# The Ethics of Elder Law

Retaining Your Legal Voice

# Elder Law Ethics

- Legal Representation
- Document Preparation
- When There Is No Capacity

# LEGAL REPRESENTATION

# Legal Representation

## Competence

A lawyer ***shall provide competent representation to a client***. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

TN R S CT Rule 8, RPC 1.1

# Legal Representation

## Competence

- Important for an attorney to understand the full scope of representing an elderly client

- In Elder Law, various areas of practice mix

| | | |
|---|---|---|
| Estate Planning | Tax Law | Real Estate |
| Conservatorships | Special Needs | Asset Protection |
| Social Security | Medicaid | Veterans |

# Legal Representation

## Competence

- Scenario
  - Client comes to an attorney to get legal help applying for Veterans Benefits
  - Client meets qualifications
  - Client is at an ALF
  - Client, however, is very likely to need skilled NH care within a year

# Legal Representation

## Competence

- Scenario
  - Spouse comes to your office
  - Client is in the Nursing Home
  - Family is worried about ongoing costs, but do not believe they are able to qualify for Medicaid yet
  - Couple has a home, 1 car, no retirement account, 2 prepaid burial plans, $1 million in term life policies, and $220,000.00 in liquid assets

# Legal Representation

## Communication

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in RPC 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

***(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation***.

TN R S CT Rule 8, RPC 1.4

# Legal Representation

## Communication

- It is important that an attorney always communicate at a level the client can understand
  - Simplified language
  - Use examples
- Never have a client sign or undertake a legal act without the client having a reasonable understanding of the matter
  - Allow plenty of time for client review
  - Allow time for client to make changes and ask questions
- Be sure, however, to not leave out important information just to make it easier to communicate

# Legal Representation

## Communication

- Scenario
  - Client wants to name adult child as agent under POA
  - Adult child has to return home out-of-state that same day
  - Client wants to have Will, DPOA, HCPOA, and LW executed

# Legal Representation

## Communication

- Scenario
  - Client wants to have her Estate Plan revised
  - Client never graduated from high school
  - Client finds it difficult to understand what testamentary, assets, agent, fiduciary, etc mean to her

# Legal Representation

## Confidentiality

(a) A lawyer shall not reveal information relating to the representation of a client unless:

(1) the client gives informed consent;

***(2) the disclosure is impliedly authorized in order to carry out the representation***; or

(3) the disclosure is permitted by paragraph (b) or required by paragraph (c).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent the client or another person from committing a crime, including a crime that is reasonably certain to result in substantial injury to the financial interest or property of another, unless disclosure is prohibited or restricted by RPC 3.3;

(2) to prevent the client from committing a fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services, unless disclosure is prohibited or restricted by RPC 3.3;

(3) to prevent, mitigate, or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a fraud in furtherance of which the client has used the lawyer's services, unless disclosure is prohibited or restricted by RPC 3.3;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(6) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c)…

(d) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of or unauthorized access to, information relating to the representation of a client.

TN R S CT Rule 8, RPC 1.6

# Legal Representation

## Confidentiality

- Client should know without a doubt that they have the ability to exclude family and friends
- If a client chooses to include family or friends in the decision-making process, it does not relieve the attorney's duty of confidentiality
- There are times when confidentiality can be waived
  - Implied by Law
  - Prevent certain crimes and frauds

# Legal Representation

## Confidentiality

- Scenario
  - Client brings adult daughter to meeting with attorney
  - Client has two other adult children
  - Client wants to discuss the distribution of her assets, but daughter does not want to leave mom alone

# Legal Representation

## Confidentiality

- Scenario
  - Client has a complex estate
  - Client has been working with a Financial Planner and CPA for years
  - Client wants to keep much of what he plans to do with his assets private
  - Client also wants his Estate Plan to work well across all areas of concern

# Legal Representation

## Client With Diminished Capacity

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

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

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

TN R S CT Rule 8, RPC 1.14

# Legal Representation

## Client With Diminished Capacity

- Make ALL efforts to never treat clients differently
- Recognize when that effort is no longer tenable
- Navigate a transition to seeking help for your client while maintaining ethical bounds of the attorney/client relationship

# Legal Representation

## Client With Diminished Capacity

- Scenario
  - Family brings client to attorney to have client's home transferred to a Trust
  - Client clearly cannot understand the matter, even in its most simplistic terms
  - There are no POAs in effect for Client

