

## Purple Haze: Does Your Client Have Capacity?

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### Notes:

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### Learning Objectives

- Understand how to apply medical reports in a legal setting.
- Understand the interaction between legal standards and the medical report.
- Describe the relationship between executive function, decisional capacity, and self care abilities.
- Describe how physicians approach decisional capacity assessments.

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### Disclosure

- UTHSCSA Department of Psychiatry has a financial contract to provide decision making capacity assessments for Texas Region 8 Adult Protective Services.
- Donald R. Royall MD, who is the presenter's immediate supervisor, mentor, and lifelong friend, holds the copyright to the EXIT25 and CLOX.

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### Medical Miranda

- If a medical examination is to be used in a court proceeding, the physician must inform the patient prior to the exam.

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### UTHSCSA Capacity Assessments



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### Questions to Answer for APS

- Does the APS client have a psychiatric diagnosis?
- Does the client have decision making capacity?
- What level of care do they need?
- Do they need to be emergently removed from their home?

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Legal Definition of Incapacity in  
Guardianship

An incapacitated person is an adult who, because of a physical or mental condition, is substantially unable to provide food, clothing, or shelter for himself or herself, to care for the individual's own physical health, or to manage the individual's own financial affairs.

**Notes:**

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Ethical, Legal, or Clinical Issues to  
Consider First

- Who has the right to determine capacity?
- Should the client be notified that I am coming?
- Should the client be informed about the purpose of my evaluation?
- Who should pay me? How much? Does this bias my opinion?

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### Ethical, Legal, or Clinical Issues to Consider First

- What if the client is Spanish speaking only?
- How much information should I get from APS? Are they biasing my assessment?
- Should the capacity assessment be completed by a physician unknown to the client (me) or the client's physician?

### Notes:

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### Ethical Legal Issues

- Civil Rights
- Ability of an incapacitated person to understand incapacity
- Functional capacity vs. legal capacity
- "Integrated all factors in the case at hand!"
  - ABA, Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers (2005)

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### Court Ordered Examinations

- When the parties can not agree.
- When the older adult does not agree.
- Now that I have the Order, how do I do this?

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### Decisional Capacity and the Primary Care Physician

- Is the PCP the best person to do the evaluation?
- Should the PCP have to do the capacity evaluation?
- What are reasons the PCP may not want to do the evaluation?

### Notes:

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### PCP's and Capacity Determinations

- No compensation
- Risk of subpoena
- Little training in capacity assessments and not a routine assignment
- These assessments are very different from the medical model
- Potential fracturing of the doctor-patient relationship

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### Case Example #1

- 77yr HF referred to APS for neglect.
- Home is filled with garbage and smells like feces and urine.
- No electricity, no water, no phone.
- Not seeking medical care because of confusion with Medicaid and Medicare.
- Sisters want her to move.

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### Case Example #1

- Past Psych History: "dementia" diagnosed in the 90's by primary care physician.
- Past Medical History: asthma
- Medications: none

### Notes:

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### Case Example #1

- Social History:
  - Born/raised: San Antonio
  - Never married
  - No children
  - Retired salesperson
  - H.S. diploma
  - No substance use

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### Case Example #1



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### Case Example #1



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### How Would You Proceed?

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### Case #1: Client's self report

- Acknowledges not seeking medical care for >3 years because of Medicare/Medicaid.
- She would like a cleaner house but she first needs to find some misplaced savings bonds.
- Agrees home is messy but does not identify any safety hazards.
- Agrees she has no water but states she has electricity (meter is not running).
- States the best way APS can help her is to move a tree limb out of her yard.

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### Case #1: Mental Status Exam

- Appearance, Behavior, and Speech: Thin, frail Hispanic woman. Clothes are covered in filth and smell like feces/urine. Severe temporal and thoracic atrophy. Very easy to engage, forthright. Normal speech.
- Mood and Affect: euthymic
- Thought: illogical particularly when discussing Medicare. Insight and judgment are poor – unable to identify any safety hazards. Unable to develop any safety plans. Biggest concern is that there is a tree branch in her yard.

### Notes:

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### Cultural Considerations

- In western culture, if you are alert and verbal you are presumed to have capacity.
- How much risk is any society willing to tolerate?
- “Their memory seems fine...”

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### How Would You Proceed?

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### Scientific Dilemmas?

- How reliable is IADL self report? Proxy report?
- What is the best way to measure functional status in these cases?
- What cognition(s) are essential to functional and decisional capacity?

### Notes:

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### Which Cognitive Functions are most Essential to Decisional Capacity?

- Memory
- Orientation
- Language
- Math
- Visuospatial
- Executive Function

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### Executive Function

- That set of cognitive processes that allow one to act independent of the environment instead of displaying behaviors mediated by the environment.
- When executive processes deteriorate, people become dependent on habits and routine.

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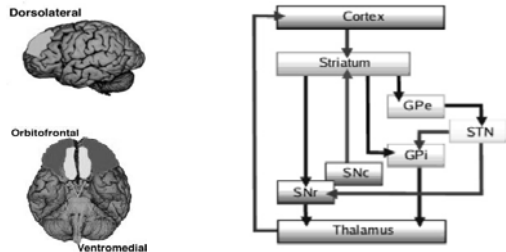
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### Prefrontal Circuits



### Notes:

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### Memory explains no variance in IADL independently of Executive Function



Royall DR, Palmer R, Chido LK, et al (2005). Executive control mediates memory's association with change in instrumental activities of daily living: the Freedom House Study. *J Am Geriatr Soc*; 53:11-17




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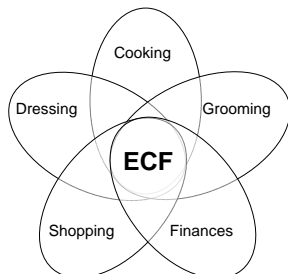
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### Loss of Executive Control Affects Many Functional Domains



Royall, DR.

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## UTHSCSA Geri Psych Battery

Test	Cognitive Domain	Range	Cut-point
MIS	Memory	0-8	≤4
MMSE	General cognition	0-30	≤24
EXIT25	Executive function	0-50	≥15
CLOX1	Executive function	0-15	≤10
CLOX2	Visuospatial function	0-15	≤12
GDS	Depression	0-15	≥5

### Notes:

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### Case #1: Neuropsychological Testing

- GDS: 3/15 (not depressed)
- MIS: 7/8 (pass)
- MMSE: 27/30 (pass)
- CLOX1: 6/15 (fail)
- CLOX2: 12/15 (fail)
- EXIT25: 24/50 (fail – comparable to a skilled nursing level of care)




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### APS Clients Compared to Geri-Psych Clinic Patients

Psychometric performance of APS clients vs. geriatric psychiatry outpatients				
	APS Clients (n=76)	Geropsych Clinic (N=61)	F/ $\chi^2$	p
MMSE				
mean	22.1 (6.5)	23.3 (6.4)	0 (1.92)	ns
% fail	51%	52%	0.01	ns
CLOX1				
mean	7.4 (4.0)	9.3 (4.2)	4.79 (1.92)	0.03
% fail	75%	47%	9.34	0.002
CLOX2				
mean	10.6 (3.2)	11.6 (3.8)	3.17 (1.91)	ns
% fail	64%	43%	4.64	0.03
EXIT25				
mean	24.3 (6.4)	17.3 (7.6)	15.7 (1.87)	<0.001
% fail	89%	63%	10.11	0.001
GDS				
mean	3.6 (3.2)	5.2 (3.9)	6.07 (1.112)	0.02
% fail	29%	51%	5.8	0.02

Schillerstrom JE, et al. Executive function in self-neglecting adult protective services referrals compared with elder psychiatric outpatients. American Journal of Geriatric Psychiatry 2009; 17:907-910.

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### Case #1: Functional Status Testing

Money Management (11-33): 18 – generally able to read a bill and check register; unable to demonstrate how to write a check or use a check register.

Telephone Task (4-12): 8 – able to state she would call 911 in emergency; unable to demonstrate how to use a phone book; unable to demonstrate how to dial a phone (has no phone).

### Notes:

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### Case #1: Assessment and Recommendations

- Mild memory impairments, severe executive deficits, (+) functional decline.
- Dementia NOS: Vascular Dementia; Dementia secondary to metabolic disturbances, vitamin deficiencies, etc...
- Because of the cognitive impairments associated with dementia she is unable to provide food, clothing, shelter or attend to her medical needs. She does NOT have decisional capacity.
- Her physical condition (undernourished, feces on hands and clothes) and living environment pose an imminent threat to her safety – recommend client be emergently removed from home.

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### Is it possible to be partially incapacitated?

