of NRS, as appropriate.

b. **Nev. Rev. Stat. § 164.015. Petition concerning internal affairs of nontestamentary trust; jurisdiction of court; procedure for contests of certain trusts; final order; appeal.**

- i. The court has exclusive jurisdiction of proceedings initiated by the petition of an interested person concerning the internal affairs of a nontestamentary trust, including a revocable living trust while the settlor is still living if the court determines that the settlor cannot adequately protect his or her own interests or if the interested person shows that the settlor is incompetent or susceptible to undue influence. Proceedings which may be maintained under this section

are those concerning the administration and distribution of trusts, the declaration of rights and the determination of other matters involving trustees and beneficiaries of trusts, including petitions with respect to a nontestamentary trust for any appropriate relief provided with respect to a testamentary trust in NRS 153.031.

- ii. A petition under this section may be filed in conjunction with a petition under NRS 164.010 or at any time after the court has assumed jurisdiction under that section.
- iii. If an interested person contests the validity of a revocable nontestamentary trust, the interested person is the plaintiff and the trustee is the defendant. The written grounds for contesting the validity of the trust constitutes a pleading and must conform with any rules applicable to pleadings in a civil action.
- iv. In a proceeding pursuant to subsection 3, the competency of the settlor to make the trust, the freedom of the settlor from duress, menace, fraud or undue influence at the time of execution of the will, the execution and attestation of the trust instrument, or any other question affecting the validity of the trust is a question of fact and must be tried by the court, subject to the provisions of subsection 5.
- v. A court may consolidate the cases if there is a contest of a revocable nontestamentary trust and a contest relating to a will executed on the same date. If a jury is demanded pursuant to NRS 137.020 for the contest of the will, the court may instruct the jury to render an advisory opinion with respect to an issue of fact pursuant to subsection 4 in the contest of the trust.
- vi. Upon the hearing, the court shall enter such order as it deems appropriate. The order is final and conclusive as to all matters determined and is binding in rem upon the trust estate and upon the interests of all beneficiaries, vested or contingent, except that appeal to the Supreme Court may be taken from the order within 30 days after notice of its entry by filing notice of appeal with the clerk of the district court. The appellant shall mail a copy of the notice to each person who has appeared of record. If the proceeding was brought pursuant to subsections 3, 4 or 5, the court must also award costs pursuant to chapter 18 of NRS.
- vii. A proceeding under this section does not result in continuing supervisory proceedings. The administration of the trust must proceed expeditiously in a manner consistent with the terms of the trust, without judicial intervention or the order, approval or other action of any court, unless the jurisdiction of the court is invoked by an interested person or exercised as provided by other law.

c. **Nev. Rev. Stat. § 153.031. Petition by trustee or beneficiary concerning affairs of trust: Purposes of petition; contents; notice and hearing; additional relief.**

- i. A trustee or beneficiary may petition the court regarding any aspect of the affairs of the trust, including:
 - (a) Determining the existence of the trust;
 - (b) Determining the construction of the trust instrument;
 - (c) Determining the existence of an immunity, power, privilege, right or duty;
 - (d) Determining the validity of a provision of the trust;
 - (e) Ascertaining beneficiaries and determining to whom property is to pass or be delivered upon final or partial termination of the trust, to the extent not provided in the trust instrument;
 - (f) Settling the accounts and reviewing the acts of the trustee, including the exercise of discretionary powers;
 - (g) Instructing the trustee;
 - (h) Compelling the trustee to report information about the trust or account, to the beneficiary;
 - (i) Granting powers to the trustee;
 - (j) Fixing or allowing payment of the trustee's compensation, or reviewing the reasonableness of the trustee's compensation;
 - (k) Appointing or removing a trustee;
 - (l) Accepting the resignation of a trustee;
 - (m) Compelling redress of a breach of the trust;
 - (n) Approving or directing the modification or termination of the trust;
 - (o) Approving or directing the combination or division of trusts;
 - (p) Amending or conforming the trust instrument in the manner required to qualify the estate of a decedent for the charitable estate tax deduction under federal law, including the addition of mandatory requirements for a charitable-remainder trust;
 - (q) Compelling compliance with the terms of the trust or other applicable law.

