



Probate Trust & Estate Track

To Be or Not to Be: Capacity Issues in Estate Planning, with Cameos by Guardianships and Conservatorships

July 10-12, 2023

8:15 AM - 12:30 PM



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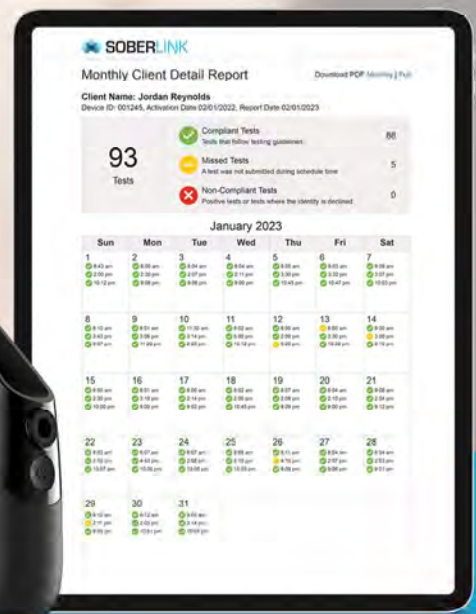
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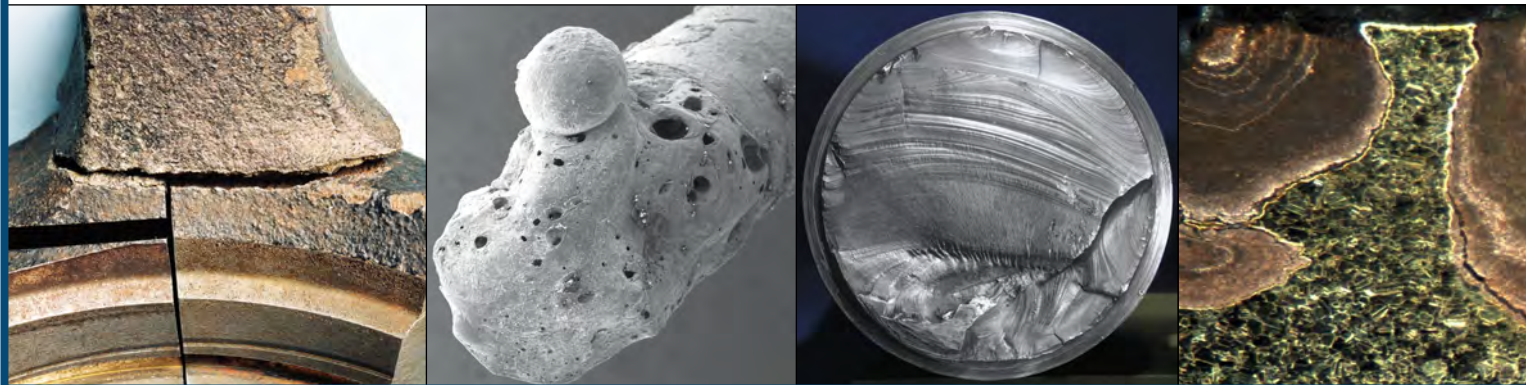
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2023 CLE by the Sea: Probate & Estate Track
July 10-12, 2023

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**2023 CLE BY THE SEA
PROBATE & TRUST TRACK**

Monday, July 10

- 8:15 am to 9:15 am **Testamentary Capacity Standards**
Judge Jay Polk, *Maricopa County Superior Court*
- 9:15 am to 10:15 am **Guardianships and Conservatorships Overview**
Judge Jay Polk, *Maricopa County Superior Court*
- 10:15 am to 10:30 am **Break**
- 10:30 am to 12:30 pm **Medical/Neuro Evaluations in Estate Planning + G&C**
Dr. Kevin O'Brien, *Arizona Neuropsychology, P.C.*

Tuesday, July 11

- 8:15 am to 10:15 am **Representing Clients with Declining or Diminished Capacity**
Judge Jay Polk, *Maricopa County Superior Court*
Teresa Lancaster, *Bogutz & Gordon PC*
TJ Ryan, *Frazier Ryan Goldberg & Arnold LLP*
- 10:15 am to 10:30 am **Break**
- 10:30 am to 11:30 am **Dementia + Alzheimer's: Understanding Diagnoses and Research Updates**
Lena Huang, *Alzheimer's Association*
- 11:30 am to 12:30 pm **Tales from the Courtyard: Review and Learn from AZ Precedent Involving Capacity and Undue Influence**
Judge Jay Polk, *Maricopa County Superior Court*
Teresa Lancaster, *Bogutz & Gordon PC*
TJ Ryan, *Frazier Ryan Goldberg & Arnold LLP*

Wednesday, July 12

- 8:15 am to 9:45 am **Getting Paid Under AZ Fee Rules**
Judge Jay Polk, *Maricopa County Superior Court*
Denice Shepherd, *Law Office of Denice R Shepherd PC*
- 9:45 am to 10:45 pm **Special Needs Planning Overview**
Afsanieh Rassti, *Frazier Ryan Goldberg and Arnold LLC*
- 10:45 am to 11:00 am **Break**
- 11:00 am to 1230 pm **Mental Health + Addiction: Suggested Estate Planning Provisions and Fiduciary Considerations**
Elizabeth Noble Rollings Friman, *Fleming & Curti PLC*

2023 CLE by the Sea: Probate & Estate Track

July 10-12, 2023

Faculty Biographies

SHANNON M. DERKSEN is a shareholder with the Tucson, Arizona law firm of Duffield, Adamson & Helenbolt, P.C. She practices primarily in the areas of estate planning, estate and trust administration, related litigation, and guardianships/conservatorships. She received her Juris Doctor, magna cum laude, from Tulane University Law School in New Orleans, Louisiana. Prior to her move to Arizona, Ms. Derksen practiced law in Louisiana and focused on litigation matters there (La. Bar license currently inactive). Shannon M. Derksen also serves on the Executive Council of the Arizona State Bar Probate and Trust Section and is a member of the Pima County Bar Association, the Southern Arizona Estate Planning Council, and the Planned Giving Roundtable of Southern Arizona.

ELIZABETH N. FRIMAN is a Principal of Fleming & Curti, PLC, an elder law and fiduciary practice located in Tucson, Arizona. She counsels her clients on estate planning, guardianship/conservatorship and estate administration matters. Elizabeth is a licensed fiduciary and frequent serves as a fiduciary for individuals and families in Arizona and throughout the country. She enjoys working collaboratively and embraces unusual cases. A recipient of the Tucson Hispanic Chamber of Commerce “40 Under 40” award, Elizabeth is active in community and professional organizations and enjoys public speaking. Elizabeth is a member of the Special Needs Alliance and the Arizona State Bar Probate & Trust Executive Council. In addition, Elizabeth serves on the Board of Trustees for the TMC Hospital, the Primavera Foundation and Jewish Philanthropies of Southern Arizona. She earned her law degree from the University of Arizona after earning her bachelor’s degree from Connecticut College, where she graduated cum laude. Fleming & Curti is a dog-friendly office, which means that Elizabeth’s goldendoodle, Duncan, often joins her at work. During her free time, Elizabeth enjoys gardening, grilling, hiking, and paddle boarding with her husband, Doug.

LENA HUANG is a Community Engagement Manager at the San Diego and Imperial Chapter of the Alzheimer's Association, where she works to spread awareness and educate communities about Alzheimer's disease and other forms of dementia. Lena is a San Diego native and holds a Master's Degree in Nonprofit Leadership and Management from the University of San Diego.

TERESA D. LANCASTER started her life in Fargo, North Dakota where she graduated high school before moving to Arizona for college (and warmer weather). After graduating from the university of Arizona in 2005 and from the John Marshall Law School in Chicago in 2008, Teresa became member of the Arizona State Bar. She started her career at Bogutz & Gordon, P.C. in 2008 and became a Shareholder in 2015. She has focused her career in the area of Probate and Trust, becoming a certified specialist by the Arizona State Bar in 2015. During her career she has serve as president of the Arizona chapter of the National Academy of Elder Law Attorneys, currently serves on the Arizona Fiduciary Board through the Arizona

Supreme Court and made the Best Lawyers list for 2023. In her free time she enjoys her family, including her husband and two daughters. Together they hike, ski, and generally enjoy being together.

KEVIN O'BRIEN is a licensed psychologist in Arizona and one of the founding members of Arizona Neuropsychology, P.C. He is a board-certified, clinical neuropsychologist specializing in the neurocognitive and emotional assessment of clients with brain injury, neurological disorders, dementia, neurovascular disease, and psychological and medical conditions that may affect brain function. He provides evaluations for clients in clinical settings, as well as for those involved in the medical legal system. Dr. O'Brien received his doctorate in clinical neuropsychology from the University of Victoria in British Columbia. He completed a post-doctoral fellowship in neuropsychological assessment and rehabilitation at the Barrow Neurological Institute and St. Joseph's Hospital and Medical Center, and later worked in the outpatient brain-injury rehabilitation and inpatient neurorehabilitation programs. Dr. O'Brien has been in private practice since 2000 under the auspices of Arizona Neuropsychology, P.C.

HON JAY M. POLK is the Presiding Judge of the Probate and Mental Health Department of the Superior Court of Arizona for Maricopa County, which since 2012 has experienced the greatest caseload growth of all the departments of that court. He served as the Associate Presiding Judge of that department from April 10, 2017, through June 26, 2020. From November 21, 2011, to April 7, 2017, Judge Polk was assigned to the Family Law Department and served as the Associate Presiding Judge of the Family Law Department for the Northeast Regional Court Center for approximately two of those years. He is the recipient of the Maricopa County Bar Association's 2022 Judicial Officer of the Year Award. For nearly 20 years prior to his appointment to the bench, Judge Polk limited his practice of law to contested and uncontested matters relating to guardianships, conservatorships, decedents' estates, the abuse or exploitation of vulnerable adults, and estate planning for modest estates. In addition, he served as a mediator and arbitrator, as a guardian ad litem for minor children and incapacitated adults, and as judge pro tempore. Between 1999 and 2011, Judge Polk was an Arizona Licensed Fiduciary and, as such, served as a personal representative or special administrator for several estates, as well as the special conservator for an attorney. Before starting private practice, Judge Polk served as a judicial law clerk for the Honorable E. G. Noyes, Jr., of the Arizona Court of Appeals (1993-94) and a law-trained bailiff for the Honorable Robert D. Myers of the Superior Court of Arizona for Maricopa County (1992-93). Throughout his career, Judge Polk has helped draft numerous legislative bills in areas including probate, mental health, criminal, and family law. In addition, he has been involved in drafting court rules and rule amendments in the Rules of the Arizona Supreme Court, the Arizona Rules of Civil Procedure, the Arizona Family Law Rules, the Arizona Rules of Probate Procedure and rules of procedure for court-ordered mental health evaluation and treatment cases and rules of procedure for sexually violent persons cases. He also has been a frequent speaker on probate, mental health, and family law matters. He is an editor of the 2022 and 2014 editions of the Arizona Probate Code Practice Manual, was an associate editor of the 2000 edition of that publication, and has been a regular contributor to the Judicial College of Arizona's Probate Benchbook. Judge Polk currently is serving his second term on the Judicial

Executive Committee of the Judicial Branch of Arizona in Maricopa County. In addition, he is a member of the Strategic Planning Committee of the Judicial Branch of Arizona in Maricopa County. During his tenure on the family law bench, Judge Polk served as a co-chair of the Family Law Department's Initiatives Committee and a member of that department's Behavioral Health Committee. Between 2014 and 2015, Judge Polk assisted in creating the Superior Court of Arizona for Maricopa County's intelligent probate forms, and he presently is in the process of updating all of that court's Self-Service Center probate forms. Judge Polk also has served on several Arizona Supreme Court committees, including the Steering Committee on Arizona Case Processing Standards (2018 – 2019), the Probate Rules Committee (2006 – 2008), the Committee on Improving Judicial Oversight and Processing of Probate Court Matters (2010 – 2011), the Task Force on the Arizona Rules of Probate Procedure (2017 – 2019), and the Electronic Signatures Workgroup (2022 – present). While serving on those committees, he often chaired subcommittees or workgroups. From July 2018 to June 2019, Judge Polk served as President of the Arizona Judges Association, and he was a member of the Executive Board from June 2014 until June 2020. Since November 2016, Judge Polk has been a member of the Arizona Public Safety Personnel Retirement System Advisory Committee, and, since 2011, he has been a member of the Fiduciary Board, which regulates Arizona professional fiduciaries. Judge Polk has served as the Judicial Liaison to the Estate Planning, Probate, and Trust Law Section of the Maricopa County Bar Association since May 2017, and he has served as the Judicial Liaison to the Elder Law, Mental Health, and Special Needs Planning Section of the State of Bar of Arizona since September 2018. Since June 2019, he also has been the Judicial Liaison to the Probate and Trust Law Section of the State Bar of Arizona. While he was private practice, Judge Polk was actively involved in the Arizona Chapter of the National Academy of Elder Law Attorneys and the Probate and Trust Law and the Mental Health and Elder Law Sections of the State Bar of Arizona, and he served on countless committees of those organizations. Judge Polk received his juris doctorate degree from Arizona State University in 1992. He received his bachelor's degree in political science, with honors, from the University of Chicago in 1989. Since 2016, Judge Polk has participated in the Latina Mentoring Project, which provides mentoring relationships for Latina undergraduate and law students. Since June 2021, Judge Polk and his wife have been members of the West Point Parents Club of Arizona, which is a non-profit organization that is dedicated to promoting the well-being and continued success of the United States Service Academies. From 2004 to 2006, Judge Polk served as President of The Council For Jews With Special Needs (now known as Gesher Disability Resources). In addition, he was a member of that organization's Board of Directors from 1998 through 2007. Since 2006, Judge Polk has been a manager of Council Properties, L.L.C., a wholly-owned subsidiary of Gesher Disability Resources that owns two other limited liability companies that manage group homes for persons with disabilities. When he was in private practice, Judge Polk volunteered for the Maricopa County Volunteer Lawyers Program. For two decades, he and his wife co-chaired the University of Chicago Alumni Club of Phoenix and the University of Chicago Alumni Schools committee.

AFSANIEH RASSTI is an estate planning and probate attorney at Frazer Ryan Goldberg & Arnold, LLP. Afsanieh primarily practices in the area of estate planning, probate and trust administration and estate controversy matters. Afsanieh is originally from Dallas, Texas but

has lived most of her life in Arizona. Afsanieh obtained her undergraduate degree, masters degree and law degree from Arizona State University. She is named as The Best Lawyers in America® “Ones to Watch” for Trusts and Estates from 2021-present and sits on the Maricopa County Bar Association’s Estate Planning Probate and Trust executive board. She also serves as the current Vice President to the National Iranian American Bar Association (IABA). In her spare time, Afsanieh enjoys spending time with her family and friends, football, traveling the world, and experiencing new cultures and food.

T.J. RYAN is a senior partner with the law firm of Frazer Ryan Goldberg & Arnold, LLP, in Phoenix. T.J.'s practice encompasses virtually all aspects of estates and trusts, including estate and business planning, probate and trust administration, and litigating contested issues related to estates and trusts. An AV Preeminent rated attorney by Martindale-Hubbell, Best Lawyers in America selected T.J. as "Lawyer of the Year" in Trust Litigation for 2015. In 2017, the American College of Trust and Estate Counsel (ACTEC) named T.J. as a Fellow of the college. T.J. received his law degree from the James E. Rogers College of Law at the University of Arizona in 2002, after graduating with a BBA from Baylor University in Waco, Texas. Along with colleagues Darren Case and Brent Nelson, T.J. is the co-author of the Arizona Estate Planning and Probate Handbook, published by Thompson Reuters as a part of the Arizona Practice Series. T.J. has assisted with the editing of the Arizona Probate Practice Manual and the Arizona Attorneys’ Fees Manual (both publications of the Arizona State Bar) and served on the Task Force which revised the Arizona Rules of Probate Procedure in 2017-2019. T.J. served as the President of the Maricopa County Bar Association in 2015. T.J. is a native of Phoenix, Arizona who enjoys golf, Crossfit™, baseball, and spending time with his wife and two sons.

DENICE SHEPHERD has been practicing and litigating in the areas of personal injury, general civil litigation, probates, guardianships, conservatorships and elder law since 1984, Shepherd has served on the Supreme Court Probate Rules Committee twice. In 2012, Shepherd received the 2012 Eleanor ter Horst Probate award for contributions to probate law. In 2016, she received the William H. Morris Legal Services Foundation Award for pro bono work. Shepherd received the 2011 Arizona Supreme Court Pro Bono Attorney Award. In 2016, she joined the Board of Directors for Step-Up to Justice, a pro-bono organization providing legal services to the poor. She was named Treasurer of the Board and still holds that position. Shepherd has been a member of the National Academy of Elder Law Attorneys (NAELA), and has served on both NAELA’s state governing board and on the board of the Arizona Fiduciaries Association (AFA). She has been named AFA’s member of the year for 2011 and 2012 and won the National Guardianship Association’s Affiliate Award in 2010. Shepherd has served on the panel for court-appointed attorneys in Pima County in guardianship/conservatorship actions for most of her legal career. She has been appointed by the court to represent minors in domestic relations cases and has served as a guardian ad litem. She has also served on the court appointment panels in criminal cases for the United States District Court, Pima County Superior Court appellate and trial panels, and the City of Tucson Magistrate’s Court. She is admitted to practice before the United States Supreme Court. Shepherd is a licensed fiduciary and has provided fiduciary services since 1996. She has represented fiduciaries for most of her legal career. She has served on the executive board for

the Mental Health and Elder Law section of the State Bar of Arizona and has been a speaker for that section on numerous occasions. She frequently presents training and continuing education courses for fiduciaries through the Arizona Fiduciaries Association. Shepherd served as a Judge Pro Tempore for various lower courts for 16 years. In 2021, she was reappointed as a Judge Pro Tempore in Pima County Superior Court. She has also served as a disciplinary hearing officer through the Arizona's Supreme Court disciplinary section for eight years, hearing cases regarding complaints against attorneys, document preparers, fiduciaries and court reporters. She has served on the Reid Park Zoological Society Board of Directors since 2005. In 2007 and 2008 she was President of the Board and currently holds the position of Board Emeritus. She is a member of the Board's finance committee, chair of their legal committee, and frequently serves as legal counsel to the Board. Shepherd is also a Board Member and Treasurer of Step Up to Justice, a non-profit organization which provides legal services to persons whose income is less than 125% of the Federal Poverty Levels. Besides her work on the Board, Shepherd conducts legal clinics, takes cases for direct representation and provides continuing education to other lawyers volunteering for the program.

SARAH R. SINGER is an attorney at Gadarian & Cacy, PLLC. She is admitted to the State Bar of Arizona and the State Bar of New York. Prior to practicing law, Sarah worked on Wall Street doing investment banking and proprietary trading. During law school, she was a judicial intern for the U.S. Court of Federal Claims (Hon. Margaret Sweeney) and the U.S. District Court, Eastern District of Pennsylvania (Hon. Michael Baylson). After law school, she worked with high-net-worth clients on Gift and Estate Tax issues for a boutique accounting firm and a public accounting firm. Sarah graduated from University High School in Tucson, Arizona. She graduated summa cum laude from Tulane University, in New Orleans, Louisiana, with a double major in Finance and Accounting. Sarah received her J.D. from the Benjamin N. Cardozo School of Law in New York, New York. In addition to her law practice, Sarah serves on the board of the Tucson Jewish Community Center and is involved with many other organizations in Tucson. She enjoys spending time with her family, traveling, and running.



Probate Trust & Estate Track

Day One

July 10, 2023

8:15 AM - 12:30 PM

TESTAMENTARY CAPACITY & UNDUE INFLUENCE

by **Honorable Jay M. Polk**¹
State Bar of Arizona, CLE by the Sea
July 10, 2023

I. Presumptions, Burdens of Proof, and Standards of Proof

“The policy of the law favors testacy, and this policy would be defeated if wills were lightly set aside.” *In re Walters’ Estate*, 77 Ariz. 122, 125, 267 P.2d 896, 898 (1954) (citation omitted). Consequently, a person contesting a will generally bears the burden of proving by a preponderance of the evidence that the will is invalid. *Id.*; *see also* A.R.S. 14-2712(B) and (D); *but see* A.R.S. § 14-2712(E) (setting forth circumstances under which a will is presumed to be the product of undue influence).

When it comes to testamentary capacity, the testator is presumed to have capacity and a person contesting the will must provide sufficient evidence to rebut that presumption. *See Walters’ Estate* 77 Ariz. at 125, 267 P.2d at 898; *see also* A.R.S. § 14-2712(B) (“It is a rebuttable presumption that a person who executes a governing instrument is presumed to have capacity to execute the governing instrument . . .”).

Likewise, a testator usually is presumed to have executed the will free from undue influence and duress. A.R.S. § 14-2712(B). However, a will is presumed to be the product of undue influence if either of the following is true:

1. A person who had a confidential relationship to the testator was active in procuring the will’s creation and execution and that person is a principal beneficiary of the will, or
2. The person who prepared the will, or that person’s spouse or parents, or the issue of the preparer’s spouse or parents, is a principal beneficiary of the will.²

A.R.S. § 14-2712(E). A beneficiary of the will may overcome the presumption of undue influence by a preponderance of the evidence.

II. Testamentary Capacity

A. Generally; the Three-Pronged Test

Arizona Revised Statutes (“A.R.S.”) section 14-2501 states that any person who is 18 years of age or older and who “is of sound mind” may make a will. However, Title 14, A.R.S., does not provide a definition of “sound mind” (nor does it provide a definition of “unsound mind”). Consequently, one must look to case law to determine what “sound mind” means.

¹Judge of the Superior Court of Arizona for Maricopa County.

²The presumption of undue influence does not apply if the will was prepared for a person who is a grandparent of the preparer, the issue of a grandparent of the preparer, or the respective spouses or former spouses of persons related to the preparer. A.R.S. § 14-2712(E)(2).

Even prior to Arizona's adoption of the Uniform Probate Code (the "UPC") in 1974, Arizona courts discussed testamentary capacity in terms of whether the testator was of "sound mind." See, e.g., *In re Cook's Estate*, 63 Ariz. 78, 88, 159 P.2d 797, 801 (1945) (commenting that "not a single witness took the witness stand and testified that the testator was of unsound mind or lacked testamentary capacity"); *In re Greene's Estate*, 40 Ariz. 274, 278, 11 P.2d 947, 948 (1932).

In *In re Walters' Estate*, 77 Ariz. 122, 267 P.2d 896 (1954), a pre-UPC case, the Arizona Supreme Court set forth a three-pronged test for determining whether a testator has testamentary capacity. Under the *Walters' Estate* test, a testator has testamentary capacity if the testator has all the following:

1. The ability to know the nature and extend of the testator's property;
2. The ability to know the natural objects of the testator's bounty; and
3. The ability to understand the nature of the testamentary act.

77 Ariz. at 129, 267 P.2d at 901. This test has survived Arizona's adoption of the UPC. See *In re Estate of Killen*, 188 Ariz. 562, 565, 937 P.2d 1368, 1371 (App. 1996). However, in *Killen's Estate*, the Arizona Court of Appeals rephrased the second element as "the ability to know [the testator's] relation to the persons who are the natural objects of his bounty and whose interests are affected by the terms of the instrument." *Id.*

When applying the test, one must look at the testator's capacity "as it existed at the time the will was executed." *Id.* In fact, in *Walters' Estate*, the Arizona Supreme Court declared that the contestant of a will "must produce evidence that one or more of the essential elements of testamentary capacity was missing *at the instant of execution* of the will." 77 Ariz. at 129, 267 P.2d at 901 (emphasis added). However, evidence of the testator's mental condition before or after the will's execution may be relevant insofar as it tends to show the testator's mental condition at the time the testator executed the will. *Greene's Estate*, 40 Ariz. at 278, 11 P.2d at 948.

Whether a testator had testamentary capacity is determined by the particular facts and circumstances of the individual case. In the words of one court, "There is no rule by which it may be determined, with precision, where (testamentary) capacity ends and incapacity begins, but this question should be determined from all the facts and circumstances of each particular case." *Slater v. Phipps*, 193 Okl. 267, 143 P.2d 133 (1943) (quoted in *In re Westfall's Estate*, 74 Ariz. 181, 184, 245 P.2d 951, 953 (1952)).

B. Impact of Old Age; Intellect; Guardianship

The testator's age, by itself, is not sufficient to establish lack of testamentary capacity. On more than one occasion, Arizona's appellate courts have held that a testator's generally deteriorating mental condition or old age accompanied by mental slowness, poor memory, childishness, eccentricities, or physical infirmities does not show lack of testamentary capacity. See, e.g., *In re Estate of Thorpe*, 152 Ariz. 341, 348, 732 P.2d 571, 578 (App. 1986); *Evans v. Liston*, 116 Ariz. 218, 219-220, 568 P.2d 1116, 1117-18 (1977); *In re Estate of Teel*, 14 Ariz. App. 371, 373, 483 P.2d 603, 605 (1971) (citing with approval Atkinson on Wills, p. 232).

In *Thorpe's Estate*, the testatrix was 89 years old when she executed her will. 152 Ariz. at 342; 732 P.2d at 572. The appellate court concluded that although the record contained

“substantial evidence of [the testatrix’s] medical infirmities, there was no evidence that [she] was without capacity to execute her will.” *Id.* at 349, 732 P.2d at 579.

In *In re Estate of Vermeersch*, 109 Ariz. 125, 506 P.2d 256 (1973), the testatrix was 94 years old when she executed her will, and she had “very poor eyesight and was deaf in one year and partially deaf in the other.” 109 Ariz. at 127, 506 P.2d at 258. Moreover, due to previously broken hips, the testatrix used a walker to move around. *Id.* She also was forgetful, did not remember the names of her great grandchildren, had a short attention span, spilled food when she ate, and went to the bathroom frequently. *Id.* Nevertheless, the Arizona Supreme Court concluded that the contestant failed to meet her burden of proving that the testatrix lacked one of the three elements of testamentary capacity. *Id.* at 128, 406 P.2d at 259.

Similarly, a testator’s less than average intellect or cognitive functioning, by itself, does not prove lack of testamentary capacity. *See Teel’s Estate*, 14 Ariz. App. at 373, 483 P.2d at 605. In *Teel’s Estate*, the trial court found that the testator, who was approximately 54 years old when he executed his will, was “mentally retarded” and functioned at an age level of ten to twelve years old. *Id.* at 372, 483 P.2d at 604. The appellate court held that such finding was not necessarily inconsistent with the trial court’s ultimate finding that the testator had testamentary capacity because the trial court also found that the testator understood the natural objects of his bounty, the kind and character of his property, and the nature of the testamentary act. *Id.* at 373, 483 P.2d at 605.

The appointment of a guardian for an adult also does not necessarily prove that the adult lacks testamentary capacity. *See, e.g., In re Estate of Thomas*, 105 Ariz. 186, 461 P.2d 484 (1969); *Thorpe’s Estate*, 14 Ariz. App. at 372, 483 P.2d at 605. In *Thomas’ Estate*, a guardian was appointed for the testator approximately seven months after the testator executed a will in which he left his entire estate to Grand Canyon College. 105 Ariz. at 187, 461 P.2d at 485. Less than a year after the guardian was appointed, the testator executed a document in which he revoked the will. *Id.* After the testator died, Grand Canyon College, asserting the revocation was invalid, attempted to probate the will. *Id.* Ultimately, the trial court found the will’s revocation to be valid. *Id.* at 188, 461 P.2d at 486. On appeal, Grand Canyon College argued that “the fact the decedent was adjudged incompetent under the guardianship statute prior to his execution of the purported revocation overcame the presumption of testamentary capacity.” *Id.* at 189, 461 P.2d at 487. Rejecting this argument, the Arizona Supreme Court declared the following: “An adjudication of incompetency under the guardianship statute does not of necessity indicate a lack of mental capacity to execute a will. A person under a guardianship may still perform a valid testamentary act.” *Id.* The supreme court then concluded that the record contained “an abundance of evidence” to support the trial court’s findings that the testator knew and understood the nature and extent of his property, knew the objects of his bounty, and knew and understood the nature of the testamentary act.” *Id.*

C. Mental Illness and Insane Delusions

Because testamentary capacity is determined at the time of the will’s execution, the existence of mental illness or disability or an insane delusion, by itself, is not sufficient to prove lack of testamentary capacity. As one court has stated, “Testamentary capacity cannot be destroyed by showing a few isolated acts, foibles, idiosyncrasies, moral or mental irregularities or

departures from the normal unless they directly bear upon and have influenced the testamentary act.” *In re Wright’s Estate*, 7 Cal.2d 348, 60, P.2d 434, 438 (1936) (quoted in *In re Stitt’s Estate*, 93 Ariz. 302, 306, 380 P.2d at 601, 603 (1963)).

A finding that the testator is senile, without more, is insufficient to support a finding that the testator lacks testamentary capacity. See *Evans v. Liston*, 116 Ariz. 218, 219-20, 568 P.2d 1116, 1117-18 (App. 1977). In the words of the *Evans* court, “Mental derangement sufficient to invalidate a will must be insanity to so broad as to produce general mental incompetence or insanity which causes hallucinations or delusions. The will must be a product of such delusion or hallucination and the terms of the will must be also a product of such delusion or hallucination and must be actually influenced thereby.” *Id.* at 220, 568 P.2d at 1118. Phrased a bit differently, “if at the time of execution of a will the testator knew the natural objects of her bounty but suffered from insane delusions that affected her perception of those persons and the terms of the will, the testator did not have the requisite testamentary capacity and the will is invalid.” *In re Estate of Killen*, 188 Ariz. 562, 568, 937 P.2d 1368, 1374 (App. 1996).

In *Killen’s Estate*, the Arizona Court of Appeals observed that Arizona law recognizes that mental illness can render a person incapable of making a valid will if the mental illness³ either (a) is so broad as to produce general mental incompetence or (b) is a form of mental illness that causes hallucinations or delusions. 188 Ariz. at 565-66, 937 P.2d at 1371-72 (citing *In re Estate of Stitt*, 93 Ariz. 302, 305, 380 P.2d 601, 603 (1963); *Evans*, 116 Ariz. at 220, 568 P.2d at 1118). However, with respect to the latter category, “the hallucinations or delusions must have influenced the creation and terms of the will such that the testator devised his property in a way that he would not have done except for the delusions.” *Killen’s Estate*, 188 Ariz. at 566, 937 P.2d at 1372; see also *Stitt’s Estate*, 93 Ariz. at 305, 380 P.2d at 603 (stating that to vitiate a will, a mental delusion must have “directly affected the dispositive provisions of the will at the time of its making”).

Going back to at least 1932, Arizona law has recognized that a hallucination or delusion can serve as the basis to invalidate a will if the will was the product of the hallucination or delusion. See *In re Estate of Green*, 40 Ariz. 274, 279, 11 P.2d 947, 949 (1932). However, *Killen’s Estate*, decided in 1996, was the first reported Arizona appellate court case that upheld a finding that the testator’s insane delusions at the time of the will’s execution rendered the will invalid. See *Killen’s Estate*, 188 Ariz. at 566, 937 P.2d at 1372. In the more than 25 years since *Killen’s Estate* was decided, no other Arizona published decision has dealt with the impact of insane delusions or hallucinations on testamentary capacity.

In *Killen’s Estate*, for many years before her death, the testatrix wrongly believed that her husband was trying to kill her, was putting poison in her food, and was in the mob. 188 Ariz. at 563, 937 P.2d at 1369. She then started having delusions about two of her nephews and her niece. *Id.* at 564, 937 P.2d at 1370. Specifically, the testatrix believed they lived in her attic, or caused others to live in the attic, and sprinkled chemicals and parasites down on her; put her to sleep and then pulled a tooth out and cut her arms and hands with glass; were in the Mafia; and were trying to kill her so they could take her property. *Id.* Eight days before executing a will in which she left only one dollar to each of the two nephews and the niece, the testatrix was evaluated by a

³Like other reported appellate court cases, *Killen’s Estate* often uses the term *insanity* instead of the phrase *mental illness*.

psychiatrist who diagnosed her as having delusional paranoid disorder. *Id.* Less than a month after executing her will, the testatrix was admitted to a psychiatric unit and examined by a psychiatrist who concluded she was having persecutory delusions, had poor insight and impaired judgment, and was incapacitated by mental illness. *Id.* After the testatrix died, the two nephews and the niece contested the will. *Id.* At trial, two psychiatrists, both of whom had examined the testatrix, testified that a delusion is a permanent and fixed belief that cannot be disabused by rational argument. *Id.* Both also testified regarding the impact the delusions had on the testatrix's ability to make a valid will. *Id.* One psychiatrist testified that although the testatrix knew who the natural objects of her bounty were, her mental illness caused her to have a misperception of them. *Id.* The trial court found that, as a result of a delusional paranoid disorder that influenced the creation and terms of the will she signed, the testatrix lacked testamentary capacity. *Id.* at 565, 937 P.2d at 1371.

In affirming the trial court, the Arizona Court of Appeals first held that “even if the testator has apparent testamentary capacity under the three-prong test, the will is nonetheless invalid if an insane delusion affects the terms of the will related to one of the requirements.” *Id.* at 566, 937 P.2d at 1372. After examining cases from other jurisdictions, our court of appeals explained as follows:

Accordingly, if the testator is eccentric or mean-spirited and dislikes family members for no good reason, but otherwise meets the three-prong capacity test, leaving the family members out of the will would not be due to lack of testamentary capacity. *See Stitt's*. However, when mental illness that produces insane delusions renders the testator unable to evaluate or understand his relationships with the natural objects of his bounty and this inability affects the terms of his will, the testator lacks the mental capacity to make a valid will.

Id. Examining the record, the appellate court found that the evidence supported that the conclusion that, when she signed her will, the testatrix was operating under insane delusions about her two nephews and her niece and those delusions controlled her perceptions of them and her treatment of them in her will. *Id.* at 567, 937 P.2d at 1373. As a result, the court of appeals affirmed the trial court's order declaring the will to be invalid. *Id.* at 568, 937 P.2d at 1374.

D. Final Note Regarding the Three-Prongs

Despite the appellate court cases repeatedly setting forth a three-pronged test for testamentary capacity, none of the cases discusses in detail the “nature and extent of the testator's property” element or the “ability to understand the nature of the testamentary act” element. Instead, the published decisions give the most attention to the “natural objects of his bounty” element.

In *In re Weil's Estate*, 21 Ariz. App. 278, 518 P.2d 995 (1974), the Arizona Court of Appeals elaborated on the “natural objects of his bounty” element as follows:

The rationale behind the requirement that the testator recollect who are ‘the natural objects of his bounty’ appears to be founded upon the reasoning that one of the purposes of making a will is to change the prospective inheritance of heirs so

that they would not take the property of the testator in the manner provided for by intestate succession; and that while prospective heirs have no present legal interest in the testator's property, the law regards their expectations as something which a competent testator will normally have in mind, for these expectations will by the very act of making a testamentary [sic] disposition, be changed. *See* 175 A.L.R. Testamentary Capacity 891. When viewed in this light it is obvious that the injury concerning this element of testamentary [sic] capacity must be focused on whether the testator has the capacity to know who these objects of his bounty are and to appreciate his relationship to them (i.e., they are my sons) and not whether in fact the testator appreciates his moral obligations and duties toward such heirs in accordance with some standard fixed by society, the courts or psychiatrists.

21 Ariz. App. at 281-82, 518 P.2d at 998-99.

Even the *Restatement (Third) of Property (Wills & Donative Transfers)* (2003) focuses its discussion of the elements of testamentary capacity on the “natural objects of the testator’s bounty” element. Comment c to section 8.1 explains,

The natural objects of a testator's bounty include the testator's closest family members, who are not limited to blood or adoptive relatives or to those who would take by intestacy. For example, a testator's stepchildren are natural objects of the testator's bounty, even though stepchildren do not ordinarily take by intestacy (see § 2.5, Comment *j*). Relatives by affinity do not take by intestacy but could be counted as natural objects of a testator's bounty in the case in which the testator was close to them. To have testamentary capacity, the testator need not know the identity or location of remote relatives who are beyond his or her immediate family circle.

The natural objects of the testator's bounty might include nontraditional as well as traditional family members. For example, a testator's domestic partner as defined in § 6.03 of the *Principles of the Law of Family Dissolution: Analysis and Recommendations* is a natural object of the testator's bounty. So also is the testator's unmarried partner under any other relationship entitling the donor's unmarried partner to intestacy rights under applicable law, such as a civil-union relationship under the law of Vermont (or under a similar law of another state) or a relationship based on the partners' signed reciprocal beneficiary designation under the law of Hawaii (or under a similar law of another state).

The requirement that the testator must, when executing a will, be capable of knowing and understanding in a general way the natural objects of his or her bounty does not suggest that a testator must devise his or her property to those persons or devise it to them in the shares embodied in the intestacy statutes. Indeed, one of the common reasons for making a will is to create a dispositive plan that does not track the pattern of distribution in intestacy. A will that favors persons who are not close family members or a will that favors family members disproportionately to their relationship to the testator is not evidence that the testator did not know and understand in a general way the natural objects of his or her bounty.

Unfortunately, neither the *Restatement* nor Arizona case law provides much guidance regarding the “nature and extent of property” factor or the “nature of the testamentary act” factor.

III. Undue Influence

A. Generally

“[A] person unduly influences a testator or testatrix in executing a will when that person through his power over the mind of the testator or testatrix makes the latter’s desires conform to his own, thereby overmastering the volition of [the] testator or testatrix.” *In re McCauley’s Estate*, 101 Ariz. 8, 10, 415 P.2d 431, 433 (1966). Phrased differently, a will is not the product of undue influence if it is the product of the testator’s own “free act and not the product of coercion.” *In re Regaldo’s Estate*, 77 Ariz. 180, 184, 268 P.2d 973, 975 (1954). Thus, some might colloquially refer to undue influence as the equivalent of brain washing.

Because undue influence usually occurs in secret, it often needs to be established by circumstantial evidence. *See id.* “Whether undue influence has been exerted to bring about the making of a particular will is a question of fact.” *Id.*

B. Indicia of Undue Influence

In *McCauley’s Estate*, the Arizona Supreme Court recognized the following eight factors as “significant indicia of the presence or absence of [undue] influence”:

1. Whether the alleged influencer made fraudulent representations to the testator;
2. Whether execution of the will was the product of “hasty action”;
3. Whether the execution of the will was concealed from others;
4. Whether the person benefitted by the will was “active in securing its drafting and execution”;
5. Whether the will, as drafted, was consistent or inconsistent with the testator’s prior declarations and plannings;
6. Whether the will was reasonable, rather than unnatural, in view of the testator’s circumstances, attitudes, and family;
7. Whether the testatrix was a person susceptible to undue influence; and
8. Whether the testator and the beneficiary were in a confidential relationship.

101 Ariz. at 10-11, 415 P.2d at 433-34.⁴ None of the factors standing alone, or even in combination with some others, may be sufficient to sustain a finding of undue influence; however, “the force of the combination of all these factors may be sufficient to raise a question of fact as to the existence of undue influence.” *Id.* at 11, 415 P.2d at 434.

For 56 years, the eight factors identified in *McCauley’s Estate* were the only factors that Arizona appellate courts considered when determining whether a will was the product of undue influence. However, on May 31, 2022, the Arizona Court of Appeals declared that “the *McCauley* factors are not exclusive.” *Rosenberg v. Sanders*, 253 Ariz. 279, 284, ¶ 32, 512 P.3d 1027, 1032 (App. 2022). In *Rosenberg*, the court of appeals held that “a grantor’s alleged post-deed statements may provide relevant and admissible evidence of undue influence.” *Id.* ¶ 33. Because the trial court in that case did not consider the grantor’s alleged statements made 14 months after he signed and recorded a deed, the trial court erred in granting summary judgment against the person who was contesting the deed on the grounds of undue influence. *See id.*

Many probate practitioners have been critical of the Arizona Court of Appeals’ decision in *Rosenberg*. On January 4, 2023, the Arizona Supreme Court granted review but rephrased the issue as, “Should a ninth factor, based on statements reflecting a grantor’s state of mind months after the execution of a deed, be added to the long-standing eight-factor test used in Arizona to determine whether a grantor acted under undue influence?” (<https://www.azcourts.gov/LinkClick.aspx?fileticket=yxmFin0xr4k%3d&portalid=45>.) The case was argued on April 18, 2023, and as of the date of the preparation of these materials (June 10, 2023), the Arizona Supreme Court’s decision remains pending.

C. Special Note re Confidential Relationship Factor

Of the eight *McCauley* factors, the one that perhaps has received the most attention in reported appellate court decisions is whether a confidential relationship existed between the testator and the person who allegedly exerted undue influence on the testator. A confidential relationship “may be said to exist wherever trust and confidence is imposed in one person in the integrity and fidelity of another.” *Eagerton v. Fleming*, 145 Ariz. 289, 292, 700 P.2d 1389, 1392 (App. 1985). A “confidential relation” is broader than a “fiduciary relation.” *See Condos v. Felder*, 92 Ariz. 366, 371, 377 P.2d 305, 308 (1962) (quoting 3 Bogert on Trusts and Trustees § 482 (1946 ed.)). “The existence of a confidential relationship is a question of fact.” *Eagerton*, 145 Ariz. at 292; 700 P.2d at 1392.

“The relationship of parent and child does not in and of itself constitute a confidential relationship as that term is used in the context of undue influence.” *Evans v. Liston*, 116 Ariz. 218, 568 P.2d 1116 (App. 1977) (citing *Amado v. Aguirre*, 63 Ariz. 213, 219, 161 P.2d 117, 120 (1945)). Likewise, a marital relationship, by itself, is not a confidential relationship for purposes of determining whether a will is the product of undue influence. *See McCauley’s Estate*, 101 Ariz. at 11, 415 P.2d at 434. Instead, “[t]here also must be some other circumstances, such as actual

⁴For each of the eight factors, the Arizona Supreme Court cited to a different reported case. Three of the factors were derived from prior Arizona Supreme Court opinions; two factors were derived from California appellate court cases; one factor was taken from an Oregon Supreme Court decision; one factor came from a Florida Supreme Court opinion; and the one factor resulted from published decisions from Connecticut and Utah.

dominance [over the testator by the other person], an established course of management of [the testator's] affairs by [the other person], a disability, or similar facts coupled with the family relationship.” *Gonzalez v. Gonzalez*, 181 Ariz. 32, 34, 887 P.2d 562, 564 (App. 1994).⁵

D. Special Note re Presumptions, Burdens of Proof, and Standards of Proof

In *In re Estate of O'Connor*, 74 Ariz. 248, 246 P.2d 1063 (1952), the Arizona Supreme Court held that a legal presumption of undue influence arises when the sole beneficiary of the will is in a fiduciary relationship to the testator and also is active in procuring the will but that this presumption is “dissolved” when the beneficiary denies exercising undue influence—even if the trier of fact does not believe the denial to be true. 74 Ariz. at 259-60, 246 P.2d at 1071. Once the presumption has been dissolved, the burden shifts to the contestant to prove the existence of undue influence by “a clear preponderance of the evidence.” *Id.* at 260, 246 P.2d at 1071. In *In re Pitt's Estate*, 88 Ariz. 312, 356 P.2d 408 (1960), the Arizona Supreme Court declined to modify or depart from its holding in *O'Connor's Estate*, but it clarified that the standard of proof to establish undue influence is “clear and convincing evidence.” 88 Ariz. at 318, 356 P.2d at 412.

Twenty-five years after *O'Connor* was decided, the Arizona Court of Appeals reiterated that a will contestant has the burden of proving “by clear and convincing evidence that the will was procured by undue influence.” *Evans v. Liston*, 116 Ariz. 218, 220, 568 P.2d 1116, 1118 (App. 1977). The *Evans* court further affirmed that a presumption of undue influence arises “when one who occupies a confidential relationship to the decedent is active in procuring the execution of the will and is a principal beneficiary,” but that the presumption “disappears” when the person accused of undue influence denies it.” *Id.*

Almost 25 years after *Evans*, the Arizona Supreme Court, in addressing the issue of what constitutes “probable cause” for challenging a will for purposes of A.R.S. § 14-2517 (which deals with the enforceability of *in terrorem* clauses in wills), quoted *Stewart v. Woodruff*, 19 Ariz. App. 190, 194, 505 P.2d 1081, 1084 (1973), for the proposition that, “[W]here a confidential relationship is shown the presumption of invalidity can be overcome only by clear and convincing evidence that the transaction was fair and voluntary.” *In re Estate of Shumway*, 198 Ariz. 323, 328, ¶ 16, 9 P.3d 1062, 1067 (2000).

Thus, as of 2000, Arizona law on this subject was as follows:

- A person contesting a will on the grounds of undue influence had the burden of proving the undue influence by clear and convincing evidence.
- However, if the contestant proved that a person who was in a confidential relationship with the testator both was active in procuring the will's execution and is a principal beneficiary of the will, then the will was presumed to be the product

⁵The quoted language is from a jury instruction that was given by the *Gonzalez* trial court. *Gonzalez* arose from a fraud claim brought by a widow against her son and daughter-in-law. 181 Ariz. at 33, 887 P.2d at 563. The jury returned verdicts against the son and daughter-in-law for actual and constructive fraud. *Id.* The Arizona Court of Appeals held that “the jury was properly instructed on the requirements for a confidential relationship between a parent and child.” *Id.* at 34, 887 P.2d at 564.

of undue influence and the burden shifts to the will's proponent to show by clear and convincing evidence that the will is not the product of undue influence.

See generally Mullin v. Brown, 210 Ariz. 545, 547-550, ¶¶ 14-17, 115 P.3d 139, 141-44 (App. 2005) (discussing *Shumway*).

In 2010, A.R.S. § 14-2712 was enacted. That statute sets forth the presumptions, burdens of proof, and standards of proof applicable to disputes regarding the validity of wills and other governing instruments. Under A.R.S. § 14-2712, which supersedes prior case law on the subject,

- A person who executes a will is presumed to have capacity to execute the will and to have done so free from undue influence and duress. This is a rebuttable presumption. A.R.S. § 14-2712(B).
- Generally, a party who is challenging the validity of a will has the burden of proving the invalidity of the will by a preponderance of the evidence. A.R.S. § 14-2712(D).
- However, a will is presumed to be the product of undue influence if either (a) a person who had a confidential relationship to the testator was active in procuring the will's creation and execution and also is a principal beneficiary of the will, or (b) the will's preparer or the preparer's spouse or parents to the issue of the preparer's spouse or parents is a principal beneficiary of the will.⁶ A.R.S. § 14-2712(E).
- A beneficiary under the will may overcome a presumption of undue influence by a preponderance of the evidence. A.R.S. § 14-2712(F).

See also Rosenberg v. Sanders, 253 Ariz. 279, 282, ¶ 16, 512 P.3d 1027, 1030 (App. 2022) (explaining presumptions, burdens, and standards under A.R.S. § 14-2712). Thus, no longer is clear and convincing evidence necessary to prove either the existence or the non-existence of undue influence. Instead, the standard (quantum) of proof requires in all instances is only a preponderance of the evidence. In addition, a general denial of undue influence by the person who allegedly exerted the undue influence no longer is effective to reverse a presumption of undue influence.

IV. Conclusion

"The policy of the law favors testacy." *In re Estate of Killen*, 188 Ariz. 562, 565, 937 P.2d 1368, 1371 (App. 1996). As a result, generally the law (a) presumes that a testator has testamentary capacity and executes the testator's will free from undue influence and duress, and (b) requires the a person who is contesting the will to prove the will's invalidity by a preponderance of the evidence. *See* A.R.S. § 14-2712(B) and (D). The only exception is that a will is presumed to be the product of undue influence if either

⁶The presumption does not apply if the will was prepared for a person who is a grandparent of the preparer, the issue of a grandparent of the preparer, or the respective spouses or former spouses of persons related to the preparer. A.R.S. § 14-2712(E)(2).

- A person who had a confidential relationship to the testator was active in procuring the will's creation and execution and is a principal beneficiary of the will, or
- The will's preparer, or the preparer's spouse or parents, or the issue of the preparer's spouse or parents, is a principal beneficiary of the will (unless the will was prepared for a person who is a grandparent of the preparer, the issue of grandparent of the preparer, or the respective spouses or former spouses of persons related to the preparer).

A.R.S. § 14-2712(E). If a presumption of undue influence does arise, a beneficiary of the will may overcome the presumption by a preponderance of the evidence. A.R.S. § 14-2712(F).

Even though the quantum of proof required is only a preponderance of the evidence, proving lack of testamentary capacity or existence of undue influence often is challenging for the contestant. The three-prong test for determining whether someone has testamentary capacity should be easy for most testators to pass. The testator need only be *capable of understanding* (1) who the testator's relatives are, (2) what property the testator owns, and (3) the nature of the testamentary act, i.e., that by executing the will the testator is deciding who will receive the testator's property after the testator dies. Conversely, proving that someone made the testator's desires conform to his own, exercising power over the testator's mind and overmastering the testator's own volition (i.e., that a will is the product of undue influence), is not an easy burden to meet. *See Rosenberg v. Sanders*, 253 Ariz. 279, 282-83, ¶ 20, 512 P.3d 1027, 1030-31 (App. 2022) (addressing undue influence claim made in connection with a beneficiary deed).⁷

Moreover, consistent with the policy of favoring testacy, appellate courts will “carefully scrutinize” a trial court's determination that a will is invalid and will set aside such a determination if sufficient evidence does not support it. *Killen's Estate*, 188 Ariz. at 565, 937 P.2d at 1371. Indeed, the majority of reported Arizona appellate court decisions dealing with testamentary capacity or undue influence challenges either have reversed a trial court's determination that a will was invalid⁸ or have affirmed a trial court's determination that the will was valid.⁹ Very rarely does an appellate court in a published opinion affirm a trial court's determination that a will is invalid due to either undue influence or lack of testamentary capacity¹⁰ or reverse a trial court's

⁷In the words of a different panel of the Arizona Court of Appeals, *O'Connor's Estate*, *Pitt's Estate*, and *In re Estate of Harber*, 102 Ariz. 285, 428 P.2d 662 (1967), “all of which held that the record presented no factual issue on undue influence, evidence that this [proving undue influence] is not an easy burden to meet.” *In re Sherer's Estate*, 10 Ariz. App. 31, 35, 455 P.2d 480, 484 (1969).

⁸*See, e.g., In re Estate of Vermeersch*, 109 Ariz. 125, 506 P.2d 256 (1973); *In re Walter's Estate*, 77 Ariz. 122, 267 P.2d 896 (1954); *In re O'Connor's Estate*, 74 Ariz. 248, 246 P.2d 1063 (1952); *In re Cook's Estate*, 63 Ariz. 78, 159 P.2d 797 (1945); *In re Greene's Estate*, 40 Ariz. 274, 11 P.2d 947 (1932); *In re Estate of Thorpe*, 152 Ariz. 341, 732 P.2d 571 (App. 1986); *Evans v. Liston*, 116 Ariz. 218, 568 P.2d 1116 (App. 1977).

⁹*See, e.g., In re Estate of Thomas*, 105 Ariz. 186, 461 P.2d 484 (1969); *In re Estate of Stitt*, 93 Ariz. 302, 380 P.2d 601 (1963); *In re Smith's Estate*, 53 Ariz. 505, 91 P.2d 254 (1939); *In re Estate of Weil*, 21 Ariz. App. 278, 519 P.2d 995 (1974); *In re Estate of Teel*, 14 Ariz. App. 371, 483 P.2d 603 (1971); *In re Estate of Sherer*, 10 Ariz. App. 31, 455 P.2d 480 (1969).

¹⁰In *In re Estate of Killen*, 188 Ariz. 562, 937 P.2d 1368 (App. 1996), the Arizona Court of Appeals affirmed the trial court's determination that the testatrix's insane delusions caused her to lack testamentary capacity, thereby rendering her will invalid. In *In re Estate of McCauley*, 101 Ariz. 8, 415 P.2d 431 (1966), the Arizona Supreme Court

determination that a will is valid despite an undue influence or lack of testamentary capacity challenge.¹¹

For these reasons, before challenging a will on the grounds of undue influence or lack of testamentary capacity, the practitioners should carefully review the elements necessary to establish such a claim and compare them to the available evidence to ensure that the claim is supported by that evidence.

held that the trial court's finding that the decedent's will had been procured by undue influence was not clearly erroneous.

