South Carolina Bar
Continuing Legal Education Division

2019 SC BAR CONVENTION

Probate, Estate Planning & Trust Section

Friday, January 18

SC Supreme Court Commission on CLE Course No. 190355

South Carolina Bar
Continuing Legal Education Division

2019 SC BAR CONVENTION

Probate, Estate Planning & Trust Section

Friday, January 18

Estate Planning & Technology Updates: Digital Assets, Cryptocurrency and Electronic Wills, Oh My!

Karin Prangley

Estate Planning & Technology Update:
Digital Assets, Cryptocurrency and Electronic Wills, Oh My!

January 18, 2018, South Carolina Bar Association
Probate, Estate Planning & Trust Section
Karin Prangley, Brown Brothers Harriman Trust Company, N.A.

Introduction

I. Why you should care about technology: it is malpractice to be technologically incompetent [a bit of an exaggerated statement, but not far from the truth]..

A. On August 6, 2012, the American Bar Association ("ABA") House of Delegates voted to approve an amendment to what is now comment #8 to Model Rule of Professional Conduct ("Model Rule") 1.1, which reads "[t]o maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology . . .*" (emphasis added). Rule 1.1 states that a lawyer "shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

B. South Carolina has not adopted comment 8 in its legal ethics rules and is in the minority in doing so. Approximately 31 states have adopted comment 8 in their legal ethics rules.

Electronic Wills: the "Lion"[i]

II. Technology in Estate Planning Generally

A. Technological change in the estate planning arena has been going on for decades: typewriters gave way to personal computers; fax machines are no longer used as frequently as email and scanning technology; drafting software has become more ubiquitous; and online document preparation services are in many instances cutting out attorneys all together.

B. Is the time ripe for electronic wills?

- ❖ The internet and electronic commerce is commonplace
- ❖ Consumers have embraced online and mobile banking and other electronic transactions

- ❖ There is a greater reliance on technology in the general legal field
  - Increased acceptance by financial institutions and the government of faxed and emailed signatures
  - Tax returns and court documents can be signed and filed electronically and sometimes are required to be

II. Legislation Concerning Electronic Signatures

A. Uniform Electronic Transactions Act of 1999 ("UETA")

- ❖ "[T]the purpose of the UETA is to remove barriers to electronic commerce by validating and effectuating electronic records and signatures."
- ❖ UETA aims to make electronic records and signatures as legal as paper records and handwritten signatures.

B. Electronic Signatures in Global and National Commerce Act ("E-sign Act")

- ❖ The general intent of the E-Sign Act is that "a signature, contract, or other record relating to a transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form." (15 U.S.C. § 701)
- ❖ Federal law which facilitates the use of electronic signatures in interstate and foreign commerce by ensuring the validity and legal effect of contracts entered into electronically mmm

III. Will Formalities

A. Three basic requirements

- ❖ In writing
- ❖ Signed
- ❖ Attested

B. Functions of the formalities: evidentiary aspects, protective aspects, cautionary/ritual/ceremonial aspects

C. Compliance standards: strict compliance, substantial compliance, harmless error (not in Illinois)

IV. Existing Legislation Concerning Electronic Wills

A. Nevada's Electronic Wills Statute

- ❖ Nevada was the first state to adopt a statute recognizing electronic wills (Current version: Nev. Rev. Stat. § 133.085(1) (2017)

- ❖ Background: In 2001 Nevada enacted legislation authorizing the creation of electronic wills. In practice, few if any people made use of the legislation as the stringent requirements likely dissuaded people from taking advantage of the law. New legislation was subsequently passed on June 9, 2017 to revise the 2001 law.

- ❖ Valid Electronic Wills Under the 2017 Updated Legislation:

    - An electronic will can be signed by the testator with no witnesses present if the electronic will contains an "authentication characteristic of the testator". This provision was carried over from the original 2001 legislation.

        - An "authentication characteristic" is something that is unique to the person and that is capaclbe of measurement and recognition in an electronic record as a biological aspect of or physical act performed by that person (e.g., a fingerprint, a retinal scan, voice recognition, facial recognition, video recording, a digitized signature).

    - An electronic will can be executed by the testator in the "presence" of an electronic notary if the electronic notary signs and electronically seals the electronic will in the presence of the testator.

    - An electronic will can be executed by the testator in the "presence" of two witnesses, if the electronic signatures of each are placed on the electronic will in the "presence" of each other.

    - Definitions/Logistics:

        - "Presence" includes (i) being in the same physical location or (ii) being able to communicate with the other person(s) by means of audio-visual equipment (e.g., Skype webcam).

        - Signature requirements can be fulfilled by electronic signatures (e.g., a digitized signature or possibly simply typing in the testator's name or checking a box to mark the signature).

    - Not Automatically Self-Proving. An electronic will is not self-proving, even if notarized by an electronic notary public, unless the electronic will is maintained by a "qualified custodian" [there are extensive provisions and requirements applicable to qualified custodians].

- An electronic will may be executed by the testator while he/she is physically outside Nevada so long as the witnesses or notary are in Nevada at the time of online execution.

    - **Note of interest**: Many state laws give full legal effect to wills validly executed under the law of another jurisdiction regardless of the testator's domicile. However, there is possible uncertainty.

B. Indiana's Electronic Wills Statute.

❖ On March 8, 2018, the governor of Indiana signed three new provisions of the Indiana Code that allow electronic wills, electronic trust instruments and electronic powers of attorney. The provisions became effective on July 1, 2018. The Indiana legislation is not as expansive as the Nevada legislation. Essentially, the Indiana legislation allows for an electronic signature in lieu of a pen signature on estate planning documents and the electronic signature will operate in the same way as a pen signature. The Indiana legislation essentially allows e-signing of estate planning documents.

❖ Section 2. IC 29-1-21 governs electronic wills and provides that if an electronic will is electronically signed in the physical presence of two witnesses and maintained in compliance with existing probate rules, all the normal presumptions that apply to a valid traditional paper will apply to that electronic will. Other than the fact that Will is signed electronically rather than with a pen, the legal processes for filing and probating wills will be the same. Section 3. IC 30-4-1.5 governs electronic trust instruments and operates similarly. Section 4. IC 30-5-11 governs electronic powers of attorney and also operates similarly.

❖ Under the Indiana legislation, estate planning documents may also be revoked and amended electronically. Electronic Wills, trusts and powers of attorney may be revoked by "permanently and irrevocably mak[ing] unreadable and nonretrievable the electronic record" of the document.

❖ The full text of the Indiana legislation can be found at http://iga.in.gov/legislative/2018/bills/house/1303

V. Examples of Case Law on Electronic Wills in the Absence of Legislation

A. Domestic

❖ *Taylor v. Holt*, 134 S.W.3d 830 (Tenn. Ct. App. 2003) (will admitted to probate that was signed by the decedent using a computer generated signature)

❖ *In re Estate of Castro*, Case No. 2013ES00140 (Probate Div., Court of Common Pleas, Lorain County, Ohio 2013) (will written by the decedent

with a stylus on a Samsung Galaxy tablet and witnessed by three individuals was admitted to probate; no parties had any objection to the will, including the decedent's parents who would have otherwise received the decedents estate if the will had been thrown out.

- ❖ *In re Horton Estate,* Case No. 339737 (Mi Ct. App. 2018). The personal representative of the decedent's estate asked the probate court to admit a note on the decedent's cell phone in an app called "Evernote" as the decedent's will. On appeal, the court decided that it was clear that it reflected the decedent's wishes and that he had prepared it himself. Under Michigan law, that was enough to qualify the Evernote file on the decedent's smartphone as his will.

B. International

- ❖ *Yazbek v. Yazbek and another* [2012] NSWSC 594 (Supreme Court of New South Wales) (Australia) (will admitted to probate which consisted of an unsigned Word document on the decedent's laptop titled "will.doc")

- ❖ *Van der Merwe v. Master of the High Court and another* (605/09) [2010] ZASCA 99 (Supreme Court of Appeal of South Africa) (Sept. 6, 2010) (an unsigned draft will emailed by the decedent to a friend was admitted to probate)

- ❖ Mellino v. Wnuk & Ors [2013] SQC 336 (Supreme Court of Queensland) (Australia) (video recording on a DVD created by the decedent immediately prior to his suicide admitted to probate)

VI. Considerations for Estate Planners and Future Developments

A. Uniform Law Commission. The Joint Editorial Board for the Uniform Trusts and Estates Act has recommended that the Uniform Law Commission look into drafting proposed uniform legislation for electronic wills. The ULC Committee has worked on a number of drafts and is approaching a final draft. A copy of the current draft can be found at: http://www.uniformlaws.org/shared/docs/electronic%20wills/2018nov_E-Wills_Mtg%20Draft.ADA.pdf

B. It seems inevitable that electronic wills and other estate planning documents will become widely used and accepted.

C. The development of comprehensive and intelligent legislation in this area will be critical to accommodate legitimate concerns of estate planning attorneys and relevant professionals.

D. Open Questions/Concerns:

- ❖ Proper storage of electronic estate planning documents?

- ❖ How to guard against fraudulent creation or tampering?
- ❖ How do we ensure there is no undue coercion or influence when documents are no longer signed in person under the direction of professionals?
- ❖ How can people be protected from poorly chosen do-it-yourself planning when online drafting resources are so readily available online?

Cryptocurrency: The "Tiger"

III. Cryptocurrency[ii]

A. If they haven't already, estate planning attorneys will soon encounter clients who hold significant sums of cryptocurrency, which bring special planning issues to the engagement.

B. What is cryptocurrency?

i. The first cryptocurrency to go to market was Bitcoin, which was created in the wake of the 2008 financial crisis, a period in which financial institutions around the world teetered, the stability of monetary systems was called into question, and global central banks adopted policy roles far beyond their original charters. In the midst of the crisis – on Halloween in 2008 – a white paper titled "Bitcoin: A Peer-to-Peer Electronic Cash System" was posted to a cryptography listserv. The purported author was Satoshi Nakamoto, a name that has never been positively linked with any known individual. Nakamoto – whoever he, she or they are – proposed a framework for a genuine peer-to-peer network that would establish trust without the presence of a central authority, solve the double-spend problem and disintermediate institutions as well as government entities such as central banks. The opening paragraphs of the nine-page paper propose that: A purely peer-to-peer version of electronic cash would allow online payments to be sent directly from one party to another without going through a financial institution. … What is needed is an electronic payment system based on cryptographic proof instead of trust, allowing any two willing parties to transact directly with each other without the need for a trusted third party.

ii. For people concerned that central banks were debasing sound money in the pursuit of political goals, a currency free from government influence held great appeal. Unsurprisingly, some of bitcoin's earliest advocates hailed from countries plagued with rampant inflation and confiscatory government policies. Finally, bitcoin offered an opportunity to lower transaction costs and time by disintermediating institutions whose very economic models were

based on transaction fees.

iii. Instead of relying on a central trusted authority, such as a bank, to validate holdings and transactions, bitcoin and other cryptocurrencies distribute information widely across distributed ledger technology and use advanced cryptography to assure the legitimacy and security of financial information. Anyone with sufficient computing power may join the bitcoin network and participate in the validation effort, a process commonly known as mining. Successful validations are rewarded with newly created bitcoins. This distributed ledger technology is called blockchain.

iv. How does blockchain work? Information is traditionally stored in a central location. Your bank has a record of balances and financial transactions, your doctor's office holds your medical records, and various government entities hold a wide range of personal information such as Social Security numbers and tax returns. The beauty of centralized storage is that you know where to go to find the information you need. The downside is that the bad guys know this as well. In a world in which information is largely digital, central repositories can be (and often are) hacked, and it often takes days, weeks or months to realize it. Central points of control can lead to central points of failure. A blockchain, on the other hand, can spread this same information – appropriately encrypted – across a decentralized network of computers, without the need for an authoritative intermediary such as a bank or government. A blockchain is a type of distributed ledger technology, and, indeed, the two terms are often used interchangeably, although technically a blockchain is but one type of a distributed ledger approach to managing data. Information contained within a blockchain requires a private key for someone to access it. These private keys are randomly generated numbers, with a nearly infinite number of possible combinations, making them difficult to the point of impossible to crack. A blockchain furthermore employs cryptographic security to ensure that information cannot be added, deleted or changed without a rigorous, costly and time-consuming application of an algorithm that confirms the new data, while linking it to all the previous data in the chain. A majority of the network participants must agree to a change, so a breach in one or even multiple points on the network doesn't compromise the data.

v. Bitcoin today. Nakamoto's white paper was turned into an operating protocol a few months later, and the first block was added to the blockchain – and the first bitcoins created – in the first week of January 2009. For over a year, the system remained nothing more than a libertarian experiment and a technological novelty. The number of people or computer nodes adding to the blockchain was quite small, and no one knew what to do with the bitcoins

being created other than count them and occasionally trade them to each other. The use of bitcoin has skyrocketed. There are now about 17.3 million bitcoins in existence (as of Sept. 10, 2018), with ultimate issuance capped at 21 million. Over the past year, volumes have averaged almost 263,000 transactions per day, representing an average daily commercial value of $1.5 billion.

vi. Beyond Bitcoin. Bitcoin is far from the only cryptocurrency in circulation. The bitcoin operating protocol is open source, which has allowed participants to tweak, change, shift and improve the bitcoin process to launch new cryptocurrencies so that there are over 1,600 cryptocurrencies in existence, using a variety of cryptographic algorithms. A new cryptocurrency is created through an initial coin offering (ICO), which raises funds for operations of a new currency through the issuance of that very currency. Bitcoin remains the largest cryptocurrency by far, accounting for 38% of the total value of cryptocurrencies. The five largest cryptocurrencies add up to 70% of the entire market.

C. How people hold cryptocurrencies. Some of the most important nuances involved in estate planning with cryptocurrencies involve how cryptocurrencies are held, custodied and transferred. Cryptocurrencies are born using asymmetric cryptography, which is a cryptographic system that uses pairs of keys. In the case of cryptocurrency, the encryption pair includes a public key (like a bank routing number, known widely) and a private key (like a password). Typically, the cryptographic pair is held in a wallet. A wallet could simply be a piece of paper where all the public and private keys are written down, but few cryptocurrency holders use paper wallets (partially because you ultimately have to go back digital to buy/sell the cryptocurrency so it is easier to have a digital wallet). Typically, there are three wallet systems:

i. Online web wallets, like blockchain.info, Coinbase, etc. In generally, these wallets keep the user's private keys on their servers.
ii. Hot wallets/storage: Any app on computer or phone which is used with an Internet connection
iii. Cold wallets/storage: An external device or physical medium that holds the private and public key pairs. Common cold storage methods include:
    1. A USB drive or other external storage media including an offline hardware wallet.
    2. A bearer item such as a physical bitcoin—bitcoin cash

D. How cryptocurrency can be transferred in the event of death or disability. The absolute most important points to note when doing estate planning for a holder of cryptocurrency are: (1) the holder's authorized representatives must have a way to

know that the holder has cryptocurrency, and (2) the authorized representatives must have the private keys or a way to get the private keys. If a cryptocurrency holder passes away without providing a mechanism for his authorized representatives (or any other survivor willing to assist in recovery) to access his private keys, then the cryptocurrency is lost. The authorized representatives of a deceased or disabled holder might know if the holder has cryptocurrency by scanning the holder's devices for a wallet or searching the holder's physical property for an external wallet device such as a trezor, which looks like this

Methods of providing the authorized representatives with the private keys vary depending on what type of wallet the holder uses.

i. Online web wallets: Typically, the online service will, upon proper documentation by the authorized representative, transfer the deceased or disabled holder's account and thus his/her cryptocurrency to the authorized representative. See e.g., https://support.coinbase.com/customer/en/portal/articles/2321225-how-do-i-gain-access-to-a-deceased-family-member-s-coinbase-account-
ii. Hot Wallets/Cold Storage: Typically, holders make arrangements for their authorized representatives to have access in the event of death or disability outside of the wallet itself. Most common- private keys or PIN(s) to wallet(s) are stored in one or more safe deposit boxes to which the authorized representative will have access following the holder's death or disability.

E. How cryptocurrency can be transferred out of the holder's gross estate. Because of its volatility, cryptocurrency is a great asset for a GRAT or, for the charitably inclined, a charitable remainder trust. Optimal techniques for sophisticated estate planning with cryptocurrency are evolving. A few planning points of note:

i. Because there is no centralized exchange for cryptocurrency, and because the IRS has issued a notice (discussed below) stating that cryptocurrency is property and not currency, it is necessary to obtain a valuation of cryptocurrency transferred for gift or estate tax purposes. These valuations

are typically not as expensive or complex as valuations of a privately held business, but it is not recommended to simply take the average of the high and low trading price on an exchange such as Coinbase and leave it at that (similar to what is done for publicly traded securities).

ii. Many types of property that estate planners transfer outside of the client's estate do not have legal title. Often, an "Assignment" document is used in connection with such transfers. As stated above, estate planning with cryptocurrency is a new and evolving area, so a single set of widely accepted best practices to transfer title of cryptocurrency outside the client's estate does not exist. However, the author's recommended approach is to transfer the cryptocurrency to the estate planning vehicle just as if the donor were transferring the cryptocurrency to a third-party seller. Thus, the following steps are recommended:
    1. The transferee (ie the irrevocable gift trust) should obtain a wallet.
    2. The cyptocurrency should be electronically sent to that wallet on whatever method is appropriate. For example, a trezor or other storage device can be connected to the web and then the device can be directed to send the cryptocurrency to the transferee's wallet.
    3. The donor should not just simply share the private keys/public keys with the transferee or simply transfer the trezor and password to the transferee. Doing so would be like writing a post it note saying "I hereby give you my Bank of America checking account" and expecting that note to sufficiently transfer legal title. Just like there is a legal process to transfer your Bank of America account to another, there is a legal process to transfer cryptocurrency through the blockchain. The transfer of cryptocurrency should be recorded formally through the blockchain.

F. Income Tax Characterization of Bitcoin. When cryptocurrency is acquired for services rendered such as mining, it is ordinary income to the acquirer at the moment of acquisition. In a ruling issued in March 2014 (Notice 2014-21), the Internal Revenue Service (IRS) stated that virtual currencies will be treated as property according to U.S. tax law, incurring capital gains or losses when bought or sold. As with other property, such as stocks and bonds, different rates are applied to short-term (less than a year) and long-term (more than a year) gains and reported on Schedule D of the IRS 1040 filing. Furthermore, the IRS has ruled that even when used in transactions, the difference in U.S. dollar value in the cryptocurrency from the date of purchase to the date of use is also treated as a capital gain or loss. For example, if someone bought bitcoin at $1,000 and then used it to buy a new Tesla on a date when bitcoin was worth $8,000, the $7,000 difference is a gain on which she owes tax. Few are aware (or compliant) on these rules. For the past few years, only about 800 tax returns per year have disclosed and paid tax on cryptocurrency gains, and the

surge in cryptocurrency prices has attracted the attention of the IRS. In 2016, the IRS asked for details on cryptocurrency wallets held at Coinbase (one popular cryptocurrency exchange) and will likely step up its enforcement actions on noncompliance even more in the future.

G. Prudent Investor Rule and Cryptocurrency. Would the Prudent investor rule allow the retention of a highly volatile and purely speculative asset like cryptocurrency? Many think not. Estate planning attorneys should include provisions exculpating the fiduciary from liability for holding cryptocurrencies.

