CHAPTER 8

ESTATE PLANNING AND ADMINISTRATION; GUARDIANSHIPS AND CONSERVATORSHIPS

Melissa F. Busley
Dunn Carney LLP

Chapter 8

ESTATE PLANNING & ADMINISTRATION; GUARDIANSHIPS & CONSERVATORSHIPS

TABLE OF CONTENTS

Additional Resources

Conservatoship Duiter, Professional Liability Fund Practice Aid
https://osbplf.org/assets/forms/practice_forms/Conservatorship%20Duties.pdf

Circuit Court letter to the Personal Representatives of the Estate, September 2016

Capacity Issues in Representing Clients, Oregon Estate Planning and Administration Section Newsletter, April 2010

ESTATE PLANNING AND ADMINISTRATION; GUARDIANSHIPS AND CONSERVATORSHIPS[1]

INTRODUCTION

The estate planning and administration area, including guardianships and conservatorships, is an ideal choice for a practitioner who wants to be challenged intellectually, have minimal contentious negotiations, and experience a sense of service to and interpersonal connection with individuals and families.

I. WHAT IS THE SUBSTANCE OF THIS PRACTICE AREA?

This practice area includes establishing wills and trusts, powers of attorney and advance health care directives for clients, as well as guardianships and conservatorships for individuals who are unable to manage their health care, residential decisions and/or financial matters due to incapacity. Some practitioners in this area also handle litigation matters and negotiate prenuptial agreements; some even cross into pure domestic relations work, handling divorces and custody disputes. Others blend a general business practice with their estate planning practice, which works nicely when your firm clientele includes many small business owners. Estate planning attorneys regularly become generalists, to some extent, because our clients face so many issues – as employees, as business owners, as real property owners, as landlords, as parents, and so on. If you want to practice in this area and do not want to be a generalist, you will quickly learn that having a referral list for trusted attorneys who provide services that are complementary to your own gives you a value-added service you can provide to your clients.

A. **Components of an estate planning practice**. Estate planning is more of a process than a product. Executing a will, for example, is just one piece of the overall practice. We provide a service that generally results in the delivery of a product (i.e., estate planning documents). Working with clients through the estate planning process often involves a great deal of client education so that the client has an understanding of how the pieces of his or her plan fit together to accomplish the client's goals.

1. ***Developing a client base***. This, of course, occurs over time. The practice of law is truly a relationship-driven practice. As you develop relationships in your community (with other lawyers in your firm and elsewhere, with clients, with CPAs and financial planners, with brokers, fellow alumni, and so forth) and those relationships are based on mutual respect, the work will come through referrals. In this practice area, knowing your referral sources and taking care of them is a very important key to success. It is even more important to simply do good work: <u>be responsive, respectful and pragmatic in all of your dealings</u>. The most valuable referrals you receive will be those that begin with the following declaration: "I received your name from my friend who worked with you on her estate planning. She highly recommended you."

[1] Thank you to my colleague Heather L. Guthrie for graciously allowing me to use her presentation materials.

2. ***Establishing the relationship.***

   a. *Engagement letter*.

   b. *Joint representation memo*. Representing both spouses in their estate planning is common, but informed consent of the jointly represented clients is a must.

   c. *First meeting(s)*. The most important thing to do in an initial meeting with clients is to listen. Ask open-ended questions and let the clients tell you their stories. By doing this, and listening actively, you accomplish two things: first, you immediately establish who the important people in the room are – this process is all about the *client*. Second, you learn what is important to the clients so that you can identify issues and build a plan that is right for the client. You cannot create an estate plan that accomplishes your client's goals until you understand what those goals are. Do not be surprised when, even in multi-million dollar estates, the clients are more interested in talking about their children's special challenges with money – or other issues – than about reducing their overall estate tax risk. Your job is to deal with both of these issues, but pay attention to what matters most to the client. By letting your client know that you are listening to what they have to say and problem-solving around their concerns, you establish credibility and trust. Often, I have just one initial meeting with clients and in the next meeting we sign documents, working through drafts by telephone and email. However, some clients have such complicated plans that it can take more than a year and many meetings before a plan is finalized.

   d. *Educate the client*. Estate planning is not something clients do every day and many clients will only have a basic understanding (at best) of what it entails. A common assumption is that the passage of all of one's assets will be governed at death by the individual's will. However there are lots of different methods for passing property at death that can affect the overall distribution of assets following one's death. Be prepared to educate your clients about these different methods and how they will be used to carry out the overall distribution scheme desired by the client.

