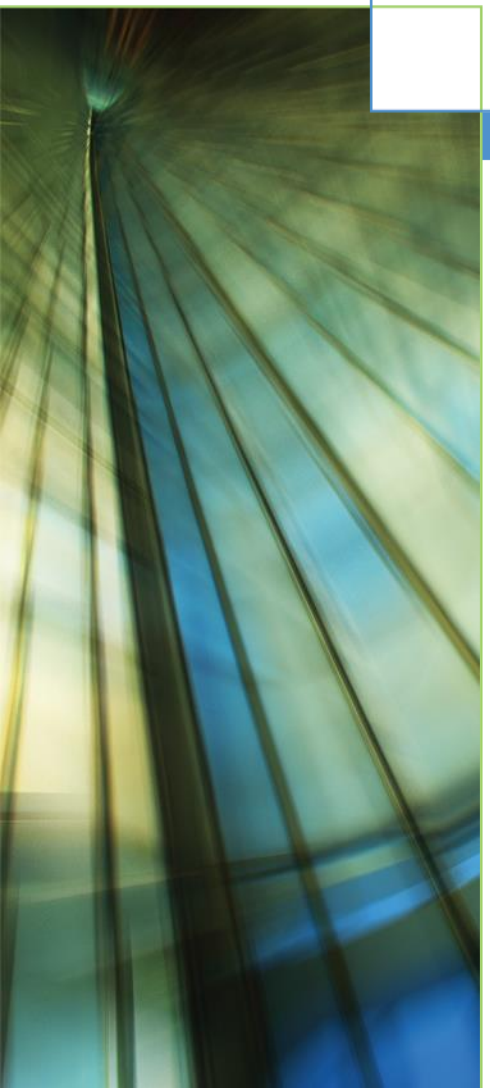

Effective Estate Planning for Diminished Capacity
Can You Really Avoid a Guardianship?

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Adult Disability Is on the Rise

- Disability as defined by the **Americans with Disabilities Act** is an individual's physical or mental impairment that substantially limits one or more major activities of that individual.
- Studies find consistently that disability rates rise with age. A study by U.S. Census Bureau on **Older Americans with a Disability: 2008-2012** reports that of 40.7 million people aged 65 and older (13.2% of the population), 38.7% reported having one or more disabilities, with the oldest old (85 and older) disproportionately affected.

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Adult Disability Is on the Rise

- "Disability" includes both physical and mental impairments
  - Ambulatory difficulty
  - Serious hearing loss
  - Difficulty with independent living
- However, 28.8% of the population over age 65 also reported some form of cognitive disability, rising to 39.1% among the oldest old.
- The population of the oldest old has increased from 8.8% in 1980 to 13.6% in 2010.

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Continuing Role of Counsel for a Client with Diminished Capacity

- Rule 1.14 of the ABA Model Rules of Professional Conduct
  - (a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as is reasonably possible, maintain a normal client-lawyer relationship with the client.

ABA Model Rule 1.14

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

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ABA Model Rule 1.14

- (c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6 [relating to the duty of confidentiality]. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(b) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

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ABA Model Rule 1.14

- Comments to Rule 1.14 contemplate that the lawyer will continue to communicate with the client, and acknowledge that the client may continue to have the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being.
- Comment [3] contemplates the assistance of family members if the client wishes without loss of attorney-client privilege to the extent their participation is necessary to assist in the representation.

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ABA Model Rule 1.14

- Comment [5] contemplates that when the lawyer reasonably believes the client to be at risk, as part of the lawyer's protective action, the lawyer make consult family members, use a reconsideration period to permit clarification or improvement, use voluntary surrogate decision-making tools such as a durable powers of attorney, consult with support groups, professional services, adult-protective agencies or entities having the ability to protect the client.
- In taking protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goal of intruding into the client's decision-making autonomy to the least extent feasible.

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ABA Model Rule 1.14

- Comment [6] provides that in determining the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision; and the consistency of the decision with the long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from a diagnostician.
- "[T]he lawyer's position in such cases in an unavoidably difficult one."