H. Anti-Money Laundering and Know Your Client Diligence. If/when the fiduciary sells substantial cryptocurrency and converts to fiat currency, the fiduciary should be prepared for substantial anti-money laundering and know-your-client documentation from the bank that will hold the fiat currency. Typically banking institutions will scrutinize the source of funds and because cryptocurrencies are designed to be held and exchanged anonymously, it is very difficult to prove that the holder's cryptocurrency was not acquired from a terrorist or sanctioned organization.

Digital Assets: The Bear

IV. A Brief Summary of Why Estate Planning for Digital Assets is Complex

Most estate planning attorneys have learned the complexities of administering and planning for digital assets but for those who have not, or those needing a refresher, this Section will include a summary of the relevant issues.

A. "Digital asset" is defined as an electronic record in which an individual has a right or interest. The term does not include an underlying asset or liability unless the asset or liability is itself an electronic record. This definition is found in the Revised Uniform Fiduciary Access to Digital Assets Act ("RUFADAA") (the text of RUFADAA can be found at http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2015_RUFADAA_Final%20Act_2016mar8.pdf). Digital assets include:

i. Email accounts

ii. The content of email messages and other electronic communications protected under federal privacy laws

iii. Data in smartphones, tablets, netbooks and computers

iv. Online sales accounts (e.g., eBay, Amazon, Etsy)

v. Online purchasing accounts (e.g., PayPal)

vi. Online storage accounts / cloud storage accounts (e.g., DropBox, Shutterfly, Google Drive)

vii. Webpages, Domain names and Blogs

viii. Social networking accounts (e.g., Facebook, Twitter, LinkedIn)

ix. Intellectual property rights in digital assets

B. A digital asset can be the key to unlocking other assets ("hard assets") with financial value. For example, a decedent received statements for his bank and brokerage accounts only via email. The bank or brokerage assets are hard assets, and if the fiduciary can locate them she can access them via traditional means. However, technology has complicated the process, because the fiduciary may not discover the financial accounts themselves without access to the email account.

C. Digital assets themselves can also have financial value. The most obvious example are Bitcoins, a digital currency. Domain names can also have tremendous value. Blogging or acting as a social media influencer can generate revenue and in many cases, a blog should be treated as a valuable business.

D. Digital assets may carry non-financial value or indirectly implicate financial value.

i. Preserving the decedent's story and memories: historically, shoeboxes of the decedent's letters, photos and diaries were treasured. The new "digital shoebox" includes:

1. Online photo accounts

2. Personal blogs

3. Email messages

4. Twitter feeds

ii. Consoling grieving loved ones. It is common for grieving family members and friends to search for answers, comfort and support in the social media accounts, voicemails, or other digital assets of their deceased friends and relatives. Most of the stories in the press relating to fiduciary access to digital assets highlight heartbreaking facts—often a homicide or suicide, where the family is looking for answers in social media postings.

iii. Preventing disclosure of secrets and reputation preservation: protecting the sensitive information of the deceased/disabled person is often important to prevent family members from emotional suffering. With full access to the client's digital assets it is easier to preserve and protect sensitive or confidential information.

iv. Minimizing risk of identity theft, damage to reputation, liability to the principal: The AARP estimates that the identities of 2.5 million deceased Americans are subject to fraud each year and concludes that the crime often begins with a search of online information. http://www.aarp.org/money/scams-fraud/info-03-2013/protecting-the-dead-from-identity-theft.html. Careful censure of online information about the decedent (such as dates of birth, names of family members – specifically mother's maiden name – and place of residence) is critical to preventing fraudulent activities. If an account holder becomes incapacitated and no one has authority to monitor his or her social media account to secure its privacy settings, etc., on the principal's behalf, hackers could wreak havoc with it—posting malicious or even actionable comments in the guise of the principal.

v. Protecting the fiduciary: if a decedent set up automatic payments from his accounts for various recurring expenses, gaining early access is essential for the fiduciary to shut off automatic payments. In an insolvent estate, failure to shut them off could mean paying creditors out of the statutorily mandated order. For any estate, payments that simply should not be made (e.g., renewal of subscriptions or memberships for the decedent) should be stopped to avoid waste.

E. Obstacles to fiduciary access.

i. Lack of awareness—the fiduciary may not even know that an asset exists.

ii. Usernames and passwords. Most online accounts are password protected and the passwords can be reset only with access to the account holder's email account. Many fiduciaries will simply be unaware of the usernames and passwords relevant to the deceased or disabled person's digital assets.

iii. Added security measures**.** Some individuals plan ahead and make lists of usernames and passwords for their spouses or named fiduciaries. But what about security questions? Some accounts require not only the username and password but also answers to questions that perhaps only the account holder would know: name of first grade teacher; make and model of first car; favorite food; etc. Some smartphones are not accessed with PINs or passwords, but with a fingerprint or unique swipe pattern invented by the phone's owner. Encryption can also stymie efforts to custody a digital asset.

iv. Inadequate laws. Prior 2016, only a few states had enacted legislation addressing fiduciary access to digital assets. For the most part, that has changed.

v. The terms of service (TOS). The account provider's TOS agreements are frequently silent as to fiduciary access or postmortem options, or they simply

prohibit transfer altogether (including postmortem transfer to an authorized fiduciary).

vi. Federal and state computer fraud and abuse acts. All states and the U.S. Congress have enacted laws that criminalize (or at least, create civil liability for) unauthorized access to computers. If the digital asset provider's TOS do not authorize a fiduciary to access a deceased or disabled user's account, then access by that fiduciary is unauthorized and, consequently, a criminal act—the deceased or disabled user may not himself or herself have the authority under the TOS to grant someone else access his or her accounts. The user has only the authority granted to him or her under the service provider's TOS; only the TOS (or state laws superseding the TOS) can "authorize" the fiduciary's access.

1. The Computer Fraud and Abuse Act ("CFAA"), enacted in 1986, makes it a federal crime intentionally to access a computer without authorization or exceeding authorization and thereby obtain financial data or information from a computer system. 18 U.S.C. §1030.

2. Although "without authorization" is not defined, the term "exceeds authorized access" is defined 18 U.S.C. §1030(e)(6) in the CFAA to mean: "[t]o access a computer with authorization and to use such access to obtain or alter information in the computer that the accessor is not entitled so to obtain or alter." This second prong, wherein a user who has access, but *exceeds his or her authority* by accessing other files or information on the system, like the first, is designed to prohibit something nefarious: computer trespass. Although the state statutes vary in their coverage, they also typically prohibit "unauthorized access."

3. Unfortunately, the fact that a fiduciary has the permission of the account owner or state law (unless that state law supersedes the TOS) to use a computer or to act for the account owner may not be an absolute bar to CFAA prosecution, even if it should be. By accessing another's digital accounts or assets online, the fiduciary may be violating the account provider's TOS. That renders the access unauthorized and, consequently, violative of the CFAA.

vii. **The Stored Communications Act.** Congress enacted the Stored Communications Act ("SCA") in 1986, as a part of the Electronic Communications Privacy Act ("ECPA"). *See generally* 18 U.S.C. §§ 2701-2711; *See also* Orin S. Kerr, *A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It*, 72 Geo. Wash. L. Rev. 1208. (2004).

1. The Stored Communications Act prohibits certain providers of communications services to the public from disclosing the *content* of its users' communications to a government or nongovernment entity

(different rules apply to each), except under limited circumstances which are akin to the warrant required under the Fourth Amendment for a governmental search.

2. The SCA applies different rules to government/law enforcement entities requesting information than to others, such as fiduciaries. Under the SCA, law enforcement officials can, under certain circumstances, force or compel the provider who is otherwise covered and subject to the SCA to divulge the contents of an account.

3. A fiduciary, however, can never compel the provider to divulge the same information. The public communications provider may voluntarily disclose the communications to a fiduciary, but only if an exception to the SCA's blanket prohibition against disclosure applies. 18 U.S.C. § 2702(b). The relevant exception for fiduciaries permits service providers to disclose communications with the "lawful consent" of "the originator" or an addressee or intended recipient of such communication[s], or the subscriber. 18 U.S.C. § 2702(b)(3). Whether a fiduciary can provide such lawful consent on behalf of the originator is a very important question that remains the subject of debate.

4. Facebook asked one court, in its memo supporting Facebook's motion to quash a civil subpoena for information contained in a deceased user's profile and account, to alternatively hold that the fiduciary had lawful consent and to order Facebook to disclose the requested content. In 2012, a federal judge in California granted Facebook's motion to quash a subpoena from representatives of former beauty queen Sahar Daftary's estate to gain access to her Facebook account. In re Request for Order Requiring Facebook, Inc. to Produce Documents and Things, C 12-80171 LHK (PSG) (N.D. Cal.; Sept. 20, 2012). Sahar's personal representative brought a civil action against Facebook to release the contents of her Facebook account in an effort to prove her state of mind at the time of her alleged suicide. The SWA permits disclosure where there has been lawful consent, but does not mandate it—the ruling stated that civil subpoenas do not compel disclosure under the SWA, and that Facebook was within its rights to deny the request for disclosure. The court stated that "nothing prevents Facebook from concluding on its own that Applicants have standing to consent on Sahar's behalf and providing the requested materials voluntarily." A more recent ruling minimized extraneous statements in that case: "The court's remarks on this point may have been dictum." Negro v. Navalimpianti USA, Inc., 230 Cal. App. 4th 870, 23 (Oct. 21, 2014).

5. Negro also discusses an important point for fiduciary access under the SCA, that is, whether the consent of the account holder to disclose under the SCA could be imputed (i.e., not actually given but constructive or implied). In Negro, an employee and his email provider, Google, sought

to quash a subpoena served on Google by the employee's former employer. The motion to quash argued that Negro's consent to disclose electronic communications protected under the SCA was not in fact given, but was imputed or implied, which the motion argued is not effective consent under the SCA. The court determined that consent under the SCA cannot be imputed, it must actually be given by the account holder. At some point in the litigation, a Florida court ordered Negro actually to consent to Google's disclosure of his emails and he did so. The motion to quash argued that Negro's consent was compelled by the court, and therefore invalid. The motion to quash also argued that even if Negro's consent is valid, a provider has the discretionary authority under the SCA to decline to produce the contents in the account (i.e., because the language of the SWA is permissive, where lawful consent has been given, rather than compulsory), which trumps the court's authority to compel. The court denied the motion to quash, indicating that consent to disclosure was actually given and valid, even though mandated by an order of a different court. Interestingly, the court also held that, contrary to the permissive-rather-than-compulsory language of the SCA, the SCA does not provide a basis for an electronic communications service provider to refuse to produce a user's emails or other stored electronic communications where consent of the account holder has been provided.

F. 2014 UFADAA. The ambiguity surrounding a fiduciary's access to digital assets made it an ideal subject of study for the Uniform Law Commission ("ULC"). In January of 2012, the ULC approved a study committee on a fiduciary's power and authority concerning digital assets of a disabled or deceased person. The study committee formed a drafting committee to create a free-standing act that would vest personal representatives, trustees, guardians/conservators, and agents under a power of attorney with the authority to access digital assets.

G. The ULC approved the Committee's final draft of UFADAA in July 2014, and in October of 2014 it became available to the public in final form for adoption in interested states. Delaware adopted an earlier draft version of UFADAA in 2014 before the October final draft became available.

   i. UFADAA provides that the account holder's executor/personal representative has the same authority over digital assets as the account holder, is an authorized user of the digital asset under computer fraud and unauthorized access laws, and "has the lawful consent of the account holder" to access the digital asset unless the account holder expresses a contrary intent (i.e., the account holder would have to OPT OUT to prevent her personal representative from gaining access).

   ii. If a fiduciary has access under UFADAA and substantiates authority as specified, the custodian of the digital asset (i.e., the online service provider)

must comply with the fiduciary's request for access, control or a copy of the digital asset. UFADAA thereby mandates what the SCA merely permits with respect to disclosure of the content of protected electronic communications.

iii. UFADAA provides that TOS that restrict fiduciary access are void as against public policy unless the user, in a manner that is separate from his or her agreement to the TOS necessary to open the account, expressly OPTS OUT. A provision in a will restricting fiduciary access (i.e., OPTING OUT) would also be honored.

iv. UFADAA provides that a choice-of-law provision in a TOS agreement is unenforceable to the extent that the choice of law would uphold a term of service that restricts fiduciary access.

v. In the 2015 legislative session, UFADAA was introduced in 26 states and none of these introductions led to enactment of UFADAA. Lobbyists for many large providers of electronic communications services to the public (Yahoo!, Facebook, AOL and Google were the most commonly seen, often with a representative of their trade association, Netchoice) vehemently opposed UFADAA in nearly every state in which it was introduced. To see an explanation of the three publicly touted arguments as articulated by the provider's own trade association and lobbying organization, see letter from Carl Szabo, Policy Counsel of NetChoice, to the Hawaii Senate Commerce and Consumer Protection Committee, available at http://netchoice.org/wp-content/uploads/NetChoice-Opposition-to-HI-SB-467.pdf. These three arguments are:

1. **Privacy**: The providers have publicly complained that UFADAA ignores the privacy interests of third parties. Fiduciaries, they argue, should not be given access to the content of communications sent to an account holder from someone else simply because these communications are accessible in the account holder's digital records.

2. **Federal Preemption**. The providers assert that disclosure to a fiduciary under UFADAA will place a provider in violation of the SCA. The providers argue that it is anything but clear that a fiduciary can stand in the shoes of the user for purposes of providing the necessary consent. The providers believe that the Negro case (discussed in Section IV) makes clear that consent under the SCA can be given only personally by the account holder him/herself. Thus, the providers argue that disclosure to a fiduciary in compliance with UFADAA will place them in violation of the SCA, notwithstanding limiting language throughout the text of UFADAA making clear that providers are NOT required to disclose, under UFADAA, anything that they are not permitted to disclose under the SCA.

3. **Improperly Voids Contracts**. Finally, certain providers have publicly argued that UFADAA improperly voids contracts with their existing users, namely, the providers' TOS agreements and account settings that restrict fiduciary access. Section 8 of UFADAA voids, as against public policy, any restrictions in TOS agreements that restrict fiduciary access except if such restrictions were (i) agreed to separate and apart from the TOS agreement required to open the account itself, and (ii) executed after a certain specified effective date

vi. **The PEAC Act**: Netchoice drafted a model act offered as an alternative to UFADAA—the Privacy Expectation Afterlife Choices Act, pronounced as the "peace act" but abbreviated as the PEAC Act. The full text of the PEAC Act is available at http://netchoice.org/library/privacy-expectation-afterlife-choices-act-peac/.

H. **Breaking the Stalemate: The Revised Uniform Fiduciary Access to Digital Assets Act ("RUFADAA")**

i. Perhaps no one can summarize the 2015 stalemate on UFADAA better and more poetically than ULC Commissioner Turney Berry, who stated "[w]e were facing people who don't normally lose: privacy advocates; the ACLU; the Center for Democracy; and Technology. We were also facing a consortium of internet providers who [have] very effective lobbyists and are accustomed to getting their way. We fought them to a draw, which was, I think, shocking to them." Transcript to Third Session, Revised Uniform Fiduciary Access to Digital Assets Act, Friday Morning, July 11, 2015, ULC's 124th Annual Conference, Williamsburg, Virginia.

ii. Simply put, everyone involved in the legislative attempt to provide or prohibit fiduciary access to digital assets learned that it would be very time consuming, expensive and exhausting, if not impossible, to get either UFADAA or the PEAC Act enacted in the states.

iii. In May of 2015, representatives from the providers contacted former ULC employee Terry Morrow to request a "re-group." On May 13, 2015, half a dozen representatives from the ULC met in Washington D.C. with counsel from some of the large providers—lobbyists were deliberately excluded. At that initial meeting, it was decided to tweak UFADAA to build more support from the technology industry and other opponents. After representatives from the UFADAA drafting committee and certain providers had gone through about a dozen drafts, a new consensus emerged among providers, privacy advocates and the trusts and estates bar. This new consensus was introduced at the 124th annual meeting of the ULC in Williamsburg, Virginia (July 10-16, 2015) as the Revised Uniform Fiduciary Access to Digital Assets Act ("RUFADAA").

iv. The RUFADAA draft approved at the 124th annual meeting then went to the ULC Style Committee, who made some additional revisions. The final

version of RUFADAA is available at http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2015_RUFADAA_Final%20Act_2016mar8.pdf

v. The changes between UFADAA and the draft RUFADAA cannot be illustrated via a simple redline. RUFADAA is organized differently and is a complete rewrite of UFADAA. The differences are:

1. RUFADAA includes an entirely new section enumerating fiduciary duties. Although the section unnecessarily reiterates the basic fiduciary duties that other law imposes (and that members of the trusts and estates bar know well), the section was added to clarify to providers the stringent legal duties that apply to fiduciaries and to comfort would-be RUFADAA opponents that a fiduciary cannot simply behave recklessly when managing the digital assets of the deceased or disabled person.

2. In understanding RUFADAA, it is important to distinguish between (i) digital assets that are not electronic communications protected under the SCA, and (ii) the content of electronic communications (a subset of digital assets) protected under the SCA. Digital assets that are not electronic communications include public blogs, webpages, online purchasing accounts, Bitcoin, files and photos in cloud storage, and domain names. Electronic communications (as described more fully in Section IV) protected under the SCA include the content of email messages, social media posts, and text messages.

3. UFADAA and RUFADAA are fairly similar with respect to digital assets *other than* the content of electronic communications. UFADAA granted blanket authority to fiduciaries to access such non-content digital assets. RUFADAA grants the fiduciary full access to such non-content assets except that: (i) the custodian of the digital asset may require specific identification of the account and evidence linking the account to the principal (via documentation or court order); and (ii) any TOS restricting fiduciary access will be upheld, absent a conflicting provision in the user's estate planning documents or an online tool/setting.

4. Under UFADAA, many of the default provisions favored fiduciary access—that is, the account holder had to OPT OUT to prevent access, and the default would be to let the fiduciary in. Under RUFADAA, the default is flipped to an OPT-IN approach—no fiduciary has access to the content of protected electronic communications unless (i) the relevant estate planning document expressly authorizes fiduciary access, or (ii) the account holder otherwise consented to fiduciary access via an online tool or other record. There is a slightly different rule for conservators/guardians. Under RUFADAA, a provider need not disclose the content of protected electronic communications of the ward

without the express consent of the ward (a simple court order is not sufficient), but a provider may suspend or terminate an account for good cause if requested by the conservator/guardian.

5. RUFADAA's OPT-IN approach allows account holders to express their intent to grant fiduciary access to digital property either via the estate planning documents or via an online tool or other record. RUFADAA provides that if there is a conflict between the online tool/account setting and the deceased or disabled person's governing estate planning documents, **the online tool/account setting prevails**.

    a. An "online tool" is defined as an electronic service provided by a custodian that is distinct and separate from the TOS required to open the account (i.e., not "click through").

    b. Google's Inactive Account Manager and Facebook's Legacy Contact feature are two examples of such online tools (and the only examples known to the authors as of the date of this outline).