# Legal Representation

## Client With Diminished Capacity

- Scenario
  - Spouse brings Client in for an Estate Planning meeting
  - Children have created an ever-escalating contentious relationship with parents
  - Client has recently received a diagnosis of early onset dementia
  - Spouse and Client both want to either disinherit or greatly limit bequests to their children as listed in a current Will

# Legal Representation

## Client With Diminished Capacity

- Cognitive Tests?
- Pros
  - Can assist in determining client's level of capacity
  - Provides some concrete support to an attorney's refusal to move forward with a legal matter
- Cons
  - Can create an imbalance in treatment between clients
  - Provides support to someone who would question a client's capacity later, despite attorney not finding anything of concern

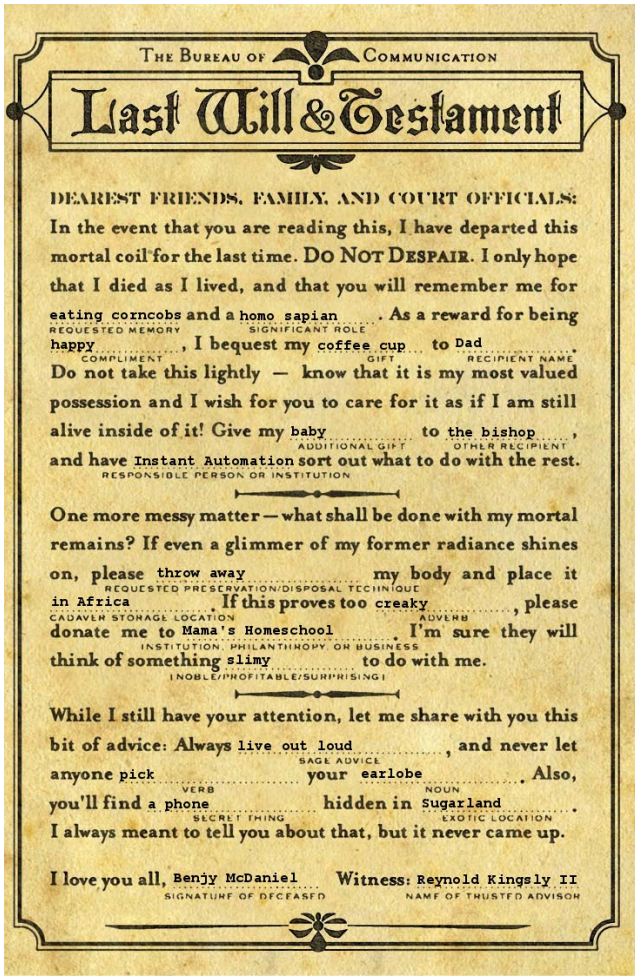
# DOCUMENT PREPARATION

# Document Preparation

- Last Will & Testament
- Real Property Deed
- Durable Power of Attorney & Contracts
- Health Care Power of Attorney & Living Will

# Last Will & Testament

T. C. A. § 32-1-101 et seq



THE BUREAU OF COMMUNICATION

## Last Will & Testament

DEAREST FRIENDS, FAMILY, AND COURT OFFICIALS:
In the event that you are reading this, I have departed this mortal coil for the last time. DO NOT DESPAIR. I only hope that I died as I lived, and that you will remember me for eating corncobs (REQUESTED MEMORY) and a homo sapian (SIGNIFICANT ROLE). As a reward for being happy (COMPLIMENT), I bequest my coffee cup (GIFT) to Dad (RECIPIENT NAME).
Do not take this lightly — know that it is my most valued possession and I wish for you to care for it as if I am still alive inside of it! Give my baby (ADDITIONAL GIFT) to the bishop (OTHER RECIPIENT), and have Instant Automation (RESPONSIBLE PERSON OR INSTITUTION) sort out what to do with the rest.

One more messy matter—what shall be done with my mortal remains? If even a glimmer of my former radiance shines on, please throw away (REQUESTED PRESERVATION/DISPOSAL TECHNIQUE) my body and place it in Africa (CADAVER STORAGE LOCATION). If this proves too creaky (ADVERB), please donate me to Mama's Homeschool (INSTITUTION, PHILANTHROPY, OR BUSINESS). I'm sure they will think of something slimy (INOBLE/PROFITABLE/SURPRISING) to do with me.

While I still have your attention, let me share with you this bit of advice: Always live out loud (SAGE ADVICE), and never let anyone pick (VERB) your earlobe (NOUN). Also, you'll find a phone (SECRET THING) hidden in Sugarland (EXOTIC LOCATION). I always meant to tell you about that, but it never came up.