Does this person have the ability to:

- |   |  |
|---|--|
| <ul style="list-style-type: none"><li>• Legal decisions such as marriage and making a will</li><li>• Vote in a public election</li><li>• Seek and maintain employment</li><li>• Operate a motor vehicle</li><li>• Handle a bank account</li><li>• Determine place of residence</li><li>• Contract and incur obligations</li></ul> | <ul style="list-style-type: none"><li>• <u>Consent to medical treatment</u></li><li>• Hire an attorney</li><li>• Travel</li><li>• Apply and receive government benefits</li><li>• Sue or defend law suits</li><li>• Manage property</li><li>• Make decisions regarding financial obligations</li></ul> |
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### Case Example #1

- Legal issues for assessment:
  - Ability to determine living arrangements
  - Ability to make medical decisions
  - Ability to manage finances, write checks, pay bills, sign a POA, etc.
  - Ability to drive
  - Ability to state a preference

### Notes:

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### LEGAL OPTIONS *Least Restrictive Options*

- Surrogate decision makers
- Bill paying
- Medical Power of Attorney
- Financial Power of Attorney
- Trust
- Creative alternatives

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### GUARDIANSHIP OPTIONS

- Design the Order to fit the situation:
  - Permanent Guardianship of Person and/or Estate
  - Temporary Guardianship of Person and/or Estate

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## Contract

- “Each party must be of sufficient mental capacity to appreciate the effect of what he or she is doing and must also be able to exercise his or her will with reference thereto. There must be a meeting of the minds to effect assent and there can be no meeting of the minds where either party to the agreement is mentally incapable of understanding the consequences of his or her acts.”

■ *Corpus Juris Secundum*, 17ACJS Contracts Section 141 (1999)

## Notes:

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## Contract varying levels.....

- Setting up accounts
- Setting up utility accounts
- Check writing (gifting is a different standard)
- Credit cards
- Purchasing cars
- Buying household appliances
- Purchasing clothing

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## DONATIVE CAPACITY

- The donor knows and understands the gift to be irrevocable and it would result in a reduction in the donor's assets or estate.

- Intent
- Deliver
- Acceptance

- CLEAR AND CONVINCING...

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### GIFTS WITH A FIDUCIARY

- Presumption of unfairness
- Review the gift of abuse

### Notes:

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### Capacity to Create a Trust

- “a person has the same capacity to create a trust by declaration, intervivos or testamentary transfer, or appointment that the person has to transfer, will, or appoint free of trust”
  - Texas Property Code section 112.007
- Generally interpreted as contracts....

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### Capacity to Vote

- No clear standard but a past history of denying incapacitated people the right to vote.
- TX generally not entitled to vote unless judicially determined otherwise.
- ABA recommendation is that people should be prevented from voting only if they cannot indicate with or without help a specific desire.

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### Power of Attorney

- This is a contract!

### Notes:

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### Designation of Guardian Before the Need Arises

- "other than an incapacitated person"
- "Appeared to them (two witnesses) to be of sound mind"
  - TX Probate code section 679
- **Caution.... Don't do this after a Guardianship has been filed.**

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### Health Care

- Possessing the ability based on reasonable medical judgment, to understand and appreciate the nature and consequence of a treatment decision, including the significant benefits and harms of and reasonable alternatives to a proposed treatment decision.
  - Tex. Health & Safety Code section 166.002(4)

**DOCTORS ALWAYS SAY SOMEONE CAN CONSENT TO TREATMENT**

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## SOCIAL SECURITY

- “Who are legally incompetent or mentally incapable” of managing benefit payments.
  - see 20 CFR section 404.2010(a)
- Social Security is not bound by State law.

## Notes:

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## The Order must fit the medical Exam

Texas Guardianship is medically driven

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## Conclusion



Age: 66 years  
GDS: 4/15  
MIS: 0  
MMSE: 24  
CLOX1: 2  
CLOX2: 10  
EXIT25: 32

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**TEXAS LEGAL STANDARDS RELATED  
TO MENTAL CAPACITY IN GUARDIANSHIP  
PROCEEDINGS**

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**CHAPTER 8**

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### **Education**

J.D. Degree, Lewis and Clark College, Northwestern School of Law, Portland, OR, 1984  
B.S. Degree, Lewis and Clark College (Political Science), Portland OR, 1978  
Certified Elder Law Attorney, Fall 2002

### **Professional Activities**

State Bar of Texas, chair, Advanced Elder Law and Guardianship, CLE, 2009  
Board of Directors, National Academy of Elder Law Attorneys, 2007  
Board of Directors, National Elder Law Foundation, the certification entity for Elder Law attorneys, 2006  
Member, National Academy of Elder Law Attorneys (national and state)  
Board Member, Texas Chapter, National Academy of Elder Law Attorneys, 2004-present  
Member, San Antonio Bar Association, San Antonio, Elder Law Section and the Unauthorized Practice of Law local section  
Planning committee for Docket Call 1992, San Antonio, Tx.  
ARC San Antonio Board of Directors, 1993 to 1996  
Terrell Heights Neighborhood Association, president, 2007

### **Law-Related Publications and Presentations**

Presentation for Arden Courts, San Antonio, Texas, TX. Caregiver Guardianship vs Power of Attorneys, April 22, 2010.  
Presentation and paper for State Bar of Texas, Dallas, TX. Medicaid Issues in a Guardianship, April 2010  
Presentation for Association of Retarded Citizens, San Antonio, TX. Special Needs Trusts 101, March 13, 2010.  
Presentation for Elder Care Mediation Training, San Antonio, TX. Basics of Elder Law with Specific Emphasis on Guardianship and Capacity, Issues, September 2009.  
Presentation for Nix Foundation Grand Rounds, San Antonio, TX. Capacity Exam from a Legal Perspective, July 2009.  
Presentation for The Arc of San Antonio, San Antonio, TX. Guardianship and Special Needs Trusts, June 2009.  
Presentation for Grand Opening of Christian Senior Services, San Antonio, TX. General Legal Issues and Aging, June 2009  
Presentation for Association for Retarded Citizens, San Antonio, TX General Legal Issues regarding Guardianships and Trust, June 2009  
Presentation for Nix Senior Gold, San Antonio, TX. General Legal Issues and Aging, June 2009  
Presentation for Nix Behavioral Health Hospital, San Antonio, TX. Capacity and Commitment, June 2009

Presentation for Grand Rounds at Nix Hospital System, San Antonio, TX Competency and Capacity, July 2009

Presentation and Paper, Docket Call, San Antonio, TX. Legal Capacity Standards in Texas, February 2009

Presentation and Paper, Texas Chapter of the National Academy of Elder Law Attorney's fall meeting, Applying Legal Capacity Standards in Texas, Fall 2008

Presentation and Paper, State Bar of Texas Advance Elder Law and Guardianship Legal Capacity Standards in Texas

Presentation for Arden Courts Alzheimer's Assisted Living, San Antonio, Texas, How to Recognize Your Elder's Legal Needs, September 2008

Presentation for Alzheimer's Association, San Antonio, Texas, Medicaid planning, estate planning, guardianships and probate, March 2008

Presentation for The People's Law School/St. Mary's University School of Law & San Antonio Bar Association, Living Wills and Powers of Attorney, February 2008

Presentation for Texas Specialty Hospital, Medical Capacity, November 2007

Presentation for Senior Bridge, South Texas Geriatric Education Center at the University of Texas Health Science Center at San Antonio, and the Geriatric Research Education, and Clinical Center, STVHCS, ALMD, Medico-Legal Issues in Aging: "Capacity & Competence," September 2007

Presentation for the 4th Annual Down Syndrome Conference, Special Needs Trusts, September 2007

Presentation, Spring 2007, National Academy of Elder Law Attorneys, Attorneys as Guardians

Presentation, Spring 2006, National Academy of Elder Law Attorneys, Proposed Uniform Guardianship Jurisdictional Code.

Presentation, Spring 2006, National Academy of Elder Law Attorneys, Tucson, Elder Law Certification Courses

Presentation, Fall 2005, National Academy of Elder Law Attorneys, Tucson, Elder Law Certification Courses

Presentation and paper for State Bar of Texas, Austin, Texas Elder Law Seminar, Spring 2004, Buyer Beware: Assisted Living.

Presentation, National Academy of Elder Law Attorneys Fall Institute 2003, HIPAA, An Advocate's Perspective, Dallas, Texas, Fall 2003

Presentation, Transfer Penalties and the Application Process, paper by Clyde Farrel, Medical Educational Services, San Antonio, TX, September 2003.

Presentation, Legislative Update, Texas Chapter of Elder Law Attorneys, paper by Glen Karish September 2003

Presentation, Advocating for Your Client Under HIPAA, Arden Courts, CE for social workers and nurses, August 2003

Presentation, Medicaid Basics, Nix Specialty Hospital, San Antonio, TX, July 2003

Presentation and paper, State Bar of Texas, Dallas, Texas Advanced Guardianship Seminar, 2003 Case Law Update in Guardianships

Presentation, Oaks Club, February 2003, Elder Law, Why It Matters.

Presentation, Oasis, January 2003, Wills, Probate and Trusts.

Presentation and paper, National Academy of Elder Law Attorneys Fall Institute 2002, Substituted Judgement v. Best Interest.

Presentation, Medicaid Benefits in Texas: Passing the Means Test, Medical Educational Services, Summer 2002.

Presentation, San Antonio Certified Financial Planners, August 2002, Paying for Long Term Care

Presentation, San Antonio Bar Association Elder Law Section seminar, San Antonio, Texas, November 15, 2001, Fraud: As Case Study.

Presentation, Medicaid Benefits in Texas, Medical Educational Services, San Antonio, TX June 2001.

Presentation and paper, Elder Law Issues, Lorman Educational Services, San Antonio, TX, August 2001

Presentation and Paper, Problems in Guardianship, Docket Call 2000, Texas Young Lawyers Association, San Antonio, Tx, January 2000

Presentation and Paper, Corpus Christi Estate Planners Counsel, March 2000, Corpus Christi, TX

Presentation, Lorman Education Services, Personal Injury Settlements and Medicaid, San Antonio, TX, August 2000.