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Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers

- Prepared in collaboration with the American Psychological Association
- Acknowledges that lawyers are faced with the assessment or at least screening of capacity in a rising number of contexts. Even the belief that "something about the client has changed" or the decision to refer a client for evaluation represents a preliminary assessment of capacity
- Lawyer is inevitably involved in some level of capacity assessment, as the lawyer makes the legal judgment whether or not a client has sufficient understanding of a contemplated transaction to go forward

Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers

- The Handbook sets forth the cognitive signs of diminished capacity: short term memory loss, communication problems, comprehension problems, lack of mental flexibility, calculation problems and disorientation
- Emotional signs of diminished capacity include significant emotional distress and emotional inappropriateness
- Behavioral signs of diminished capacity include delusions, hallucinations and poor grooming/hygiene

Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers

- Nonetheless, in the context of estate planning, doubt will be resolved in the lawyer's favor. The lawyer's primary obligation is to represent the client's interests and carry out the client's wishes to the extent the client is able to express those to the lawyer. Thus, although the lawyer must be familiar with the required capacities under the law for the client to engage in various legal transactions, a court, and not the lawyer, is the final word on whether a client had the capacity to execute the transaction in question.

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Examining the State Law Estate Planning Tools Available to Avoid the Need for Guardianship

- Durable Powers of Attorney – It is well settled that an agent under a power of attorney is a fiduciary, but there is little clarity about the standard of care – which may range from due care to almost a trustee-type duty.
  - FL Powers of Attorney
    - In Florida, an agent acting under a power of attorney has no affirmative duties unless the agent's assertions or conduct manifest acceptance.
    - All estate planning powers must be specifically initialed
    - The agent has no authority except that expressly granted in the power of attorney, and an omnibus grant of authority is ineffective.

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Examining the State Law Estate Planning Tools Available to Avoid the Need for Guardianship

- Other state powers of attorney
  - CA Power of Attorney
    - Statute is unusual because is expressly authorizes the principal to grant authority to the agent with regard to the "principal's property, personal care or any other matter."
    - The principal may grant the agent authority to determine where the principal will live, to provide meals, to hire household employees, to provide transportation, to handle mail, and to arrange recreation and entertainment.
    - The CA printed form provides in bold type a statement that the agent has no duty to act unless the principal and agent agree otherwise in writing.

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Examining the State Law Estate Planning Tools Available to Avoid the Need for Guardianship

- IL and NY Powers of Attorney
  - Both Illinois and New York provide a short form of statutory power of attorney
  - Appears to be restricted to property and financial matters
  - The Comments to the Uniform Power of Attorney Act also appear to contemplate that a power of attorney will only grant the agent authority over the principal's property
  - The lack of affirmative duties may avoid a claim for equitable relief, but would permit a claim for damages for breach of fiduciary duty

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Examining the State Law Estate Planning Tools Available to Avoid the Need for Guardianship

- Health Care Advance Directives
  - Historically, Health Care Advance Directives were applicable only in case the principal would be incapacitated, but the modern statutes permit the appointment of a person to make health care decisions even if the principal remains capable of making decisions personally.
  - In addition, probably in response to the Terry Schiavo case in Florida, the more modern statutes permit granting the surrogate authority to withdraw or apply life-prolonging procedures. The Illinois short form power of attorney for health care gives the principal comprehensive information in an attempt to ensure informed consent, providing a list of open ended questions to elicit the principal's attitude towards end of life decisions.

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Examining the State Law Estate Planning Tools Available to Avoid the Need for Guardianship

- Designations of Preneed Guardian
  - If state law authorizes it, a designation of preneed guardian should be prepared for every client.
  - In Florida, a ward's preference is the "polestar to guide probate judges" in the appointment of a guardian. Thus in *Acuna v. Dresner*, the 3rd DCA found that the probate court abused its discretion by appointing the ward's accountant due to disharmony among the three daughters designated as preneed guardians when none of the daughters was unqualified, unwilling or unable to serve. The alleged deadlock was resolved by majority vote.

Examining the State Law Estate Planning Tools Available to Avoid the Need for Guardianship

- However, a conflict of interest may overcome the presumption. In *David v. King* (5th DCA), substantial evidence of conflict of interest existed to rebut the statutory presumption that preneed guardians were entitled to appointment. Note, however, that under F.S. 744.446, a relationship giving rise to conflict that existed prior to the appointment of a guardian that is disclosed to the court would not be a barrier to appointment.