¹¹In *Rosenberg v. Sanders*, 253 Ariz. 279, 512 P.3d 1027 (App. 2022), *review granted* 1/4/23, the Arizona Court of Appeals reversed the trial court's determination that a beneficiary deed was not the product of undue influence. However, that determination was made at a summary judgment stage of the proceeding, and the appellate court only concluded that "the record had just enough evidence to create a factual dispute and defeat summary judgment." 253 Ariz. at 285, ¶ 38, 512 P.3d at 1033. Thus, the court of appeals remanded the matter for a trial. *Id.* at 286, ¶ 40, 512 P.3d at 1034.

ADULT GUARDIANSHIPS & CONSERVATORSHIPS OVERVIEW¹

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I. A Few Preliminary Concepts

A. Nomenclature: *Guardian, Conservator, Ward, Protected Person, Alleged Incapacitated Person, Person Allegedly in Need of Protection*

A guardian of an adult is a person³ who “has qualified as a guardian of a[n] . . . incapacitated person pursuant to testamentary or court appointment but excludes a person who is merely a guardian ad litem.” A.R.S. § 14-1201(28). A conservator is a person “who is appointed by a court to manage the estate of a protected person.” A.R.S. § 14-1201(10). Thus, except for a guardian whose appointment was made in a testamentary proceeding, a person is not a guardian or conservator until a court of competent jurisdiction has appointed that person as guardian or conservator.

A ward is “a person for whom a guardian has been appointed.” A.R.S. § 14-5101(16). A “protected person” is a person “for whom a conservator has been appointed or any other protective order has been made.” A.R.S. § 14-5101(10).

A person can be both a ward and a protected person, i.e., if a guardian and a conservator has been appointed for that person. Similarly, one person can serve as both guardian and conservator for an adult. Alternatively, one person may serve as guardian for an adult and a different person may serve as that adult’s conservator. In addition, the court may appoint multiple persons to serve as co-guardians or co-conservators for an adult.

Title 14, A.R.S., (the “Arizona Probate Code”) refers to a person for whom the appointment of a guardian has been requested as an “alleged incapacitated person.” *See, e.g.*, A.R.S. § 14-5303(A). It refers to a person for whom the appointment of a conservator has been requested as a “person allegedly in need of protection.” *See, e.g.*, A.R.S. § 14-5404(A). To simplify things, the Arizona Rules of Probate Procedures (“Probate Rules”) use the term *subject person* to refer to the “alleged incapacitated person, ward, persona allegedly in need of protection, or protected person, whose estate or interest is the focus of the proceeding.”

¹This presentation is intended to provide a general overview of guardianship and conservatorship proceedings for adults. It is not an in-depth discussion of all topics relating to guardianships and conservatorships. For example, it does not address proceedings to substitute a guardian or a conservator, nor does it cover actions for breach of fiduciary duty or for surcharge that might be brought against a guardian or conservator. This presentation also does not discuss proceedings to terminate a guardianship or conservatorship.

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³A person is “an individual or an organization.” A.R.S. § 14-1201(46). An organization is a “corporation, limited liability company, business trust, estate, trust, partnership, joint venture, association, government or governmental subdivision or agency or any other legal or commercial entity.” A.R.S. § 14-1201(41).

B. Powers of the Guardian; Powers of the Conservator

A guardian of an adult “has the same powers, rights and duties respecting the guardian’s ward that a parent has respecting the parent’s unemancipated minor child, except that a guardian is not liable to third persons for acts of the ward solely by reason of the guardianship.” A.R.S. § 14-5312(A). For example, unless the court has ordered otherwise, the guardian

- “is entitled to custody of the person of the ward and may establish the ward’s place of abode within or without the state”;
- May “make provision for the care, comfort and maintenance of the ward and, whenever appropriate, arrange for the ward’s training and education”; and
- May “give consents or approvals that may be necessary to enable the ward to receive medical or other professional care, counsel, treatment or service.”⁴

Id. Thus, in essence, the guardian is a *decision-maker* regarding the ward’s placement (living arrangements), medical treatment, and education. The guardian is not a caregiver.

“The appointment of a conservator vests in the conservator title as trustee as to all property or to the part specified in the order of the protected person, presently held or thereafter acquired, including title to any property previously held for the protected person by custodians or attorneys in fact.” A.R.S. § 14-5420(A). Thus, unless otherwise limited by the court, a conservator has the same powers that a trustee generally has. *See* A.R.S. § 14-5424(A).⁵ For this reason, a conservator is held to the same standard of care applicable to trustees. *See* A.R.S. § 14-5417. In other words, whereas a guardian makes decisions regarding the ward’s person, a conservator makes decisions regarding the protected person’s finances.

C. A Word About “Licensed Fiduciaries”

The Arizona Probate Code does not use the phrase *licensed fiduciary*. However, the Probate Rules, as well as practitioners, judicial officers, and court staff and administrators, use that phrase to describe a person or entity that is licensed by the Arizona Supreme Court under A.R.S. § 14-5651. *See* Ariz. R. Prob. P. 2(o) (defining *licensed fiduciary*).

Unfortunately, A.R.S. section 14-5651 is awkwardly worded. Subsection A generally prohibits the superior court from appointing a “fiduciary unless that person is licensed by the

⁴The power to give consents and approvals for medical care and treatment includes the power to consent to psychiatric and psychological care and treatment, including the administration of psychotropic medications, if that care and treatment takes place outside an inpatient psychiatric facility licensed by the Arizona Department of Health Services. A.R.S. § 14-5312.01(A). Under certain circumstances, the court may grant the guardian the power to give consent for the ward to receive inpatient mental health care and treatment in an inpatient psychiatric facility licensed by the Arizona Department of Health Services. *See* A.R.S. § 14-5312.01(B). A more in-depth discussion of this inpatient mental health treatment authority is beyond the scope of this presentation.

⁵A more thorough description of a conservator’s powers can be found in A.R.S. §§ 14-5424(C) and (D) and -5425.

supreme court.”⁶ As applicable to guardianships and conservatorships, subsection K(1) then defines “fiduciary” as a “person who for a fee serves as a court appointed guardian or conservator for one or more persons who are unrelated to the fiduciary,” as well as the public fiduciary, and the Arizona Department of Veterans’ Services. Thus, the upshot is that, any person (or entity) who wishes to serve as a guardian or conservator for a person who is not related to that person (or entity) must be licensed by the Arizona Supreme Court. A more thorough discussion of the licensing requirements and process is beyond the scope of this presentation.

II. The Testamentary Appointment Process

A person, by will “or other signed writing,” may appoint a guardian for that person’s spouse or adult child whom the person believes is incapacitated; however, the appointment becomes effective only upon either (a) the person’s death, (b) an adjudication that the person is incapacitated, or (c) a written determination by a physician who has examined the person that the person is no longer able to care for the incapacitated spouse or adult child. *See* A.R.S. §§ 14-5301(A) and (B) and -5301.01(A). The appointment of a guardian using this process does not constitute a determination that the spouse or adult child is, in fact, incapacitated. *See* A.R.S. § 14-5301.01(F). Moreover, the authority of a guardian appointed using this process terminates on the judicial appointment of a guardian or the giving of written notice to the guardian of the filing of an objection as described below, whichever occurs first. A.R.S. § 14-5301.01(E).

After executing the will or “other signed writing,” the appointing spouse or parent may file a petition that asks the court to find that the appointing parent or spouse “will likely become unable to care for the [allegedly] incapacitated person within two years.” A.R.S. § 14-5301(D). Notice of the Initial Hearing on that petition must be given to the nominated guardian and any other person who is entitled to notice of the guardian’s acceptance of the appointment (see below regarding who is entitled to notice of the guardians’ acceptance). *Id.* If, after notice and hearing on the petition, the court finds that the appointing spouse or parent “will likely become unable to care for the [allegedly] incapacitated person within two years,” the court may confirm the appointing parent’s or spouse’s selection of a guardian and terminate the rights of others to object. *Id.* Note that this process is a prospective adjudication because it occurs before the guardian’s appointment becomes effective and merely eliminates the ability of persons, in the future, to object of the guardian’s appointment.

The person designated as guardian in the will or “other signed writing” may exercise the powers of a guardian only after the guardian files an acceptance of the appointment. A.R.S. § 14-5301.01(B). If the appointment is made pursuant to a will, the acceptance and a copy of the will must filed with the court in which the will was, or could be, probated. *Id.* If the appointment is made pursuant to a signed writing, the acceptance and the original signed writing must be filed with the court in the county in which the allegedly incapacitated spouse or adult child resides or is present. *Id.* To be valid, the acceptance must be filed within 30 days after the guardian’s appointment becomes effective, i.e., within 30 days of condition (a), (b), or (c) described above

⁶Subsection G provides that this prohibition does not apply to “a financial institution,” which defined in subsection K(2), and that the Arizona Supreme Court “may exempt a fiduciary from the requirements of this section for good cause.”

occurring. *See id.* In addition, the guardian must give written notice of the acceptance of the appointment to all the following:

- The person who made the appointment (if that person is living),
- The allegedly incapacitated spouse or adult child for whom the guardian has been appointed,
- A person having care or custody of the allegedly incapacitated spouse or adult child, other than the appointing parent or spouse, and
- The “adult nearest in kinship.”

A.R.S. § 14-5301.01(B)(2). Unless a court previously confirmed the appointment, the notice must include a statement of the right of those notified to terminate the appointment by filing a written objection (as described below). *Id.*

Unless the court already has confirmed the appointment, within 30 days after filing the notice of acceptance (and the signed writing or a copy of the will), the guardian must file a petition requesting that the court confirm the appointment. A.R.S. § 14-5301.01(D). Notice of the Initial Hearing on the petition must be given in the same manner as required of a petition for the judicial appointment of a guardian. *Id.*

Unless the court has already confirmed the appointment, the following persons may file a written objection to the appointment:

- The allegedly incapacitated spouse or adult child for whom the guardian has been appointed,
- The person having care or custody of the allegedly incapacitated spouse or adult child, and
- The “adult nearest in kinship to the [allegedly] incapacitated person.”

A.R.S. § 14-5301(C). The filing of the written objection automatically terminates the appointment. *Id.* The objection does not preclude a judicial appointment of the person selected by the appointing parent or spouse. *Id.* The court may treat the filing of an objection as a petition for the appointment of a temporary guardian for the appointment of a permanent guardian “and proceed accordingly.” *Id.*

The appointment of a guardian for an adult by will or other writing (often referred to simply as “testamentary appointment”) is rarely used. This could be because the testamentary appointment process, like a judicial appointment, requires some degree of court involvement (i.e., at a minimum, the court must confirm the testamentary appointment, *see* A.R.S. § 14-5301.01(D)). In addition, unlike the judicial appointment of a guardian for an adult, the testamentary appointment process does not require the court to appoint a guardian for the allegedly incapacitated person, which could raise due process concerns.

Finally, in at least one respect, the testamentary appointment process conflicts with the judicial appointment process, specifically with respect to who may appoint a guardian and the priorities for appointment. Under the testamentary appointment process, only a spouse or a parent of an allegedly incapacitated person may appoint a guardian for the allegedly incapacitated spouse or child. However, this seems to ignore the priorities for a judicial appointment of a guardian as set forth in A.R.S. section 14-5311(B), which gives a higher priority for appointment (a) to a person nominated by the incapacitated person if the person has, in the opinion of the court, sufficient mental capacity to make an intelligent choice and then (b) to the person nominated to serve as guardian in the incapacitated person’s most recent durable power of attorney or health care power of attorney. So, for example, if an (allegedly) incapacitated spouse or adult child had, while not incapacitated, executed a power of attorney in which that (allegedly) incapacitated spouse or adult child nominated a guardian, the spouse or parent of the (allegedly) incapacitated spouse or child could thwart that nomination by using the testamentary appointment process to appoint someone other than the (allegedly) incapacitated spouse’s or child’s nominee as guardian. Moreover, under A.R.S. section 14-5311(B), an adult child of the incapacitated person has a higher priority for appointment as guardian than does a parent, yet the testamentary appointment statutes do not allow an adult child to appoint a guardian for the adult child’s (allegedly) incapacitated parent.

III. The Court Appointment Process

A. The Petition and Pre-Initial Hearing Events

1. The Petition & Obtaining an Initial Hearing Date

The processes for the court appointment of a guardian for an adult and the court appointment of a conservator for an adult are very similar. The subject person, or any person in the subject person’s affairs, estate, or welfare, may petition for the appointment of a guardian, a conservator, or any other “appropriate” protective order. A.R.S. §§ 14-5303(A) and -5404(A).⁷ A.R.S. section 14-5303(B) sets forth the minimum statements that must be made in a petition for the appointment of a guardian, and A.R.S. section 14-5404(B) sets forth the minimum statements that must be made in a petition for the appointment of a conservator or other protective order. Although the lists are quite similar, they are not identical. Moreover, *if 2023 SB1291 is enacted, it will amend A.R.S. sections 14-5303(B) and -5404(B) to include additional statements that must be contained in a petition for the appointment of a guardian or conservator for an adult.*⁸ The format of the petition must comply with Rules 5.2(a), 5.2(b), 8(a), 8(e), 9, 10(b), and 11, Arizona Rules of Civil Procedure (“Civil Rule”). For example, each allegation of the petition should be “simple, concise, and direct,” Ariz. R. Civ. P. 8(e)(1), and be set forth in numbered paragraphs, “each limited as far as practicable to a single set of circumstances,” Ariz. R. Civ. P. 10(b).

⁷A.R.S. § 14-5404(A) also authorizes “any person who would be adversely affected by lack of effective management of [the subject] person’s estate and affairs” to petition for the appointment of a conservator or other “appropriate” protective order for the subject person. Thus, a creditor of a person allegedly in need of protection has standing to petition for the appointment of a conservator or other protective order for that person.

⁸On June 14, 2023, the Arizona Legislature transmitted SB1291 to Governor Hobbs; however, as of the date these materials were submitted (June 18, 2023), Governor Hobbs had not taken any actions with respect to SB1291.

When filing the petition, the petitioner also must file Form 12, Probate Information Form for Guardianship/Conservatorship (the “PIF”). Ariz. R. Prob. P. 13(b)(1). The PIF provides some basic information about the subject person and the nominated guardian/conservator. As a result, the PIF is maintained as a confidential document, and the petitioner is not required to provide other parties (including the subject person) or interested persons with a copy of the PIF. Ariz. R. Prob. P. 13(b)(2) and (3).

After filing the petition, the petitioner must obtain from the court the date, time, and location for an Initial Hearing on the petition. Ariz. R. Prob. P. 15(c). Failure to timely obtain an Initial Hearing date may result in the petition being dismissed for lack of prosecution under Probate Rule 18. *See* Ariz. R. Prob. P. 15(c).

2. Appointment of Attorney, Investigator, and Medical Professional

Regardless of whether the petition requests the appointment of a guardian or a conservator, the court must appoint an attorney to represent the subject person unless the subject person already is represented by “independent counsel.” A.R.S. §§ 14-5303(C) and -5407(B).⁹ ***NOTE: If 2023 SB1291 is enacted, the court-appointed attorney will be required to fulfill certain “minimal” duties no later than seven calendar days before the Initial Hearing. Those duties include interviewing the subject person and informing the subject person of certain rights, as well as the court process.***¹⁰

Upon the filing of the petition, the court also must appoint an investigator if either

- The petition requests the appointment of a guardian, A.R.S. § 14-5303(C); or
- The petition requests the appointment of a conservator for any reason other than confinement, disappearance, or detention by a foreign power, A.R.S. § 14-5407(B).

For a guardianship, the investigator must “interview the person seeking appointment as guardian, visit the present place of abode of the alleged incapacitated person and the place where it is proposed that the person will be detained or reside if the requested appointment is made and submit a report in writing to the court.” A.R.S. § 14-5303(C). Although A.R.S. section 14-5407(B) does not specify the investigator’s duties in a conservatorship proceeding, A.R.S. section 14-5308(B) specifically requires the investigator to “conduct an investigation before the court appoints a guardian or a conservator to allow the court to determine the appropriateness of that appointment.” In addition, A.R.S. section 14-5308(C) sets forth the specific duties of the investigator, and section 14-5308(D) expressly authorizes the investigator to “examine any court record, medical record or financial record that relates to the investigation.”

⁹Inexplicably, A.R.S. section 14-5303(C) uses the phrase “independent counsel” whereas A.R.S. section 14-5407(B) uses the phrase “counsel of that person’s own choice.” Probate Rule 41(b) and (c) suggest that, even in a conservatorship proceeding, the subject person’s attorney must be “independent,” i.e., free from conflicts of interest.

¹⁰If 2023 SB1291 is enacted, a new A.R.S. section 14-5111, which is entitled “Duties of appointed attorney; contempt,” will be added to Title 14, A.R.S.

If the petition requests the appointment of a guardian, the court must appoint a physician, psychologist, or registered nurse to examine the subject person and submit a written report to the court prior to the Initial Hearing. A.R.S. § 14-5303(C). The minimum contents for that report are described in A.R.S. section 14-5303(D). A medical report is not required in a conservatorship proceeding; however, “[o]n petition by an interested person or on the court’s own motion, the court may direct that an appropriate medical or psychological evaluation of the [subject] person be conducted.” A.R.S. § 14-5407(B).

3. Notice of Initial Hearing

The petitioner is responsible for giving certain interested persons timely notice of the Initial Hearing and for filing proof of having given notice. Ariz. R. Prob. P. 15(d). Except when giving notice by publication, the petitioner must include with the notice a copy of the petition that is the subject of the Initial Hearing. Ariz. R. Prob. P. 16(c). The notice must be in writing and must provide the information described in Probate Rule 16(a), as well as the required warning language set forth in Probate Rule 16(b). **NOTE: If 2023 SB1291 is enacted, the notice of hearing will also need to “provide notice of the right to a trial by jury under section 14-1306, subsection A.”**¹¹

In both a guardianship and a conservatorship proceeding, the petitioner must cause notice of the Initial Hearing to be **personally served** on the subject person at least 14 calendar days before the Initial Hearing, and subject person may waive this requirement only if the subject person attends the Initial Hearing. See A.R.S. §§ 14-5309(B) and -5405(B). In addition, the petitioner must cause notice of the Initial Hearing to be **personally served** on the subject person’s spouse and parents at least 14 days before the Initial Hearing, but only if they can be “found” in Arizona. *Id.*

The petitioner also must give notice to the following people, but personal service is not required for them:

- The subject person’s adult children,
- At least one of the subject person’s closest adult relatives,¹² but only if the subject person’s spouse, parents, and adult children cannot be located,
- Any person who is serving as the subject person’s guardian or conservator or who has care and custody of the subject person, and
- Any person who has filed a demand for notice.

¹¹If enacted, 2023 SB1291 will add to A.R.S. sections 14-5309 and -5405 a new subsection C that reads, “In addition to stating the time and place of the hearing, a notice given pursuant to this section shall provide notice of the right to a trial by jury under section 14-1306, subsection A.”

¹²For a guardianship proceeding, the phrase used is “at least one of [the subject] person’s closest adult relatives, if any can be found.” A.R.S. § 14-5309(A)(3). In contrast, for a conservatorship, the phrase used is “at least one adult relative of [the subject person], if such a relative can be found.” A.R.S. § 14-5405(A)(2). Notice the word “closest” is only used in the guardianship statute.

A.R.S. §§ 14-5309(A) and -5405(A). Because the guardianship and conservatorship statutes do not set forth the time or method for giving notice to these people, the general notice provisions in A.R.S. section 14-1401 control. As a result, notice to those persons must be given at least 14 days before the Initial Hearing, and notice may be given by mail or personal delivery or, if the address or identity of a person is not known and cannot be ascertained with reasonable diligence, by publication. ***NOTE: If 2023 SB 1291 is enacted, service by “ordinary first class” mail no longer will be permissible; instead, service by mail will be limited to certified or registered mail.***¹³

B. The Initial Hearing, Contested Petitions, and Evidentiary Hearings

NOTE: If 2023 SB1291 is enacted,

- ***At the Initial Hearing, the court will be required to “read into the record the notice of right to trial by jury as stated in the notice of hearing.”***¹⁴
- ***Also at the Initial Hearing, the subject person’s attorney will be required to “attest to the court that the attorney has fulfilled the requirements prescribed in [A.R.S. section 14-5111] or has been unable to comply with the requirements prescribed in this section.”***¹⁵
- ***Unless the alleged basis for the appointment of a conservator (or entry of a protective order) is that the subject person is confined, detained by a foreign power, or missing, the court will be prohibited from appointing a conservator (or entering another protective order) unless subject person “has appeared before the court either in person or by virtual means. If the subject person is unable or unwilling to appear in person or by virtual means, evidence of the person’s inability or unwillingness to attend “shall be presented to the court. If the person does not wish to attend in person or by virtual means, a declaration signed by that person shall be filed with the court to prove the person’s inability or unwillingness to attend.” Moreover, the court must “weigh the evidence, request additional evidence if necessary and document all evidence in the court record” with respect to the subject person’s inability or unwillingness to attend the hearing.***¹⁶

Any interested person, including the subject person, who wishes to oppose the relief requested in (i.e., object to) the petition, must either (a) at least seven calendar days before the

¹³If enacted, 2023 SB1291 will amend A.R.S. section 14-1401(A)(1) by striking the phrase, “or ordinary first class” between the word “registered” and the word “mail” and will add the word “or” between “certified” and “registered.”

¹⁴If enacted, 2023 SB1291 will add a new subsection D to A.R.S. section 14-5303 and a new subsection E to A.R.S. section 14-5307. Both new subsections will read, “At the initial hearing on the petition, the court shall read into the record the notice of right to a trial by jury as stated in the notice of hearing.”

¹⁵If enacted, 2023 SB1291 will add to the Arizona Probate Code new section 14-5111, subsection B of which will contain this requirement.

¹⁶If enacted, 2023 SB1291 will add to A.R.S. section 14-5401 a new subsection D, which will contain these restrictions and requirements.

Initial Hearing, file a written response to the petition or a motion under Civil Rule 12, or (b) attend the Initial Hearing, orally respond to the petition, and then file a written response or a Civil Rule 12 motion within 14 calendar days after the Initial Hearing or as the court orders. Ariz. R. Prob. P. 15(e)(1) and (2). The written response must comply with Civil Rules 5.2(a), 5.2(b), 8(c), 8(d), 8(e), 9, 10, and 11. Ariz. R. Prob. P. 15(e)(3). For example, the response must admit or deny each allegation asserted in the petition. *See* Ariz. R. Civ. P. 8(c)(1)(B). Unless the court directs otherwise, the petitioner may not file a reply to the response. Ariz. R. Prob. P. 15(g).

If notice of the Initial Hearing has been given as required by law¹⁷ and if neither the subject person nor any other interested person has timely opposed the relief requested in the petition, the court may decide the issue(s) raised in the petition at the Initial Hearing without setting additional court events. Ariz. R. Prob. P. 17(b)(1). In other words, if no one objects to the petition, the court—at the Initial Hearing—may proceed to receive evidence in support of the petition and then rule on the petition. The vast majority of petitions for the appointment of a guardian and/or conservator for an adult are uncontested and, thus, are resolved at the Initial Hearing, which typically takes 10 to 15 minutes.

If notice of the Initial Hearing has been given as required by law but the subject person or another interested person has timely opposed the relief requested in the petition, the clerk must note the opposition in the minutes and the court must follow the procedures set forth in Probate Rules 27 through 29, which relate to contested matters. Ariz. R. Prob. P. 17(b)(2). A more thorough discussion of contested proceedings is beyond the scope of this presentation. Suffice it to say that if the subject person or another interested person opposes the relief requested in the petition, the court ultimately will set an Evidentiary Hearing, which is the same thing as a trial, to resolve the matter. *See generally* Ariz. R. Prob. P. 23.

C. Subject Person’s Rights at Hearing

The Arizona Probate Code expressly grants certain rights to the subject person. *See* A.R.S. §§ 14-5303(C) and -5407(D). Those rights are as follows:

- The right to be represented by counsel,
- The right to present evidence,
- The right to cross-examine witnesses, including the court-appointed medical professional and the court-appointed investigator, and
- The right to request that the hearing be closed to the public.¹⁸

Id. Moreover, when a petition requests the appointment of a guardian, the subject person has the right to trial by jury, at least with respect to the issue of whether the subject person is

¹⁷If notice of the Initial Hearing has not been given as required by law, the court will need to reset the Initial Hearing so proper notice can be given.

¹⁸The subject person’s attorney also has the right to request that the hearing be closed to the public. A.R.S. §§ 14-5303(C) and -5407(D).

incapacitated;¹⁹ however, no such statutory right to a jury trial exists for a petition that requests the appointment of a conservator. *Compare* A.R.S. § 14-5303(C) *with* A.R.S. § 14-5407(D).

D. Burdens and Standards (Quantum) of Proof & Persuasion; Findings Required

In a proceeding to appoint a guardian and/or a conservator, the petitioner bears the burden of persuasion. *See* A.R.S. § 14-1311. To appoint a *guardian*, the quantum of evidence required is *clear and convincing evidence*. *See* A.R.S. § 14-5304(B). In contrast, to appoint a *conservator* presently only a *preponderance of the evidence* is required. *See* A.R.S. § 14-1311. However, *if 2023 SB1291 is enacted, the quantum of evidence required to appoint a conservator will be increased to clear and convincing evidence.*²⁰

The findings required to appoint a guardian for an adult differ from the findings required to appoint a conservator for an adult. To appoint a guardian for an adult, the court must find all the following (as just noted, by clear and convincing evidence):

1. The subject person is “incapacitated”;
2. The appointment of a guardian is necessary to provide for the subject person’s “demonstrated needs”; and
3. The subject person’s “needs cannot be met by less restrictive means, including the use of appropriate technological assistance.”

A.R.S. § 14-5304(B). In addition, the court must make a specific finding as to whether the appointment of a guardian is due solely to the ward’s physical incapacity. A.R.S. § 14-5304(F).

The subject person is “incapacitated” if the subject person “is impaired by reason of mental illness, mental deficiency, mental disorder, physical illness or disability, chronic use of drugs, chronic intoxication or other cause, except minority, to the extent that he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person.”

¹⁹A.R.S. section 14-5303(C) states that, “[o]n the filing of a petition [for the appointment of a guardian], the court shall set a hearing date on the issues [sic] of incapacity” and then goes on to state that the subject person “is entitled . . . to trial by jury.” However, as explained in the next section, incapacity is just one of three distinct findings the court must make before it can appoint a guardian. *See* A.S. § 14-5404(B) (setting forth the necessary findings for the court to appoint a guardian). Moreover, as discussed in the section after that, another issue that the court must determine is whom should be appointed as the subject person’s guardian. Thus, it is not clear if the jury’s role is limited to deciding whether the subject person is incapacitated, or whether the jury may decide the other issues too.

²⁰A.R.S. section 14-1311 states, in relevant part, “Except as otherwise provided in this title, the standard of proof required in a judicial proceeding brought pursuant to this title is the preponderance of evidence.” A.R.S. section 14-5304(B) specifically requires the court to make certain findings “by clear and convincing evidence” before the court appoints a guardian for an adult. However, nothing in article 4, chapter 5, Title 14, A.R.S. (the article that addresses conservatorships) specifies the standard of proof required for a court to appoint a conservator. Therefore, presently, A.R.S. section 14-1311 governs the standard of evidence required to appoint a conservator. If 2023 SB 1291 is enacted, it will amend A.R.S. section 14-5401(A)(2) to specifically require the court to make certain findings by “clear and convincing evidence” before the court appoints a conservator for an adult.

A.R.S. § 14-5101(3). Thus, rephrased, all the following the elements are necessary for the court to appoint a guardian:

1. The subject person must be “impaired.”
2. The impairment must cause the subject person to lack sufficient understanding or ability (capacity) to make or communicate responsible decisions concerning his person.
3. The appointment of a guardian must be necessary for the subject person’s demonstrated needs.
4. The subject person’s needs cannot be met by less restrictive means.

In contrast, to appoint a conservator for an adult, the court must find both of the following:

1. The subject person is unable to manage the person’s estate and affairs effectively, for reasons such as mental illness, mental deficiency, mental disorder, physical illness or disability, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, or disappearance; and
2. Either
 - a. The subject person has property that will be wasted or dissipated unless proper management is provided, or
 - b. Funds are need for the support, care, and welfare of the subject person or those entitled to be supported by the subject person and protection is necessary or desirable to obtain or provide funds.

A.R.S. § 14-5401(A)(2).

E. Priorities for Appointment

The two quintessential issues in any adult guardianship/conservatorship case are the following:

1. Does the subject person qualify for the appointment of a guardian and/or conservator, i.e., has the petitioner proven the necessary facts exist to support the appointment of a guardian and/or conservator?
2. If the answer to the first question is “yes,” whom should the court appoint as the guardian/conservator?

The court need address the second question only if it answers the first question in the affirmative.

Whom the court should appoint as guardian/conservator is governed by the priority statutes, A.R.S. sections 14-5311 (for guardianships) and -5410 (for conservatorships). Each of those statutes set forth a list of those persons (including entities) who have *priority* for

appointment. Notably, neither statute grants a *right* to appointment; instead, the statutes merely state that “[t]he court may *consider* the following persons for appointment . . . in the following order,” A.R.S. § 14-5311(B) (emphasis added), and that “[t]he following are entitled to *consideration* for appointment in the order listed,” A.R.S. § 14-5310(A) (emphasis added). Moreover, each statute has a provision that allows the court, “for good cause” to “pass over a person having priority and appoint a person having a lower or no priority.” A.R.S. §§ 14-5311(F) and -5410(B). The definition of “good cause” includes that the “estimated cost of the fiduciary and associated professional fees would adversely affect the ability of the [subject person’s] estate to provide for the [subject person’s] reasonable and necessary living expenses.” *Id.*

With one exception, the list of persons who have priority for appointment as a guardian is substantially similar to the list of persons who have priority for appointment as a conservator. *Compare* A.R.S. § 14-5311(B) *with* A.R.S. § 14-5410(A). The one exception is that A.R.S. section 14-5311(D) gives a super-priority for appointment as a guardian to any person who, by court order, had either sole or joint legal decision-making of the subject person when the subject person turned 18 years of age,²¹ but that super-priority applies only if both the petition for appointment of guardian was filed within two years after the subject person’s 18th birthday and the court does not find the appointment to be contrary to the subject person’s best interest. *See* A.R.S. § 14-5311(D).

F. Issuance of Letters

An order appointing a guardian or conservator is not effective until the clerk of the superior court has issued letters of appointment. *See* Ariz. R. Prob. P. 36(a)(1) (requiring every order appointing a guardian or conservator to include language stating that the order is not effective until the clerk has issued letters); *see also* A.R.S. § 14-5421 (stating that letters of conservatorship are evidence of the transfer of the protected person’s assets to the conservator). “Letters of appointment” is a document the clerk of court issues, pursuant to a court order, that authorizes a guardian or conservator to act for the subject person or the subject person’s estate. *See* Ariz. R. Prob. P. 39(a). Thus, a guardian or conservator may not act on behalf of the subject person or the subject person’s estate until the clerk has issued letters of appointment. Ariz. R. Prob. P. 39(b).

Before the clerk of court issues letters of appointment, the following must occur:

- The court must have entered an order appointing the guardian and conservator. If the appointment of the guardian or conservator is contingent on the guardian or conservator posting a bond, the order of appointment must state the amount of the bond that is required. Ariz. R. Prob. P. 36(b). In addition, the order of appointment must state any restrictions that the court has placed on the guardian’s or conservator’s powers. Ariz. R. Prob. P. 36(b)(1).
- The guardian or conservator must have signed, and the court must have entered, the appropriate Order to Fiduciary form. Ariz. R. Prob. P. 37(a). If the person is being appointed as only a guardian, the Order to Fiduciary form is Form 2, Order to

²¹If two persons had joint legal decision-making for the subject person when the incapacitated person turned 18 years of age, the court must appoint both persons as the subject person’s co-guardians—unless the court finds such appointment to be contrary to the subject person’s best interest. A.R.S. § 14-5311(D)(2).

Guardian. Ariz. R. Prob. P. 37(c). If the person is being appointed as only a conservator, the Order to Fiduciary form is Form 3, Order to Conservator. If the person is being appointed as both a guardian and conservator, the Order to Fiduciary form is Form 4, Order to Guardian and Conservator.

- Unless the guardian or conservator is a financial institution (as defined in A.R.S. § 14-5651) or a licensed fiduciary, the guardian or conservator must complete a training program approved by the Arizona Supreme Court and file a Certificate of Completion of that training. Ariz. R. Prob. P. 38.
- The guardian or conservator must file written acceptance of the appointment. *See* A.R.S. §§ 14-5304(D) and -5413.

If the court has limited the duration of the guardian's or conservator's appointment, the letters must state the appointment's termination date. Ariz. R. Prob. P. 39(c). Likewise, if the court has restricted the guardian's or conservator's powers, the letters of appointment must include the language of the court's order restricting the authority. Ariz. R. Prob. P. 39(d).

No later than ten court days after issuance of letters of appointment (whether temporary or permanent), the conservator must record a certified copy of the letters of appointment with the county recorder in every county of *any* state in which the protected person owns real property. A.R.S. § 14-5421; Ariz. R. Prob. P. 39(g). No later than 45 calendar days after a county recorder has recorded the letters of appointment, the conservator must file a copy of the recorded letters with the court. Ariz. R. Prob. P. 39(g). The reason for the recording requirement is that the letters are evidence of the transfer of legal title to the protected person's property from the protected person to the conservator, and recording of the letters gives notice of title as between the conservator and the protected person. *See* A.R.S. § 14-5421.

G. Temporary Guardians and Conservators

If the subject person does not have a guardian or conservator and "an emergency exists," or if the subject person already has a guardian or conservator but that fiduciary is not effectively performing the fiduciary's duties and the subject person's welfare or estate or affairs are "found to require immediate action," the court may appoint a temporary guardian or conservator. A.R.S. §§ 14-5310(A) and -5401.01(A). The court may make the appointment with or without advance notice. *See id.* A more detailed discussion of temporary guardianships and conservatorships is beyond the scope of this presentation. Thus, a practitioner who is considering requesting the appointment of a temporary guardian or conservator should carefully read A.R.S. sections 14-5310 and -5401.01, as well as Probate Rule 44.

H. A Brief Word About Fiduciary and Attorney Compensation from the Estate of a Ward or Protected Person²²

Guardians, conservators, their respective attorneys, the subject person's attorney, and a guardian *ad litem* appointed for the subject person all are entitled to "reasonable compensation" to be paid from the subject person's estate. *See generally* A.R.S. §§ 14-5314 and -5414. Besides being "reasonable," the compensation also must be "necessary." *See* A.R.S. § 14-5109(C). "To determine the reasonableness and necessity of compensation, the court must consider the best interest of the ward or protected person." *Id.* A.R.S. section 14-5109(C) sets forth some of the factors that the court may consider when assessing whether compensation is "reasonable and necessary." "The person seeking compensation has the burden of proving the reasonableness and necessity of compensation and expenses sought." A.R.S. § 14-5109(D).

When a guardian, conservator, attorney, or guardian *ad litem* who wishes to be compensated from the estate of a ward or protected person first appears in the guardianship/conservator proceeding, such person seeking compensation must give written notice of the basis for such compensation by filing a statement with the court and providing a copy of the statement to all persons entitled to notice of the original petition for appointment of guardian or conservator. A.R.S. § 14-5109(A). The statement must provide a general explanation of the compensation arrangement and how the compensation will be computed. *Id.* For example, if the compensation is to be based on the time expended by the person requesting the compensation, the statement must state that fact and provide the hourly rate(s) to be used in determining the amount of compensation (i.e., dollars per hour). If, during the pendency of the action, the basis for compensation changes, the person seeking compensation must give at least 30 days advance notice of the change to all persons entitled to notice of the original petition for appointment of guardian or conservator. A.R.S. § 14-5109(B). For example, if the person intends to change the hourly rate charged for services rendered, the person must give at least 30 days advance notice before changing the hourly rate.²³

Unless a later claim deadline is established in advance by the court, a claim for compensation by an attorney or guardian *ad litem* who intends to be paid by the subject person's estate is waived if not submitted to the fiduciary in writing within four months after either rendering the service, incurring the cost, or the initial appointment of the fiduciary, whichever is later.²⁴ A.R.S. § 14-5110(A). A claim is deemed submitted on delivery, mailing, or electronic

²²Compensation for services rendered in a guardianship/conservatorship proceeding is a complex topic. A thorough discussion of the subject is beyond the scope of this presentation. Hence, this section is intended to provide merely a brief overview of some of the more important concepts.

²³What, if any, consequences result from the failure to comply with the disclosure requirements of A.R.S. section 14-5109 has been the subject of much discussion and debate. Some argue that failure to file a notice of basis of compensation automatically bars a person from receiving *any* compensation from the subject person's estate. Others argue that failure to file a notice of basis of compensation does not necessarily preclude compensation being received from the subject person's estate and, instead, merely is a factor for the court to consider in determining whether the amount of compensation requested is reasonable. As of the submission of these written materials (June 18, 2023), a case pending before the Arizona Court of Appeals might resolve this debate. *See In re Conservatorship of Chalmers*, 1 CA-CV 22-0429 (argued on 1/31/2023).

²⁴This requirement does not apply if an attorney is seeking compensation based on a contingency fee agreement. A.R.S. § 14-5110(B).

transmission to the fiduciary, and a subsequent appointment of a substitute fiduciary does not renew the claim period. *Id.* Consequently, an attorney or guardian *ad litem* who wishes to be compensated from the estate of a ward or protected person must promptly (within four months after rendering the service for which compensation is sought) invoice the subject person's guardian or conservator. The best practice is to send the fiduciary invoices on a monthly basis even if the person seeking compensation is confident that the invoice will not be paid right away (e.g., if the subject person's estate is illiquid).

IV. Some Post-Appointment Duties

A. Guardians

If the guardian's contact information changes, the guardian must file Form 13, Notice of Change of Fiduciary's Contact Information, within ten court days after such change occurs. Ariz. R. Prob. P. 13(c)(1)(A). If the ward's contact information changes, the guardian must file Form 14, Notice of Change of Ward's Contact Information, within three court days of learning of such change. Unlike the PIF, the notices of change of contact information are maintained as a part of the public record, and the guardian must mail or deliver a copy of the notice of change of contact information to the subject person's court-appointed attorney, the subject person's statutory representative, the subject person's guardian *ad litem*, and all parties to the guardianship case. Ariz. R. Prob. P. 13(c)(2) and (3).

Unless the court sets a different deadline, no later than 60 days after each anniversary date of the issuance of the guardian's letters of permanent appointment, the guardian must file a written report and mail a copy of the report to the persons listed in A.R.S. section 14-5315(B). A.R.S. § 14-5315(A) and (B); Ariz. R. Prob. P. 46(a). The report must contain the information specified in A.R.S. section 14-5315(C). Ariz. R. Prob. P. 46(b). The guardian also must file a report on the guardian's resignation or substitution, as well as on termination of the ward's incapacity. A.R.S. § 14-5315(A).

The guardian must notify the ward's family members if either the ward is admitted to a hospital for more than three days or the ward dies. A.R.S. § 14-5317(A). If the ward dies, the notification also must include information about any known funeral arrangements and the place of burial. *Id.* "Family members" is defined in A.R.S. section 14-5317(B).

Additional duties of a guardian are set forth in A.R.S. sections 14-5312(A), -5312.01, and -5316. The latter of those statutes imposes a duty on the guardian to "encourage and allow contact between the ward and other persons who have a significant relationship with the ward," A.R.S. § 14-5316(A), but also gives the guardian discretion to restrict contact if the guardian "reasonably believes the contact will be detrimental to the ward's health, safety or welfare," A.R.S. § 14-5316(B). The statute then provides a mechanism for the ward or a person who has a significant relationship with the ward to petition the court for an order compelling the guardian to allow contact with the ward. *See* A.R.S. § 14-5316(C)-(M). ***NOTE: If 2023 SB 1291 is enacted, certain aspects of A.R.S. section 14-5316, including who has the burden of proof and the quantum of proof required, will be amended.***

B. Conservators

If the conservator's contact information changes, the conservator must file Form 13, Notice of Change of Fiduciary's Contact Information, within ten court days after such change occurs. Ariz. R. Prob. P. 13(c)(1)(A). However, the conservator does not have any obligation to file a Form 14, Notice of Change of Ward's Contact Information, if the protected person's contact information changes. *See* Ariz. R. Prob. P. 13(c)(1)(B) (imposing duty on guardian, but not conservator, to file a Form 14). The reason for this distinction is that a conservator is not entitled to decide where the protected person lives and, thus, has no control over the protected person's contact information. As noted above, unlike the PIF, a notice of change of contact information is maintained as a part of the public record, and the conservator must mail or deliver a copy of the notice of change of contact information to the subject person's court-appointed attorney, the subject person's statutory representative, the subject person's guardian *ad litem*, and all parties to the conservatorship case. Ariz. R. Prob. P. 13(c)(2) and (3).

No later than 90 days after the date the conservator's first letters of appointment (whether temporary or permanent) were issued,²⁵ the conservator must file an inventory that lists all the protected person's property as of the date those letters were issued. A.R.S. § 14-5418(A); Ariz. R. Prob. P. 45(c). When the conservator files the inventory, the conservator also must file a consumer credit report for the protected person. A.R.S. § 14-5418(A); Ariz. R. Prob. P. 45(c)(5). In addition, the conservator must attach to the inventory copies of the following documents:

- For each bank or securities account listed in the inventory, a complete copy of the statement that shows the balance of such account as of the date the conservator's letters of appointment were first issued;
- For each parcel of real property listed in the inventory, document(s) such as an appraisal or broker price opinion that shows the fair market value of the real property as of the date of the conservator's letters of appointment were first issued; and
- If the value of any tangible personal property listed in in the inventory is based on an appraisal conducted by someone other than the conservator, the appraisal.

Ariz. R. Prob. P. 45(c)(3). The last two of those items is not intended to require the conservator to obtain or use a specific type of appraisal; instead, it is intended to require the conservator to provide the court with whatever documentation the conservator used to determine the value of the real property or item of tangible personal property.

²⁵Probate Rule 45 frequently uses the phrase *date of the conservator's appointment*, which Probate Rule 45(b) defines as "the date the court first issues letters of appointment." So, for example, if a conservator is first appointed as temporary conservator on January 3, 2023, and then is appointed as permanent conservator on March 6, 2023, the date of the conservator's appointment is deemed to be January 3, 2023, for purposes of calculating the deadline for the conservator to file an inventory, consumer credit report, and initial budget, and also for purposes of determining the beginning date of the conservator's first account (but not for purposes of determining the deadline for the filing of each annual account, which is governed by the date the conservator's letters of *permanent* appointment were issued).

Also no later than 90 days after the date the conservator's first letters of appointment were issued, the conservator must file an initial budget using Form 5. Ariz. R. Prob. P. 45(d)(1) and (2). In the budget, the conservator must include reasonable estimates of all anticipated income and expenditures relating to the protected person's estate. Ariz. R. Prob. P. 45(d)(2). The conservator must provide a copy of the budget to all persons entitled to notice of the conservator's accounts (as described in A.R.S. section 14-5419(C)). Ariz. R. Prob. P. 45(d)(4). A timely filed budget is presumed to be reasonable unless there is an objection, and any interested person may file an objection no later than 14 calendar days after the budget was filed. Ariz. R. Prob. P. 45(d)(5)(A). No later than 30 days after reasonably projecting the expenditures for any specific category will exceed the budget by a threshold stated in the instructions to Form 5, the conservator must file an amended budget and provide a copy of the amended budget to all persons entitled to notice of the conservator's accounts. Ariz. R. Prob. P. 45(d)(3) and (4).

On or before each anniversary date of the issuance of the conservator's letters of *permanent* appointment, the conservator must file an annual account. A.R.S. § 14-5419(A); Ariz. R. Prob. P. 45(e). The conservator must attach to each account copies of the following documents:

- For each bank or securities account listed in the ending balance schedule, a complete copy of the statement that shows the ending balance of such account; and
- For any real property that was sold during the account period, the conservator must attach to the account the final HUD-1 or final HUD-1A settlement statement or similar final settlement statement for the sale.

Ariz. R. Prob. P. 45(e)(2). For the conservator's first account, the conservator must use Form 6; for the conservator's final account, the conservator must use Form 8; and for all accounts in between (i.e., interim account), the conservator must use Form 7. Ariz. R. Prob. P. 45(e)(7). The conservator's first account must reflect all activity relating to the conservatorship account from the date the conservator's letters of appointment were first issued through and including the last day of the 9th month after the date the conservator's letters of permanent appointment were issued. Ariz. R. Prob. P. 45(e)(4). The conservator's final account must reflect all activity between the ending date of the most recently approved account and the date the conservator released the conservatorship assets to the protected person or the protected person's successors. Ariz. R. Prob. P. 45(e)(6). All other accounts must reflect all activity relating to the conservatorship estate from the ending date of the most recently filed account through, and including, the last day of the 12th month thereafter. Ariz. R. Prob. P. 45(e)(5).

With each account, the conservator must file a budget for the upcoming account period. Ariz. R. Prob. P. 45(d)(1). In addition, each account must state whether the conservatorship's recurring expenses exceed its recurring income. Ariz. R. Prob. P. 45(e)(3). If recurring expenses do not exceed recurring income, the conservatorship is, *per se*, considered to be sustainable. However, if the recurring expenses exceed recurring income, the conservator must conduct a two-part analysis. First, the conservator must state whether the assets available to the conservator, less the estate's liabilities, are sufficient to sustain the conservatorship for the protected person's foreseeable needs. Ariz. R. Prob. P. 45(e)(3)(A). If so, the conservatorship also is considered to be sustainable. If not, the conservatorship is not considered to be sustainable, and the conservator must provide an explanation of the available options. Ariz. R. Prob. P. 45(e)(3)(B). Both the

budget and the sustainability calculation are “baked into” account Forms 6 and 7 (the budget and sustainability are not relevant to a conservator’s final account and, thus, are not part of Form 8).

When the conservator files an account, the conservator typically also will file a petition in which the conservator asks the court to approve the account. The reason is that an order approving an account operates as an adjudication as to the conservator’s liabilities concerning the matters considered in connection with the account. *See* A.R.S. § 14-5419(D). Thus, approval of an account usually will bar any claim against the conservator for matters disclosed in connection with that particular account. A more thorough discussion of the process relating to the approval of a conservator’s account is beyond the scope of this presentation.

For good cause, the court may relieve the conservator from the duty to file annual or other accounts. A.R.S. § 14-5419(A). In addition, the court may order a variation of Probate Rule 45’s requirements for an inventory, budget, or account (including the form to be used), if the court finds the variation is consistent with prudent management and oversight of the case. Ariz. R. Prob. P. 45(a).

Additional duties of a conservator are described in A.R.S. sections 14-5417 (setting forth the conservator’s general duty), -5425 (describing the conservator’s distributive duties and powers), and -5427 (describing the conservator’s duties with respect to the protected person’s estate plan).

V. Conclusion

This presentation was intended to provide a general overview of guardianship and conservatorship proceedings for adults. It was not an in-depth discussion of all topics relating to guardianships and conservatorships. For example, it did not address proceedings to substitute a guardian or a conservator, nor did it cover actions for breach of fiduciary duty or for surcharge that might be brought against a guardian or conservator. This presentation also did not discuss proceedings to terminate a guardianship or conservatorship, or some of the more complex issues relating to fiduciary and attorney compensation in guardianship and conservatorship cases. Moreover, the statutes and court rules governing guardianships and conservatorships are rapidly changing. For these reasons, the practitioner always should review the relevant statutes and court rules carefully.

Neuropsychologist-Doctorate degree (Ph.D., Psy.D., or Ed.D.) typically with Clinical psychology background with focus on brain-behavior relationships. Specialization in neuropsychology includes knowledge of functional neuroanatomy and neurology, diagnosis, extensive familiarity with statistics and psychometrics, detailed knowledge and familiarity of test administration and scoring, and interpretation, and clinical services. Training typically includes a one-year internship (pre-doctoral) and a two-year post-doctoral residency. Board-certification (ABPP & ABN) is optional but strongly recommended. Continuing Education is required to maintain licensure.

Forensic Training for Neuropsychologists:

- While there are doctorate-level programs in Forensic Psychology, there are no Forensic Neuropsychology doctoral programs.
- Forensic training for neuropsychology varies considerably in doctoral level programs (None to little in most).
- Some training in forensics may begin in a post-doctoral residency; most training occurs after licensure.
- Training in forensic realm is obtained through individual study, experience, mentorship, and/or CE (workshops and presentations).
- Sources of CE in forensic neuropsychology include AACN, NAN, INS, and AAFP.
- No specific licensing in AZ for forensic psychology / neuropsychology.
- Providers in AZ are licensed as “Psychologists”; APA Ethical Principles of Psychologists and Code of Conduct guides scope of practice and competency.

Components of Neuropsychological Evaluation

- Referral and Referral question & Intake with Attorney / Legal Representative
- Records review
- Collateral information (persons familiar with examinee)
- Clinical interview & behavioral observations
- Test selection and administration
- Test scoring (application of norms / reference groups)
- Interpretation (integration of all above) to determine normal and abnormal function.
- Report (addressing legal questions and providing neuropsychological evidence to support opinions)

Conditions affecting Cognition and Behavior—Transient and Acute:

- Pharmacological (e.g., benzodiazepines, alcohol, antipsychotics, anticonvulsants, sedatives, opioids, etc.)
- Metabolic (e.g., acute electrolyte imbalance, UTI, low thyroid, Obstructive Sleep Apnea—OSA)
- Neurovascular (e.g., Transient ischemic attack, transient global amnesia, CVA, cardiac issues>>low SpO2);
- Other: Acute psychosis / brief psychotic disorder; Delirium; Concussion; Severe stress (Trauma, grief, loss of independence)

Conditions affecting Cognition and Behavior--Chronic and Progressive:

- Dementia [Umbrella term] / aka Major Neurocognitive Disorder [DSM-5]:
 - Alzheimer’s disease [60-80% of cases]
 - Neurovascular [5 to 10% of cases]
 - Frontotemporal [5% of cases]
 - Prion disease (e.g., Creutzfeldt-Jacob, mad cow; Pick’s) [<1% of cases]
 - Residual effects of severe TBI (including CTE) [? %]
 - Chronic effects of alcohol dependence/abuse [? %]
 - Untreated OSA [? %]


Application of Neuropsychological Findings to Psycho-legal Questions

- **Testamentary Capacity – Essential NPSY Domains:**
 - Receptive language--Comprehension of oral & written material (simple and complex)
 - Verbal learning, STM, LTM, and recognition memory (Includes looking for rapid forgetting, contamination, and confabulation)
 - Abstract Reasoning (Verbal and nonverbal)
 - Diminished awareness of deficits—if present [anosognosia]
 - Ability to recall / describe their estate value, reliably identify and recognize heirs, and appreciate execution of an estate document.

- **Vulnerable Adult / Incapacitated Adult—Essential NPSY Domains for Evaluating Need for Guardianship or Conservatorship:**
 - Includes all Domains relevant for assessment of TC *plus* consideration of:
 - Acute and chronic illness(es), terminal illness, pain status
 - Sensory status (e.g., hearing and vision)
 - Ambulatory and mobility status
 - Ability to perform ADL's / IADL's
 - Personality factors (e.g., avoidant, dependent, masochistic)
 - Financial decision-making status (independent, dependent, use of helpers)
 - Ability to recognize and / or willingness to accept assistance

- **Susceptibility to Undue Influence—Essential NPSY domains:**
 - Includes all those relevant for TC, VA, and IA *plus* consideration of:
 - Dependence on another for: ambulation or mobility; care-giving services; managing finances; access to or use of electronic devices (e.g., cell phone, land line, computer, internet)
 - Nature of relationship between VA/IA and caregiver, (new) spouse, financial advisor, roommate, etc.
 - Characteristics of person exerting or potentially exerting influence

- **Threats to Validity and Applicability of Neuropsychological Examination Findings:**
 - Third Party Observer/Observation [TPO]:
 - ✓ TPO includes: Person (e.g., attorney/designate and family member) & Audio and Video recording.
 - ✓ TPO represents deviation from standardized administration of tests; validity of test interpretation is threatened because test norms are/were *not* based on TPO conditions.
 - ✓ TPO might contribute to distractibility and/or cueing
 - ✓ Although now allowed by AZ. R. Civ. P. 35(c)(1)(2), potential neuropsychologist experts may refuse participation in evaluations if TPO is required.
 - Failure to assess a relevant domain may lead to *underestimation* of deficits.
 - Failure to consider collateral data may lead to omission of relevant behavioral, personality, and historical data.
 - Failure to consider base-rates [Likelihood that an observation is a common vs infrequent occurrence]
 - Failure to accommodate for meds, drugs, fatigue, or sensory deficits or language / cultural factors may lead to *overestimation or underestimation* of deficits.
 - Coaching
 - Internet
- Test-retest effects (Practice effects)



Neuropsychological Evaluations in Estate Planning and Guardianship and Conservatorship

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CLE by the SEA²⁰²³

Presentation Objective

- My job today is to talk to you about neuropsychology, who we are, what we do, and how we perform evaluations to help you manage your cases.
- I will not be talking about the law! But I will be talking about the psychological-legal interface.