Presentation and Paper, Guardianship Basics, San Antonio Young Lawyers Association Docket Call in Probate Court, San Antonio, TX, January 1998

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**I. Introduction.** Mental capacity in its most generic sense refers to the set of mental skills that most people use in their everyday lives—skills such as memory, logic, the ability to calculate, and spatial abilities. The concept of mental capacity is especially relevant when the court is considering whether a guardianship is necessary for an elderly individual experiencing a decline in cognitive skills associated with aging. In Texas the preference is to avoid a full guardianship of an incapacitated person when possible in favor of a limited guardianship. *See* Texas Probate Code § 602. In a limited guardianship, the ward retains some degree of self-reliance and autonomy, so the crucial issue for the court becomes which types of transactions and activities will be permitted (e.g., voting, driving, medical decisions, financial decisions). To assist with this determination, courts rely upon the testimony of clinicians trained in assessing mental capacity whose standardized, objective clinical instruments provide information to the courts about an elderly individual’s diagnosis (the cause of the incapacity), and his cognitive and functional performance abilities. This clinical information is vital for determining the particular transactional abilities to be retained by the incapacitated person in a limited guardianship. Although courts rely upon clinical evidence of mental capacity, or lack thereof, it should be emphasized that the issue of mental capacity ultimately becomes a legal issue (e.g., can the contract signed by the elderly widow be revoked; is the most recent will purporting to disinherit the children in favor of a new found friend invalid; should the physician discontinue life-sustaining treatment pursuant to the patient’s advance directive). “The ultimate question of capacity is a legal – and in some cases a judicial – determination, not a clinical finding. A clinical assessment stands as strong evidence to which the lawyer must apply judgment taking into account all of the factors in the case at hand.” ABA Commn.on Law & Aging & Am. Psychological Assn., *Assessment of*

*Older Adults with Diminished Capacity: A Handbook for Lawyers* (2005). These legal issues become further complicated because there is no unitary standard for mental capacity; different legal standards may apply depending on the transaction or activity involved (e.g., capacity to make a will, capacity to vote, capacity to enter a contract, capacity to drive, capacity to consent to medical treatment). This paper seeks to identify mental capacity for particular transactions in order to determine the extent and scope of a guardianship.

**II. Definition of “Incapacitated Person”** Texas Probate Code § 601(14) defines “incapacitated person” as “an adult individual who, because of a physical or mental condition, is substantially unable to provide food, clothing or shelter for himself or herself, to care for the individual’s own physical health, or to manage the individual’s own financial affairs.”

A. **Two-Pronged Approach.** This definition (also found in Texas Probate Code § 3(p)) tracks the two-pronged approach found in most states: 1) a finding of a disabling condition; and 2) a finding that such disabling condition causes an inability to manage one’s personal or financial affairs (in essence, how the individual is functioning with respect to certain transactions). *See* Charles P. Sabatino & Susanna L. Basinger, *Competency Reforming Our Legal Fictions*, 6 J. of Mental Health & Aging 199 (2000).

B. **UGPPA.** In contrast to the Texas definition of the 1997 Uniform Guardianship and Protective Proceedings Act § 102(5) focuses on cognitive functioning rather than the disabling condition:

“Incapacitated person” means an individual who, for reasons other than being a minor, is unable to receive and evaluate information or make a or communicate decisions to such an extent that the individual lacks the ability to meet essential requirements for physical

health, safety, or self-care, even with appropriate technological assistance.”

- C. **Evidentiary Models.** The two definitions have evolved to the medical model versus the functional model. The jurisdiction’s definition determines what evidence is to be presented to determine incapacity. The “functional model” allows for the appointment of a guardian when the functional deficiencies have been established by non-medical testimony. In these cases the medical records of the Proposed Ward will not be admitted as proof of incapacity. The “medical model” allows for the use of medical testimony when determining incapacity. The testimony of the alleged incapacitated person’s treating physician is often used as evidence of incapacity. Peter J. Strauss, *Appointing a Guardian in America: How Do We Get There?*

### III. Testimony of Mental Health

**Professional Experts.** Although the tools used by mental health professionals in a capacity evaluation are important in guardianship matters, it should be emphasized that such neuropsychological and mental status test measures do not in themselves determine the issue of capacity. Daniel C. Marson et al., *Testamentary Capacity and Undue Influence in the Elderly: A Jurisprudential Therapy Perspective*, 28 Law & Psychol. Rev. 71, 83 (Spring 2004). A diagnosis of a mental condition or disease such as dementia of the Alzheimer type does not equate with incapacity in all contexts. Accordingly, the courts have held in certain contexts that the testimony of an expert witness as to mental capacity is not conclusive on the issue and must be evaluated along with other evidence presented. *Dubree v. Blackwell*, 67 S.W.3d 286 (Tex. App. —Amarillo 2001, no writ); see also *In re: Finkelstein’s Estate*, 61 S.W.2d 590 (Tex. Civ App. —Amarillo 1933, writ dism’d w.o.j.)(concluding that a physician’s opinion regarding mental capacity is, in the eye of the law, no better than that of any other person).

**IV. PROVING MENTAL INCAPACITY.** A lack of mental capacity may be shown by circumstantial evidence including: “(1) a person’s outward conduct, ‘manifesting an inward and causing condition’; (2) any pre-existing external circumstances tending to produce a special mental condition; and (3) the prior or subsequent existence of a mental condition from which a person’s mental capacity (or incapacity) at the time in question may be inferred.” *In re Estate of Robinson*, 140 S.W.3d 782, 793 (Tex. App.—Corpus Christi, 2004, pet. denied) (citing *Bach v. Hudson*, 596 S.W.2d 673, 676 (Tex. Civ. App.—Corpus Christi 1980, no writ)).

- A. **Prior Mental Condition.** Since a prior mental condition or disorder can be a continuing condition, it may be probative of mental capacity to execute a deed, even if remote in time. *Voigt v. Underwood*, 616 S.W.2d 266, 269 (Tex. Civ. App.—San Antonio 1981, writ ref’d n.r.e.).
- B. **Observations of Conduct.** Observations of the testator’s conduct prior or subsequent to the will’s execution may be relevant to determine the testator’s mental condition but only if the condition persisted or had some probability of being present when the will was executed. *Horton v. Horton*, 965 S.W.2d 78 (Tex. App.—Fort Worth 1998, no writ); *Lee v. Lee*, 424 S.W.2d 609 (Tex. 1968).

**V. TREATISES ADDRESSING MENTAL CAPACITY TO CONTRACT.** Although these legal treatises are non-binding authority, they are frequently used as persuasive weight by both lawyers and courts.

- A. **Corpus Juris Secundum.** 17A C.J.S. *Contracts* § 141 (1999) provides: “To make a valid contract, each party must be of sufficient mental capacity to appreciate the effect of what he or she is doing, and must also be able to exercise his or her will with reference thereto. There must be a meeting of the minds to effect assent, and there can be no meeting of the minds where either party to the agreement is mentally incapable of understanding the consequences of his or her acts” (footnotes omitted).
- B. **Restatement (Second) of Contracts.**

According to the Restatement (Second) of Contracts, incapacity may be total or partial, and contracts formed by persons lacking capacity are deemed voidable, not necessarily void. The Restatement also recognizes that capacity may be different depending upon the complexity of the transaction or contract: “Capacity to contract may be partial and its existence in respect of a particular transaction may depend upon the nature of the transaction or upon other circumstances.” Restatement (Second) of Contracts § 12 (1981). Thus, a person may lack capacity only with respect to particular transactions. The test for “mental illness or defect” is either: (1) “he is unable to understand in a reasonable manner the nature and consequences of the transaction”; or (2) “he is unable to act in a reasonable manner in relation to the transaction and the other party has reason to know of the condition.” Restatement (Second) of Contracts § 15 (1981) (emphasis added).

**C. Corbin on Contracts.** This treatise states: “It is generally held that incapacity exists when a party does not understand the nature and consequences of what is happening at the time of the transaction.” Corbin on Contracts § 27.10 (2003). Corbin further explains that contracts formed by a person lacking mental capacity should be treated as voidable: “According to older authority, transactions of the mentally infirm are void, but under the overwhelming weight of modern authority, the contracts and executed transactions of the mentally infirm are, with one exception, merely voidable.” Corbin comments that the Restatement test for capacity to contract (a two-part, either/or test) allows parties to renege when they “understand what they are doing but cannot control their behavior in a rational manner.”

**VI. PRESUMPTIONS RELATED TO MENTAL CAPACITY.** Adults possess the

capacity to undertake any legal task unless they have been adjudicated as incapacitated in the context of guardianship or conservatorship, or the party challenging their capacity puts forward sufficient evidence of incapacity to meet a requisite burden of proof.

**A. Presumption of Capacity.** The law presumes that an adult person is of sound mind and is capable of managing his own affairs, and the burden of proof rests with party alleging mental incapacity to prove it. *Dubree v. Blackwell*, 67 S.W.3d 286 (Tex. App.—Amarillo 2001, no writ) (in action by executor to set aside deed and bank account signature cards, holding that evidence was insufficient to overcome presumption that grantor was mentally competent at time she deeded house and bank accounts over to her friend); *Arnold v. Arnold*, 657 S.W.2d 506 (Tex. App.—Corpus Christi 1983, no writ); *Missouri Pacific Railroad Co. v. Brazzil*, 72 Tex. 233, 10 S.W. 403 (Tex. 1888). Absent proof and determination of mental incapacity, a person who signs a document is presumed to have read and understood the document. *Reyes v. Storage & Processors, Inc.*, 995 S.W.2d 722, 725 (Tex. App.—San Antonio 1999, pet. denied).