- (r) Permitting the division or allocation of the aggregate value of community property assets in a manner other than on a pro rata basis.
 - (1) A petition under this section must state the grounds of the petition and the name and address of each interested person, including the attorney general if the petition relates to a charitable trust, and the relief sought by the petition. Except as otherwise provided in this chapter, the clerk shall set the petition for hearing and the petitioner shall give notice for the period and in the manner provided in NRS 155.010. The court may order such further notice to be given as may be proper.
 - (2) If the court grants any relief to the petitioner, the court may, in its discretion, order any or all of the following additional relief if the court determines that such additional relief is appropriate to redress or avoid an injustice:
 - (A) Order a reduction in the trustee's compensation.
 - (B) Order the trustee to pay to the petitioner or any other party all reasonable costs incurred by the party to adjudicate the affairs of the trust pursuant to this section, including, without limitation, reasonable attorney's fees. The trustee may not be held personally liable for the payment of such costs unless the court determines that the trustee was negligent in the performance of or breached his or her fiduciary duties.

6. North Dakota.

a. N.D. Cent. Code § 30.1-08.1-01. Declaratory judgment.

Any person who executes a will disposing of the person's estate in accordance with this title may institute a proceeding under chapter 32-23 for a judgment declaring the validity of the will as to the signature on the will, the required number of witnesses to the signature and their signatures, and the testamentary capacity and freedom from undue influence of the person executing the will.

b. N.D. Cent. Code § 30.1-08.1-02. Parties -- Process.

Any beneficiary named in the will and all the testator's present intestate successors shall be named parties to the proceeding. For the purposes of this chapter, any beneficiary named in the will and all the testator's present intestate successors shall be deemed possessed of inchoate property rights.

Service of process upon the parties to the proceeding shall be made in accordance with rule 4 of the North Dakota Rules of Civil Procedure.

c. **N.D. Cent. Code § 30.1-08.1-03. Finding of validity -- Revocation.**

If the court finds under chapter 32-23 that the will has been properly executed and that the plaintiff testator has the requisite testamentary capacity and freedom from undue influence, it shall declare the will valid and order it placed on file with the court. For the purposes of section 30.1-12-02, a finding of validity under this chapter shall constitute an adjudication of probate. The will shall be binding in North Dakota unless and until the plaintiff-testator executes a new will and institutes a new proceeding under this chapter naming the appropriate parties to the new proceeding as well as the parties to any former proceeding brought under this chapter.

d. **N.D. Cent. Code § 30.1-08.1-04. Admissibility of facts -- Effect on other actions.**

The facts found in a proceeding brought under this chapter shall not be admissible in evidence in any proceeding other than one brought in North Dakota to determine the validity of a will; nor shall the determination in a proceeding under this chapter be binding, upon the parties to such proceeding, in any action not brought to determine the validity of a will.

7. **Ohio.**

a. **Ohio Rev. Code Ann. § 2107.081. Petition for judgment declaring validity of will.**

- i. A person who executes a will allegedly in conformity with the laws of this state may petition the probate court of the county in which he is domiciled, if he is domiciled in this state or the probate court of the county in which any of his real property is located, if he is not domiciled in this state, for a judgment declaring the validity of the will.

The petition may be filed in the form determined by the probate court of the county in which it is filed.

The petition shall name as parties defendant all persons named in the will as beneficiaries, and all of the persons who would be entitled to inherit from the testator under Chapter 2105. of the Revised Code had the testator died intestate on the date the petition was filed.

For the purposes of this section, "domicile" shall be determined at the time of filing the petition with the probate court.

- ii. The failure of a testator to file a petition for a judgment declaring the validity of a will he has executed shall not be construed as evidence or an admission that the will was not properly executed pursuant to section 2107.03 of the Revised Code or any prior law of this state in effect at the time of execution or as evidence or an admission that the testator did not have the requisite

testamentary capacity and freedom from undue influence under section 2107.02 of the Revised Code.

b. Ohio Rev. Code Ann. § 2107.082. Service of process.

Service of process in an action authorized by section 2107.081 [2107.08.1] of the Revised Code shall be made on every party defendant named in that action by the following methods:

- i. By certified mail, or any other valid personal service permitted by the Rules of Civil Procedure, if the party is an inhabitant of this state or is found within this state;
- ii. By certified mail, with a copy of the summons and petition, to the party at his last known address or any other valid personal service permitted by the Rules of Civil Procedure, if the party is not an inhabitant of this state or is not found within this state;
- iii. By publication, according to Civil Rule 4.4, in a newspaper of general circulation published in the county where the petition was filed, for three consecutive weeks, if the address of the party is unknown, if all methods of personal service permitted under division (B) of this section were attempted without success, or if the interest of the party under the will or in the estate of the testator should the will be declared invalid is unascertainable at that time.

c. Ohio Rev. Code Ann. § 2107.083. Hearing on validity of will.