I love you all, Benjy McDaniel (SIGNATURE OF DECEASED) Witness: Reynold Kingsly II (NAME OF TRUSTED ADVISOR)

# Last Will & Testament

- Names executor, beneficiaries, and guardians
- Specific and Residuary bequests
- Controls what you own alone at death
- Your rules vs state rules
- Subject to probate
- Avoid the law firm of Google, Yahoo, & Bing

# Last Will & Testament

## Attested Will

(a) The execution of a will, other than a holographic or nuncupative will, must ***be by the signature of the testator and of at least two (2) witnesses*** as follows:

(1) The testator shall signify to the attesting witnesses that the instrument is the testator's will and either:

(A) The ***testator sign***;

(B) Acknowledge the testator's signature already made; or

(C) At the testator's direction and in the testator's presence have someone else sign the testator's name; and

(D) In any of the above cases the act must be ***done in the presence of two (2) or more attesting witnesses***.

(2) The attesting witnesses must sign:

(A) In the ***presence of the testator***; and

(B) In the ***presence of each other***.

Tenn. Code Ann. § 32-1-104

# Last Will & Testament

## Holographic Will

No witness to a holographic will is necessary, but the signature and all its ***material provisions must be in the handwriting of the testator*** and the testator's ***handwriting must be proved by two (2) witnesses***.

Tenn. Code Ann. § 32-1-105

# Last Will & Testament

## Nuncupative Will

(a) A nuncupative will may be made only ***by a person in imminent peril of death***, whether from illness or otherwise, and shall be ***valid only if the testator died as a result of the impending peril***, and must be:

(1) Declared to be the testator's will by the testator ***before two (2) disinterested witnesses***;

(2) ***Reduced to writing*** by or under the direction of one (1) of the witnesses ***within thirty (30) days*** after such declaration; and

(3) ***Submitted for probate within six (6) months*** after the death of the testator.

(b) The nuncupative will may dispose of personal property only and to an aggregate ***value not exceeding one thousand dollars ($1,000)***, except that in the case of persons in ***active military***, air or naval service in time of war the aggregate amount ***may be ten thousand dollars ($10,000)***.

(c) A nuncupative will ***neither revokes nor changes an existing written will***.

Tenn. Code Ann. § 32-1-106

# Last Will & Testament

Capacity to Execute a Will

But the law does not require that a man shall make an equal distribution of his property among his heirs and **he is not to be adjudged of unsound mind merely because he makes what may seem to be an unjust or unequal distribution of his estate**. He may for reasons satisfactory to himself disinherit certain of his children if he has the **requisite mental capacity** to ***know the natural objects of his bounty***, to ***comprehend the kind and character of his property***, to ***understand the nature and effect of his act***, and to ***make a disposition of his property according to some plan formed in his mind***.

Farmers Union Bank of Henning v. Johnson, 27 Tenn. App. 342, 350, 181 S.W.2d 369, 372 (1943)

# Last Will & Testament

Capacity to Execute a Will

- ***know the natural objects of his bounty***
  - Who are the family
  - Important to name even family being disinherited
- ***comprehend the kind and character of his property***
  - What all does he own
- ***understand the nature and effect of his act***
  - Knowing that making a Will is an act to dispose of his assets

# Last Will & Testament

Capacity to Execute a Will

***At time will is executed***, testator's mind must be sufficiently sound to enable him to know and understand consequence of his act, and testator is ***not rendered incapable*** of making a will by ***mere physical weakness*** or ***disease***, ***old age***, ***blunt perception***, or ***failing mind and memory***, if his mind is sufficiently sound to enable him to know and understand what he is doing.

Am. Trust & Banking Co. v. Williams, 32 Tenn. App. 592, 225 S.W.2d 79 (1948)

# Last Will & Testament

Capacity to Execute a Will

It is generally held that ***less mental capacity is required for the testator to make a will than to carry on business*** transactions generally, to manage his estate or to ***make a contract or deed***, and a person who is competent to transact ordinary business is generally regarded as competent to make a will

Farmers Union Bank of Henning v. Johnson, 27 Tenn. App. 342, 353, 181 S.W.2d 369, 374 (1943)

# Last Will & Testament

## Challenging A Will

The proponents of the will have the initial burden of proving that the will was duly executed…the burden of proof then shifts to the contestant to prove the will is invalid for some reason.