**B. Elderly Not Presumed Incompetent.** Elderly persons are not presumptively incompetent. *Edward D. Jones & Co. v. Fletcher*, 975 S.W.2d 539 (Tex. 1998) (holding that stock broker had no legal duty to ascertain mental capacity of elderly client because not presumptively incompetent); *Dubree v. Blackwell*, 67 S.W.3d 286 (Tex. App.—Amarillo 2001, no writ).

**C. Variable Capacity.** Mental capacity or incapacity is frequently variable. A person may be incompetent at one time but competent at another time. *Dubree v. Blackwell*, 67 S.W.3d 286, 290 (Tex. App.—Amarillo 2001, no writ) (expert witness testifying that person can have diminished mental capacity and yet have “lucid, clear moments”).

**D. Voidable Contract.** Since the law presumes every party to a legal contract to

have had sufficient mental capacity to understand his legal right with reference to the transaction involved, a contract executed by one lacking mental capacity is not void but voidable. *Schmaltz v. Walder*, 566 S.W.2d 81 (Tex. Civ. App.—Corpus Christi 1978, writ ref’d n.r.e.).

## VII. MENTAL CAPACITY TO

**CONTRACT.** In order to form a binding agreement, a person must have the mental capacity to create a contract.

**A General Standard.** To form a binding contract, a meeting of the minds on the essential terms of the contract is required. *KW Const. v. Stephens & Sons Concrete Contractors, Inc.*, 165 S.W.3d 874 (Tex. App.—Texarkana 2005, pet. denied). In determining an individual’s capacity to enter a contract, courts generally assess the party’s ability to understand the nature and effect of the act and the business being transacted. Thus, if the business being transacted is highly complicated, presumably a higher level of understanding may be needed to comprehend its nature and effect. ABA Commn. on Law & Aging & Am. Psychological Assn., *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers* 44 (2005).

### **B Understanding Nature and**

**Consequences.** To have mental capacity to enter a contract in Texas, a person must have “appreciated the effect of what she was doing and understood the nature and consequences of her acts and the business she was transacting.” *Mandell & Wright v. Thomas*, 441 S.W.2d 841, 845 (Tex. 1969). See *Dubree v. Blackwell*, 67 S.W.3d 286, 290 (Tex. App.—Amarillo 2001, no writ) (focusing on whether person had “sufficient mind and memory to understand the nature and consequences of her acts and the business she was transacting”); *West v. Watkins*, 594 S.W.2d 800, 804 (Tex. Civ. App.—San Antonio 1980, writ ref’d n.r.e.)

(holding that deed was cancelled because elderly grantor lacked the mental capacity to understand the nature and effect of the act on the date of execution).

### **C. “Intelligently” Understand / “Reasonably Prudent” Not Required.**

Texas courts have rejected the requirement that the party entering the contract “intelligently” understand the nature and effect of the act. *Wright v. Matthews*, 130 S.W.2d 413 (Tex. Civ. App.—San Antonio 1939, writ dismissed judgment corrected). Likewise, the courts do not require the mental capacity possessed by a “reasonably prudent person.” 17A C.J.S. *Contracts* § 143 (1999).

### **D. Ratification After Restoration of Capacity.**

In the seminal case *Missouri Pacific Railroad Co. v. Brazzil*, 10 S.W. 403, 406 (Tex. 1888), the Texas Supreme Court examined whether the party had mental capacity “sufficient to comprehend the nature, purpose, and effect of the contract” and held that if a person lacking mental capacity executes a contract and is subsequently restored to reason and acts as to clearly evidence his intention to be bound by the contract, the law will regard the contract as ratified.

**E. Question for Jury.** Whether a person knows or understands the nature and consequences of his act at the time of the contract is a question for the jury. *In re Estate of Robinson*, 140 S.W.3d 782, 793-794 (Tex. App.—Corpus Christi 2004, pet. denied).

**F. Lacking Ability to Control Conduct.** If a person lacks the ability to control his conduct because of some mental affliction but otherwise understands the nature and consequences of his actions, should the courts treat him as lacking mental capacity? Should the decision depend on whether the other party to the contract knows of the condition? In *Nohra v. Evans*, 509 S.W.2d 648 (Tex. Civ. App.—Austin 1974, no writ), the Austin Court of Appeals approved enlarging in a jury instruction the traditional test of mental capacity beyond the test of understanding, or cognition, to encompass motivation, or

the exercise of will. According to the court's rationale, a person may meet the standard of cognition, but nevertheless lack the ability to control his conduct and should therefore be treated as incompetent to contract. This case specifically addressed the mental capacity of a manic-depressive. *See York v. Georgia-Pacific Corp.*, 585 F.Supp. 1265 (N.D. Miss. 1984) (distinguishing *Nohra* because no evidence that grantor's depression affected his business judgment); *see also* 2007 TexApp LX 8694.

**G. Doctor's Examination Not Conclusive.**

In *Bennett v. Miller*, 137 S.W.3d 894 (Tex. App.—Texarkana 2004, no pet. h.), the court recognized the motor vehicle accident victim's competency to retain an attorney three days after the accident despite a letter from the victim's doctor stating that "her thinking is quite muddled [sic]" (referring to doctor's examination of the victim eight days after the accident). Although the court acknowledged that the rights of incompetents are protected by rules that, in some circumstances, void transactions in which they are involved, the court relied upon the victim's affidavit in which she reiterated that at the time she signed the contract with her selected attorney, "she had not been placed under guardianship or deemed mentally incapacitated or incompetent by any court or medical professional, and she fully understood the effect of her action and intended to be bound by them." 137 S.W.3d at 897.

**H. Defenses.** Texas law does provide certain defenses that would render the contract voidable at the option of the disadvantaged party (e.g., duress, undue influence, and fraud).

**1. Undue Influence.** "In deciding whether undue influence resulted in execution of a document, three factors are considered: (1) the existence and exertion of an influence; (2) whether the influence operated to subvert or overpower the grantor's mind when

the deed was executed; and (3) whether the grantor would not have executed the deed but for the influence." *Dubree v. Blackwell*, 67 S.W.3d 286, 290 (Tex. App.—Amarillo 2001, no writ) (citing *Dulak v. Dulak*, 513 S.W.2d 205, 209 (Tex. 1974)).

**2. Tension and Anxiety.** Nervous tension and anxiety, without more, do not amount to mental incapacity which precludes a person from understanding the nature and consequences of his acts. *Schmaltz v. Walder*, 566 S.W.2d 81 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.).

**VIII. POLICY ISSUE:** In the eyes of the law, should the elderly be treated like minors and be shielded from their bad contractual decisions?

**A. California Statutory Protection.**

California's elder financial abuse statute recognizes that the elderly are more subject to risks of "abuse, neglect and abandonment." An older person has been financially abused when "it is obvious to a reasonable person" that fraud has occurred. *See* California's Elder Abuse and Dependent Adult Civil Protection Act (California Welfare & Institutions Code, §§ 15600 et seq.) (protecting elders 65 and older and dependent adults).

**B. Illinois Elder Abuse and Neglect Act.**

Illinois' elder abuse statute defines protect "eligible adults" from mistreatment and abuse by an "abuser." The Act defines "eligible adult" as a person 60 years of age or older who resides in a domestic living situation and is, or is alleged to be, abused, neglected, or financially exploited by another individual or who neglects himself or herself." *See* Illinois' Elder Abuse and Neglect Act (Chapter 320 of the Illinois Compiled Statutes 20/1, et seq.) and [http://www.state.il.us/aging/1news\\_pubs/publications/ea-act\\_book.pdf](http://www.state.il.us/aging/1news_pubs/publications/ea-act_book.pdf).

**C. Definition of Elder Financial Abuse.**

The statutory definition of elder financial abuse (California Welfare & Institutions Code § 15610.30) states that “financial abuse” of an elder or dependent adult occurs when a person or entity does any of the following:

1. Takes, secretes, appropriates, or retains real or personal property of an elder or dependent adult to a wrongful use or with intent to defraud, or both.
2. Assists in taking, secreting, appropriating, or retaining real or personal property of an elder or dependent adult to a wrongful use or with intent to defraud, or both.

**C. Court Interpretation Lacking.** Because most of these “financial abuse” cases settle before trial, it is unclear how the courts will interpret these laws protecting the elders.

**D. Arbitration Agreements.** Legislative proposal recently sponsored by the Trusts & Estates Section of the State Bar of California would amend the EADACPA to provide that no claim brought under the elder financial abuse statute would be subject to the provisions of an arbitration agreement unless certain minimum requirements as set forth by the California Supreme Court are satisfied. In California, enhanced remedies are available under the elder financial abuse statute, including the right to attorney fees (Welfare & Institutions Code § 15657.5), post death damages for pain and suffering (Welfare & Institutions Code § 15657.5(b)), punitive damages (Civil Code § 3294), and treble damages for unfair and deceptive practices against seniors (Civil Code § 3345). Arbitration agreements frequently prohibit recovery of enhanced remedies created for seniors.