6. RUFADAA permits the fiduciary to obtain a catalog of electronic communications (as opposed to the content of those communications)—including protected communications under the SCA—without the express prior consent of the account owner, even though the content of the protected electronic communications may be provided only with express prior consent. A catalog of electronic communications is defined as a log of "information that identifies each person with which a user has had an electronic communication, the time and date of the communication, and the electronic address of the person." RUFADAA § 2(4). Providers referred to this as the "outside of the envelope" information (to/from information, time and date, but not the subject line and not the substantive text of the communication); essentially, it is equivalent to seeing a phone bill with dates, times, and phone numbers to which (or from which) calls were placed, but without information describing the substance of the phone discussions.

7. UFADAA rarely mentions a court order, except with respect to court-appointed guardians/conservators. In fact, one of the original missions of the UFADAA drafting committee was to provide an out-of-court mechanism whereby a fiduciary would gain access to the digital assets of a deceased or disabled person, to reduce the burden on the judiciary to be involved in every situation. Under RUFADAA, in contrast, a custodian/provider may request a court order in nearly every instance, to clarify and determine whether (i) the user had a specific account with the custodian, (ii) disclosure of the content of electronic communications of the user would not violate the SCA or other applicable law, (iii) the user actually consented to disclosure of the content of electronic communications (where an online tool is not used),

and (iv) disclosure of the content of electronic communications is reasonably necessary for administration of the estate.

V. Planning in the evolving environment

A. RUFADAA has been enacted in approximately 39 states. See enactment map at http://www.uniformlaws.org/Act.aspx?title=Fiduciary%20Access%20to%20Digital%20Assets%20Act,%20Revised%20(2015).

B. Estate Planning under RUFADAA. The first step in the planning process is to assess whether the client would like to preserve all/some/none of his digital assets following death or disability. Some clients, despite obtaining legal advice as to its importance, do not want to grant access to their fiduciaries with respect to some or all of their digital assets. Many clients do not have a preference, but it is the estate planning attorney's task to inform the client of the repercussions and potential financial and emotional loss that may be suffered if digital assets are not preserved. Some clients do not want the content of their electronic communications disclosed, even if they do want to preserve other digital assets.

C. If the client does not want his fiduciary to have access, warn the client that, without legislation granting account holders the power to choose one way or the other, it may not be possible to restrict completely a fiduciary's access to digital assets following death or disability. Although many digital asset providers currently restrict fiduciary access to digital assets following death or disability, RUFADAA overrides some of those restrictions except where the user has specifically expressed a desire to prohibit fiduciary access.

i. For a client that does not want his fiduciary to access electronic communications or other digital assets, consider:

1. Encouraging client to use only those digital assets that allow the user to specify (in a separate, not "click-through" format) that his data will not be available following death or disability. Digital asset providers that allow an account owner to select such an option are very limited. Google, though use of its Inactive Account Manager, is one of the rare options.

2. Including a provision in the estate planning documents providing that the fiduciary shall have no or limited access to digital assets.

3. Urging client to conduct his digital and online life so that the data that he wants to protect is inaccessible to anyone except himself, both during life and following death or disability.

a. Sensitive information in the client's inbox and sent mail folders should be deleted frequently.

b. Information that needs to be retained can be downloaded to a USB drive or secret cloud storage and highly encrypted before deletion. If a USB drive is used, a back-up USB drive should be kept (USB drives fail from time to time).

c. Ensure highly complex usernames and passwords (guess-proof) are being used.

4. Consider appointing a special digital fiduciary to destroy digital assets following death or disability or specifically bequeathing digital assets to a trusted person for destruction.

D. If the client does want to preserve digital assets, then the appropriate planning method depends on the complexity of the client's digital assets, his technological fluency and his trust of online resources. As with all estate planning, one size does not fit all. It bears repeating that the TOS of certain providers currently prevent anyone other than the user from accessing the user's account, regardless of whether the fiduciary can demonstrate that he is acting as the user's legal successor and regardless of whether the fiduciary has the user's password. RUFADAA does not change this. Before the fiduciary attempts to access digital assets, the TOS must be reviewed and the consequences for breach of the TOS discussed with counsel. In most instances, four steps should be taken:

i. Client's significant digital assets of value should be owned by a business entity or trust, if possible. Many digital asset providers recognize the importance of digital assets to a business and will allow an entity to own the digital asset. For example, Southwest Airlines owns and operates a webpage, blog, Twitter account and Facebook page. However, entities usually cannot hold free web-based email accounts or individual social-media accounts.

1. If the client is a professional athlete, celebrity or public figure who uses social media for endorsements and publicity, the client's management company should own her social-media account. Otherwise, social-media activity can be transferred to company or estate page following death. For example, Dick Clark's Facebook account has been de-activated and turned into a memorial. However, Dick Clark Productions has an active Facebook "fan" page providing press to several charities and businesses.

2. The TOS of most digital asset providers that do allow digital assets to be owned by an entity would seemingly also allow such digital assets to be owned by a trust. For example, the TOS of Twitter do not appear to prohibit a revocable trust from holding a Twitter account. However, because holding digital assets in a trust is not common, it is uncertain how digital asset providers would react to a request for such ownership. Accordingly, these authors recommend that digital assets with substantial value should be placed into a business entity where possible.

ii. Create an inventory of digital assets, usernames and passwords, and security questions and answers. If the fiduciary does not know about the existence of the digital asset, access becomes a moot point.

1. Advantages of using electronic or paper list of digital assets:

    a. Ensures fiduciaries know about valuable digital assets and those digital assets that unlock valuable "hard" assets;

    b. Easy and inexpensive to implement;

    c. Easy and inexpensive to update.

2. Disadvantages:

    a. Must be updated as passwords and digital assets change;

    b. A reminder to update the digital-asset inventory should be included in the closing instructions of the estate planning engagement (e.g., the client communication where instructions regarding change of beneficiaries, etc. are given).

3. For clients who have few digital assets, an old-fashioned paper list of digital assets, passwords and usernames may be appropriate. This list should be physically secured in a lockbox, safe or locked file cabinet.

4. The author's preferred method is to create a password-protected electronic file listing digital assets. The electronic file itself would be stored on the client's home computer or USB drive. Write the password to access the electronic list on a piece of paper that is stored with original estate planning documents or in safe-deposit box.

5. Electronic list of digital assets should be encrypted, secured with a complex password, and stored appropriately.

    a. Password protecting a MS Word or other Office document can be circumvented easily and is not adequately secure.

    b. Software packages designed to store confidential documents and passwords such as KeePass, SecuBox or Web Confidential can be helpful.

    c. Web based services such as Estate Assist or PasswordBox may also be helpful.

    d. A back-up should be maintained to guard against data loss.

    e. Disclosed password should be changed from time to time.

f. The estate planning attorney should not have custody of both the list of digital assets and the password to access the list. Because this information is so valuable, the risk of liability to the attorney is too great.

g. If the estate planning attorney does not have access to the electronic (or paper) list of digital assets, the attorney can store the password. As with all confidential client information, the attorney has a duty to safeguard this information appropriately, and the password should be stored securely to avoid inadvertent or unauthorized disclosure.

iii. Counsel the client to select only (or primarily) those digital asset providers that allow the digital asset to be accessed by the fiduciary following death or disability or to be owned by a business entity or trust (e.g., Google's Inactive Account Manager).

iv. **Add special language to powers of attorney for property, wills, and revocable trusts authorizing fiduciary to access digital assets. Be sure to address specifically the content of electronic communications. Under RUFADAA, this is essential.**

1. In a RUFADAA state: The only mechanisms for providing the necessary consent for a fiduciary to access to the user's protected electronic communications following death are (i) including language in the estate planning documents or a separate document that authorizes fiduciaries to access digital assets, and (ii) using an online tool—a setting within the account whereby the account owner can consent to disclosure of his electronic communications following death or disability. Digital assets other than protected electronic communications: see IV(H)v(iii) infra. Absent special language granting authority, TOS govern.

2. In a non-RUFADAA state: the TOS of a digital asset provider restricting fiduciary access to digital assets supersede provisions in an estate planning document expressly authorizing fiduciary access. In other words, these provisions have no effectiveness in those jurisdictions and can be ignored by digital asset providers who refuse to allow fiduciaries to access the deceased or disabled person's digital assets. (Nevertheless, it is better to have authorization language to point to when explaining to a judge why the fiduciary accessed an account in violation of a TOS agreement.)

E. Fiduciary selection: The tech-savvy client should select a fiduciary competent to administer his digital assets. This may mean selecting a special fiduciary for the sole purpose of administering digital assets.

i. The fiduciary should be familiar with digital assets and have the technological competency to work effectively with an IT expert, if necessary.

ii. If a client has sensitive digital assets/information (for example, an online extramarital relationship), appointment of a special fiduciary may be appropriate.

iii. For young clients who appoint their parents or individuals of substantially greater age as fiduciaries, appointment of a contemporary as special fiduciary to deal with social media may be appropriate.

VI. Accessing digital assets of deceased or disabled client

Before the fiduciary accesses a digital asset, he must ensure that he is authorized by the TOS (or RUFADAA) of the applicable digital asset provider to do so. Accessing digital assets without this authorization can put the fiduciary at risk under federal and most state laws. The next steps to access digital assets when the fiduciary has no inventory of digital assets include:

A. Making a list of all the decedent's known digital assets, including all personal and professional email accounts. Consider retaining a service that can perform an internet search for accounts affiliated with the decedent. Unfortunately, there does not appear to be one globally recommended search service.

B. After determining whether fiduciary access is permitted, the fiduciary should access the decedent's relevant email accounts to search for unknown digital assets and the information relevant to access digital assets (i.e., passwords, security questions etc.). Email is often the gateway to discovering digital assets (and often is the gateway to discovering unknown hard assets), so the client's email account may be a key resource. Often, online accounts have an "I forgot my password" feature that will send an email to the user's email account to facilitate resetting the password; if the fiduciary has access to the email account, therefore, it may be possible to rebuild access to other digital property from there. Email may be accessible from the decedent's home and (if permitted) office computers, tablets, netbooks and smartphone.

i. Internet browser programs can, at the user's option, save username and password information, providing easy access to an email account from a home or work computer.

ii. Smartphones and tablets often have direct access to email accounts, without the necessity of entering the password.

iii. If a device is password protected, a software and/or computer forensics specialist may be able to bypass the password.

C. If the email account is with an Internet Service Provider (phone or cable company), the ISP will often reset the password upon the appropriate fiduciary's request.

D. Prompt access is extremely important.

   i. Review or cancel automatic and electronic bill payments. If the estate assets are insufficient to pay all creditors' claims, such automatic payments may expose the fiduciary to liability for paying creditors' claims out of order. Whether insolent or not, unintentional automatic payments may expose the fiduciary to an allegation of waste.

   ii. If prompt access is not obtained, emails could be deleted: most free email services delete messages if the account has not been accessed for 4 to 9 months and will delete a person's entire account if not accessed for 8 to 12 months.

E. The fiduciary should change the password on all email accounts to a highly complex password to secure the accounts and prevent unauthorized access. Decedents are often specifically targeted for identity theft.

F. The fiduciary should access email accounts every week during the period of estate administration.

G. The fiduciary should delete the account after the period of audit on the federal estate tax return (IRS Form 706) is closed or the probate estate has been closed.

H. The fiduciary should check decedent's home and work computers for internet browser history to determine what other digital assets the decedent might have owned.

---

[i] This Section of the Outline, covering Electronic Wills, has been prepared with great thanks primarily by Andrew McKay of Katten Muchin in Chicago, Illinois.

[ii] The author would like to thank her Brown Brothers Harriman colleague G. Scott Clemons for his contributions to this section of the outline.

South Carolina Bar
Continuing Legal Education Division

2019 SC BAR CONVENTION

Probate, Estate Planning & Trust Section

Friday, January 18

Fabian: Curiouser and Curiouser – How Fabian and Our Changing World Affect Estate Planning of the Past, Present, and Future

Kathryn Cook DeAngelo

SC BAR CONVENTION 2019

FABIAN Curiouser and Curiouser – How *Fabian* and Our Changing World Affect Estate Planning of the Past, Present, and Future

Presented by:

*Kathryn Cook DeAngelo, Esq., CELA**

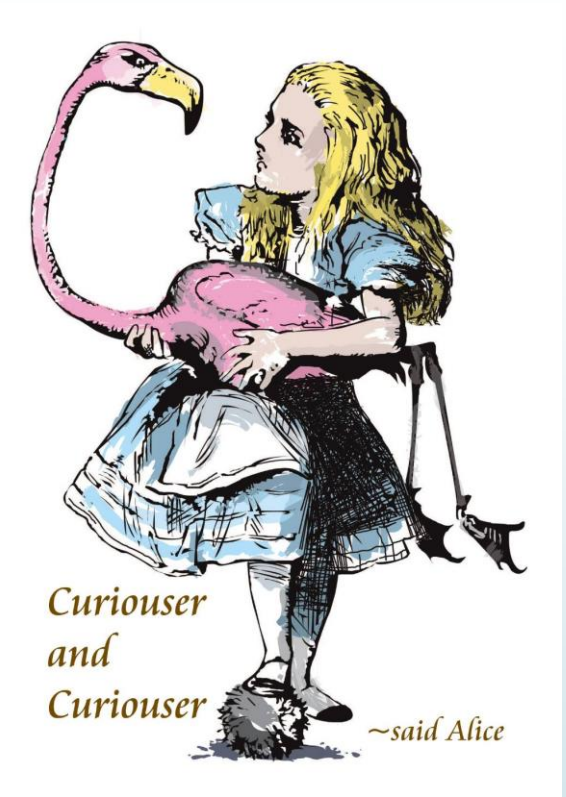
Kathryn Cook DeAngelo Law Firm, Ltd.
P.O. Box 15667, 1500 U.S. Hwy. 17 N.
The Courtyard, Suite 214
Surfside Beach, SC 29587-5667

Telephone: 843-238-8422 *Website: Elderlawanswers.com*

*Certified as an Elder Law Attorney by the National Elder Law Foundation

Licensed SC, NC, DC

Curiouser: The expression is used to mean that something is getting increasingly confounding; also means stranger and stranger.



Fabian v. Lindsay, 410 SC 475, 765 SE2d 132 (2014)

Pre-Fabian Elements of Legal Malpractice Action (ALL SC Lawyers)

- (1) ***the existence of an attorney-client relationship***; (2) breach of a duty by the attorney; (3) damage to the client; and (4) proximate causation of the client's damages by the breach. **McNair v. Rainsford, 330 S.C. 332, 499 S.E.2d 488 (Ct. App. 1998)** [emphasis added]

Pre-Fabian Law "Strict Privity"

- Pre-Fabian the law required "strict privity," the first essential element of legal malpractice against the lawyer
- Strict privity requires an attorney-client relationship
- In an estate planning case involving a Will, the privity is between the client, person whose Will is being prepared, and the client's lawyer. But the client is dead when the alleged error is usually discovered

Fabian v. Lindsay, 410 SC 475, 765 SE2d 132 (2014)

- Drafting error in Dr. Fabian's trust (value $13 million in 2000) that effectively disinherited Plaintiff/niece who stood to gain about $3.2 million.

- Court reviewed laws and various theories from majority of jurisdictions that have essentially abolished strict privity

- Court abolished strict privity in favor of tort/contract theories

Fabian v. Lindsay, 410 SC 475, 765 SE2d 132 (2014)

- In sum, today we affirmatively recognize causes of action both in tort and in contract by a third-party beneficiary of an existing will or estate planning document against a lawyer whose drafting error defeats or diminishes the client's intent.

- The Court adopted a limitation on recovery to persons who are named in the estate planning document or otherwise identified in the instrument by their status (e.g., my children and grandchildren, my wife's children).

So we know

- Fabian case involved a Trust
- *Fabian* Court holds the case applies to an "existing Will" and an "estate planning document"

I am curious . . .
What is an estate planning document?

- Give me a few examples please.

Could these qualify?

- AMD
- DPA
- Beneficiary forms for IRAs, 401Ks, life insurance, annuities
- Business formation
- Business succession planning, buy-out, stock options, partnerships
- Deeds and changes (sole to jtros or t/c, life estate/remainder)
- Divorce – QDROs, beneficiary changes, life insurance, property transfers
- Documents, including letters, prepared in connection with
  - Medicaid planning
  - VA planning
  - Life insurance and financial beneficiary forms
  - Tax planning
  - And what else?

Potential Positive Implications of Fabian on Legal Profession?

- Newspaper ads for the $100 "simple Will" may disappear
- Attorney competency heightened – a MUST before but a deal-breaker now
- May eliminate or reduce the number of attorneys who dabble in estate planning and other areas of elder law and estate planning
- Heightens dedication to improved professional policies and practices to minimize exposure to claims
- CLE attendance a MUST to learn and stay proficient
- Attorneys, especially new attorneys, should seek out colleagues to mentor and shepherd them

Curious . . .

- Who is the client (current, former, prospective)? Duties RPC?

- IT MATTERS….

RULE 1.0	Terminology
RULE 1.1	Competence
RULE 1.2	Scope of Representation and Allocation of Authority Between Client and Lawyer
RULE 1.3	Diligence
RULE 1.4	Communication
RULE 1.5	Fees
RULE 1.6	Confidentiality of Information
RULE 1.7	Conflict of Interest: Current Clients
RULE 1.8	Conflict of Interest: Current Clients: Specific Rules
RULE 1.9	Duties to Former Clients
RULE 1.10	Imputation of Conflicts of Interest: General Rule
RULE 1.11	Special Conflicts of Interest for Former and Current Government Officers and Employees
RULE 1.12	Former Judge, Arbitrator, Mediator or Other Third-Party Neutral
RULE 1.13	Organization as Client
RULE 1.14	Client With Diminished Capacity
RULE 1.15	Safekeeping Property
RULE 1.16	Declining or Terminating Representation
RULE 1.17	Sale of Law Practice

Duties to Client

- Conflicts (attorney's duty to client as well as future unknown Plaintiffs)
- Attorney-Client Privilege & Confidentiality
- Statute of Limitations (Tort, Contract, Malpractice) - how long?
- When does Statute of Limitations begin to run? Discovery? Repose?
- File Retention
- More complexity, more risk, increased time and resultant fees

Unintended but Natural Extension of Attorney Liability to Non-Clients

Attorney Drafting and Legal Advice in Following:

- Pro bono – Ex. SC Appleseed, SC Legal Services, SC Bar Will Clinics
- Divorce – Children? Creditors? Opposing spouse?
- Personal injury/liens, injured party's family
- Guardian/Conservator – Ward's children/family/other third persons suffering damage
- Probate/estate administration – heirs, beneficiaries, creditors
- Trustee – beneficiaries' creditors and other ancillary
- DPA Agent – any third party(ies) who suffer damage as a result of DPA drafting or attorney advice

Closely related . . .
AVOID the Accidental Client

- Probate – Dealing with Unrepresented Beneficiaries and Heirs
- Letters forwarding documents to third parties (heirs and beneficiaries) to be signed and returned (Receipts, Waivers):
- We must remind you again that we do not represent you and cannot provide you with legal advice in this matter. Therefore, if you have any questions or desire legal advice regarding this matter, we recommend you contact an attorney of your own selection before signing the enclosed Waiver as it may affect your legal rights with regard to the Estate.

Lawyer for Fiduciary - What about 62-1-109?