3. ***Evaluating challenges and strategies for the particular client***. The unique challenges of a client may be myriad. While listening to your client's story, you will need to identify issues which may include any or many of the following:

   a. Blended family issues. Second marriages and children from previous marriages or relationships. Support obligations to previous family.
   b. Special needs of children or grandchildren.

c. Anticipated inheritances.
d. Non-traditional families. Unmarried and/or LGBTQ clients.
e. Taxable gift issues. Did the clients make a substantial gift recently to help a child buy a first home? Did they give beyond the gift tax exemption threshold?
f. Real estate in multiple states or out of the country.
g. Children in troubled marriages.
h. Charitable inclinations and goals.
i. Beloved pets. To whom should these pets go? Is a pet trust wanted or warranted?
j. Care for parents of the clients. Many children support their parents in some way. How should that care continue after your client dies if the parents survive?
k. Health issues of the client.
l. Rental property issues. If the clients own rental property, do they own it outright or in an entity? Who manages the property? Do they have adequate insurance? Is entity ownership advisable?
m. Death tax exposure at the state and/or federal level.
n. Selecting fiduciaries. Who will care for minor children? Who will manage money for the beneficiaries? Who will make health-care decisions for the client in the event of incapacity?
o. Business ownership and transition planning.

4. ***Drafting documents***. Every estate plan should consist of the following documents at a minimum:

a. *Will*. This document establishes how property (that is owned by the client in his/her own name and which will not pass by beneficiary designation) will pass at the client's death. The document must be carefully drafted and properly executed (two witnesses).

b. *Power of Attorney*. Preparing for incapacity with a power of attorney is a critical part of this process. If the client has a stroke, for example, the Will does nothing – it speaks only at death – and absent a power of attorney (or trust – see below), it may be necessary to commence conservatorship proceedings to manage assets.

c. *Advance Directive*. An important part of this process is to discuss with your clients whether or not they would like to execute an advance directive giving decision-making authority related to end-of-life circumstances and giving advance direction about the client's wishes regarding tube feeding and life support.

Many estate plans will also include trusts of one sort or another, whether revocable living trusts (as a privacy and probate-avoidance vehicle, and an alternate mechanism for managing assets in the event of incapacity) or irrevocable trusts as part of a death-tax minimization plan (such as an Irrevocable Life Insurance Trust or ILIT). Also, it is not uncommon for a client's Will to create trusts (testamentary trust) that are funded after death. These testamentary trusts don't typically avoid the need for probate, but can be helpful in dealing with different client concerns (such as minor beneficiaries).

5. ***Executing documents and following-up on executing the plan***.

   a. *Execution and Safe-keeping of Documents*. Overseeing the proper execution of and providing guidance about safe-keeping of estate planning documents is also part of the process.

   b. *Beneficiary designations*. Providing the client with beneficiary designations that are tailored to dovetail with the client's plan and advising the client about updating their beneficiary designations are essential. This is becoming an increasingly important piece of estate planning as many clients have much of their wealth in retirement plans that pass based on beneficiary designations.

   c. *"Funding" a Trust*. If the client has entered into a trust agreement, transferring assets to the trust – so-called "funding" of the trust – is essential. You should provide instructions to the client that explain exactly what needs to be done: how should the new accounts be titled? How can they change title to their cars? What about time-share interests? Specific instructions for each type of asset should be provided. Prepare deeds where appropriate. Advise clients to obtain lender consents, where applicable. Provide alternative recommendations for POD designations. Explain. Note: funding a trust does not occur until after a client's death, if you only have testamentary trusts.

6. ***Staying in touch with the client***. The key to staying in touch with clients is maintaining a good database of client information that allows you to search for, for example, all clients with tax-planning documents so that when a change in the tax laws occurs, you are able to readily sort through your clients to determine who should receive a letter from you regarding the change and any updates that the client should consider. Many clients will execute their plan and you will not hear from them again for years. Other clients have plans of such complexity that the process involves several phases (establishing the basic plan; enhancing that plan with irrevocable trust(s) and the like) and demands regular maintenance. Some clients will become friends with whom you have regular contact.