What is a Neuropsychologist?

- Doctorate-level degree (Ph.D., Psy.D., Ed.D.):
 - Clinical psychology with focus on brain-behavior relationships
 - Knowledge of functional neuroanatomy and neurology
 - Extensive familiarity with statistics, psychometrics.
 - Training in test administration & interpretation, and
 - Clinical Diagnosis.
- Internship - 1 year
- Post-doctoral training (2 years recommended)
- Board-certification (ABPP & ABN); optional but recommended
- Continuing Education (Required)

Forensic Training - Part 1

- Doctorate-level degree in Forensic Psychology (Few)
Focus is not neuropsychology typically.
- While some training might begin in a post-doctoral residency, most training occurs after licensure.
- Forensic training for neuropsychology varies in doctoral level programs (None to little in most)

Forensic Training - Part 2

- Training in forensic realm is obtained through individual study, experience, mentorship, and/or continuing education.
- Sources of CE in forensic include AACN, NAN, INS, and AAFP.
- There is no specific licensing in AZ for forensic psychology / neuropsychology.
- Providers in AZ are licensed as “Psychologists”; APA Ethical Principles of Psychologists and Code of Conduct guides scope of practice and competency.

Components of Neuropsychological Evaluation

- Referral >>> Referral question >>> Intake with Attorney
- Records review
- Collateral info (persons familiar with examinee)
- Clinical interview & behavioral observations
- Test selection and administration
- Test scoring (application of norms / reference groups)
- Interpretation (integration of all above)
- Report (addressing legal questions & NPSY evidence)
- Feedback to referral source and client (if requested)

Components of Neuropsychological Evaluation

- Referral Question:
 - Provides focus of evaluation (Important!)
 - This includes areas NOT to be addressed
 - Directs clinical interview, selection of tests, use of collaterals, and records needed.
 - Provides the legal framework for which psycho-legal opinions will be developed

Components of Neuropsychological Evaluation

- **Records review:**
 - Provides historical context for relevant developmental, medical and psychiatric issues (More better than too few)
 - Provides estimates of premorbid intellectual / cognitive functioning
 - Provides estimates of premorbid adaptive functioning
 - Provides data on prior preferences, wishes, and desires

Components of Neuropsychological Evaluation

- **Collateral Information*** - Interviews of family, significant others, friends, neighbors, care-givers, health care personnel, and others
 - Provides additional information on premorbid, developmental, medical, intellectual, cognitive, educational, and psychiatric issues
 - Provides info on past & current adaptive functioning
 - Provides info on prior preferences, wishes, and desires

** Needs to be assessed in context of records, clinical presentation, expected symptoms, and test data*

Components of Neuropsychological Evaluation

- **Clinical Interview & Behavioral Observations:**
 - Includes all aspects of client/examinee interaction w/office
 - Gait, dress, hearing, vision, motor functioning, comportment, mood, affect, ideational processes and content, understanding of eval, interactional style, awareness of issues/deficits, etc.
 - Ability to engage in casual conversation (including humor)
 - Grasping of instructions
 - Attitude toward examiner and toward examination
 - Credibility

Components of Neuropsychological Evaluation

- **Test Selection - Based on Domains to be assessed:**
 - Receptive & expressive language
 - Sustained attention
 - Divided / alternating attention (“multi-tasking”)
 - Speed of mental processing
 - Intellectual functioning (multi-factorial)
 - Executive functioning (abstract reasoning, judgment, planning, risk assessment, deficit awareness)
 - Learning and Memory (Verbal and Visual)
 - Performance Validity Tests [PVTs]

Performance Validity Tests (PVTs)

- Assess test validity* which can be affected by:
 - Motivation
 - Lack of engagement with examination procedures
 - Frank dementia
 - Psychosis
 - Severe developmental disorders
 - Psychiatric factors (e.g., conversion disorder)
 - Deliberate misrepresentation (aka “Malingering”)
 - Other factors

**May affect how or whether test data are interpreted*

Components of Neuropsychological Evaluation

- **Test scoring (application of norms / reference groups):**
 - Accounting for gender, age, educational status*
 - Accounting for racial, ethnic, and cultural factors
 - Accounting for language status (Is English first language?)
 - Accounting for context of evaluation (e.g., clinical vs. forensic)

** Some or all may be addressed in a specific normative group*

Components of Neuropsychological Evaluation

- Interpretation -Integration of:
 - Referral question,
 - Records review,
 - Collateral information,
 - Presentation at time of examination,
 - Expectations regarding disorder (if Dx known),
 - Demographic, cultural, and language factors,
 - Test performance, and
 - Legal issue(s) to be addressed

Conditions affecting Cognition and Behavior- Transient and Acute

- Pharmacological (e.g., benzodiazepines, alcohol, antipsychotics, anticonvulsants, sedatives, opioids, & other medications)
- Metabolic (e.g., acute electrolyte imbalance, UTI, low thyroid, obstructive sleep apnea–OSA)
- Neurovascular (e.g. Transient ischemic attack, transient global amnesia, CVA, cardiac issues>>low SpO2)
- Acute psychosis / brief psychotic disorder
- Delirium
- Concussion
- Severe stress (Trauma, grief, loss of independence)

Conditions affecting Cognition and Behavior-Chronic and Progressive

- Dementia [Umbrella term] / DSM-5-Major Neurocognitive D/O:
 - Alzheimer's [60 to 80% of cases]
 - Neurovascular dementia [5 to 10% of cases]
 - Frontotemporal [5% of cases]
 - Prion disease (Creutzfeldt-Jacob, mad cow, Pick's) [<1% of cases]
 - Residual effects of severe TBI (including CTE?) [? % of cases]
 - Chronic effects of alcohol/substance dependence/abuse [? %]

Application of Neuropsychological Findings to Psycho-legal Questions - Part 1

- **Testamentary Capacity - Essential NPSY Domains:**
 - Receptive language: Comprehension of oral & written material (simple and complex)
 - Verbal learning, STM, LTM, and recognition memory
 - (Includes looking for rapid forgetting, contamination, and confabulation)
 - Abstract Reasoning (Verbal and nonverbal)
 - Awareness of deficits—if present [anosognosia]
 - Ability to recall / describe their estate value, reliably identify and recognize heirs, and appreciate execution of an estate document

Application of Neuropsychological Findings to Psycho-legal Questions - Part 1

Testamentary Capacity - Objective Measures:

- Semi-Structured Interview for the Assessment of Testamentary Capacity (SSIATC)
- Hopemont Capacity Assessment (HCAI):
 - 1) Appreciate and communicate meaning of choice
 - 2) Understand a choice is being offered
 - 3) Understand & communicate how/why choice is made
 - 4) Understand & communicate consequences of decisions
 - 5) Weigh risks & benefits of choices in rational & logical manner

Assessment of Older Adults with Diminished Capacities (2nd Ed.) by ABA and APA

Application of Neuropsychological Findings to Psycho-legal Questions - Part 2

- **Essential NPSY Domains for Evaluating Need for Guardianship or Conservatorship [IA / VA]:**
- Includes all of those relevant for TC *plus* consideration of:
- Acute & chronic illness(es), terminal illness, and pain status
- Sensory status (e.g., hearing and vision)
- Ambulatory and mobility status / Ability to perform ADLs / IADLs
- Personality factors (e.g., avoidant, dependent, masochistic)
- Financial decision-making status
- Ability to recognize need and/or willingness to accept assistance

Application of Neuropsychological Findings to Psycho-legal Questions - Part 2 (continued)

- **Essential NPSY Domains for Evaluating Need for Guardianship or Conservatorship [IA / VA]:**
- Is there a risk of harm to individual if a Guardian is not provided?
- Is there a history of adverse incidents?
- Are their circumscribed areas of ability [e.g., ADLs, Driving]?
- *Level of client's awareness of their physical, cognitive, and functional limitations [Anosognosia].*
- Ability of client to effectively compensate for limitations.
- *How willing is VA/IA to accepting assistance?*

Application of Neuropsychological Findings to Psycho-legal Questions - Part 2 (continued)

- **Guardianship—Useful Objective Tools:**
 - Lawton ADL/IADL Questionnaire [Client / examinee interview]
 - Texas Functional Living Scale (Functional areas directly assessed) [Becoming outdated]
 - Hopemont Capacity Assessment (HCAI) [Others' ratings]

Application of Neuropsychological Findings to Psycho-legal Questions - Part 3

- **Susceptibility to Undue Influence**—Essential NPSY domains:
- Includes those relevant for TC, VA, and IA *plus* consideration of:
- Dependence on another for ambulation or mobility
- Dependence on another for care-giving services
- Dependence on another for managing finances
- Dependence on another for access to or use of electronic devices (e.g., cell phone, land line, computer, internet)
- Nature of relationship between VA/IA and caregiver, helper, professional staff, financial advisor, roommate, and/or other.

Application of Neuropsychological Findings to Psycho-legal Questions - Part 3

- **Susceptibility to Undue Influence—Assessment Tools**
 - **California Influence Screening Tool (CUIST):**
 - 1) Client's vulnerability
 - 2) Influencer's Authority/Power
 - 3) Actions/Tactics
 - 4) Unfair/Improper Outcomes
 - 5) Other Models*:
 - Singer/Nievod, Blum IDEAL, Bernatz SCAM and Brandle/Heisler/Stiegel
 - Share many features (e.g., isolation, dependency, unawareness)

* Assessment of Older Adults with Diminished Capacity(2008) by ABA and APA

Application of Neuropsychological Findings to Psycho-legal Questions - Part 4

- Conservatorship—Essential NPSY domains:
- Includes all of those relevant for TC, VA, IA, and SUI *plus* particular attention to arithmetic, math, and basic money skills,
- *Level of client's awareness of their physical, cognitive, and functional limitations [Anosognosia],*
- Ability of client to effectively compensate for limitations, and
- How willing is VA/IA to accept assistance?

Application of Neuropsychological Findings to Psycho-legal Questions - Part 5

- **Conservatorship—Objective Tools:**
 - Lichtenberg Financial Decision Rating Scale (LFDRS)
 - Lawton ADL/IADL Questionnaire
 - Texas Functional Living Scale [becoming outdated]
 - Hopemont Capacity Assessment (HCAI) *plus*
- Prior history with money management, check writing, managing investments, susceptibility to scams / fraud

Threats to Npsy Examination Findings: Third Party Observer/Observation [TPO]

- TPO includes:
 - Person (e.g., attorney/designee and family member)
 - Audio recording
 - Video recording
- TPO represents deviation from standardized administration of tests; **Validity of test interpretation** is threatened because test norms are/were *not* based on TPO conditions.
- TPO can contribute to distractibility and/or cueing, and changes in milieu
- Although allowed by Ariz. R. Civ. P.35(c)(1)(2), many NP's will refuse participation in evaluations if TPO is required.

Threats to Npsy Examination Findings: Assessment-Related

- Failure to assess a relevant domain may lead to *underestimation* of deficits.
- Failure to consider collateral data may lead to omission of relevant behavioral, personality, and historical data.
- Failure to consider base-rates [Likelihood that an observation is a common vs infrequent occurrence]
- Failure to accommodate for meds, drugs, fatigue, or sensory deficits or language/cultural factors may lead to *overestimation or underestimation* of deficits.

Threats to Npsy Examination Findings: External Factors

- Compromised test security
- Coaching
- Internet
- Test-retest effects [practice effects]

Questions / Dilemmas

- When assessing TC, does reliability of response / memory matter?
- When assessing TC, what memory needs to be demonstrated? Free recall? Cued recall? Recognition memory (i.e., multiple choice)?
- Does “lucid moment” reflect the historical (or current) wishes of the person? Does consistency of a person’s wishes matter?

Quaere Vērum

Thank You!
Questions Welcomed





Probate Trust & Estate Track

Day Two

July 11, 2023

8:15 AM - 12:30 PM

I. Planning for Incapacity—Protecting Vulnerable Persons

A. Estate Planning Documents Every Person Should Consider

1. **Durable Financial Powers of Attorney** (A.R.S. 14-5501) Grants the Agent broad authority to act in a wide range of financial, legal, and business matters for the principal. (A.R.S. 14-5501(A)) The power is “durable” because it survives the incapacity of the Principal. Thus, a power of attorney that becomes invalid upon the incapacity of the Principal is “non-durable.”

a) Scope of Authority.

(1) A financial power of attorney must set forth scope of the authority granted to the agent. (A.R.S. 14-5501(A)). The scope of authority may be limited to specific acts, or may so broad as to grant the agent anything the principal could do if the principal were not incapacitated. The former type of power of attorney is often referred to as a “limited” or “specific” power of attorney whereas the latter type of power of attorney is typically referred to as a “general” power of attorney.

b) Two Main Types of Durable Financial Powers of Attorney

(1) Springing: These take effect upon the Principal’s incapacity. (A.R.S. 14-5501(B)(2)) Typically incapacity is defined as when the Principal has a physical or mental impairment that causes the Principal to be unable to effectively manage his or her finances.

(a) While A.R.S. § 14-5501 et seq. provide no definition of incapacity, A.R.S. § 14-5101(3) defines an “incapacitated person” as someone who is “impaired by reason of mental illness, mental deficiency, mental disorder, physical illness or disability, chronic use of drugs, chronic intoxication or other cause, except minority, to the extent that he lacks sufficient understanding or capacity to make or communicate responsible decisions” about themselves or their estate. The express language of A.R.S. § 14-5101 applies such definition to the entire “title,” meaning the whole of Title 14. Thus, typically, any springing power of attorney should include a procedure by which to determine the event of incapacity of the Principal, and thus the “springing” of the Agent’s authority.

(2) Presently Effective: Effective upon signing, regardless of the principal’s incapacity. (A.R.S. 14-5501(B)(1))

c) Special Power of Attorney: Can be done to grant an Agent authority to deal with a specific transaction, relating to a specific power, or for a limited period of time.

d) A.R.S. 14-5501—Durable power of attorney; creation; validity

A. A durable power of attorney is a written instrument by which a principal designates another person as the principal's agent. The instrument shall contain words that demonstrate the principal's intent that the authority conferred in the durable power of attorney may be exercised:

1. If the principal is subsequently a person with a disability or incapacitated.

2. Regardless of how much time has elapsed, unless the instrument states a definite termination time.

B. The written instrument may demonstrate the principal's intent required by subsection A of this section using either of the following statements or similar language:

1. "This power of attorney is not affected by subsequent disability or incapacity of the principal or lapse of time."

2. "This power of attorney is effective on the disability or incapacity of the principal."

C. A power of attorney executed in another jurisdiction of the United States is valid in this state if the power of attorney was validly executed in the jurisdiction in which it was created.

D. Except as provided in section 28-370, an adult, known as the principal, may designate another adult, known as the agent, to make financial decisions on the principal's behalf by executing a written power of attorney that satisfies all of the following requirements:

1. Contains language that clearly indicates that the principal intends to create a power of attorney and clearly identifies the agent.

2. Is signed or marked by the principal or signed in the principal's name by some other individual in the principal's conscious presence and at the principal's direction.

3. Is witnessed by a person other than the agent, the agent's spouse, the agent's children or the notary public.

4. Is executed and attested by its acknowledgment by the principal and by an affidavit of the witness before a notary public and evidenced by the notary public's certificate, under official seal, in substantially the following form:

I, _____, the principal, sign my name to this power of attorney this _____ day of _____ and, being first duly sworn, do declare to the undersigned authority that I sign and execute this instrument as my power of attorney and that I sign it willingly, or willingly direct another to sign for me, that I execute it as my free and voluntary act for the purposes expressed in the power of attorney and that I am eighteen years of age or older, of sound mind and under no constraint or undue influence.

Principal

I, _____, the witness, sign my name to the foregoing power of attorney being first duly sworn and do declare to the undersigned authority that the principal signs and executes this instrument as the principal's power of attorney and that the principal signs it willingly, or willingly directs another to sign for the principal, and that I, in the presence and hearing of the principal, sign this power of attorney as witness to the principal's signing and that to the best of my knowledge the principal is eighteen years of age or older, of sound mind and under no constraint or undue influence.

Witness

The state of _____

County of _____

Subscribed, sworn to and acknowledged before me by _____, the principal, and subscribed and sworn to before me by _____, witness, this _____ day of _____.

(seal)

(signed) _____

(notary public)

E. The execution requirements for the creation of a power of attorney provided in subsection D of this section do not apply if the principal creating the power of attorney is:

- 1. A person other than a natural person.*
- 2. Any person, if the power of attorney to be created is a power coupled with an interest. For the purposes of this paragraph, "power coupled with an interest" means a power that forms a part of a contract and is security for money or for the performance of a valuable act.*

F. A person whose license as a fiduciary has been suspended or revoked pursuant to section 14-5651 may not serve as an agent under a power of attorney in any capacity unless the person is related to the principal by blood, adoption or marriage. This prohibition does not apply if the person's license has been reinstated and is in good standing.

e) Benefit: Aids in avoiding a Conservatorship for a person by granting an Agent authority to manage financial matters when the Principal is unable to manage the Principal's finances.

f) Limitations:

- (1) The agent's authority to act under the durable financial power of attorney terminates when the agent has actual knowledge of the Principal's death. (A.R.S. 14-5504(A))
- (2) Financial Institutions can decline to accept the financial power of attorney.
- (3) May be required to provide continual or duplicative documentation of the Principal's incapacity.

2. **Health Care Powers of Attorney (HCPOA) A.R.S. 36-3221**

a) A.R.S. 36-3221: Health care power of attorney; scope; requirements; limitations; fiduciaries

A. A person who is an adult may designate another adult individual or other adult individuals to make health care decisions on that person's behalf or to provide funeral and disposition arrangements in the event of the person's death by executing a written health care power of attorney that meets all of the following requirements:

1. Contains language that clearly indicates that the person intends to create a health care power of attorney.

2. Except as provided under subsection B of this section, is dated and signed or marked by the person who is the subject of the health care power of attorney.

3. Is notarized or is witnessed in writing by at least one adult who affirms that the notary or witness was present when the person dated and signed or marked the health care power of attorney, except as provided under subsection B, and that the person appeared to be of sound mind and free from duress at the time of execution of the health care power of attorney.

B. If a person is physically unable to sign or mark a health care power of attorney, the notary or each witness shall verify on the document that the person directly indicated to the notary or witness that the power of attorney expressed the person's wishes and that the person intended to adopt the power of attorney at that time.

C. A notary or witness shall not be any of the following:

1. A person designated to make medical decisions on the principal's behalf.

2. A person directly involved with the provision of health care to the principal at the time the health care power of attorney is executed.

D. If a health care power of attorney is witnessed by only one person, that person may not be related to the principal by blood, marriage or adoption and may not be entitled to any part of the principal's estate by will or by operation of law at the time that the power of attorney is executed.

E. A person whose license as a fiduciary has been suspended or revoked pursuant to section 14-5651 may not serve as an agent under a power of attorney in any capacity unless the person is related to the principal by blood, adoption or marriage. This prohibition does not apply if the person's license has been reinstated and is in good standing.

b) A.R.S. § 36-3231. Surrogate decision makers; priorities; limitations

A. If an adult patient is unable to make or communicate health care treatment decisions, a health care provider shall make a reasonable effort to locate and shall follow a health care directive. A health care provider shall also make a reasonable effort to consult with a surrogate. If the patient has a health care power of attorney that meets the requirements of section 36-3221, the patient's designated agent shall act as the patient's surrogate. However, if the court appoints a guardian for the express purpose of making health care treatment decisions, that guardian shall act as the patient's surrogate. If neither of these situations applies, the health care provider shall make reasonable efforts to contact the following individual or individuals in the indicated order of priority, who are available and willing to serve as the surrogate, who then have the authority to make health care decisions for the patient and who shall follow the patient's wishes if they are known:

1. The patient's spouse, unless the patient and spouse are legally separated.

2. An adult child of the patient. If the patient has more than one adult child, the health care provider shall seek the consent of a majority of the adult children who are reasonably available for consultation.

3. A parent of the patient.

4. If the patient is unmarried, the patient's domestic partner.

5. A brother or sister of the patient.

6. A close friend of the patient. For the purposes of this paragraph, "close friend" means an adult who has exhibited special care and concern for the patient, who is familiar with the patient's health care views and desires and who is willing and able to become involved in the patient's health care and to act in the patient's best interest.

B. If the health care provider cannot locate any of the people listed in subsection A of this section, the patient's attending physician may make health care treatment decisions for the patient after the physician consults with and obtains the recommendations of an institutional ethics committee. If this is not possible, the physician may make these decisions after consulting with a second physician who concurs with the physician's decision. For the purposes of this subsection, "institutional ethics committee" means a standing committee of a licensed health care institution appointed or elected to render advice concerning ethical issues involving medical treatment.

C. A person who makes a good faith medical decision pursuant to this section is immune from liability to the same extent and under the same conditions as prescribed in section 36-3205.

c) Living Wills A.R.S. § 36-3261.

A living will is a legal document that allows individuals to make decisions about their future medical treatment in case they become unable to communicate their wishes. It is a type of advance directive that outlines an individual's preferences regarding life-sustaining treatments. Under Arizona law, a living will is governed by A.R.S. § 36-3261.

A living will allows a person to express their desires regarding medical treatments such as resuscitation, mechanical ventilation, artificial nutrition and hydration, and other life-sustaining interventions. It enables individuals to specify their preferences for these treatments in different medical situations, such as if they are in a persistent vegetative state or have a terminal condition.

To create a valid living will in Arizona, the document must be executed consistent with the same standards as a health care power of attorney: It must contain language that clearly indicates the person intends to create a living will; it must be in writing and signed by the individual. It must be either notarized or witnessed by at least one adult who affirms that the notary or witness was present when the person dated and signed or marked the health care power of attorney, and that the person appeared to be of sound mind and free from duress at the time of execution of the living will. If the person is physically unable to sign or mark the living will, then the notary or each witness shall verify on the document that the person directly indicated to the notary or witness that the living will expressed the person's wishes and that the person intended to adopt the living will at that time. The notary or witness may not be anyone designated to make medical decisions on the person's behalf, or directly involved with the provision of health care to the person signing the living will. A.R.S. § 36-3261 and A.R.S. § 36-3221.

A living will can be a standalone document or combined with a healthcare power of attorney.

d) Mental Health Care Power of Attorney A.R.S. 36-3282

(a) A.R.S. 36-3282(B) “If a mental health care power of attorney expressly provides that the agent can admit the principal to an inpatient psychiatric facility licensed by the department of health services, each paragraph that grants this authority must be separately initialed by the principal at the time the mental health care power of attorney is signed and witnessed.”

(b) Can be included within the general HCPOA, but should have a separate initial for the Principal and the Notary Public.

(c) Can also prepare a stand-alone mental health care power of attorney that is witnessed or notarized.

(d) Sample Language for Mental Health Care Power within a HCPOA:

Mental Health Care Power of Attorney. The Agent shall have authority to give or withhold any medical consents and execute any documents which may be necessary in order to obtain or withhold any and all necessary and appropriate mental health treatments, including but not limited to hospitalization, administration of medications, diagnostic procedures and blood tests, counseling, and obtaining consulting or second opinions from psychiatrists, psychologists, and other medical and mental health professionals. Additionally, the Principal specifically authorizes the Agent to admit the Principal to an inpatient (formerly level one) behavioral health facility licensed by the department of health services. This Mental Health Care Power of Attorney is irrevocable if the Principal is unable to give informed consent.

___ *Principal’s initials* ___ *Notary’s initials*

e) Benefits of a HCPOA

(1) Effective upon a Principal’s Incapacity (“Springing”), which is determined by a physician and the terms of the document.

(2) A HCPOA can be an effective tool in avoiding Guardianship.

(3) HCPOA should specifically nominate the Agent to serve as Guardian if a Guardian is necessary.

(4) *Survives death only for purposes of giving the agent the authority to make decisions regarding the disposition of the Principal’s body.*

f) Limitations of a HCPOA

(1) HCPOAs are springing in nature and become effective only when the Principal is “unable to make or communicate health care treatment decisions.” (A.R.S. 36-3231(A)) Hence, unless a “health care provider” (as defined in A.R.S. 36-3201) determines the Principal is not capable of making or communicating health care

treatment decisions, the Agent is very limited its ability to override the decisions of the Principal.

(2) If the Principal needs care/placement and is refusing to comply with recommendations, the Agent is limited in their ability to place the Principal against their will.

(3) If the Principal does not have a mental health care power of attorney, the Agent will not be able to give consent for the Principal to receive inpatient psychiatric care.

g) Updated HCPOA Visitation Rules Under A.R.S. 36-3211: Principals; Significant Relationships; Contact Orders; Definitions

A. Unless inconsistent with the express directions of the principal in a health care directive, an agent shall encourage and allow contact between the principal and other persons who have a significant relationship with the principal.

B. An agent may not limit, restrict or prohibit reasonable contact between the principal and any other person without prior court approval, unless the principal has granted the agent such authority in a health care directive.

C. A person who has a significant relationship with the principal and whose contact with the principal has been limited, restricted or prohibited by an agent may petition the court for an order compelling the agent to allow the person to have contact with the principal. The petition shall describe the nature of the relationship between the person and the principal and the type and frequency of contact being requested. The person has the burden of proving that the person has a significant relationship with the principal and that the requested contact is in the principal's best interest. The petition and notice of the hearing on the petition shall be personally served on the principal and the agent and shall be provided to any other persons the court orders.

D. A principal whose contact with a person who has a significant relationship with the principal has been limited, restricted or prohibited by an agent may petition the court for an order compelling the agent to allow the principal to have contact with the person. The petition shall describe the nature of the relationship between the person and the principal and the type and frequency of contact being requested. The principal has the burden of proving that the person has a significant relationship with the principal and that the requested contact is in the principal's best interest. The petition and notice of the hearing on the petition shall be personally served on the agent and the person whose contact will be affected and shall be provided to any other persons the court orders.

E. If an agent who does not have authority expressly granted in a health care directive to limit, restrict or prohibit contact between the principal and another person reasonably believes that contact between the principal and the person is not in the principal's best interest, the agent may petition the court for an order that limits, restricts or prohibits contact between the person and the principal. The petition shall describe the nature of the relationship between the

person and the principal and the limitations or restrictions on the contact being requested and why the limitations or restrictions are in the principal's best interest. If the agent requests an order that prohibits all contact between a person and the principal because the contact would be detrimental to the principal's physical or emotional health or well-being, the agent shall file with the court a written statement or report of a physician, psychologist, physician assistant or registered nurse who has recently evaluated the principal and who supports this position. The petition and notice of the hearing on the petition shall be personally served on the principal and the person whose contact will be affected and shall be provided to any other persons the court orders.

F. In determining what, if any, contact between a person and the principal is in the principal's best interest, the court shall consider all factors that are relevant to the principal's health, safety and welfare, including the following:

- 1. The past and present relationship between the principal and the person whose contact is being considered.*
- 2. If the principal has sufficient mental capacity to make an intelligent choice, the wishes of the principal.*
- 3. The mental and physical health of the principal and the person whose contact is being considered.*
- 4. Whether the person whose contact is being considered has committed any of the following:*
 - (a) Act involving domestic violence as defined in section 13-3601.*
 - (b) Child abuse.*
 - (c) Abuse, neglect or exploitation of a vulnerable adult.*
- 5. Whether the person whose contact is being considered has abused drugs or alcohol or has been convicted of any drug offense listed in title 13, chapter 34 or a violation of title 28, chapter 4, article 3.*
- 6. Whether the person whose contact is being considered is listed in the elder abuse central registry pursuant to section 46-457 or is required to register pursuant to section 13-3821.*
- 7. Whether the person whose contact is being considered has been convicted of a violation of section 13-2907.02 or 13-2907.04.*

G. On the filing of a petition under this section, the court:

- 1. Shall appoint an attorney or guardian ad litem, or both for the principal.*
- 2. May appoint an investigator as provided under section 14-5308 or a physician, or both, to evaluate the principal and submit a written report to the court before the hearing.*
- 3. May enter any other temporary order that the court determines is necessary and appropriate to protect the wishes or best interests of the principal, including an order exercising the power of a guardian or appointing a temporary guardian as provided under section 14-5310.*

4. *May issue, without notice, a temporary protective order that limits, restricts or prohibits contact between the principal and another person if the petition is supported by a written statement or report of a physician, psychologist, physician assistant or registered nurse who has recently evaluated the principal and the court finds, based on the statement or report and other specific facts shown by affidavit or verified petition, reasonable grounds to believe that contact between the principal and the person before the matter can be heard would result in immediate and irreparable injury, loss or damage to the principal. The temporary protective order expires on the date prescribed by the court but not later than fourteen days after the order is entered, unless within that time the court extends the order for good cause shown or the person whose contact is limited, restricted or prohibited consents to the extension. If the temporary protective order is issued, the court shall require that the petition and order be personally served on the principal and the person whose contact is the subject of the order within the time ordered by the court but not more than seventy-two hours after entry of the order. If the court issues a temporary protective order without notice, the principal or the person whose contact has been limited, restricted or prohibited may file a motion requesting that the order be dissolved or modified. The person filing the motion shall cause a copy of the motion to be personally served on the agent and any other person the court orders. The court shall proceed to hear and determine the motion as expeditiously as possible.*

H. Except as provided in subsection G, paragraph 4 of this section, the petitioner shall cause notice of the time and place of hearing of any petition filed under this section to be given at least fourteen days before the hearing.

I. Unless inconsistent with the standards and procedures set forth in this section, a petition filed under this section shall be heard and determined as a formal proceeding filed under title 14 and governed by the rules of probate procedure.

J. A principal, an agent or a person who has a significant relationship with the principal may petition the court to modify a contact order if a material change in circumstances affecting the principal's health, safety or welfare has occurred since the last contact order was entered. The petition shall be supported by an affidavit alleging the change of circumstances that has occurred since the entry of the last contact order. The court shall deny the petition unless the court finds that the petition establishes good cause for a hearing, in which case the court shall set a hearing on the petition. The petition and notice of the hearing on the petition shall be served on the principal, the agent and the person whose contact is being considered and shall be provided to any other persons the court orders.

K. A principal, an agent or a person who has a significant relationship with the principal may file a motion asking the court to temporarily modify or suspend a contact order if a material change in circumstances affecting the principal's health, safety or welfare has occurred since the last contact order was entered. The motion shall be supported by an affidavit alleging the change of circumstances that has occurred since the entry of the last contact order. The

motion shall be filed contemporaneously with or after the filing of a petition to modify the prior contact order. The motion shall state whether the petitioner requests that the prior contact order be modified or suspended with or without notice to affected persons.

L. The court may temporarily modify or suspend a contact order without notice only if both of the following apply:

- 1. It clearly appears from specific facts shown in the motion or affidavit that immediate and irreparable injury, loss or damage likely will result if the order is not issued before the affected persons can be heard in opposition.*
- 2. The moving party or the moving party's attorney certifies to the court in writing the efforts, if any, that the moving party or the moving party's attorney has made to give the notice or the reasons supporting the claim that notice should not be required.*

M. If the court grants a motion to temporarily modify or suspend a contact order without notice, the court shall set a hearing on the motion.

N. An order temporarily modifying or suspending a contact order that is granted without notice shall state the injury, loss or damage that would likely have occurred if the order were not issued before giving the affected persons the opportunity to be heard in opposition. The temporary order expires at the date and time set for the hearing on the motion unless the temporary order is extended by the court for good cause.

O. The moving party shall personally serve a copy of the order and notice of the hearing on the person whose contact with the principal has been modified or suspended without notice within the time period the court directs but not more than seventy-two hours after entry of the order. The moving party shall personally serve a copy of the order and notice of hearing on the principal or the agent if either person is not the moving party.

P. On notice and a hearing, the court may enter appropriate orders to safeguard the wishes of the principal if those wishes can be reasonably ascertained. The court may assess court costs, reasonable attorney fees and the cost of any professionals appointed to evaluate the principal against a party found to have proceeded in bad faith or to have acted unreasonably.

Q. In a proceeding brought pursuant to this section, the court may order alternative dispute resolution, including mediation.

R. For the purposes of this section:

- 1. "Abuse" in relation to a vulnerable adult has the same meaning prescribed in section 46-451.*
- 2. "Child abuse" means abuse as defined in section 8-201 of an individual who is under eighteen years of age.*
- 3. "Contact" includes communications through any method, including in person, in writing and by electronic methods.*

4. "Court" means the superior court.
5. "Exploitation" has the same meaning prescribed in section 46-451.
6. "Neglect" has the same meaning prescribed in section 46-451.

h) Sample Language for HCPOAs:

(1) Visitation and Contact. As authorized under A.R.S. Section 36-3211(B), the Principal specifically grants to the Agent the power to make all decisions regarding visitation of and contact with the Principal, in any setting whatsoever, in the sole and absolute discretion of the Agent. This shall include the authority to grant, limit, restrict, and prohibit contact and visitation with any individual.

3. Benefits of a Revocable Trust for Incapacity planning

- a) *A financial institution is less likely to express concerns about honoring a trust than a financial power of attorney. Trusts are effective upon execution, and continue through incapacity and after death, pursuant to their express terms.*
- b) Accounting
 - (1) Trust Terms
 - (a) A Trust may specify the duty to account and modify the trustees accounting duties under 14-10813.
 - (b) Accounting provisions in a Trust are a key to ensuring the protection of the Settlor(s) and beneficiaries.
 - (2) Statutory Accounting Terms (If Trust does not specify)

A.R.S. 14-10813 Duty to Inform and Report

A. Unless the trust instrument provides otherwise, a trustee shall keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests. Unless the trustee determines that it is unreasonable under the circumstances to do so, a trustee shall promptly respond to a beneficiary's request for information related to the administration of the trust.

B. The Role of a Fiduciary

1. Fiduciary Roles

- a) Trustee
- b) Financial Agent
- c) Health Care Agent
- d) Guardian
- e) Conservator

2. Questions to Consider When Choosing a Fiduciary

- a) Values: Values of a client and an Agent can be a significant consideration. If a client is not religious and picks an Agent who is—those values can lead to high conflict.
- b) Time: Consider if the fiduciary being named is likely to have the time to commit to managing a person’s day to day life. Remind clients, this can be a long-term role if a person is living and incapacitated.
- c) Family Structure & Blended Families:
- (1) Do siblings or other family members get along? Or, are they antagonistic toward one another?
 - (2) If clients have separate children, strongly consider what it would look like for a step-child to be a trustee for an incapacitated step-parent or how they would interact with step-siblings.
 - (3) Does a family member have a particular skill set that would make that particular family member a better fiduciary than any other family member? E.g., designate the family member who has a medical background as the health care agent and designate the family member with a business background as the financial agent.

d) Case Study:

Husband established a Trust with a continuing trust for wife if he died. Upon his death, his daughter (who was not a child of wife) was named as Trustee of wife’s trust. Wife was the sole beneficiary during her lifetime and the trust retained a home. The trustee had discretion to make distributions from the wife’s trust. During father’s lifetime, daughter and wife got along. However, when he died, daughter was angry wife retained the role as beneficiary of her father’s assets and restricted any distributions for the home or for the wife. Daughter would receive all assets at the death of wife. Protracted litigation ensued about the interest of the beneficiary and duties of the trustee.

3. Warning/Notices to a Fiduciary--Include a Notice to Agent in the Financial Power of Attorney. Sample Language:

NOTICE TO AGENT

PLEASE READ BEFORE ACTING UNDER THIS DOCUMENT

An Agent MUST understand the significant responsibility of acting under this Power of Attorney. Arizona law provides important restrictions on an Agent acting under a Power of Attorney. An Agent is generally prohibited from using the Power of Attorney for their own benefit, unless that benefit is specifically identified within this instrument or within a written contract. There can be significant penalties for not following the law and responsibilities of this fiduciary role. An Agent is strongly recommended to consult with an attorney who is versed in this area of law prior to exercising the authority granted by this Power of Attorney.

(INSERT ATTORNEY OR LAW FIRM) as the attorney for the Principal hereunder, is authorized by the Principal’s signature above, to provide the Agent at his or her request with a document titled “Acknowledgment of Duties and Acceptance of Responsibilities as Agent” for the Agent’s review and signature. While that document is a form which does not constitute individual legal advice, it is an important starting point to provide an

overview of the responsibilities of which the Agent should be aware. This is important not only for the Principal's protection, but for the Agent's protection as well.

4. Acknowledgement of Duties and Acceptance of Responsibilities
 - a) Given to a financial fiduciary upon the death or incapacity of a Principal/Settlor.
 - b) Functions similarly to a General Order or training required by the Court.
 - c) Ensures that the fiduciary understand his or her obligations to the Principal/Settlor or to the beneficiaries.
 - d) Reviews all duties of a fiduciary based on his or her role.

II. Managing Incapacity

A. Rule 1.14 Client with Diminished Capacity

(a) When a client's capacity to make adequately considered decisions in connection with the 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 ER 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under ER 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

B. Role of the Attorney Under 1.14

ER 1.14. Client with Diminished Capacity

(a) When a client's capacity to make adequately considered decisions in connection with the 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 ER 1.6. **When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under ER 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.**

ER 1.14 does not define “diminished capacity.” In some cases, it is easily identifiable, as when a minor lacks contractual capacity due sheerly to the minor’s age. In other cases, the determination is more difficult, as when an individual is exhibiting signs of dementia. The latter case rarely results in immediate “diminished capacity” but rather usually occurs gradually, with increased vulnerability as the decision-making capacity of the individual declines. A person with “diminished capacity” refers to someone whose intellectual acuity is so substantially impaired, as a result of some illness, condition, or injury, that the person lacks the ability to make informed financial, medical, or personal decisions. A formal determination of diminished capacity need not have been made by a medical doctor or a court in order for a lawyer to believe that a client suffers from diminished capacity. A lawyer must be aware, however, that his or her determination of the client’s diminished capacity is subjective and that the lawyer may lack the expertise to appraise the client’s capacity accurately.

A person with “declining capacity” refers to someone who is beginning to exhibit signs of reduced capacity but who possesses the ability to make informed decisions with respect to some or all financial, medical, or personal matters. Signs of declining capacity include, but are not limited to, occasional forgetfulness, confusion, or disorientation concerning persons or events that a fully competent person would understand clearly.

1. An attorney can determine if a client has capacity to sign estate planning documents.
2. Mandatory Reporting: A.R.S. § 46-454 requires that certain professionals report abuse, neglect, or exploitation of a vulnerable adult if they have a basis to believe it has occurred. Those professionals include: physicians, hospital interns or residents, surgeons, dentists, psychologists, social workers, peace officers, guardians, conservators or other individual who have responsibility for the care of an incapacitated or vulnerable adult.

An attorney, accountant, trustee, guardian, conservator or other person who has responsibility for preparing the tax records of an incapacitated or vulnerable adult or a person who has responsibility for any other action concerning the use or preservation of the incapacitated or vulnerable adult’s property and who, in the course of fulfilling that responsibility, discovers a reasonable basis to believe that exploitation of the adult’s property has occurred or that abuse or neglect of the adult has occurred also is mandated to report the abuse, neglect, or exploitation.

- C. Probate Rule 42
- (a) Training.* A court-appointed attorney for the subject person of an adult guardianship or protective proceeding must complete training prescribed by the Supreme Court.
- (b) The Attorney's Role.* The attorney for the subject person must advocate for the subject person's wishes to the extent the attorney is able to ascertain those wishes. The attorney must, as far as possible, maintain a normal client-lawyer relationship with the subject person. In addition, the attorney must act to protect the subject person's substantive and procedural due process rights.
- (c) Subject Person's Death.*
- (1) Generally.* The participation of an attorney representing the subject person in a guardianship or protective proceeding terminates upon the subject person's death.
- (2) Exception.* In extraordinary situations and for good cause, the court may authorize the limited participation of the subject person's attorney after the subject person's death. The court's order authorizing the attorney's continued participation must state the basis and scope of the attorney's continued participation.
- D. SB1291 (Proposed Addition of 14-5111)
- a) If enacted, A.R.S. 14-5111 would impose specific duties on the attorney who represents the subject of a guardianship or conservatorship proceeding.
- b) No later than seven calendar days before the initial hearing on the petition for appointment of permanent guardian or conservator, the attorney must do all the following:
- (1) Interview the client;
 - (2) Inform the client of all the following:
 - (i) The right to a jury trial pursuant to section 14-1306,
 - (ii) The client's right to select an attorney of the client's choosing at the client's own expense,
 - (iii) The client's right to appear in court and have any person the client wishes to be present, and
 - (iv) A "review of the court process, timelines and expected future proceedings"; and
 - (3) Provide the client with a copy of the Order to Fiduciary that the court will enter if the court grants the relief requested in the petition.
- c) At the initial hearing on the petition for appointment, the attorney must attest to the court that the attorney has fulfilled these requirements or must provide an explanation as to why the attorney has been unable to comply with the requirements.
- d) The court may find an attorney who fails to fulfill these duties to be in contempt of court.
- E. Differing Levels of Capacity and Assessing Capacity for Necessity of Fiduciary to Take Action
1. Contractual

- a) Restatement of Contracts 2nd Section 12: Capacity to Contract:
(1) No one can be bound by contract who has not legal capacity to incur at least voidable contractual duties. 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. (2) A natural person who manifests assent to a transaction has full legal capacity to incur contractual duties thereby unless he is (a) under guardianship, or (b) an infant, or (c) mentally ill or defective, or (d) intoxicated.

2. Testamentary

- a) A.R.S. 14-2501: Who May Make a Will: A person who is eighteen years of age or older and who is of sound mind may make a will.
- b) An attorney can determine a person's capacity to make a Will. In some cases an attorney may seek a report of a medical professional if capacity is questioned.
- c) Meeting a client over a number of meetings can further establish consistency and capacity.
- d) If the person wishes to make potentially contentious changes, the attorney can utilize various strategies such as:
- (1) Meeting the client alone in a room.
 - (2) Asking repetitive questions to establish consistency.
 - (3) Documenting his or her file contemporaneously with the meeting.
 - (4) Requesting that the client have a neuropsychological evaluation to establish capacity.
 - (5) Reviewing prior estate planning documents for consistency.
- e) "...the testator had to be able to understand the natural objects of his bounty, the kind and character of his property, and the nature of testamentary act." *In re Walter's Estate*, 77 Ariz. 122, 267 P.2d 896 (1954).
- f) *In re Dorothy Killen*, 188 Ariz. 562
- (1) Synopsis: Dorothy Killen executed on Will on February 18, 1988. Ms. Killen had long suffered from paranoid delusions regarding her niece and nephew—who she left a dollar under her Will. These delusions included that people were attempting to poison her, persons living in her attic, cutting her hands with glass, pulling out her teeth, that family members were in the mafia, and that family members wanted to kill her to take her property. Eight days prior to execution of her Will, she was evaluated by a psychologist who determined that she had a delusional paranoid disorder that could interfere with her decision making. Less than a month after making her Will, she was hospitalized for psychiatric care where they determined her judgment was impaired and that she was incapacitated due to her psychiatric condition.
 - (2) Legal basis for Capacity: Capacity is assessed by whether testator understood their property, persons to whom they are giving property, and the mode of disposition. In order to show a lack of capacity, objector must show one of following elements:

(1) ability to know nature and extent of property; (2) ability to know relation to persons who are natural objects of testator's bounty and whose interests are affected by terms of instrument; or (3) ability to understand nature of testamentary act.

(3) Findings:

(a) The presumption is that if there is a validly executed Will, then the testator had capacity. That presumption must be overcome by varying factors. The person contesting the Will has the burden to overcome the presumption.

(b) The evidence must show that the delusions were without a basis in fact. In this case, the Court found that the delusions surrounding the niece and nephew were unfounded and not based in fact.

(c) The Court found that even if she met factors of testamentary capacity, that if her delusions directly affected the terms of her Will it could be invalidated. The Court found that since these delusions affected her understanding of her family relationships, it therefore resulted in her not having testamentary capacity.

(d) The Court also found that the delusions directly affected "objects of her bounty" and therefore affected her testamentary capacity. Had the delusions been about other persons that were not natural object of her bounty, then it would not have rendered her incapacitated.

3. Gifting

a) Restatement (Third) of Prop. Wills and Donative Transfers § 8.1(c) (Am. Law. Inst. 2003): "...must have the mental capacity necessary to make or revoke a will and must also be capable of understanding the effect that the gift may have on the future financial security of the donor and of anyone who may be dependent on the donor."

b) *Pass v. Stephens*, 22 Ariz.461, 198 P. 712 (1921): "...it is well settled that mere mental weakness in the grantor does not invalidate a deed. To have that effect the mental power must be so far deteriorated or destroyed that the grantor is incapable of understanding in a reasonable degree and knowing the consequences of the instrument he executes."

c) An attorney can determine a person's capacity to make a gift if assisting with the transfer. Otherwise, the gift is made at the discretion of the person making said gift.

4. Guardianship

a) A.R.S. 14-5101(3)

"Incapacitated person" means any person who is impaired by reason of mental illness, mental deficiency, mental disorder, physical illness or disability, chronic use of drugs, chronic intoxication or other cause, except minority, to the extent that he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person. In cases of limited guardianship only, a person is not deemed an incapacitated person for purposes of voting if the person files a petition and has a hearing and the

judge determines by clear and convincing evidence that the person retains sufficient understanding to exercise the right to vote pursuant to section 14-5304.02.

b) Medical Report: A report of physician, psychologist, or registered nurse is required in order to establish incapacity for the purpose of a Guardianship. (A.R.S. § 14-5303(C) and (D)). Unlike testamentary capacity or contractual capacity, an attorney cannot assert incapacity for a Guardianship without the support of medical evidence.

5. Conservatorship

a) A.R.S. 14-5401(A)(2)

2. Appointment of a conservator or other protective order may be made in relation to the estate and affairs of a person if the court specifically finds on the record both of the following:

(a) The person is unable to manage the person's estate and affairs effectively for reasons such as mental illness, mental deficiency, mental disorder, physical illness or disability, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power or disappearance.

(b) The person has property that will be wasted or dissipated unless proper management is provided, or that funds are needed for the support, care and welfare of the person or those entitled to be supported by the person and that protection is necessary or desirable to obtain or provide funds.

b) Practical Considerations

(1) Prior to filing, encourage clients to obtain a medical report to solidify support for the Conservatorship action. Similar to a Guardianship, a medical report is required to establish incapacity.

(2) Establish documentation regarding financial concerns—past due bills, utility shut-off notices, bank statements showing fund transfers, credit card statements.

(3) Look for signs of abuse. Repetitive donations, large cash withdrawals, etc.

c) *NOTE re SB1291: If enacted, SB1291 will amend A.R.S. 14-5401(A)(2) to require clear and convincing evidence of both (a) and (b) (currently, the law only requires a preponderance of the evidence for those two elements).*

6. Financial Power of Attorney

a) A.R.S. 14-5506(D)(1)

"Capacity" means that at the time the power of attorney was executed the principal was capable of understanding in a reasonable manner the nature and effect of the act of executing and granting the power of attorney.

b) An attorney can determine a Principal's capacity to sign at the time of signing. The threshold for capacity is low in these cases.

7. Revocable Trusts

- a) A.R.S. 14-10402(A)(1): One of the requirements to create a valid trust is that, “The settlor has capacity to create a trust.”
- b) Restatement (Third) of Trusts § 11(2): “a person has capacity to create a revocable inter vivos trust by transfer to another or by declaration to the same extent that the person has capacity to create a trust by will.”
- c) An attorney has the ability to determine if a person has capacity to create a Trust at the time of signing.

F. Alternatives to Conservatorships

1. 14-5409: Protective Arrangements and Single Transactions Authorized 14-5409. Protective arrangements and single transactions authorized

A. If it is established in a proper proceeding that a basis exists as described in section 14-5401 for affecting the estate and affairs of a person the court, without appointing a conservator, may authorize, direct or ratify any transaction necessary or desirable to achieve any security, service or care arrangement meeting the foreseeable needs of the protected person. Protective arrangements include, but are not limited to, payment, delivery, deposit or retention of funds or property, sale, mortgage, lease or other transfer of property, entry into an annuity contract, a contract for life care, a deposit contract, a contract for training and education, or addition to or establishment of a suitable trust.

B. When it has been established in a proper proceeding that a basis exists as described in section 14-5401 for affecting the estate and affairs of a person the court, without appointing a conservator, may authorize, direct or ratify any contract, trust or other transaction relating to the protected person's financial affairs or involving the protected person's estate if the court determines that the transaction is in the best interests of the protected person.

C. Before approving a protective arrangement or other transaction under this section, the court shall consider the interests of creditors and dependents of the protected person and, in view of the protected person's disability, whether the protected person needs the continuing protection of a conservator. The court may appoint a special conservator to assist in the accomplishment of any protective arrangement or other transaction authorized under this section who shall have the authority conferred by the order and serve until discharged by order after report to the court of all matters done pursuant to the order of appointment.

- a) Funding Options for Single Transactions:
 - (1) Special Needs Trust: If appropriate, the single transaction can be used to fund a first-party special needs trust in instances where the incapacitated person is disabled and may need public benefit assistance that they would not qualify for should they not have a special needs trust.

(2) Revocable Trust: A person can also establish a revocable trust for a beneficiary to reduce the need for ongoing Court costs and oversight. The Order may require accountings be provided to certain persons on an annual basis or other protective measures.

b) May also request to fund a UTMA as defined below.

2. UTMA (A.R.S. Title 14 Article 7)—For Minors Only (note that A.R.S. 14-7651 defines “minor” for purposes of UTMA as someone who is under the age of 21 years)

a) *Methods of Creation*

14-7654. Transfer by gift or exercise of power of appointment

A person may make a transfer by irrevocable gift to, or the irrevocable exercise of a power of appointment in favor of, a custodian for the benefit of a minor pursuant to section 14-7659.

14-7655. Transfer authorized by will or trust

A. A personal representative or trustee may make an irrevocable transfer pursuant to section 14-7659 to a custodian for the benefit of a minor as authorized in the governing will or trust.

B. If the testator or settlor has nominated a custodian pursuant to section 14-7653 to receive the custodial property, the transfer must be made to that person.

C. If the testator or settlor has not nominated a custodian pursuant to section 14-7653, or all persons so nominated as custodian die before the transfer or are unable, decline or are ineligible to serve, the personal representative or the trustee, as the case may be, shall designate the custodian from among those eligible to serve as custodian for property of that kind pursuant to section 14-7659, subsection A.

14-7656. Other transfer by fiduciary

A. Pursuant to subsection C of this section, a personal representative or trustee may make an irrevocable transfer to another adult or trust company as custodian for the benefit of a minor pursuant to section 14-7659 in the absence of a will or under a will or trust that does not contain an authorization to do so.

B. Pursuant to subsection C of this section, a conservator may make an irrevocable transfer to another adult or trust company as custodian for the benefit of the minor pursuant to section 14-7659.

C. A transfer pursuant to subsection A or B of this section may be made only if all of the following apply:

1. The personal representative, trustee or conservator considers the transfer to be in the best interest of the minor.

2. *The transfer is not prohibited by or inconsistent with provisions of the applicable will, trust agreement or other governing instrument.*

3. *The transfer is authorized by the court if it exceeds ten thousand dollars in value.*

G. Guardian ad Litem vs. Statutory Representative vs Special Masters

1. A.R.S. 14-1408 Appointment of Guardian ad Litem

At any point in a proceeding brought under this title, the court may appoint a guardian ad litem to represent the interest of a minor, an incapacitated, unborn or unascertained person or a person whose identity or address is unknown, if the court determines that representation of the interest otherwise would be inadequate. If not precluded by conflict of interests, the court may appoint a guardian ad litem to represent several persons or interests. In its order appointing the guardian ad litem, the court shall state the basis for the appointment.

2. A.R.S. 14-10302 Appointment of Representative

3. Arizona Rules of Probate Procedure, Rule 32. Guardians ad Litem and Statutory Representatives.

4. Rules of Civil Procedure for the Superior Courts of Arizona, Rule 53(a). Masters

(a) Appointment.