When a petition is filed pursuant to section 2107.081 [2107.08.1] of the Revised Code, the probate court shall conduct a hearing on the validity of the will. The hearing shall be adversary in nature and shall be conducted pursuant to section 2721.10 of the Revised Code, except as otherwise provided in sections 2107.081 [2107.08.1] to 2107.085 [2107.08.5] of the Revised Code.

d. Ohio Rev. Code Ann. § 2107.084. Declaration of validity; sealing, filing; procedure for revoking or modifying will.

- i. The probate court shall declare the will valid if, after conducting a proper hearing pursuant to section 2107.083 [2107.08.3] of the Revised Code, it finds that the will was properly executed pursuant to section 2107.03 of the Revised Code or under any prior law of this state that was in effect at the time of execution and that the testator had the requisite testamentary capacity and freedom from undue influence pursuant to section 2107.02 of the Revised Code.

Any such judgment declaring a will valid is binding in this state as to the validity of the will on all facts found, unless provided otherwise in this section, section 2107.33, or division (B) of section 2107.71 of the Revised Code, and, if the will remains valid, shall give the will full legal effect as the

instrument of disposition of the testator's estate, unless the will has been modified or revoked according to law.

- ii. Any declaration of validity issued as a judgment pursuant to this section shall be sealed in an envelope along with the will to which it pertains, and filed by the probate judge or his designated officer in the offices of that probate court. The filed will shall be available during the testator's lifetime only to the testator. If the testator removes a filed will from the possession of the probate judge, the declaration of validity rendered under division (A) of this section no longer has any effect.
- iii. A testator may revoke or modify a will declared valid and filed with a probate court pursuant to this section by petitioning the probate court in possession of the will and asking that the will be revoked or modified. The petition shall include a document executed pursuant to sections 2107.02 and 2107.03 of the Revised Code, and shall name as parties defendant those persons who were parties defendant in any previous action declaring the will valid, those persons who are named in any modification as beneficiaries, and those persons who would be entitled because of the revocation or modification, to inherit from the testator under Chapter 2105 of the Revised Code had the testator died intestate on the date the petition was filed. Service of the petition and process shall be made on these parties by the methods authorized in section 2107.082 [2107.08.2] of the Revised Code.

Unless waived by all parties, the court shall conduct a hearing on the validity of the revocation or modification requested under this division in the same manner as it would on any initial petition for a judgment declaring a will to be valid under this section. If the court finds that the revocation or modification is valid, as defined in division (A) of this section, the revocation or modification shall take full effect and be binding, and revoke the will or modify it to the extent of the valid modification. The revocation or modification, the judgment declaring it valid, and the will itself shall be sealed in an envelope and filed with the probate court, and shall be available during the testator's lifetime only to the testator.

- iv. A testator may also modify a will by any later will or codicil executed according to the laws of this state or any other state and may revoke a will by any method permitted under section 2107.33 of the Revised Code.
- v. A declaration of validity of a will, or of a revocation or modification of a will previously determined to be valid, given under division (C) of this section, is not subject to collateral attack, except by a person and in the manner specified in division (B) of section 2107.71 of the Revised Code, but is appealable subject to the terms of Chapter 2721 of the Revised Code.

e. **Ohio Rev. Code Ann. § 2107.085. Effect on other proceedings.**

The finding of facts by a probate court in a proceeding brought under sections 2107.081[2107.08.1] to 2107.085 [2107.08.5] of the Revised Code is not admissible as evidence in any proceeding other than one brought to determine the validity of a will.

The determination or judgment rendered in a proceeding under these sections is not binding upon the parties to such a proceeding in any action not brought to determine the validity of a will.

The failure of a testator to file a petition for a judgment declaring the validity of a will he has executed is not admissible as evidence in any proceeding to determine the validity of that will or any other will executed by the testator.

E. **Select Cases.**

1. **California.**

- a. *Murphy v. Murphy* (No. A115177, June 26, 2007). The California First District Court of Appeals in San Francisco held that where a conservator has been appointed for an incapacitated person and the court approves an estate plan for the incapacitated person under substituted judgment during the person's lifetime, later challenges to the estate plan after the person died are barred. Under this decision, challenges to the estate plan being presented to the court must be raised before the testator dies, and will be barred after death when the will actually "speaks".