B. **Administration**. Administering trusts and estates is all about putting the plan into action after death.

1. ***Probating a Will***. The process of probating a Will involves the following basic steps:

   a. Preparing a petition asking the court to admit the Will to probate and appoint the person designated in that Will as personal representative.
   b. Sending notice of the probate to heirs and devisees.
   c. Publishing notice of the probate and appointment to commence the period during which creditors may bring claims against the decedent's estate. Giving notices to known creditors.
   d. Preparing and filing an inventory of assets that are probate assets (assets not passing by beneficiary designation or by survivorship).
   e. Preparing and filing an affidavit of compliance with respect to certain duties of the personal representative.
   f. Reporting to the court all acts of the personal representative, including accounting for all income and expenditures, and asking the court to approve distribution of assets.
   g. Confirming the filing of fiduciary income tax returns (with the taxing authorities, not the court, but an important step nevertheless).
   h. Distributing assets in accordance with the Will, obtaining and filing receipts for distributions, discharging the personal representative and closing the estate.

   If the decedent died without a Will, the same basic steps are followed except that: (1) assets pass to the decedent's heirs by the laws of intestacy; (2) the statute establishes an order of preference for individuals who may serve as personal representative; and (3) bonding of the personal representative may be required. Probate can take anywhere from 6 months to several years, depending on a myriad of complicating factors. Every estate is different, and the foregoing is intended as a general outline to give you a sense of the basics. Probate is a cooperative process between attorney and client; paralegals can be invaluable in this process to track deadlines, draft documents and coordinate with the client while keeping fees as low as possible.

2. ***Administering a Trust***. Trust administration includes many of the same basic steps as probating a Will (e.g., determining who the beneficiaries are, determining what the assets are and taking control of them, filing necessary tax returns (income and estate), reporting to the beneficiaries, and so forth), but without court oversight. Instead of working from the Will and the statutes, trust administration is controlled by the terms of the trust agreement itself; it is fundamentally a matter of contract. If a trust agreement calls for outright distribution, trust administration can be quite brief. If it calls for assets to continue in trust, it may continue for many years. You should become familiar with the provisions of the Oregon Uniform Trust Code in order to comply with reporting requirements that

are imposed by statute, some of which can be waived by the terms of the trust agreement but some of which cannot. See ORS Chapter 130.

3. ***Estate Tax Returns***. Estate tax returns can be required whether you are administering a probate estate or doing a post-mortem trust administration. Whether they are required depends on the fair market value of the decedent's assets on the date of death rather than on the estate planning vehicle used. Some CPAs will prepare these returns; however, in most cases the attorney is better positioned to prepare them because so much of how assets are valued and reported for estate tax purposes is driven by an estate plan developed by the attorney.

4. ***Administering Based on Estate Planning Documents Prepared by Another Attorney***. Keep in mind that not every administration will be an administration of documents you prepared; quite often, you will never have seen the documents before. Your job is to figure out what was intended based on the words of the document. Keep this in mind when you are drafting, too. Someone else may be administering your documents twenty years from now, so *draft clearly and carefully*.

C. **Guardianships and Conservatorships**.

1. ***Guardianships***. Establishing a guardianship is necessary when an individual is unable to make health-care or residential decisions for him/herself. Typically, the need arises when an elderly person with some mental disability becomes combative and unwilling to go along with a caregiver's plan. Guardianships may also be necessary in the case of a minor whose natural parent is deceased or otherwise unable to care for the child. Note the following standard that must be met in order to establish a guardianship: "A guardian may be appointed for an adult person only as is necessary to promote and protect the well-being of the protected person. A guardianship for an adult person must be designed to encourage the development of maximum self-reliance and independence of the protected person and may be ordered only to the extent necessitated by the person's actual mental and physical limitations." ORS 125.300. See ORS 127.505-660 regarding Advance Directives for health care. See ORS 127.700-737 regarding Declarations for Mental Health Treatment.

2. ***Conservatorships***. Establishing a conservatorship is necessary when an individual is unable to make financial decisions in his/her own best interests. Typically, the need arises when an elderly person begins mismanaging money or in the event of a stroke or similarly debilitating condition that limits the person's ability to handle his or her own financial affairs. A conservatorship may also be necessary in the case of a minor who is entitled to receive funds but as a matter of law is deemed to not have capacity to manage those funds. Note the following standard that must be met in order to establish a conservatorship: "Upon the filing of a petition seeking the appointment of a conservator, the court may appoint a conservator and make other appropriate protective orders if the court finds

by clear and convincing evidence that the respondent is a minor or financially incapable, and that the respondent has money or property that requires management or protection." ORS 125.400. See ORS 125.005(3) for definition of financially incapable.