(1) *Scope.* Unless a statute provides otherwise, a court may appoint a master only to:

(A) perform duties consented to by the parties;

(B) hold trial proceedings and make or recommend findings of fact and conclusions of law on issues to be decided without a jury if appointment is warranted by:

(i) some exceptional condition; or

(ii) the need to perform an accounting or resolve a difficult computation of damages; or

(C) address pretrial and posttrial matters that cannot be effectively and timely addressed by an available superior court judge in the county in which the court sits.

(2) *Disqualification; Affidavit.*

(A) A master must not have a relationship to the parties, attorneys, action, or court that would require disqualification of a judge under Arizona Supreme Court Rule 81, unless the parties, with the court's approval, consent to the appointment after the master discloses any potential grounds for disqualification.

(B) Promptly on receiving notice of an appointment or a prospective appointment, and before accepting the appointment, the prospective appointee must file an affidavit disclosing whether there is any ground for disqualification under Rule 53(a)(2)(A).

(3) *Possible Expense or Delay.* In appointing a master, the court must consider the fairness of imposing the likely expenses on the parties and must protect against unreasonable expense or delay.

5. Uses for Each Role

a) Guardian ad Litem for Incapacitated Person or Minor: If you have an incapacitated person or minor who is unable to act in his or her own best interest in a

case—especially where that person’s legal interests are at risk due to a lawsuit or other action, then a Guardian ad Litem should be considered. The Guardian ad Litem should work with the attorney for the incapacitated person to advocate a position to the Court and consider the effects of litigation on the incapacitated adult or minor.

b) Statutory Representative: Whereas a guardian ad litem’s role is limited to acting on behalf of another person in a pending court case, a statutory representative’s role may extend beyond the life of the court case. A statutory representative may be appointed only for a beneficiary of a trust and only if that beneficiary is a minor, an incapacitated person, an unborn child, or a person whose identity or location is unknown. The statutory representative, acting on behalf of the trust beneficiary for whom the representative was appointed, may receive notices, give consents, and other bind and act on behalf of that beneficiary.

c) Special Master: If there are specific issues to be addressed within a case—such as an accounting, review of spending, assessment of living conditions—then a Special Master should be considered to specifically review that issue and report to the Court.

d) County Variations: The use of these roles varies by county. Some counties in AZ have routinely appointed persons in this role, while other counties rarely appoint such persons without a specific request from the parties.

III. Tales from the COURTyard—Capacity and Undue Influence Adventures in Practice

A. Insane Delusion

1. A Thief in the Attic

a) Case Study: An elderly woman comes into the office to update her Will. She has two children and has decided to write out a child. Up until recently this child had provided her with care in another state, but she made the decision to move away from that child to be near her other child. She asserts that unfavored child had been stealing personal property from her and that is why she has decided to take the child out of the Will. She was very clear during the meeting and had clear answers to various questions. During a second meeting, alone with the client, she starts discussing the fact that while she is sleeping at night people are coming in through the window and stealing her things. She is very upset by the theft. I decided to not proceed with signing the Will because her clear delusions related to theft of her property and directly affected her previously expressed rationale for why she was writing a child out of her estate plan.

(1) In this case her delusion that people were stealing from her was directly related to her rationale for leaving a child out of her estate plan.

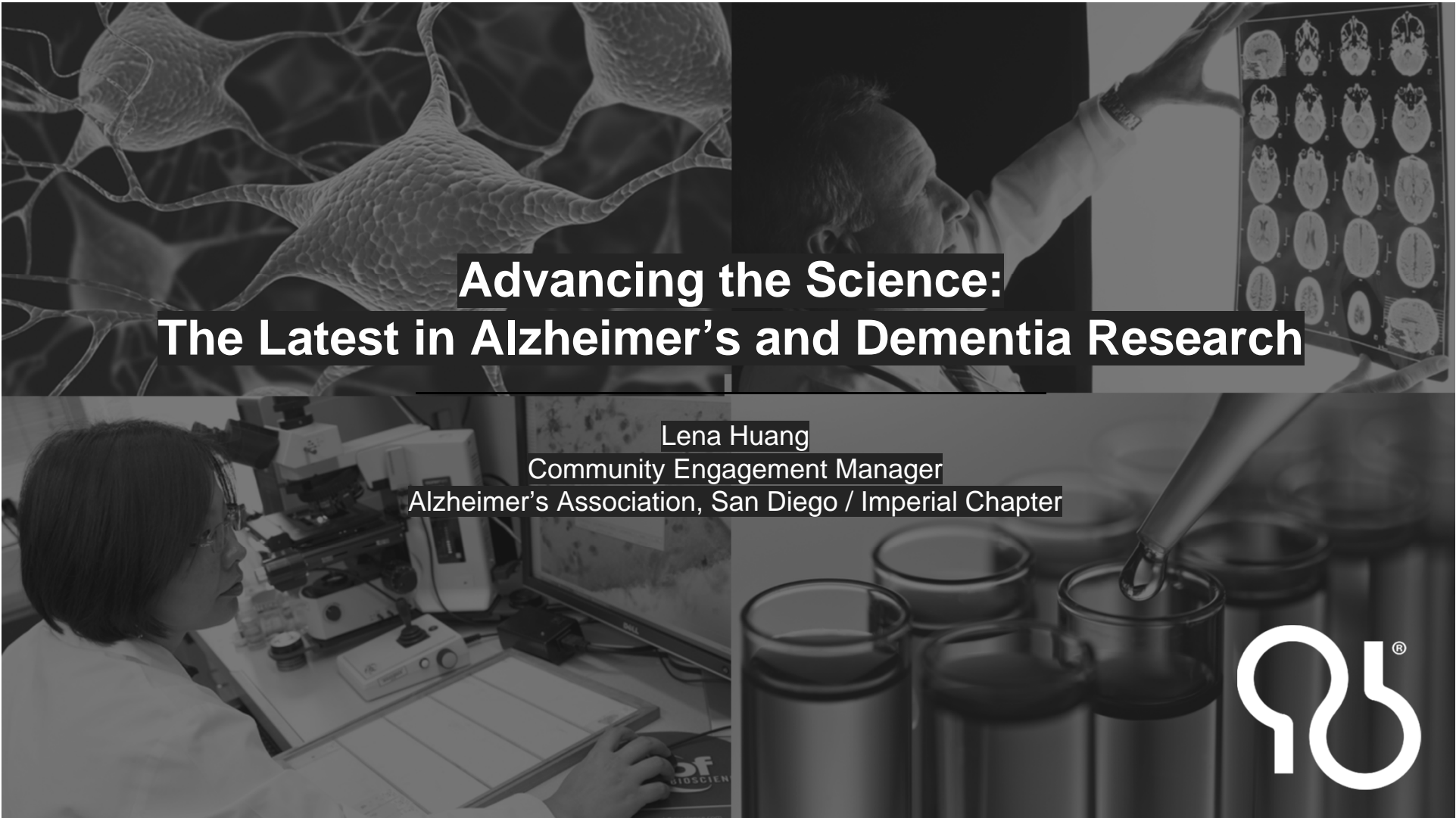
(2) If her delusions related to dogs running through her room at night, that would have changed the evaluation of the affect of her delusions on her capacity to execute a Will.

B. Undue Influence

1. Signs Practitioners Often See

- a) Clients are often brought in by one child who insists on being in the meeting.*
- b) Significant changes from a prior estate plan.*

- c) Clients deferring to another person in the room.
 - d) Client seems nervous, unsure, and overall sad about the changes he or she is proposing to the documents.
2. Ways to Protect Against Undue Influence.
- a) Meet with the client alone.
 - b) Ensure the client knows that no information will go to any person and that your meeting is confidential.
 - c) Make clear that no one is entitled to a copy of a person's Will or Trust while he or she is alive and that the document can be kept private and confidential.
 - d) Ask questions in different ways to ensure the client is consistent and feel comfortable expressing their personal opinion.
 - e) If working with a married couple, look at both people in the room and address them both during the planning process.
3. War Hero War Story (Judge Polk)



**Advancing the Science:
The Latest in Alzheimer's and Dementia Research**

Lena Huang
Community Engagement Manager
Alzheimer's Association, San Diego / Imperial Chapter





Our Work is About People and Science



The Alzheimer's Association is a worldwide voluntary health organization dedicated to Alzheimer's care, support and research.

Our mission is to lead the way to end Alzheimer's and all other dementia — by accelerating global research, driving risk reduction and early detection, and maximizing quality care and support.

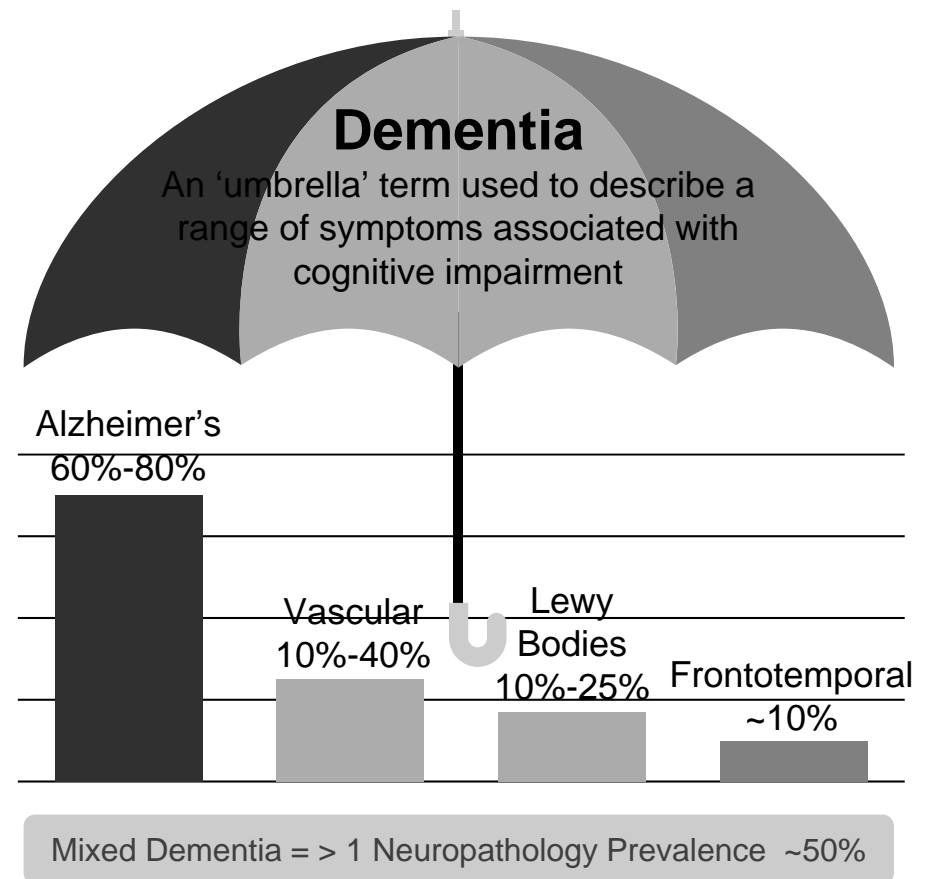


Our Time Today

- Landscape of Alzheimer's and Dementia Science
- Highlights in Early Detection and Diagnosis
- Latest Advances in Clinical Trials, Treatments and Lifestyle Interventions
- How You Can Get Involved

Dementia is a Syndrome

- Dementia is a collection of symptoms related to cognitive decline
- Can include cognitive, behavioral and psychological symptoms
- Due to biological changes in the brain
- Alzheimer's is most common cause
- Mixed dementia is very prevalent
- Some causes of cognitive decline are reversible and not truly dementia





2023 ALZHEIMER'S DISEASE FACTS AND FIGURES



While only 4 in 10 Americans talk to their doctor right away when experiencing early memory or cognitive loss,



7 in 10 would want to know early if they have Alzheimer's disease if it could allow for earlier treatment.

Between 2000 and 2019, deaths from heart disease has



decreased 7.3%

while deaths from Alzheimer's disease have

increased 145%



More than **6 million Americans** are living with Alzheimer's

.....a number expected to **double** by 2050

In 2023, Alzheimer's and other dementias will cost the nation

\$345 billion

By 2050, these costs could rise to nearly **\$1 trillion**

Over 11 million Americans provide unpaid care for people with Alzheimer's or other dementias

These caregivers provided more than 18 billion hours valued at nearly

\$340 billion



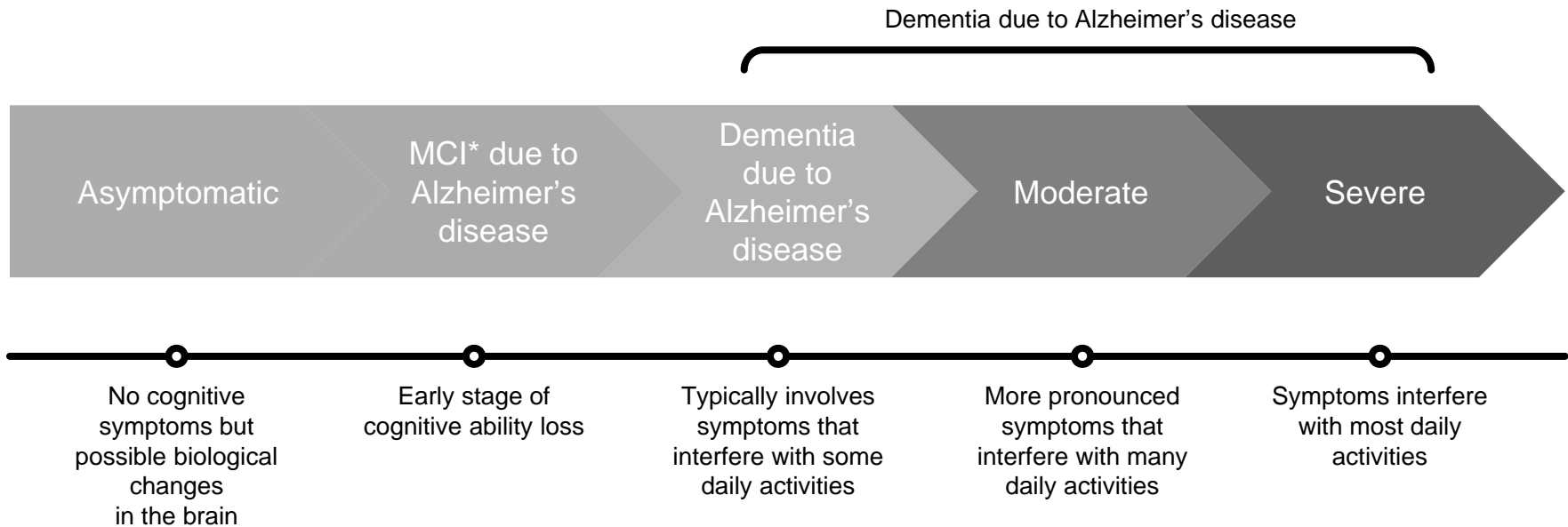
1 in 3 seniors dies with Alzheimer's or another dementia

It kills more than **breast cancer + prostate cancer** combined

The lifetime risk for Alzheimer's at age 45 is

1 in 5 for women + **1 in 10** for men

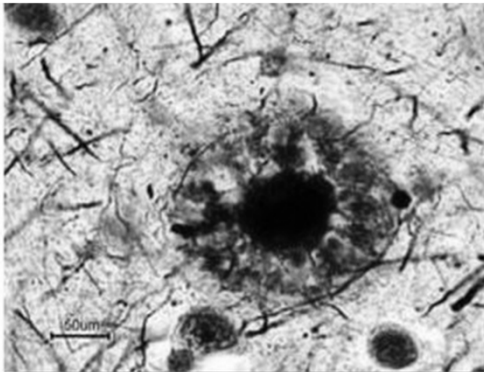
Alzheimer's Disease is a Continuum



*Mild cognitive impairment

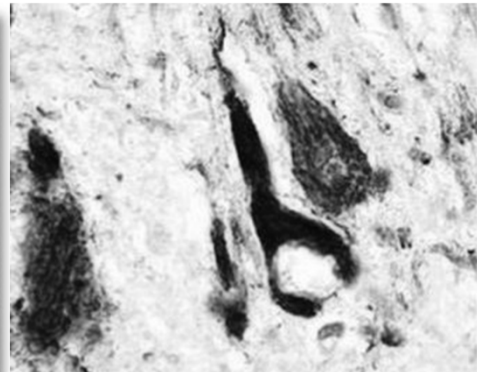
Hallmarks of Alzheimer's Disease

Neuritic Plaques



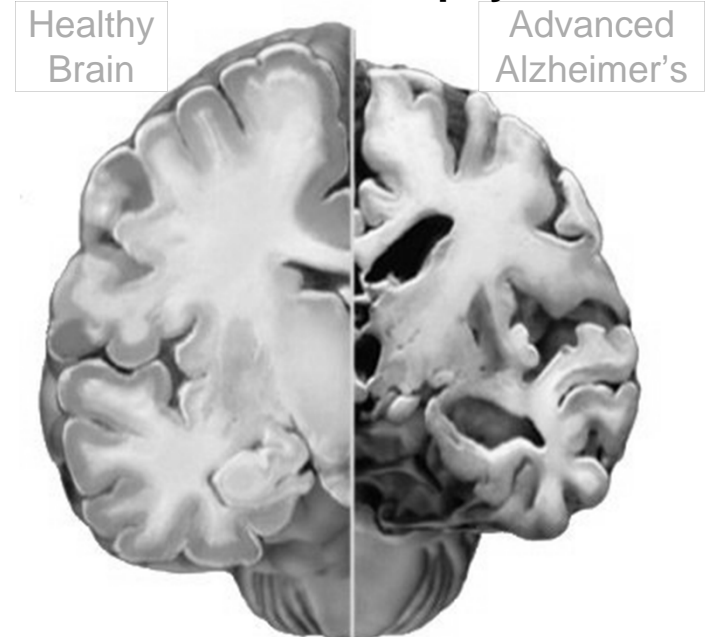
Extracellular deposits of **beta-amyloid**

Neurofibrillary Tangles

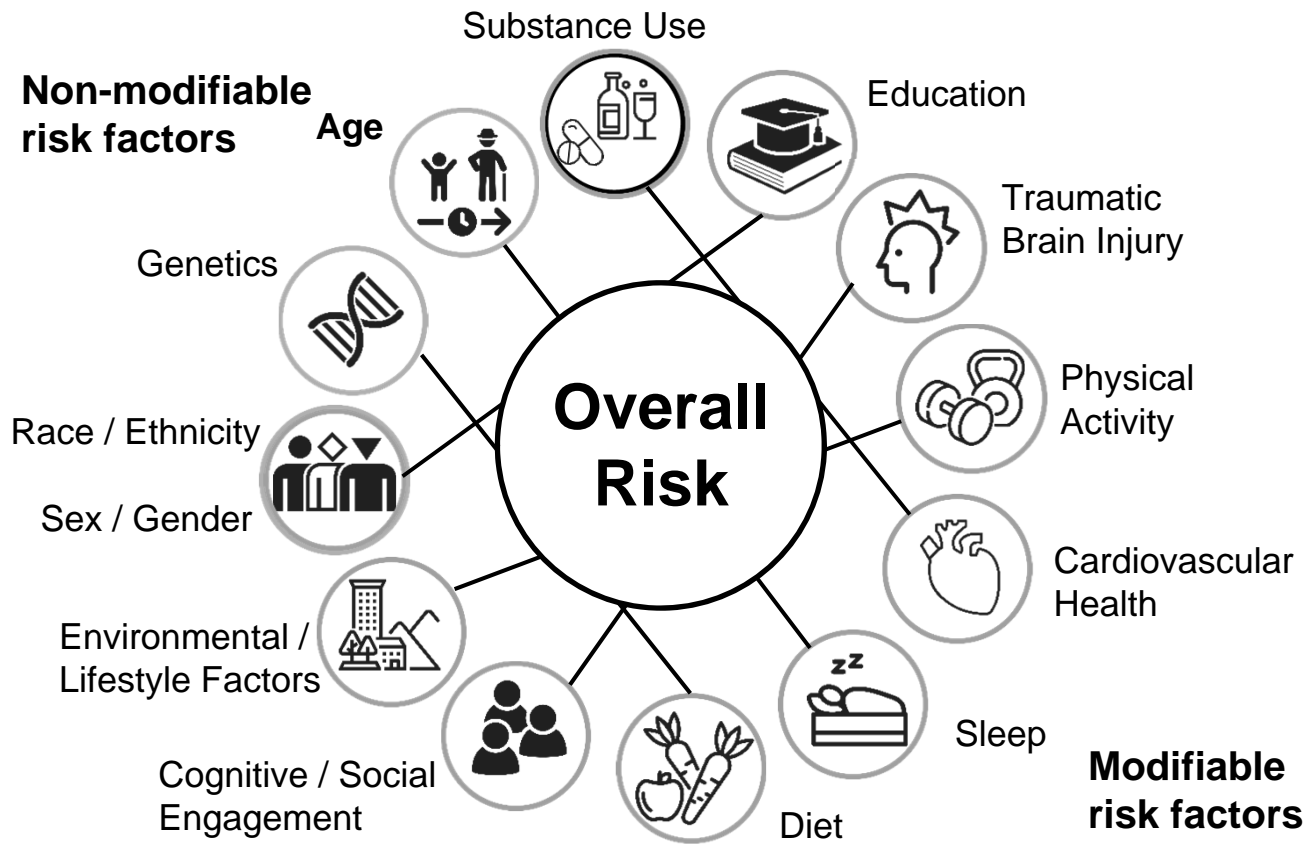


Intracellular deposits of hyperphosphorylated **tau**

**Neurodegeneration
Cortical Atrophy**



What May Impact Risk of Cognitive Decline or Dementia



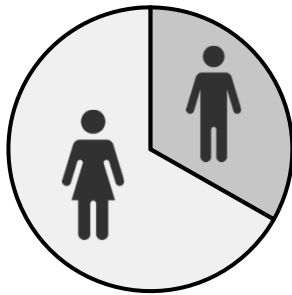
Constellation of reasons may be fundamental and unique to each individual

Social determinants of health may impact some or all of these factors

Strength of our understanding is different across risk factors

Need to Study Risk from ALL Angles

Gender, Racial and Ethnic Disparities in Alzheimer's Prevalence and Clinical Trials



Almost **two-thirds** of Americans with Alzheimer's are **women**.



Older **Black** and **Hispanic** Americans are disproportionately more likely than older **Whites** to have Alzheimer's or other dementias.



Ethnoracial groups have been historically **underrepresented** in clinical studies, underscoring the need for more **diversity** in dementia research.



Exciting Time in Research



ALZHEIMER'S  ASSOCIATION®

**The Largest Nonprofit
Funder of Alzheimer's
& All Dementia
Research in the World**



\$320M

currently
active



1000+

projects



54

countries



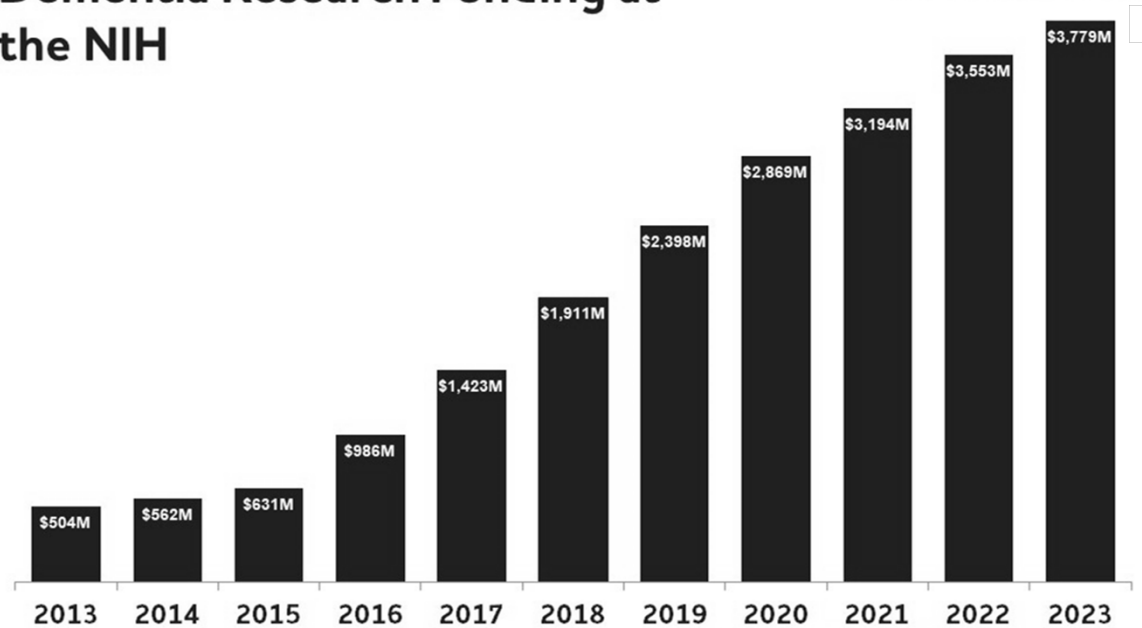
Find GRANT info at
alz.org/grants

We Advocate



Today, Alzheimer's and dementia research funding is more than \$3.7 billion annually. Since the passage of the Alzheimer's Accountability Act, Congress has increased Alzheimer's and dementia research funding more than seven-fold.

Alzheimer's and Related Dementia Research Funding at the NIH



Source: NIH (<https://report.nih.gov/funding/categorical-spending>) with the 2023 figure reflecting NIH's estimated 2022 funding plus the additional increase of \$226M appropriated through the FY2023 omnibus.

RESEARCH IN OUR COMMUNITY

We have played a role in nearly every significant development in Alzheimer's science to date

California



ISTAART

810 Members

Grant Funding



Total awards: 423
Year: 1993-2023
Active awards: 151



Total amount: \$ 110.1 M
Active amount: \$ 55.9 M

Grant Reviewers



Reviewers: 479
Critiques: 4343

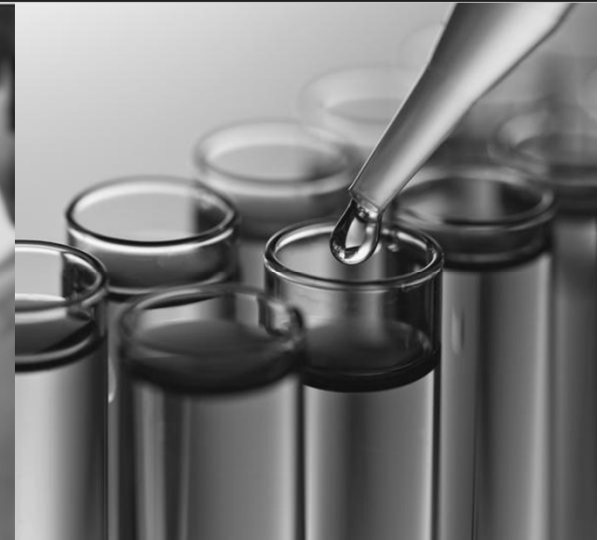
Funded Institutions



University of California, San Francisco, University of Southern California, The J. David Gladstone Institutes, Stanford University, Cedars-Sinai Medical Center, and others



Early Detection and Diagnosis



ALZHEIMER'S  ASSOCIATION®



An early diagnosis can have emotional, social and medical benefits

- Understand symptoms
- Explore treatment options
- Improve health outcomes
- Prevent complications
- Make legal and financial decisions
- Access care services
- Participate in clinical trials
- Effectively manage the cost of care

Modernizing the Diagnosis

Cognitively Unimpaired

Alzheimer's Dementia

Biomarkers

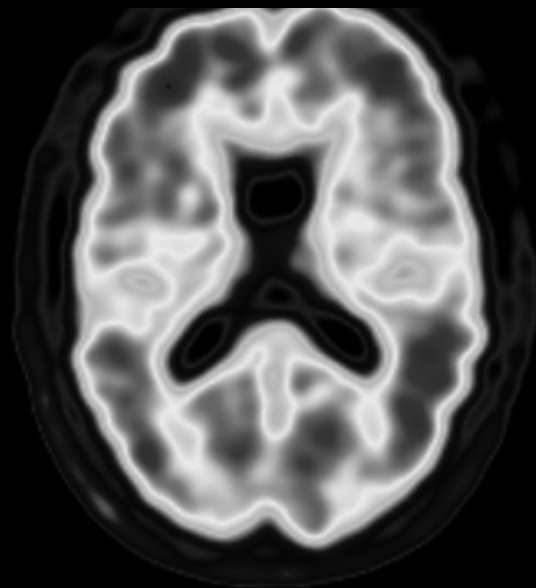
History & Cognition

20

years or more before symptoms appear,
the brain changes of Alzheimer's may begin.

ALZHEIMER'S  ASSOCIATION®

BIOMARKERS ARE CHANGING THE GAME



ACCELERATING THE SPEED OF RESEARCH

Brain Imaging

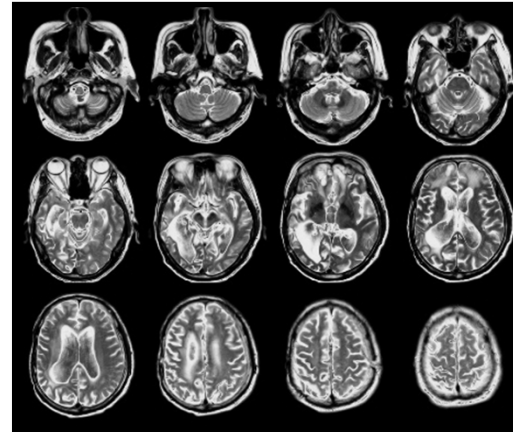
Biofluid Analysis

Emerging Markers

ALZHEIMER'S  ASSOCIATION

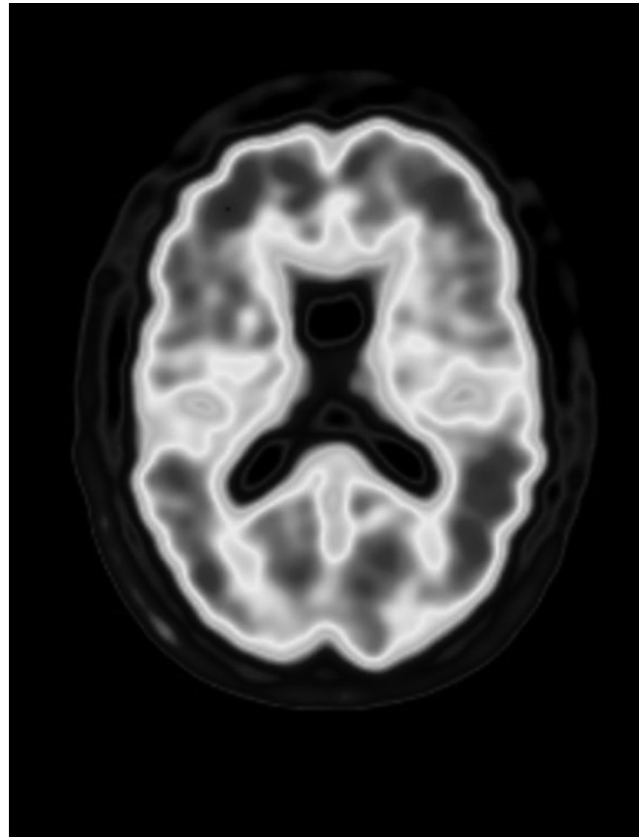
What is a Brain PET Scan?

- **Positron emission tomography (PET)** scan results aid doctors in diagnosing and treating memory conditions
- PET scan agents used to measure amyloid and tau, two hallmarks of Alzheimer's, are FDA-approved
- Scan information can help exclude Alzheimer's disease, aid in diagnosis, and may help guide patient management.



Advances in Biomarkers

- Biofluids are likely to be the future
- Urgent need for tools that streamline the process for patients
- But they **WILL NOT** replace the need for PET in trials in the near future



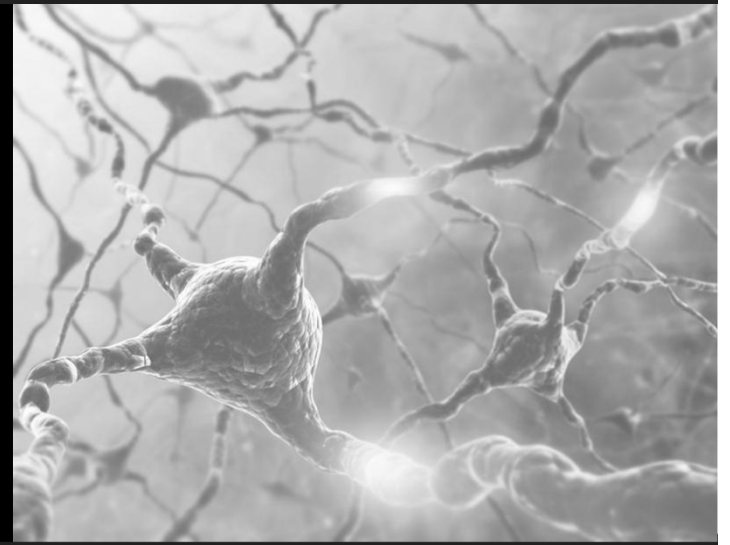
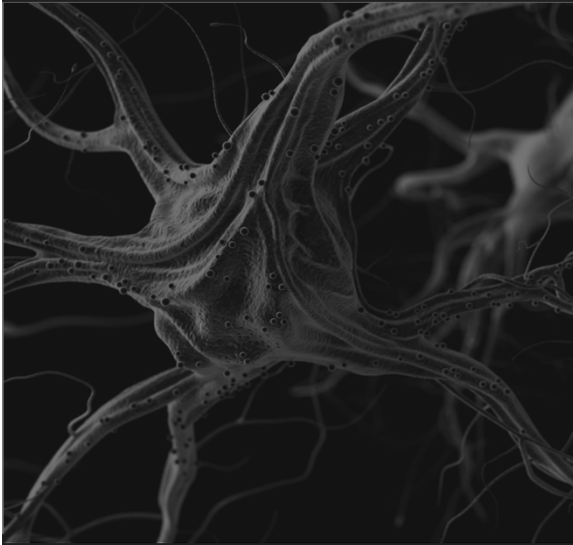
Brain Imaging



Biofluid Analysis



Progress Towards Risk Reduction and More Effective Treatments



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Focus on Risk Reduction

Up to **40%** of dementia cases could be prevented or delayed by targeting modifiable risk factors

Research suggests combining multiple healthy factors may be the most impactful



Physical Activity

Cognitive & Social Stimulation



Healthy Diet



U.S. Study to Protect Brain Health through Lifestyle Intervention to Reduce Risk



**Two Year | Multi-Center (Five U.S. Sites) | Randomized Clinical Trial
2,000 Participants | 60-79 Years Old | At Risk for Cognitive Decline**



Self-Guided and Structured Intervention Groups
Physical Activity | Nutrition | Intellectual Engagement | Health Coaching
Differ in Format, Expectations, and Accountability



Commitment to **Community-Based**
Outreach, Recruitment and Representation
✓ *Completed Recruitment in March 2023*
✓ *~ 30% from Underrepresented Populations*



NIA Supported **Ancillary Studies:**

- ✓ POINTER-Neuroimaging
- ✓ POINTER-zzz
- ✓ POINTER-Neurovascular
- ✓ POINTER-Microbiome

If the interventions prove effective, this study will lead the way in the development of an accessible and sustainable community-based program for prevention.

U.S. POINTER Is Not Alone

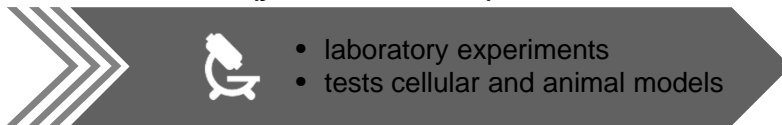
World-Wide FINGERS is a large, international network sharing experiences and data, and is collaborating to prevent cognitive impairment & dementia worldwide.



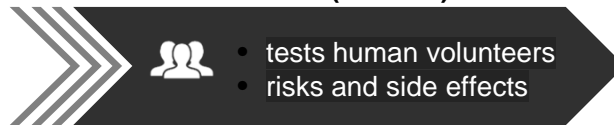
Feeding the Treatment Discovery Pipeline



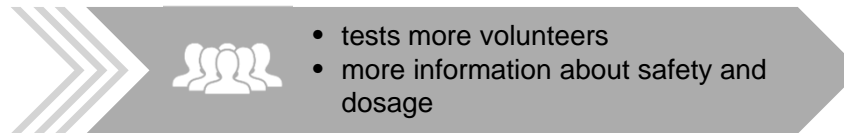
Preclinical (years to decades)



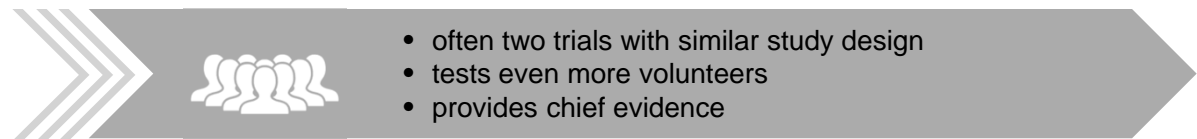
Phase I (months)



Phase II (months to years)

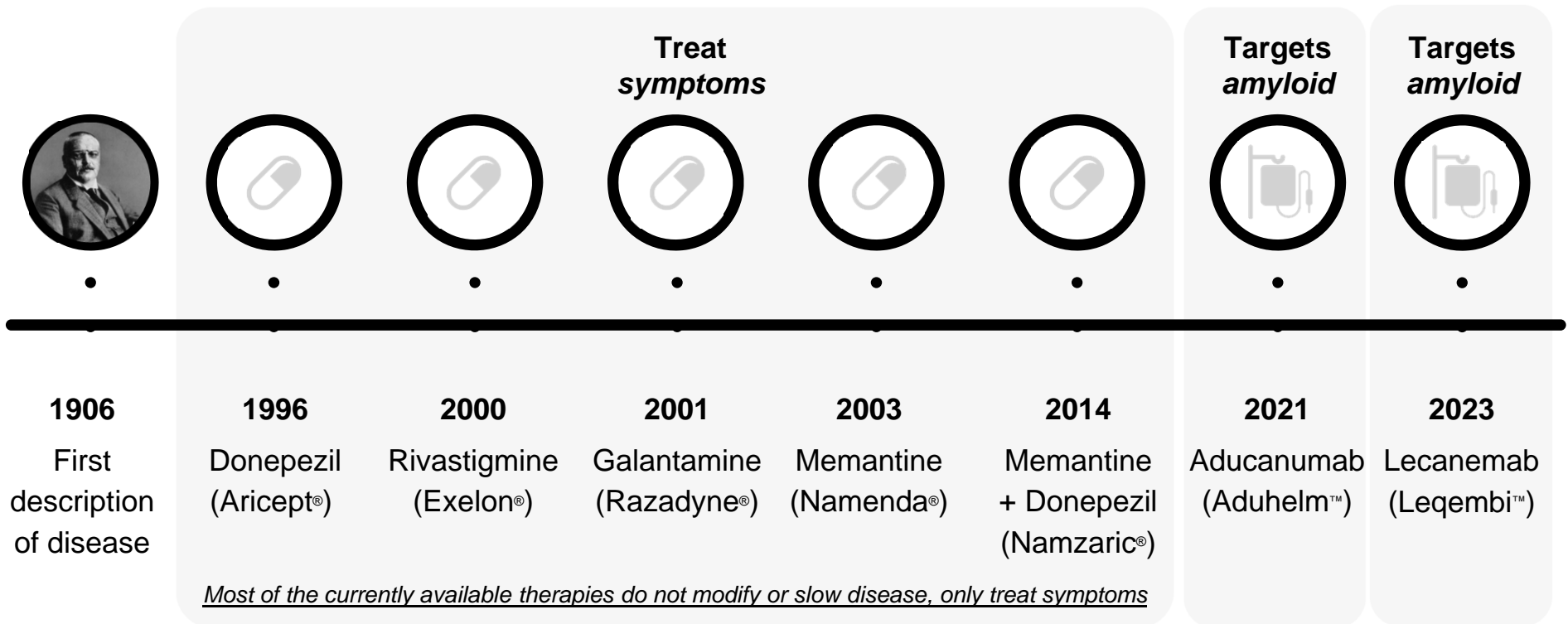


Phase III (years to decades)



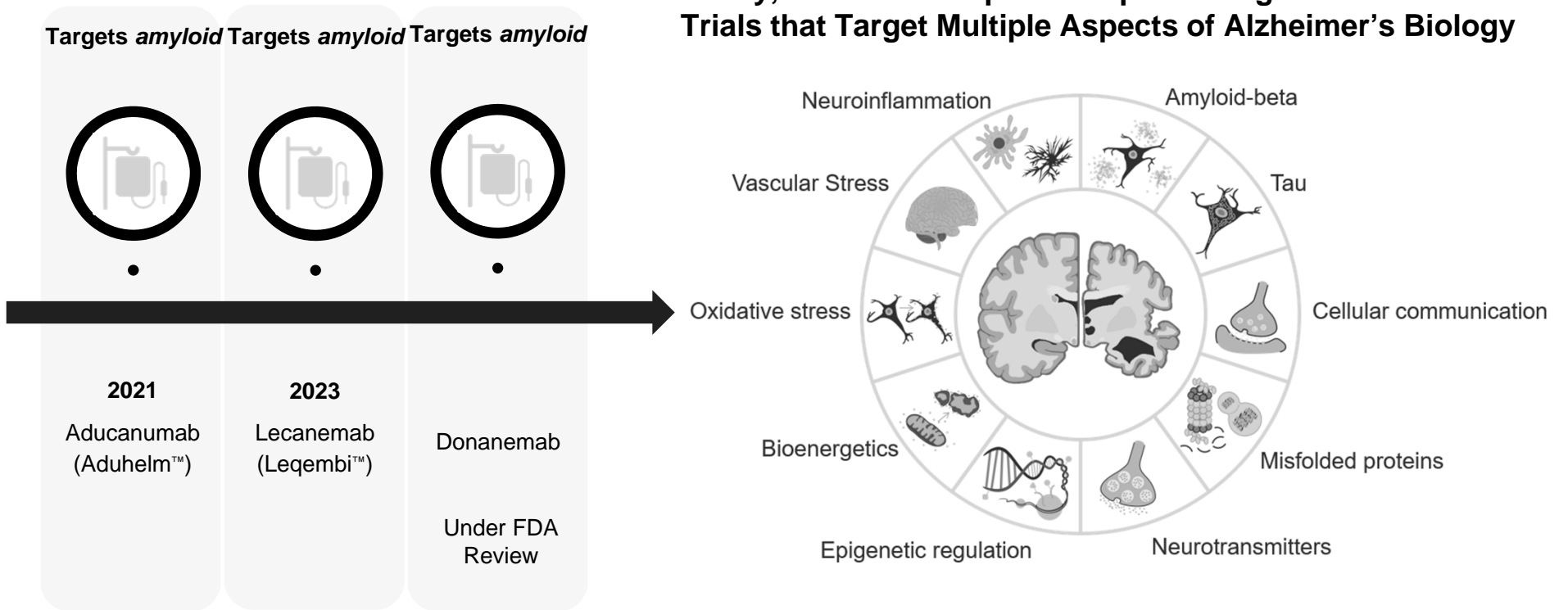
ALZHEIMER'S ASSOCIATION

FDA-Approved Therapies for Alzheimer's



A New Phase of Treatment

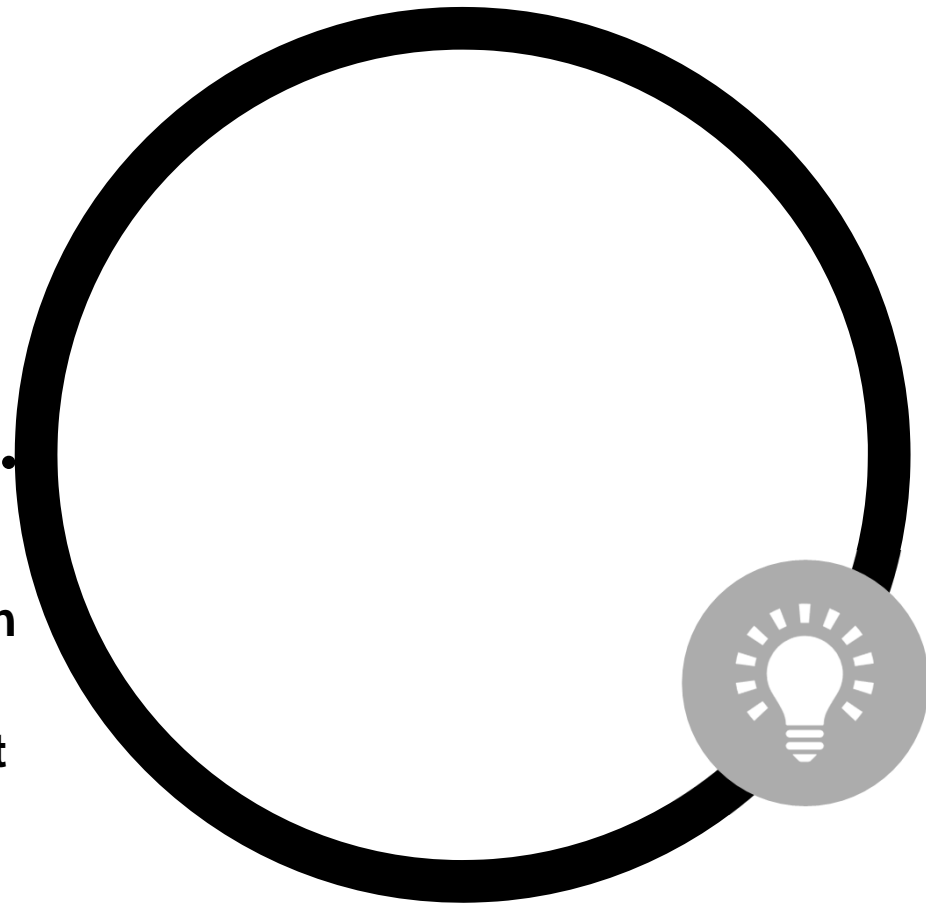
Today, Over 140 Unique Therapies Being Tested in Clinical Trials that Target Multiple Aspects of Alzheimer's Biology



**Every study helps
scientists learn more
about the disease they
are trying to address.**



**There is an urgent need for inclusion
of individuals of under-represented
backgrounds in clinical trials so that
new discoveries can benefit all.**



How to Get Involved in Research

Over 370,000 Users

**750+ Clinical Studies at
Locations around the world**

alz.org/trialmatch

TrialMatch is a free **clinical studies matching service** designed to provide a **customized list** of potential study matches to each user.



trialmatch[®]
ALZHEIMER'S  ASSOCIATION[®]

641

Alzheimer's
disease

278

Mild Cognitive
Impairment

21

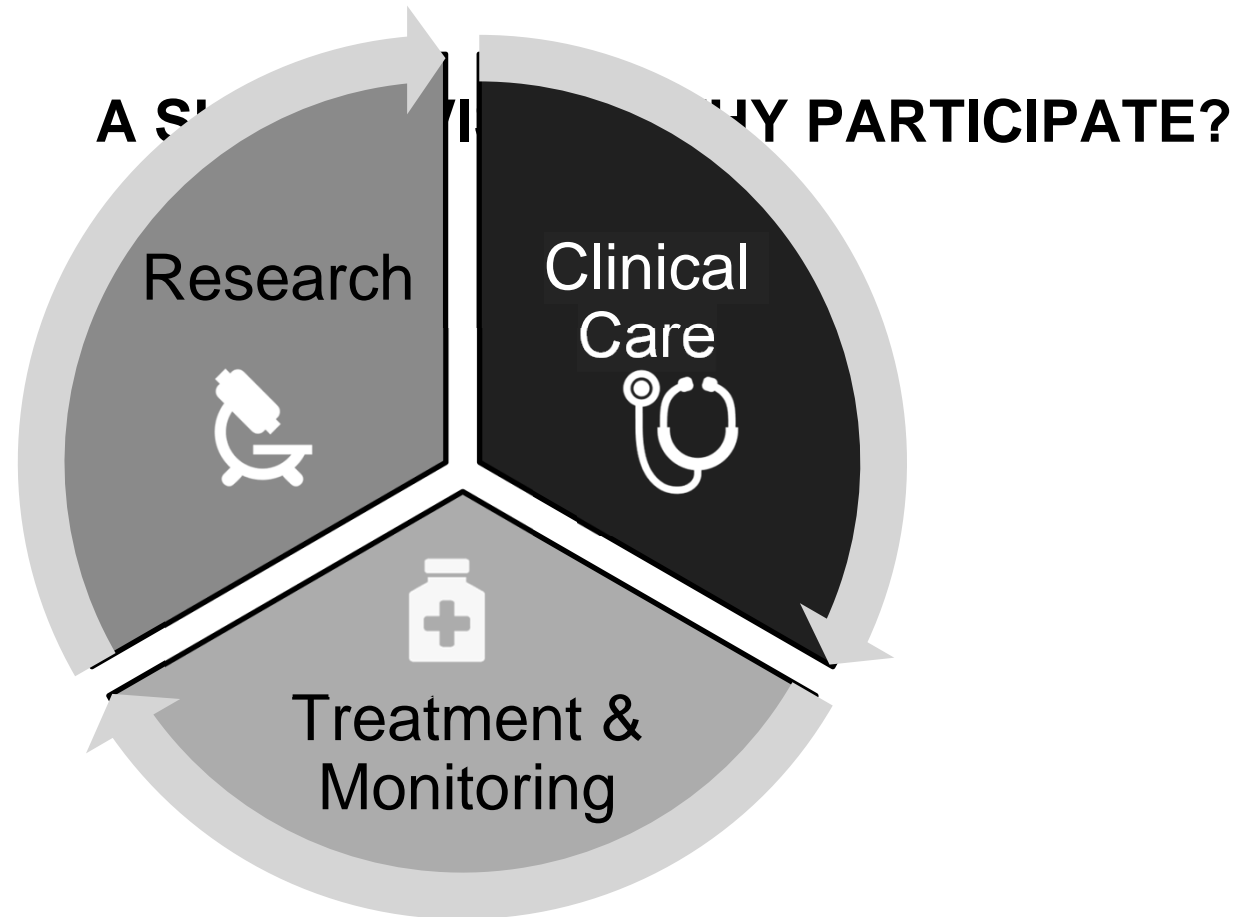
Vascular
Dementia

88

Other
Dementia

ALZHEIMER'S  ASSOCIATION[®]

A New Phase



ALZHEIMER'S ASSOCIATION

Alzheimer's Association Research Resources



Association's Website | alz.org



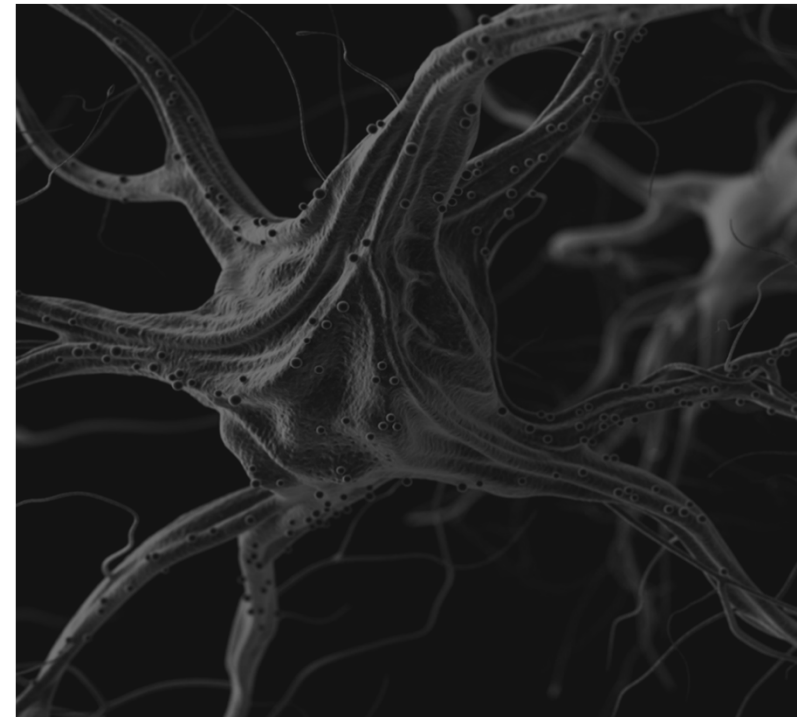
Research at the Association | alz.org/research



Join a Clinical Trial | alz.org/trialmatch



Contact the 24/7 helpline | 800-272-3900



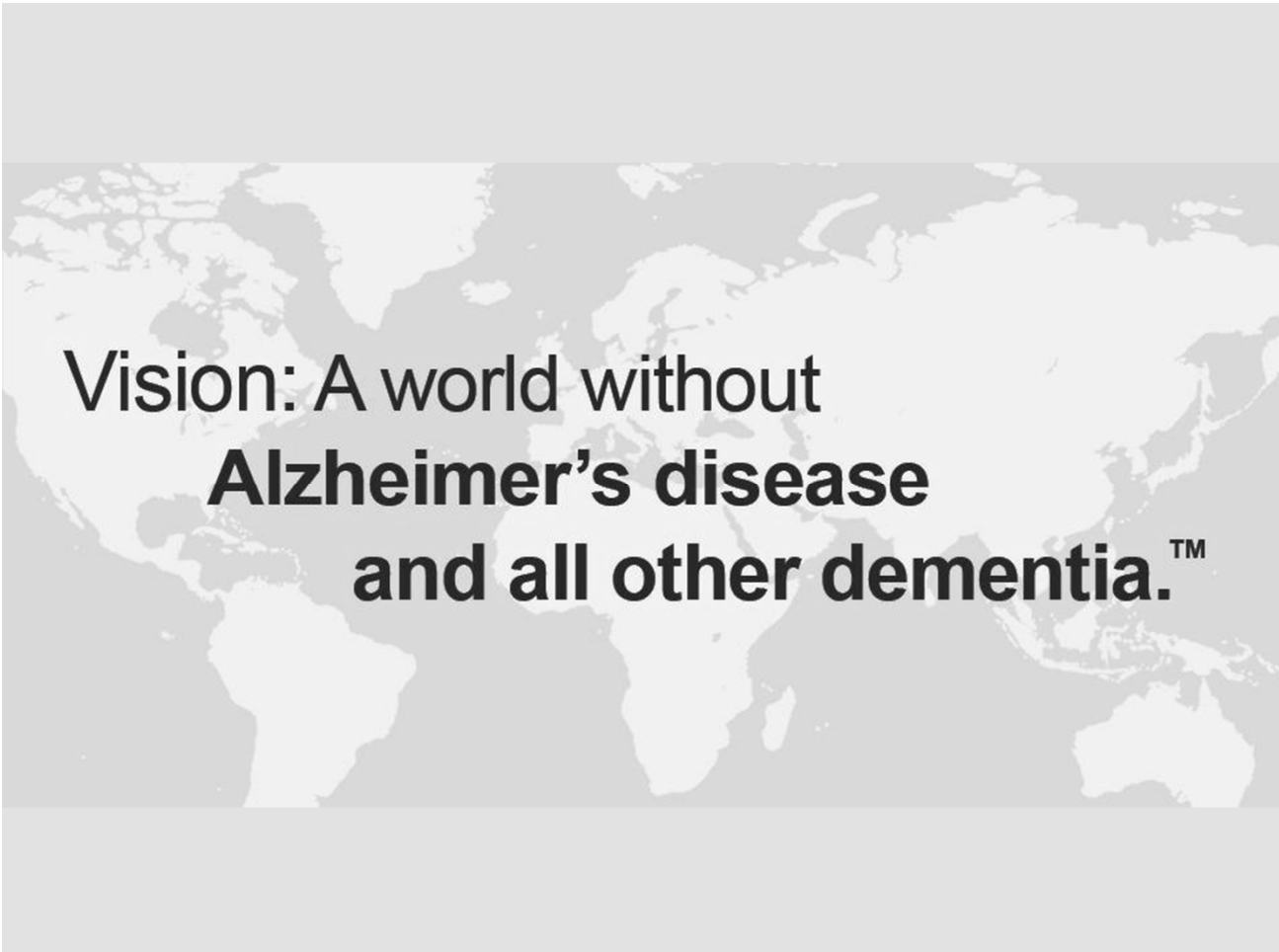


In Summary...