**IX. DONATIVE CAPACITY (SIMILAR STANDARD TO TESTAMENTARY CAPACITY).**

Capacity to make a gift has been subject to a higher standard in some state courts requiring that the donor knows and understands the gift to be irrevocable and that it would result in a reduction in the donor’s assets or estate. See Arthur C. Walsh et al., *Mental Capacity: Legal and Medical Aspects*

*of Assessment and Treatment* (2d ed. 1994).

**A. Requisites.** The party seeking to prove a gift must establish three elements: (1) the intent to make a gift; (2) delivery of the property; and (3) acceptance of the property. *In re Marriage of Royal*, 107 S.W.3d 846 (Tex. App.—Amarillo 2003, no writ).

**B. Weight and Sufficiency.** Under Texas law, the person claiming that a gift was made must prove the gift by “*clear and convincing evidence*.” *Long v. Turner*, 134 F.3d 312 (5<sup>th</sup> Cir. 1998); *Dorman v. Arnold*, 932 S.W.2d 225 (Tex. App.—Texarkana 1996, no writ).

**C. Fiduciary Relationships.** In “gift” transactions involving parties with fiduciary relationship, equity indulges presumption of unfairness and invalidity, and requires proof at hand of party claiming validity and benefits of transaction that it is fair and reasonable. *Sorrell v. Elsey*, 748 S.W.2d 584 (Tex. App.—San Antonio 1988, writ denied); *Anderson v. Anderson*, 618 S.W.2d 927 (Tex. App.—Houston [1<sup>st</sup> Dist.] 1981, writ dism’d as moot) (holding that once a confidential relationship is established, a presumption arises that the gift is unfair or invalid; burden of proof of inter vivos gift is on party claiming gift was made).

1. When a fiduciary receives a gift from the principal of a fiduciary or confidential relationship, the ultimate and controlling issue determining whether receipt of the gift was a breach of the established relationship should basically inquire whether the gift was ultimately fair and equitable to the principal. *Moore v. Texas Bank & Trust Co.*, 576 S.W.2d 691 (Tex. Civ. App.—Eastland 1979), *rev’d*, 595 S.W.2d 502 (Tex. 1980) (holding that fiduciary includes informal relations between aunt and nephew which exist whenever one party trusts and relies upon another).
2. The conduct of the fiduciary is critical in determining whether there has been a breach of duty because of the presumption of invalidity: whether there was a good faith effort on the part of the fiduciary to full inform the donor of the nature and effect of the transaction. Fiduciary must

show that he acted in good faith and that gift was voluntarily and understandably made. *Sorrell v. Elsey*, 748 S.W.2d 584, 586 (Tex. App.—San Antonio 1988, writ denied).

**D. Improvidence and Undue Influence.**

Improvidence may be a factor in determination of the mental capacity of donor to make a gift. *Pace v. McEwen*, 574 S.W.2d 792 (Tex. Civ. App.—El Paso 1978, writ ref'd n.r.e.) (recognizing that a gift between persons occupying confidential relations toward each other, if its validity is attacked, will be jealously scrutinized by a court, and unless found to have been freely, voluntarily, and with a full understanding of the facts, the gift will be invalidated).

1. If, at time of gift, donor's mind has been enfeebled by age and disease, even though not to extent of mental unsoundness, and donor acted without independent advice, and such a gift is of a large portion or all of the donor's estate and operates substantially to deprive those having a natural claim to donor's estate, these circumstances, if proved and unexplained, will authorize a finding that the gift is void, through undue influence, without proof of specific acts or conduct of donee. *Pace v. McEwen*, 574 S.W.2d 792 (Tex. Civ. App.—El Paso 1978, writ ref'd n.r.e.).
2. The grantor lacked the mental capacity to execute deed in favor of university when the grantor, who sold his home to a private person, within a short time before or afterwards gave the same home to the university. *Board of Regents of Univ. of Tex. Yarbrough*, 470 S.W.2d 86 (Tex. Civ. App.—Waco 1971, writ ref'd n.r.e.) (finding undue influence on part of university employees who failed to take into account the physical and mental problems of the old man with no

family).

**X. CAPACITY TO CREATE A WILL: TESTAMENTARY CAPACITY**

**A. Black's Law Dictionary of Testamentary Capacity.**

Law of testation requires that testator have testamentary capacity. According to Black's Law Dictionary, "testamentary capacity" is defined as "that measure of mental ability recognized in law as sufficient for the making of a will." If the person making the will lacks testamentary capacity, the will is invalid and void in effect.

**B. Historical Perspective from English Courts.**

1. In 1840 the English courts discussed the requirement that the testator have testamentary capacity—"a sound disposing mind." *Harwood v. Baker*, 3 Moo. P.C.C. 282; 13 E.R. 1173 (1840) (declaring will invalid in case where the will was executed by the testator on his deathbed in favor of a second wife, to the exclusion of the other members of his family; holding that "in order to constitute a sound disposing mind, a testator must not only be able to understand that he is by his will giving the whole of his property to one object of his regard, but he must also have capacity to comprehend the extent of his property, and the nature of the claims of others, whom by his will he is excluding from all participation in that property").
2. Subsequent English case, *Banks v. Goodfellow*, 5 L.R.Q.B. 549 (1870), established testamentary capacity ("a sound and disposing mind and memory"):
  - (1) "Nature of the Business"—the testator must understand the nature of the business in which he is engaged. Thus, he must be aware that he is engaged in a testamentary act concerning the disposition of his property that will take effect on his death.

- (2) “Recollection of the Property”—the testator must have a recollection of the property he means to dispose of. Again, it is a general awareness that is required; the testator need not recollect every item of his property.
- (3) “The Objects of his Bounty”—the testator must recollect the persons who are the objects of his bounty. *Harwood v. Baker* (1840) held the testator’s will invalid based on failure to satisfy this requirement. A few days after suffering a stroke, the testator changed his will to leave all his property to his second wife, thus excluding a number of relatives. In the opinion of the court, the testator was too ill to give sufficient consideration to the potential claims of his relatives.
- (4) “Know the Manner of Distribution”—the testator must have recollection of the manner in which the property is to be distributed between the objects of his bounty. The requirement is generally construed to mean that the testator must be broadly aware of how he has shared out his estate.

**C. Statutory Definition of Incapacity**

**(Capacity Not Defined by Statute).** As set forth in Texas Probate Code § 3(p), the definition of “Incapacitated” or “Incapacitated person” means:

- (1) a minor;
- (2) an adult individual who, because of a physical or mental condition, is substantially unable to provide food, clothing or shelter for himself or herself, to care for the individual’s own physical health, or to manage the individual’s own financial affairs; or
- (3) a person who must have a guardian appointed to receive the funds due the person from any governmental source.

**D. Texas Requirements for Testamentary Capacity.**

Texas Probate Code § 57 provides: “Every person who has attained the age of eighteen years, . . ., **being of sound mind**, shall have the right and power

to make a last will and testament, under the rules and limitations prescribed by law” (emphasis added). “Being of sound mind” is equated with having testamentary capacity. *See Gilkey v. Allen*, 617 S.W.2d 308 (Tex. Civ. App.—Tyler 1981, no writ) (recognizing that a competent testator is presumed to know and understand the contents of his will, unless circumstances exist that cast suspicion on the issue).

**E. Seminal Case of Prather v. McClelland, 13 S.W. 543, 546 (Tex. 1890).**

For testamentary capacity, the testator “must have been capable of understanding the business he was engaged in, the nature and extent of his property, the persons to whom he meant to devise and bequeath it, the persons dependent upon his bounty, and the mode of distribution among them; that he must have had memory sufficient to collect in his mind the elements of the business to be transacted, and to hold them long enough to perceive, at least, their obvious relation to each other, and be able to form a reasonable judgment as to them.”

**F. Memory Requirement.** Texas will contest cases emphasize the memory requirement—the testatrix must have “sufficient memory to collect in her mind the elements of the business to be transacted and to hold them long enough to at least perceive their obvious relation to each other, and to be able to form a reasonable judgment as to them.” *Lowery v. Saunders*, 666 S.W.2d 226, 232 (Tex. App.—San Antonio 1984, writ ref’d n.r.e.).

**G. Testamentary Capacity vs. Contractual Capacity – Lower Standard for Testamentary Capacity.**

“[L]ess mental capacity is required to enable a testator to make a will than for the same person to make a contract . . .” *Rudersdorf v. Bowers*, 112 S.W.2d 784 (Tex. Civ. App.—Galveston 1937, writ dism’d w.o.j.) (upholding decision that testator had capacity).

**H. Relevant Time of Determination.**

Testamentary capacity is determined at the time the will was executed. Accordingly, a will is still valid if the testator lacked testamentary capacity before and/or after executing a will, provided the will is made during a “lucid interval.” *In re Estate of Trawick*, 170 S.W.3d 871 (Tex. App.—



Texarkana 2005, no writ) (jury verdict upheld that testator had capacity although testator's conduct was eccentric and bizarre and she had good days and bad days).