3. ***Generally***. The tests relating to and the process of establishing guardianships and conservatorships are set forth in ORS Chapter 125. Often, a debilitating condition makes it necessary to establish both a guardianship and a conservatorship at the same time, though the need for a conservatorship can generally be avoided if the individual has an adequate Power of Attorney in place. Guardianship and conservatorship practice is generally a fairly small part of most estate planning and administration practices because in many cases, if a plan is in place that includes incapacity planning – as any such plan should – a guardianship or conservatorship can often be avoided. With respect to conservatorships for minors, there are mechanisms for avoiding a conservatorship altogether in certain circumstances, such as where the dollar amount is relatively small or where the conservatorship is thought to be needed solely to settle a claim. See ORS 126.700 and ORS 126.725.

D. **Resources**. The following are some helpful resources for this practice area:

1. Administering Oregon Estates. Oregon Bar Association Continuing Legal Education publication, updated periodically.
2. Administering Trusts in Oregon. Oregon Bar Association Continuing Legal Education publication, updated periodically.
3. Elder Law. Oregon Bar Association Continuing Legal Education publication, updated periodically.
4. Guardianships, Conservatorships and Transfers to Minors. Oregon Bar Association Continuing Legal Education publication.
5. Oregon Revised Statutes chapters 111 through 130.
6. Will and Trust Forms, published by US Bank National Association.
7. The list-serv of the Estate Planning and Administration section of the Oregon State Bar, as well as periodic publications by this group, which in many cases are available on-line.
8. OSB site generally for form letters, conflicts waivers, etc.

II. WHAT IS AN AVERAGE DAY LIKE IN THIS PRACTICE AREA?

III. WHAT ARE THE PROS AND CONS OF THIS PRACTICE AREA?

A. ***Pace of practice – the prospect of balance***. One of the reasons I have chosen to practice in this area is that for the most part I can control the pace. Whereas the pace of many practice areas is purely client driven (such as in the business transaction environment), the estate planning area is usually a fairly calm and controlled process that allows me to maintain some balance between my personal and professional life. Exceptions include client illness and client travel plans, among other things. On the administration side of practice, there are statutory deadlines that drive much of the practice.

B. ***Litigation – knowing your limits***. Fortunately, I practice in a firm where I have litigators who are available to handle contentious matters that are headed for court. However, many estate planning and administration attorneys handle litigation as part of their practice.

C. ***Profitability – the small matter challenge***. Keeping the estate planning and administration balance in your practice is important because while the estate planning side often consists of small matters that generate minimal fees relative to the administrative tasks involved (opening the file, running conflicts, overseeing or doing the work in a cost-effective fashion), the administration side generally involves much more time and generates more significant fees. This is a business reality that practitioners deal with in different ways, but doing both sides of the practice – planning and administration – also makes you a better resource for your clients and helps you develop a better skill set because you know how the plan you drafted works out in practice.

D. ***Working independently***. Many who practice in this area work very independently. If you are conscientious and detail-oriented, this can be a plus – no one is looking over your shoulder. On the other hand, not having a second set of eyes reviewing your work and not having a second brain to help you think through difficult concepts means you must be meticulous in your drafting and in your communications with your client.

E. ***Personality characteristics of a good estate planning and administration practitioner***. The following is a list of personality characteristics that are important to have in order to succeed and enjoy practicing in this area:

1. A good listener
2. Compassionate
3. Detail-oriented
4. Practical
5. Patient
6. Must enjoy working with elderly people

IV. CONCLUSION

Practicing in this area can be tremendously rewarding, both personally and professionally, but it is not for everyone. If you crave the challenge of the courtroom or if you thrive on the adrenaline of fast-paced transactional work, working solely in this practice area is probably not for you. On the other hand, if you are looking for a practice that offers a sense of service to individuals, a richness of intellectual challenge, and a relatively controlled pace, you should consider pursuing the estate planning and administration area.