2. **Indiana.**

- a. *In re Guardianship of E.N.*, 877 N.E.2d 795 (Ind. 2007). The adult children of E.N. were appointed his co-guardians and petitioned the court to establish the "E.N Revocable Trust" and transfer all of E.N.'s property to the Trust. The Trust provided for distributions of income and principal for E.N.'s support during his lifetime, and any property remaining after E.N.'s death was to be distributed to his children. E.N.'s brothers opposed the estate plan in the guardianship proceeding. The contested guardianship proceedings took many years, and E.N. died while the dispute was still pending. Ultimately, the Supreme Court of Indiana ruled that Indiana's substituted judgment statute does not authorize dispositions of the ward's entire estate, but only of those assets in excess of the ward's needs. Accordingly, the estate plan was denied.
- b. *Americans for the Arts v. National City Bank* (855 N.E.2d 592 (Indiana Court of Appeals 2006)).
 - i. National City Bank as conservator petitioned the court for the creation of two large charitable remainder annuity trust to hold 3.8 million shares of Eli Lilly Company stock behalf of the sole surviving grandchild of Eli Lilly, and then successfully defended itself against a surcharge action based on lack of

diversification of Eli Lilly Company stock as a result of protective provisions in the newly created trusts.

- ii. Ruth Lilly is the sole surviving grandchild of Eli Lilly, the founder of Eli Lilly & Company. In 1981, the probate court appointed National City Bank as conservator of Ruth's estate. In 2001, the court directed National City to prepare a new estate plan for Ruth. National City sought the new estate plan because of concerns that her existing documents would result in extensive post-death litigation and incur significant unnecessary taxes.
- iii. National City submitted a proposed new estate plan, and notice was given to Ruth and three charities named as beneficiaries under Ruth's then existing documents, The Poetry Foundation, Lilly Endowment, Inc., and Americans for the Arts. All parties were represented by counsel, were provided with copies of the proposed plan, and had the opportunity to object to the plan. In December 2001, the court approved the new estate plan.
- iv. Under the approved plan, two charitable remainder annuity trusts were created, one for Ruth's lifetime benefit, and one for the benefit of Ruth's nieces and nephews. Both CRATs named the three charities as remainder beneficiaries. National City is the trustee of both CRATs. The trust instruments authorize National City to retain assets received in trust indefinitely, and provide that "*any investment made or retained by the trustee in good faith shall be proper despite any resulting risk or lack of diversification or marketability and although not of a kind considered by law suitable for trust investments*". None of the parties or their counsel objected to these provisions of the trust agreements.
- v. The CRATs were funded in 2002 entirely with 3.8 million shares of Lilly stock. By March 2002, National City had drafted an investment policy for the CRATs, and by October 2002 National City has diversified most of the Lilly stock, which had declined significantly in value since the CRATs were funded. In November 2002, National City petitioned the probate court to approve its diversification of the Lilly stock. Two of the charities objected, and counterclaimed to surcharge National City for damages arising out of its alleged delay in diversifying the stock.
- vi. The probate court granted summary judgment in favor of National City. On appeal, the Indiana Court of Appeals affirmed the granting of summary judgment in favor of National City on the basis of the exculpatory clause in the trust agreements. In its decision, the Court of Appeals noted that: (1) counsel for the charities did not object to the exculpatory clause during the proceedings to approve the trust agreements, (2) there was no evidence of self-dealing by National City, (3) there was no evidence that National City benefited from the failure to diversify, (4) none of the parties have ever sought to remove National City as trustee, (5) there was no evidence that National City abused its fiduciary relationship, (6) National City has no connection to

the Lilly company, and (7) none of the parties alleged bad faith on the part of National City.

3. Michigan.

- a. *Lloyd v. Chambers*, 56 Mich. 236 (1885): Invalidating a statute allowing pre-death adjudication of wills, and stating that “[t]he broadest definition ever given to the judicial power confines it to controversies between conflicting parties in interest, and such can never be the condition of a living man and his possible heirs”.

4. Mississippi.

- a. *In re Conservatorship of Davis*, 954 So.2d 521 (Miss. App. 2007). This case concerns the standing afforded to a beneficiary of an incompetent person’s estate plan. Lauree Davis executed a 1995 will leaving all of her property to the three minor daughters of a friend, Alvin Peyton. In 2004, she was found incompetent, and an alleged “informally adopted son,” John Longo, was appointed her conservator. Peyton challenged both Longo’s appointment and a deed apparently executed by Davis to Longo a few weeks before she was judged incompetent. The trial court found that Peyton lacked standing, but the Court of Appeals of Mississippi concluded that Peyton was an interested party because his daughters have a prospective interest in Davis’s estate.⁹⁴
- b. *Brown v. Ainsworth*, 943 So.2d 757 (Miss. App. 2006). This case began as a pre-death contest, but the conservatee passed away before a resolution. In 1998, Samuel Brown transferred 122 acres of real property to his friend, Charles Ainsworth. Brown suffered from mental and physical illness, and had been under a conservatorship since the 1970's. However, the conservatorship was lifted in 1995 and was not replaced until 1999, a year after Brown had transferred the property in question. In 1999, Brown’s sister was appointed conservator, and she filed a petition to set aside the deed to Ainsworth. The trial court found that the conservator did not meet her burden of proof, by clear and convincing evidence, that Brown lacked capacity to execute the deed, and the Court of Appeals of Mississippi affirmed.