- **Alzheimer's Association is the global leader for Alzheimer's and dementia science**
- **Exciting time in research**
 - New tools for detection and diagnosis
 - Growing diversity of therapies under investigation
 - New resources and strategies to promote diverse participation
- There is **HOPE** in research



1-800-272-3900

A grayscale world map is centered in the background of the slide, showing the continents of North America, South America, Europe, Africa, and Asia.

**Vision: A world without
Alzheimer's disease
and all other dementia.™**

ALZ.ORG

ALZHEIMER'S  ASSOCIATION®



Probate Trust & Estate Track

Day Three

July 12, 2023

8:15 AM - 12:30 PM

How to Get Paid For Your Work

By: mostly Denice R. Shepherd with a little help from Hon. Jay M. Polk

A. BEST PRACTICES FOR LAW OFFICE MANAGEMENT

1. Follow good office procedures in documenting time and expenses. Use a time billing system and keep track of your time daily.
2. Bill a reasonable amount based on market value, your actual skills and experience—not based on your opinion of your worth. Don't be a pig.
 - a. It is unethical in Arizona to charge an excessive fee. Attorneys who have knowledge that another attorney charged an excessive fee should report it to the State Bar. *Ariz. Op. 94-09* regarding alleged excessive fee in routine probate.
3. Tell the Court what you are doing in how you write the time to explain the amount of time you are spending, but watch you do not reveal client confidences.
4. Always have a written understanding with your client about who pays what and when. Ask them if they have the resources to pay your bill on a monthly basis. Give them the written understanding prior to accepting the employment and make sure they read it. Encourage them to ask questions about it. Require a signed understanding about fees, and if at all possible, a deposit, before actually accepting the case. Explain how the deposit is deposited into a trust account and expended as fees are earned and costs incurred.
5. Explain what is legally required for you to do in the type of case you are working on, so that clients will anticipate costs for such legal work as annual accounts, discovery, etc.
6. Explain cost benefit analysis requirements and *In Re Sleeth*, [226 Ariz. 171](#), [244 P.3d 1169](#) (App. 2010). You should be able to ascertain if your client is particularly emotional about an issue in the case and you should address how their emotions might impact their judgment as the case unfolds.
 - a. If your client is not willing to allow the legal matter to be pursued under the dictates of *Sleeth*, the new statutes and proposed rules, then do not take the case, or make it very clear the client is responsible for payment, and that the estate **might** reimburse none, part or all of it.
7. I use the following paragraph in my guardianship/conservatorship representation agreements:

CLIENT understands she/he may be reimbursed for a portion of the attorney's fees and costs by the Conservatorship Estate of John Doe, if CLIENTS' petition is successful. However, the reimbursement, if any, is subject to court approval. ATTORNEY agrees to prepare any itemization or documents the court requires to obtain said reimbursement for CLIENT, but does not and cannot guarantee CLIENT will, in fact, be reimbursed. CLIENT shall remain responsible and liable for all reasonable fees and costs not reimbursed by the Conservatorship Estate.

 - a. I use similar paragraphs in all Title 14 cases. I would rather the client pay me, and my client to run the risk of not getting repaid than have me risk waiting to get paid, not getting paid, or having to reimburse fees. I cannot collect in cases where I represent a fiduciary who has no money, but needs to pursue a claim on behalf of the ward. I often, but not always, will seek prior Court authorization to

- periodically bill the estate.
8. Consider if multiple beneficiaries—all of whom might benefit from your work—would jointly pay for your services, but be careful to follow the rules and get waivers.
 - a. *Arizona Ethics Opinion 01-06* held, “A lawyer should not enter a contract to provide legal services paid by a third party if the contract might induce the lawyer improperly to curtail services to a client or to perform them in a way contrary to the client’s interests.”
 9. If you anticipate getting paid out of the sale of an asset, such as real estate, get the client to sign appropriate documents up front that you have a lien on the proceeds. Draft escrow instructions to that effect.
 10. Talk to your client about time and expenses in the first conference and keep bringing it up. Talk to them about costs of expert witnesses (before incurring the expense). Talk to them about the expense of hearings (before you file the petition). Offer alternatives to expensive discovery means. This has the added benefit of promoting good client relations by making your clients feel a part of the legal team.
 11. Bill clients monthly even if you expect to get paid from the estate. Clients need to know what you are doing and showing them a bill lets them know you are paying attention to their case.
 12. Tell anyone else entitled to the information how you will be billing, then send regular bills to those entitled to receive the billing.

B. KNOW AND FOLLOW APPLICABLE STATUTES, RULES AND CASELAW RE: FEES IN PROBATELAND

1. Read *ER 1.5, Rule 42, Ariz. Rules of Sup. Ct.*
2. Read *Schwartz v. Schwerin*, [85 Ariz. 242, 336 P.2d 144 \(1959\)](#).
 - a. In *Schwartz*, the amount of compensation had not been agreed upon by the parties, and the court held that the attorney's claim must be based on *quantum meruit* to establish the "reasonable value of services rendered." *Id.* at 245, 336 P.2d at 146.
 The court identified the following factors to be considered:
 - (1) the qualities of the advocate : his ability, his training, education, experience, professional standing and skill;
 - (2) the character of the work to be done: its difficulty, its intricacy, its importance, time and skill required, the responsibility imposed and the prominence and character of the parties where they affect the importance of the litigation;
 - (3) the work actually performed by the lawyer : the skill, time and attention given to the work;
 - (4) the result: whether the attorney was successful and what benefits were derived.
 The court noted that no one element should predominate or be given undue weight.
3. Read *In Schweiger v. China Doll Restaurant Inc.*, [673 P.2d 927, 138 Ariz. 183 \(Ariz.App.Div.1 07/28/1983\)](#). In this case the Court set the standard for how attorneys

should present their billings to judges to justify the hours charged. The Court wrote: “The affidavit of counsel should indicate the type of legal services provided, the date the service was provided, the attorney providing the service (if more than one attorney was involved in the appeal), and the time spent in providing the service... It is insufficient to provide the court with broad summaries of the work done and time incurred. “[A]ny attorney who hopes to obtain an allowance from the court should keep accurate and current records of work done and time spent.”

4. The application requirements set forth in *China Doll* are meant to "enable the court to assess the reasonableness of the time incurred." *Orfaly v. Tucson Symphony Soc’y*, 209 Ariz. 260, ¶ 23, 99 P.3d 1030 (App. 2004)
5. In order for the court to make a determination that the hours claimed are justified, the fee application must be in sufficient detail to enable the court to assess the reasonableness of the time incurred. Practitioners are advised to prepare their summaries based upon contemporaneous time records which indicate the work performed by each attorney for whom fees are sought. *Laje v. R.E. Thomason General Hospital*, 665 F.2d 724, 730 (5th Cir.1982).
6. Read *In re Sleeth*, 226 Ariz. 171, 244 P.3d 1169 (App. 2010), then read it again. Pay particular attention to:
 - a. The *Sleeth* Court cited the National Probate Court Standard 3.1.5, Attorneys’ and Fiduciaries’ Compensation, which lists eight possible factors to aid courts in determining whether a fee request is reasonable, one of which is the benefit derived by the provision of an attorney’s services. The commentary emphasizes that “[t]ime expended should not be the exclusive criterion for determining fees . . . [and] “should not warrant an award of fees in excess of the worth of the services performed” In addition, the commentary notes that courts should encourage rendering of services “in the most efficient and cost-effective manner feasible” and appropriate delegation to paraprofessionals. Furthermore, the “attorney or fiduciary has the burden of proving the reasonableness of the fees requested . . . [and] [i]mproper actions . . . may justify a reduction or denial of compensation.” The other factors listed by the Standard are: the usual and customary fees in the legal community; the risks and responsibilities associated with the services; the estate’s size; the character of the services or the complexity of the issues; the amount of time required; the skill and expertise required; the experience, reputation, and ability of the provider. *National Probate Court Standards*, § 3.1.5. *cmt. 6.*
 - b. “Obviously, fiduciaries and their attorneys must avoid the pursuit of pyrrhic victories that accomplish little but to bankrupt the protected person.” (Para.21) .
 - c. “When a guardian or conservator has no personal financial obligation for attorney’s fees and no concern over whether his expenditures will be fully approved, he may lack incentive to avoid financial improvidence. In a case in which the protected person’s estate suffers significant and harmful losses, the superior court must exercise its independent judgment to determine what portion of the attorney’s fees were reasonably incurred. Otherwise, there is no motivation for attorneys to judiciously weigh the cost of their actions against the risks and potential harm to the protected person’s estate.” (Para.26)
 - d. “whether counsel has filed unnecessary motions or engaged in unproductive

litigation are factors that the superior court should consider [regarding fee awards].” (Para.22).

7. *Sleeth* has its limits, though. In *In re Conservatorship for Mallet*, 233 Ariz. 29, 308 P.3d 1180 (App. 2013), the Arizona Court of Appeals held that the trial court abused its discretion in denying half of the fiduciary’s and attorney’s fees when the sole basis for the denial was that the majority of the protected person’s net worth was the result of illiquid assets (specifically, real property) and the trial court’s finding that the protected person could not afford the requested fees “even though they were rightfully earned.” Of particular note is the following passage from paragraph 11 of the *Mallet* opinion:

Although the size and liquidity of the estate are relevant in determining whether services should be provided and fees approved for those services, the more significant inquiry is the degree to which the services will potentially benefit or have benefited the *overall* estate. Services are generally reasonable if their anticipated or actual benefit exceeds their cost to the estate. On the other hand, services would generally not be worthwhile (or reasonable) if cost exceeds benefit. Liquidity may also be relevant to the inquiry, as the total cost of services for an illiquid estate must include the cost of liquidating assets to pay for those services. If without proffered fiduciary/legal services, a substantial but illiquid estate would be depleted in an amount greater than the total cost of services (including the cost of liquidating assets to provide funds for payment), the services are likely reasonable and the court should approve payment of fees, liquidity notwithstanding.

8. In determining whether to award attorney’s fees to a prevailing party, the trial court may consider the following factors:

(1) the merits of the claim or defense presented by the unsuccessful party; (2) whether the litigation could have been avoided or settled and the successful party's efforts were completely superfluous in achieving the result; (3) whether assessing fees against the unsuccessful party would cause extreme hardship; (4) whether the successful party prevailed with respect to all of the relief sought; (5) the novelty of the legal question presented; (6) whether the successful party's claim or defense was adjudicated previously in this jurisdiction; and (7) whether an award would discourage other parties with tenable claims or defenses from litigating or defending legitimate contract issues. *In re Estate of Parker*, 217 Ariz. 563, ¶ 32, 177 P.3d 305, 311 (App. 2008).

9. A contingency fee is not *per se* inappropriate; however, the resultant fee must be reasonable and courts have the “inherent power to prevent the collection of excessive, unreasonable contingent fees.” *In re Conservatorship of Fallers*, 181 Ariz. 227, 229, 889 P.2d 20, 22 (App. 1994). In *Fallers*, the Arizona Court of Appeals applied that principle to a proceeding for the approval of a minor’s personal injury settlement and “recognize[d] and affirm[ed] the probate court’s discretion to determine a reasonable fee on a case by case analysis, pursuant to the standards established in ER 1.5(a) and *Swartz*.” *Id.*
10. *Rule 33, Ariz. Rules of Prob. Proc.* delineates the requirements for an application of fees

by an attorney representing a fiduciary in Title 14 proceedings, and states the court must follow the guidelines set forth in the *ACJA* §3-303.

- a. *Rule 33* and the Guidelines do not apply if you are seeking fees from another litigant and not the estate.
11. 14-1104. Prudent management of costs
12. 14-3720. Expenses in estate litigation
13. 14-3721. Proceedings for review of employment of agents and compensation of personal representatives and employees of estate
14. 14-3722. Compensation of appointees
15. 14-5109. Disclosure of compensation; determining reasonableness and necessity
16. 14-5110. Claim deadline for compensation; definitions
17. 14-5314. Compensation of appointees; definitions
18. 14-5414. Compensation and expenses; definitions
19. 14-5425. Distributive duties and powers of conservator
20. 14-10708. Compensation of trustee
21. 14-10709. Reimbursement of expenses
22. 14-10805. Costs of administration
23. 14-11004. Attorney fees and costs

C. COMMON LEGAL THEORIES REGARDING FEE AWARDS IN PROBATELAND

1. *Good faith theory*. Permits reimbursement of a personal representative for attorney's fees incurred in prosecuting or defending a claim even if the efforts are not successful, as long as the litigation was undertaken in good faith. The reference to "good faith" requires an objective determination based on all of the circumstances. *In re Estate of Gordon*, 207 *Ariz.* 401, 406, ¶ 24, 87 *P.3d* 89, 94 (*App.* 2004). Fees incurred in good faith may be paid. *In re Estate of Sadie R. Wright*, 647 *P.2d* 1153, 132 *Ariz.* 555 (*Ariz.App.Div.2* 03/30/1982).
 - a. Good faith may mean you were ordered by statute, rule or the Court to take some action—if so, say so. Good faith can be demonstrated by showing all along how you did a cost-benefit analysis of the alternatives. Good faith can be shown by a discussion of the possible benefits to the ward had you won and any detriment to the ward had you not tried. Sometimes you can lose the battle, but win the war. Good faith can be shown by your continued analysis of the benefits vs the cost and your suggestions for lowering costs. Good faith can also be shown by your attempts to settle a dispute (similar to civil cases). Point out your good faith (how many times you brought up cost to Court and/or parties) in your fee application.
2. *Benefit to the estate theory*. A benefit to the estate is a "circumstance that can assist in determining" whether good faith motivated the litigation. *Gordon* at ¶ 25. Thus, evidence of a benefit to the estate may indicate good faith and is a factor to be considered, just as the lack of benefit may reflect the absence of good faith.
 - a. Benefit need not be just financial. A benefit might include placing a ward in a more appropriate setting, preventing abuse or neglect or promoting the ward's emotional stability or general welfare.
 - b. Fees incurred for services providing a benefit to the estate should be paid. *Matter of Estes Estate*, 134 *Ariz.* 70, 654 *P.2d* 4 (*App.* 1982).

- c. The Court in *In re Estate of Goldie C. Brown*, 670 P.2d 414, 137 Ariz. 309 (Ariz.App.Div.1 05/19/1983), extended the “benefit” analysis to a “common fund doctrine.”
3. *Necessity and reasonableness*. The value of a fiduciary’s or attorney’s services should be evaluated based on considerations of necessity and reasonableness. *In re Smith's Estate*, 131 Ariz. 190, 639 P.2d 380 (1981)
4. *Proper or required administration*. The courts have recognized that payments to fiduciaries must be considered a priority debt and that payment of the fiduciary’s fees is actually part of the administration of an estate. *Treadway v. Montague-Elliston*, 673 P.2d 331, 138 Ariz. 133 (Ariz.App.Div.1 10/04/1983) [Conservator may pay herself and her attorney prior to transferring property to personal representative.]
5. *Common Fund Doctrine*. A party who employs attorneys to preserve a common fund may be entitled to be reimbursed for their attorney fees from that fund. See *In re Estate of Brown* , 137 Ariz. 309, 312, 670 P.2d 414, 417 (App. 1983).

D. NOT SO COMMON LEGAL THEORIES IN PROBATELAND TO GET FEES

1. *Benefit to Others*. Similar to the common fund doctrine, courts have recognized that fiduciaries often benefit not only their ward’s or probate estates but also others and those “others” receiving a benefit must also pay the fiduciary for its services. *In re Monaghan's Estate*, 220 P.2d 726, 70 Ariz. 349 (Ariz. 07/15/1950)
2. *Community expense contribution*. Sale of community property, including surviving spouse’s share, was allowed to pay personal representative’s administrative expenses and attorney’s fees, though costs between estate and spouse apportioned on benefit analysis.
3. *Attribution of expenses*. Prorating of expenses between the estates of several children in a family on a reasonably fair basis has been upheld. *In re Boyes' Estate*, 151 Cal. 143, 90 P. 454 (1907) (cited by Arizona opinions.)
4. *Legal Consequence*. The exceptions to this general rule include those situations in which the "attorneys’ fees are a legal consequence of an original wrongful act," *City Ctr. Exec. Plaza, LLC v. Jantzen* , 237 Ariz. 37, 344 P.3d 339 (App. 2015), often referred to as the "tort of another" principle, see State Bar of Arizona, *Arizona Attorneys’ Fees Manual* § 7.3.1, at 7-2 (Bruce E. Myerson & Patricia K. Norris eds., 6th ed. Supp. 2017); see also *Desert Mountain*, 225 Ariz. 194, ¶ 61, 236 P.3d 421.
 - a. The Arizona Supreme Court has described one of the exceptions to the general rule prohibiting awards of attorneys' fees as follows: Wre the wrongful act of the defendant has involved the plaintiff in litigation with others or placed him in such relation with others as makes it necessary to incur expenses to protect his interest, such costs and expenses, including attorneys' fees, should be treated as the legal consequences of the original wrongful act and may be recovered as damages.] *United States Fidelity & Guaranty Co. v. Frohmiller*, 71 Ariz. 377, 380, 227 P.2d 1007, 1009 (1951) (quoting 15 Am. Jur. Damages 144)
 - b. This exception is also embodied in the *Restatement (Second) of Torts* ? 914(2) (1979), which states:
One who through the tort of another has been required to act in the protection of his interests by bringing or defending an action against

a third person is entitled to recover reasonable compensation for loss of time, attorney fees and other expenditures thereby suffered or incurred in the earlier action. The foregoing exception, known as the "tort of another" exception, has been widely recognized in other jurisdictions. See *Annot.*, 45 *A.L.R. 2d* 1183 (1956); 22 *Am. Jur. 2d Damages* ? 618 (1988). As generally applied, in order to recover attorneys' fees under this exception, the plaintiff must show that: (1) he became involved in a legal dispute because of the defendant's tortious conduct; (2) the dispute was with a third party; (3) the plaintiff incurred attorneys' fees in connection with that suit; (4) the expenditure of attorneys' fees was a foreseeable or necessary result of the tortious conduct; and (5) the claimed fees are reasonable. 22 *Am. Jur. 2d Damages* 621 (1988).

5. Arizona courts have stated that the measure of conversion damages includes not only the value of the property taken, but also other damage suffered because of the wrongful detention or deprivation of the property, such as damages for loss of use. See *Phelps v. Melton*, 14 *Ariz. App.* 296, 297, 482 *P.2d* 905, 906 (1971). This statement of the law is consistent with the *Restatement (Second) of Torts*, which states that damages for conversion include "the amount of any further pecuniary loss of which the deprivation has been a legal cause[.]" *Restatement (Second) of Torts* 927(2)(b) (1979). *Collins v. First Financial Services Inc.*, 815 *P.2d* 411, 168 *Ariz.* 484 (*Ariz.App.Div.1* 07/25/1991).
6. *Attorney's Fees as Damages* Certain kinds of tort claims, such as wrongful repudiation of insurance coverage, or wrongful injunction, attachment, garnishment or execution. *Chula Vista Homeowners Ass'n v. Irwin*, 426 *P.3d* 1228 (*Ariz. App.* 2018).
7. *Third Party Litigation.* *Wichita v. Pima County*, 131 *Ariz.* 576, 643 *P.2d* 21 (*App.* 1982); *Chula Vista Homeowners Ass'n v. Irwin*, 426 *P.3d* 1228 (*Ariz. App.* 2018).

E. OTHER STATUTES IMPOSING FEES SOMETIMES FOUND IN PROBATE

1. 12-341.01. Recovery of attorney fees in contract actions.
 - a. Section 12-341.01(A) provides that a court may award reasonable attorney fees to the successful party in any contested action arising out of a contract. The statute further directs that a fee award "need not equal or relate to the attorney fees actually paid or contracted, but the award may not exceed the amount paid or agreed to be paid." *A.R.S. § 12-341.01(B)*. To recover fees under the statute, the successful party must therefore show it entered an attorney-client relationship and assumed a genuine financial obligation to compensate the attorney. *Moedt v. General Motors Corp.*, 204 *Ariz.* 100, 103, ¶ 11, 60 *P.3d* 240, 243 (*App.* 2002). *Fields v. Elected Officials Ret. Plan*, 248 *Ariz.* 241, 459 *P.3d* 503 (*Ariz. App.* 2020).
 - b. For clients who lack the means to retain competent representation, a contingent fee agreement to surrender any fee-shift award represents the only economic option—shifting the risk and expense of litigation to counsel. *Cf. Arnold v. Ariz. Dep't of Health Servs.*, 160 *Ariz.* 593, 608, 775 *P.2d* 521, 536 (1989) ("Attorney's fees should not be limited by the fact that the plaintiffs are indigent and that their attorneys accepted the case on a pro bono basis."). Nothing in § 12-341.01 shows this fee arrangement is outside its reach. *Fields v. Elected Officials Ret. Plan*, 248 *Ariz.* 241, 459 *P.3d* 503 (*Ariz. App.* 2020) This holding is very

important if you are representing a client through a legal services organization. You can ask for fees in such representation if there is some theory or statute allowing an award of fees. Confirm with the legal services organization how an award would be handled and advise the client in writing what you are doing.

- c. When two claims are so intertwined as to be indistinguishable, a court has discretion to award attorney fees under § 12-341.01 even though the fees attributable to one of the causes of action would not be recoverable under this statute. *City of Cottonwood v. James L. Fann Contracting, Inc.*, 179 Ariz. 185, 194-95, 877 P.2d 284, 293-94 (App. 1994) (trial court in best position to determine whether litigation on successful and unsuccessful claims so intertwined as to render fees for both compensable). Though a bankruptcy action was a separate and distinct proceeding, the logic of prior cases allowed an appellate court to find a bankruptcy proceeding was substantially intertwined with the contract dispute to allow fees. See *First Nat'l Bank of Ariz. v. Cont'l Bank*, 138 Ariz. 194, 200, 673 P.2d 938, 944 (App.1983) (awarding fees under § 12-341.01 because "pre-complaint investigation and evaluation of the potential claim is part of the process and expense of litigation"). *Zeagler v. Buckley*, 219 P.3d 247 (Ariz. App. 2009)
2. 12-1103. Disclaimer of interest and recovery of costs; request for quit claim deed; disclaimer of interest by state
3. 25-324. Attorneys Fees in Dissolution
 - a. The Arizona legislature has viewed legal representation as sufficiently important to the dissolution process to include it, along with "necessities of life" in the expenditures either party may make from community assets after [the] filing of a petition for dissolution. 4 A.R.S. § 25-315(A)(1)(a). Likewise, in discussing whether attorney fees could be awarded to a spouse who was not destitute under A.R.S. § 25-324, this court recognized the principle that "every spouse ... owes a duty of support to his or her marital partner," and that duty extends to the payment of dissolution-incurred attorney fees under certain circumstances. *Magee v. Magee*, 206 Ariz. 589, ¶ 14, 81 P.3d 1048, 1051 (App.2004).
 - b. Had the legislature intended to add a subjective dimension to the reasonableness component of, it would have chosen similarly express language to do so. Arizona courts have concluded the legislature intended courts to assess the reasonableness of a litigant's position pursuant to § 25-324(A) by an objective standard. *In re Marriage of Williams*, 200 P.3d 1043, 219 Ariz. 546 (Ariz. App. 2008)
 - c. Since court appointed attorneys are now serving as GAL's in dissolution cases this statute has become more important. Also it might be relevant if community property issues are decided by a probate judge in a conservatorship case. These cases may also be useful for court appointed attorneys to get paid in cases involving the disabled 18-year-old whose divorced parents are still fighting custody and child support issues.
 - d. Attorney fees incurred during a dissolution proceeding can be incurred for the benefit of the community, are debts "connected with the community and from which the community receives" [a] benefit. *Hamada v. Valley Nat'l Bank*, 27 Ariz.App. 433, 436, 555 P.2d 1121, 1124 (1976). Indeed, although initially counterintuitive in the context of dissolution proceedings, in some cases the

community may benefit from the orderly and lawful division of assets, including temporary orders which protect community assets. And, in certain circumstances, the advice of counsel and the entry of temporary orders providing for a spouse's necessary living expenses may, when coupled with mediation or counseling, actually preserve the marriage. *Cardianl & Stachel, PC v. Curtiss*, 225 Ariz. 381, 238 P.3d 649, 590 Ariz. Adv. Rep. 21 (Ariz. App. 2010)

- e. In order to constitute community debt, a debt need not be incurred with the primary intent of benefiting the community. *Hofmann Co. v. Meisner*, 17 Ariz.App. 263, 268, 497 P.2d 83, 88 (App.1972). Rather “[a]ll that is required is that some benefit was intended for the community.” Id. Furthermore, no actual pecuniary benefit need be received by the community. *Lorenz-Auxier Fin. Group, Inc. v. Bidewell*, 160 Ariz. 218, 220, 772 P.2d 41, 43 (App.1989). Thus, the fact that attorney fees may benefit the client spouse more than the community as a whole is not determinative; rather, there need only be some intent to benefit the community. If such intent exists, the attorney fees can be a community debt, despite the fact the proceeding in which they are incurred ultimately will divide the community assets and terminate the community. *Cardianl & Stachel, PC v. Curtiss*, 225 Ariz. 381, 238 P.3d 649, 590 Ariz. Adv. Rep. 21 (Ariz. App. 2010)
- 4. 46-456. Duty to a vulnerable adult; financial exploitation; civil penalties; exceptions; definitions
- 5. Many other statutorily based claims provide for fees, so review all applicable statutes for the claim prior to making it. Most common-law and/or tort claims do not provide for fee awards.

F. HOW AND WHEN TO ASK FOR FEES

- 1. Comply with 14-5109 in all cases in which you want, **or might want**, an estate, probate or trust to pay. Do this at the very beginning of the case preferably when filing the first document.
- 2. Ask for fees when filing a complaint, petitions for injunctive, extraordinary and monetary relief, an objection to those kinds or filings or in any other non-traditional probate case where you are allowed to obtain fees if successful. Do this at the very beginning of the case in your complaint, petition, or objection or response. May be done in *Rule 12*, *ARCP* responses.
 - a. *Rule 54(g)(1) [ARCP]* provides that “[a] claim for attorney's fees must be made in the pleadings or in a *Rule 12* motion filed before the movant's responsive pleading.” The rule is intended to give parties notice of the risk that they may bear the burden of their opponent's legal fees, encouraging out-of-court settlement to avoid that risk. The word “must” in this notice requirement is unambiguously mandatory, and we have held that our supreme court's use of such language shows its intent that trial courts award attorney fees only if a claim for fees is made as required by the rule. *Rule 54(i)* provides two express exceptions to this rule: for fees “awarded as sanctions under a statute or rule,” and when “the substantive law requires fees to be proved at trial as an element of damages.” No exception is provided for attorney fees sought under the common fund doctrine specifically,

nor is there a general exception for fees sought on equitable grounds. *Adwell v. Moore (In re Restated Trust of Crystal H. W.)*, 249 Ariz. 355, 470 P.3d 161 (Ariz. App. 2020)

- b. You may ask for a liquidated amount of fees in a complaint, or a “not to exceed x amount.” This makes it somewhat easier to obtain fees at a default hearing if fees are otherwise authorized.
- 3. Are there other ways to get things paid for besides your client?
 - a. Stipulations, Medicare.....
- 4. Tactfully bring up costs nearly every time you are in Court. Bring up costs in most of your substantive pleadings. This way, the Court knows you, and if you represent the fiduciary, your client, are complying with *Sleeth*, showing good faith and expect to be paid. You must particularly be concerned with costs if you have to file pleadings such as a motion to compel, a notice of repetitive pleadings, a petition for relief from vexatious party, petition for temporary restraining order, order to show cause and provisional remedies.
- 5. Ask for a pretrial conference pursuant to *Rule 16.1, Ariz. Rules, Civ. Proc.* File a pleading describing what topics you want to discuss and offer some suggestions to reduce costs, or at least have a list of such items with you.
 - a. At that conference, it is appropriate, to ask the Court who will pay for particular items of discovery. For example, if a party objects to your fiduciary client’s accounting, who will pay the forensic accountant to go over it? There is no requirement that all the costs be paid out of the estate. Ask the Court to order the party to hire a forensic accountant if that party wants one. It is perfectly acceptable, and appropriate, for you to ask the Court to give specific direction as to the nature and type of discovery to be conducted, duration of trial and so forth. This may mean limiting depositions, summary trials, etc.
- 6. Talk to the Court about your continuing fees. Ask for a Court order allowing the fiduciary to pay you up to a set amount each quarter, which makes it much easier for the fiduciary to budget, gives the Court and the parties proper notice, helps avoid a later fee dispute and most importantly, **gets you paid**. If you have this Court order, you can submit your fee affidavit with the fiduciary’s accounting and probably not have to worry. If you do not have this Court order, then in your fee affidavit (application), you may tactfully, and briefly reiterate all of the times you brought up the cost-benefit analysis with the Court. For example, in your affidavit/application you can write:

1) Litigation in this matter was necessary because.....

2) The estate/client derived the following benefits from this litigation.....

3) A cost-benefit analysis was provided to the Court on and reiterated on

4) As a result of the foregoing discussions with the Court related to a cost-benefit analysis of this litigation, the Court entered the following orders.....

The point is that you have to remind the Court, at every possible opportunity, that it is in control of the expenditures, you are trying to hold down costs, you will accept whatever direction the Court gives you, and it is unfair to ask you to work for free. If you have

consistently given the Court the opportunity to control the costs throughout the litigation, you have a good argument that the Court has abused its discretion if it cuts your fees at the end of the case.

7. If the Court ruled your fees were unreasonable or unnecessary you probably cannot bill your client under *ER 1.5*. The Court might cut your fees for other reasons, in which case you **might** be able to ethically bill your client depending upon circumstances. If the Court ruled that your fees did not benefit the ward, therefore you could not be paid from the estate, and you have given notice to your client prior to incurring the fees that the client was ultimately responsible for payment, then should be able to bill your client for any reasonable and necessary fees. Do an ethical analysis though before sending the bill.
8. Courts will use the factors cited above in reviewing the fee applications so emphasize how your fees met the applicable criteria. If the case is not governed by *Rule 33, Ariz. Rules of Prob. Proc.*, you can always discuss *Swartz*.
 - a. In determining reasonableness of amount of fees courts have used the lodestar method in some types of case such as evaluating a contingency fee agreement. The lodestar method, a two-step process, is a guide to the judge awarding fees that exceed those indicated by the amount of time spent on the case. First, the court determines the number of hours expended multiplied by an appropriate hourly rate. This is the lodestar figure. *Comment, Statutory Attorney's Fees in Arizona: An Analysis of A.R.S. A§ 12-341.01, 24 Ariz.L.Rev. 658, 681-82 (1982)*. Once this figure is calculated, the trial court adjusts it, based on factors such as complexity of litigation, quality of representation and risk of recovery. *Illinois v. Sangamo Const. Co., 657 F.2d 855, 862 (7th Cir.1981)*. Whether an award constitutes reasonable attorney's fees is left in the sound discretion of the trial judge, as the decision must necessarily rest on the facts and consequences of each case. *Lange v. Penn Mut. Life Ins. Co., 843 F.2d 1175 (9th Cir.1988)*; *Associated Indem. Corp. v. Warner, 143 Ariz. 567, 694 P.2d 1181 (1985)*. The United States Supreme Court has made it very clear that the use of the lodestar method to enhance attorney's fees is the exception. In *Blum v. Stenson*, the Court stated that "[a] trial court may justify an upward adjustment only in the rare cases where the fee applicant offers specific evidence to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and that their success was exceptional." *465 U.S. 886, 899, 104 S.Ct.1541, 1549, 79 L.Ed.2d 891, 902 (1984)*. See also *Planned Parenthood v. Arizona, 789 F.2d 1348 (9th Cir.1986)*; *London v. Green Acres Trust, 765 P.2d 538, 159 Ariz. 136 (Ariz.App.Div.1 06/30/1988)*.
9. If you are asking for fees as you go along, and the Court awards them, analyze whether that particular fee award could immediately be reduced to a *Rule 54, ARCP* judgment or if you have to wait until final resolution of the dispute.
10. If you are asking for fees as you go along, and the Court declines to award them, do not be discouraged and do not give up unless it is clear the Court is mad at you.
11. If you settle, you must deal with attorney's fees and costs in the settlement agreement, or state in writing that the issue of a fee award will be left to the trial court.
12. *Rule 68 ARCP* allows any party to serve on the other party an offer allowing judgment to be entered in accordance with the offer's terms. If the offer of judgment is accepted, then "either party may file the offer together with proof of acceptance, and a judgment ... shall

- be entered.” *Ariz. R. Civ. P. 68*.
- a. Once entered by the court, an accepted offer of judgment represents a substantive adjudication of the case on its merits. *See 4501 Northpoint LP v. Maricopa Cnty.*, [212 Ariz. 98, 102, ¶ 19, 128 P.3d 215 \(2006\)](#) (explaining that a *Rule 68* judgment, “under ordinary principles of claim preclusion,” prevents the parties thereto from re-litigating the claims resolved by the judgment). Accordingly, a party's acceptance of a *Rule 68* offer of judgment ends litigation and represents a final resolution of all claims at issue therein. *See also Cuellar v. Vettorel*, [235 Ariz. 399, 403, ¶ 14, 332 P.3d 625 \(App. 2014\)](#) (holding that *Rule 68* prevents “collateral litigation” to determine liability after entry of judgment). *Lee v. ING Inv. Mgmt., LLC*, [240 Ariz. 158, 377 P.3d 355 \(Ariz. App. 2016\)](#).
 - b. You must address attorney’s fees in any offer if you want to get them. You can say in the offer that “attorney’s fees are not included in the offer and will be determined by the trial court.” “Because an offer of judgment need not be apportioned by claim, it follows that a party's offer encompasses all the opposing party's claims, unless otherwise specified in the language of the offer.” *Douglas v. Governing Bd. of Window Rock*, [221 Ariz. 104, 109–10, 210 P.3d 1275 \(App. 2009\)](#) (explaining that offer of judgment in a class-action suit encompassed both (1) the class certification and (2) the individual claim on the merits). *Lee v. ING Inv. Mgmt., LLC*, [240 Ariz. 158, 377 P.3d 355 \(Ariz. App. 2016\)](#).
13. If you default the defendant, you still have to submit your affidavit of fees which you should address in the default hearing. Either have your affidavit with you or offer an affidavit to be filed with a notice of lodging final judgment.
- i. [T]he trial court’s duty to make such an assessment is greater, not reduced, when no party has appeared to object to a fee request, as often occurs in all default judgments. *Daou v. Harris*, [139 Ariz. 353, 361, 678 P.2d 934, 942 \(1984\)](#) (in default judgment sounding in tort, trial court’s well-considered damages award not abuse of discretion, for “if a court merely awards a plaintiff what is prayed for in the complaint, that ‘may not attain that level of judicial discretion which will pass appellate muster’ ” *Tucson Estates Prop. Owners Ass’n, an Ariz. Nonprofit Corp. v. Estate of Jenkins*, [247 Ariz. 475, 451 P.3d 1201 \(Ariz. App. 2019\)](#))
14. **If you win** or prevail on at least some issues, you can and should ask again after the Court decides the substantive issues and prior to entry of judgment. Fees are not determined after entry of judgment pursuant to *Rule 54* because no final appealable order can be entered without fees being determine if being awarded in the substantive case.
- a. This request for fees should carefully analyze each time you requested fees, the basis for those requests and include one or more of the legal theories, statutes, etc. allowing you to get fees. Details are important.
15. In contract actions, *Rule 68* unaccepted offers where the verdict was less than the offer and some other types of cases, the trial court must determine which party was successful and then whether attorney fees should be awarded.
- a. There is no presumption that a successful party should be awarded attorney fees under § 12–341.01. *Associated Indem. Corp. v. Warner*, [143 Ariz. 567, 569, 694 P.2d 1181, 1183 \(1985\)](#). Instead, the court has broad discretion to consider a variety of factors set forth in *Associated Indemnity*, including the merits of the

defense by the unsuccessful party, whether the parties could have settled, whether the successful party prevailed as to all relief and whether awarding attorney fees would “discourage other parties with tenable claims.” 143 Ariz. at 570, 694 P.2d at 1184. *Moezer v. Escalante*, [228 Ariz. 295](#), [265 P.3d 1094](#), [622 Ariz. Adv. Rep. 42](#) (Ariz. App. 2011).

- b. Court may consider “the totality of the case,” including a reasonable settlement offer, the fact that neither party proposed mediation or a settlement conference and that both parties had prevailed in part. Furthermore, the parties argued before the court whether the denial of the award of attorney fees would discourage future plaintiffs in bringing the lawsuit. All of these are factors the court correctly may consider in exercising its discretion whether or not to award fees to the successful party under Associated Indemnity, 143 Ariz. at 570, 694 P.2d at 1184. See *State Farm Mut. Auto. Ins. Co.*, [192 Ariz. 255](#), ¶ 27, 963 P.2d at 340. *Moezer v. Escalante*, [228 Ariz. 295](#), [265 P.3d 1094](#), [622 Ariz. Adv. Rep. 42](#) (Ariz. App. 2011)
16. Do not forget to timely ask for costs and allowable “other” expenses. *Ariz. Rev. Stat. 12-341* and *12-346*.
- a. Generally, “the parties to a civil proceeding are responsible for their own litigation expenses” unless a statute provides otherwise. *Moezer v. Escalante*, [228 Ariz. 295](#), [265 P.3d 1094](#), [622 Ariz. Adv. Rep. 42](#) (Ariz. App. 2011)
 - b. Under *A.R.S. §§ 12–341* and *12–332(A)*, a successful party may recover certain taxable costs including the “[c]ost of taking depositions” and “[o]ther disbursements that are made or incurred pursuant to an order.”...
 - c. “Costs of taking a deposition may include expenses such as those incurred photocopying the transcript. *State ex rel. Corbin v. Ariz. Corp. Comm'n*, [143 Ariz. 219](#), [230](#), [693 P.2d 362](#), [373](#) (App.1984).” *Moezer v. Escalante*, [228 Ariz. 295](#), [265 P.3d 1094](#), [622 Ariz. Adv. Rep. 42](#) (Ariz. App. 2011).
 - d. “[d]eposition costs have been allowed to parties other than the one taking the deposition. See *Corbin*, [143 Ariz. at 229](#), [693 P.2d at 372](#).” *Moezer v. Escalante*, [228 Ariz. 295](#), [265 P.3d 1094](#), [622 Ariz. Adv. Rep. 42](#) (Ariz. App. 2011).
 - e. If a Court orders you to incur a cost, it is recoverable, but it must be an actual order. A suggestion by the Court to prepare jury notebooks was not a taxable cost. *Moezer v. Escalante*, [228 Ariz. 295](#), [265 P.3d 1094](#), [622 Ariz. Adv. Rep. 42](#) (Ariz. App. 2011).
 - f. Filing fees, service of process fees, TurboCourt fees, certified copies of public records, depositions, transcripts of hearings (if you can show necessity), witness fees, subpoena costs, and jury fees are all considered taxable costs and other costs may be allowed in particular fact situations.

G. BAD ACTORS

1. Parties who choose to represent themselves “are entitled to no more consideration than if they had been represented by counsel” and are held to the same standards as attorneys with respect to “familiarity with required procedures and ... notice of statutes and local rules.” *Smith v. Rabb*, [95 Ariz. 49](#), [53](#), [386 P.2d 649](#), [652](#) (1963); see also *Higgins v. Higgins*, [194 Ariz. 266](#), ¶ 12, [981 P.2d 134](#), [138](#) (App.1999). A party's ignorance of the

- law is not an excuse for failing to comply with it.
2. Arizona courts have recognized that the "vexatious litigation" exception to the rule prohibiting awards of attorneys' fees is separate and distinct from the "tort of another" exception. In *Wichita v. Pima County*, [131 Ariz. 576, 643 P.2d 21 \(App. 1982\)](#), Division Two of this court stated:

The general rule is that each party to a lawsuit must pay his own way. Exceptions are few: (1) Where contracting parties provide otherwise; (2) where a statute allows the award; (3) where the losing party has been guilty of vexatious litigation or (4) where the defendant has generated litigation between the plaintiff and a third party. *Id.* at 577, 643 P.2d at 22.

 - a. In *Taylor v. Southern Pac. Transp. Co.*, [130 Ariz. 516, 637 P.2d 726 \(1981\)](#), the court recognized that when one, acting vexatiously, wantonly, or for oppressive reasons, places another in a position, vis-a-vis a third person, so that the second person must incur attorney's fees to protect his interests, such fees are the legal consequence of the first person's wrongful conduct and are recoverable as damages. The court in Taylor, however, did not limit the rule to cases where the wrongdoer has embroiled a second person in litigation with a third. It went on to say, in discussing an award of fees in a lawsuit when one party claimed the other had engaged in improper conduct, that [w]here there is a complete and repeated disregard of a court order and where there is no reasonable justification for its breach, a court might, in its discretion, award attorneys fees as a sanction. See *6 J. Moore, Federal Practice* Â§ 54.77(2) (2d ed. 1976). The integrity of the courtroom and the judicial process requires that the trial court have this remedy in exceptional circumstances.
 3. Bad faith may be found in the conduct of litigation as well as the conduct that gives rise to the litigation. *Hall v. Cole*, [412 U.S. 1, 15, 93 S.Ct. 1943, 1951, 36 L.Ed.2d 702, 713 \(1973\)](#). An award in these situations has been characterized as "redressing the insult to injury." *Straub v. Vaisman & Co.*, [540 F.2d 591, 600 \(3d Cir.1976\)](#). Just as other court-awarded sanctions punish and deter conduct that unnecessarily prolongs or complicates litigation, so does an award of attorney's fees deter bad faith.
 4. Courts award bad faith fees for both procedural and substantive abuse. *London v. Green Acres Trust*, [765 P.2d 538, 159 Ariz. 136 \(Ariz.App.Div.1 06/30/1988\)](#)
 - a. Procedural abuse may include situations where counsel has persistently failed to cooperate with the opposing litigant's counsel or the court. Substantive abuse includes situations where counsel imposes unnecessary, groundless, vexatious, and oppressive petitions [and] motions, or the refusal to concede matters about which there can be no legitimate dispute.
 5. Legal authority to ask for fees as a sanction can include contempt, disclosure/discovery rules, *14-1105, Rule 11, Ariz. Rev. Stat. 12-349, and 12-3201*. Always review applicable caselaw before citing these rules in a pleading. Getting fee awards under these provisions is not easy. Establishing cumulative misconduct works best in obtaining awards.

H. COLLECTION

1. If you are withdrawing from a case and are entitled to fees from an estate or otherwise,

- file your petition to approve **and to enter judgment for** fees when you withdraw.
2. If a guardian or conservator was just appointed in a case, the ward dies and you are entitled to fees from the estate, file your petition to approve **and to enter judgment for** fees as soon as possible. Your fees are then a debt of administration and entitled to priority in the probate.
 3. Don't forget you probably can get interest on a fees judgment. *Ariz. Rev. Stat. 44-1201.*
 4. Any final judgment for fees may be collected in the same manner as any other judgment.
 5. Immediately record the judgment with an information sheet. *Ariz. Rev. Stat. 33-964 and 33-967.*
 6. Generally, most post judgment collection proceedings do not provide for the award of additional attorney's fees for the collection process. *Bennett Blum, M.D., Inc. v. Cowan, 235 Ariz. 204, 330 P.3d 961, 690 Ariz. Adv. Rep. 4 (Ariz. App. 2014)* Error not to award post-judgment attorney's fees based on written contract with expert witness, but expert not entitled to attorney's fees in garnishment action to collect judgment.

I. APPEALS ARE NOT ALWAYS APPEALING

1. If you want fees for prevailing on appeal, you must ask for them in both motions and the initial brief you file and you must cite the legal basis. *Rule 21, ARCAP.*
2. The determination of the successful party under *A.R.S. § 12-341.01(A)* is within the "discretion of the trial court," and appellate courts will not disturb the court's award "if any reasonable basis exists" to support it. *Berry v. 352 E. Virginia, LLC, 228 Ariz. 9, 13, ¶ 21, 261 P.3d 784 (App. 2011); Hawk v. PC Village Ass'n Inc., 233 Ariz. 94, 100, ¶ 19, 309 P.3d 918 (App. 2013); Lee v. ING Inv. Mgmt., LLC, 240 Ariz. 158, 377 P.3d 355 (Ariz. App. 2016).*
3. "To find an abuse of discretion, there must either be no evidence to support the superior court's conclusion or the reasons given by the court must be 'clearly untenable, legally incorrect, or amount to a denial of justice.'" *Tucson Estates Prop. Owners Ass'n, an Ariz. Nonprofit Corp. v. Estate of Jenkins, 247 Ariz. 475, 451 P.3d 1201 (Ariz. App. 2019).*
4. The Chalker's saga or Why does Division Two Hate Judge Lee?

IN RE INDENTURE OF TRUST DATED JANUARY 13, 1964. [235 Ariz. 40](#); [326 P.3d 307](#); [686 Ariz. Adv. Rep. 35](#); 2014

Lynn Karp and Annette Everlove represented by Corey Larson

Due in part to protracted divorce litigation concerning multiple Fidelity investment accounts subject to the decree, Mrs. Chalker owed approximately \$273,000 in legal fees to petitioners by early 1999. Mrs. Chalker consented to an amended fee agreement, which provided that if petitioners recovered the Fidelity accounts, she would pay them half of the recovered funds.

At the time of Chalker's death in 2005, the litigation regarding the Fidelity

accounts had not resolved. It was not until 2014 that Fidelity transferred the accounts to Chalker's estate. Those accounts were subsequently liquidated and yielded more than \$1.2 million. Rule 68 offer of judgment made by petitioners and the Estate.

In 2016, the trial court determined petitioners were not entitled to half the funds because they had not been responsible for recovering the Fidelity accounts. It concluded petitioners were entitled to the reasonable value of their legal services, totaling \$196,071, based on a theory of quantum meruit, but were not entitled to prejudgment interest on that amount. It also awarded petitioners costs, and interest related to those costs, totaling \$275,438.33. The court further determined that the estate was entitled to an award of \$190,000 for its attorney fees beginning from the day of its settlement offer because the final judgment had been for less than the rejected offer.

Petitioners appealed, arguing the trial court had erred by failing to add prejudgment interest to the quantum meruit award. The Court of Appeals agreed and remanded on that limited issue.

On remand, the court awarded prejudgment interest on the quantum meruit award to petitioners, but only after first subtracting the estate's \$190,000 attorney fee award.

In their second appeal, petitioners argued that the trial court had erred on remand by subtracting the \$190,000 attorney fee award before calculating prejudgment interest and by failing to re-examine which party was eligible for an award of attorney fees in light of the addition of

prejudgment interest on the quantum meruit award. They requested the Court of Appeals instruct Judge Lee to recalculate the interest on the quantum meruit award, to vacate the estate's attorney fee award and remand for the court to award fees in their favor.

The Court of Appeals agreed with petitioners that the trial court had miscalculated the prejudgment interest but concluded the issue regarding the estate's fee award should have been raised in the first appeal and petitioners had failed to properly do so, waiving the issue for the

subsequent appeal.

The Court of Appeals remanded the case ordering Judge Lee to recalculate the interest on the quantum meruit award by applying prejudgment interest to the award before subtracting the \$190,000 in fees owed to the estate. On remand in November 2021, the trial court entered a final

judgment, consistent with our directive, which awarded \$585,094.47 to petitioners, and

then subtracted the \$190,000 attorney fee award to the estate as well as costs paid, for a final judgment of \$352,655.88 in favor of petitioners.

Petitioners filed a *Rule 60(b)(5)* motion for relief from the judgment requesting that the court vacate the estate's \$190,000 attorney fee award. They asserted that, prior to the court's subtraction of costs already paid and the estate's fee award, the "real value" of their quantum meruit award was \$585,094.47. And because the estate's pretrial offer of \$300,000

was significantly less than the final judgment they received as a result of our appellate decisions, they argued the estate was never the successful party and was not entitled to a fee award. They also filed a motion seeking attorney fees in their favor.

A court may relieve a party from a final judgment if it is based on an earlier judgment that has been reversed or vacated, *Ariz. R. Civ. P. 60(b)(5)*, even after a trial court has entered final judgment pursuant to an appellate court mandate, *Minjares v. State*, [223 Ariz. 54](#), ¶¶ 20, 22 (*App. 2009*).

This issue raised by petitioners in this appeal was raised in the prior appeal to the Court of Appeals. There, petitioners argued that, "in light of the proper amendments to the judgment, [the trial court] would have been compelled to conclude that they, not the estate, were the successful party, and accordingly would have omitted the fee award to the estate and included fee awards to them." The Court of Appeals, in the prior appeal, determined the issue should have been raised in petitioners' first appeal, but it was not, and thus was waived.

Petitioners now assert that although they attempted to raise it before, their argument was not actually ripe for adjudication until the November 2021 judgment was entered demonstrating that they were, in fact, the successful party. Because this was a result of the Appellate Court decisions vacating the prior judgments, they assert *Rule 60* is the proper mechanism for relief.