- **SECTION 62-1-109.** Duties and obligations of lawyer arising out of relationship between lawyer and person serving as a fiduciary.

- Unless expressly provided otherwise in a written employment agreement, the creation of an attorney-client relationship between a lawyer and a person serving as a fiduciary shall not impose upon the lawyer any duties or obligations to other persons interested in the estate, trust estate, or other fiduciary property, even though fiduciary funds may be used to compensate the lawyer for legal services rendered to the fiduciary. This section is intended to be declaratory of the common law and governs relationships in existence between lawyers and persons serving as fiduciaries as well as such relationships hereafter created.

- HISTORY: 1994 Act No. 449, Section 2; 2013 Act No. 100, Section 1, eff January 1, 2014.

What about 62-1-110?

- **SECTION 62-1-110.** Fiduciary-lawyer privilege.

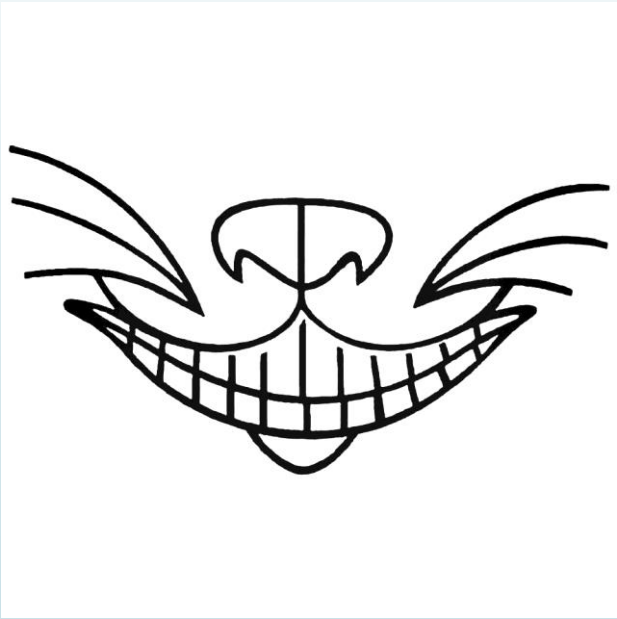
- Whenever an attorney-client relationship exists between a lawyer and a fiduciary, communications between the lawyer and the fiduciary shall be subject to the attorney-client privilege unless waived by the fiduciary, even though fiduciary funds may be used to compensate the lawyer for legal services rendered to the fiduciary. The existence of a fiduciary relationship between a fiduciary and a beneficiary does not constitute or give rise to any waiver of the privilege for communications between the lawyer and the fiduciary.

- HISTORY: 2008 Act No. 211, Section 1, eff May 13, 2008; 2013 Act No. 100, Section 1, eff January 1, 2014.

Curiouser . . . Post-Fabian non-client claims extended in other practice areas

- SENTRY SELECT INSURANCE CO. v. Maybank Law Firm (S.C. Sup. Ct. 5/2018)
- Insurance company can sue lawyer it hired to defend insured (lawyer's client) – case of first impression Fabian cited

"Well! I've often seen a cat without a grin," thought Alice; "but a grin without a cat! It's the most curious thing I ever saw in all my life!" —Chapter 6, Pig and Pepper



How many potential Plaintiffs? How much RISK?

Policy Considerations

[T]he legal profession can gracefully take no other position **...** than that its members should practice their profession with the highest degree of competence, diligence and care and should be answerable to anyone for whom they have legitimately undertaken to render their services in that manner.... **On the other hand, they cannot be expected, for ordinary fees, to undertake a liability to an indeterminate number of possible plaintiffs**. John J. Meehan, Careless Lawyers and Careworn Third Parties,28 *BROOK. L. REV.* 99 (1961).

Policy Considerations

- In addition to this liability to an unknown group of third parties is the fear that attorney's liability could be expanded to include liability to a vague notion of "**the public at large.**" William W. Voorhees, Jr., *Attorney Malpractice: The Expanding Scope of Liability,18* ***SETON HALL*** *L. REV. 630 (1988).*

New Will Client

- Client, who has terminal lung cancer, meets with lawyer about estate planning.
- Client does not have a Will and wants lawyer to prepare a Will, DPA, and HCP.
- Do you take or reject this case?

New Will Client

- Lawyer accepts case and gives Client an estate planning questionnaire to complete and return.
- Client returns completed questionnaire about 3 weeks later.
- About 3 days later, Lawyer prepares and sends to client the DPA and HCP for review.
- Next day, Client placed on respirator and in sleep-induced coma and dies a few days later.
- Will was never prepared and DPA and HCP never executed.

New Will Client

- Client dies intestate and is sued by beneficiaries who would have been beneficiaries in Client's Will.
- Did lawyer commit malpractice?

CRISIS PLAN/DYING CLIENT
RYDDE V. MORRIS (S.C. Sup. Ct. 2009)

- Non-Client Prospective beneficiaries vs. Lawyer
- Failure to timely draft a Will and arrange for its execution
- Emergency and crisis – one month prior to death
- 12(b)(6) dismissal – appeal

Rydde v. Morris

- [W]e conclude that the risk of interfering with the attorney's duty of undivided loyalty to the client exceeds the risk of harm to the prospective beneficiary.

- In sum, under the circumstances presented, **we see no reason to depart from existing law which imposes a privity requirement** as a condition to maintaining a legal malpractice claim in South Carolina. We hold an attorney owes no duty to a prospective beneficiary of a nonexistent will. The judgment of the trial court is affirmed. [bold added]

Fabian

- *In a footnote, the Court distinguished Rydde v. Morris:*
- *Rydde* is not controlling as it involves a distinguishable issue that implicates different legal and policy considerations, as suggested in *Rydde* itself.

Fabian

- Court carved out this *Rydde* distinction or limitation.
- Court also limited standing to those third parties identified specifically or as part of a class, i.e., my children, my grandchildren, my wife's grandchildren.

Simple Will

- Initial consult with client who brings in copy of their simple Will prepared by another SC attorney last year and wants a few "simple" changes (delete a beneficiary, add a new beneficiary, and change the PR)
  - Do you prepare a codicil or new Will?
  - Why?

Sophisticated/Complicated Estate Planning Documents

- Initial consult with client who brings in originals of revocable living trust plan (non-taxable) in a notebook prepared by another SC attorney
  - Client wants a few "simple changes" (delete a beneficiary, add a few new beneficiaries, and change the trustee(s))

Trust Hypothetical

- Your advice and recommendations?
  - Amend? Restate?
- What other information or facts would change your advice or opinion?

I want you to draft my Will . . .

- And it's simple
- Client has a listing of 15 beneficiaries who get small percentages

Review my Legal Zoom Will or my Homemade Will

- What do you do?

So is my Will okay?

- It shouldn't take you long.
- How much ya gonna charge me?

Who's in Charge Here? You or the Client?

- Client makes it clear, "I have a few changes, and I don't want to pay you a lot of money to do this."
- "You want how much? I only paid $150 for the whole Will."
- "You lawyers have forms on your computer, so this won't take you 15 minutes."
- "I'll do the changes myself and you can just look them over. That shouldn't cost me too much."

What is your RISK appetite?

- CNA reports trust and estates work generates most insurance claims taking over first place from real estate

- High proportion of claims from "phantom clients" – intended beneficiaries or disappointed heirs

- "Risk Management for Lawyers – International Trends to Watch for" Law News, 7/15/16 https://www.adls.org.nz/for-the-profession/news-and-opinion/2016/7/15/risk-management-for-lawyers-–-international-trends-to-watch-for/

Minimize Exposure – Clients & Services

- Select Clients Carefully
- Assess Your Legal Competency
- Consider Potential Conflicts of Interest
- Clearly Identify the Client
- Consider Court Appointments Carefully
- Engagement letter
- Legal Representation Agreement/Scope of Services
- Document, Document

Possible Protective Mechanisms DISCLAIMER AND CAUTIONARY NOTE TO ALL:

- ***Disclaimer and Caution***: *The lawyer must study the SC Rules of Professional Conduct and case law to determine if the possible protective mechanisms and methods to minimize exposure to such claims are consistent with the ethical Rules.*

Possible Methods to Minimize Exposure to Non-Client Beneficiary Claims

- Engagement Letter and Fee Agreements
- " . . . there are half as many claims when there are engagement letters as when there are not."
- ". . . law firms which **identify, control and transfer their risks properly** will cope with the interesting times better than those which don't." [emphasis added]

- "Risk Management for Lawyers – International Trends to Watch for" Law News, 7/15/16 https://www.adls.org.nz/for-the-profession/news-and-opinion/2016/7/15/risk-management-for-lawyers---international-trends-to-watch-for/

Possible Methods to Minimize Exposure to Non-Client Beneficiary Claims

- Obtain a signed Written Engagement/Fee Agreement
  - Address Joint Representation Issues
  - Address Identity of Client(s) and Relevant Capacities
  - Address Scope of Representation
  - Address Basis For Legal Fees & Expenses

Possible Methods to Minimize Exposure to Non-Client Beneficiary Claims

- Address Payment & Sources of Fees
- File retention and destruction
- Include Dispute Resolution Provision - Arbitration/mediation
- Choice of Law as to Claims (State that does NOT recognize non-client claims)
- Waiver of Right to Jury Trial

Methods to Minimize Non-Client Beneficiary Exposure

- In business and transactional contracts, it is common for parties to clearly express intentions concerning third parties and other terms in the contract itself. The Fabian court focused on and identifies "intent" i.e., "[I]if a contract is made for the benefit of a third person, that person may enforce the contract **if the contracting parties intended** to create a direct, rather than an incidental or consequential, benefit to such third person." *Windsor Green Owner's Ass'n*., 605 S.E.2d 750
- Thus, utilizing the basic principles of contract law, the parties may use a solid and conspicuous disclaimer of any intent to benefit third parties. A court may, depending on state law, defer to the expressed intentions of the parties in the contract and not waste the parties' time and resources trying to wade through a sea of facts concerning the circumstances surrounding the contract.

Sample: Disclaimer of Intent

- No Third-Party Beneficiaries. It is expressly understood and agreed that this Agreement is entered into solely for the mutual benefit of the parties hereto, Lawyer and Client, and that no benefits, rights, duties, or obligations are intended by this Agreement as to third parties, including but not limited to heirs, beneficiaries, successors, and assigns, who are not a signatory hereto.

Consider . . .

- Rule 1.8 Conflict of Interest: Current Clients
- . . . .
- (h) A lawyer shall not:
- (1) make an agreement prospectively limiting the lawyer's liability **to a client** for malpractice unless the client is independently represented in making the agreement; or [emphasis added]

Possible Protective Third-Party Beneficiary Claim Mechanism

- Indemnification is a method for a legally responsible party to shift a loss to another party. Indemnification can arise from contract or can be imposed through common law or equitable principles or through statutes. *See, e.g., American Transtech, Inc. v. U.S. Trust Corp.*, 933 F. Supp. 1193, 1202 (S.D.N.Y. 1996)
- Indemnification provisions provide just one method through which the parties to the contract can allocate losses, but it may not always be the preferred method of risk allocation. Fact situations vary.

Caution: As with all possible protective mechanisms and methods to minimize exposure to such claims, the lawyer must study the SC Rules of Professional Conduct and case law to determine if the protective mechanism and method are consistent with or in violation of the ethical Rules.

Simple Indemnity Example

Subject to the terms and conditions of this Agreement, Client's heirs, beneficiaries, devisees, representatives, and estate shall indemnify Lawyer from any malpractice claim(s) brought or commenced against Lawyer by any non-client third party(ies), including Client's devisees, beneficiaries, heirs, and also any other non-clients and third-party beneficiaries.

Protective Letter Advising Against Chosen Course

- Some clients may make truly unusual or even bizarre choices and you foresee the possibility of disgruntled beneficiary claims.
  - What if husband and wife clients (only marriage) no children cannot decide what to do with their property upon the death of the survivor and instruct the attorney to just let the property pass by intestacy upon the survivor's death? If attorney drafts it the way they want but advises against it, what should attorney do?
- Protect yourself - How?

Protective Letter Advising Against Chosen Course

- Protective letters have their limits:
  - Not absolute. Simply confirming client's choice may not be enough. For example:
  - "As we discussed, you have decided not to name or designate beneficiaries upon the second spouse's death. Instead, you want your estate to pass as if you died intestate (without a Will.) I advised against the foregoing."

Protective Letter – Is This Enough?

- Could this invite plaintiffs to argue that the clients would have chosen otherwise if they were fully informed. Indeed, from a strictly self-protective point of view, the attorney should draft a protective letter with strong language to urge client to adopt most beneficial estate plan.

- But even a strongly worded letter is no absolute defense.

Include Resolution Provisions in Legal Fee/Rep Agreement

- **Dispute**

- While not required, it may be helpful to include a mechanism to resolve future disputes relating to the engagement. These provisions may range from mediation to arbitration and dispute resolution, including reformation for drafting error(s).

Practical Implications Necessary Expertise/Burdens on Time & Resultant Fee

- Protective letters increase lawyer time, fees, and potential risk of liability.
- Time devoted to detailed conversations and discussions and then drafting a strongly worded letter.
- The time is devoted primarily because of the attorney's duty to non-clients (potential third-party plaintiffs), not the client.
- Attorney's advice is usually directed to client's needs, goals and interests, but because of the threat of lawsuits from third parties, the lawyer is "forced" to urge or strongly suggest an estate plan that is most beneficial to the beneficiaries.
- So who is the client? And what about the attorney's duty of loyalty and zealous representation to the client, not their beneficiaries.

Possible Protective Mechanism

- Consider declining or not accepting clients who want an estate plan that is novel, curious, quirky, and runs a high risk of a later malpractice claim. If an attorney takes such a client, how can s/he reduce the risk of a later claim (or, at least, the risk of a successful claim)?
- Unless competent and well-qualified, think twice about preparing estate documents for a high-wealth client because the more money involved in the dispute (*Fabian* estate $13 million in 2000), the more likely the third-party beneficiary stands to lose and the more likely an attorney will take their case because they have more to gain.
- Torts waiting to happen.

Statute of Limitations - Legal Malpractice Application to *Fabian*?

- The statute of limitations for a legal malpractice action is three years. S.C. Code Ann. § 15-3-530(5) (2005) (stating the statute of limitations for "an action for assault, battery, or any injury to the person or rights of another, not arising on contract and not enumerated by law" is three years); *see Berry v. McLeod*, 328 S.C. 435, 444-45, 492 S.E.2d 794, 799 (Ct. App. 1997) (concluding that section 15-3- 530(5) of the South Carolina Code provides a three-year statute of limitations for legal malpractice actions).
- Under the discovery rule, the limitations period commences when the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some claim against another party might exist. *Burgess v. Am. Cancer Soc'y, S.C. Div., Inc.*, 300 S.C. 182, 186, 386 S.E.2d 798, 800 (Ct. App. 1989); *see* S.C. Code Ann. § 15-3-535 (2005) ("[A]ll actions initiated under Section 15-3-530(5) must be commenced within three years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action.").
- "This standard as to when the limitations period begins to run is *objective* rather than subjective." *Burgess*, 300 S.C. at 186, 386 S.E.2d at 800. "Therefore, the statutory period of limitations begins to run when a person *could or should have known*, through the exercise of reasonable diligence, that a cause of action might exist in his or her favor, rather than when a person obtains actual knowledge of either the potential claim or of the facts giving rise thereto." *Id.*

Questions to Ponder

- Client's death, S/L commences?
- What if Decedent's (former Client's) estate closed well before 3 years expire and all distributions approved by Court and estate closed?
- What if Decedent's estate has no probate assets – all non-probate (jtros, beneficiary, and other designations)?

Statute of Repose?

- Example – Medical Malpractice claims must be commenced within three years from the date of the treatment, omission, or operation giving rise to the cause of action or three years from date of discovery or when it reasonably ought to have been discovered, **not to exceed six years from date of occurrence, or as tolled by this section**. S.C. Code Ann. § 15-3-545
- No Statute of Repose for tort/legal malpractice.

Expert Affidavit to File Attorney Malpractice Action

S. C. Code §15-36-100. Complaint in actions for damages alleging professional negligence; contemporaneous affidavit of expert specifying negligent act or omission.

- **Since July 1, 2005, a plaintiff is required to file an expert affidavit along with the complaint when there are allegations of professional negligence against an attorney, architect, professional engineer, physician or other professional licensed by or registered with the State of South Carolina.**
- **The expert witness is required to specify in the affidavit at least one negligent act or omission claimed to exist and the factual basis for each claim based on the evidence available at the time of filing.**
- **If plaintiff does not comply with the statute, they run the risk that the complaint will be dismissed for failure to state a claim.**

Possible Defenses to Non-Client Beneficiary's Claim

- Statute of Limitations/Statute of Repose
- Mutual or Unilateral Mistake
- Unclean Hands/Laches
- Estoppel – Hindered or Prevented Correct & Proper Preparation
- Estoppel by Contract – terms in contract/Plaintiff's breach
- Mistake/Reformation in Equity
- Tort defenses - comparative negligence, assumption of risk, proximate cause, no damages

Lawyer Dies

- What if lawyer dies, lawyer estate closed, and years later a *Fabian* claim?
- Implications of creditor's claim statute – barred?

Parting Thoughts

- No method is fool-proof
- Cost of doing business?

FINAL THOUGHTS FROM THE CAT

- “But I don’t want to go among mad people," Alice remarked.
- "Oh, you can’t help that," said the Cat: "we’re all mad here. I’m mad. You’re mad."
- "How do you know I’m mad?" said Alice.
- "You must be," said the Cat, "or you wouldn’t have come here.”
- — **Lewis Carroll**, Alice in Wonderland

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Erika Fabian, Appellant,

v.

Ross M. Lindsay, III and Lindsay and Lindsay, LLC, Respondents.

Appellate Case No. 2012-213726

Appeal from Georgetown County
The Honorable Benjamin H. Culbertson, Circuit Court Judge

Opinion No. 27460
Heard April 2, 2014 – Filed October 29, 2014

REVERSED AND REMANDED

James Matthew Dillon, of Mt. Pleasant; and Thomas A. Pendarvis and Catherine Brown Kerney, both of Pendarvis Law Offices, of Beaufort, for Appellant.

Curtis W. Dowling and Matthew Gregory Gerrald, both of Barnes Alford Stork & Johnson, of Columbia, for Respondents.

David A. Merline, Jr., of Merline & Meacham, PA, of Greenville, for Amicus Curiae, The Greenville Estate Planning Study Group.

JUSTICE BEATTY: Erika Fabian (Appellant) brought this action for legal malpractice and breach of contract by a third-party beneficiary, alleging attorney Ross M. Lindsay, III and his law firm Lindsay & Lindsay (collectively, Respondents) made a drafting error in preparing a trust instrument for her late uncle and, as a result, she was effectively disinherited. Appellant appeals from a circuit court order dismissing her action under Rule 12(b)(6), SCRCP for failure to state a claim and contends South Carolina should recognize a cause of action, in tort and in contract, by a third-party beneficiary of a will or estate planning document against a lawyer whose drafting error defeats or diminishes the client's intent. We agree, and we reverse and remand for further proceedings.