5. Missouri.

- a. *Gardner v. Rogers*, 125 S.W.3d 334 (Missouri Court of Appeals, 2004). Missouri Court of Appeals reverses trial court determination of the validity of a will in a suit concerning a conservatorship on the basis that those determinations “can only be determined in a will contest” under the applicable state statute.

⁹⁴ *Id.*

6. Nevada.

- a. *Linthicum v. Rudi*, 148 P.3d 746 (Nev. 2006). This case demonstrates that guardianship proceedings appear to be the favored venue for pre-death contests. Claire Linthicum-Cobb executed a revocable trust in 2002, naming her brother and sister-in-law (the Linthicums) as beneficiaries. In 2004, Linthicum-Cobb executed an amendment, replacing the Linthicums with her deceased husband's nephew, Arnold Rudi. A guardian was subsequently appointed for Linthicum-Cobb, and the Linthicums filed a trust action seeking to cancel the trust amendment. The trial court found that the Linthicums did not have standing to challenge the amendment during Linthicum-Cobb's lifetime. The Supreme Court of Nevada affirmed, noting that the Linthicums could challenge Linthicum-Cobb's capacity to make amendments in the guardianship proceeding, but lacked standing to bring a trust contest during her lifetime.

7. New Jersey.

- a. *In re the Guardianship of Lillian Glasser*, 2007 WL 867783 (N.J. Super. Ct. Mar. 8, 2007). The two children of Lillian Glasser brought competing guardianship actions in New Jersey and Texas. The New Jersey court ultimately concluded that it had primary jurisdiction, as Glasser had been a long-time resident and domiciliary of New Jersey. The New Jersey court ruled that Glasser lacked capacity and set aside an estate plan she signed (with the involvement of her daughter) that significantly benefited her daughter's family at the expense of her son. As a result, an earlier version of Glasser's estate plan was adopted, in which her two children were essentially treated equally. This entire litigation was conducted while Glasser was alive.⁹⁵

8. Pennsylvania.

- a. *In re Mampe*, 932 A. 2d 954 (Pa. Superior Court, 2007):

“We begin with the observation that, although this case is, in essence, a contest to the validity of Mrs. Mampe's will, it sounds as a declaratory judgment action. Therefore, we must consider whether a declaratory judgment action, filed properly prior to Mrs. Mampe's death, can be continued following her death as a vehicle to challenge the validity of her will. See, e.g., *Wagner v. Wagner*, 2005 PA Super 377, 887 A.2d 282, 285 (Pa. Super. 2005) (Superior Court may assess its jurisdiction *sua sponte*). We conclude that both the trial court and this Court may exercise subject matter jurisdiction over this case. We reach this decision because, under the Declaratory Judgment Act, 42 Pa.C.S.A. §§ 7531-7541, the trial court has the ability to declare the legal rights, status, and legal relations of persons interested under a will or trust and to determine any question arising in the administration of a decedent's estate or trust, including questions of

⁹⁵ Gerard G. Brew, James R. Carey, Dana G. Fitzsimons Jr. & Jessica A. Uzcategui, *Heirs in Waiting? Pre-Mortem Probate Disputes in the Context of Guardianships, Conservatorships, Powers of Attorney, and Family Business Entities*, ABA RPTE 2008 Spring Symposium.

construction of wills and other writings. See 42 Pa.C.S.A. §§ 7534, 7535(3). However, a will may not be construed under the Declaratory Judgment Act unless there exists an actual controversy indicating imminent and inevitable litigation, coupled with a clear manifestation that the declaration sought will render practical help in ending the dispute. See *In re Cryan's Estate*, 301 Pa. 386, 397, 152 A. 675, 680 (1930). Likewise, a will may not be construed under the Declaratory Judgment Act unless all parties who may be affected are before the trial court. See *In re Straus' Estate*, 307 Pa. 454, 161 A. 547 (1932).