Although the Court concluded in the prior appeal that this issue was waived, it would be manifestly unjust to apply that waiver where a final judgment has since been entered demonstrating that the estate would never have been the successful party had the judgment been correctly calculated in the first instance. *Amfac Distrib. Corp. v. J.B. Contractors, Inc.*, [146 Ariz. 19](#), 27 (*App. 1985*) (award of attorney fees should await trial court determination after remand "so that the ultimately successful party can be determined"); see also *15B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure* § 3915.6 (2d ed. 2022 update) (enforcing fee award based on judgment that has been vacated is "unseemly spectacle"); cf. *Cal X-Tra v. W.V.S.V. Holdings, L.L.C.*, [229 Ariz. 377](#), ¶ 74 (*App. 2012*) (vacating judgment necessarily vacated award of fees flowing from judgment). *Rule 60* is an appropriate

means to challenge a fee award based on a reversed or vacated merits judgment later amended. Because the undisputed facts require a contrary ruling, the trial court's order refusing to vacate the fee award to the estate was improper.

In re Estate of Chalker, 245 Ariz. 410 (App. 2018),

In re Estate of Chalker, No. 1 CA-CV 17-0109 (Ariz. App. Sept. 20, 2018) (mem. decision),

In re Estate of Chalker, No. 2 CA-CV 2020-0013 (Ariz. App. Sept. 23, 2020) (mem. decision).

In Re Estate of Chalker, No. 2 CA-CV 2022-0061 Filed May 4, 2023

STATUTES

GENERAL PROVISIONS APPLICABLE TO ALL PROBATE CASES

14-1104. Prudent management of costs

In a proceeding brought pursuant to this title:

1. The fiduciary must prudently manage costs, preserve the assets of the ward or protected person for the benefit of the ward or protected person and protect against incurring any costs that exceed probable benefits to the ward, protected person, decedent's estate or trust, except as otherwise directed by a governing instrument or court order.
2. A guardian ad litem, fiduciary, fiduciary's attorney and attorney for the ward or protected person have a duty to:
 - (a) Act in the best interest of the ward or protected person.
 - (b) Avoid engaging in excessive or unproductive activities.
 - (c) Affirmatively assess the financial cost of pursuing any action compared to the reasonably expected benefit to the ward or protected person.
3. Market rates for goods and services are a proper, ongoing consideration for the fiduciary and the court during the initial court appointment of a fiduciary or attorney and relating to a request to substitute a court-appointed fiduciary or attorney.

14-1105. Remedies for unreasonable conduct; definitions

- A. If the court finds that a decedent's estate or trust has incurred professional fees or expenses as a result of unreasonable conduct, the court may order the person who engaged in the conduct or the person's attorney, or both, to pay the decedent's estate or trust for some or all of the fees and expenses as the court deems just under the circumstances.
- B. In a guardianship or conservatorship case, if the court finds that a ward or protected person has incurred professional fees or expenses as a result of unreasonable conduct, the court may order the person who engaged in the conduct or the person's attorney, or both, to pay the ward or protected person for some or all of the fees and expenses as the court deems just under the circumstances.
- C. The remedies allowed pursuant to this section are in addition to any other civil remedy or any other provision of law. The remedies allowed pursuant to this section may be invoked to mitigate the financial burden on a ward, protected person, decedent's estate or trust incurred as a result of unjustified court proceedings or unreasonable or excessive demands made on a fiduciary, fiduciary's attorney, court-appointed attorney, guardian ad litem or representative.
- D. For the purposes of this section:
 1. "Court-appointed attorney" means an attorney appointed pursuant to section 14-5303, subsection C, section 14-5310, subsection C, section 14-5401.01, subsection C or section 14-5407, subsection B.
 2. "Fiduciary" means an agent under a durable power of attorney, an agent under a health care power of attorney, a guardian, a conservator, a personal representative, a trustee or a guardian ad litem.
 3. "Person who engaged in the conduct" includes a fiduciary, an attorney or a guardian ad litem.

4. "Professional" means an accountant, an attorney, a fiduciary, a physician, a psychologist, a registered nurse, a guardian ad litem or an expert witness.

5. "Professional fees or expenses" includes the fiduciary's fees and expenses and the fiduciary's attorney fees and expenses, as well as the fees and expenses of any other professionals hired by the fiduciary or the fiduciary's attorney.

14-1109. Repetitive filings; summary denial

If an interested person files a motion or petition that requests the same or substantially similar relief to the relief requested in another motion or petition filed by the same interested person within the preceding twelve months and if the later filed motion or petition does not describe in detail a change in fact or circumstance that supports the requested relief, the court may summarily deny the motion or petition without a response or objection being filed and without a hearing or oral argument being set.

DECEDENT'S ESTATES

14-3709. Duty of personal representative; possession of estate; discovery of concealed assets

A. Except as otherwise provided by a decedent's will, every personal representative has a right to, and shall take possession or control of, the decedent's property, except that any real property or tangible personal property may be left with or surrendered to the person presumptively entitled to it unless or until, in the judgment of the personal representative, possession of the property by the personal representative will be necessary for purposes of administration. The request by a personal representative for delivery of any property possessed by an heir or devisee is conclusive evidence, in any action against the heir or devisee for possession of the property, that the possession of the property by the personal representative is necessary for purposes of administration. The personal representative shall pay taxes on, and take all steps reasonably necessary for the management, protection and preservation of, the estate in the personal representative's possession. The personal representative may maintain an action to recover possession of property or to determine its title.

B. If the personal representative or other person interested in the estate of a decedent complains to the court, on oath, that a person is suspected of having concealed, embezzled, conveyed or disposed of any property of a decedent, or possesses or has knowledge of deeds, bonds, contracts or other writings which contain evidence of or tend to disclose the right, interest or claim of a decedent to any property, or the will of a decedent, the court may cite that person to appear before the court and may examine that person on oath on the complaint. If that person is not in the county where letters have been issued, the person may be cited and examined before the court in the county where the person is found or the court issuing the citation. If the person appears and the court determines that the claim is unfounded, the court shall allow that person necessary expenses out of the estate.

C. If the person cited as provided by subsection B refuses to appear and submit to an examination, or to answer questions relevant to the complaint, the court may commit that person to jail until the person submits to the order of the court or is discharged according to law.

D. If on examination or from other evidence adduced at the hearing it appears that a person has concealed, embezzled, conveyed or disposed of any property of a decedent, or possesses or has

knowledge of deeds, bonds, contracts or other writings tending to disclose the right, interest or claim of a decedent to any property, or the will of a decedent, the court may order that person to turn over the documents or disclose knowledge to the personal representative and may commit the person cited to jail until the order is complied with or the person is discharged according to law. The examination shall be reduced to writing and filed in court. The order for the disclosure made on this examination is prima facie evidence of the right of the personal representative to the property in an action brought for recovery of that property, and a judgment shall be for double the value of the property, or for return of the property and damages in addition to the property equal to the value of the property. The court may also award reasonable attorney fees and costs.

14-3710. Power to avoid transfers; action to set aside fraudulent conveyances

- A. The property liable for the payment of unsecured debts of a decedent includes all property transferred by him by any means which is in law void or voidable as against his creditors and subject to prior liens. The right to recover this property, so far as necessary for the payment of unsecured debts of the decedent, is exclusively in the personal representative.
- B. When there is a deficiency of assets in custody of a personal representative, and decedent in his lifetime has conveyed or transferred property, or any rights or interests therein, with intent to defraud creditors, or to avoid a right, debt or duty of any person, or has conveyed or transferred the property so that the conveyance or transfer by law is void or voidable as against creditors, the personal representative shall commence and prosecute an action for the recovery of the property for the benefit of the creditors, and shall recover property which has been so conveyed or transferred, whatever may have been the manner of the conveyance or transfer.
- C. The personal representative is not bound to bring the action unless the creditors pay such part of the costs and expenses of the action, or give such surety to the personal representative therefor as the court on application by the creditors may direct.
- D. The property recovered shall be subject to payment of the debts of decedent as other property in custody of the personal representative.

14-3720. Expenses in estate litigation

If any personal representative or person nominated as personal representative defends or prosecutes any proceeding in good faith, whether successful or not he is entitled to receive from the estate his necessary expenses and disbursements including reasonable attorneys' fees incurred.

14-3721. Proceedings for review of employment of agents and compensation of personal representatives and employees of estate

After notice to all interested persons, on petition of an interested person, including any person employed by the personal representative, or on appropriate motion if administration is supervised, the court may review the propriety of employment of any person by the personal representative, the reasonableness of the compensation of any person so employed, or the reasonableness of the compensation determined by the personal representative for his own services. Any person who has received excessive compensation from an estate for services rendered may be ordered to make appropriate refund.

14-3722. Compensation of appointees

A. If not otherwise compensated for services rendered, an investigator, accountant or lawyer appointed pursuant to this article is entitled to reasonable compensation from the estate of the decedent. If the court compensates the provider of a service the court may charge the estate for the reasonable cost of the service and shall deposit these monies in the probate fund pursuant to section 14-5433.

B. Notwithstanding subsection A of this section, if compensation by the estate is not feasible the court shall determine and pay reasonable compensation for services rendered by an investigator, accountant or lawyer appointed in a probate administration proceeding.

C. If a county pays for any of these services from general fund appropriations, the county may charge the estate for reasonable compensation. The county treasurer shall deposit monies collected pursuant to this subsection in the same fund from which the expenditure was made.

14-3951. Effect of approval of agreements involving trusts, inalienable interests, or interests of third persons

A compromise of any controversy as to admission to probate of any instrument offered for formal probate as the will of a decedent, the construction, validity or effect of any probated will, the rights or interests in the estate of the decedent, of any successor, or the administration of the estate, if approved in a formal proceeding in the court for that purpose, is binding on all the parties thereto including those unborn, unascertained or who could not be located. An approved compromise is binding even though it may affect a trust or an inalienable interest. A compromise does not impair the rights of creditors or of taxing authorities who are not parties to it.

GUARDIANSHIPS/CONSERVATORSHIPS

14-5109. Disclosure of compensation; determining reasonableness and necessity

A. When a guardian, a conservator, an attorney or a guardian ad litem who intends to seek compensation from the estate of a ward or protected person first appears in the proceeding, that person must give written notice of the basis of the compensation by filing a statement with the court and providing a copy of the statement to all persons entitled to notice pursuant to sections 14-5309 and 14-5405. The statement must provide a general explanation of the compensation arrangement and how the compensation will be computed.

B. If during the pendency of the action the basis for compensation changes, the guardian, conservator, attorney or guardian ad litem must provide notice of the change to all persons entitled to notice pursuant to this subsection not less than thirty days before the change becomes effective.

C. Compensation paid from an estate to a guardian, conservator, attorney or guardian ad litem must be reasonable and necessary. To determine the reasonableness and necessity of compensation, the court must consider the best interest of the ward or protected person. The following factors may be considered to the extent applicable:

1. Whether the services provided any benefit or attempted to advance the best interest of the ward or protected person.
2. The usual and customary fees charged in the relevant professional community for the services.
3. The size and composition of the estate.

4. The extent that the services were provided in a reasonable, efficient and cost-effective manner.
 5. Whether there was appropriate and prudent delegation to others.
 6. Any other factors bearing on the reasonableness of fees.
- D. The person seeking compensation has the burden of proving the reasonableness and necessity of compensation and expenses sought.

14-5110. Claim deadline for compensation; definitions

- A. In a guardianship, conservatorship or protective proceeding, unless a later claim deadline is established in advance by the court, a claim for compensation by attorneys or guardians ad litem who intend to be paid by the ward or protected person's estate is waived if not submitted to the fiduciary in writing within four months after either rendering the service, incurring the cost, initial appointment of the fiduciary or the effective date of this section, whichever is later. A claim is deemed submitted on delivery, mailing or electronic transmission to the fiduciary. A subsequent appointment of a substitute fiduciary does not renew the claim period.
- B. This section does not apply to an attorney seeking compensation based on a contingency fee agreement.
- C. For the purposes of this section:
1. "Compensation" includes fees, costs and reimbursable expenses.
 2. "Estate" includes any estate established pursuant to this title except a trust unless the trust is supervised by the court and the ward or protected person is a beneficiary.

14-5314. Compensation of appointees; definitions

- A. If not otherwise compensated for services rendered, an investigator, accountant, lawyer, physician, registered nurse, psychologist, guardian or guardian ad litem who is appointed pursuant to this article, including an independent lawyer representing the alleged incapacitated person pursuant to section 14-5303, subsection C, is entitled to reasonable compensation from the estate of the ward if the petition is granted, or from the petitioner if the petition is denied.
- B. If the petitioner withdraws the petition or if the petition is dismissed because of the petitioner's failure to prosecute, the court may order that the compensation of the investigator, accountant, lawyer, physician, registered nurse, psychologist, guardian or guardian ad litem appointed pursuant to this article, including an independent lawyer representing the alleged incapacitated person pursuant to section 14-5303, subsection C, be paid either from the ward's estate or by the petitioner, depending on the facts and circumstances. In making this determination, the court may consider any evidence it deems appropriate.
- C. A lawyer who is employed by the guardian to represent the guardian in the guardian's appointment or duties as guardian is entitled to reasonable compensation from the ward's estate if the petition is granted. If the petitioner withdraws the petition or if the court dismisses the petition because of the petitioner's failure to prosecute, the court may order that the compensation of the proposed guardian's lawyer be paid either from the ward's estate or by the petitioner, depending on the facts and circumstances. In making these determinations, the court may consider any evidence it deems appropriate.
- D. A lawyer who is employed by the petitioner to represent the petitioner in seeking the appointment of a guardian is entitled to reasonable compensation from the ward's estate if the petition is granted.
- E. If the court compensates the provider of a service, the court may charge the estate for the reasonable cost of the service and shall deposit these monies in the probate fund pursuant to

section 14-5433.

F. If compensation by the ward or the petitioner is not feasible the court shall determine and pay reasonable compensation for services rendered by an investigator, accountant, lawyer, physician, registered nurse, psychologist, guardian or guardian ad litem appointed in a guardianship proceeding.

G. If a county pays for any of these services from general fund appropriations, the county may charge the estate for reasonable compensation. The county treasurer shall deposit monies collected pursuant to this subsection in the same fund from which the expenditure was made.

H. For the purposes of this section:

1. "Guardian" includes both a guardian and a temporary guardian.
2. "Petition" means a petition filed pursuant to section 14-5303, subsection A or section 14-5310, subsection A.
3. "Ward" includes an alleged incapacitated person.

14-5414. Compensation and expenses; definitions

A. If not otherwise compensated for services rendered, any investigator, accountant, lawyer, physician, registered nurse, psychologist, guardian ad litem or conservator who is appointed in a protective proceeding, including a lawyer of the person alleged to be in need of protection pursuant to section 14-5407, subsection B, is entitled to reasonable compensation from the estate of the protected person if the petition is granted or from the petitioner if the petition is denied.

B. If the petitioner withdraws the petition or if the court dismisses the petition because of the petitioner's failure to prosecute, the court may order that the compensation of the investigator, accountant, lawyer, physician, registered nurse, psychologist, guardian ad litem or conservator who is appointed pursuant to this article, including a lawyer of the person alleged to be in need of protection pursuant to section 14-5407, subsection B, be paid either from the protected person's estate or by the petitioner, depending on the facts and circumstances. In making these determinations, the court may consider any evidence it deems appropriate.

C. A lawyer who is employed by the conservator to represent the conservator in the conservator's appointment or duties as conservator is entitled to reasonable compensation from the estate if the petition is granted. If the petitioner withdraws the petition or if the petition is dismissed because of the petitioner's failure to prosecute, the court may order that the compensation of the proposed conservator's lawyer be paid either from the protected person's estate or by the petitioner, depending on the facts and circumstances. In determining which party shall pay, the court may consider any evidence it deems appropriate.

D. A lawyer who is employed by the petitioner to represent the petitioner in seeking the appointment of a conservator is entitled to reasonable compensation from the protected person's estate if the petition is granted.

E. If the court pays for any of these services it may charge the estate for reasonable compensation. The clerk shall deposit monies it collects in the probate fund pursuant to section 14-5433.

F. If a county pays for any of these services from general fund appropriations, the county may charge the estate for reasonable compensation. The county treasurer shall deposit monies collected pursuant to this subsection in the same fund from which the expenditure was made.

G. Compensation payable to the department of veterans' services, when acting as a conservator of the estate of a veteran or a veteran's surviving spouse or minor child or the incapacitated spouse of a protected veteran, shall not be more than five percent of the amount of monies

received during the period covered by the conservatorship. A copy of the petition and notice of hearing shall be given to the proper officer of the United States department of veterans affairs in the manner provided in the case of any hearing on a guardian's account or any other pleading. A commission or compensation is not allowed on the monies or other assets received from a prior conservator or on the amount received from liquidation of loans or other investments.

H. For the purposes of this section:

1. "Conservator" includes a conservator, temporary conservator or special conservator.
2. "Petition" means a petition filed pursuant to section 14-5401.01, subsection A or section 14-5404, subsection A.
3. "Protected person" includes a person who is alleged to be in need of protection.

14-5425. Distributive duties and powers of conservator

A. A conservator may expend or distribute income or principal of the estate without court authorization or confirmation for the support, education, care or benefit of the protected person and the person's dependents in accordance with the following principles:

.....

2. The conservator shall expend or distribute sums reasonably necessary for the support, education, care or benefit of the protected person and the person's dependents with due regard to:

- (a) The size of the estate, the probable duration of the conservatorship and the likelihood that the protected person, at some future time, may be fully able to be wholly self-sufficient and able to manage business affairs and the estate.

- (b) The accustomed standard of living of the protected person and the person's dependents.

- (c) Other funds or sources used for the support of the protected person.

3. With respect to the affairs and estate of a minor, the conservator shall also consider the following factors in making estate distributions:

- (a) The financial responsibility and financial resources of the parents of the child.

- (b) Extraordinary custodial responsibilities undertaken by the parent or parents as the result of the child's physical or mental condition and the effect of these extraordinary responsibilities on appropriate gainful employment of the parent.

- (c) The physical and mental condition of the child and the child's medical and educational needs. Any incidental benefit to other members of the child's household derived from a distribution is not a disqualifying factor.

- (d) If the child has a permanent and total disability, the standard of living the child should reasonably expect to enjoy given the financial resources available to the child.

....

5. Funds expended under this subsection may be paid by the conservator to any person, including the protected person, to reimburse for expenditures that the conservator might have made, or in advance for services to be rendered to the protected person when it is reasonable to expect that they will be performed and where advance payments are customary or reasonably necessary under the circumstances.

6. A conservator, in discharging the responsibilities conferred by a court order and this section, shall implement the principles described in section 14-5408 to the extent possible.

.....

G. The estate of a deceased protected person is liable for any unpaid expenses of the conservator's administration, and such expenses are a lien on property transferred by the conservator to the decedent's personal representative.

NOTE RE: PENDING LEGISLATION: As of May 27, 2023, (the time these materials were submitted), SB1291 remained pending before the Arizona Legislature. If enacted, SB1291 would create the following additional bases for an award of attorney fees in guardianship/conservatorship matters:

- Failure to Give Notice/Knowingly Making a False Claim of Notice Receiving Notice: New subsection D would be added to both A.R.S. §§ 14-5309 (Notices in guardianship proceedings) and -5405 (Notices in conservatorships proceedings). The new subsection would read, “The court may order a person who intentionally fails to provide notice of a hearing as required by this section, or who knowingly makes a false claim that the person did not receive notice of a hearing, to pay damages, including reasonable attorney fees and costs, incurred as a result of such unreasonable conduct.”
- Unreasonably Denying Contact Between a Ward and a Person Who Has a Significant Relationship with the Ward: A.R.S. § 14-5316 would be amended to include a new subsection (O) that would authorize the court, if the court finds that a guardian unreasonably denied contact between the ward and a person who has a significant relationship with the ward, to do one or both of the following: (a) remove the guardian, or (b) order the guardian to personally pay some or all of the reasonable attorney fees incurred by the person or the ward, or both.

TRUSTS

14-10708. Compensation of trustee

- A. If the terms of a trust do not specify the trustee's compensation, a trustee is entitled to compensation that is reasonable under the circumstances.
- B. If the terms of a trust specify the trustee's compensation or refer to another ascertainable source for determining that compensation, the trustee is entitled to be compensated as specified, but the court may allow more or less compensation if either:
1. The duties of the trustee are substantially different from those contemplated when the trust was created.
 2. The compensation specified by the terms of the trust would be unreasonably low or high.

14-10709. Reimbursement of expenses

- A. A trustee is entitled to be reimbursed out of the trust property, with reasonable interest, for:
1. Expenses that were properly incurred in the administration of the trust.
 2. To the extent necessary to prevent unjust enrichment of the trust, expenses that were not properly incurred in the administration of the trust.
- B. An advance by the trustee of money for the protection of the trust gives rise to a lien against trust property to secure reimbursement with reasonable interest.

14-10805. Costs of administration

In administering a trust, the trustee may incur only costs that are reasonable in relation to the trust property, the purposes of the trust and the skills of the trustee.

14-11004. Attorney fees and costs

A. A trustee or a person who is nominated as a trustee is entitled to reimbursement from the trust for that person's reasonable fees, expenses and disbursement, including attorney fees and costs, that arise out of and that relate to the good faith defense or prosecution of a judicial or alternative dispute resolution proceeding involving the administration of the trust, regardless of whether the defense or prosecution is successful.

B. A court or arbitrator may order that a party's reasonable fees, expenses and disbursements pursuant to subsection A be paid by any other party or the trust that is the subject of the judicial proceeding.

14-10811. Enforcement and defense of claims

A trustee shall take reasonable steps to enforce claims of the trust and to defend claims against the trust.

GENERAL STATUTES APPLICABLE TO CIVIL CASES

12-341. Recovery of costs

The successful party to a civil action shall recover from his adversary all costs expended or incurred therein unless otherwise provided by law.

12-341.01. Recovery of attorney fees

A. In any contested action arising out of a contract, express or implied, the court may award the successful party reasonable attorney fees. If a written settlement offer is rejected and the judgment finally obtained is equal to or more favorable to the offeror than an offer made in writing to settle any contested action arising out of a contract, the offeror is deemed to be the successful party from the date of the offer and the court may award the successful party reasonable attorney fees. This section shall not be construed as altering, prohibiting or restricting present or future contracts or statutes that may provide for attorney fees.

B. The award of reasonable attorney fees pursuant to this section should be made to mitigate the burden of the expense of litigation to establish a just claim or a just defense. It need not equal or relate to the attorney fees actually paid or contracted, but the award may not exceed the amount paid or agreed to be paid.

C. The court and not a jury shall award reasonable attorney fees under this section.

12-342. Costs on appeal

A. On an appeal by the party against whom judgment was given in the court below, if the judgment of the appellate court is against him, but for a lesser amount, he shall recover costs in the appellate court, but shall be adjudged to pay costs in the court below. If the judgment of the appellate court is against him for the same or a greater amount than in the court below, the adverse party shall recover costs in both courts.

B. On an appeal by the party in whose favor judgment was given in the court below, if the judgment of the appellate court is in his favor for a greater amount, he shall recover costs in both courts. If judgment of the appellate court is in his favor but for the same or less amount than in the court below, he shall recover costs in the court below and pay costs in the court above.

12-346. Statement of costs; service and objections

A. The party in whose favor judgment is rendered and who claims costs shall file a verified statement of his costs and serve a copy thereof on the opposing party. The statement shall be filed and served within ten days after judgment, unless for good cause shown the time is extended by the court.

B. At any time within five days after receipt of the copy of the statement of costs, the opposing party may file objections to the statement, serving a copy thereof on the party claiming such costs. The court shall pass upon the objections and by its order correct the statement of costs to the extent that it requires correction.

12-349. Unjustified actions; attorney fees, expenses and double damages; exceptions; definition

A. Except as otherwise provided by and not inconsistent with another statute, in any civil action commenced or appealed in a court of record in this state, the court shall assess reasonable attorney fees, expenses and, at the court's discretion, double damages of not to exceed five thousand dollars against an attorney or party, including this state and political subdivisions of this state, if the attorney or party does any of the following:

1. Brings or defends a claim without substantial justification.
2. Brings or defends a claim solely or primarily for delay or harassment.
3. Unreasonably expands or delays the proceeding.
4. Engages in abuse of discovery.

B. The court may allocate the payment of attorney fees among the offending attorneys and parties, jointly or severally, and may assess separate amounts against an offending attorney or party.

C. Attorney fees shall not be assessed if after filing an action a voluntary dismissal is filed for any claim or defense within a reasonable time after the attorney or party filing the dismissal knew or reasonably should have known that the claim or defense was without substantial justification.

D. This section does not apply to the adjudication of civil traffic violations or to any proceedings brought by this state pursuant to title 13.

E. Notwithstanding any other law, this state and political subdivisions of this state may be awarded attorney fees pursuant to this section.

F. For the purposes of this section, "without substantial justification" means that the claim or defense is groundless and is not made in good faith.

12-350. Determination of award; reasons; factors

In awarding attorney fees pursuant to section 12-349, the court shall set forth the specific reasons for the award and may include the following factors, as relevant, in its consideration:

1. The extent of any effort made to determine the validity of a claim before the claim was asserted.
2. The extent of any effort made after the commencement of an action to reduce the number of claims or defenses being asserted or to dismiss claims or defenses found not to be valid.
3. The availability of facts to assist a party in determining the validity of a claim or defense.
4. The relative financial positions of the parties involved.
5. Whether the action was prosecuted or defended, in whole or in part, in bad faith.
6. Whether issues of fact determinative of the validity of a party's claim or defense were reasonably in conflict.

7. The extent to which the party prevailed with respect to the amount and number of claims in controversy.
8. The amount and conditions of any offer of judgment or settlement as related to the amount and conditions of the ultimate relief granted by the court.

12-3201. Vexatious litigants; designation; definitions

- A. In a noncriminal case, at the request of a party or on the court's own motion, the presiding judge of the superior court or a judge designated by the presiding judge of the superior court may designate a pro se litigant a vexatious litigant.
- B. A pro se litigant who is designated a vexatious litigant may not file a new pleading, motion or other document without prior leave of the court.
- C. A pro se litigant is a vexatious litigant if the court finds the pro se litigant engaged in vexatious conduct.
- D. The requesting party may make an amended request at any time if the court either:
 1. Determined that the party is not a vexatious litigant and the requesting party has new information or evidence that is relevant to the determination, even if there is not a pending case in the court.
 2. Did not rule on the original request during the pendency of the action, even if there is not a pending case in the court.
- E. For the purposes of this section:
 1. "Vexatious conduct" includes any of the following:
 - (a) Repeated filing of court actions solely or primarily for the purpose of harassment.
 - (b) Unreasonably expanding or delaying court proceedings.
 - (c) Court actions brought or defended without substantial justification.
 - (d) Engaging in abuse of discovery or conduct in discovery that has resulted in the imposition of sanctions against the pro se litigant.
 - (e) A pattern of making unreasonable, repetitive and excessive requests for information.
 - (f) Repeated filing of documents or requests for relief that have been the subject of previous rulings by the court in the same litigation.
 2. "Without substantial justification" has the same meaning prescribed in section 12-349.

33-964. Lien of judgment; duration; homestead; partial release of judgment lien; acknowledgment of satisfaction by judgment creditor; applicability; definition

33-967. Money judgment; information statement; amendment to recorded judgment; exemption; retroactive applicability

44-1201. Rate of interest for loan or indebtedness; interest on judgments; definitions

- A. Interest on any loan, indebtedness or other obligation shall be as follows:
 1. The maximum interest rate on medical debt shall be the lesser of the following:
 - (a) The annual rate equal to the weekly average one-year constant maturity treasury yield, as published by the board of governors of the federal reserve system, for the calendar week preceding the date when the consumer was first provided with a bill, or
 - (b) Three percent a year.The maximum interest rate provided pursuant to this paragraph also applies to any judgments on medical debt.

2. For any loan, indebtedness or obligation other than medical debt, interest shall be at the rate of ten per cent per annum, unless a different rate is contracted for in writing, in which event any rate of interest may be agreed to. Interest on any judgment, other than a judgment on medical debt, that is based on a written agreement evidencing a loan, indebtedness or obligation that bears a rate of interest not in excess of the maximum permitted by law shall be at the rate of interest provided in the agreement and shall be specified in the judgment.

B. Unless specifically provided for in statute or a different rate is contracted for in writing, interest on any judgment other than a judgment on medical debt shall be at the lesser of ten per cent per annum or at a rate per annum that is equal to one per cent plus the prime rate as published by the board of governors of the federal reserve system in statistical release H.15 or any publication that may supersede it on the date that the judgment is entered. The judgment shall state the applicable interest rate and it shall not change after it is entered.

C. Interest on a judgment on a condemnation proceeding, including interest that is payable pursuant to section 12-1123, subsection B, shall be payable as follows:

1. If instituted by a city or town, at the rate prescribed by section 9-409.
2. If instituted by a county, at the rate prescribed by section 11-269.04.
3. If instituted by the department of transportation, at the rate prescribed by section 28-7101.
4. If instituted by a county flood control district, a power district or an agricultural improvement district, at the rate prescribed by section 48-3628.

D. A court shall not award either of the following:

1. Prejudgment interest for any unliquidated, future, punitive or exemplary damages that are found by the trier of fact.
 2. Interest for any future, punitive or exemplary damages that are found by the trier of fact.
- E. For the purposes of subsection D of this section, "future damages" means damages that will be incurred after the date of the judgment and includes the costs of any injunctive or equitable relief that will be provided after the date of the judgment.

F. If awarded, prejudgment interest shall be at the rate described in subsection A or B of this section.

G. For the purposes of this section:

1. "Health care services" means services provided at or by any of the following:
 - (a) Health care institutions as defined in section 36-401.
 - (b) Private offices or clinics of health care providers licensed under title 32, chapters 7, 11, 13, 15, 15.1, 16, 17, 18, 19, 19.1, 25, 28, 33, 34, or 35.
 - (c) Ambulances or ambulance services as defined in section 36-2201.
2. "Medical debt" means a loan, indebtedness or other obligation arising directly from the receipt of health care services or of medical products or devices.

OTHER STATUTES ROUTINELY APPLICABLE IN PROBATELAND

25-324. Attorney fees

A. The court from time to time, after considering the financial resources of both parties and the reasonableness of the positions each party has taken throughout the proceedings, may order a party to pay a reasonable amount to the other party for the costs and expenses of maintaining or

defending any proceeding under this chapter or chapter 4, article 1 of this title. On request of a party or another court of competent jurisdiction, the court shall make specific findings concerning the portions of any award of fees and expenses that are based on consideration of financial resources and that are based on consideration of reasonableness of positions. The court may make these findings before, during or after the issuance of a fee award.

B. If the court determines that a party filed a petition under one of the following circumstances, the court shall award reasonable costs and attorney fees to the other party:

1. The petition was not filed in good faith.
2. The petition was not grounded in fact or based on law.
3. The petition was filed for an improper purpose, such as to harass the other party, to cause an unnecessary delay or to increase the cost of litigation to the other party.

C. For the purpose of this section, costs and expenses may include attorney fees, deposition costs and other reasonable expenses as the court finds necessary to the full and proper presentation of the action, including any appeal.

D. The court may order all amounts paid directly to the attorney, who may enforce the order in the attorney's name with the same force and effect, and in the same manner, as if the order had been made on behalf of any party to the action.

12-1103. Disclaimer of interest and recovery of costs; request for quit claim deed; disclaimer of interest by state

A. If defendant, other than the state, appears and disclaims all right and title adverse to plaintiff, he shall recover his costs.

B. If a party, twenty days prior to bringing the action to quiet title to real property, requests the person, other than the state, holding an apparent adverse interest or right therein to execute a quit claim deed thereto, and also tenders to him five dollars for execution and delivery of the deed, and if such person refuses or neglects to comply, the filing of a disclaimer of interest or right shall not avoid the costs and the court may allow plaintiff, in addition to the ordinary costs, an attorney's fee to be fixed by the court.

C. If, after appropriate investigation, it appears to the attorney general that the state claims no right or title to the property adverse to plaintiff, he may file a disclaimer of right and title.

46-456. Duty to a vulnerable adult; financial exploitation; civil penalties; exceptions; definitions

A. A person who is in a position of trust and confidence to a vulnerable adult shall use the vulnerable adult's assets solely for the benefit of the vulnerable adult and not for the benefit of the person who is in the position of trust and confidence to the vulnerable adult or the person's relatives

B. A person who violates subsection A of this section or section 13-1802, subsection B shall be subject to actual damages and reasonable costs and attorney fees in a civil action brought by or

on behalf of a vulnerable adult and the court may award additional damages in an amount up to two times the amount of the actual damages.

PROBATE RULES TO LIVE BY

Rule 28. Disclosure and Discovery

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For purposes of a claim for attorney fees, discovery taken by a party within the limits of this rule does not establish that the discovery was necessary or that the time expended on that discovery was reasonable.

Rule 31. Duties of a Fiduciary's Attorney

(a) Duty to Minimize Legal Expenses. To minimize legal expenses, a fiduciary's attorney must encourage the fiduciary to take actions the fiduciary is authorized to perform rather than have the attorney perform them.

(b) Duty upon Withdrawal. A fiduciary's attorney who moves to withdraw must comply with Civil Rule 5.3 and must inform the court of any issues pending in the probate case and whether all required reports, inventories, accounts, and documents have been filed.

Rule 32. Guardians ad Litem and Statutory Representatives

(f) Order.

(1) Required Provisions. An order appointing a guardian ad litem or a statutory representative must state:

(A) the basis for the appointment;

(B) the appointment's scope and duration;

(C) that the guardian ad litem or the statutory representative represents the person's interest, not the person; and

(D) any applicable terms of compensation.

Rule 33. Compensation for Fiduciaries, Attorneys, Guardians ad Litem, and Statutory Representatives

(a) Generally.

(1) Guardianships and Conservatorships. A request for approval of fees for a guardian, a conservator, an attorney, a guardian ad litem, or a statutory representative to be paid from an estate of a ward or protected person, or a trust that the ward or protected person established, must be made in a petition filed under section (c) or section (d) of this rule.

(2) Decedents' Estates and Trusts. A personal representative, a trustee, a guardian ad litem, a statutory representative, or an attorney for any of them, is not required to request court approval of fees to be paid from the estate or trust, unless the court orders otherwise. If approval is requested, the request must be made in a petition filed under section (c) or section (d).

(b) Content of Request for Approval. Any request for approval of compensation must be accompanied by statements that include the following information:

(1) If requested fees are based on hourly rates, the statements must specify the services provided and explain the tasks performed, the date each task was performed, the time expended in performing each task, the name and position of the person who performed each task, and the

hourly rate charged for such services. Block billing is not permitted.

(2) If requested fees are not based on hourly rates, the statement must include an explanation of the fee arrangement and a computation of the fee for which approval is sought.

(3) If the request includes reimbursement of costs, the statement must specify each cost, the date the cost was incurred, the purpose of the cost, and the amount of reimbursement requested or, if reimbursement of costs is based on some other method, an explanation of the method being used.

(c) Approval in an Account. If a petition requests approval of a fiduciary's account and the account lists fees paid to a fiduciary, an attorney, a guardian ad litem, or a statutory representative, the petition must request the court's approval of those fees paid during the accounting period. Statements that document the fees paid and conform with section (b) must be submitted with the petition.

(d) Approval by Separate Petition. If a request for approval of fees is not included in a petition for approval of the fiduciary's account, a fiduciary, an attorney, a guardian ad litem, or a statutory representative may file a separate petition for approval of compensation.

(e) Waiver. An attorney, a guardian ad litem, or a statutory representative waives compensation from the estate of a ward or protected person if a request is not timely submitted under A.R.S. § 14-5110.

(f) Objections. A person who opposes a request for approval of compensation must file a response as prescribed in Rule 15(e). The response must provide a specific basis for each objection.

(g) Fee Guidelines. When determining whether compensation is reasonable, the court must follow statewide fee guidelines contained in [A.C.J.A. § 3-303](#).

NOTE: Effective January 1, 2020, the Arizona Rules of Probate Procedure were significantly amended. The amendments were both stylistic and substantive. As part of the restyling, most of the comments from the pre-2020 version of the Probate Rules were deleted. However, the comments to the pre-2020 version of the Probate Rules “continue to be authoritative unless rendered inapplicable by changes in the 2020 rules.” Ariz. R. Prob. P., Pref. Comm. to the 2020 Amendments. The pre-2020 version of Probate Rule 33 included an extensive comment that remains authoritative and relevant to an understanding of not only Probate Rule 33 but also of the factors the court considers when determining whether a fiduciary’s, attorney’s, or guardian *ad litem*’s fee is reasonable. In addition, the comment explains how petitions to approve conservatorship accounts and Probate Rule 33 statements operate together.

Rule 34. Prudent Management of Costs

The following are in addition to the duties imposed by A.R.S. § 14-1104 and A.C.J.A. § 3-303.

(a) Disclosure When Cost Exceeds Benefits. A guardian ad litem, statutory representative, guardian, conservator, personal representative, attorney for a fiduciary, or an attorney for a ward or protected person must timely disclose to the court and the other parties any reasonable belief that the projected cost of complying with a court order may exceed the likely benefit to the ward, protected person, decedent's estate, or trust.

(b) Orders. If appropriate and if consistent with due process, the court may enter or modify orders to protect or further the best interests of the ward, protected person, decedent's estate, or trust.

(c) Market Rates. In appointing a fiduciary, attorney, guardian ad litem, or statutory

representative, in ruling on or considering a budget objection, and in ruling on a request to substitute a court-appointed fiduciary, attorney, guardian ad litem, or statutory representative, the court and the fiduciary should not pay more than market rates for a good or service.

(d) Competitive Bids. At any stage of the proceedings, the court may require competitive bids for goods or services.

Rule 35. Repetitive Filings; Vexatious Conduct; Remedies

(a) Definitions. For purposes of this rule,

(1) “Repetitive filing” means a petition, motion, or other document that

(A) requests relief that is the same or substantially similar to the relief requested in an earlier petition, motion, or document filed within the preceding 12 months by the same person; and

(B) the later-filed motion or petition does not describe in detail a change in fact or law that supports the requested relief.

(2) “Vexatious conduct” means habitual, repetitive conduct undertaken solely or primarily to harass or injure another party or that party's representative, cause unreasonable delay in proceedings, cause undue harm to the ward or protected person, or cause unnecessary expense. It does not include conduct undertaken in good faith.

(b) Notice of Repetitive Filings.

(1) Grounds. A party may file a notice of repetitive filings if the party has a good faith belief that a person has filed a repetitive filing.

(2) Timing and Identification of the Earlier Filing. A party must file a notice of repetitive filing no later than the response or objection deadline for the allegedly repetitive filing. A notice of repetitive filing must include the title and date of the alleged repetitive filing, the title and date of the earlier filing, and the date of any court ruling on the earlier filing.

(3) Effect of a Notice. A notice of repetitive filing stays the deadline to respond or object to the alleged repetitive filing until further court order.

(4) Court's Authority. The court may summarily strike a repetitive filing on its own motion or after receiving a notice of repetitive filing.

(c) Remedies. If the court finds that a person has engaged in repetitive filings or vexatious conduct, the court may do any combination of the following:

(1) require the person to obtain the court's permission to file future pleadings and other papers in the probate case or in other cases, and, if the court enters such an order, no party is required to respond to the person's future filings until ordered to do so;

(2) order that no response to the person's future requests for information is required, unless a later order requires it; or

(3) order any other remedy provided by law.

Rule 53. Settlements of Claims for Minors and Adults in Need of Protection

....

(c) Appointment of a Guardian ad Litem or Master. The court may appoint a guardian ad litem pursuant to A.R.S. § 14-1408 or a master pursuant to Civil Rule 53, with instructions to address specific items, including any of the following:

(1) the reasonableness of the settlement proposal,

(2) the attorney fees to be paid from the minor's or adult's settlement proceeds,

(3) the costs of litigation and apportionment of those costs,

ARIZONA RULES OF CIVIL PROCEDURE

Rule 11. Signing Pleadings, Motions, and Other Documents; Representations to the Court; Sanctions; Assisting Filing by Self-Represented Person

...

(b) Representations to the Court. By signing a pleading, motion, or other document, the attorney or party certifies that to the best of the person's knowledge, information, and belief formed after reasonable inquiry:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law.

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

(c) Sanctions.

(1) Generally. If a pleading, motion, or other document is signed in violation of this rule, or if a party fails to participate in good faith in the consultation required under Rule 11(c)(2), the court--on motion or on its own--may impose on the person who signed it, a represented party, or both, an appropriate sanction. The sanction may include an order to pay to the other party or parties the amount of the reasonable expenses incurred, including a reasonable attorney's fee, because of the filing of the document or because of the party's failure to participate in the required Rule 11(c)(2) consultation. In considering an appropriate sanction, the court must take into account the opportunities provided to the person or party violating Rule 11 to withdraw or correct the alleged violation under Rule 11(c)(2).

(2) Consultation. Before filing a motion for sanctions under this rule, the moving party must:

(A) attempt to resolve the matter by good faith consultation as provided in Rule 7.1(h); and

(B) if the matter is not satisfactorily resolved by consultation, serve the opposing party with written notice of the specific conduct that allegedly violates Rule 11(b). If the opposing party does not withdraw or appropriately correct the alleged violation(s) within 10 days after the written notice is served, the moving party may file a motion under Rule 11(c)(3).

(3) Motion for Sanctions. A motion for sanctions under this rule must:

(A) be made separately from any other motion;

(B) describe the specific conduct that allegedly violates Rule 11(b);

(C) be accompanied by a Rule 7.1(h) good faith consultation certificate; and

(D) attach a copy of the written notice provided to the opposing party under Rule 11(c)(2)(B).

Rule 54. Judgment; Costs; Attorney's Fees; Form of Proposed Judgments

(a) Judgment and Decision Defined. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment should not include recitals of pleadings, a master's report, or a record of earlier proceedings. For purposes of this rule, a "decision" is a written

order, ruling, or minute entry that adjudicates at least one claim or defense.

(b) Judgment on Multiple Claims or Involving Multiple Parties. If an action presents more than one claim for relief--whether as a claim, counterclaim, crossclaim, or third-party claim--or if multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines there is no just reason for delay and recites that the judgment is entered under Rule 54(b). If there is no such express determination and recital, any decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

(c) Judgment as to All Claims and Parties. A judgment as to all claims and parties is not final unless the judgment recites that no further matters remain pending and that the judgment is entered under Rule 54(c).

(d) Demand for Judgment; Relief to Be Granted. A default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings. Every other final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings.

(e) Entry of Judgment After Party's Death. Judgment may be entered on a verdict or decision after a party's death on an issue of fact rendered while the party was alive.

(f) Request for Costs.

(1) Time for Filing Request if a Motion for Attorney's Fees Is Filed. If a party seeking costs also seeks an award of attorney's fees, a verified request for an award of taxable costs under A.R.S. § 12-332 must be filed on the same day the party files its motion for attorney's fees under Rule 54(g).

(2) Time for Filing Request if No Motion for Attorney's Fees Is Filed. If a party seeking costs does not seek an award of attorney's fees under Rule 54(g), a verified request for costs must be filed within the time set forth below:

(A) Rule 54(c) Judgments. If a decision adjudicates all claims and liabilities of all of the parties and judgment is to be entered under Rule 54(c), any request for costs must be filed within 20 days after the decision is filed, or by such other date as the court may order.

(B) Decisions Subject to Rule 54(b)--Adjudicating All Claims and Liabilities of Any Party. If a decision adjudicates all claims and liabilities of any party:

(i) If that party or another party moves for entry of judgment under Rule 54(b), or includes Rule 54(b) language in a proposed form of judgment, a prevailing party seeking costs must file a verified request for an award of taxable costs under A.R.S. § 12-332 within 20 days after service of the motion or proposed form of judgment seeking Rule 54(b) treatment, or by such other date as the court may order.

(ii) If the court declines to enter judgment under Rule 54(b), or no party seeks entry of judgment under Rule 54(b), a prevailing party seeking costs must file a verified request for costs no later than 20 days after any decision is filed that adjudicates all remaining claims in the action, or 20 days after the action's dismissal, whichever occurs first.

(C) Decisions Subject to Rule 54(b)--Adjudicating Fewer Than All Claims and Liabilities of a Party. If a decision or judgment adjudicates fewer than all claims and liabilities of a party, a prevailing party seeking costs must file a verified request for costs no later than 20 days after any decision is filed that adjudicates all remaining claims in the action, or 20 days after the action's dismissal, whichever occurs first.

(3) Response and Reply. A party opposing a request for costs must file a response within 5 days after the request is served. Any reply must be filed within 5 days after the response is served.

(g) Attorney's Fees.

(1) Generally. A claim for attorney's fees must be made in the pleadings or in a Rule 12 motion filed before the movant's responsive pleading.

(2) Time for Filing Motion--Rule 54(c) Judgments. If a decision adjudicates all claims and liabilities of all of the parties, except a claim for attorney's fees, and judgment is to be entered under Rule 54(c), any motion for attorney's fees must be filed within 20 days after the decision is filed, or by such other date as the court may order.

(3) Time for Filing Motion--Decisions Subject to Rule 54(b).

(A) Adjudicating All Claims and Liabilities of Any Party. If a decision adjudicates all claims and liabilities of any party:

(i) If that party or another party moves for entry of judgment under Rule 54(b), or includes Rule 54(b) language in a proposed form of judgment, a motion for fees must be filed within 20 days after service of the motion or proposed form of judgment seeking Rule 54(b) treatment, or by such other date as the court may order.

(ii) If the court declines to enter judgment under Rule 54(b), or no party seeks entry of judgment under Rule 54(b), a motion for fees must be filed no later than 20 days after any decision is filed that adjudicates all remaining claims in the action, or 20 days after the action's dismissal, whichever occurs first.

(B) Adjudicating Fewer Than All Claims and Liabilities of a Party. If a decision or judgment adjudicates fewer than all claims and liabilities of a party, a motion for fees must be filed no later than 20 days after any decision is filed that adjudicates all remaining claims in the action, or 20 days after the action's dismissal, whichever occurs first.

(4) Motion and Proceedings. Unless a statute or court order provides otherwise, a motion for attorney's fees must be supported by affidavit and is governed by Rule 7.1. The movant's affidavit must disclose the terms of any fee agreement for the services for which the claim is made.

(h) Proposed Forms of Judgment.

(1) Including Costs and Fees in Judgment. Except as otherwise allowed by this rule:

(A) claims for attorney's fees and costs must be resolved before any judgment may be entered under Rule 54(b) or (c); and

(B) any award of attorney's fees or costs must be included in the judgment.

(2) Form of Judgment. When a judgment is required to include fees or costs:

(A) If fees are requested, the form of judgment must either state the specific sum of attorney's fees awarded by the court, or must include a blank in the form of judgment to allow the court to include an amount for any attorney's fees.

(B) If costs are requested, the form of judgment must either state the specific sum of costs awarded by the court, or must include a blank in the form of judgment to allow the court to include an amount for costs.

(C) If the court enters a judgment under Rule 54(b) or (c) without first receiving a motion for judgment or a proposed form of judgment, a prevailing party seeking costs and/or fees must file a motion to alter or amend the judgment within the time required by Rule 59(d).

(i) Scope; Jurisdiction.

(1) Scope. Rules 54(f) and (g) do not apply to claims for taxable costs and attorney's fees that may be awarded as sanctions under a statute or rule, or if the substantive law requires fees to be

proved at trial as an element of damages.

(2) Jurisdiction. If a judgment certified under Rule 54(b) adjudicates fewer than all of the claims and liabilities of any party, the court retains jurisdiction:

(A) to award costs with respect to that judgment, if a request for costs is timely filed under Rule 54(f); and

(B) to award attorney's fees with respect to that judgment, if a motion for fees is timely filed under Rule 54(g).

Rule 55. Default; Default Judgment

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(B) Fee Award--Specific Amount Stated. A default judgment entered under Rule 55(b)(1) may include an award of reasonable attorney's fees if the claim states a specific sum of attorney's fees that will be sought if judgment is rendered by default, and:

(i) the amount of the award is supported by affidavit;

(ii) the award is allowed by law; and

(iii) the award does not exceed the amount demanded in the claim.

(C) Fee Award--No Specific Amount Stated. If the claim requests an award of attorney's fees, but does not specify the amount of fees that will be sought if judgment is rendered by default, a default judgment entered under Rule 55(b)(1) may include an award of reasonable attorney's fees only if:

(i) an affidavit establishes the reasonable amount of the fee award;

(ii) the defendant has not entered an appearance in the action; and

(iii) the award is allowed by law.

Rule 68. Offer of Judgment

(a) Time for Making; Procedure. Any party may serve on any other party an offer to allow judgment to be entered in the action.

(1) Trial. An offer of judgment must be made more than 30 days before trial begins.

(2) Arbitration. In actions assigned to arbitration, no offer of judgment may be made during the time period beginning 25 days before the arbitration hearing and ending when a Rule 77(a) notice of appeal is filed.

(b) Contents of Offer.

(1) Money Judgment. An offer that includes a money judgment must specifically state the sum of money to be awarded, inclusive of all damages, taxable court costs, interest, and attorney's fees, if any, sought in the action.

(2) Attorney's Fees. If specifically stated, attorney's fees may be excluded from an offer. If an offer that excludes attorney's fees is accepted and attorney's fees are allowed by statute, contract, or otherwise, either party may seek an award of attorney's fees.

(3) Apportionment. The offer need not be apportioned by claim.

(c) Acceptance of Offer; Entry of Judgment. To accept an offer, the offeree must serve written notice--during the effective time period--that the offer is accepted. After either party files the offer and proof of acceptance, the court must enter judgment in accordance with Rule 58(b).

(d) Rejection of Offer; Waiver of Objections.

(1) Rejection of Offer. An unaccepted offer is considered rejected. Evidence of an unaccepted offer is not admissible except in a proceeding to determine sanctions under this rule.

(2) Objections to Offer. An offeree who objects to the validity of an offer must--within 10 days after the offer is served--serve on the offeror written notice of the objections. The failure to serve timely objections waives the right to object to the offer's validity in any proceeding to determine sanctions under this rule.

(e) Multiple Offerors. Multiple parties may make a joint unapportioned offer of judgment to a single offeree.

(f) Multiple Offerees.

(1) Unapportioned Offers. Unapportioned offers may not be made to multiple offerees.

(2) Apportioned Offers. One or more parties may make an apportioned offer to multiple offerees conditioned on acceptance by all of the offerees. Each offeree may serve a separate written notice of acceptance of the offer. If fewer than all offerees accept, the offeror may enforce any of the acceptances if:

(A) the offer discloses that the offeror may exercise this option; and

(B) the offeror serves written notice of final acceptance no later than 10 days after the offer expires.

The sanctions provided in this rule apply to each offeree who did not accept the apportioned offer.

(g) Sanctions.

(1) Amount. A party who rejects an offer, but does not obtain a more favorable judgment, must pay as a sanction--twenty percent of the difference between the amount of the offer and the amount of the final judgment.

(2) Taxable Costs and Attorney's Fees. To determine if a judgment that includes an award of taxable costs or attorney's fees is more favorable than the offer, the court must consider only those taxable costs and attorney's fees that were reasonably incurred as of the offer date.

(3) Arbitration. To determine whether to impose a sanction after an arbitration hearing, the court must compare the offer to the final judgment entered either on the award under Rule 76(b)(4) or after appeal under Rule 77.

(4) Application.

(A) A court may not assess a sanction under this rule if the action seeks solely injunctive relief.

(B) A court may reduce or eliminate a sanction otherwise required by this rule only if it finds the sanction to be manifestly unjust.

(h) Effective Period of Offers; Later Offers; Offers on Damages.

(1) Effective Date. An offer of judgment must remain effective for 30 days after it is served, except:

(A) an offer made within 60 days after service of the summons and complaint must remain effective for 60 days after the offer is served;

(B) an offer made within 45 days of trial must remain effective for 15 days after it is served; and

(C) in an action subject to arbitration, an unexpired offer will automatically expire at 5:00 p.m. on the fifth day before the arbitration hearing.

If the court enlarges the effective period, the offeror may withdraw the offer at any time after the initial effective period expires and before the offer is accepted.

(2) Later Offers. A rejected offer does not preclude a later offer.

(3) Offers on Damages. When one party's liability to another has been determined but the extent of liability remains to be determined by further proceedings, any party may make an offer of judgment. It must be served within a reasonable time--but at least 10 days--before the date set for a hearing to determine the extent of liability.