I. FACTS

A. The Trust Agreement

The facts, in the light most favorable to Appellant, are as follows. On May 25, 1990, Appellant's uncle, Dr. Denis Fabian, executed a trust agreement that was drafted by Respondents. Dr. Fabian was then around 80 years old and his wife, Marilyn Fabian, whom he had married in 1973, was about twenty years younger. Dr. Fabian made his wife the life beneficiary of the trust.

Mrs. Fabian had two adult daughters from a prior marriage. Dr. Fabian then had one living brother, Eli Fabian, who was in his 70s and not in good health. Dr. Fabian also had two nieces, Miriam Fabian, who was Eli's daughter, and Appellant, who was the daughter of Dr. Fabian's predeceased brother, Zoltan Fabian. Dr. Fabian was aware of Appellant's loss of both her father and her mother at an early age.

Dr. Fabian died on February 5, 2000, and his brother Eli died a few weeks later. Thus, Eli survived Dr. Fabian, but not Mrs. Fabian, who held the life interest in the trust. At Dr. Fabian's death, the trust was valued at approximately $13 million.

Appellant had been told by Dr. Fabian and his wife that she was being provided for in Dr. Fabian's estate plan. She alleges that at the time of Dr. Fabian's death, everyone involved in the matter was under the impression that, when Mrs. Fabian passed, one-half of Dr. Fabian's estate was going to Appellant and Miriam, with the other half to be distributed to Mrs. Fabian's two children.

After Dr. Fabian's death, however, Respondents mailed a letter and two pages from the trust agreement to Appellant and informed her that she would not be receiving anything from Dr. Fabian's trust upon Mrs. Fabian's future death

because the share that would have been distributed to her would, instead, be distributed to Eli's estate. Since Appellant's cousin Miriam was Eli's only heir, Miriam would now stand to be the beneficiary of both her share and Appellant's share. The distribution provision at issue in the trust agreement drafted by Respondents reads as follows:

> *Upon or after the death of the survivor of my said spouse and me*, my Trustee shall divide this Trust as then constituted into two (2) separate shares so as to provide One (1) share for the children of Marilyn K. Fabian and One (1) share for my brother, Eli Fabian. If either of my wife's children predceases (sic) her, the predeceased child's share shall be distributed to his or her issue per stirpes. *If my said brother, Eli Fabian, predeceases me*, then one half of *his share* shall be distributed to his daughter, Miriam Fabian, or her issue per stirpes, and the other half of *his share* shall be distributed to my niece, Erica (sic) Fabian [Appellant], or her issue per stirpes.

(Emphasis added.) Appellant maintains the first sentence makes it abundantly clear that the division and distribution of the trust corpus is to occur only *after* the death of *both* Dr. Fabian and his wife. In addition, Respondents knew that Dr. Fabian wanted Eli's share of the trust to pass to the two named nieces if Eli was not alive at the time of distribution to receive his share. However, the use of the word "me" in the last sentence has effectively defeated her uncle's intentions by inadvertently disinheriting her. She contends this drafting error has resulted in an "unexpected windfall" to one cousin (Miriam), who has now received an unintended double share, and the "devastating" disinheritance of the other cousin (Appellant).

B. Reformation Action

In response to this situation, Appellant filed an action for reformation of the trust agreement. Two of the three trustees, Mrs. Fabian, who held the life interest, and Walter Pikul, Dr. Fabian's long-time business advisor, agreed with Appellant that the trust document contained a drafting error that thwarted Dr. Fabian's intent, and they concurred in Appellant's request for reformation on the basis the error made the trust ambiguous. In contrast, Appellant's cousin Miriam, who stood to reap the windfall of receiving a double share, strenuously opposed reformation, as did the drafting attorney, respondent Ross M. Lindsay, III, who maintained the trust document was unambiguous and did not need correction.

After years of escalating litigation expenses, Appellant accepted a settlement paid for by the trust. The trust was not reformed, but the parties stipulated that Appellant was not releasing any claim she had against Respondents in their capacity as Dr. Fabian's estate planning attorneys who had drafted the instrument and counseled Dr. Fabian on the creation of the trust.

C. Action for Professional Negligence & Breach of Contract

Appellant filed the current action against Respondents as the drafters of the trust agreement in which she claims to hold an intended beneficial interest. She asserted a tort claim for professional negligence (attorney malpractice) and a claim for breach of contract on behalf of a third-party beneficiary. Respondents promptly moved to dismiss Appellant's claims under Rule 12(b)(6), SCRCP for failure to state a cause of action.

The circuit court granted the motion to dismiss, finding Appellant could not assert a claim for legal malpractice because South Carolina law recognizes no duty in the absence of an attorney-client relationship. In addition, the court stated no South Carolina court had ever recognized a breach of contract action by an intended beneficiary of estate planning documents, stating: "To the contrary, the Supreme Court has characterized such a cause of action as merely one of a variety of theories which fall under the umbrella of 'legal malpractice,' which requires privity."[1] The court concluded Respondents were "immune from liability" to Appellant under any theory for their alleged error in drafting the trust document. Appellant appealed, and this Court certified the appeal from the Court of Appeals pursuant to Rule 204(b), SCACR. We thereafter granted a motion by the Greenville Estate Planning Study Group to file an amicus curiae brief in support of Respondents.

---

[1] The circuit court relied upon *Rydde v. Morris*, 381 S.C. 643, 645, 675 S.E.2d 431, 432 (2009), in which this Court held "an attorney owes no duty to a prospective beneficiary of a *nonexistent* will." (Emphasis added.) We noted some jurisdictions had relaxed privity requirements to allow a cause of action where an attorney failed to draft a will in conformity with the testator's wishes, but not for cases involving a nonexistent document. *Id.* at 647-48, 675 S.E.2d at 433-34. *Rydde* is not controlling as it involves a distinguishable issue that implicates different legal and policy considerations, as suggested in *Rydde* itself.

II. STANDARD OF REVIEW

A defendant may move to dismiss the plaintiff's complaint for "failure to state facts sufficient to constitute a cause of action" pursuant to Rule 12(b)(6), SCRCP. "A ruling on a motion to dismiss pursuant to Rule 12(b)(6) must be based solely on the factual allegations set forth in the complaint, and the court must consider all well-pled allegations as true." *Disabato v. S.C. Ass'n of Sch. Adm'rs*, 404 S.C. 433, 441, 746 S.E.2d 329, 333 (2013); *see also Turner v. Daniels*, 404 S.C. 430, 431 n.1, 746 S.E.2d 40, 41 n.1 (2013) (noting under the standard of review applicable to Rule 12(b)(6) motions, we construe all of the facts in the appellant's well-pled complaint in the light most favorable to the appellant and presume those facts to be true). "If the facts alleged and inferences reasonably deducible therefrom, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, dismissal under Rule 12(b)(6) is improper." *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 74-75, 753 S.E.2d 846, 850 (2014).

When reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP, the appellate court applies the same standard applied by the trial court. *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). This Court is free to decide questions of law, such as whether South Carolina recognizes a certain cause of action, with no particular deference to the trial court. *Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 327, 534 S.E.2d 672, 675 (2000).

III. LAW/ANALYSIS

A. Privity Under Existing Law

In dismissing Appellant's claims, the circuit court essentially found Appellant was not in privity with Respondents and therefore failed to establish a viable cause of action. "'Privity' denotes [a] mutual or successive relationship to the same rights of property." *Thompson v. Hudgens*, 161 S.C. 450, 462, 159 S.E. 807, 812 (1931) (citation omitted); *see also Black's Law Dictionary* 1394 (10th ed. 2014) (defining "privity" as "[t]he connection or relationship between two parties, each having a legally recognized interest in the same subject matter (such as a transaction, proceeding, or piece of property); mutuality of interests"). South Carolina courts have equated privity with standing. *See Maners v. Lexington Cnty. Sav. & Loan Ass'n*, 275 S.C. 31, 33-34, 267 S.E.2d 422, 423 (1980) (affirming the

trial judge's determination that "appellant had no standing to allege [her claim] because she was not in privity with respondent").

An early case by the United States Supreme Court adopted the concept of privity from an English decision, *Winterbottom v. Wright*, 152 Eng. Rep. 402 (Exch.) (1842), and applied it to hold an attorney was not liable to a bank that relied on his erroneous certification that his client had good title to land. *See Nat'l Sav. Bank v. Ward*, 100 U.S. 195, 205-07 (1879) (discussing *Winterbottom*'s limitation of recovery in another context to those having privity of contract). The Supreme Court noted there were exceptions, however, for instances of fraud, collusion, and like circumstances. *Id.* at 205-06.

Privity for legal malpractice has traditionally been established by the existence of an attorney-client relationship. *See generally Rydde v. Morris*, 381 S.C. 643, 650, 675 S.E.2d 431, 435 (2009) (stating "existing law [] imposes a privity requirement as a condition to maintaining a legal malpractice claim in South Carolina"). "A plaintiff in a legal malpractice action must establish four elements: (1) the existence of an attorney-client relationship, (2) a breach of duty by the attorney, (3) damage to the client, and (4) proximate causation of the client's damages by the breach." *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 331, 732 S.E.2d 166, 170 (2012).

Appellant contends the current appeal presents an opportunity not available in prior cases for South Carolina to join the vast majority of states allowing intended third-party beneficiaries to bring claims against the lawyer who prepared the defective will or estate planning document. *See Chastain v. Hiltabidle*, 381 S.C. 508, 673 S.E.2d 826 (Ct. App. 2009) (stating whether a duty exists in regard to an alleged wrong is a question of law for the court). Appellant argues a lawyer's negligence in preparing an estate or testamentary document impacts three potential classes of plaintiffs: (1) the client, (2) the decedent's estate, and (3) the intended beneficiaries. As she aptly states:

> [O]f the three possible plaintiffs, only the beneficiaries have the motivation and sufficient damages to bring a malpractice claim. The client is deceased and the estate lacks a cause of action or damages or both. Indeed, because the beneficiaries were supposed to be the beneficial owners of estate assets, only the beneficiaries suffer directly due to the lawyer's negligence. If no cause of action is available to the beneficiaries, the negligent drafting lawyer is effectively immune from liability. Therefore, only the beneficiaries suffer the loss caused by the lawyer's negligence.

In the 1950s, after observing the problems created by the traditional privity requirement, jurisdictions in the United States began abandoning strict privity as an absolute bar to claims for legal malpractice. A majority of jurisdictions now recognize a cause of action by a third-party beneficiary of a will or estate planning document against the lawyer whose drafting error defeats or diminishes the client's intent, although they have done so using a variety of tests and formulations, whether in tort, contract, or both. Max N. Pickelsimer, Comment, *Attorney Malpractice in Will Drafting: Will South Carolina Expand Privity to Impose a Duty to Intended Beneficiaries of a Will?*, 58 S.C. L. Rev. 581, 581-86 (2007) (discussing the origin and evolution of privity in the United States); *see also* Joan Teshima, Annotation, *Attorney's Liability, to One Other Than Immediate Client, for Negligence in Connection with Legal Duties*, 61 A.L.R.4th 615 (1988 & Supp. 2014) (collecting cases considering the legal theories for imposing civil liability upon an attorney for damages to a nonclient directly caused by the attorney's professional negligence).

"The jurisdictions that have eased the strict privity requirement typically use one of the following three approaches to determine whether the intended beneficiary of a will has standing to bring an action for legal malpractice: (1) the balancing of factors test, which originated in California; (2) 'the Florida-Iowa rule['']; and (3) breach of contract based on a third-party beneficiary contract theory." Pickelsimer, *supra*, at 586 (footnotes omitted).

B. Theories for Imposing Liability in Tort or Contract

(1) Balancing of Factors Test

In an influential decision emanating from California in 1958, the rule on privity in legal malpractice actions began to evolve throughout the United States. In *Biakanja v. Irving*, 320 P.2d 16 (Cal. 1958), the court held that where the defendant negligently prepared an invalid will, the beneficiary could recover for her loss in tort even though she was not in privity with the defendant. Although the defendant in that case was a notary public and not an attorney, the court also overruled prior cases involving attorneys.

The holding in *Biakanja* was formally extended to attorneys a few years later in *Lucas v. Hamm*, 364 P.2d 685 (Cal. 1961). In *Lucas*, the court allowed recovery both in tort and as a third-party beneficiary to a contract. In discussing whether to impose tort liability, the *Lucas* court reiterated all but one of the factors it originally delineated in *Biakanja* and stated, "[T]he determination whether in a specific case the defendant will be held liable to a third person not in privity is a

matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury, and the policy of preventing future harm." *Id.* at 687 (citing *Biakanja*, 320 P.2d at 19).

Applying these factors, the court reasoned that "one of the main purposes which the transaction between defendant and the testator intended to accomplish was to provide for the transfer of property to plaintiffs; the damage to plaintiffs in the event of invalidity of the bequest was clearly foreseeable; it became certain, upon the death of the testator without change of the will, that plaintiffs would have received the intended benefits but for the asserted negligence of defendant; and if persons such as plaintiffs are not permitted to recover for the loss resulting from negligence of the draftsman, no one would be able to do so, and the policy of prevent[ing] future harm would be impaired." *Id.* at 688.

The court then noted since the defendant in this case was an attorney, it "must consider an additional factor not present in *Biakanja*, namely, whether the recognition of liability to beneficiaries of wills negligently drawn by attorneys would impose an undue burden on the profession." *Id.* The court found although in some situations liability could be large and unpredictable, this was also true for any attorney's liability to his client, and the extension of liability to beneficiaries injured by a negligently drawn will does not place an undue burden on the profession, particularly when taking into consideration that the opposite conclusion would cause the innocent beneficiary to bear the entire loss of the attorney's professional negligence. *Id.*

Other jurisdictions have engaged in a similar or modified "balancing of factors" analysis to generally determine whether an attorney should be liable to a third party in the absence of strict privity. *See e.g., Fickett v. Super. Ct.*, 558 P.2d 988, 990 (Ariz. Ct. App. 1976) (citing *Biakanja* and *Lucas* and stating "[w]e are of the opinion that the better view is that the determination of whether, in a specific case, the attorney will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors . . . ."); *Pizel v. Zuspann*, 795 P.2d 42, 51 (Kan. 1990) ("We find the California cases persuasive. We conclude that an attorney may be liable to parties not in privity based upon the balancing test developed by the California courts."); *Donahue v. Shughart, Thomson & Kilroy, P.C.*, 900 S.W.2d 624, 629 (Mo. 1995) (en banc) ("[T]he question of legal duty of attorneys to non-clients will be determined by weighing the factors in the modified balancing test.").

(2) The Florida-Iowa Rule

In the event this Court joins the majority of jurisdictions allowing a third party beneficiary to seek recovery for the improper drafting of a will or estate planning document, Respondents and the amicus urge this Court to adopt an alternative theory of recovery known as the "Florida-Iowa Rule." It provides:

> An attorney preparing a will has a duty not only to the testator-client, but also to the testator's intended beneficiaries, who may maintain a legal malpractice action against the attorney on theories of either tort (negligence) or contract (third-party beneficiaries). However, liability to the testamentary beneficiary can arise only if, due to the attorney's professional negligence, the testamentary intent, *as expressed in the will*, is frustrated, and the beneficiary's legacy is lost or diminished as a direct result of that negligence.

DeMaris v. Asti, 426 So. 2d 1153, 1154 (Fla. Dist. Ct. App. 1983) (citations omitted); *see also Schreiner v. Scoville*, 410 N.W.2d 679, 683 (Iowa 1987) ("[W]e hold a cause of action ordinarily will arise only when as a direct result of the lawyer's professional negligence the testator's intent as expressed in the testamentary instruments is frustrated in whole or in part and the beneficiary's interest in the estate is either lost, diminished, or unrealized."). A few other jurisdictions have also adopted this theory. *See, e.g., Mieras v. DeBona*, 550 N.W.2d 202 (Mich. 1996) (stating the beneficiary named in a will may bring a tort-based action for negligence in drafting the will, but the court will not look to extrinsic evidence).

Respondents' desire, in the absence of this Court's retention of strict privity, is to promote the Florida-Iowa Rule because its essential feature, the imposition of a ban on all extrinsic evidence, obviously makes it more difficult for a plaintiff to establish a claim. *See* Joan Teshima, Annotation, *What Constitutes Negligence Sufficient to Render Attorney Liable to Person Other Than Immediate Client*, 61 A.L.R.4th 464, 480 (1988) ("Some courts have ruled in this situation that evidence extrinsic to the will cannot be admitted to prove the testator's intent, thus making it impossible, or virtually so, for a thwarted beneficiary to prove his case against an attorney.").

Appellant understandably opposes this theory. As she correctly asserts: "The fundamental flaw in the Florida-Iowa [R]ule is that it focuses on the testamentary documents prepared by the lawyer rather than the source of the beneficiary's claim, which is not the allegedly defective will or trust document, but

instead is the client-lawyer agreement that was intended to satisfy the client's testamentary intent. The proper approach in cases like this one where latent ambiguities exist in the will, trust agreement, or estate plan would be to allow the admission of extrinsic evidence to establish the client's intent as is generally allowed in a typical will contest."

The Florida-Iowa Rule is actually based on a California case, *Ventura County Humane Society v. Holloway*, 115 Cal. Rptr. 464, 468 (Ct. App. 1974), which held the plaintiff had standing under the balancing of factors test articulated in *Biakanja* and *Lucas*, but in doing so, the court stated "[a]n attorney may be held liable to the testamentary beneficiaries only . . . [i]f due to the attorney's professional negligence the testamentary intent expressed in the will is frustrated and the beneficiaries clearly designated by the testator lose their legacy as a direct result of such negligence." *See* Pickelsimer, *supra*, at 589 (discussing the genesis of the Florida-Iowa Rule).

Appellant's argument for rejecting the Florida-Iowa Rule and its prohibition on extrinsic evidence finds support from the fact that a California district court has specifically observed that other courts applying the Rule have "read *Ventura* too broadly" because extrinsic evidence "was not at issue in *Ventura*," and the case does not stand for the proposition that inquiries should be limited to the testamentary document to the exclusion of all other evidence. *Creighton Univ. v. Kleinfeld*, 919 F. Supp. 1421, 1425 n.5 (E.D. Cal. 1995). To the contrary, extrinsic evidence is often "vital" to proving an attorney's drafting error. *Id.*

For these reasons, we reject the Florida-Iowa Rule and hold extrinsic evidence is not barred, as it is often essential to the pursuit of a claim. *See Jewish Hosp. of St. Louis, Mo. v. Boatmen's Nat'l Bank of Belleville*, 633 N.E.2d 1267, 1273-76 (Ill. App. Ct. 1994) (holding an attorney who drafted a will owed a duty in contract or tort to the remainder beneficiaries of a testamentary trust; under either theory, the non-client beneficiary must demonstrate that they are in the nature of a third-party intended beneficiary of the relationship between the attorney and the client, and evidence of intention is derived from a consideration of all of the circumstances surrounding the parties at the time of the execution of the will).

(3) Third-Party Beneficiary of Contract Theory

Another theory recognized for recovery is based on a third-party beneficiary approach. South Carolina law already generally recognizes a breach of contract claim for a third-party beneficiary of a contract and we find this principle is appropriate here.