**I. Insane Delusions.** An insane delusion has been defined as a belief of a state of supposed facts that do not exist, and which no rational person would believe. *Nohra v. Evans*, 509 S.W.2d 648 (Tex. Civ. App.—Austin 1974, no writ); see *Knight v. Edwards*, 264 S.W.2d 692 (Tex. 1954) (holding that a conviction which testator arrives at by process of reasoning, however illogical, from existing facts, is not such an “insane delusion” as would affect his capacity to make a will). A testator who generally possesses the elements of testamentary capacity may have that capacity negated by an “insane delusion” **but only if** the insane delusion has materially affected the terms of the will. *Rich v. Rich*, 615 S.W.2d 795 (Tex. Civ. App.—Houston [1<sup>st</sup> Dist.] 1980, no writ). “A man may believe himself to be the supreme ruler of the universe and nevertheless make a perfectly sensible disposition of his property, and the courts will sustain it when it appears his mania did not dictate its provisions.” *Gulf Oil Corp. v. Walker*, 288 S.W.2d 173 (Tex. Civ. App.—Beaumont 1956, no writ). The issue is whether the insane delusion was operative in the creation of the will.

**J. Eccentric Behavior.** Although the testatrix was 92 years old, hid items in her home, and spoke of deceased persons as if they were still alive, the appellate court affirmed the jury's determination of testamentary capacity. *In re Estate of Trawick*, 170 S.W.3d 871 (Tex. App.—Texarkana 2005, no pet. h.). Just because a person is old or acts in an eccentric or bizarre manner, these facts are not enough to conclusively show lack of testamentary capacity.

**K. Revocation of Will.** Testamentary capacity is also required to revoke a will (i.e., testator must be of sound mind to effect a revocation). See *Lowery v. Saunders*, 666 S.W.2d 226 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.); Texas Probate Code § 63 Commentary by

Professor Stanley Johanson.

**XI. CAPACITY TO CREATE TRUST.** Texas Property Code § 112.007 explains that “[a] person has the same capacity to create a trust by declaration, inter vivos or testamentary transfer, or appointment that the person has to transfer, will, or appoint free of trust.” Although this statutory provision is somewhat unclear because “capacity” is not defined as “legal capacity” or “mental capacity,” it is generally recognized in all states that the settlor must understand and appreciate the nature and consequences of the trust document if the trust is to be considered valid as its initial creation.

**A. Competent Understanding.** For example, in a recent Indiana case, the court allowed an elderly widow to rescind an irrevocable trust that she had established (while recovering from a stroke) in favor of her daughter. The attending physician testified that while she was able to make simple decisions, such as writing checks, the complexity of the trust document was beyond her range of competent understanding. *Hunter v. Klimowicz*, 2007 WL 1599221 (Ind. Ct. App. 2007).

**B. Trusts Interpreted as Contracts.** In general, trust instruments are interpreted as contracts are interpreted. *Goldin v. Batholow*, 166 F.3d 710 (5th Cir. Texas 1999).

**C. Capacity Standard.** The obvious question is whether the capacity to create a trust is the same legal standard as that required to make a will, perhaps a lower standard than that required to make a contract. Professor Stanley Johanson's Commentary on Texas Property Code § 112.007 acknowledges: “As a theoretical matter, inter vivos trusts are every bit as subject to challenge **on ground of lack of capacity** or undue influence as are wills” (emphasis added).

**D. The Uniform Trust Code** (based in large part on the Restatement (Third) of Trusts) requires the settlor to have the requisite mental capacity to create a trust. See Uniform Trust Code §§ 402, 601, 602.

**1.** To create a revocable or testamentary trust, the settlor must have the capacity to make a will.

**2.** To create an irrevocable trust, the settlor

must have the capacity that would be needed to transfer the property free of trust.

**E. Legal Challenges.** Similar to a contract, a trust agreement can be set aside for lack of capacity, fraud, mistake, or undue influence. *Bute v. Stickney*, 160 S.W.2d 302 (Tex. Civ. App.—San Antonio 1942, writ ref'd w.o.m.) (holding that plaintiff's allegations that he executed instrument while in a highly nervous and excitable state were insufficient as allegations of duress); *Kimmell v. Tipton*, 142 S.W.2d 421 (Tex. Civ. App.—Eastland 1940, no writ) (recognizing that if trust deed was executed at time she understood the nature and effect of her act, she cannot cancel it on the ground of mental incapacity).

**XII. CAPACITY TO REVOKE TRUST.** Texas Property Code § 112.051 recognizes that the settlor may revoke the trust “unless it is irrevocable by the express terms of the instrument creating it or of an instrument modifying it.” Common law dictates that a trust is presumed irrevocable absent evidence of contrary intent, but some states such as California, Iowa, Montana, Oklahoma, and Texas presume that a trust is revocable unless expressly otherwise. By favoring the ability to revoke, the settlor is more protected against foolish gifts. This particular statutory provision in the Texas Property Code does not specifically mention therein any requirement that the settlor possess “capacity” at the time of revocation but since the revocable trust is used as a will substitute, it is only logical that the settlor must possess mental capacity to revoke his trust, similar to the requirement of mental capacity to revoke a will. *See* W. Thomas Coffman & Jesse N. Bomer, *Common Trust Revocation Issues* (2002), available at <http://www.okbar.org/barjournal/>.

**A. UTC.** Section 601 of the Uniform Trust Code provides: “The capacity required to **create, amend, revoke**, or add property to a revocable trust, or to direct the actions of the trustee of a revocable trust, is the same as that required to make a will” (emphasis added). As explained in the Commentary of Section 601, the revocable trust is often

used as a device for disposing of property at death; accordingly, the capacity standard for wills rather than that for lifetime gifts should apply.

**B. UTC.** According to Section 602 of the Uniform Trust Code, a settlor's power to revoke is not terminated by the settlor's incapacity because the power to revoke may instead be exercised by an agent under a power of attorney as authorized in subsection (e), by a conservator or guardian as authorized in subsection (f), or by the settlor personally **if the settlor regains capacity**.

### **XIII. MENTAL CAPACITY TO VOTE.**

**A. State Constitutions.** State constitutions reflect a deeply-rooted belief that citizens with impaired decision-making abilities should not be permitted to vote. Many states have laws that strip a person's right to vote when he is adjudged mentally incompetent and placed under guardianship.

**B. State Approaches.** Today, state laws on voting by people with mental incapacity contain numerous archaic provisions (language as “idiots,” “lunatics” or the “insane” often used), and unfortunately no states address specifically Alzheimer's disease and progressive dementia in regards to voting. The two most common approaches to voting and mental incompetence are as follows: (1) about half the states bar voting by people under guardianship or who are adjudged “non compos mentis,” a determination that is often not clearly defined; (2) about half the states prevent voting only if there is a specific determination that people lack voting competence. For example, New Hampshire has adopted the second approach; thus, when a person is declared incompetent, legal rights (including voting) are not removed unless specified by the New Hampshire court. David A. Drachman, M.D., *Fading Minds and Hanging Chads: Alzheimer's Disease and the Right to Vote*, The Dana Foundation <[www.dana.org](http://www.dana.org)>; Pam Belluck, *States Face Decisions on Who Is Mentally Fit to Vote*, New York Times, June 19, 2007.

**C. Legal issue.** The legal issue is that these incompetency proceedings typically measure skills, like the ability to manage financial affairs, that have nothing to do with the fundamental right of voting. Many people with dementia or other mental impairments wish to vote, but there is a risk of improper influence. Should judges ask specific questions to gauge someone's capacity to vote before taking away that right, especially given that voting is a fundamental right?

**D. Intelligence.** Does voting require an intelligent understanding of the issues at stake? In *Dunn v. Blumstein*, 405 U.S. 330 (1972), the state of Tennessee, in defending its one-year residency requirement for statewide elections, argued that newcomers simply could not grasp the issues well enough to cast a meaningful ballot. The U.S. Supreme Court rejected this approach, noting that "the criterion of 'intelligent' voting is an elusive one, and susceptible of abuse."

**E. Mental Disability Voting Rights Cases.** In Missouri, like many other states, if an individual is placed under guardianship because he lacks the capacity to care for himself, he is prohibited from voting, without any individualized inquiry into his competency to vote. In *Mo. Protection & Advocacy Servs v. Carnahan*, No. 06-3014, 2007 WL 2386607 (8th Cir. Aug. 23, 2007), the plaintiffs challenged Missouri constitutional and statutory provisions that disqualify individuals who are under full guardianship from voting, even if they have the capacity to vote, alleging violations of the Equal Protection Clause of the Constitution, the Americans with Disabilities Act (ADA) and the Rehabilitation Act. The Eighth Circuit affirmed the dismissal of the case, finding that there was insufficient evidence of a categorical *exclusion* from voting of people who are under guardianship orders. The court suggested, however, that if state law assumed that all people with guardians were mentally incompetent and therefore categorically excluded them from voting, then this categorical

exclusion would violate equal protection. The court noted that the guardianship order for the individual named plaintiff expressly preserved his right to vote.

**F. Mental Disability Voting Rights Cases:** *Doe v. Rowe*, 156 F Supp. 2d 35 (D. Me 2001). The constitution in Maine provides that "persons who are under guardianship for reasons of mental illness" are prohibited from registering to vote or voting in any election, said provision twice affirmed by referendum. In 2001, three persons under guardianship—two with bipolar disorder, one with "intermittent explosive disorder, antisocial personality, and mild organic brain syndrome" (secondary to encephalitis)—successfully challenged this voting prohibition. All three provided evidence of understanding the nature and effect of the act of voting and the ability to make an individual choice on the ballot. The U.S. District Court determined that this categorical disfranchisement violated the due process and equal protection clauses of the Fourteenth Amendment to the U.S. Constitution. In striking down the Maine constitutional provision, the court adopted a test proposed by the parties in the case: persons are considered incompetent to vote only if they "lack the capacity to understand the nature and effect of voting such that they cannot make an individual choice." Thus, in Maine, provided that the person under guardianship understands the nature and effect of voting and can make a choice, voting is not prohibited. Of course, the controversy is how to assess such qualifications. See P.S. Appelbaum, R. J. Bonnie, and J. H. Karlawish, *The Capacity to Vote of Persons With Alzheimer's Disease*, *Am. J Psychiatry*, November 1, 2005; 162(11): 2094 – 2100 (finding that under the *Doe* standard, patients with very mild to mild Alzheimer's disease generally retained adequate ability to vote, and persons with severe Alzheimer's disease did not possess ability to vote).