ARIZONA RULES OF CIVIL APPELLATE PROCEDURE

Rule 21. Attorneys' Fees and Costs

(a) Claim for Attorneys' Fees. A party that intends to claim attorneys' fees incurred on appeal or on a petition or cross-petition for review must give notice of such intention at the time and in the manner set forth in this Rule.

(1) Notice Required. A party claiming attorneys' fees must do so in an opening or an answering brief on appeal. Any party claiming attorneys' fees on a petition for review or a cross-petition for review must do so in the petition or cross-petition or in the response to a petition or cross-petition.

(2) Content of Notice. A claim for fees under this Rule must specifically state the statute, rule, decisional law, contract, or other authority for an award of attorneys' fees. If a party fails to comply with this requirement, the appellate court may decline to award fees on that basis. This Rule only establishes the procedure for claiming attorneys' fees and does not create any substantive right to them.

(b) Statement of Attorneys' Fees and Costs; Timing; Objections.

(1) Timing. Within 10 days after the appellate clerk has given notice of a decision or order that grants a claim for fees, a party claiming attorneys' fees or costs must file in the appellate court an itemized and verified statement of attorneys' fees and costs on appeal or review. If a party is entitled to costs but does not seek fees or the court has denied the party's fee request, the party must file a statement of costs in the appellate court within 10 days after the appellate clerk gives notice of the court's decision or order.

(2) Attorneys' Fees. The statement must include any factors relevant to a decision to award fees and the determination of a reasonable fee. The itemized statement of fees must include the following:

(A) The dates on which each person for whom fees are claimed performed services;

(B) The time each person expended for each task on each date;

(C) A description of the service;

(D) The identity of the person performing the service; and

(E) Whether the fee is fixed or contingent, and if hourly, the applicable rate for each person.

(3) Costs. The statement must itemize taxable costs. The cost of preparing paper briefs must not exceed the sum of two dollars per page.

(4) Objections and Determination. Objections to the statement of attorneys' fees and costs must be filed within 10 days after service of the statement. If no objections are timely filed, the appellate court may award attorneys' fees and costs. If objections are timely filed, the requesting party may reply within 5 days after service of the objections. The appellate court will then determine the amount of attorneys' fees and costs without a hearing or additional filings.

(c) Pending Petition for Review. The Court of Appeals retains jurisdiction to rule on a timely filed statement of attorneys' fees or taxable costs notwithstanding the filing of a petition for review. If the Court of Appeals awards attorneys' fees or costs after the filing of a petition for review, a party that timely objected to the statement may file a motion with the Supreme Court requesting review of the party's objections to the award when considering the petition. The motion must be filed with 10 days after entry of the award, and must include a copy of the order of the Court of Appeals granting fees or costs. The party in whose favor the Court of Appeals

awarded attorneys' fees or costs may file a response within 10 days after service of that motion.

(d) Vacation, Reversal, Modification, or Affirmation. If the Supreme Court vacates, reverses, modifies, or affirms the Court of Appeals' decision, a party entitled to attorneys' fees and costs may file in the Supreme Court a statement of attorneys' fees and costs incurred in the Supreme Court and in the Court of Appeals. The statement must meet the requirements of Rule 21(b). Any objections or reply must be filed within the times stated in Rule 21(b)(4). The Supreme Court clerk or the Supreme Court may determine the amounts of fees and costs, or the Supreme Court may remand the appeal to the Court of Appeals for that purpose.

(e) Mandate. The appellate clerk must include in the mandate separate statements of the amount of attorneys' fees and costs awarded on appeal. The mandate must include the amounts of attorneys' fees and costs awarded in the Supreme Court and in the Court of Appeals.

Rule 25. Sanctions

An appellate court may impose sanctions on an attorney or a party if it determines that an appeal or a motion is frivolous, or was filed solely for the purpose of delay. An appellate court also may impose sanctions on an attorney or a party for a violation of these Rules. An appellate court may impose sanctions that are appropriate in the circumstances of the case, and to discourage similar conduct in the future. Sanctions may include contempt, dismissal, or withholding or imposing costs or attorneys' fees.

ETHICAL RULES

A.R.S. Sup.Ct.Rules, Rule 42, Rules of Prof.Conduct

ER 1.5. Fees

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) the degree of risk assumed by the lawyer.

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated in writing before the fees or expenses to be billed at higher rates are actually incurred. The requirements of this subsection shall not apply to:

- (1) court-appointed lawyers who are paid by a court or other governmental entity, and
- (2) lawyers who provide pro bono short-term limited legal services to a client pursuant to ER 6.5.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof;

(2) a contingent fee for representing a defendant in a criminal case; or

(3) a fee denominated as “earned upon receipt,” “nonrefundable” or in similar terms unless the client is simultaneously advised in writing that the client may nevertheless discharge the lawyer at any time and in that event may be entitled to a refund of all or part of the fee based upon the value of the representation pursuant to paragraph (a).

(e) Two or more firms jointly working on a matter may divide a fee paid by a client if:

(1) the firms disclose to the client in writing how the fee will be divided and how the firms will divide responsibility for the matter among themselves;

(2) the client consents to the division of fees in a writing signed by the client;

(3) the total fee is reasonable; and

(4) the division of responsibility among firms is reasonable in light of the client's need that the entire representation be completely and diligently completed.

ER 1.14. Client with Diminished Capacity

(a) When a client's capacity to make adequately considered decisions in connection with the 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 ER 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under ER 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

ARIZONA CODE OF JUDICIAL ADMINISTRATION § 3-303:

Professional Services: Statewide Fee Guidelines and Competitive Bids

(See separate handout)

ARIZONA CODE OF JUDICIAL ADMINISTRATION

Part 3: Superior Court

Chapter 3: Probate Court

Section 3-303: Professional Services: Statewide Fee Guidelines and Competitive Bids

A. Definitions. In this section the following definitions apply:

“Court” means the superior court in each county.

“Estate” means “includes the property of the decedent, trust or other person whose affairs are subject to this title as originally constituted and as it exists from time to time during administration. As it relates to a spouse, the estate includes only the separate property and the share of the community property belonging to the decedent or person whose affairs are subject to this title” as provided in A.R.S. § 14-1201(22).

“Presiding judge” means the presiding judge of the superior court in each county.

B. Applicability. Pursuant to Rules 33 and 34, *Arizona Rules of Probate Procedure* and the administrative authority provided by Article VI, Section 3 of the Arizona Constitution, and A.R.S. §§ 14-1104 and 14-5109, the statewide fee guidelines and requirements for competitive bids adopted by this section apply to the reasonable compensation and reimbursement for services rendered by Professionals in Title 14 proceedings. In this section the term professional applies to licensed and unlicensed court-appointed fiduciaries, guardians ad litem and attorneys.

1. The presiding judge shall implement these statewide fee guidelines, effective September 1, 2012.
2. These fee guidelines:
 - a. Apply to the compensation of the following individuals who are paid by an estate:
 - (1) Court-appointed fiduciaries, specifically guardians, conservators, and personal representatives, licensed and unlicensed;
 - (2) Guardians *ad litem*; and
 - (3) Attorneys.
 - b. Do not apply:
 - (1) To compensation paid by a trust or decedent’s estate, if compensation is specified or set forth in the relevant trust or testamentary instrument; or
 - (2) When the fees are not paid by the Estate, including court-appointed counsel who are paid by the court.

C. Purpose. Pursuant to Rule 33(g), *Arizona Rules of Probate Procedure*, “When determining whether compensation is reasonable, the court must follow statewide fee guidelines contained in A.C.J.A. § 3-303”. Therefore the use of these guidelines is mandatory.

D. Use of the Fee Guidelines.

1. Each judicial officer shall, pursuant to Rule 33(g) *Arizona Rules of Probate Procedure*,
 - a. Use and comply with the fee guidelines and general compensation factors adopted by this section;
 - b. Weigh the totality of the circumstances in each case. Professional services shall be tailored to the specific circumstances of each case in order to meet the best interest of each unique ward, protected person, estate, and trust. Therefore, reasonable compensation is best determined on a case-by-case basis, while applying consistent compensation guidelines; and
 - c. Exercise discretion to assign more or less weight to any of the compensation factors as the officer deems just and reasonable.
2. Compensation of the Professional. Unless otherwise ordered by the court, compensation and reimbursement for professional services shall meet the following requirements:
 - a. All fee petitions shall comply with Rule 33 of the *Arizona Rules of Probate Procedure*.
 - b. All hourly billing shall be in an increment to the nearest one-tenth of an hour, with no minimum billing unit in excess of one-tenth of an hour. No “value billing” for services rendered is permitted, rather than the actual time expended.
 - c. “Block billing” is not permitted. Block billing occurs when a timekeeper provides only a total amount of time spent working on multiple tasks, rather than an itemization of the time expended on a specific task.
 - d. Necessary travel time and waiting time may be billed at 100% of the normal hourly rate, except for time spent on other billable activity; travel time and waiting time are not necessary when the service can be more efficiently rendered by correspondence or electronic communication, for example, telephonic court hearings.
 - e. Billable time that benefits multiple clients, including travel and waiting time, shall be appropriately apportioned among each client.
 - f. Billable time does not include:
 - (1) Time spent on billing or accounts receivable activities, including time spent preparing itemized statements of work performed, copying, or distributing statements; however, time spent drafting the additional documents that are

- required by court order, rule, or statute, including any related hearing, is billable time. The court shall determine the reasonable compensation, if any, in its sole discretion, concerning any contested litigation over fees or costs; and
- (2) Internal business activities of the Professional, including clerical or secretarial support to the Professional.
- g. The hourly rate charged for any given task shall be at the authorized rate, commensurate with the task performed, regardless of whom actually performed the work, but clerical and secretarial activities are not separately billable from the Professional. The Professional shall abide by the following requirements:
- (1) An attorney may only bill an attorney rate when performing services that require an attorney; a paralegal rate when performing paralegal services; a fiduciary rate when performing fiduciary services; and shall not charge when performing secretarial or clerical services, for example and
 - (2) A fiduciary may only bill a fiduciary rate when performing services that require the skill level of the fiduciary; a companion rate when performing companion services; a bookkeeper rate when performing bookkeeping and bill-paying services for a client; and shall not charge when performing secretarial or clerical services, for example.
- h. Reasonable costs that are incurred in the best interest of the Estate are reimbursable at actual cost, without increase in price. Reimbursable costs include, but are not limited to:
- (1) Goods or services obtained for or consumed by the Estate;
 - (2) Postage and shipping fees;
 - (3) Deposition and transcript costs;
 - (4) Fees charged by a process server;
 - (5) Publication fees;
 - (6) Expert witness fees;
 - (7) Messenger costs;
 - (8) Case-specific bonds; and
 - (9) Electronic database fees charged by an outside vendor, (for example, Westlaw, LexisNexis, PACER) except for charges to research Arizona (or other applicable) statutes, case law, and regulations.
- i. Reimbursable costs do not include any cost not specifically or directly associated with the delivery of goods or services to an identified Estate, for example, overhead.
- j. Time and expenses for any misfeasance or malfeasance are not compensable.
- k. Time and expenses to correct or mitigate errors caused by the professional, or their staff, are not billable to the Estate.

- l. Time or expenses to respond or defend against a regulatory complaint against the professional and the professional's licensed business entity are not billable to the Estate.
 - m. A Professional may only charge interest on their unpaid compensation or unpaid reimbursement with court approval.
3. Judicial Officer Review. The judicial officer shall consider the following general compensation factors when reviewing hourly rates and charges and determining what constitutes reasonable compensation:
- a. The usual and customary fees or market rates charged in the relevant professional community for such services. Pursuant to Rule 34(c), *Arizona Rules of Probate Procedure*, market rates for goods and services are a proper and ongoing consideration for the court in Title 14 proceedings.
 - b. To the extent authorized by law, a non-licensed fiduciary who is related to a protected person, ward, or decedent, may receive reasonable compensation for services as a conservator, guardian, or personal representative, respectively, commensurate with the services performed. The judicial officer shall also consider the number of billable hours and services rendered in comparable cases.
 - c. Common fiduciary services rendered in a routine guardianship or conservatorship engagement. The fiduciary shall provide a reasonable explanation for exceeding these services. The common fiduciary services are:
 - (1) Routine bookkeeping, such as disbursements, bank reconciliation, data entry of income and expenditures, and mail processing: four (4) hours per month, at a commensurate rate for such services;
 - (2) Routine shopping: six (6) hours per month if the ward is at home, and two (2) hours per month if the ward is in a facility, at a commensurate rate for such services;
 - (3) One routine personal visit per month by the fiduciary to the ward or protected person;
 - (4) Preparation of conservator's account and budget: five (5) hours per year;
 - (5) Preparation of annual guardianship report: two (2) hours per year; and
 - (6) Marshalling of assets and preparation of initial inventory: eighty (80) hours.
 - d. Not more than one attorney may bill for attending hearings, depositions, and other court proceedings on behalf of a client, nor bill for staff to attend, absent good cause;
 - e. Each fiduciary and guardian *ad litem* shall not bill for more than one person to attend hearings, depositions, and other court proceedings on behalf of an Estate, absent good cause. This provision does not preclude an attorney, who represents a fiduciary or guardian ad litem, from submitting a separate bill.

- f. The total amount of all annual expenditures, including reasonable professional fees, may not deplete the Estate during the anticipated lifespan of the ward or protected person, until and unless the conservator has disclosed that the conservatorship has an alternative objective, such as planned transition to public assistance or asset recovery, as set forth in Rule 45(e)(3) of the *Arizona Rules of Probate Procedure*.
 - g. The request for compensation in comparison to the previously disclosed basis for fees, any prior estimate by the Professional, and any court order;
 - h. The expertise, training, education, experience, and skill of the Professional in Title 14 proceedings;
 - i. Whether an appointment in a particular matter precluded other employment;
 - j. The character of the work to be done, including difficulty, intricacy, importance, necessity, time, skill or license required, or responsibility undertaken;
 - k. The conditions or circumstances of the work, including emergency matters requiring urgent attention, services provided outside regular business hours, potential danger (for example: hazardous materials, contaminated real property, or dangerous persons), or other extraordinary conditions;
 - l. The work actually performed, including the time actually expended, and the attention and skill-level required for each task, including whether a different person could have rendered better, faster, or less expensive service;
 - m. The result, specifically whether benefits were derived from the efforts, and whether probable benefits exceeded costs;
 - n. Whether the Professional timely disclosed that a projected cost was likely to exceed the probable benefit, affording the court an opportunity to modify its order in furtherance of the best interest of the Estate;
 - o. The fees customarily charged and time customarily expended for performing like services in the community;
 - p. The degree of financial or professional risk and responsibility assumed; and
 - q. The fidelity and loyalty displayed by the Professional, including whether the Professional put the best interest of the Estate before the economic interest of the professional.
4. Non-traditional Compensation Arrangements.
- a. Flat-fee: Unless otherwise prohibited by law or court rule, flat-fee compensation is permissible under the following conditions:

- (1) The flat fee may include all or part of an engagement, if the predictability of costs is enhanced and if the economic interests of the Professional are thereby better aligned with the Estate;
 - (2) The basis for any flat fee compensation is disclosed by the Professional in advance, in writing, specifying in detail the services included in any flat-fee, the units of each service, and the usual hourly rate for such services; and
 - (3) The Professional documents the actual delivery of services included with the flat fee.
- b. Contingent Fee: Unless otherwise prohibited by law or rule, nothing in these guidelines shall prohibit a contingent fee engagement with an attorney that is properly executed in writing. An example of a contingent fee includes representation on a personal injury claim.

E. Modifications to the Statewide Fee Guidelines. The Arizona Judicial Council shall review the statewide fee guidelines, at least biennially, to ensure the guidelines and general compensation factors continue to reflect usual and customary billing practices and are reasonable, efficient and cost effective, as required by A.R.S. § 14-5109.

F. Competitive Bids.

1. Pursuant to Rule 34(d), *Arizona Rules of Probate Procedure*, the court may order that competitive bids for goods or services be obtained at any stage of Title 14 proceedings.
2. A court shall competitively bid attorney services for those attorneys seeking appointment by the court as counsel for a ward or protected person in a Title 14 proceeding, where a prior attorney-client relationship has not been established. A court may use another method to establish the fees for these attorney services, if that method:
 - a. Results in fees that are comparable to, or more economical than fees established through a competitive bid process, and
 - b. Serves the best interests of the ward or protected person.

Adopted by Administrative Order 2012-63, effective September 1, 2012. Amended by Administrative Order 2022-155, effective November 16, 2022.

Arizona Revised Statutes Annotated
Arizona Rules of Probate Procedure (Refs & Annos)
Part V. General Roles and Duties of Participants

17B A.R.S. Rules Probate Proc., Rule 33

Rule 33. Compensation for Fiduciaries, Attorneys, Guardians ad Litem, and Statutory Representatives

Effective: January 1, 2022

[Currentness](#)

(a) Generally.

(1) *Guardianships and Conservatorships.* A request for approval of fees for a guardian, a conservator, an attorney, a guardian ad litem, or a statutory representative to be paid from an estate of a ward or protected person, or a trust that the ward or protected person established, must be made in a petition filed under section (c) or section (d) of this rule.

(2) *Decedents' Estates and Trusts.* A personal representative, a trustee, a guardian ad litem, a statutory representative, or an attorney for any of them, is not required to request court approval of fees to be paid from the estate or trust, unless the court orders otherwise. If approval is requested, the request must be made in a petition filed under section (c) or section (d).

(b) Content of Request for Approval. Any request for approval of compensation must be accompanied by statements that include the following information:

(1) If requested fees are based on hourly rates, the statements must specify the services provided and explain the tasks performed, the date each task was performed, the time expended in performing each task, the name and position of the person who performed each task, and the hourly rate charged for such services. Block billing is not permitted.

(2) If requested fees are not based on hourly rates, the statement must include an explanation of the fee arrangement and a computation of the fee for which approval is sought.

(3) If the request includes reimbursement of costs, the statement must specify each cost, the date the cost was incurred, the purpose of the cost, and the amount of reimbursement requested or, if reimbursement of costs is based on some other method, an explanation of the method being used.

(c) Approval in an Account. If a petition requests approval of a fiduciary's account and the account lists fees paid to a fiduciary, an attorney, a guardian ad litem, or a statutory representative, the petition must request the court's approval of those fees paid during the accounting period. Statements that document the fees paid and conform with section (b) must be submitted with the petition.

(d) Approval by Separate Petition. If a request for approval of fees is not included in a petition for approval of the fiduciary's account, a fiduciary, an attorney, a guardian ad litem, or a statutory representative may file a separate petition for approval of compensation.

(e) Waiver. An attorney, a guardian ad litem, or a statutory representative waives compensation from the estate of a ward or protected person if a request is not timely submitted under [A.R.S. § 14-5110](#).

(f) Objections. A person who opposes a request for approval of compensation must file a response as prescribed in [Rule 15\(e\)](#). The response must provide a specific basis for each objection.

(g) Fee Guidelines. When determining whether compensation is reasonable, the court must follow statewide fee guidelines contained in A.C.J.A. § 3-303.

Credits

Added Aug. 29, 2019, effective Jan. 1, 2020. Amended on an emergency basis Aug. 25, 2021, effective Sept. 29, 2021, adopted on a permanent basis effective Jan. 1, 2022.

Editors' Notes

APPLICABILITY PROVISION

<The new and amended rules and forms put forth by Order No. R-18-0044, effective Jan. 1, 2020, apply to all actions filed on or after January 1, 2020, and all actions pending on that date, except to the extent that the court in an affected action determines that applying the amended rule or form would be infeasible or work an injustice, in which event the former rule or form applies. >

17B A. R. S. Rules Probate Proc., Rule 33, AZ ST PROB Rule 33

State Court Rules are current with amendments received and effective through May 15, 2023. The Code of Judicial Administration is current with amendments received through May 15, 2023.

End of Document

To Be or Not to Be: Special Needs Planning Overview & Estate Planning Considerations

CLE by the Sea 2023

July 12, 2023

Afsanieh Rassti, Esq.

Frazer Ryan Goldberg & Arnold, LLP

- I. The “What” and the “Why”.
 - a. WHAT is a Special Needs Trust?
 - i. A Special Needs Trust (sometimes called a Supplemental Special Needs Trust) is a legal arrangement made by the beneficiary, court, natural or legal guardian to ensure additional financial support without endangering the beneficiary’s claim to government benefits.
 - ii. A trust designed to supplement, and not to supplant, impair or diminish, public benefits a beneficiary is receiving, or may in the future be receiving. Designed to (1) protect the trust corpus in the event that the beneficiary is, or becomes, eligible for public benefits and (2) protect the beneficiary’s eligibility for benefits, which might otherwise be in jeopardy by an outright distribution of the trust corpus.
 - iii. WHAT is the difference between a Special Needs Trust (SNT) and Supplemental Benefit Trust (SBT)?
 1. The distinction between the two lies in where the money is coming from. If the funds are coming from the disabled person, then those funds must be paid into a SNT. However, if the funds are coming from a third-party (for instance, from the estate of a parent or grandparent or from a gift) then those funds can be placed into a SBT.
 2. A SNT and a SBT are both trusts that are set up in order to preserve “means tested” government benefits on behalf of a person with a disability. “Means tested,” benefits relate to those that you can only qualify for if your assets and income are below a certain amount.

- b. WHAT are means-tested public benefits?
 - i. **The Arizona Health Care Cost Containment System (AHCCCS)-**
AHCCCS is Arizona's Medicaid program, health care coverage for individuals with lower income.
 - 1. **Basic Eligibility Requirements:**
 - a. Be under 65 years old
 - b. You can be 65 or older if you are the parent or caretaker of a child
 - c. Not be eligible for Medicare
 - d. You can be on Medicare if you are the parent or caretaker of a child or are pregnant
 - e. Be a U.S. citizen or meet specific noncitizen requirements, and
 - f. Have income below certain limits you may qualify if your countable monthly income is at or below *at least one* of two income limits:
 - i. Test 1 compares your countable income to the Federal Benefit Rate (FBR). FBR is \$914 per month for an individual.
 - ii. Test 2 compares your countable income to the Federal Poverty Guidelines (FPG). 100% of FPG is \$1,215 per month for an individual.
 - ii. **Arizona Long Term Care System (ALTCS)-** For most purposes, ALTCS, AHCCCS and Medicaid are interchangeable terms. ALTCS is a Medicaid program specifically for seniors and disabled individuals who require long-term care. Eligibility for ALTCS is determined by both financial need and functional level.
 - 1. ALTCS members cannot have more than \$2,000 in their name.
 - 2. ALTCS Breakdown- [Filing an Application for ALTCS \(azahcccs.gov\)](http://azahcccs.gov)

iii. **Supplemental Security Income (SSI)**- The SSI program provides monthly payments to adults and children with a disability or blindness who have income and resources below specific financial limits. SSI payments are also made to people age 65 and older without disabilities who meet the financial qualifications.

1. **Eligible Adults Requirements:**

- a. Are age 65 and older, or blind, or have a disability.
- b. Have limited income (wages, pensions, etc.).
- c. Have limited resources (the things you own).
- d. Are U.S. citizens, nationals of the U.S., and some noncitizens.

2. **Eligible Children Requirements:**

- a. Are under age 18 and have physical or mental condition(s) that very seriously limits their daily activities for a period of 12 months or more or may be expected to result in death, and
- b. Live in a household with limited income (benefits based on need) or resources.

iv. **Social Security Disability Insurance (SSDI)** gives monthly payments to people with disabilities who qualify because they used to work.

v. **Division of Developmental Disabilities (DDD)**- DDD provides supports and services for eligible Arizonans. DDD provides supports and services to individuals diagnosed with disabilities such as autism, cognitive or intellectual disability, down syndrome; or individuals under the age of six and at risk of having a developmental disability.

1. More information on eligibility can be found at [DDD-2069A - DDD Eligibility Packet \(az.gov\)](#)

c. WHY create a Special Needs Trust?

i. Advantages of SNT's:

1. Provides financial support and improves the quality of life of the disabled beneficiary.

2. Protects a beneficiary's ability to avail assistance provided by Supplemental Social Security (SSI), Arizona Long Term Care System (ALTCS), or Arizona Health Care Cost Containment System (AHCCCS).
3. Assurance to the creator of the trust that the trust assets in the trust will be protected and used for the stipulated purpose.
4. Creditors cannot claim or access the assets placed in the special needs trust.
5. The trust creator retains control over who inherits the trust funds or assets after the beneficiary's passes.
6. Setting up a special needs trust protects against financial misuse of the funds by a trustee.

ii. Limitations of SNT's:

1. Cost of Establishing and Maintaining the Trust

- a. SNT's can be expensive to establish and maintain. The cost will depend on the type of trust, the trustee, and the assets held in the trust.
- b. Additionally, the trustee may charge a fee for managing the trust, which can reduce the funds available for the beneficiary's care and support.

2. Restrictions on Use of Funds

- a. SNT's are subject to restrictions on the use of funds. The trustee must ensure that the funds are used solely for the beneficiary's care and support and cannot be used for other purposes. This can limit the beneficiary's ability to use the funds for non-essential expenses, such as travel or entertainment.

3. Limited Control Over Trust Assets

- a. The beneficiary has limited control over the assets held in the special needs trust. The trustee is responsible for managing the assets and making decisions about their use.

While the beneficiary can request distributions from the trust, the trustee has the ultimate discretion.

II. Applicable Law

- a. **A.R.S. § 14-10103-** “Special needs trust” means a trust established for the benefit of one or more disabled persons if one of the purposes of the trust, expressed in the trust instrument or implied from the trust instrument, is to allow the disabled person to qualify or continue to qualify for public, charitable or private benefits that might otherwise be available to the disabled person. The existence of one or more nondisabled remainder beneficiaries of the trust shall not disqualify it as a special needs trust for the purposes of this paragraph. For the purposes of this paragraph, “ disabled person” means an individual who is disabled pursuant to 42 United States Code section 1382c.
- b. **8 CFR § 213a.1-** Means-tested public benefit means either a Federal means-tested public benefit, which is any public benefit funded in whole or in part by funds provided by the Federal Government that the Federal agency administering the Federal funds has determined to be a Federal means-tested public benefit under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Public Law 104-193, or a State means-tested public benefit, which is any public benefit for which no Federal funds are provided that a State, State agency, or political subdivision of a State has determined to be a means-tested public benefit. No benefit shall be considered to be a means-tested public benefit if it is a benefit described in sections 401, 411(b), 422(b) or 423(d) of Public Law 104-193.
- c. **Section 1917(d)(3) of the Social Security Act** prescribes the rules state Medicaid agencies must apply in evaluating funds in, contributions to, and distributions from, trusts that are funded with a Medicaid applicant’s or beneficiary’s own assets.
- d. **Section 5007 of the 21st Century Cures Act** (the “Cures Act”), Pub. L. No. 114-255, supports the independence of individuals with disabilities by permitting them to set up a special needs trust on their own behalf.
 - i. In December 2017, President Obama signed into law the “21st Century Cures Act” (P.L. 114-255), Section 5007 of which is titled “Fairness in

Medicaid Supplemental Needs Trusts,” which adds the words “the individual” to the list of permissible settlors of first-party SNTs. This change long corrects a legislative error made more than 23 years ago in the Omnibus Budget Reconciliation Act of 1993 (OBRA ’93).

e. First-Party Special Needs Trusts established under **42 USC 1396p(d)(4)(A) or (C)**

(A) A trust containing the assets of an individual under age 65 who is disabled (as defined in section 1382c(a)(3) of this title) and which is established for the benefit of such individual by the individual, a parent, grandparent, legal guardian of the individual, or a court if the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this subchapter.

(C) A trust containing the assets of an individual who is disabled (as defined in section 1382c(a)(3) of this title) that meets the following conditions:

(i) The trust is established and managed by a non-profit association.

(ii) A separate account is maintained for each beneficiary of the trust, but, for purposes of investment and management of funds, the trust pools these accounts.

(iii) Accounts in the trust are established solely for the benefit of individuals who are disabled (as defined in section 1382c(a)(3) of this title) by the parent, grandparent, or legal guardian of such individuals, by such individuals, or by a court.

(iv) To the extent that amounts remaining in the beneficiary’s account upon the death of the beneficiary are not retained by the trust, the trust pays to the State from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under the State plan under this subchapter.

III. Special Needs Trust Parties & Roles

- a. WHO is the Grantor:
 - i. The Grantor is the person who establishes the trust and is generally the person whose assets fund the trust. The Grantor can be a family member, friend or anyone.
- b. WHO is the Trustee:
 - i. Family Member
 - ii. Non-Family- Bank, licensed fiduciary, trust officer, attorney
 1. Trustee Responsibilities:
 - a. Must have absolute discretion in amounts and purposes of distribution to the disabled Beneficiary.
 - b. Handles reporting and disclosure of information to benefits programs.
 - c. Files tax returns for the SNT.
- c. WHO is the Beneficiary:
 - i. An individual **who does** receive means-tested benefits such as SSI and/or Medicaid, an inheritance left directly to the Beneficiary may jeopardize benefit eligibility. The same funds, if directed to a Third-Party PSNT for the benefit of the Beneficiary, will not be counted as an asset or income for the purpose of maintaining SSI and Medicaid eligibility.
 - ii. An individual who **does not** receive SSI or Medicaid but is easily taken advantage of or cannot manage finances, the Third-Party PSNT eases this anxiety by providing fiscal oversight to ensure that funds left for the Beneficiary meet the Grantor's intended goals.
- d. Beneficiary Limitations:
 - i. Disabled Beneficiary cannot make demands or have direct access to trust assets.
 - ii. Beneficiary cannot be the Trustee of the SNT.
 - iii. A SNT operates as a "loss of control" vehicle for the disabled Beneficiary over the assets.

IV. Types of Special Needs Trusts

a. **Inter Vivos (established during the settlor's lifetime):**

- i. **First-Party/Self-settled:** a SNT established using the beneficiary's own funds
- ii. **Third Party:** a SNT established using funds of a non-beneficiary third party

b. **Testamentary**

A third-party trust established under a testator's Last Will and Testament. Also called "Supplemental Benefits Trust"

c. **Sole Benefit Trust:** A third-party SNT usually established by the parent(s) of a disabled adult child who is receiving or may receive needs-based public benefits in cases where the parent(s) also need Medicaid.

d. **Pooled Special Needs Trust:** A trust that combines the assets of two or more SNTs to obtain greater leverage in purchasing services and greater ability to leverage investment funds. These types of trusts are managed by non-profit organizations. The nonprofit organization will administer the Pooled Trust, take care of all the tax preparation, make investment decisions, and act as the trustee. Pooled Trusts can function as First Party accounts (funded with only your own money) and Third Party accounts (funded only with money from other people).

V. What Type of Special Needs Trust/Planning Fits the Situation:

a. First Party SNT's Basics

- i. Hold assets such as lawsuit settlement proceeds, inheritance or personal savings of the disabled individual
- ii. The beneficiary must be under the age of 65 when SNT established and funded.
- iii. The trust can be established by the beneficiary, court, guardian, or parents/grandparents.
- iv. Needs Medicaid or other government benefits but possesses excess assets/resources.

- v. Established to protect current or future means-tested government benefits if an individual is about to receive a settlement, inheritance or other monies that will bring his or her countable assets to more than \$2,000.
- vi. Unless these funds are sheltered in a Trust or spent down by purchasing exempt resources, the beneficiary would lose benefits and be required to pay medical bills and other expenses from the assets until those assets were under the \$2,000 limit.
- vii. If the trust is created properly, adhering to strict government rules, assets can be used to benefit the person with special needs and ensures they have supplemental resources available long-term.
- viii. Key Takeaway:
 - 1. **PAYBACK PROVISION**- At disabled beneficiary's death State Medicaid Agency must be paid back in full before anything is distributed to the remainder beneficiary of the SNT.
 - a. SNT must contain specific language to reimburse for any State medical assistance upon death of disabled beneficiary.
- b. Third-Party SNT's (Also known as "Supplemental Care Trusts") Basics
 - i. Funded with assets of someone other than the disabled beneficiary or beneficiary's spouse.
 - ii. Created with the help of third-party assets by a grantor (parents/grandparents) to ensure the beneficiary gets the benefits of both worlds (distributions from trust assets and ALTCS benefits).
 - iii. Drafted as a stand-alone trust or sub-trust.
 - iv. Benefits individual already receiving benefits under ALTCS or other schemes or might require such assistance in the future and beneficiaries that are incapable of handling his/her financial issues.
 - v. Key Takeaway:
 - 1. **NO PAYBACK PROVISION**- At the beneficiary's death, trust assets go to residual beneficiaries.
- c. Pooled Special Needs Trust vs. Regular SNT's

- i. A pooled SNT may also be available to a person over 65, unlike first-party SNTs.
- ii. Provides greater access to investments. Because a pooled trusts deal with a larger group of beneficiaries, trustees can invest in products that may not be available to a single beneficiary
- iii. Pooled trusts employ professional trustees who are familiar with the special needs planning, regulations surrounding SNT's ad local services available to beneficiaries. An individual SNT most likely is managed by a family member who is not familiar and does not have similar access to resources.

VI. Special Needs Trust- The Good, The Bad & The Ugly

a. Reporting Requirements MUSTS:

- i. You must report the establishment and existence of the Trust to the benefits program within ten (10) days of funding the SNT.
- ii. The public benefits program will require a copy of the executed SNT and verification/ proof of SNT funding.
- iii. You must report the source of funding and deposits to the Trust.
- iv. If the disabled beneficiary receives ALTCS, you must disclose the budget and submit other required forms.
- v. You must report the termination of the Trust.
- vi. A Trustee should always keep proof of reporting and disclosure of information regarding the Trust.

b. Making Distributions from SNT's

i. First-Party SNT's

- 1. Distributions are limited as regulated by law.
- 2. Stricter reporting requirements of distributions.
- 3. Need to obtain a budget and obtain permission.
- 4. Distributions can only be used for the sole beneficiary of the SNT.
- 5. Disclosure of distributions to Social Security and Medicaid.

ii. Third-Party SNT

- 1. Distributions can be made for anything that benefits the beneficiary.

2. Distributions can be made to multiple disabled beneficiaries.
 3. Distributions still must be reported as required.
- iii. Allowable Disbursements- A.R.S. § 36-2934.01(B) further specifies what disbursements are allowable from a self-settled SNT for purposes of ALTCS eligibility, which are:
1. Reasonable legal and professional expenses related to the Trust including:
 - a. Trust taxes.
 - b. Trust investment fees.
 - c. Reasonable professional expenses, including trustee, accounting and attorney fees related to the administration of the trust.
 2. The post eligibility share of cost as computed pursuant to A.R.S. § 36-2392.
 3. For trusts created pursuant to Section 1917(D)(4)(B) of the Social Security Act, that is, Income Only or “Miller” Trusts, a disbursement to the beneficiary equal to the personal needs allowance as computed pursuant to section 36-1932.
 4. Health insurance premiums, medically necessary expenses and special medical needs of the beneficiary including:
 - a. Expenses required to make the home accessible to the person.
 - b. The purchase and maintenance of a specially equipped vehicle titled to the trust or to the beneficiary with a lien against the vehicle held by the trust in an amount equal to the current market value of the vehicle.
 - c. Durable medical equipment.
 - d. Over-the-counter supplies and medication, including diapers, lotions and cleaning wipes.
 - e. Personal care services that are determined to be medically necessary by the Program Coordinator and that are provided

by a person who is registered by the Administration to provide the service who is not a financially responsible relative to the beneficiary. For the purposes of this subdivision, “financially responsible relative” means the spouse of the beneficiary or, if the beneficiary is a child under eighteen years of age, the parent of the beneficiary.

- f. Maintenance payments for the person or family in accordance with 42 U.S.C. § 1396R-5(D)(1) and (2) and A.R.S. § 36-2932 (L).
- g. Guardianship and conservatorship fees for the trust beneficiary based on the fair market value of the services provided.
- h. The following expenses for the benefit of the beneficiary including gifts to, payments for or loans to other persons, whether there are in cash or in kind:
 - i. Entertainment, educational or vocational items that are consistent with the person’s ability to use these items.
 - ii. Other expenses that are individually approved by the director.
 - iii. Living expenses for food, clothing, and shelter. If home property or other real property is purchased by the trust it must be titled in the trust.
 - iv. Income taxes owed on income from trust investment or income of the beneficiary that is assigned to the trust when an actual tax liability is established.
 - v. Provisions for burial expenses that is limited to one of the following methods:
 - 1. Purchase of a prepaid burial plan funded by an irrevocable life insurance policy,

irrevocable burial account, irrevocable trust account or irrevocable escrow account.

2. Purchase of life insurance to fund a burial plot for the beneficiary with a face value that does not exceed one thousand five hundred dollars after allowing deductions for burial plot items as defined by the Administration.
3. Funding a burial fund account in an amount not to exceed one thousand five hundred dollars.

VII. Estate Planning Drafting Considerations- What to Be Mindful Of:

- a. Discuss with your client who would be an appropriate individual to serve as Trustee.
- b. Think about appointing a Trust Protector or Trust Advisor who can oversee accounting and management of the SNT especially if the Trustee is a family member.
- c. Discuss with your client reporting requirements if SNT is funded.
- d. Common questions of loved ones planning for a special needs individual:
 - i. What financial support will my loved one need when I am no longer here?
 - ii. Will my loved one be able to enjoy the same quality of life that they have now?
 - iii. Who will administer the trust and ensure that the funds are managed and used for the benefit of my loved one?
 - iv. How can I ensure that eligibility for Medicaid and Supplemental Security Income (SSI) benefits will not be jeopardized?

VIII. Post-Special Needs Considerations and Solutions- What to Look Out For:

- a. When a Testator's Last Will and Testament does not include a trust but instead leaves an outright distribution to the disabled child, apply to the court for reformation of a testator's Will, to include a testamentary third party SNT.

- b. When a Testator's Last Will and Testament includes a non-complying trust, apply to the court for reformation of the existing (but non-complying) trust under a testator's Will, in order to effectuate the Testator's intent.
- c. When a Last Will and Testament does not contain a SNT and the estate distributions have been made to a disabled individual, apply to the court for permission to establish a Self-Settled SNT, to hold in trust the funds distributed to the disabled person under a will. Because the funds have already been distributed to the disabled person, under federal and state law, any Medicaid lien existing at the time the special needs trust is created must be repaid before the trust may be funded with such distribution.
- d. When a testator in a Last Will and Testament omitted the disabled person in an attempt to preserve the disabled person's eligibility for public benefits, apply to the court for reformation of the will in order to effectuate the Testator's intent by providing a share to the disabled person in a Testamentary Third-Party SNT
- e. When a Last Will and Testament does not contain a SNT and omits the disabled child, and the estate has been distributed to the disabled child's siblings, those siblings may wish to establish a Third-Party SNT with those funds.

IX. ABLE accounts ("The Achieving Better Life Experiences")

- a. ABLE account operate a lot like a 529 Plan and are not specific state to state. You have the ability to "shop around" for state-by-state comparisons. ABLE accounts are also similar to IRA's in which the contributions made can grow tax-free and comes our tax-free IF used for disability purpose; however the annual contributions are set. Currently, you can deposit \$17,000 into an ABLE account.
- b. ABLE accounts allow to gift money to a person who was disabled prior to age 26 without negatively impacting SSI and ALTCS benefits.
- c. For those who were disabled before age 26, they or their legal representatives may open an account and anyone may contribute to the account, up to \$15,000.00 total per year, with a maximum amount of \$100,000.00 (to remain exempt for SSI purposes). Growth of the funds is also **tax-free** and not subject to gift tax restrictions if spent on qualified disability expenses (which are listed below and are

also important considerations for means-based benefits eligibility purposes). Funds remaining in the account on the account owner's death are to be paid to any states whose Medicaid programs paid for any medical expenses of the disabled person.

- d. WHAT are qualified disability expenses?
 - i. Living expenses, education, housing, transportation, employment training and support, assistive technology, personal support services, health, prevention, and wellness, financial management, administrative services, legal fees, oversight and monitoring, an funeral and burial
- e. Benefits of ABLE accounts:
 - i. ABLE accounts are not taken into consideration if a beneficiary currently receives state disability benefits, so losing those benefits are no concern.
 - ii. There are no age limits and contributions can be made throughout a beneficiary's lifetime.
 - iii. ABLE accounts are considered a "readily available resource" where contributions can grow over time and be taken out at any time.
- f. Limitations of ABLE accounts:
 - i. A beneficiary can only have ONE account and not multiple accounts, if other family members want to make contributions, they must make to the same account for the beneficiary.
 - ii. You CANNOT frontload accounts and can only make the maximum annual contribution allowed which is now \$15,000.

X. ABLE accounts- Helpful Resources 101

- a. ABLE National Resource Center- <https://www.ablenrc.org/>
 - i. This link provides the most information in regards to what are ABLE accounts, how to start and manage the account over time and has webinars/ guides to walk you through the process.
- b. ABLE State-by-State Comparisons- <https://www.ablenrc.org/coABmpare-states/>
 - i. This link does a state by state comparison to the different type of ABLE account advantages which you will see listed in the chart to give you a side by side comparison.

- c. ABLE account information as the Social Security Sees it- [-SPOTLIGHT ON ACHIEVING A BETTER LIFE EXPERIENCE \(ABLE\) ACCOUNTS \(ssa.gov\)](#)
- d. ABLE account information as the IRS Sees It- <https://www.irs.gov/newsroom/able-accounts-a-valuable-financial-solution-for-people-with-disabilities#:~:text=Achieving%20a%20Better%20Life%20Experience,eligibility%20for%20government%20assistance%20programs>



TO BE OR NOT TO BE: SPECIAL NEEDS PLANNING OVERVIEW & ESTATE PLANNING CONSIDERATIONS

CLE By the Sea- July 12, 2023

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Frazer Ryan Goldberg & Arnold, LLP



Presentation Roadmap

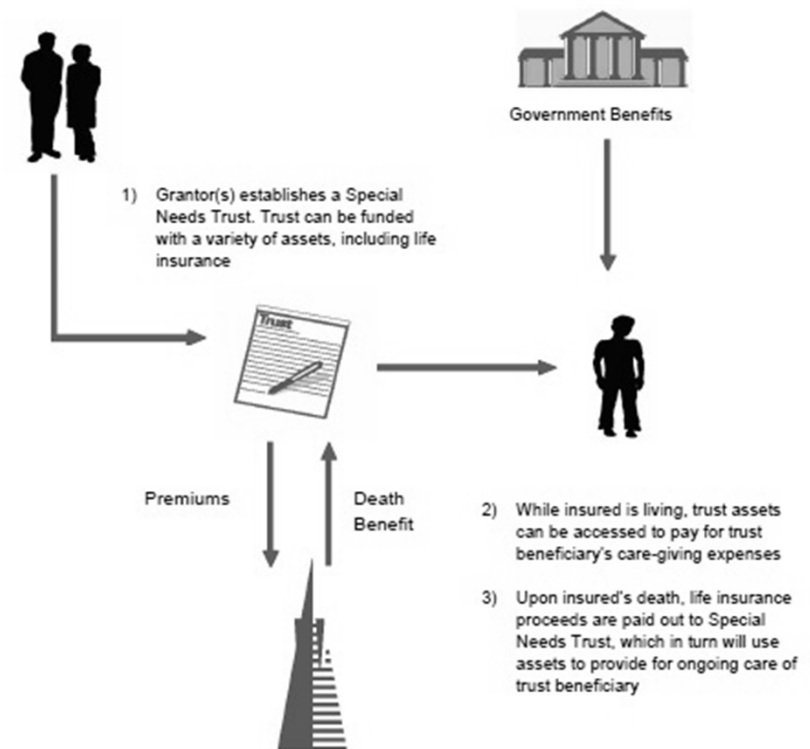
- The WHAT & the WHY?
- Means Tested Public Benefits
- Applicable law
- Special Needs Trusts Parties & Roles
- Types of SNT's
 - First-Party, Third-Party, Pooled Trusts
- The Good, the Bad & the Ugly
- Estate Planning Drafting Considerations
- Special Needs Considerations & Solutions
- ABLE Accounts 101



WHAT is a Special Needs Trust?

- Legal arrangement b made by beneficiary, court or natural or legal guardian to ensure additional financial support for disabled beneficiary without endangering beneficiary's claim to government benefits.
- Designed to supplement, and not to supplant, impair or diminish, public benefits
- Distinction between SNT & SBT
- SNT and a SBT are both trusts that are set up in order to preserve "means tested" government benefits on behalf of a person with a disability

Special Needs Trust: How It Works



Means-Tested Public Benefits

- AHCCCS
- ALTCS
- SSI
- SSDI
- DDD

- “Means tested,” benefits relate to those that you can only qualify for if your assets and income are below a certain amount.

AHCCCS & ALTCS & DDD

The Arizona Health Care Cost Containment System

- Basic Eligibility Requirements:
 - Be under 65 years old
 - You can be 65 or older if you are the parent or caretaker of a child
 - Not be eligible for Medicare.
 - You can be on Medicare if you are the parent or caretaker of a child or are pregnant
 - Be a U.S. citizen or meet specific noncitizen requirements, and
 - Have income below certain limits you may qualify if your countable monthly income is at or below *at least one* of two income limits:
 - Test 1 compares your countable income to the Federal Benefit Rate (FBR). FBR is \$914 per month for an individual.
 - Test 2 compares your countable income to the Federal Poverty Guidelines (FPG). 100% of FPG is \$1,215 per month for an individual.

Arizona Long Term Care System

- For most purposes, ALTCS, AHCCCS and Medicaid are interchangeable terms. ALTCS is a Medicaid program specifically for seniors and disabled individuals who require long-term care. Eligibility for ALTCS is determined by both financial need and functional level.
 - ALTCS members cannot have more than \$2,000 in their name.

Division of Developmental Disabilities (DDD)

- DDD provides supports and services for eligible Arizonans. DDD provides supports and services to individuals diagnosed with disabilities such as autism, cognitive or intellectual disability, down syndrome; or individuals under the age of six and at risk of having a developmental disability.

SSDI vs SSI

SOCIAL SECURITY DISABILITY INSURANCE (SSDI)

- Pays disabled individuals who are unable to work, regardless of income and resources
- Requires work history
- Wage based
- For disabled workers and for adults who have been disabled since childhood

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Law Group,
PLLC

SUPPLEMENTAL SECURITY INCOME (SSI)

- Pays disabled individuals who are unable to work and have limited resources
- No work history required
- Need based
- For disabled adults and disabled children in financial need

Applicable Law

- **A.R.S. § 14-10103**- Defines a Special Needs Trust
- **42 U.S.C. section 1382(c)**- Disabled Person
- **8 CFR § 213a.1**- Means-tested public benefits
- **Section 1917(d)(3) of the Social Security Act** – prescription of rules applying to state Medicaid agencies
- **Section 5007 of the 21st Century Cures Act**
 - Special Needs Trust Fairness Act
 - 2017- Addition of the word “the individual” to the list of permissible settlors of first-party SNTs
- **42 USC 1396p(d)(4)(A) or (C)**- Establishes rules pertaining to First-Party SNT's



The WHY?

- Advantages of SNT's

- Provides financial support
- Improves the quality of life of the disabled beneficiary.
- Protects a beneficiary's ability to secure means tested benefit programs
- Assurance to the creator of the trust that the trust assets in the trust will be protected and used for the stipulated purpose.
- Creditors cannot claim or access the assets placed in the special needs trust.
- The trust creator retains control over who inherits the trust funds or assets after the beneficiary's passes.
- Setting up a special needs trust protects against financial misuse of the funds by a trustee.

- Limitations of SNT's

- Cost of Establishing and Maintaining the Trust

- Expensive to establish and maintain
 - Trustees may charge fee for management

- Restrictions on Use of Funds

- Reporting requirements
 - Funds cannot be used for non-essential expenses, such as travel and entertainment
 - The trust must pay back Medicaid. Upon the beneficiary's death, the trust must reimburse Medicaid on behalf of the beneficiary. This step can often wipe out what remains in the trust.

- Limited Control Over Trust Assets

- The beneficiary has limited control over the assets held in the special needs trust. The trustee is responsible for managing the assets and making decisions about their use. While the beneficiary can request distributions from the trust, the trustee has the ultimate discretion.

Special Needs Trust Parties & Roles

Grantor

- Grantor is the person who establishes the trust and is generally the person whose assets fund the trust. The Grantor can be a family member, friend or anyone.

Trustee

- Family Member
- Non-Family- Bank, licensed fiduciary, trust officer, attorney
- Trustee Responsibilities:
 - Must have absolute discretion in amounts and purposes of distribution to the disabled Beneficiary.
 - Handles reporting and disclosure of information to benefits programs.
 - Files tax returns for the SNT.

Disabled Beneficiary

- A beneficiary is the person for whose benefit the trust is established. In first-party SNTs, the beneficiary must be a person who is classified as disabled by the Social Security Administration (SSA).
- An individual **who does** receives means-tested benefits such as SSI and/or Medicaid, an inheritance left directly to the Beneficiary may jeopardize benefit eligibility now, or in the future.

Types of Special Needs Trusts

Inter Vivos (established during the settlor's lifetime):

- **First-Party/Self-settled:** a SNT established using the beneficiary's own funds
- **Third Party:** a SNT established using funds of a non-beneficiary third party

Testamentary

A third-party trust established under a testator's Last Will and Testament. Also called "Supplemental Benefits Trust"

Sole Benefit Trust:

A third-party SNT usually established by the parent(s) of a disabled adult child who is receiving or may receive needs-based public benefits in cases where the parent(s) also need Medicaid.

Pooled Special Needs Trust:

A trust that combines the assets of two or more SNTs to obtain greater leverage in purchasing services and greater ability to leverage investment funds.

Basics: First Party SNT's (Self-Settled SNT's) (Medicaid Payback Trust)

- Established by the Disabled Beneficiary
- Hold assets such as lawsuit settlement proceeds, inheritance or personal savings of the disabled individual
- .Beneficiary must be under the age of 65 when SNT established and funded.
- Protects current or future means-tested government benefits Unless these funds are sheltered in a Trust or spent down by purchasing exempt resources, the beneficiary would lose benefits and be required to pay medical bills and other expenses from the assets until those assets were under the \$2,000 limit.
- Assets can be used to benefit the person with special needs and ensures supplemental resources are available.

Key Takeaway:

PAYBACK PROVISION- At disabled beneficiary's death State Medicaid Agency must be paid back in full before anything is distributed to the remainder beneficiary of the SNT.

- SNT must contain specific language to reimburse for any State medical assistance upon death of disabled beneficiary.

Basics: Third Party SNT's

(Supplemental Care Trusts)

- Third Party SNT's (also known as "Supplemental Care Trusts")
- Funded with assets of someone other than the disabled beneficiary or beneficiary's spouse.
- Created with the help of third-party by a grantor, parent, or grandparent
- Drafted as a stand-alone trust or sub-trust.
- Benefits individual already receiving benefits under ALTCS or other schemes or might require such assistance in the future and beneficiaries that are incapable of handling his/her financial issues.

Key Takeaway:

**NO PAYBACK
PROVISION-** At the
beneficiary's death, trust
assets go to residual
beneficiaries.

• .

Basics: Pooled Special Needs Trusts

- Managed by non-profit organization
- First Party or Third Party
- Pools assets from different members and put them into a large investment fund
- Operates the same as a regular SNT to
 - Safeguard benefits
 - Provides beneficiary services
 - Utilization and investment of funds
 - Additional management services that a simple vanilla SNT
- Differences between Pooled and Regular SNT
 - Experience in administration
 - Familiarity with regulations and state rules
 - Access to local resources

SNT's
Comparisons

Type Trust	Source of \$	Rules/Supervision	Payback To State
3rd Party SNT	Another person	Relaxed	No
ABLE account	Disabled person or another person	More relaxed	Yes
1st Party SNT	Disabled person	Strict	Yes
Pooled SNT	Disabled person	Strict	Yes

SNT's- The Good, Bad & Ugly

a. Reporting Requirements MUSTS:

- You must report the establishment and existence of the Trust to the benefits program within ten (10) days of funding the SNT.
- The public benefits program will require a copy of the executed SNT and verification/ proof of SNT funding.
- You must report the source of funding and deposits to the Trust.
- If the disabled beneficiary receives ALTCS, you must disclose the budget and submit other required forms.
- You must report the termination of the Trust.
- A Trustee should always keep proof of reporting and disclosure of information regarding the Trust.

Distributions from SNT's

First-Party SNT's

- Distributions are limited as regulated by law.
- Stricter reporting requirements of distributions.
- Need to obtain a budget and obtain permission.
- Distributions can only be used for the sole beneficiary of the SNT.
- Disclosure of distributions to Social Security and Medicaid.