"Generally, one not in privity of contract with another cannot maintain an action against him in breach of contract, and any damage resulting from the breach of a contract between the defendant and a third-party is not, as such, recoverable by the plaintiff." *Windsor Green Owners Ass'n v. Allied Signal, Inc.*, 362 S.C. 12, 17, 605 S.E.2d 750, 752 (Ct. App. 2004) (citation omitted). "However, if a contract is made for the benefit of a third person, that person may enforce the contract if the contracting parties intended to create a direct, rather than an incidental or consequential, benefit to such third person." *Id.* (citation omitted).

Courts in other jurisdictions have expressly extended this principle to frustrated third-party beneficiaries of estate instruments, although some have done so as a breach of contract action while others have used the "third-party beneficiary" principle as a basis to allow recovery in negligence. Some jurisdictions have recognized that a plaintiff may choose to proceed in contract, tort, or both. *See, e.g., Lucas*, 364 P.2d at 689 & n.2; *Stowe v. Smith*, 441 A.2d 81, 84 (Conn. 1981); *Blair v. Ing*, 21 P.3d 452, 464 (Haw. 2001).

In *Lucas*, in addition to allowing tort recovery, the California court found "that intended beneficiaries of a will who lose their testamentary rights because of failure of the attorney who drew the will to properly fulfill his obligations under his contract with the testator may recover as third-party beneficiaries." 364 P.2d at 689. The court stated, "Obviously the main purpose of a contract for the drafting of a will is to accomplish the future transfer of the estate of the testator to the beneficiaries named in the will, and therefore it seems improper to hold . . . that the testator intended only 'remotely' to benefit those persons." *Id.* at 688. The court found this main purpose and "intent can be effectuated, in the event of a breach by the attorney, only by giving the beneficiaries a right of action, [so] we should recognize, as a matter of policy, that they are entitled to recover as third-party beneficiaries." *Id.* at 689. Moreover, the court noted the general rule is "where a case sounds in both tort and contract, the plaintiff will ordinarily have freedom of election between the two actions." *Id.* at 689 n.2.

We find this reasoning sound and adopt it here. We also find persuasive *Guy v. Liederbach*, 459 A.2d 744, 746 (Pa. 1983) to the extent that the Pennsylvania court stated it would allow recovery as to *named* beneficiaries:

> [W]hile important policies require privity (an attorney-client or analogous professional relationship, or a specific undertaking) to maintain an action in negligence for professional malpractice, a named legatee of a will may bring suit as an intended third party beneficiary of the contract between the attorney and the testator for

> the drafting of a will which specifically names the legatee as a recipient of all or part of the estate.

The court found the grant of standing to a narrow class of third-party beneficiaries was appropriate based on the Restatement (Second) of Contracts § 302 (1979), "where the intent to benefit the plaintiff is clear and the promisee (testator) is unable to enforce the contract," as named legatees would otherwise have no recourse for failed legacies that resulted from attorney malpractice. *Id.* at 747.

Recognizing a cause of action is not a radical departure from the existing law of legal malpractice that requires a lawyer-client relationship, which is equated with privity and standing. Where a client hires an attorney to carry out his intent for estate planning and to provide for his beneficiaries, there *is* an attorney-client relationship that forms the basis for the attorney's duty to carry out the client's intent. This intent in estate planning is directly and inescapably for the benefit of the third-party beneficiaries. Thus, imposing an avenue for recourse in the beneficiary, where the client is deceased, is effectively enforcing the *client's intent*, and the third party is in privity with the attorney. It is the breach of the attorney's duty to the client that is the actionable conduct in these cases. *See* Dennis J. Horan & George W. Spellmire, Jr., *Attorney Malpractice: Prevention and Defense* 2-1 to 2-5 (1989) (discussing directly intended beneficiaries of the attorney-client relationship); *see also Gaar v. N. Myrtle Beach Realty Co.*, 287 S.C. 525, 529, 339 S.E.2d 887, 889 (Ct. App. 1986) ("In his professional capacity the attorney is not liable, except to his client *and those in privity with his client*, for injury allegedly arising out of the performance of his professional activities." (emphasis added)); *Thompson v. Hudgens*, 161 S.C. 450, 463, 159 S.E. 807, 812 (1931) ("Generally speaking, the heir is in privity with his ancestor . . . .").

In these circumstances, retaining strict privity in a legal malpractice action for negligence committed in preparing will or estate documents would serve to improperly immunize this particular subset of attorneys from liability for their professional negligence. Joining the majority of states that have recognized causes of action is the just result. This does not impose an undue burden on estate planning attorneys as it merely puts them in the same position as most other legal professionals by making them responsible for their professional negligence to the same extent as attorneys practicing in other areas.

In sum, today we affirmatively recognize causes of action both in tort and in contract by a third-party beneficiary of an existing will or estate planning document against a lawyer whose drafting error defeats or diminishes the client's intent. The focus of a will or estate document is, inherently, on third-party

beneficiaries. That being the case, the action typically does not arise until the client is deceased. *See Stowe*, 441 A.2d at 83 (stating "merely drafting and executing a will creates no vested right in the legatee until the death of the testatrix"); Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice* § 36:12, at 1288 (2014) ("Since litigation concerning errors in the preparation of a will necessarily arrives after the client's death, the plaintiff usually is an allegedly injured or omitted beneficiary . . . .").

Specifically as to tort actions, the balancing test propounded by the California courts provides a valuable framework in evaluating the considerations that support adoption of a cause of action. *See Donahue*, 900 S.W.2d at 627 ("That balancing test has been cited with approval by most jurisdictions which have considered the issue." (citing Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice* § 7.11, at 383 (3d ed. 1983)). As discussed previously, we reject the Florida-Iowa Rule for its narrow application and ban on extrinsic evidence. As to contract actions for third-party beneficiaries, we find the reasoning in *Lucas* and *Guy* particularly persuasive, and we adopt *Guy*'s limitation on recovery to persons who are named in the estate planning document or otherwise identified in the instrument by their status (e.g., my children and grandchildren, my wife's children).

One court that still retains strict privity, but struggled greatly in doing so, is particularly notable for a vigorous joint dissent in which the justices pointedly remarked:

> With an obscure reference to "the greater good," [] the Court unjustifiably insulates an entire class of negligent lawyers from the consequences of their wrongdoing, and unjustly denies legal recourse to the grandchildren for whose benefit Ms. Barcelo hired a lawyer in the first place. . . .
>
> . . . .
>
> . . . [T]he Court's decision means that, as a practical matter, no one has the right to sue for the lawyer's negligent frustration of the testator's intent. A flaw in a will or other testamentary document is not likely to be discovered until the client's death. And, generally, the estate suffers no harm from a negligently drafted testamentary document.

Barcelo v. Elliott, 923 S.W.2d 575, 579-80 (Tex. 1996) (Cornyn & Abbott, JJ., dissenting) (citations and footnotes omitted). The justices asserted the majority "gives no consideration to the fair adjustment of the loss between the parties, one of the traditional objectives of tort law," and "[t]hese grounds for the imposition of a legal duty in tort law generally, which apply to lawyers in every other context, are no less important in estate planning." *Id.* at 580. We agree with these observations and find there are compelling policy reasons supporting recognition of these claims.

IV. CONCLUSION

We recognize a cause of action, in both tort and contract, by a third-party beneficiary of an existing will or estate planning document against a lawyer whose drafting error defeats or diminishes the client's intent. Recovery under either cause of action is limited to persons who are named in the estate planning document or otherwise identified in the instrument by their status. Where the claim sounds in both tort and contract, the plaintiff may elect a recovery. We apply this holding in the instant appeal and to cases pending on appeal as of the date of this opinion. As a result, we reverse the order dismissing Appellant's complaint and remand the matter to the circuit court for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

HEARN, J., concurs. KITTREDGE, J., concurring in a separate opinion. PLEICONES, J., concurring in part and dissenting in part in a separate opinion in which TOAL, C.J., concurs.

JUSTICE KITTREDGE: I concur in the majority opinion except as may concern the applicable burden of proof, which is not addressed in the majority opinion. I agree with Justice Pleicones that the burden of proof should be the clear and convincing standard.

JUSTICE PLEICONES: I agree with the majority that we should recognize a cause of action for legal malpractice brought on behalf of a person in Appellant's position. As I believe this cause of action should properly sound only in tort, I write separately. Further, I would hold that a decision should only apply prospectively, but that Appellant may pursue her claim to finality under the guidelines announced today.

I agree that public policy considerations dictate a relaxation of the strict privity requirement for purposes of asserting a legal malpractice claim against an attorney who drafts an estate planning document. *See Russo v. Sutton*, 310 S.C. 200, 204, 422 S.E.2d 750, 753 (1992) ("We have not hesitated to act in the past when it has become apparent that the public policy of the State is offended by outdated rules of law."); *see also Auric v. Continental Cas. Co.*, 331 N.W.2d 325, 329 (Wis. 1983) (relaxing the requirement of strict privity in the context of a legal malpractice action based on public policy considerations because the possibility of liability for negligent drafting of an estate planning instrument is one way to make an attorney accountable for his negligence). Likewise, I agree that an attorney owes a duty only to a beneficiary named in an estate planning instrument or identified as such by status in the instrument. *See Lucas v. Hamm*, 364 P.2d 685, 687 (Cal. 1961) (stating the policy reasons, such as the foreseeability of harm to the named-beneficiary, that support the imposition of a duty); s*ee also* Restatement (Third) of the Law Governing Lawyers § 51(3)(a) (2000) (stating a lawyer owes a duty to a non-client when "the lawyer knows that a client intends as one of the primary objectives of the representation that the lawyer's services benefit the non-client"). Thus, I agree that Appellant may assert a legal malpractice claim against Respondent based on Respondent's status as a named beneficiary in the trust instrument.

I also write separately as I would require a beneficiary asserting such a legal malpractice claim to prove by clear and convincing evidence that the attorney breached the duty owed to the beneficiary, and the beneficiary suffered damages which were proximately caused by the attorney's breach. *See* S.C. Code Ann. § 62-2-601(B) (Supp. 2013) (noting the burden of proof is clear and convincing evidence in a will reformation action); *see, e.g.*, *Pivnick v. Beck*, 762 A.2d 653, 654 (N.J. 2000) (adopting the clear and convincing burden of proof when a non-client brings a legal malpractice claim on the basis that a lawyer was negligent in drafting an estate planning document).

I respectfully differ from the majority's recognition of a breach of contract action based on a beneficiary's supposed status as a third-party beneficiary. While I acknowledge, as the majority sets forth in great detail, that many jurisdictions recognize a breach of contract action on this basis,[2] I would rely on precedent from this Court and find that a legal malpractice action, which is a form of professional negligence brought by a third-party who lacks privity, sounds only in tort. *See Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 320 S.C. 49, 54–55, 463 S.E.2d 85, 88 (1995) (finding a professional negligence action sounds in tort). Moreover, while I agree with the majority that evidence extrinsic to the four corners of the estate planning instrument is admissible to prove whether a lawyer breached his duty in drafting the instrument, I believe characterizing such evidence as "extrinsic" in a legal malpractice context is a misnomer because the evidence sought to be admitted does not "relate to a contract."[3]

Finally, I disagree with allowing "cases pending on appeal as of the date of the opinion" the opportunity to pursue a legal malpractice action in this context. Instead, I would hold that while Appellant may pursue her claim to finality, our decision should only apply prospectively. *See Toth v. Square D Co.*, 298 S.C. 6, 8–10 377 S.E.2d 584, 586–87 (1989) ("Prospective application is required when liability is created where formerly none existed."). I would allow Appellant the benefit of pursuing her claim because our decision today recognizes a duty that has been foreshadowed by this Court. *See Rydde v. Morris*, 381 S.C. 643, 647, 675 S.E.2d 431, 433 (2009) (noting, albeit in dicta, that generally an attorney owes a duty to a non-client intended beneficiary of an executed will where it is shown that the testator's intent has been defeated or diminished by negligence on the part of the attorney, resulting in loss to the beneficiary); *see also* Joan Teshima, Annotation, *Attorney's Liability, to One Other Than Immediate Client, for Negligence in Connection with Legal Duties*, 61 A.L.R.4th 615 (1988 & Supp. 2014) (compiling cases from a majority of jurisdictions recognizing that an estate planning attorney *may* be liable to a beneficiary named or one identified as such by her status in an estate planning instrument).

---

[2] s*ee, e.g.*, *Lucas*, 364 P.2d at 689.

[3] *See* Black's Law Dictionary 637 (9th ed. 2009) (defining extrinsic evidence as evidence "relating to a contract but not appearing on the face of the contract because it comes from other sources, such as statements between the parties or the circumstances surrounding the agreement").

Whether Appellant can prevail on her legal malpractice claim is a question for the fact finder and is one in which we do not answer today. Therefore, I concur with the majority's reversal of the circuit court's Rule 12(b)(6) dismissal because Appellant has stated a viable cause of action in tort based on Respondent's purportedly negligent drafting of the trust instrument.

TOAL, C.J., concurs.

FABIAN

PROCEDURE FOR THIRD-PARTY MALPRACTICE CLAIMS AGAINST ESTATE PLANNING ATTORNEYS (WILLS & TRUSTS):

SECTION 62-??????: Action for legal malpractice against a lawyer after death of client for whom a will or trust is prepared.

(A) As used herein, "claimant" means a person who brings an action for damages as described herein after the death of a client for whom a will or trust or both was prepared by a lawyer. A claimant is specifically limited to any person who is named in such will or trust or otherwise identified in such will or trust by their status (e.g., my children, my grandchildren, my wife's children).

(B) As used herein, "lawyer" means (i) an individual lawyer, together with his or her employees who are lawyers, (ii) a professional partnership of lawyers, together with its employees, partners, and members who are lawyers, (iii) a professional service corporation of lawyers, together with its employees, officers, and shareholders who are lawyers; and (iv) a person who is a non-lawyer and employed by a lawyer as described in (i), (ii), or (iii) of this section (B).

(C) As used herein, "client" means a person who enters into or has an attorney-client relationship with a lawyer to prepare a will or trust or both.

(D) When injury is caused by an act or omission of a lawyer who rendered professional services by preparing a will or a trust or both for a client, a claimant may, after such client's death, bring an action for damages against such lawyer based on tort or on contract as a third-party beneficiary of such will or trust or both. Any such action must be commenced by the claimant within one (1) year after the date of the client's death.

(E) If the claimant brings a claim sounding in both tort and contract, the claimant must elect a recovery under one of the foregoing theories, and the claimant is barred from bringing any other theories or types of action, except an action in tort or contract.

(F) If the claimant entitled to bring such action is under the age of majority at the time the cause of action accrues, the period of limitations shall not begin to run until majority is attained. After reaching the age of majority, any such claimant may commence an action for damages against such lawyer based on tort or on contract as a third-party beneficiary of such will or trust or both. Any such action must be commenced by such claimant within one (1) year after majority is attained by such claimant, and such action shall be controlled and governed by the requirements and terms set forth in this Section.

(G) The claimant must prove his claim by clear and convincing evidence, and the court may grant relief only if it is satisfied by clear and convincing evidence that the claimant is entitled to relief under either a tort or contract theory. Extrinsic evidence shall not be admissible to prove the client's intent.

(H) This section provides the only causes of action that a claimant may bring against a lawyer after the death of the lawyer's client arising out of an act or omission in the performance of professional services provided to a client by such lawyer in connection with a will or trust or both. This statute of limitations set forth herein is the only statute of limitations applicable to any such claimant's action. Accordingly, no other statute of limitations, including but not limited to S.C. Code Section 15-3-530 or elsewhere in this Code, shall apply to or govern any such action brought by a claimant.

(I) This Section applies to all legal malpractice actions as set described herein accruing on or after its effective date.

Comment: The case of *Fabian v. Lindsay*, 765 S.E.2d 132 (2014) abolished strict privity and adopted an approach for a non-client to bring a legal malpractice claim against a lawyer who prepared a will or trust for a client. This statute overrules the case of *Fabian v. Lindsay* and establishes the only procedure for actions for damages and malpractice against a lawyer after the death of a client for whom a lawyer prepared a will or a trust or both.

South Carolina Bar
Continuing Legal Education Division

2019 SC BAR CONVENTION

Probate, Estate Planning & Trust Section

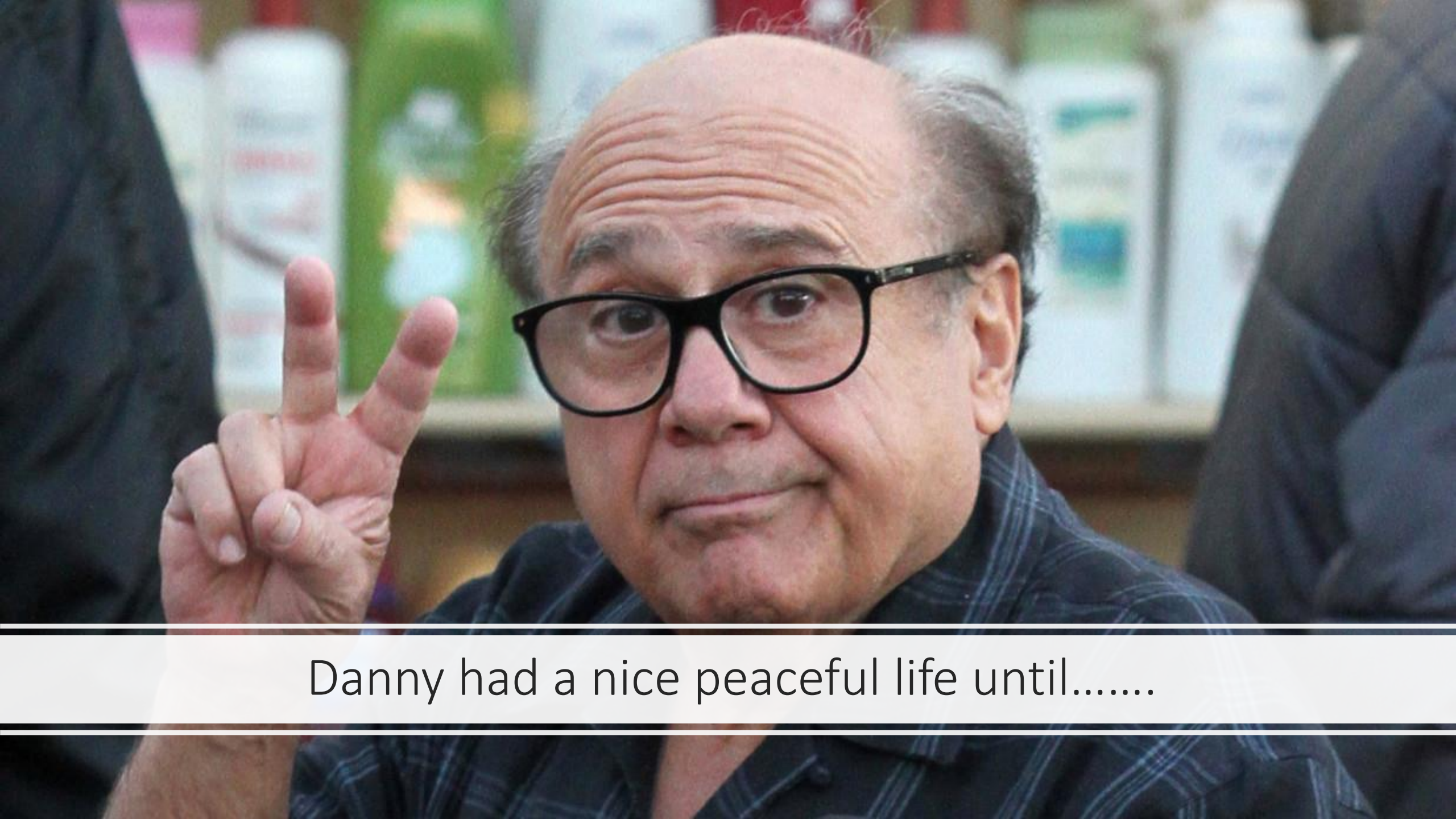
Friday, January 18

Navigating the New Article 5 from On and Off the Bench

The Honorable Leigh Powers Boan
The Honorable Molly D. Edwards
The Honorable Heather J. Galvin
The Honorable Dee A. Studebaker
Melody J.E. Breeden

Navigating the New Article 5 from On and Off the Bench

The Honorable Leigh Power Boan, Georgetown County Probate Court
The Honorable Molly D. Edwards, Dorchester County Probate Court
The Honorable Heather R. Galvin, Beaufort County Probate Court
The Honorable Dee Studebaker, Lancaster County Probate Court
Melody J.E. Breeden, Esquire, Turner Padget Graham & Laney, PA



Danny had a nice peaceful life until…….