**G. Recent Rhode Island Voting Case.** Two patients who have lived in the state mental hospital for the past 20 years (both found not guilty of murder by reason of insanity)

have been voting by mail every two years. Candidate for the Rhode Island House of Representatives learned that these two men were on the voting rolls and notified the Board of Canvassers to have them removed. The Rhode Island state constitution provides that a person “lawfully adjudicated to be non compos mentis” cannot vote. The lawyers representing the hospitalized men, Kate Sherlock and Kate Bowden from the Rhode Island Disability Law Center, contend that the standard for “non compos mentis” is different from “not guilty by reason of insanity.” “Not guilty by reason of insanity” relates to the specific intent required for the crime but it does not relate to the capacity to vote. Although the semiannual doctors’ evaluations of the two men recommended that the men remain at the state mental hospital, their lawyers argue that the evaluation address the “dangerousness” of the men, not their capacity to vote. The two men have been dropped from the voters list by the Board of Canvassers much to the chagrin of mental health advocates. *See Pam Belluck, States Face Decisions on Who Is Mentally Fit to Vote*, New York Times, June 19, 2007.

**H. Texas Protocol.** Texas Constitution, Article VI, § 1 provides that persons who have been determined mentally incompetent by a court, subject to such exceptions as the Legislature may make, shall not be entitled to vote. In Texas the judge during a guardianship proceeding will make a decision as to whether the right to vote is retained by the ward. Texas Election Code § 11.002 defines “qualified voter” as a person who “has not been determined mentally incompetent by a final judgment of a court.”

**I. ABA Recommendation.** The recommendation for national standards released by a group of psychiatrists, lawyers and others led by the American Bar Association (Chairman Charles Sabatino) suggests that people be prevented from voting only if they cannot

indicate, with or without help, “a specific desire to participate in the voting process.” “Any person who is able to provide the information, whether orally, in writing, through an interpreter or interpretive device or otherwise, which is reasonably required of all persons seeking to register to vote, shall be considered a qualified voter.” The information to be provided is considered minimal, such as name, age, address, and proof of citizenship. Although those persons with moderate to severe dementia, severe mental retardation, and profound psychosis would likely have difficulty with even this minimal a test, most persons with mental disorders and many mentally retarded persons would be able to vote under this standard.

#### **XIV. Capacity to Drive: An Essential Skill for Self-Autonomy**

**A. DPS Authority.** Texas Transportation Code § 521.201 provides that the Texas Department of Public Safety may not issue a license to a person 1) who has been determined by a judgment of the court to be mentally incompetent (unless restored to competency) or 2) who the DPS determines to be afflicted with a mental or physical disability or disease that prevents the person from “*exercising reasonable and ordinary control over a motor vehicle*” while operating the vehicle on a highway, except that a person may not be refused a license because of a physical defect if common experience shows that the defect does not incapacitate a person from safely operating a motor vehicle.

**B. Procedure.** The Driver Improvement and Compliance Bureau (an entity under the Texas Department of Public Safety) has the authority to suspend, revoke, disqualify or cancel driving privileges of hazardous drivers. A driver may be reported to the DIC by physicians, family, friends or even anonymously. The DIC evaluates the driving performance of those who jeopardize the safety of others. To review possible medical conditions of reported Texas drivers, a physician from the Medical Advisory Board panel examines medical

documentation submitted by the subject's personal doctor and the Department of Public Safety acts in accordance with the medical findings of the Medical Advisory Board, either medically incapable to drive or medically approved to drive. Texas Transportation Code § 521.294(1); see [www.txdps.state.tx.us/DriverLicense/MedicalRevocation.htm](http://www.txdps.state.tx.us/DriverLicense/MedicalRevocation.htm) (contact information to report unsafe drivers).

### C. Ways to Keep Self-Autonomy

1. "Smart Features for Mature Driver" AAA and the National Older Driver Research and Training Center (NODRTC) released its "Smart Features for Mature Drivers" guide at the New York International Auto Show.

a. Purpose. AAA's guide identifies vehicle components that can assist drivers with visual, physical, and mental changes that are frequently encountered by persons over age 65.

b. Statistics. In a survey, AAA found 43 percent of motorists over the age of 55 suffered at least one of the nine most common difficulties caused by aging, such as, hip or leg pain, decreased strength, and arthritic hands.

c. Solution. AAA recommends that mature drivers look for vehicles with features that address their specific needs and health issues. See AAA Mature Driver Advice, <http://www.texas.aaa.com/en-tx/buy-maintain-vehicles/car-buying-services/Pages/mature-driver-advice.aspx?zip=78250&stateprov=tx&city=san+antonio&referer=www.bing.com>.

## XV. POWER OF ATTORNEY UNDER

**COMMON LAW.** A common law power of attorney (POA) is an agency relationship created by contract between a principal and an attorney-in-fact (person to whom the principal gives power to act). Thus, anyone who has the legal capacity to create a valid contract may appoint an attorney-in-fact. See Texas Transaction Guide Section 92.21 [1].

**A.** A minor lacks the capacity to appoint an agent. *Sturtevant v. Pagel*, 109 S.W.2d 556,

558-559 (Tex. Civ. App.—San Antonio 1937), *aff'd on other grounds*, 130 S.W.2d 1017 (1939).

**B.** A person of "unsound mind" does not have the capacity to appoint an attorney-in-fact. *Daugherty v. McDonald*, 407 S.W.2d 954, 958 (Tex. Civ. App.—Fort Worth 1966, no writ).

**C.** Almost all common-law powers of attorney cease when the principal is declared of unsound mind or mentally incapacitated. *Harrington v. Bailey*, 351 S.W.2d 946, 948 (Tex. Civ. App.—Waco 1961, no writ). See next section for discussion of the statutory durable power of attorney.

**D.** Texas Penal Code § 32.45 provides that it is a crime (from a Class C misdemeanor to a felony depending on the amount of property misapplied) for a fiduciary to intentionally, knowingly, or recklessly to misapply property as a fiduciary.

## XVI. DURABLE POWER OF ATTORNEY ACT – TEXAS PROBATE CODE §§ 481 – 506.

To avoid the potential termination of a power of attorney when the principal becomes incapacitated under common law, Texas has enacted a statutory durable power of attorney.

**A. Definition.** According to Section 482, the statutory "durable power of attorney" contains either of the following sentences:

1. "This power of attorney is not affected by subsequent disability or incapacity of the principal." In other words, the power of attorney becomes effective on the date executed.

2. "This power of attorney becomes effective on the disability or incapacity of the principal." In other words, the power of attorney comes into effect only at the time the principal loses mental capacity—known as springing durable powers.

**B. Springing Durable Power of Attorney.** If the power of attorney becomes effective only upon the disability or incapacity of the principal and there is no definition of "disability" or "incapacity" in the document, the statutory form set forth in Texas Probate Code § 490 requires that the physician certify

in writing that the principal is “mentally incapable of managing [his] financial affairs.” This provision protects third parties who rely on the written certification of the physician. As explained by Professor Stanley Johanson in his Commentary to Section 481, many attorneys recommend against using the springing powers because third parties are less reluctant to deal with the agent (the third party has no way of knowing whether the principal has become incapacitated).

**C. Capacity to Execute a Durable Power of Attorney.** The standard of capacity for creating a power of attorney has traditionally been based on the capacity to contract, but some state courts have held that the standard is similar to that required for testamentary capacity. ABA Commn. on Law & Aging & Am. Psychological Assn., *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers* 6 (2005).

**D. Appointment of Guardian.** Section 485 provides that the appointment and qualification of a permanent guardian of the estate of the principal terminates the authority of an agent under a durable power of attorney. The appointment and qualification of a temporary guardian may suspend the agent’s authority.

**XVII. DESIGNATION OF GUARDIAN BEFORE THE NEED ARISES.** Texas Probate Code § 679(a) (emphasis added) provides that a person “*other than an incapacitated person*” may designate by a written declaration persons to serve as the guardian of the person or of the estate of the declarant if the declarant becomes incapacitated. Attached to the statutory form of the “Declaration of Guardian in the Event of Later Incapacity or Need of Guardian” set forth in Section 679(i) is a self-proving affidavit which contains a recital that the declarant “appeared to them [two witnesses] *to be of sound mind.*”

A. “Incapacitated person” is defined in Texas Probate Code § 601(14) as (same definition as Texas Probate Code § 3(p)):

- (1) a minor;
- (2) an adult individual who, because of a physical or mental condition, is substantially unable to provide food, clothing or shelter for himself or herself, to care for the individual’s own physical health, or to manage the individual’s own financial affairs; or
- (3) a person who must have a guardian appointed to receive the funds due the person from any governmental source.