Estate Planning, Administration, Guardianships and Conservatorships

Melissa F. Busley Portland, Oregon

DUNN CARNEY LLP

Overview

- Estate planning
- Probate and trust administration
- Guardianships and conservatorships

Client Education

- You need to learn about the client:
  - Who are they and their family?
  - What are their assets?
  - Any "special" challenges?
- You need to educate the client:
  - Different ways for assets to pass
  - Different tools for different tasks
  - A good estate plan is tailored to the client

DUNN CARNEY

Evaluating Challenges and Strategies: Issue Spotting

- Family issues
- Asset issues
- Tax issues
- Other issues

DUNN CARNEY

Evaluating Challenges and Strategies: Issue Spotting

- Family issues may include:
  - Blended family situation
  - Special needs of children or grandchildren
  - Non-traditional families
  - Children in troubled marriages
  - Care for parents of the clients

DUNN CARNEY

Evaluating Challenges and Strategies: Issue Spotting

- Asset issues may include:
  - Anticipated inheritances
  - Real estate in multiple states or out of the country
  - Rental property issues
  - Business ownership and transition planning
  - Retirement plans, annuities and life insurance

DUNN CARNEY

Evaluating Challenges and Strategies: Issue Spotting

- Tax issues may include:
  - Taxable gift issues
  - Death tax exposure at the state and/or federal level
    - What states may be able to tax
    - Oregon exemption is $1,000,000
    - Federal exemption in 2020 is $11,580,000
    - Federal estate tax portability
    - Basis consistency reporting
    - Marital deduction elections and portability require timely filing

DUNN CARNEY

Evaluating Challenges and Strategies: Issue Spotting

- Other issues may include:
  - Charitable inclinations and goals
  - Beloved pets
  - Health issues of the client
  - Selecting fiduciaries

DUNN CARNEY

Drafting Documents: The Essentials

- Will
- Power of attorney
- Advance directive for health care decisions

DUNN CARNEY

Executing Documents and Follow-Up

- Execution ceremony and document safekeeping
- Beneficiary designations – this can be critical
- "Funding" trusts
- Staying in touch

DUNN CARNEY

Post-Mortem Administration

- Wills – probate
- Trusts – post-mortem trust administration
- Estate tax returns
- Survivorship and beneficiary designations
- Administering based on documents prepared by other attorneys

DUNN CARNEY

Guardianships and Conservatorships

- What they are
  - Guardianship: Decisions about the person
  - Conservatorship: Decisions about the person's stuff
- How to avoid them
  - Powers of attorney
  - Trusts
  - Advance directives

DUNN CARNEY

Guardianships and Conservatorships

- Process and follow-up
  - Petition and appointment
  - Annual reporting

DUNN CARNEY

The Realities of Estate Planning

"In this world nothing can be said to be certain, except death and taxes."

Benjamin Franklin, 1789

DUNN CARNEY

Developing a Book of Business and Keeping Clients (Happy)

- Developing a client base
  - Relationship, relationship, relationship
- Establishing the client relationship
  - Your first meeting(s)
- Evaluating challenges and strategies for the particular client

DUNN CARNEY

The Pros and Cons of this Practice Area

- Pace of practice and prospect of balance/control
- Litigation
- Profitability
  - The small matter challenge
- Working independently
  - Details, details, details
- Who is happy doing this kind of work?

DUNN CARNEY

Questions?

Melissa F. Busley
Partner, Dunn Carney LLP
mbusley@dunncarney.com
503.417.5460

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH
1021 SW Fourth Avenue Portland Oregon 97204
Probate Department 503-988-3022 Opt.4

'2016

Re: In the Matter of: [Decedent Name]
Case No. [Case No.]

Dear [Personal Representative Name(s)]

The Court has appointed you Personal Representatives of this estate. You are now officers of and responsible to the Court for the proper administration of the estate's assets. Court rules require that you have an attorney. Please seek your attorney's advice on all matters concerning the estate, but pay special attention to the following rules:

1. If your case was filed on or after February 2, 2015, ***you must complete Non-Professional Fiduciary Education and Training within 60 days***. You must schedule your training within 15 days of appointment. Included with this letter is additional information regarding this requirement as well as directions for scheduling your class

2. Immediately take possession of all of the decedent's assets now belonging to the estate. Within 60 days of your appointment you must file an inventory with the Court listing your estimated values of all of the estate's assets as of the date of decedent's death.

3. ***Keep the money and property of the estate separate from your own assets and from any other person's assets***. Do not commingle or mix assets of the estate in your personal bank or brokerage accounts. Do not mix any estate money with your own or anyone else's.

4. Do not lend funds of the estate to anyone without first obtaining permission from the Court by Court Order. ***Never borrow money from the estate for yourself***.