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Initiating the Proceeding to Determine Capacity

- Any adult person may initiate an incapacity proceeding. Therefore, the disgruntled family members wishing to shift the balance of power could employ a "stalking horse," such as a professional guardian or caregiver to initiate the proceeding, thereby avoiding an adverse reaction by the alleged incapacitated person.
- The California and New York statutes require the petition to identify alternative resources that have been considered, which presumably means both personal care and financial management, and the reasons why those alternatives are not available.
- Current Florida law did not initially ask whether alternatives to guardianship exist – so called "least restrictive alternatives." Effective January 1, 2017, the petitioners must disclose known less restrictive alternatives.

Initiating the Proceeding to Determine Capacity

- The Florida statute clearly articulates the rights that may be removed but not delegated:
  - To marry, to vote, to personally apply for government benefits, to have a driver's license, to travel, to seek or retain employment
- The delegable rights include the right:
  - To contract, to sue and defend lawsuits, to apply for government benefits, to manage property or make any gift or disposition of property, to determine residence, to consent to medical or mental health treatment, to make decisions about social environment and other social aspects of life

Less Restrictive Alternative to Guardianship

- What are the Less Restrictive Alternatives to Guardianship?
  - FL – power of attorney, trust or trust amendment, health care surrogate, designation of preneed guardian
  - TX – medical health care power of attorney, a durable power of attorney, a declaration for mental health treatment, appointment of a representative payee to manage public benefits, a joint bank account, check management or special needs trusts, a preneed guardian before the need arises, and an establishment of an alternative form of decision-making
  - NY – visiting nurses, homemakers, home health aides, adult day care, powers of attorney, health care proxies, trusts, representative and protective payees, and residential care facilities

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When Will There Be Difficulty?

- Client is not incapacitated, but susceptible of undue influence
  - Do not be afraid to be proactive. Rule 4-1.14 supports counsel taking protective action, although this will always be an uncomfortable position for the lawyer to be in unless the family is in agreement.
- Guardian is appointed because effectiveness of the less restrictive alternatives is challenged. In that case, the estate planning documents may be disengaged in favor of the guardian's authority.
  - Guardian will have authority to challenge the trust potentially, and to engage in other estate planning.

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Do the Less Restrictive Alternatives Work?

Maybe . . .

- *Martinez v. Guardianship of Smith* – Trial court appointed a plenary guardian for the ward notwithstanding the existence of a power of attorney, designation of preneed guardian and health care surrogate designating the ward's wife in all capacities. Subsequently, the wife was reinstated and the was plenary guardian removed.

Maybe not . . .

- *Searle v. Bent* – Alleged incapacitated asserted a due process objection arguing her estate planning documents were effectively invalidated by the appointment of a guardian. The court disagreed stating if they were subsequently determined to be valid, the trial court would not be prevented from revisiting the continued need for guardianship.

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Ability to Challenge Less Restrictive Alternatives

- There may be statutory machinery to challenge the conduct of an agent acting under the power of attorney:
  - Florida Statutes §709.2116 – court may construe, enforce, review the agent's conduct, terminate the agent's authority, remove the agent, and grant other appropriate relief.
- Also true for a Health Care Surrogate:
  - Florida Statutes §765.105 – patient's family, the health care facility, or the primary physician or any other interested person who may reasonably be expected to be directly affected by the surrogate or proxy's decision concerning any health care decision may seek expedited judicial intervention pursuant to rule 5.900 of the Florida Probate rules – including on the basis of an allegation that the patient has changed his or her mind after execution of the directive

Limited Ability to Challenge a Revocable Trust

- Potentially not so for a Revocable Trust:
  - Florida Statutes §736.0207 provides that an action to contest the validity or all or part of a revocable trust or a revocation of part of a revocable trust may not be commenced until the trust becomes irrevocable. If all of the revocable trust has been revoked, an action to contest the revocation cannot be commenced until after the settlor's death.
  - This section does not prohibit such action by a guardian.
  - But Florida Statutes §744.441(11) requires court approval and a finding that the action is in the best interests of the ward during the ward's probable lifetime.

Improving Estate Planning Documents

- Planning for Flexibility
  - Chances that estate planning documents will survive an attempted guardianship have improved
    - Provide for succession in all instruments – consider carefully how succession will be implemented and how the need for succession will be determined and whether you need HIPAA waivers.
    - Set forth clearly the client's wishes in the event of incapacity.
    - Ensure coordination among the various documents.