The record reflects that an actual controversy exists because, had this case proceeded to probate in the traditional fashion, Appellees would have presented a challenge to the validity of the 2002 will and trust on the basis of undue influence. *Cryan's Estate*, at 397, 152 A. at 680. Secondly, all interested parties were before the trial court. Mrs. Mampe's 2002 will and trust leaves 90% of her estate to Appellant or, if Appellant is deceased, to her husband, with the remaining 10% to pass to Louise. The 2002 will and trust do not provide for the passing of these interests to either Appellant's or Louise's issue. Rather, if the aforementioned individuals were to predecease Mrs. Mampe, their shares were to pass to certain charities appointed by Appellant, Mrs. Mampe's trustee. However, as Mrs. Mampe had died in the midst of this litigation, no rights vested in any of the charities because Appellant, her husband, and Louise were living at the time of her death. Likewise, Cirlot, who was specifically disinherited by Mrs. Mampe's 2002 will and trust was present. Accordingly, this case was properly before the trial court as a declaratory judgment action.”

9. Tennessee.

- a. *Wynns v. Cummings*, 2001 Tenn. App. LEXIS 947 (2001): “Of course, a will cannot be probated until after the death of the [testator]...there was no justiciable issue concerning [any will] because [the testator] was not deceased...consideration of the will was a declaratory judgment, which is not proper in the absence of a justiciable controversy. The declaratory judgment act does not give the courts jurisdiction to render advisory opinions to assist the parties or to allay their fears as to what may occur in the future”.

10. Texas.

- a. *Cowan v. Cowan*, 254 S.W.2d 862 (Tex. Civ. Ct. App. 1952). The Cowan court concluded that “since [the testator] is not dead, there are no heirs, and there is no will.” *Cowan*, which cites numerous cases, indicates that until the testator has died, his will is nothing more than a piece of paper, and those who are beneficiaries under that will do not have any interest until his death.⁹⁶

⁹⁶ *Id.*

11. Washington.

- a. *Pond v. Faust*, 90 Wash. 117 (1916): “[C]ourts have no power to inquire into the validity of wills prior to the death of the maker... a guardian has, or should have, no interest whatever either in establishing or disestablishing a will of his ward.”

FOR A SEVENTH DEFENSE
(Non-Survival of Plaintiff's Causes of Action)

18. The Defendants re-allege and incorporate herein by reference all allegations of this Answer and Counter-Claim not inconsistent herewith.

19. The gravamen of the Plaintiff's cause of action is based upon the alleged fraud of the late Jane Doe.

20. Based upon S.C. Code Ann. §15-5-90 and the authorities cited therein, and the common law of the State of South Carolina, a cause of action based upon alleged fraud does not survive for or against the personal representative of a decedent. Therefore, the Plaintiff's claims are barred as they did not survive the death of Jane Doe and do not survive against her Estate or her Personal Representative.

<p>STATE OF SOUTH CAROLINA</p> <p>COUNTY OF GREENE</p> <p>IN THE MATTER OF: ESTATE OF JANE DOE, DECEASED</p> <p>Jack Doe, Plaintiff,</p> <p>vs.</p> <p>James Priest as Personal Representative of the Estate of Jane Doe; and the Estate of Jane Doe, Defendants.</p>	<p>IN THE PROBATE COURT</p> <p>201*-ES--00****</p> <p>AMENDED MEMORANDUM OF LAW</p> <p>IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT</p> <p>&</p> <p>IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT</p>
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NOW COMES Defendant James Priest as Personal Representative of the Estate of Jane Doe and as his personal interests may appear and also the Estate of Jane Doe, submitting this amended memorandum of facts and law in support of their Motion for Summary Judgment and in opposition to Plaintiff's Motion for Summary Judgment.

INTRODUCTION AND FACTUAL BACKGROUND

The Decedent's husband, Ray Doe, died in November, 1995. A Will dated in November, 1990 was probated as his last Will. While not conceding the validity thereof, for the purposes of the Defendant's Motion, it is assumed that Ray Doe had prepared a subsequent Will in July, 1994, that was not presented to the Probate Court in his estate.

The Decedent, Jane Doe, died in April, 2011. In October 2011, the Plaintiff filed the instant action, alleging that Jane Doe perpetrated a fraud by filing the 1990 Will as opposed to filing the 1994 Will in Mr. Doe's estate. This action was filed some six months after the death of Jane Doe. It is obvious from a reading of Plaintiff's Complaint that it is an action at law for damages based on the fraud allegedly perpetrated by Jane Doe.