5. ***Make estate checks payable to the provider of goods or services, not to "cash" or yourself***. Keep estate funds in accounts for which the financial institution provides you a written record showing the date, payee and amount for each disbursement from the account. The record may be an original canceled check, a copy of the canceled check showing it has cleared the bank, or information printed in a regular statement from the financial institution. Keep accurate records of all receipts of funds. Every receipt and disbursement must be separately itemized. Avoid cash transactions.

6. ***Do not pay any bill of the estate without determining that you have the authority to do so***. Use estate funds, not your own funds, to pay estate expenses whenever possible. If you have paid estate expenses, such as funeral expenses, from your own funds, and if you have a receipt or other proof of the payment, you may reimburse yourself from estate funds. Keep all payment proofs for filing with the Court. If the decedent owed a debt to you, you must have a written order from the Court before you pay that debt.

7. ***Do not give any estate property to any heirs or other persons without the prior written approval of the Court.***

8. ***You must be able to file an accounting of all receipts and expenditures in the estate***. It must also show assets on hand at the beginning and end of the accounting period. Written proofs of payment and the first and final statements for each bank or other account in the estate must be filed with the accounting. If you are unable to file a final accounting within a year plus 60 days of your appointment, you must file an annual accounting at that time.

Your compliance with these requirements and your prompt attention to any notices from the Court will simplify your task and will be appreciated by the Court. The Court cannot offer legal advice, so please consult your attorney if you have any questions. Thank you for your cooperation.

Cc: [Personal Representative's Attorney]

MANDATED TRAINING for NEW NON-PROFESSIONAL
TRUSTEES and PERSONAL REPRESENTATIVES
Effective February 2, 2015

Effective February 2, 2015, all non-professional trustees and personal representatives appointed by the Multnomah County Circuit Court must, within 15 days of their appointment date, register for a Oregon fiduciary education class. Non-professional fiduciaries should select a session keeping in mind that they must complete Oregon fiduciary education within 60 days of their appointment date.

Oregon fiduciary education classes are one hour classes about the responsibilities of Trustees and Personal Representatives. There are separate classes for trustees and personal representatives. The class will orient non-professional fiduciaries to decision-making, laws, working with the court and attorneys; and give practical tips about successfully managing the issues that are common for non-professional fiduciaries.

Currently, the mandated content is delivered by the non-profit Guardian Partners. This class is held at least once a month. Please contact Guardian Partners for the scheduled time and place. For people who live more than 2 hours from Portland or for whom it is impossible to attend, remote learning opportunities may be available. You can request more information on this option when you register.

The fee for the class is $100 per trustee or personal representative. To see the class schedule, register, and pay go to guardian-partners.org. If you do not have internet access, please call Guardian Partners at (971) 409-1358.

Capacity Issues in Representing Clients

By Mark M. Williams, Gaydos Churnside & Balthrop

Introduction

Pornography and legal capacity have two things in common: (1) they are difficult terms to define, and (2) we tend to rely on the standard of "we know it when we see it" in making case-by-case determinations, as Justice Potter Stewart famously framed the issue of defining pornography in *Jacobellis v. Ohio*, 378 US 184, 197 (1964).

To establish an attorney-client relationship with an adult, a client's legal competency to make and articulate decisions is a threshold question. The attorney should understand the standards for the capacity required to perform legal acts and what steps can be taken to maximize a client's decision-making ability. An understanding of the legal requirements for capacity is crucial for an attorney to effectively represent clients who may have diminished capacity. Finally, the ethical obligations of the attorney vary widely with the ability of the client to evaluate the attorney's advice and give the attorney direction.

Estate planning lawyers are routinely called upon to determine the capacity of clients. Do they have the ability to articulate their wishes? Are they able to enter into a contract of employment? Do they need a surrogate decision-maker? What fiduciary standard will be applied in making decisions for the client? What standard applies to the particular legal question at hand? How is legal capacity determined?

Few of us have formal training in capacity assessment, but we have some excellent guides available to us. The Oregon State Bar has published *The Ethical Oregon Lawyer* with an entire chapter (18) entitled "Representing Clients with Diminished Capacity and Disability" by Michael Levelle. It provides a summary of a "sliding scale" of capacity appropriate to different situations. The American Bar Association in conjunction with the American Psychological Association (ABA/APA) has also published *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers*. Both of these publications are available online at no charge to Oregon attorneys.