B. The declarant may revoke the declaration “in any manner provided for the revocation of a will under Section 63”; thus, the declarant must presumably have capacity similar to testamentary capacity to revoke his/her declaration of guardianship. Texas Probate Code § 679(g). See *Guardianship of Lynch*, 35 S.W.3d 162 (Tex. App.—Texarkana 2000, no writ) (capacity existed when declaration of guardianship was executed but not when revocation of declaration was effected).

#### **XVIII. DECISIONAL CAPACITY IN**

**HEALTH CARE.** Capacity to make a health care decision is defined by statute in most states under advance directives laws. According to the Uniform Health Care Decisions Act, “Capacity means an individual’s ability to understand the significant benefits, risks, and alternatives to proposed health care and to make and communicate a health-care decision.” See Uniform Health Decisions Act ([http://www.law.upenn.edu/bll/archives/ulc/fnac/t99/19\\_90s/uhcda93.htm](http://www.law.upenn.edu/bll/archives/ulc/fnac/t99/19_90s/uhcda93.htm)). Decisional capacity in health care is rooted in the concept of informed consent.

#### **XIX. ADVANCE DIRECTIVES ACT**

(Directive to Physicians, Medical Power of Attorney, Out-of-Hospital DNR Order): Tex. Health & Safety Code Chapter 166

- A. “Competent” means “possessing the ability, based on reasonable medical judgment, to understand and appreciate the nature and consequences of a treatment decision, including the significant benefits and harms of and reasonable alternatives to a proposed treatment decision.” Tex. Health & Safety Code § 166.002(4).
- B. “Incompetent” means “lacking the ability,

based on reasonable medical judgment, to understand and appreciate the nature and consequences of a treatment decision, including the significant benefits and harms of and reasonable alternatives to a proposed treatment decision.” Tex. Health & Safety Code § 166.002(8).

**C. Competency Requirement in Texas for Executing Advance Directives.**

**1. Directive to Physicians.** “A competent adult may at any time execute a written directive.” Tex. Health & Safety Code § 166.032 (a). The Directive to Physicians only takes effect if the attending physician examines the declarant and makes a written report that the declarant has a terminal or irreversible condition. The statutory form of written directive provides that as long as the patient is “of sound mind and able to make my wishes known,” the patient and physician will make health care decisions together. In the event the patient becomes “unable to make medical decisions about myself because of illness or injury,” the treatment preferences contained in the directive will be honored. Tex. Health & Safety Code § 166.033. A competent person may also make an oral Directive to Physicians. Tex. Health & Safety Code § 166.034.

**2. Out-of-Hospital DNR Order.** “A competent person may at any time execute a written out-of-hospital DNR order . . . .” Tex. Health & Safety Code § 166.082. *See also* Tex. Health & Safety Code § 166.084 (authorizing a competent person to issue an out-of-hospital DNR by nonwritten communication).

**3. Medical Power of Attorney (Durable Power of Attorney for Health Care).** The medical power of attorney, like any power of attorney, requires the principal to be competent at the time of execution. In a medical power of attorney, the principal designates an agent “who may make any health care decision on the principal’s behalf that the principal could make if the principal were competent. Tex. Health & Safety Code

§ 166.152(a).

(1) The obvious limitation on the agent’s authority is that the agent may exercise authority only if “the principal is incompetent” as certified by the principal’s attending physician based on reasonable medical judgment. Tex. Health & Safety Code § 166.152(b). *See also* Tex. Health & Safety Code § 166.164 (providing in the statutory form of the medical power of attorney, that the document takes effect only when the principal becomes unable to make health care decisions (i.e., incompetent as certified by principal’s doctor in writing)).

(2) Recent Texas case held that nursing home resident’s daughter did not have the authority (actual or apparent) to sign an arbitration agreement with the nursing home on behalf of the resident because by the terms of the medical power of attorney executed by the resident and by statute, the daughter had no authority until a doctor certified that the resident was unable to make health care decisions for herself (which did not occur) and furthermore, the medical power of attorney conferred only the authority to make medical decisions not legal decisions. The nursing home resident signed the medical power of attorney naming her daughter as her agent on the day she was admitted to the facility and then the daughter signed, among other agreements, an arbitration agreement purporting to bind her mother to those agreements. *Texas Cityview Care Center, L.P. v. Fryer*, 227 S.W.3d 345 (Tex. App.—Forth Worth 2007, petition for review filed).

(3) A civil action may be brought by a near relative or an “interested” responsible adult to revoke the medical power of attorney on the grounds that the principal “was not competent” at the time of signing or “was under duress, fraud, or undue influence.” Tex. Health & Safety Code § 166.165.

**4.** *See also* 40 Tex. Adm. Code § 19.419(a) (reiterating that “Competent adults may



issue advance directives in accordance with applicable law”).

**D. Subsequent Incompetency and Revocation.**

1. The patient may revoke a directive at any time “without regard to the declarant’s mental state or competency.” Tex. Health & Safety Code § 166.042.
2. A declarant may revoke an out-of-hospital DNR order at any time “without regard to the declarant’s mental state or competency.” Tex. Health & Safety Code § 166.092.
3. A medical power of attorney may be revoked by the principal “without regard to whether the principal is competent or the principal’s mental state.” Tex. Health & Safety Code § 166.155(a)(1).

**E. Present Desires of Patient.** The patient’s wishes may not be ignored regardless of the advance directive and his/her competence or incompetence.

1. Directive to Physicians. “The desire of a qualified patient [patient diagnosed with a terminal or irreversible condition], including a qualified patient younger than 18 years of age, supersedes the effect of a directive.” Tex. Health & Safety Code § 166.037 (competency is not a requirement for patient’s present expressed desires related to life-sustaining treatment to be followed).
2. Out-of-Hospital DNR. “The desire of a competent person, including a competent minor, supersedes the effect of an out-of hospital DNR order executed by or on behalf of the person . . .” Tex. Health & Safety Code § 166.086.
3. Medical Power of Attorney. “[T]reatment may not be given or withheld from the principal if the principal objects regardless of whether, at the time of the objection . . . the principal is competent.” Tex. Health & Safety Code § 166.152(c).

**F. Appointment of Guardian vis-à-vis Medical Power of Attorney.** Texas Health & Safety Code § 166.156 provides that the appointment of a guardian *may revoke* the authority of an agent pursuant to a medical

power of attorney to make health care decisions on behalf of the principal: “[A] probate court shall determine whether to suspend or revoke the authority of the agent.” This provision mandates that the court consider the preferences of the principal as expressed in the medical power of attorney.

**XX. CONSENT TO MEDICAL TREATMENT**

**ACT.** Chapter 313 of the Texas Health & Safety Code addresses those adult hospital or nursing home patients who do not have a medical power of attorney or an appointed guardian and are “comatose, incapacitated, or otherwise mentally or physically incapable of communication.” Section 313.004 sets forth the authority of a surrogate decision-maker to consent for medical treatment on behalf of the patient. The Act uses the terminology “incapacitated” but its definition (Section 313.002) tracks the same language as “incompetent” in the Advance Directives Act, Chapter 166 of the Tex. Health & Safety Code.

**XXI. MONTHLY SOCIAL SECURITY**

**CHECKS.** More than seven million people who get monthly Social Security or Supplemental Security Income (SSI) benefits need help managing their money. Social Security’s Representative Payment Program provides financial management for the Social Security and SSI payments of beneficiaries “who are legally incompetent or mentally incapable” of managing benefit payments. *See* 20 C.F.R. § 404.2010(a). This program is available even after the beneficiary becomes mentally disabled and whether or not the beneficiary has a legal guardian. The law requires minor children and legally incompetent adults to have payees. In all other situations, adult beneficiaries are presumed to be capable of managing benefits. If there is evidence to the contrary, however, SSA may appoint a representative payee, such as a relative, friend or other interested party. *See* <http://www.ssa.gov/payee> (explanation of program). Note: For Social Security purposes, a “power of attorney” is not an acceptable way to manage a person’s monthly benefits because Social Security recognizes only a representative payee for handling the beneficiary’s funds.



A 20 C.F.R. § 404.2015 allows consideration of the following in determining whether to make representative payments:

1. Court determinations. “If we learn that a beneficiary has been found to be legally incompetent, a certified copy of the court's determination will be the basis of our determination to make representative payment.”
2. Medical evidence. “When available, we will use medical evidence to determine if a beneficiary is capable of managing or directing the management of benefit payments. For example, a statement by a physician or other medical professional based upon his or her recent examination of the beneficiary and his or her knowledge of the beneficiary's present condition will be used in our determination, if it includes information concerning the nature of the beneficiary's illness, the beneficiary's chances for recovery and the opinion of the physician or other medical professional as to whether the beneficiary is able to manage or direct the management of benefit payments.
3. Other evidence. “We will also consider any statements of relatives, friends and other people in a position to know and observe the beneficiary, which contain information helpful to us in deciding whether the beneficiary is able to manage or direct the management of benefit payments.”

**XXII. CONCLUSION.** Texas courts prefer to preserve as much self-autonomy as possible for the ward in guardianship proceedings so it is useful for attorneys and clinicians to consider particular legal standards for mental capacity relevant to certain transactions, such as the mental capacity to create a will, to make health care decisions or to execute a contract. Because legal standards for mental capacity vary according to the activity contemplated, the ward may retain the capacity to engage in certain transactions but not others.