ARGUMENT

1. Non-Survival of Plaintiff's Causes of Action.

As stated, it is clear from plaintiff's complaint in this matter that the gravamen of the complaint is an action at law for damages for alleged fraud and deceit.

At common law, tort claims did not survive the death of the plaintiff or defendant. Wills by Coleman Karesh, XIV. Claims Against Estate, p.109, South Carolina Law Publishers (1977). Since the early 1900's, the South Carolina legislature repudiated the old common law rule and enacted a liberal survival statute (codified at S.C.Code Ann. §15-5-90, cited below).

Causes of action for and in respect to any and all injuries and trespasses to and upon real estate and any and all injuries to the person or to personal property shall survive both to and against the personal or real representative, as the case may be, of a deceased person and the legal representative of an insolvent person or a defunct or insolvent corporation, any law or rule to the contrary notwithstanding.

However, for at least seventy (70) years, the South Carolina Supreme Court has uniformly recognized an exception to survivability for claims of slander, malicious prosecution, and fraud. Mattison v. Palmetto State Life Insurance Co., 197 S.C. 256, 15 S.E.2d 117 (1941). This means that causes of action

based on fraud do not survive for or against the estate of a decedent. South Carolina Jurisprudence, Abatement, Revival, Etc., §26. Layne v. International Brotherhood, 247 S.E.2d 346 (1978). Brewer v. Graydon, 103 S.E.2d 767 (1958).

The South Carolina Supreme Court and the South Carolina Court of Appeals have both had occasion to reaffirm this principle in recent cases. In 2002, the Supreme Court in Ferguson v. Charleston Lincoln Mercury, Inc., 564 S.E.2d 94(S.C. 2002) stated:

At common law, a personal action *ex delicto* did not survive the death of either party. In 1905, the common law prohibition was partially abrogated by statute to include "any and all injuries to the person or to personal property."

The survivability statute has survived with little change. As noted above, the statute's language is broad and ostensibly appears to include almost every conceivable cause of action. Causes of action relating to "any and all injuries to the person or to personal property" survive to the personal representative of the deceased. **Despite this broad language, South Carolina case law has continued to recognize a common law exception regarding causes of action for fraud or deceit.**

Although Mr. Ferguson's cause of action arose directly under the Dealers Act, his action was based upon a theory of fraud and deceit. Under the Dealers Act, fraud is defined in accordance with its normal legal connotation as including: a misrepresentation in any manner, whether intentionally false or due to gross negligence, of a material fact; a promise or representation not made honestly and in good faith; and an intentional failure to disclose a material fact.

The essence of Mr. Ferguson's allegation was that CLM included an improper fee in the purchase price and concealed the fee through fraudulent and deceptive actions. Whether Mr. Ferguson labeled CLM's actions as unfair, misleading, or deceptive is irrelevant. At the core of Mr. Ferguson's complaint was the allegation that CLM misled him into paying more for the car than he should have paid, and concealed the overcharge either through intentionally deceptive actions or through grossly negligent disclosure practices. **Allegations of such fraud and deceit are exempted from the general survival statute and do not survive the plaintiff's death.** Accordingly, we hold that Mr. Ferguson's cause of action did not survive his death. *Id.*, at 97. (Citations omitted and emphasis added).

In a very recent case, Brailsford v. Brailsford, 669 S.E.2d 342 (S.C.App. 2008), after citing much of the language above from Ferguson v. Charleston Lincoln Mercury, Inc., the Court went further and stated:

The fraud exception to survivability is not limited only to a cause of action titled "fraud." In Ferguson, our Supreme Court recognized that although Ferguson's cause of action arose under the "Dealer Act," the essence of the Defendant's alleged conduct amounted to misleading Mr. Ferguson, and concealing overcharges by either intentional deception or gross negligence. ***The court held that because such actions fit within the ambit of fraudulent or deceptive conduct, it was insignificant what "label" the Plaintiff gave to such conduct.***

Accordingly, inasmuch as any of Donna's causes of action are essentially a cause of action for fraud simply disguised under a different title, such actions do not survive William's death. Id., at 345. (emphasis added)

Thus, both our South Carolina Appellate Courts have recently affirmed that any causes of action based on fraud and deceit do not survive death and those actions that are based on fraud but disguised under a different title, also do not survive. In the footnotes to the Brailsford v. Brailsford decision, the Court enumerated the various causes of action pled which were based on some type of fraudulent conduct: "These causes of action included (1) Breach of Fiduciary Duty, (2) Removal of Personal Representative and Trustee, (3) Fraud, (4) Distribution of Trust (5) Accounting, (6) Constructive Trust, (7) Return of Property, (8) Conversion, (9) Tortious Interference with Expected Inheritance, and (10) Return of Ill Gotten Gain." Id. at 347. This further illustrates that, regardless of how the cause of action is labeled, actions for fraudulent conduct expire with a decedent.