Mama fell
from the train.

After her fall she began making bad decisions, the worst of which was to move in with Richard, who told Mama she was a pretty woman who deserved the finer things in life.

Danny was concerned that Richard was spending all of Mama's money and that Mama needed to see a doctor.

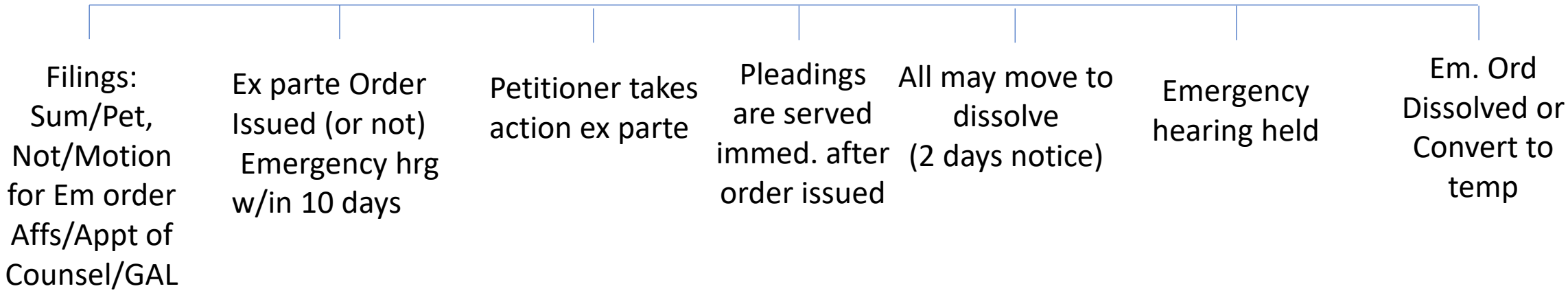
Danny comes to you for help. How do you proceed?

Is this an emergency?

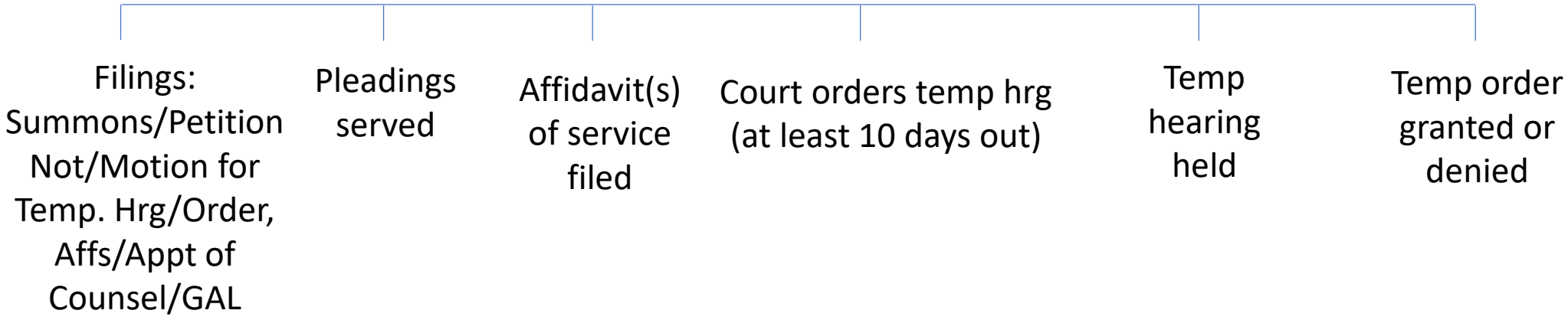
62-5-101(7) defines emergency as:

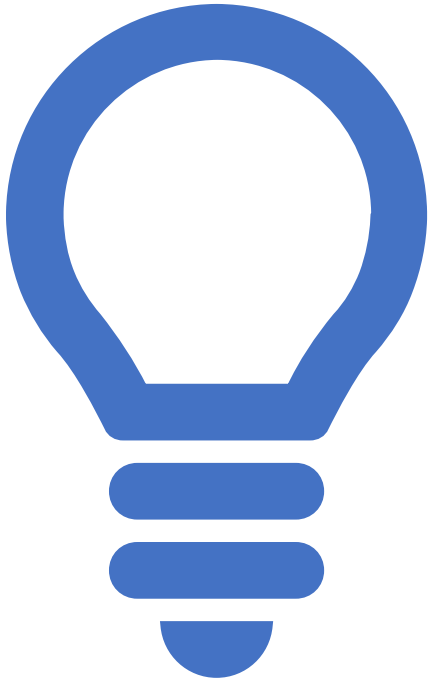
- circumstances that are likely to result in substantial harm to the alleged incapacitated individual's health, safety, or welfare or in substantial economic loss to the alleged incapacitated individual

Emergency Relief Timeline 62-5-108



Temporary Relief Timeline 62-5-108





Tips for Lawyers

1. Make sure that you have adequately investigated the situation to determine that an emergency does exist and that you have supporting Affidavits.

2.Make sure you know all the parties that need to be served and notified prior to filing the action.

3. Make sure your client is available to attend the emergency hearing.

4. Make sure before filing that your client is credit worthy enough to obtain a surety bond.

5. Make sure you have done your homework before bringing the matter before the Court.

Danny was appointed Temporary Guardian.

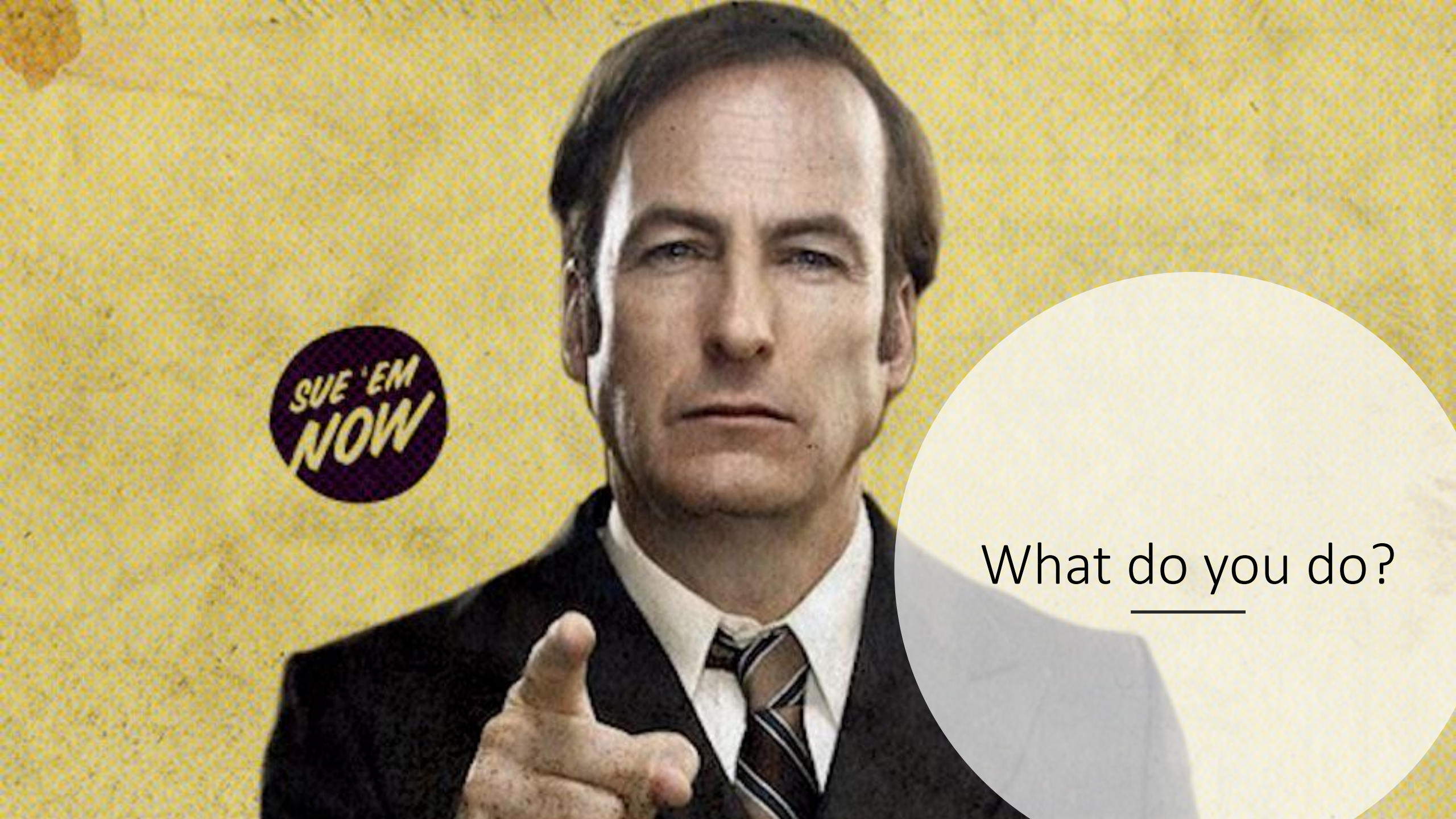
Richard has moved on to greener pastures.

Danny would like to move forward with plenary Guardianship and Conservatorship. He calls you and discloses he has an evil twin brother.....

Arnold - who has been estranged from the family for years.

After being served Arnold files an answer and competing petitions. He claims Mama has capacity, but even if she doesn't, she signed healthcare and durable powers of attorney naming Arnold as her agent.

Just when you think things couldn't get any worse. Richard returns claiming he and Mama had entered into a common law marriage and he wasn't just a gigolo.



What do you do?

TO DO LIST

Serve the interested parties.

Answer Arnold's competing Petition.

Review the DE Report and GAL Report.

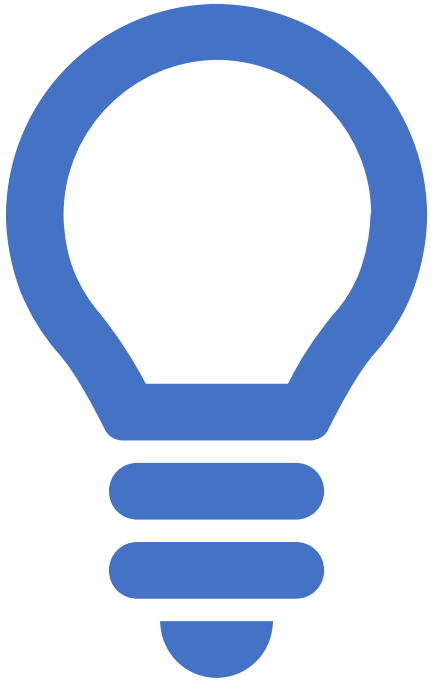
Can the parties reach ment?

- Parties that must agre
  - Danny;
  - Arnold
  - M
- Has M ice at the hearing
- Does the necessary?

IF ALL THE E COURT MAY SIGN A TEMPORARY WITHOUT A HEARING.

BUT… a hearing may still be required…

- If there is no agreement between the parties, then the Court will hold a FORMAL hearing.
- Even if everyone agrees, the Court may still require a FORMAL hearing or an INFORMAL proceeding.
- In most instances with a lay Guardian or Conservator, a formal hearing or an informal proceeding will likely be required.



Tips for Lawyers

1. Make sure everyone has been served.

2. Make sure that all the proper exams have been completed and reports filed and served.

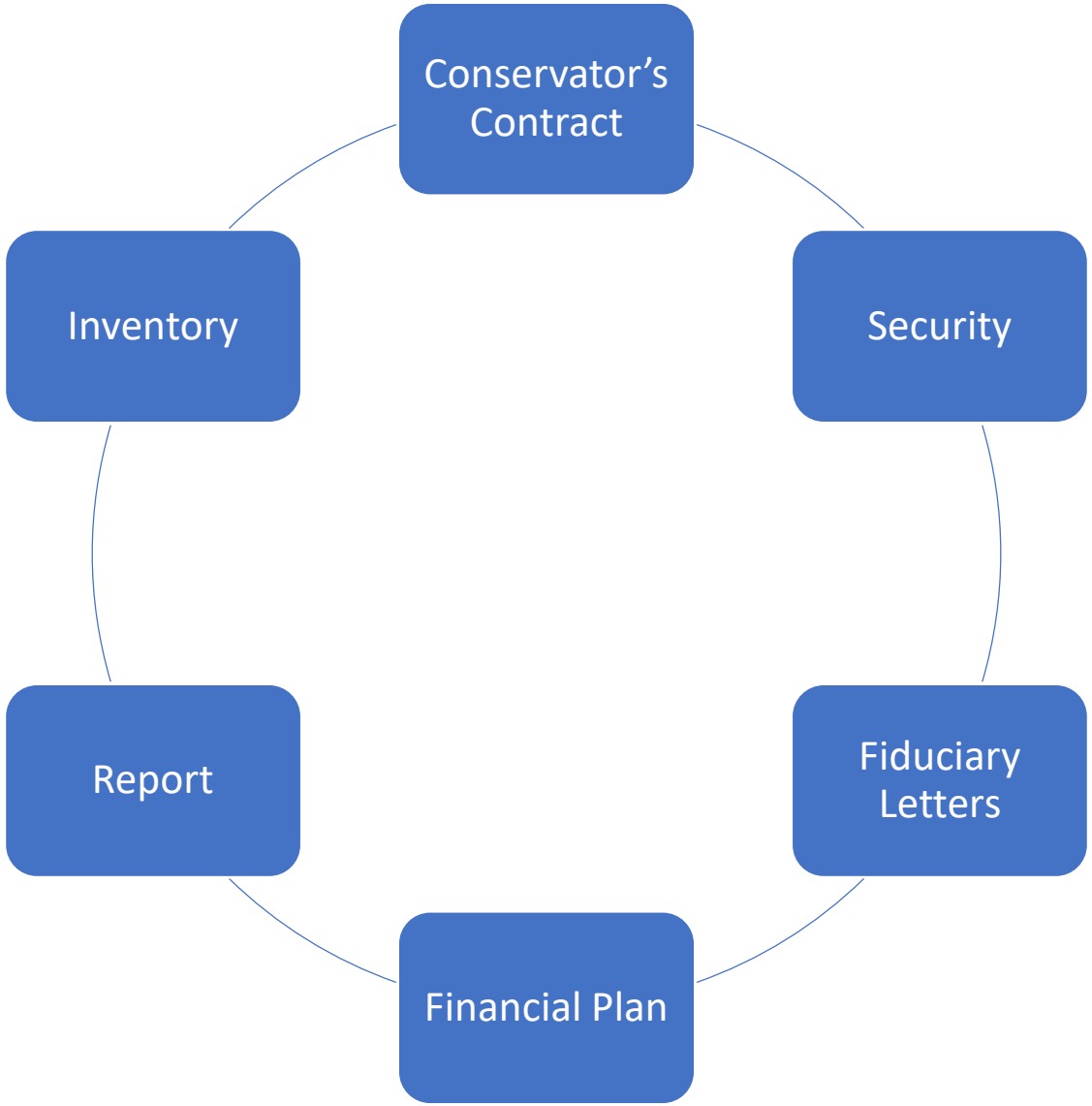
3. Make sure that there is either an agreement in place or a hearing is requested.

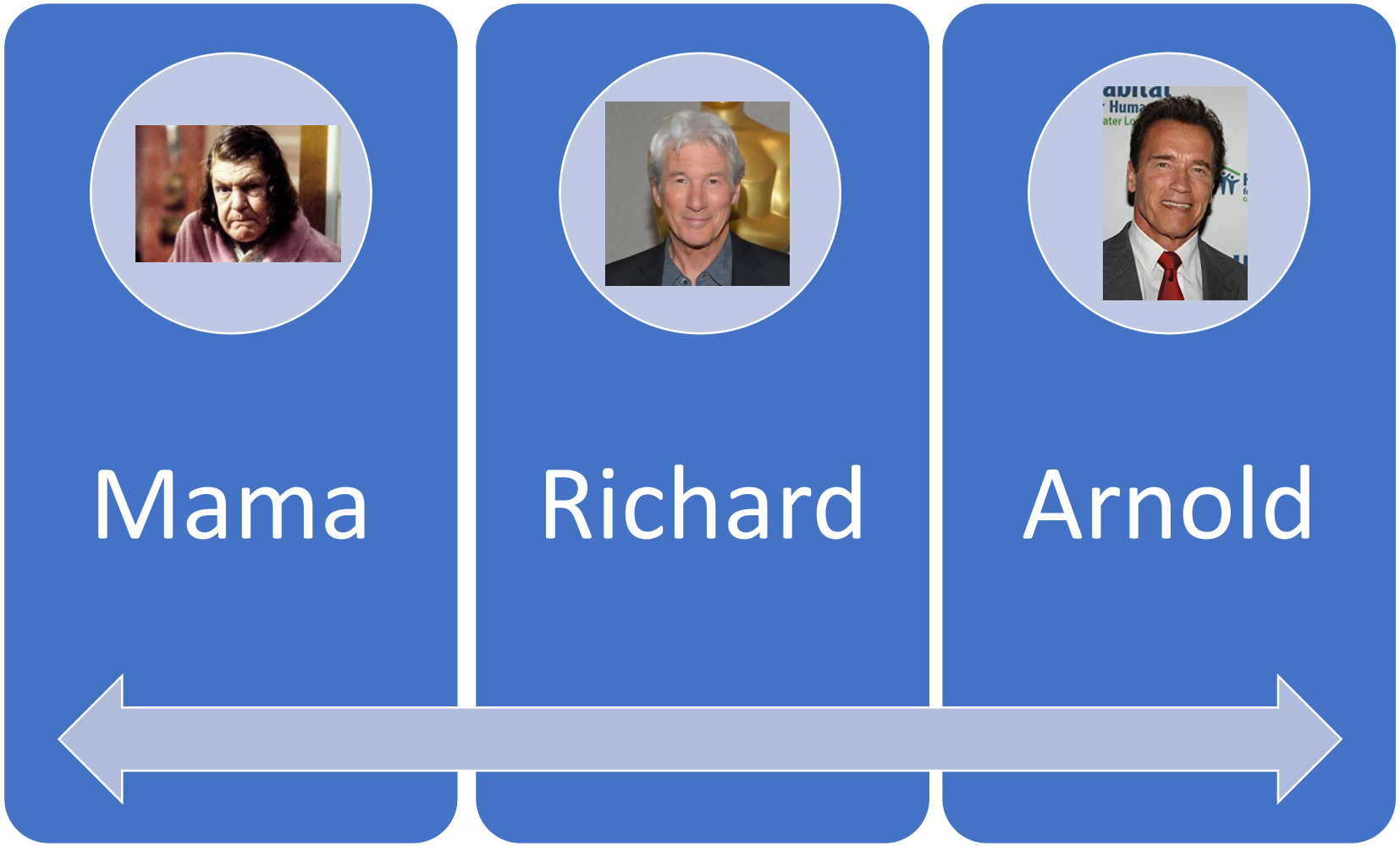
4. Before proceeding to a hearing, make sure you have done your homework and everything is in order. Don’t forget to send out notice of the hearing.