In re Estate of Eden, 99 S.W.3d 82, 88 (Tenn. Ct. App. 1995)

Real Property
Deed

# Deed

…less mental capacity is required to execute a deed or will than to execute a contract.

Owen v. Summers, 97 S.W.3d 114, 125 (Tenn. Ct. App. 2001)

# Durable Power of Attorney

T. C. A. § 34-6-101 et seq

# Durable Power of Attorney

A durable power of attorney is a power of attorney by which a principal designates another as the principal's attorney in fact in writing and the writing contains the words “This power of attorney shall not be affected by subsequent disability or incapacity of the principal,” or “This power of attorney shall become effective upon the disability or incapacity of the principal,” or similar words showing the intent of the principal that the authority conferred shall be exercisable, notwithstanding the principal's subsequent disability or incapacity.

Tenn. Code Ann. § 34-6-102

# Durable Power of Attorney

- Name an agent to act for your benefit
- Legal and financial matters
- Self-dealing
- Gifting, trusts, benefits, & statutory rights
- Not recognized by federal agencies
- Important, but Conservatorships and Trusts can be more robust

# Durable Power of Attorney

## Capacity to Execute a Power of Attorney

The mental capacity required to execute a power of attorney equates to the mental capacity required to enter into a contract

Dickson v. Long, No. M200800279COAR3CV, 2009 WL 961784, at *3 (Tenn. Ct. App. Apr. 8, 2009)

# Durable Power of Attorney

## Capacity to Execute a Power of Attorney

Competency to contract does not require an ability to act with judgment and discretion[,]" only that "the contracting party ***reasonably knew and understood the nature, extent, character and effect of the transaction***.

Dickson v. Long, No. M200800279COAR3CV, 2009 WL 961784, at *3 (Tenn. Ct. App. Apr. 8, 2009)

# Durable Power of Attorney

## Challenging Capacity

Accordingly, “[t]he party asserting a principal's lack of capacity as grounds for invalidating a power of attorney bears the burden of proof, and ‘[that] proof must be clear, cogent, and convincing.

Dickson v. Long, No. M200800279COAR3CV, 2009 WL 961784, at *3 (Tenn. Ct. App. Apr. 8, 2009)

# Capacity to Marry

Fun Little Tidbit…Just Because

- No license shall be issued when it appears that the applicants or either of them is at the time drunk, insane or an imbecile.

  Tenn. Code Ann. § 36-3-109

- [Enforcement must be limited] such that the statute is applied only to forbid the issuance of marriage licenses to persons who are known by the clerk to lack the requisite mental capacity to enter into contracts and, therefore, to marry. Any broader application of the statute would be subject to constitutional challenge on either equal protection or due process grounds.

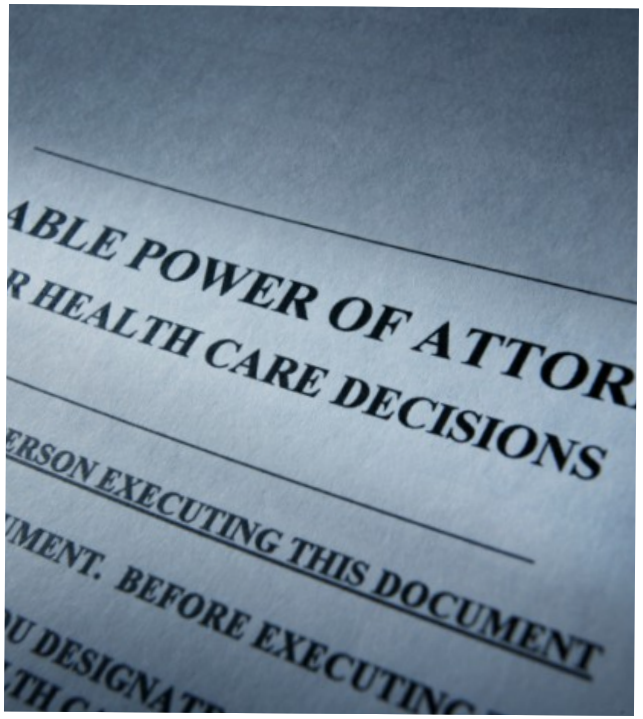
  Tenn. Op. Att'y Gen. No. 98-011 (Jan. 9, 1998)

# Capacity Hierarchy

- Conduct Business
  - Contract
  - Power of Attorney
- Get Married
- Deed
- Will