A constitutional challenge was made in the South Carolina District Court, alleging that the fraud exception to the Survival Statute violated the Equal Protection clause of the Fourteenth Amendment to the United States Constitution. Judge Hawkins so ruled in Faircloth v. Jackie Fine Arts, Inc., 682 F.Supp. 837 (D.S.C. 1988). However, the Fourth Circuit overruled Judge Hawkins' decision in Faircloth v. Finesod, 938 F.2d 513 (4th Cir. 1991), and went on to explain the rationale behind the fraud exception to the survival statute as follows:

The "rational basis" for the distinction is the real issue, and the basis posited by appellant is enough. **Appellant argues that fraud is a tort that requires a special quality of proof, and the states of mind of the victim (e.g., whether he knew the statement was false, relied upon it, and was justified in so relying) and the perpetrator are especially vital. Appellant asserts that a legislature could rationally conclude that the difficulty and potential unfairness of proving the state of mind of a dead party to a fraudulent transaction justified excepting fraud from the survival statute.** *Id.*, at 517. (emphasis mine)

Thus, the Fourth Circuit held that the fraud exception to the South Carolina survival statute does not violate the Fourteenth Amendment's Equal Protection Clause, reversed the District Court, and held that the fraud exception to the survival statute barred the common-law fraud claims.

It is worth noting that the non-survival of the causes of action applies regardless of whether the plaintiff or the alleged wrongdoer (the defendant) has died. The South Carolina cases for over one hundred (100) years have held that the non-survivability is the rule in cases where the alleged **tortfeasor** has died. (as in our case). Huff v. Watkins, 20 S.C. 477(1884)(tort action relating to hiring of agricultural laborers – defendant died – court said “the cause of action ... was

buried with the offender” Id. at 481). Jenkins v. Bennett, 40 S.C. 393(1894)(tort action relating to preventing performing work - defendant died). Sims v. Davis, 49 S.E.2d 872(1904)(action for trespass – defendant died). Carver v. Morrow, 48 S.E.2d 814(1948)(action for defamation in a will – alleged wrongdoer died – the court said “if the person who utters the libel should die, the injured party has no redress ... the cause of action being buried along with the decedent” Id. at 816). Brown v. Bailey, 54 S.E.2d 769(1949)(cause of action for fraud – alleged wrongdoer died – court said “He is now dead and ... cause of action did not survive against his estate.”). Thus, South Carolina has firmly applied the non-survivability against both Plaintiffs and Defendants for over a hundred years.

In the instant case, the alleged fraud took place in 1995 – some 15 years before the death of the Decedent. This action was not filed until after the death of the Decedent and obviously the Decedent is unable to defend herself. For all the reasons cited in Faircloth v. Finesop, Id., long-time South Carolina precedent prevents these fraud claims from being pursued against the estate of Mrs. Doe. Even assuming that the Plaintiff can prove all of his allegations, these causes of action did not survive the death of the Decedent to be brought against her estate. Thus the Defendant’s motion for Summary Judgment should be granted, because as a matter of law the Plaintiff cannot prevail. The Plaintiff’s claims are barred as a matter of law as they did not survive the death of Jane Doe and do not survive against her Estate or her Personal Representative.

2. Summary Judgment should be granted:

“The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder.” Dawkins v. Fields, 354 S.C. 58,

69, 580 S.E.2d 433, 438 (2003) (internal quotation marks omitted). Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Rule 56(c), SCRCP; see Helms Realty, Inc. v. Gibson-Wall Co., 363 S.C. 334, 340, 611 S.E.2d 485, 488 (2005). In determining whether there is a genuine issue of material fact, the court must view the evidence in the light most favorable to the non-moving party. See Ellis v. Davidson, 358 S.C. 509, 517, 595 S.E.2d 817, 821 (Ct. App. 2004). “[W]hen plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted.” Id. 358 S.C. at 518, 595 S.E.2d at 822. It does not matter what facts Plaintiff may possibly prove in furtherance of the pleadings in this case, Plaintiff’s claims are barred, and accordingly, Summary Judgment is proper.

CONCLUSION

The Plaintiff cannot establish a legal basis upon which his claims can be founded, and since here the Plaintiff’s claims are barred no matter what facts he proves, this court should grant summary judgment to the Defendant and against the Plaintiff.

Respectfully submitted