The ABA/APA publication includes a helpful chapter, "Capacity Worksheet for Lawyers," which includes observational signs from cognitive functioning (memory, language, calculation skills, disorientation) and emotional functioning (distress, liability) to behavioral functioning (delusions, hallucinations, hygiene). Then we are asked to record mitigating factors and consider the varying standard of legal capacity. The form is a useful tool in assisting a lawyer with marshalling the information that supports a conclusion regarding capacity. It is not a mental status exam, which is the province of highly trained professionals, and it is not a substitute for the diagnosis or opinion of medical or psycho-social professionals.

Consider three different, but typical, scenarios from my practice: (1) estate planning for a client with bickering devisees; (2) filing a guardianship/conservatorship petition against

an alleged incapacitated person; and (3) filing a guardianship/conservatorship petition against a client whose capacity has deteriorated since my initial representation and legal services.

Estate Planning for a Client with Bickering Devisees

Early in my career I had a terminally ill woman referred to me for estate planning by her son. It turned out that the son was alcoholic and dependent fiscally and psychologically on his mother. It also turned out that he had a sister who was fiercely independent and highly suspicious of anything her mother did to benefit her brother. Mother wanted me to prepare a will for her. We established at the outset that mother was my only client, but her son brought her to the initial appointment and it was apparent that her estate plan was to be skewed to his substantial benefit. Mother's terminal illness had her on hospice care, and there were significant issues about her mental health. Did mother have the capacity to enter into a retainer agreement with me? Was she being unduly influenced by her son to articulate the choices she made in defining her estate plan? Did she have testamentary capacity to sign the documents I prepared for her? All of these questions require answers.

After meeting with her, I felt confident that she had the capacity to engage me and direct me, but what was that confidence based upon? I met with her several times, and she had a lively personality, she was oriented to time and place, she understood the gravity of her health conditions, she knew that her time on this Earth was limited, she was able to articulate reasons for her decisions about who should be in charge of her affairs and how her assets should be divided, and she was consistent in her analysis and determinations. Over the course of the relationship I came to be acquainted with her personality and her biases. I also got to meet both the son and the daughter and had various interactions with them, which were consonant with her descriptions of them. She certainly knew the natural objects of her bounty and was familiar with the nature and extent of her assets, so I determined that I was willing to sign her will as a witness to her testamentary capacity.

But I am a lawyer, and I also had concerns about the impending will contest that seemed likely to follow, so I wanted to have some back-up. I called in a gero-psychiatric specialist to administer a formal mental status exam and had my client release those test results to me for future use in defending her capacity. I also had the specialist sign as the second witness to attest to her capacity. No will contest was ever filed.

Was this necessary, prudent, or even advisable under the circumstances? Soon after going through this process, I heard noted will contest attorney Jim Cartwright speak at a CLE program and ask the rhetorical question: If you sought a professional evaluation for this client, but did not do it for every client, isn't that evidence that you doubted your client's capacity? It was a statement that struck me dumb. Since most clients would not begin to consider the added cost and inconvenience of a mental status test, requiring every client to get one is infeasible. I have relied on my own determination of testamentary capacity ever since, relying on my ever-increasing years of experience to buttress my ability to make that determination. I consider a number of factors from my observation of the

client's cognitive, emotional, and behavioral functioning, but in the final analysis, it comes back to the pornography standard: I know it when I see it.

Filing a Petition for Guardianship/Conservatorship Against an Incapacitated Person

I think of guardianship and conservatorship as solutions to assist someone with medical and financial decision-making. Of course, there are limits. ORS Chapter 125 provides that the court may only impose this solution if is it the least restrictive alternative available to accomplish the purpose of keeping a person or his or her money safe from his or her own inability to make appropriate decisions. How do lawyers get sufficient information to make this determination and get a court to sign a limited judgment appointing another person to serve as a decision-maker?

Remember that reasonable investigation is required. When a client suggests a need for a guardianship for another person, the attorney for the petitioner must establish that (1) the need exists (and the court will likely recognize that need), and (2) the proposed guardian is appropriate for the role. This is usually done based on information provided by the petitioner and without contact with the proposed protected person. The attorney is required to make a reasonable investigation before filing a petition and must believe the petition is well founded in law and fact. ORCP 17; *Whitaker v. Bank of Newport*, 101 Or App 327, 333, 795 P2d 1170 (1990), *aff'd*, 313 Or 450 (1992).