Third-Party SNT

- Distributions can be made for anything that benefits the beneficiary.
- Distributions can be made to multiple disabled beneficiaries.
- Distributions still must be reported as required.

Allowable
Disbursements
A.R.S. § 36-2934.01(B)

Reasonable legal and professional expenses related to the Trust including:

- Trust taxes.
- Trust investment fees.
- Reasonable professional expenses, including trustee, accounting and attorney fees related to the administration of the trust.

Medical expenses and special equipment not covered by other benefits

Dental work not covered by Medicaid

Grocery items

Public transportation costs

Travel expenses

Clothing

Education

Appliances

Vacation

Cleaning services

Legal services

Insurance

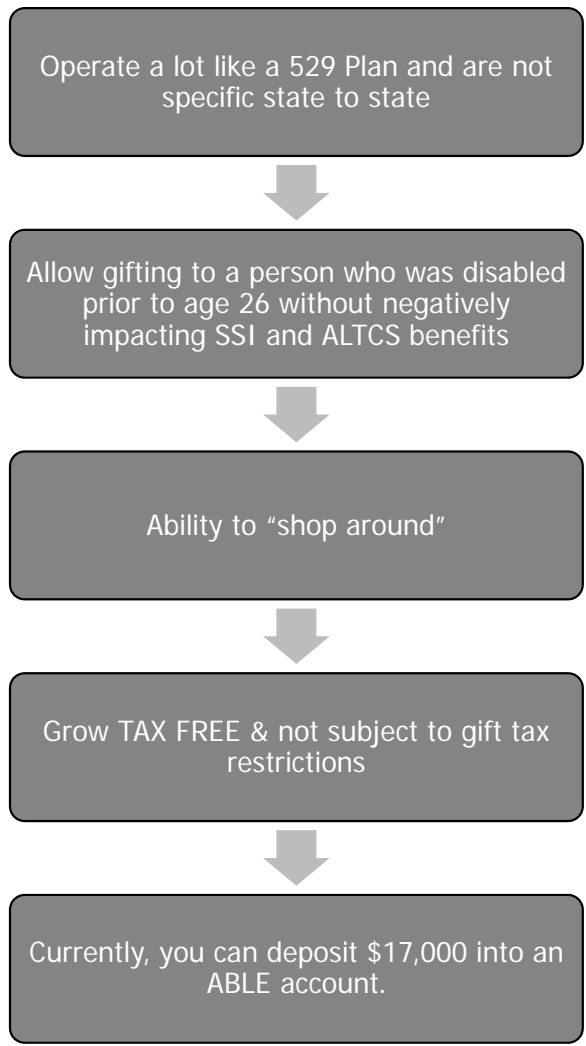
Burial services

Estate Planning Considerations & SNT's



- Discuss with your client who would be an appropriate individual to serve as Trustee.
- Think about appointing a Trust Protector or Trust Advisor who can oversee accounting and management of the SNT especially if the Trustee is a family member.
- Discuss with your client reporting requirements if SNT is funded.
- Common questions of loved ones planning for a special needs individual:
 - What financial support will my loved one need when I am no longer here?
 - Will my loved one be able to enjoy the same quality of life that they have now?
 - Who will administer the trust and ensure that the funds are managed and used for the benefit of my loved one?
 - How can I ensure that eligibility for Medicaid and Supplemental Security Income (SSI) benefits will not be jeopardized?

ABLE accounts “The Achieving Better Life Experiences”



- Payback provisions after death of account holder
- Growth of the funds is also tax-free if spent on qualified disability expenses
 - Living expenses, education, housing, transportation, employment training and support, assistive technology, personal support services, health, prevention, and wellness, financial management, administrative services, legal fees, oversight and monitoring, an funeral and burial

ABLE Basics



Benefits of ABLE accounts:

ABLE accounts are not taken into consideration if a beneficiary currently receives state disability benefits.

There are no age limits and contributions can be made throughout a beneficiary's lifetime.

ABLE accounts are considered a "readily available resource" where contributions can grow over time and be taken out at any time.

- Limitations of ABLE accounts:
- Account must be established prior to age 26 (changing in 2026 to age 46 to benefit a projected 6 million eligible individuals)
- A beneficiary can only have ONE account and not multiple accounts, if other family members want to make contributions, they must make to the same account for the beneficiary.
- You CANNOT frontload accounts and can only make the maximum annual contribution.
- Payback provisions



THANK YOU!

Mental Health + Addiction: Suggested Estate Planning Provisions and Fiduciary Considerations¹

State Bar of Arizona – CLE by the Sea
Estate Planning, Trust and Probate Seminar

July 12, 2023

Elizabeth Noble Rollings Friman

Fleming & Curti, PLC

Friman@flemingandcurti.com

www.Elder-Law.com

¹ Supplemental Materials (includes sample language)

1. *Addiction & Trusts – It Looks Great On Paper But Does it Work?* Stuart D. Zimring, Esq. for Stetson University, National Conference on Special Needs Planning and Special Needs Trusts (October 2020).
2. *Considerations at the Intersection of Substance Use Disorder & Special Needs.* Dr. Monica Sosnowitz, LPC, LCADC for Stetson University, National Conference on Special Needs Planning and Special Needs Trusts (October 2022).
3. *Model Language for Addressing Substance Use Disorders (Addiction) in Trust Documents: Best Practices for Treating Substance and Other Behavioral Disorders.* William F. Messinger, JD, LADC (Aureus, Inc.) and Arden O'Connor, MBA (O'Connor Professional Group).
4. *Trust for Beneficiaries with Addiction and Mental Illness Issues.* G. Andrew Benjamin and Wendy S. Goffe. *The Practical Lawyer* (October 2021).

Summary: In complex situations where a beneficiary² lives with mental illness and/or struggles with addiction (of any sort), masterfully drafted trust provisions only go so far. Distribution provisions in wills and trust documents that use plain language and provide fiduciaries with broad discretion are easier to administer and for beneficiaries to understand than documents with terms that impose tedious standards on both fiduciaries and beneficiaries. Confusing terms create conflict. In cases where substance abuse and mood swings are commonplace, drafting attorneys who think practically and draft with simplicity in mind will create provisions that work well for both fiduciaries and beneficiaries.

I. Listen carefully and identify the client’s goals *before* you begin drafting.

- a. Talking about a loved one who may be unable to manage funds due to mental illness and/or substance abuse is difficult. Shame, anger, confusion and exhaustion are some of the common feelings that a client may have when talking about someone who lives with mental illness and addiction. It is important for the drafting attorney to be alert to this on the onset of a conversation with a client who wants to discuss how distributions can be made from the estate or trust to or for the benefit of a beneficiary.
- b. Do not rush the conversation even though it may be uncomfortable. Let your client describe what “success” looks like. Does “success” mean that funds are stringently managed so that they are wasted on frivolous things? Or, perhaps “success” means that a beneficiary maintains sobriety and/or becomes self-sufficient. Maybe “success” means structuring the distribution of funds in such a way that a beneficiary can maintain eligibility for needs-based government benefits, like SSI and Medicaid. Each client is different and so are the beneficiaries who are affected by the terms of the will or trust. What success looks like will vary based on your client and the beneficiary.
- c. Trust Planning, Are conditions on distributions: good or bad? It depends!
 - i. If the grantor wants to impose strict conditions on distributions so that money is preserved for remainder beneficiaries, then imposing conditional standards create a hurdle that will make it less efficient and more difficult for trustees to make distributions. For example: In the event the trustee has reason to believe that Jane is using drugs or alcohol, the trustee shall make no distributions of income or principal to Jane until Jane has provided to the trustee a "clean" drug and alcohol test, which the trustee believes to be legitimate.
 - ii. If the grantor wants to encourage a beneficiary to seek medical assistance for a mental health diagnosis or substance abuse, then imposing conditions on distributions (for anything other than medical treatment) *may* help incentivize a beneficiary to engage in treatment. For example: If Jane successfully maintains her sobriety for a period of twelve months after she completes a

² For purposes of simplicity, the term “beneficiary” is used in this outline to also describe people who might otherwise be identified as a “devisee” or “heir”.

treatment program, then the trustee shall resume making mandatory distributions of income.

- iii. Remember, every case is different, and people change. Creating complicated trust provisions that make distributions conditional in certain situations will create administrative burdens, which in turn will often increase the costs of administration. In cases where there is an experienced licensed fiduciary serving as trustee, complex language and conditions may be unnecessary if the trust terms provide the trustee broad discretion to make decisions.

II. Use of definitions and common phrases

- a. As scientific research evolves, so does the medical field. This means that medical diagnoses change. Drafting attorneys should be careful when incorporating specific references to medical phrases like “substance abuse” or “mental disorder” in their wills and trusts because terms and definitions change.
- b. The Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5), no longer uses the terms substance abuse and substance dependence, rather it refers to substance use disorders, which are defined as “mild, moderate, or severe to indicate the level of severity, which is determined by the number of diagnostic criteria met by an individual. Substance use disorders occur when the recurrent use of alcohol and/or drugs causes clinically and functionally significant impairment, such as health problems, disability, and failure to meet major responsibilities at work, school, or home.” According to the DSM-5, a diagnosis of substance use disorder is based on evidence of impaired control, social impairment, risky use, and pharmacological criteria.³
- c. Mental health: The DSM-5 defines a mental disorder as “a syndrome characterized by clinically significant disturbance in an individual's cognition, emotion regulation, or behavior that reflects a dysfunction in the psychological, biological, or development processes underlying mental functioning. Mental disorders are usually associated with significant distress or disability in social, occupational, or other important activities.”⁴
- d. Do terms need to be defined? Most drafting attorneys prefer to incorporate a definition by reference rather than include the definition in the actual will or trust document. For example: If the trustee has probable cause to believe that a beneficiary routinely uses or is clinically dependent on a substance (as defined in American Psychiatric Association. (2013). Diagnostic and Statistical Manual of Mental Disorders (5th ed.), then...
- e. Who is your audience? Drafting attorneys sometimes assume that their audience can read and understand the provisions of a will or trust. Keep in mind that it is rare to

³ National Association of Addiction Treatment Providers: <https://www.naatp.org/resources/clinical/substance-use-disorder>

⁴ Stein DJ, Palk AC, Kendler KS. What is a mental disorder? An exemplar-focused approach. *Psychol Med.* 2021 Apr;51(6):894-901. doi: 10.1017/S0033291721001185. Epub 2021 Apr 12. PMID: 33843505; PMCID: PMC8161428.

have a fiduciary that has the medical expertise needed to explain a medical condition or diagnosis. This is one reason why many professional fiduciaries hire private case managers who have clinical expertise to work with them and the beneficiary.

III. Substance Abuse: Common trust provisions and sample language⁵

- a. Dependence: If the trustee reasonably believes that a beneficiary routinely uses or is clinically dependent upon the use or consumption of any drug or substance, and as a result the beneficiary is incapable of caring for himself or is likely to dissipate his financial resources, then the following provisions shall apply...
- b. Testing: The beneficiary will be asked to submit to examinations and/or testing determined to be appropriate by a licensed medical doctor or psychiatrist selected by trustee. The trustee shall request that the beneficiary consent to the full disclosure of all results from examinations and medical tests and the trustee shall maintain strict confidentiality and not disclose the results to any person other than the beneficiary without the beneficiary's written consent.
- c. Treatment: If the results of any examinations and/or testing and the opinion of the examining doctor or psychiatrist, indicates current or recent use of a substance or drug (as defined herein) then...
- d. Suspension of Distributions: Trustee may (or must) suspend distributions until...
- e. Other Prohibitions During Suspension of Benefits: Beneficiary shall be disqualified from acting as trustee (or trust protector) and shall have no authority to remove and replace the trustee who is then serving.
- f. Exoneration Provision: Trustee shall not be responsible or liable to anyone for the actions of a beneficiary or for the beneficiary's welfare. The trustee has no duty to inquire whether a beneficiary uses drugs or other substances. The trustee will be indemnified from the trust estate for any liability in exercising the trustee's judgment and authority under this Article...
- g. Tax Savings Provision: Required mandatory distributions shall not be suspended if they are required for a trust to qualify for certain tax treatment.
- h. Receiving Public Benefits: Beneficiary Receiving Public Benefits: If any person who might otherwise be eligible to receive a distribution of income or principal from the Trust is at the time receiving or, in the sole determination of Trustee, will likely be eligible to receive, government benefits based on disability or financial need, it is helpful to authorize the Trustee to withhold outright distributions and instead continue to hold any such contemplated distribution, along with the remaining trust principal and any undistributed income, for the benefit of such beneficiary.

⁵ See attached supplemental materials (includes sample language)

IV. Planning without a trust

- a. If someone dies without a trust and the decedent has a will, the will may have a testamentary trust provision that establishes a trust for the benefit of the devisee who struggles with mental and/or substance abuse. If the will does not contain language to establish a testamentary trust, there may still be a clause that allows the personal representative to establish a trust for the benefit of a beneficiary if the personal representative believes that a beneficiary under the will is unable to manage funds responsibly or is then receiving or is likely eligible to receive government benefits based on financial need.
- b. If the decedent dies intestate, then the personal representative may elect to seek permission from the Court to either establish a trust for the benefit of the beneficiary or seek to have a conservator appointed to oversee the management of funds that would otherwise have been distributed outright to the beneficiary.

V. Fiduciary Considerations

- a. Special needs planning is an area of law that can create solutions and added support for people living with mental and substance use disorders. Planning ahead to make sure that medical and financial support is in place can ensure that someone who needs extra assistance can receive that assistance after the death of a spouse or parent. A “special needs trust” is specifically designed to allow trust assets to be available for a beneficiary while preserving eligibility for the major needs-based government benefits, like SSI and Medicaid.
- b. What does a successful estate/trust administration look like? It depends on who you ask.
 - i. For someone who establishes a trust with hopes that money will not be wasted by a beneficiary who lives with a substance use disorder and/or mental health challenges, a successful estate or trust administration may be one where the fiduciary who is controlling the purse strings employs a highly structured process before a distribution is made. Alternately, a successful administration may be achieved when a fiduciary is able to distribute funds to or for the benefit of the beneficiary in a fashion that encourages a beneficiary to build autonomy and improves the beneficiary’s quality of life.
 - ii. For a beneficiary who is unable to manage money and depends on ongoing distributions to pay for basic living expenses, success will be defined by how much money the beneficiary receives to use at his/her discretion and how often distributions are made directly to the beneficiary.
 - iii. For a family member or a professional fiduciary serving as a personal representative or trustee, a successful administration will depend on factors including the cooperation of the beneficiary, the ability to avoid and resolve conflict and the requirements and conditions imposed on the fiduciary and beneficiary.

- c. The National Academy of Elder Law Attorneys has a set of aspirational standards that attempt to exceed the American Bar Associations Model Rules of Professional Conduct.⁶ In applying a holistic approach to legal problems this set of standards encourages attorneys to consider the larger context, both other legal consequences as well as the extra-legal context in which the problems exist and must be solved. Attorneys who follow these standards should take the broad view and recognize an obligation to all the players: the client, the beneficiary and the fiduciary in creating a document that will effectively carry out the client's wishes.⁷
- d. Not all professional fiduciaries will agree to work on cases where the beneficiary may be a danger to herself/himself or others. "Saying "no" and/or placing various restrictions on a beneficiary will routinely illicit emotional responses from the beneficiary. These reactions may be difficult for trustees who are not experienced in dealing with anger, violence, tears or mind games. In most cases, where addiction or the effect of mental illness influences the behavior of a beneficiary, it is important for trustees to be aware that the beneficiary may lack self-awareness and/or self-control and in turn, the behavior of the beneficiary may be unpredictable and sometimes dangerous.
- e. Sometimes licensed fiduciaries may decline to serve as trustee in a case where the trust terms are so ambiguous, or requirements are so stringent that the exposure and liability of the trustee is difficult to reduce.
- f. Using a professional, like a licensed social worker or an experienced case manager, can help defuse tensions between the fiduciary and beneficiary. In these cases, having an independent third-party assess the situation and provide objective, fact-based input can illuminate solutions and contribute ideas that improve the working relationship between the beneficiary and the fiduciary.⁸
- g. Rising fees and costs. Estate and trust administrations that involve working with a beneficiary who struggles with addiction and mental health challenges may require significant resources to pay for the professional fees and costs necessary to administer the estate or trust.
- h. The more complicated the terms of the will or trust, the higher the likelihood that the Court may get involved. If the terms of the trust set out distribution requirements or conditions that are difficult to implement, the trustee may seek instruction from the Court. The drafting attorney should consider including a provision that prohibits the

⁶ National Academy of Elder Law Attorneys (NALEA), Aspirational Standards available online: <https://www.naela.org/Default.aspx>

⁷ *Addiction & Trusts – It Looks Great On Paper But Does it Work?* Stuart D. Zimring, Esq. for Stetson University, National Conference on Special Needs Planning and Special Needs Trusts (October 2020).

⁸ *Model Language for Addressing Substance Use Disorders (Addiction) in Trust Documents: Best Practices for Treating Substance and Other Behavioral Disorders.* William F. Messinger, JD, LADC (Aureus, Inc.) and Arden O'Connor, MBA (O'Connor Professional Group), Second Edition (2017).

trustee from using trust funds to pay the beneficiary's attorney's fees and expenses incurred in bringing and prosecuting an action against the trustee.

VI. Lessons Learned

- a. Keep it simple. Complex distribution standards and conditional language can create administrative albatross for fiduciaries and lead to friction with beneficiaries.
 - i. Start with discretionary provisions that provide the fiduciary with sole and absolute discretion to make distributions to or for the benefit of the beneficiary, and in the case of a will, that allow the personal representative to establish and fund a trust for the benefit of a beneficiary, rather than making an outright distribution.
- b. Look for ways to deploy funds in a fashion that will improve the beneficiary's quality of life. Remember, the personal representative/trustee has a fiduciary duty to make sure that, to the degree it is permissible, funds can be used to benefit the beneficiary.
 - i. Make sure there is enough flexibility in the trust that the trustee can use different ways to make distributions to or for the benefit of the beneficiary. For example, when considering distributions from a trust, it is helpful to have language that allows distributions to be paid directly to the beneficiary, deposited in any banking institution to the credit of the beneficiary, in an account carried in the beneficiary's name either alone or jointly with others, or expended to third persons for the benefit of the beneficiary. It is also helpful to include a provision that allows the trustee to make a distribution to someone who has undertaken the responsibility, legally or voluntarily, for the support and maintenance of the beneficiary, or paid to a person who has been appointed conservator of the beneficiary by a court.
- c. Be realistic. The physical, emotional and psychological effects of mental and substance use disorders are not the fiduciary's job to try and minimize or resolve. Fiduciaries must be realistic about what is outside the scope of their duties and role. Creating parameters and standards for distribution that are impossible to implement will make for an unproductive, conflict-riddled unpleasant administration for everyone.
- d. Do not expect trust distributions, or the withholding of distributions to "fix" the problem(s). Mental and substance use disorders and the behaviors that come with them are impossible to control or fix. When it comes to trusts, instead of drafting language that encourages a trustee to use trust funds as leverage, consider drafting provisions that will allow the trustee to deploy the assets of the trust to connect the beneficiary to resources that encourage a healthy lifestyle, autonomy and engagement with the trustee and others in the beneficiary's circle of influence.

Supplemental Materials (includes sample language)

1. *Addiction & Trusts – It Looks Great on Paper But Does it Work?* Stuart D. Zimring, Esq. for Stetson University, National Conference on Special Needs Planning and Special Needs Trusts (October 2020).
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STETSON LAW

National Conference on Special Needs Planning and Special Needs Trusts

**Pre-Recorded Session
October 2020**

Addiction & Trusts – It Looks Great on Paper, But Does It Work?

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***Addiction & Trusts -
It Looks Great On Paper But Does it Work?***

a presentation for

**2020 Special Needs Trusts - The National
Conference**

by
Stuart D. Zimring

October, 2020

Law Offices Of

STUART D. ZIMRING

Attorneys & Counselors At Law

ADDICTION & TRUSTS - IT LOOKS GREAT ON PAPER, BUT

DOES IT WORK?

Introduction

The clients, Husband and Wife, (Mom & Dad), are sitting in front of you. The three of you are discussing how they want their assets distributed upon the death of the survivor of them. They have three children. When you ask about the children, Dad's facial expression changes and Mom's eyes begin to well up with tears. It seems that two of the three (all adult) children are "fine" but their daughter, Susie, has a "drug problem." Probing a bit further you learn that Susie started smoking marijuana in Junior High School and over the years (she's now in her thirties), has been know to use heroin, meth and LSD. She's been arrested, put in diversion programs, rehab programs *etc.* but has not, in her Father's words (spoken somewhat angrily) been able to "get it together for any period of time." She stands to inherit a significant amount of money (possibly 7 figures) and they don't want her to "shoot it up her arm or snort it up her nose" (Dad, again angrily and loudly states). "What can we do?" they ask.

Unfortunately, this conversation could have just as easily occurred in the author's office 45 years ago or last week. The items being abused or the activities being perceived as "addictive" and in need of attention have changed and expanded in scope over the years, but the pain, anguish, frustration and helplessness expressed by the clients does not change.

Determining What the “Real” Issues Are

In the hypothetical above it seems there are really two concerns (at least) being expressed by the clients: (a) concern for their daughter’s well-being and (b) concern for preserving their estate for her benefit. In a sense, this case is “easy” because the nature of the substance abuse is clearly identified and possible responses are also clearly identifiable. This scenario will be discussed in more detail below.

The attorney should, at the outset, clarify what the client hopes to achieve in including language that conditions distributions to a beneficiary on compliance with restrictions set forth in the trust. Is it behavior modification, *i.e.* assisting and encouraging the beneficiary to achieve or maintain certain goals, or a life style? Or is it more punitive in nature, *i.e.* “punishing” the beneficiary for not conforming to the client’s expectations and desires? In many cases the clients may not have a clear understanding themselves of what they are trying to accomplish. In addition, where the attorney is representing a couple, they may have different perceptions of what the issues really are and what they hope to accomplish. While we as attorneys are not psychologists, if we are going to draft documents that conceivably could be operative for decades and have a serious impact on the lives of the Trustees and beneficiaries, the more insight we can get regarding our client’s motivations, the better we will be able to do our jobs. Therefore, asking open-ended questions - “It sounds like you want to punish Susie. Am I hearing that correctly? Why?” and to the spouse - “How do you feel about that? (the classic therapist’s question!). If we are drafting for a couple, resolving these conflicts is necessary before fingers ever touch a keyboard.

As noted above, some behaviors are easily identified as “addictive” or abusive,” drugs and alcohol being the most common. But even here, all is not black or white.

Smoking tobacco is clearly addictive but is not considered “substance abuse” by the Diagnostic and Statistical Manual of Mental Disorders (DSM-5). A client who is a teetotaler may consider a glass of wine to be inappropriate because “it could lead to alcoholism.”

The DSM-IV defined “substance abuse” as:

“A maladaptive pattern of substance use leading to clinically significant impairment or distress, as manifested by one (or more) of the following, occurring within a 12-month period:

- (1) recurrent substance use resulting in a failure to fulfill major role obligations at work, school, or home..
- (2) recurrent substance use in situations in which it is physically hazardous.
- (3) recurrent substance-related legal problems..
- (4) continued substance use despite having persistent or recurrent social or inter-personal problems caused or exacerbated by the effects of the substance.”

The Drafting Dilemma

In the context of identifying behaviors that concern clients, it is easy to substitute gambling, hoarding and other compulsive behaviors that have the same negative impacts used to define “substance abuse” in the above definition. The concern here is that while it may be relatively easy for the attorney to draft language defining or identifying the behavior to be addressed, clearly setting out the criteria that enable the Trustee to carry out the mandated course of action is not so simple. The drafting attorney needs to devote

as much attention to the guidance and direction given to the Trustee as she does to identifying the behavior being addressed. A beautifully drafted document that is virtually impossible to implement because of its complexity, inherent ambiguity because of the absence of “bright line” non-subjective benchmarks, cost of implementation, or the time commitment placed on a non-professional, family-member Trustee to carry out the directives helps no one.

The first step is to identify the behavior in question. Is it “abuse” in the clinical sense or “use” in a manner of which the clients do not approve? Does any use of a controlled substance for other than its prescribed use constitute abuse? Does finding relaxation in spending hours (and dollars) on Amazon Prime or the Home Shopping Network really constitute “abuse” requiring the types of draconian measures discussed in this article just because the client believes such spending is a waste of money? If the shopping sprees are consuming an inordinate amount of the Beneficiary’s income, the answer may well be “yes.” If it is just irritating to the client/parent but causes no harm to the Beneficiary, should the attorney be counseling the client to “let it be?” While the attorney may have her own opinion on the subject, the proper response is that we are all here to do what our clients ask of us, whether we agree or not.

The language used in our office as a starting point in defining “abuse” and establishing what the Trustee’s immediate response should be reads:

“If the Trustee has probable cause to believe that any beneficiary of any trust established under this Agreement uses or consumes any illegal drug or other illegal substance, or is clinically dependent (as defined in the most current version of the Diagnostic and Statistical Manual of Mental Disorders (DSM)), upon the use or consumption of alcohol or any other legal drug or chemical substance that is not prescribed by a board certified medical

doctor or psychiatrist, in a current program of treatment supervised by such doctor or psychiatrist and if the Trustee reasonably believes that as a result of such use or consumption the beneficiary is incapable of caring for himself or herself or is likely to dissipate his or her financial resources, the Trustee shall request the beneficiary to submit to one or more examinations (including laboratory tests of bodily fluids and/or hair analysis) determined to be appropriate by a board certified medical doctor or psychiatrist specializing in substance use disorders selected by the Trustee. The Trustee shall request the beneficiary to consent to full disclosure by the examining doctor or facility to the Trustee of the results of all such examinations. The Trustee shall maintain strict confidentiality of those results and shall not disclose those results to any person other than the beneficiary without the prior written permission of the beneficiary.”

Note that the concern here is not necessarily the well-being of the Beneficiary but rather the dissipation of the Trust corpus by the Beneficiary. From this perspective a beneficiary who is a compulsive gambler, online shopper or hoarder might also be subjected to similar treatment by a concerned Settlor/Trustor.

Having defined the behavior about which the client is concerned, the next question is what does the client want to do about it? What is the client’s goal here? Is it to create an opportunity for rehabilitation and treatment or is it punitive? In cases where there is a past history of substance abuse there may well be valid concerns about what the beneficiary is going to do with his or her inheritance. In other cases, the client, looking over the current cultural landscape, may be fearful of what a young beneficiary might do in the future and wants to give the Trustee guidance and tools with which to address a potential, future issue. Finally, in some cases the history of abuse may be so frustrating and painful to the client that the client feels “if it happens one more time, that’s it -she get nothing!” and cut off the beneficiary entirely.

Our response as Elder Law and Special Needs Trust attorneys needs to be a combination of compassion and pragmatism. Using our holistic approach, we need to listen not just to what the client is saying but the emotions behind the words. Sometimes we need to counsel the client who, having lived through any number of episodes of abusive behavior/rehabilitation/abusive behavior/rehabilitation/etc. is frustrated to the point of saying “enough! No more chances.!” The client may well be right. On the other hand, if there is no history, but a fear of potential future conduct, it may be appropriate to ask the client what kind of message the client is sending to the beneficiary in terms of the client’s confidence in the beneficiary’s ability to make good choices.

Obviously, the language quoted above is only one approach. In preparing this article the author asked a number of colleagues to share the language they use. Five variations are attached as Appendices A-E. Further, Appendix F is a partial list of counseling and support resources.

Finally, and possibly more important than anything else in terms of creating a workable document, it is incumbent on the attorney to ask the client whether the client is being fair to the Trustee in giving the Trustee this authority/burden/responsibility? Further, it is incumbent on the attorney to insist that the client discuss the trust terms with the Trustee (or authorize the attorney to do it for the client). Is the Trustee willing to spend the time and energy required by the clause quoted above? If the Trust then mandates rehabilitation and treatment, is the Trustee willing/able to undertake obtaining that and monitoring it? If not, the client needs to know this up front or else the trust language, for all its good intentions, is useless. With that thought in mind, should one consider a

“simpler” approach and “simply” advise the client to be very mindful in choosing the Trustee, give the Trustee broad discretionary powers to, in effect, “do the right thing” and leave it at that? In the author’s opinion, where there is a known history of abuse, it is perfectly appropriate for the client to respond to the issue head on and forcefully if that is the client’s goal. In other situations, where there is only a concern about future possibilities or vague suspicions, giving the

Trustee broader discretion may be more appropriate. In either case, following the guidance of the NAELA Aspirational Standard A.1 that:

“In applying a holistic approach to legal problems, the elder law and special needs planning attorney works to consider the larger context, both other legal consequences, as well as the extra-legal context in which the problems exist and most be solved.” the attorney should take the broad view and recognize an obligation to all the players: the client, the beneficiary and the Trustee in creating a document that will effectively carry out the client’s wishes, which is why the client came to you in the first place.

Appendix A

The author thanks Joseph Block, Alan Grass and Gary Edelstone for permitting the use of their language regarding substance abuse.

A. If the Trustee has probable cause to believe that any beneficiary of any trust established under this Agreement:

1. Uses or consumes any illegal drug or other illegal substance, or
2. Is clinically dependent (as defined in the most current version of the Diagnostic and Statistical Manual of Mental Disorders (DSM)), upon the use or consumption of alcohol or any other legal drug or chemical substance that is not prescribed by a board certified medical doctor or psychiatrist, in a current program of treatment supervised by such doctor or psychiatrist and if the Trustee reasonably believes that as a result of such use or consumption the beneficiary is incapable of caring for himself or herself or is likely to dissipate his or her financial resources, the Trustee shall request the beneficiary to submit to one or more examinations (including laboratory tests of bodily fluids and/or hair analysis) determined to be appropriate by a board certified medical doctor or psychiatrist specializing in substance use disorders selected by the Trustee. The Trustee shall request the beneficiary to consent to full disclosure by the examining doctor or facility to the Trustee of the results of all such examinations. The

Trustee shall maintain strict confidentiality of those results and shall not disclose those results to any person other than the beneficiary without the prior written permission of the beneficiary.

B. The Trustee may totally or partially suspend all distributions otherwise required or permitted to be made to that beneficiary until the beneficiary consents to the examination and disclosure to the Trustee. Nevertheless, the Trustee cannot suspend any mandatory distributions to or for the benefit of the beneficiary that are required in order for that trust to qualify for any federal transfer tax exemption, deduction or exclusion allowable with respect to that trust, or that are required to qualify the trust as a qualified Subchapter S trust.

C. If in the opinion of the examining doctor or psychiatrist the examination indicates current or recent use of a drug or substance as described above, the beneficiary shall consult with the examining doctor or psychiatrist to determine an appropriate method of treatment for the beneficiary (for example, counseling or treatment on an in-patient basis in a rehabilitation facility). If the beneficiary consents to the treatment, the Trustee shall pay the costs of treatment directly to the provider of those services from the income or principal otherwise authorized or required to be distributed to that beneficiary.

D. Except as provided above for mandatory distributions that must be made for federal tax purposes, all mandatory distributions to the beneficiary during his or her lifetime of income or principal (including distributions upon termination of the trust) will be suspended until, in the case of use or consumption of an illegal drug or illegal substance,

examinations indicate no such use, and in all cases until the Trustee in the Trustee*s sole judgment determines that the beneficiary is fully capable of caring for himself or herself and is no longer likely to dissipate his or her financial resources. While mandatory distributions are suspended, the trust will be administered as a discretionary trust to provide for the beneficiary*s health, support and maintenance.

E. When mandatory distributions to the beneficiary are resumed, the remaining balance, if any, of the mandatory distributions that were suspended shall be distributed to the beneficiary at that time. If the beneficiary dies before the mandatory distributions are resumed, the remaining balance of the mandatory distributions that were suspended shall be distributed to the persons who would be the alternate beneficiaries of that beneficiary*s share as provided in other provisions of this Agreement.

F. It is not Settlor*s intention to make the Trustee (or any doctor or psychiatrist retained by the Trustee) responsible or liable to anyone for a beneficiary*s actions or welfare. Trustee shall have no duty to inquire whether a beneficiary uses drugs or other substances as described in this Paragraph _____. The Trustee (and any doctor or psychiatrist retained by Trustee) shall be indemnified from the Trust Estate and held harmless from any liability of any nature in exercising its judgment and authority under this Paragraph _____, including any failure to request a beneficiary to submit to medical examination, and including a decision to distribute suspended amounts to a beneficiary.

Appendix B

Notwithstanding anything to the contrary, any statement in Paragraphs 8.5 or 8.6 to the effect that the Trustees “shall” distribute all or a portion of the trust estate (principal and/or income) of any such Separate Trust which is not based upon an ascertainable standard (the health, education, support and/or maintenance needs of the beneficiary of such Separate Trust) shall be applicable only in the event that there has been no determination by the Trustees, in the Trustees’ discretion, that such beneficiary does not meet the Conditions of Eligibility. If the Trustees determine that such beneficiary does not meet one or more of the Conditions of Eligibility, the Trustees may, in the

Trustees’ discretion, withhold all or any part of the trust estate that would otherwise be distributable to or for the benefit of such beneficiary hereunder not based upon an ascertainable standard. If all or a portion of the principal of any trust is withheld from distribution hereunder because of the provisions of this Paragraph 8.8, the Trustees may, but need not, pay to such beneficiary all of the income on the withheld principal thereof.

If the Trustees at any time after having withheld any trust estate distribution pursuant to this

Paragraph 8.8 determine that the Conditions of Eligibility have subsequently been met, the Trustees shall thereupon distribute to or for the benefit of such beneficiary that portion of the trust estate theretofore withheld pursuant to this Paragraph 8.8.

12.14 Provisions Pertaining to Conditions of Eligibility. The following provisions shall be applicable to the determinations to be made by the Trustees with regard to whether or not the Conditions of Eligibility have been met with respect to any individual:

12.14.1 The Trustees may, in the Trustees' discretion, take into account any information which the Trustees consider relevant to the question of whether or not such individual is suffering from drug and/or alcohol abuse, from gambling addiction or from any mental or emotional deficiency, defect, illness or impairment.

12.14.2 The Trustees may, in the Trustees' discretion, require such individual to take random, regular and/or periodic drug and/or alcohol tests as a prerequisite to the Trustees' determination that such individual does not fail to meet the Conditions of Eligibility; provided, however, that no such individual shall be required to undergo any such examination more frequently than two (2) times within a period of six (6) months, or three (3) times within a period of twelve (12) months. If such individual either:

(a) refuses to undergo such a physician's examination within thirty (30) days after a proper demand has been made of him or her, or

(b) fails to disclose all results and information from such examination that relevantly pertain to whether or not such individual is suffering from drug abuse, alcohol abuse or other substance abuse Trustee's within twenty (20) days after such examination results and information have been made available to such individual, such individual shall be conclusively regarded as having failed to meet the Conditions of Eligibility. Nothing herein shall require the disclosure of any Protected Health Information ("PHI"), as that term is used in the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), by such individual or any other party; however, such individual's failure or refusal to disclose any PHI to the Trustees as required by this

Subparagraph 12.14.2 shall constitute his or her acknowledgment that he or she has failed to meet the Conditions of Eligibility.

12.14.3 Such individual may voluntarily take such drug and/or alcohol tests on his or her own initiative. In the event that drug and/or alcohol tests, whether initiated by the Trustees or by such individual, indicate that such individual is free from illegal drug and alcohol abuse or addiction for a consecutive period of at least eighteen (18) months, such individual shall be conclusively regarded as not suffering from such abuse or addiction.

12.14.4 For purposes of this Trust Agreement, moderate and non-addictive use of drugs or alcohol shall not constitute abuse (regardless of whether or not such use is legal). The cost of any tests required pursuant to this Paragraph 12.14 with respect to any beneficiary shall be borne by the Separate Trust of which such individual is the primary beneficiary.

17.1.5 The term "Conditions of Eligibility", as used in this Trust Agreement with respect to any individual, shall be the requirement that such individual is not suffering from drug abuse, from alcohol abuse, from gambling addiction, from any substantial mental or emotional deficiency, defect, illness or impairment, or from any similar mental or emotional condition, addiction or dependency that significantly impairs his or her ability to function fully and properly.

Appendix C

Except as otherwise provided in this Section, the Trustee, in the Trustee's sole discretion, shall distribute to John Doe ("John"), or pay for his benefit, such amounts of the income and/or principal of John's separate trust estate, up to the whole thereof, as the Trustee deems to be necessary or advisable for John's health, maintenance, support and

education. The Trustee may pay from John's separate trust estate the costs and expenses in connection with the condominium commonly described as

_____ (hereinafter referred to as the "Condominium"), for so long as John may reside there. If John elects to move to a different residence, the Trustee shall have the right, power and authority, but not the obligation, to sell or rent the Condominium, and to purchase or pay rent on a different residence for John. The Trustee shall have sole and absolute discretion in making any decisions about supporting a new residence for John and the Trustee shall have no liability whatsoever to any Beneficiary or other party with respect to any decision made or action taken in exercising the Trustee's discretion with respect to any matter pertaining to John's separate Trust. By way of guidelines, and not restrictions, income and/or principal can be used for rehab or any other drug or alcohol related program. However, no "posh" or "country club" rehab or other program should be paid for by the Trustee. The Trustee should consider hiring the services of an individual or program to administer or compel drug tests and meet periodically with John in an effort to determine his sobriety and state of mind. Income and/or principal of the separate trust estate for John shall not be used to post bail or pay for tickets or other violations of the law.

The Trustee may make any distribution to John if the Trustee determines, in his, her or its absolute discretion, that John has the maturity, judgment and ability to wisely handle such distribution and such distribution is in John's best interests. The Trustee shall incur no liability to any person, whether a Beneficiary or otherwise, by reason of the determination to accelerate, postpone or otherwise distribute principal under this Paragraph, nor shall the Trustee be obligated to provide any Beneficiary with notice or

accountings of the Trustee's exercise of his, her or its discretion to distribute income or principal hereunder.

In the event the Trustee has reason to believe that John is using drugs or alcohol, the Trustee shall make no distributions of income or principal to John (but the Trustee may pay for his health, maintenance and support) until John has provided to the Trustee a

"clean" drug and alcohol test which the Trustee believes to be legitimate. In the event the Trustee ever feels threatened by John in any way, or if John ever challenges any of the terms or provisions of this Trust, the Trustee shall cease and refrain from making any further income or principal distributions to John or for John's benefit (other than paying the costs of the Condominium or John's other residence) until such time as the Trustee feels comfortable that such threat no longer exists.

Appendix D

The Trustees may postpone any or all of the principal distributions to any beneficiary if, at the time distribution would otherwise be required, the Trustees determine, in their absolute discretion, that the beneficiary to whom the distribution would otherwise be made does not have the legal competence or the maturity, judgment and ability to wisely handle such distribution, or such distribution would not otherwise be in the best interests of such beneficiary. The Trustees may accelerate any such principal distribution, if, at such earlier date, the Trustees determine, in their absolute discretion, that the beneficiary has the maturity, judgment and ability to wisely handle such distribution and such earlier distribution is in the best interests of the beneficiary. The

Trustees shall take into account the income, estate, gift, generation-skipping transfer, excise and other tax consequences from postponing, accelerating or otherwise distributing principal to a beneficiary. The Trustees shall incur no liability to any person, whether a beneficiary or otherwise, by reason of the determination to accelerate, postpone or otherwise distribute principal under this paragraph unless made in bad faith, nor shall the Trustees be obligated to provide any beneficiary with notice or accountings of the Trustees' exercise of their discretion to accelerate, postpone or otherwise distribute principal hereunder.

Appendix E

1.1 Powers of Trustee In the Event of Current Beneficiary Misconduct.

(a) Suspension of Discretionary Distributions, Withdrawal Rights and Mandatory Distributions. Notwithstanding anything to the contrary contained in this Trust Agreement, no Current Beneficiary shall have a right to withdraw or receive an otherwise discretionary or mandatory distribution of all or any portion of the principal of a Trust, and/or the net income of the Trust, if on the date a withdrawal is requested or a distribution is provided under the terms of any Trust (collectively, the "Distribution Date"), an event of Beneficiary

Misconduct (as hereafter defined) exists. For purposes of this Trust, "Beneficiary Misconduct" means any one or more of the following:

- (1) The Current Beneficiary is incarcerated.
- (2) The Current Beneficiary has been convicted of any crime, other than misdemeanors or minor traffic violations, within five (5) years of the Distribution Date.

(3) The Current Beneficiary is on probation in connection with any criminal conviction, other than for misdemeanors or minor traffic violations.

(4) The Current Beneficiary previously has been on probation and any such period of probation has expired less than two (2) years prior to the Distribution Date, other than for misdemeanors or minor traffic violations.

(5) The Trustee determines in its sole discretion that within three (3) years of the Distribution Date, the Current Beneficiary has used or engaged in the purchase and/or sale of any illegal drugs or other illegal substances or has abused the use of alcohol, marijuana (whether legal or illegal) or prescription drugs.

(6) The Trustee determines in its sole discretion that within five (5) years of the Distribution Date, the Current Beneficiary has displayed a habitual and continual pattern of financial irresponsibility, which may include, but shall not be limited to, declaring bankruptcy, incurring significant debts in excess of assets and/or incurring significant monthly expenses in excess of monthly income.

Any right to withdraw principal exercisable by a Current Beneficiary and any right to receive a distribution of net income and/or principal otherwise provided under the terms of the Trust shall be delayed until the Beneficiary Misconduct no longer applies and any period of time defining such Beneficiary Misconduct (as described above) has expired. Whether an event or condition of Beneficiary Misconduct exists shall be determined in the sole and absolute discretion of the Trustee, and shall be final and binding upon all parties interested in such Trust. During such time that any distribution of net income and/or principal is delayed pursuant to the terms of this Paragraph, the Trustee shall hold in trust for the benefit of the Current Beneficiary the amounts otherwise distributable to the

Current Beneficiary but for the Beneficiary Misconduct. The Trustee shall, in its sole and absolute discretion, until the Beneficiary Misconduct no longer applies, make distributions of income and, if necessary, principal, to the Current Beneficiary for the Current Beneficiary's, support, maintenance, health and education. Any income not distributed shall be accumulated and added to principal. For the avoidance of doubt, during such time that amounts are held in trust for a Current Beneficiary pursuant to this Paragraph (i.e., during such time that the Beneficiary Misconduct applies), the provisions of this Trust Agreement shall apply to the administration of that Current Beneficiary's Trust.

(b) Optional Reduction or Suspension of Discretionary Distributions. Any discretionary distributions for a Current Beneficiary's support, maintenance, health and education shall be made by the Trustee after considering the Grantors' desire that a Current Beneficiary lead a life free of crime and substance abuse and the Grantors' intent that the assets of the Trust may not be used to encourage or support a Current Beneficiary in a lifestyle including criminal activities, illegal drugs or abuse of alcohol, marijuana (whether legal or illegal) or prescription drugs. Notwithstanding any other provision in this Trust Agreement, the Trustee shall withhold any and all distributions for support and maintenance which in the Trustee's sole and absolute discretion may (1) encourage a lifestyle involving criminal activities or (2) contribute to a chemical dependence or substance abuse, or otherwise free funds for such use by the Current Beneficiary; provided, however, that such distributions for support may be provided for a hospital or other program of recovery or a stay in a recovery house, plus all costs incident thereto. Nothing in this Trust Agreement shall prevent the Trustee from making discretionary

distributions for the support, maintenance, health and education of a Current Beneficiary and/or a Current Beneficiary's issue as otherwise provided in this Trust Agreement to the extent that the Trustee, in its sole and absolute discretion, determines that the Current Beneficiary will use such funds for the purposes for which they are distributed.

(c) Trustee's Right, But Not the Duty, To Investigate Beneficiary Misconduct. The Trustee shall not have any duty to investigate any Beneficiary Misconduct and shall not be liable to anyone for any Beneficiary Misconduct. If the Trustee suspects or becomes aware that the Current Beneficiary is involved with drug and/or alcohol abuse, the Trustee is authorized, but not required, to employ private investigators and to take such other actions as the Trustee determines appropriate, at the expense of the Trust, to determine whether any Beneficiary Misconduct exists or whether any distribution would be contrary to the Grantors' desires described herein. The Trustee shall not incur any liability to persons whose interest may have been affected by disbursements made or not made in good faith by the Trustee without knowledge of any event affecting distribution to a Current Beneficiary described in this Paragraph 12.5(c).

(d) Death of a Current Beneficiary During Period of Beneficiary Misconduct. If termination of the Trust is postponed pursuant to this Paragraph and the Current Beneficiary dies during such postponement, the deceased Current Beneficiary's Trust shall be held, administered and distributed in accordance with this Trust Agreement.

(e) "Interested Trustee." In the event that one of two or more individual Co-Trustees then serving is an Interested Trustee (as that term is defined in this Paragraph 12.5(e)), then the remaining Co-Trustees who are not Interested Trustees shall exercise

the discretionary authorities under this Paragraph. In the event that the sole Trustee, or all of the Co-Trustees then serving, are Interested Trustees, then the next Trustee who is not an Interested Trustee and who is not related or subordinate to such individual serving as Trustee.

Appendix F

This list of Resources was compiled by Joseph Block and used with permission.

AA.org - Not just for Alcoholics - any addiction

NA.org (Narcotics Anonymous)

CA.org (Cocaine Anonymous)

GamblersAnonymous.org

OA.org - (Over-Eaters Anonymous)

SAA - Recovery.org - Sex Addicts Anonymous

DrugAbuse.gov (NIDA - National Institute on drug Abuse Under National Institute on Health)

SAMHSA.gov (Substance Abuse and Mental Health Services Administration - within US Dept. Of Health and Human Services)

NCBI.NLM.NIH.GOV (article on Evidence Based Practices)

Health and Safety Code §11831.6 (Law prohibiting rehabs, etc., to pay referral fees)

HazeldenBettyFord.org

AddictionRecoverybulletin.com

Cadenceonline.com (Parent CRAFT)

Choopersguide.com



Mental Health + Addiction: Suggested Estate Planning Provisions and Fiduciary Considerations

Elizabeth Noble Rollings Friman
Fleming & Curti, PLC
Tucson, Arizona
www.Elder-Law.com

State Bar of Arizona:
CLE by the Sea 2023

1

Why is this topic relevant to my practice?

- Any attorney who has a practice that involves probate, trust administration, guardianship, conservatorship or estate planning needs to be familiar with the common challenges and pitfalls that families and fiduciaries face when planning for and working with beneficiaries with mental and substance use disorders.
- Drafting attorney may not be the attorney who administers the estate. Consider what things will look like when the rubber meets the road.
- While it is important to consider various contingencies, using plain language in wills and trusts and relying on the discretion of the fiduciary appointed to manage the estate/trust is often a successful strategy.

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2

Wills, POAs and Trusts

- When estate planning attorneys and fiduciaries consider the operative document to rely upon when distributing funds to or for the benefit of the person with substance use (or a mental) disorder people think of trusts. Using a trust to hold funds is considered a best practice.
- A Will can include a testamentary trust or provide the PR the ability to establish a trust to hold funds for the benefit of a beneficiary.
- Someone may establish a healthcare power of attorney (with or without mental health provisions) and a durable financial power of attorney that later needs to be used if the Principal struggles with substance use or lives with ongoing challenges that are the result of a mental disorder.

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3

The Starting Point

- Listen carefully and identify the client's goals before you begin drafting.
- Determine what the "real" issues are....concern for the beneficiary's well-being...and/or.....concern for preserving the estate for her benefit?
- If the plan includes a trust, clarify what the client hopes to achieve in including language that conditions distributions to a beneficiary on compliance with restrictions set forth in the trust.
- Not all behaviors are easy to identify or define. For instance, smoking tobacco is addictive, but is it substance abuse? Or, if someone obsessively collect tchotchkes, when does that behavior become hoarding and considered a mental disorder?

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4

Use of definitions and common phrases

- Drafting attorneys should be careful when incorporating specific references to medical phrases like “substance abuse” or “mental disorder” in their wills and trusts because terms and definitions change.
- The Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5), no longer uses the terms substance abuse and substance dependence, rather it refers to substance use disorders.
- In cases where there is an experienced licensed fiduciary serving as trustee, complex language and conditions may be unnecessary if the trust terms provide the trustee broad discretion to make decisions.

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5

Trust Planning: Conditional Distributions

- It may make the client feel good to include conditional language and rigid standards around distributions, but will they work in the fashion intended?
- Creating complicated trust provisions that make distributions conditional in certain situations will create administrative burdens, which in turn will often increase the costs of administration.
- In cases where there is an experienced licensed fiduciary serving as trustee, complex language and conditions may be unnecessary if the trust terms provide the trustee broad discretion to make decisions.

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Trust Provisions

- See Supplemental Materials
- Dependence – Does the trustee believe the beneficiary is dependent upon the use or consumption of a drug or substance? What does that *actually* mean?
- Testing – Who determines what qualifies as “testing” and how about HIPAA? How do you decide if the results are reliable?
- Treatment – If treatment is recommended then why require it if the beneficiary is only engaging for the purpose of getting a distribution, and not because the beneficiary herself wants to live a healthier lifestyle?

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Trust Provisions

- Suspension of distributions – “May” vs. “Must” and how long?
- Other prohibitions when distributions are suspended – Disqualify beneficiary from serving as trustee or trust protector. What about the ability to remove and replace the trustee?
- Exoneration provision – Some Trustees will require this. Does waiving a Trustee’s duties actually improve the quality of the trust administration?
- Tax savings provision – Be careful that if distributions stop, the trust will not lose special tax treatment.
- Public benefits - If beneficiary might otherwise be entitled to receive distributions and distribution could render the beneficiary ineligible for government benefits based on disability or financial need.

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Planning Without a Trust

- What happens if decedent dies intestate?
- What if there is a will but no testamentary trust provisions?
- In some cases, the Court's oversight (even if it's only temporary) can create support for the fiduciary administering the estate and provide opportunities for the fiduciary to develop a plan in collaboration with the beneficiary.
- Collaboration is not always possible. Worst case scenario when fiduciary tries and fails to establish a trust or conservatorship to manage the funds for the benefit of the beneficiary and funds from the estate end up being used to pay the beneficiary's attorney's fees and expenses incurred in bringing and prosecuting an action against the personal representative.

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Fiduciary Considerations

- Special Needs Planning should always be considered because it can increase the likelihood a beneficiary will be eligible for government benefits now or in the future.
- National Academy of Elder Law Attorneys Aspirational Standards
- In applying a holistic approach to legal problems this set of standards encourages attorneys to consider the larger context, both other legal consequences as well as the extra-legal context in which the problems exist and must be solved. Attorneys who follow these standards should take the broad view and recognize an obligation to all the players: the client, the beneficiary and the fiduciary in creating a document that will effectively carry out the client's wishes

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Fiduciary Considerations

- Not everyone will agree to work on cases where the beneficiary may be a danger to herself/himself or others.
- In a case where the trust terms are so ambiguous, or requirements are so stringent that the exposure and liability of the trustee is difficult to reduce, it can be hard to find a trustee.
- Social workers/case managers can help reduce conflict between the fiduciary and beneficiary and improve working relationships.
- Keep an eye on fees and costs. The more complex the criteria and distribution standards, the less efficient it will be to run the administration and the more likely the Court will be involved.

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Lessons Learned

- Working with beneficiaries who live with substance use and mental disorders is complicated enough...try to draft using plain language in a fashion that provides broad discretion to the fiduciary.
- Look for ways to deploy funds to help improve the beneficiary's quality of life. Remember, quality of life is subjective and people who live with substance use and mental disorders can lead long and meaningful lives.
- Draft with flexibility in mind. Trust protectors can be helpful.
- Be realistic. Do not expect that trust distributions (or the withholding of distributions) can "fix" the problem(s).

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12

Supplemental Materials

- *Addiction & Trusts – It Looks Great on Paper But Does it Work?* Stuart D. Zimring, Esq. for Stetson University, National Conference on Special Needs Planning and Special Needs Trusts (October 2020).
- *Considerations at the Intersection of Substance Use Disorder & Special Needs.* Dr. Monica Sosnowitz, LPC, LCADC for Stetson University, National Conference on Special Needs Planning and Special Needs Trusts (October 2022).
- *Model Language for Addressing Substance Use Disorders (Addiction) in Trusts Documents: Best Practices for Treating Substance and Other Behavioral Disorders.* William F. Messinger, JD, LADC (Aureus, Inc.) and Arden O'Connor, MBA (O'Connor Professional Group), Second Edition (2017).

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