# Durable Power of Attorney for Health Care

T. C. A. § 34-6-201 et seq



# Health Care Power of Attorney

(a) An attorney in fact under a durable power of attorney for health care may not make health care decisions unless all of the following requirements are satisfied:

(1) The durable power of attorney for health care ***specifically authorizes the attorney in the fact to make health care decisions***;

(2) The durable power of attorney for health care ***contains the date of its execution***; and

(3) The durable power of attorney for health care ***must be in writing*** and ***signed by the principal***. The durable power of attorney for health care is valid if the principal's signature is either ***attested by a notary public*** with no witnesses ***or witnessed by two (2) witnesses without attestation by a notary public***. A witness is a competent adult, who is not the agent, and at least one (1) of whom is not related to the principal by blood, marriage, or adoption and would not be entitled to any portion of the estate of the principal upon the death of the principal under any will or codicil made by the principal existing at the time of execution of the durable power of attorney for health care or by operation of law then existing. The durable power of attorney for health care shall contain an attestation clause that attests to the witnesses' compliance with the requirements of this subdivision (a)(3). It is the intent of the general assembly that this subdivision (a)(3) have retroactive application.

Tenn. Code Ann. § 34-6-203

# Health Care Power of Attorney

- Can be same or different agent as DPOA
- Medical decisions
- Statutorily created
- Post-mortem decisions
- HIPPA and Doctor-Patient Privilege issues
- Often a springing power

# Living Will

T. C. A. § 32-11-103 et seq

# Living Will

- (a) ***Any competent adult person may execute a declaration directing the withholding or withdrawal of medical care to the person, to become effective on loss of competency***. The declaration ***must be in writing*** and ***signed by the principal***. The declaration is valid if the principal's signature is either ***attested by a notary*** public with no witnesses **or** ***witnessed by two (2) witnesses without attestation by a notary public***. A witness is a competent adult, who is not the agent, and at least one (1) of whom is not related to the principal by blood, marriage, or adoption and would not be entitled to any portion of the estate of the principal upon the death of the principal under any will or codicil made by the principal existing at the time of execution of the declaration or by operation of law then existing. The declaration shall contain an attestation clause that attests to the witnesses' compliance with the requirements of this subsection (a). The declaration shall be substantially in the form established in § 32-11-105. It is the intent of the general assembly that this subsection (a) have retroactive application.
- (b) It is the responsibility of the declarant or someone acting on the declarant's behalf to deliver a copy of the living will or declaration to the attending physician and/or other concerned health care provider. An attending physician who is so notified shall make the declaration, or a copy of it, part of the declarant's medical record.

Tenn. Code Ann. § 32-11-104

# Living Will

- Your written end-of-life decisions
- Withholding of care
- Artificial nutrition
- Organ donation
- DNRs, experimental drugs/treatment, etc
- Safety net
- Personal care plans

# WHEN THERE IS NO CAPACITY

# When There Is No Capacity

Where to Start?

- First look for an Agent under a POA
  - Does one exist?
  - Is the Agent available and competent?
  - Does the POA permit needed actions
- If there is a usable POA and competent Agent
  - Then proceed where you can to further the legal wishes and needs of the client

# When There Is No Capacity

What if a POA is not an option?

- Conservatorship
  - Differs in TN from Guardianship based on age of Ward
  - Must be established by a Court
  - Capacity is a LEGAL, not medical, determination
  - Removal of rights of the Ward (different from POA)

# When There Is No Capacity

What if a POA is not an option?

- Conservatorship
  - Petition must be filed
  - Medical Reports & Affidavit required as evidence
  - GAL appointed to investigate proposed Ward's need of a Conservatorship and the fitness of all proposed Conservators
  - Hearing to determine whether evidence is sufficient to support making Respondent a Ward of the court

# When There Is No Capacity

What if a POA is not an option?

- Role of a Conservator
  - Can be bifurcated  (Estate, Person, or Both)
  - Role defined by Court Order
    - Specifics required to transfer rights away from Ward to Conservator
    - Should be uniquely crafted to meet individual Ward's needs
  - Letters of Conservatorship required

# Why Elder Law?

- Multi-disciplined practice and issue spotting
    - Estate Planning, Government Benefits, Taxes, Real Estate, Contracts, Business Formation, Special Needs, Conservatorships and Guardianships, Probate, Estate Administration

- Planning is always less expensive than fixing mistakes

“It's paradoxical that the idea of living a long life appeals to everyone, but the idea of getting old doesn't appeal to anyone."

–Andy Rooney

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# Questions?

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