The need exists when the proposed protected person is "incapacitated," that is, suffering from an impairment that affects the person's ability to receive and evaluate information or to communicate decisions to such an extent that the person presently lacks the capacity to meet the essential requirement for physical health or safety. "Meeting the essential requirements for physical health or safety means those actions necessary to provide the health care, food , shelter, clothing, personal hygiene and other care without which serious physical injury or illness is likely to occur." ORS 125.005(5).

ORS 125.400 provides that "upon the filing of a petition seeking the appointment of a conservator, the court may appoint a conservator and make other appropriate protective orders if the court finds by clear and convincing evidence that the respondent is a minor or financially incapable, and that the respondent has money or property that requires management or protection." "Financially incapable" means a condition in which a person is unable to manage his or her financial resources effectively for reasons including, but not limited to, mental illness, mental deficiency, physical illness or disability, chronic use of drugs or controlled substances, chronic intoxication, confinement, detention by a foreign power, or disappearance. ORS 125.005(3). These requirements bootstrap from one to the other to the logical and legal conclusion of the need for appointment of a conservator.

To get an order from the court, it is simplest if medical evidence is offered. A letter from the treating or primary care physician of the proposed protected person stating that there is a medical condition warranting the imposition of the guardianship or conservatorship

may be obtained under some circumstances but not in others. A particular diagnosis, for example, that the person has Alzheimer's disease, is *not* sufficient. *See Shaefer v. Schaefer*, 183 Or App 513 (2002). The *impairment* must be shown. *See In the Matter of Baxter*, 128 Or App 91 (1994) (holding that double amputee status did not equal financial incapacity). Important information may be provided by social workers, caregivers, and other persons with the ability to observe the functioning of the proposed protected person. Depending on the credentials of these individuals (RN, LCSW, MSW, PhD), their evidence may be sufficient to support a petition. Sometimes the lawyer may need to rely solely on the observations of friends and neighbors. In such a case, an opportunity to observe and the length and nature of the relationship are important factors to describe in the petition.

The lawyer must always consider lesser measures than a full-blown guardianship/conservatorship to achieve the purpose of protection. *See* ORS 125.150(7)(c). Intervention and support from a local area agency on aging may be adequate to meet the needs of the proposed protected person. A power of attorney, an advance directive for health care, and a living trust may exist or be creatable. The lawyer should make certain these avenues have been explored. If they have, they may provide additional evidence to support the petition.

Filing a Petition for Guardianship/Conservatorship Against an Incapacitated Client

What happens when a person who apparently needs a guardian or conservator is your own client whose capacity has deteriorated over time since your last contact? Oregon Rule of Professional Conduct 1.14 provides some guidance, exhorting the maintenance of a "normal client-lawyer relationship" "as far as reasonably possible" when the client is incapacitated and the taking of reasonable action to protect the client as deemed necessary by the attorney.

There is no Oregon case law interpreting the current ethical rule. The Oregon State Bar has given us Formal Ethics Opinion 2005-41, which does little more than recite the above rule when asked what duties a lawyer has when a current/former client begins to demonstrate a lack of capacity that is damaging. The American Bar Association has given us ABA Formal Ethics Opinion 96-404. The ABA analysis is this: Attorneys should not bring an action against a client to seek the initial appointment of a fiduciary in a protective proceeding, but may do so if the determination that it is necessary and reasonable has been made by the attorney. And once a court has made a determination that the client is incapacitated, the lawyer may represent the fiduciary appointed by the court to protect the client.

A lawyer may refer the matter to another appropriate party and continue to represent the client in the ensuing protective proceeding. The altruistic view of this posture is that it allows the attorney to ensure that the proceeding is fair and the client has every opportunity to avoid the imposition of authority against him or her, but it allows the attorney with a long-term relationship with the client to remain in the role of advisor and protector of the client, while advocating for the long-time judgments of the client.

Continuing to represent a client deemed by the attorney to be incapacitated raises its own issues. How does the attorney take direction from the incapacitated client? What position does the attorney take if the client changes long-held views regarding estate disposition, fiduciary preferences, or other matters expressed when the client's capacity was not in question?

Conclusion

Incapacity can be devastating to a client. Recognizing incapacity may be as simple as knowing it when you see it, but making the appropriate determination of how to proceed as an attorney once the incapacity is recognized requires a sophisticated analysis of the psycho-social, legal, and ethical components of appropriate representation of a client.

This article was originally published in the Oregon Estate Planning and Administration Section Newsletter, *Vol. 27, No. 2, April 2010. This article is posted with permission.*