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Improving Estate Planning Documents

- Consider the Potential for Conflicts Among Family Members
- Consider Creating a Document that Provides Additional Guidance – Appendix I
- Communicate with all client's advisors
- Ensure appropriate HIPAA waivers for client and all designated fiduciaries
  - Consider automatic retirement provisions at a stated age

Improving Estate Planning Documents

- Determine Whether the Need or Desire for Ongoing Estate Planning Should be Addressed
  - Who should have this authority?
  - Should it require the consent of more than one person?
  - Should there be independence?
  - Is decanting a solution?

Improving Estate Planning Documents

- Protecting the Assets Against Improvidence
  - Using an Irrevocable Trust
    - Need not constitute a taxable gift
  - Make the trust revocable only with the consent of an independent person
  - Consider using a co-trustee, especially a corporate co-trustee
  - Consider giving an agent amendment authority
  - Co-ownership of assets as a solution
  - Deal expressly with compensation

Improving Estate Planning Documents

- Preserving the Estate Plan
  - Consider provisions in the power of attorney and revocable trust that require the estate plan to be preserved absent extraordinary or unforeseen circumstances, such as significant changes in the tax laws, circumstances of the beneficiaries or assets that under a substituted judgment standard cause the fiduciaries reasonably to believe the client would have changed his or her plan

Potential Liability of a Lawyer Who Fails to Make an Assessment of Capacity

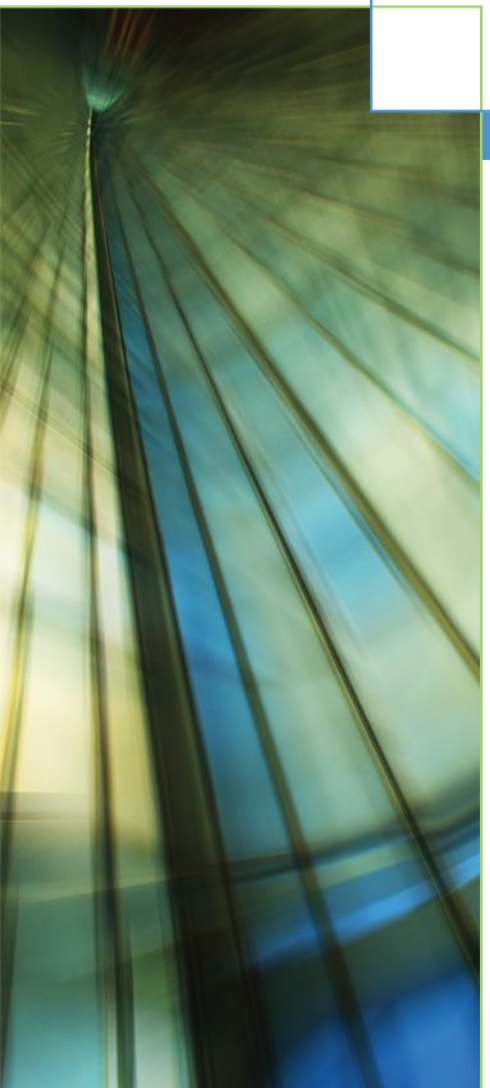
- Has been asserted as ground for a malpractice claim; however, such actions have generally been successfully defended by the lawyer, except under extreme facts.
- *Florida Bar v. Betts* - lawyer presented two codicils when client was in a rapidly deteriorating physical and mental state. The second codicil was presented when the client was comatose!
- *Lovett v. Estate of Lovett* – lawyer has an obligation not to permit a client to execute documents if the lawyer believes the client to be incompetent.

Potential Liability of a Lawyer Who Fails to Make an Assessment of Capacity

- *Vignes v. Weiskopf* – It was proper for the lawyer to prepare and supervise the execution of a codicil for his client who was "incurably ill and was in such pain that a great deal of medication to relieve him from his suffering was being administered." The court holds:
  - *We are convinced that the lawyer should have complied as nearly as he could with the testator's request, should have exposed the true situation to the court, which he did, and should have left the matter to that tribunal to decide whether in view of all the facts surrounding the execution of the codicil it should be admitted to probate.*

Potential Liability of a Lawyer Who Fails to Make an Assessment of Capacity

- The court goes on to state:
  - Had the attorney arrogated to himself the power and responsibility of determining capacity of the testator, decided he was incapacitated, and departed, he would have been subjected to severe criticism when, after the testator's death, it was discovered that because of his presumptuousness the last-minute effort of a dying man to change his will had been thwarted.
  - ACTEC commentary suggests that the lawyer may proceed even if the client's capacity appears to be borderline, but should undertake to preserve evidence regarding the client's testamentary capacity.



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