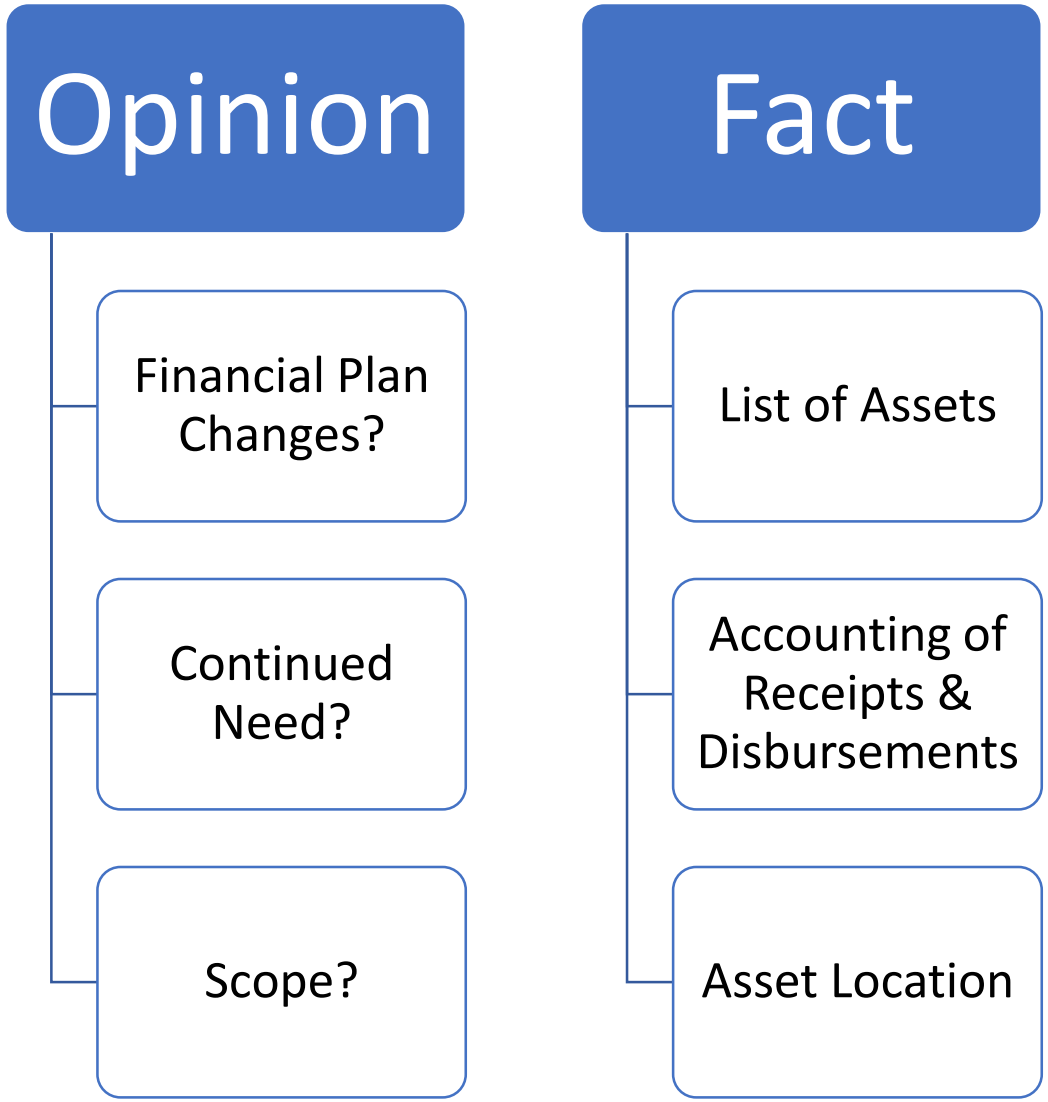
5. Make sure your client is prepared if there is no agreement.

After the dust has cleared Danny is appointed. He now needs your help as he invested Mama's funds with a nice fellow named Leo and things didn't go so well.

What do you do?


Conservator's Contract
Security
Fiduciary Letters
Financial Plan
Report
Inventory


Mama
Richard
Arnold


Opinion
Financial Plan Changes?
Continued Need?
Scope?
Fact
List of Assets
Accounting of Receipts & Disbursements
Asset Location

CONSERVATOR REPORT DETAILS

After receiving the Report, interested parties can seek informal relief

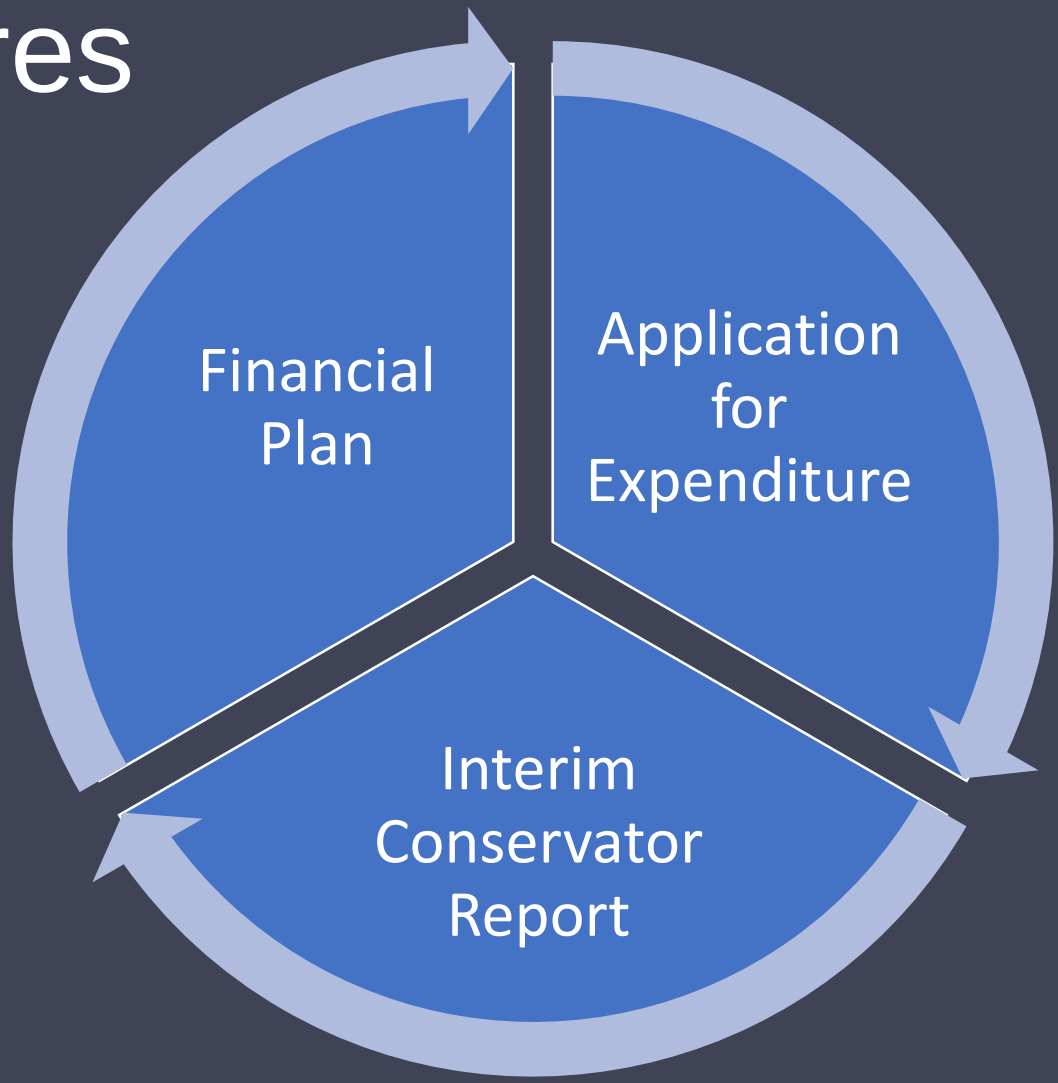
Danny must include all assets received and disbursed

The Court may require a physical examination or check of Mama's assets

Danny must support Conservator Report with receipts, canceled checks, any other proof the Court may require.

Danny was short on money after Leo's "investments" and was forced to hire Misery, Inc., an inexpensive in-home care service.

Expenditures




After an unfortunate accident involving cutlery, Danny sued Misery, Inc. and obtained a substantial judgment. Danny now has to file a supplemental inventory and financial plan. What does Danny need to do?

Report Pending Lawsuit- Long Form

Supplemental Inventory

Financial Plan

GAL?

Informal or Formal Relief

Examination

11. Professional conservators must confirm security is current and adequate. Have you filed an Affidavit of Conservator Regarding Bond (FORM ____)?
☐ YES ☐ NO.

12. ☐ The Conservator is requesting a change to the surety bond/other protection and is filing a motion with the Court.

Section 2: Other Financial Information (Attach copies of applicable documents).

13. Is anyone involved in this conservatorship a party to a **lawsuit**? ☐YES ☐NO
If yes, answer the following: NAME:_____ (☐ Conservator, ☐ Protected Person)

	Location of Filing	Represented by	Docket/Case No.
☐ Plaintiff ☐ Defendant			
Amount of Suit	**Possible Completion Date**	**Subject of Suit**	
$			

14. Has the Conservator or any entity to which it has a fiduciary duty filed for **bankruptcy**? ☐YES ☐NO
If yes, answer the following:

Date Filed	Date Dismissed	Date Discharged	Petition/Case No.	Location Filed

15. Will the Protected Person receive any assets from a decedent's estate? ☐YES ☐NO
If yes, explain and prepare Supplemental Inventory and Appraisement for assets are received.

Describe asset and when received:	Anticipated amount to be received	When will it be received?

Report Pending Lawsuit- Long Form

Supplemental Inventory

Financial Plan

GAL?

Informal or Formal Relief

Examination

FINANCIAL PLAN

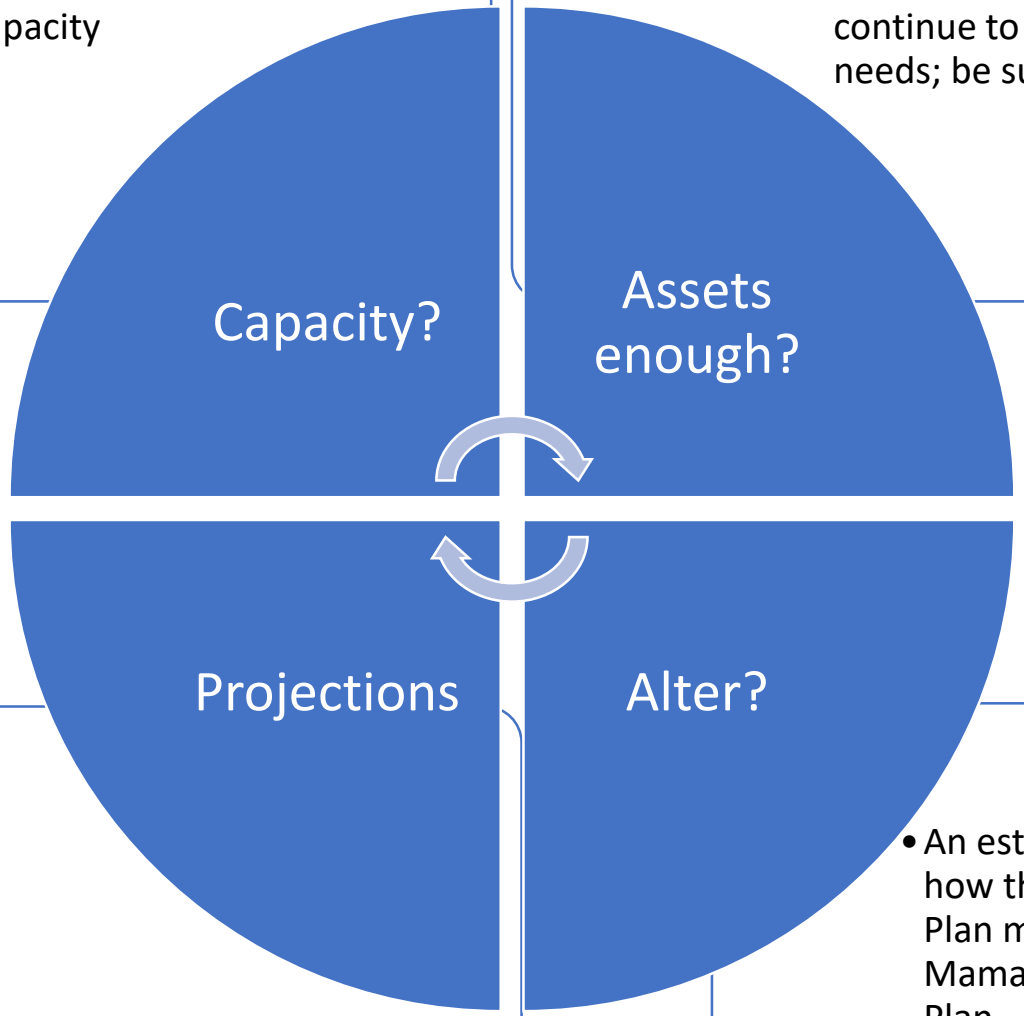
Mama's Health, Education, Maintenance & Support

- Court Action
- Tailored to Mama
- Standard of Care
- Revised when needed
- Helps Danny plan & manage
- Provided to?

FINANCIAL PLAN

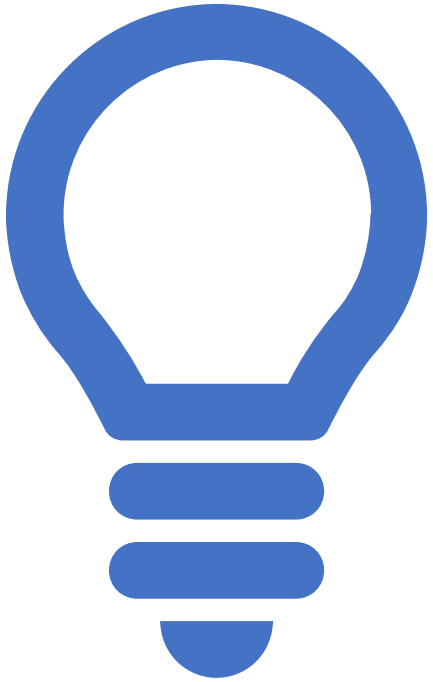
- Statement of the extent to which Mama may regain capacity

- Estimate whether assets will continue to meet current/future needs; be sufficient



- Expenses
- Resources

- An estimate of how the Financial Plan may alter Mama's Estate Plan



Tips for Lawyers

1. Assist client with compiling financial information by having client provide or assisting client in obtaining copies of all financial documents, bank statements, investment statements, income, expenses, etc.

2. Financial information will be used for the Financial Plan, Inventory, and Accounting.

3. Work with a financial planner if necessary for the financial plan depending on the complexity of the individual's assets and needs. Having a budget of what and the money can be used for will keep the client on the right path.

4. Prepare the Financial Plan, Inventory, and Accounting with the information provided and verified by the client.

5. Stay involved with the client throughout the process to guide them down the right path and keep them from going astray.

Many years later after a long and happy life, Mama passes peacefully away in her sleep. What must Danny do to terminate the Guardianship and Conservatorship to ensure Arnold doesn't terminate him if something goes wrong?

§ 62-5-306 Termination of Guardianship for incapacitated person; accounting of funds.

- (A) Upon the death of the ward, the guardian shall notify the court and file a death certificate confirming the ward's death. The court may then issue an order terminating the guardianship and the appointment of the guardian.
- (B) If there is no conservatorship for the ward, the guardian may file an application for specific authority to use the ward's funds for the final disposition of the ward's remains.

WHAT TO DO

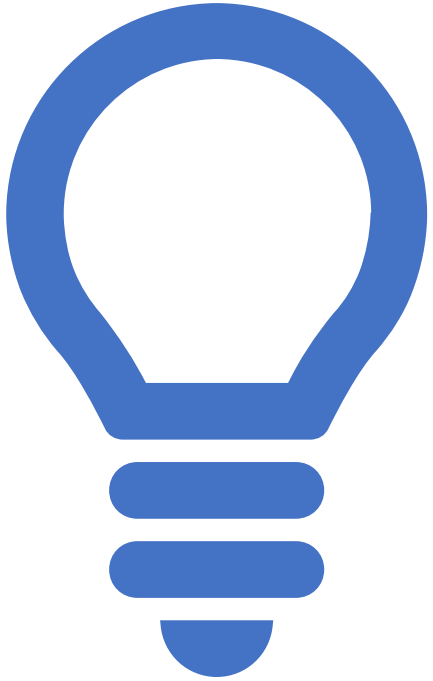
1. File an Application for Relief to Terminate Guardianship
2. If no Conservator, the Guardian may file an Application for Use of Deceased Ward's Funds for final disposition of the Ward's remains
3. If the funds are used by the Guardian for the final disposition of the remains, an Accounting must be filed with the Court.
    a. It must be filed within 10 days of the Order approving the expenditure.
    b. A Proof of Delivery must be filed showing delivery to last known address of Personal Representative.
    c. If no Will is located, a copy to one of ward's closest adult relatives.

§ 62-5-428 Termination of Conservatorship for incapacitated person; accounting of funds.

- Upon the death of the ward, the Conservator may request an Order terminating the Conservatorship and approving a final accounting
- Shall deliver to the Court any Will in his/her possession and inform the Personal Representative or a beneficiary named in the will of delivery.
- Retain the estate for delivery to Personal Representative or other person entitled to it
- After 30 days without appointment or pending appointment the Conservator may apply for appointment as Personal Representative

WHAT TO DO

- File a Conservator Report requesting discharge and approval of Final Accounting
- Distribute assets to PR (62-5-423)
- Turn over the Will
- Apply to be PR



Tips for Lawyers

1. Since the attorney has been working with client all along, the attorney should have much information already to complete the final accounting.

2. Make sure that the client has accurately accounted for everything up until the date of death.

3. Make sure the client understands that the Conservatorship does not continue after death.

4. Make sure the client does not keep paying for expenses out of the Conservatorship account(s) after death that are expenses that should cease after death.

5. Make sure the client does not treat anything left in the Conservatorship account(s) as client's own.

6. Assist the client with appointment as Personal Representative in the Estate or in turning over assets to the Personal Representative of the Estate.