

MENTAL CAPACITY AND UNDUE INFLUENCE: THE LAW, THE FACTS AND PRACTICAL APPLICATIONS

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I. The Law and The Facts

A. Mental Capacity

1. Statutory Requirement

a. **Wills.** Utah law provides that “[a]n individual 18 or more years of age who is of sound mind may make a will.” Utah Code Ann. § 75-2-501 (emphasis added).

b. **Trusts.** This “sound mind” requirement also applies to one who creates a trust. See *id.* § 75-7-402(1)(a) (stating that “[a] trust is created only if . . . the settlor has capacity to create a trust, which standard of capacity shall be the same as for a person to create a will”). Utah courts generally applied the “sound mind” requirement to the execution of trusts even before the Utah legislature’s 2004 enactment of the Utah Uniform Trust Code. See, e.g., *Estate of Kesler v. First Interstate Bank*, 702 P.2d 86 (Utah 1985) (applying the sound mind requirement of § 75-2-501 in the context of a challenge to the validity of a will and a trust).

2. Presumption and Burden of Proof

a. **Presumption.** The general rule is that “[a] testator is presumed competent to make a will.” *Id.* at 88 (emphasis added); see also *Estate of Holten v. Tracy-Collins Bank & Trust Co.*, 404 P.2d 27, 31 (Utah 1965) (stating that “it is presumed that the testatrix was competent and was acting of her own free will and not under duress or undue influence”) (emphasis added).

b. **Burden of Proof.** It is also well settled that “the burden of proof of testamentary incapacity is on the contestant of a will.” *Estate of Kesler*, 702 P.2d at 88 (emphasis added); see also Utah Code Ann. § 75-3-407 (stating that “[p]roponents of a will have the burden of establishing prima facie proof of due execution in all cases,” but that “[c]ontestants of a will have the burden of establishing lack of testamentary intent or capacity, undue influence, fraud, duress, mistake, or revocation”) (emphasis added). To carry this burden of proof, the contestant must “show by a preponderance of the evidence” that the testator was incompetent. *Estate of Kesler*, 702 P.2d at 88 (emphasis added).

3. Case Law Competency Requirements¹

a. **Three-Part Test.** Utah courts have established a three-part test to determine competency to make a will. To be competent, “one must be able to (1) identify the natural objects of one’s bounty and recognize one’s relationship to them, (2) recall the nature

¹ The case law set forth in this outline generally discusses the competency requirements for making a will, but should apply with equal force to the creation of a trust.

and extent of one's property, and (3) dispose of one's property understandingly, according to a plan formed in one's mind." *Id.* (emphasis added); see also *Estate of Swan v. Walker Bank & Trust Co.*, 293 P.2d 682, 684 (Utah 1956). The will is invalid if "any of these three elements is lacking." *Estate of Kesler*, 702 P.2d at 88 (emphasis added).

b. **Level of Competency Required.** The three-part competency test "does not require that a person be particularly alert, nor need he have any special acumen in order to execute a will." *Estate of Loupe v. Carter*, 878 P.2d 1168, 1173 (Utah Ct. App. 1994) (emphasis added).

c. **At the Time the Will Was Made.** The "test is whether the testator had testamentary capacity at the time the alleged will was made, and the inquiry should be limited to a period of time not too remote from that event." *Estate of Kesler*, 702 P.2d at 93 (emphasis added) (quoting *In re Hansen's Will*, 167 P. 256, 261 (Utah 1917)).

d. **Examples.**

(1) *Estate of Loupe*: In this case, the Utah Court of Appeals upheld a trial court's decision that a decedent had testamentary capacity, notwithstanding that the Veterans Administration had given the decedent an incompetency rating and that the Ute Indian Tribal Court had appointed a conservator and guardian for the decedent. *Estate of Loupe*, 878 P.2d at 1174.

(2) *In re Chongas' Estate*: In this case, the Utah Supreme Court noted that "[c]apacity to transact business generally and to carry on difficult negotiations are not essential to testamentary capacity," and held that a decedent had testamentary capacity, even though he had been committed to the Utah State Mental Hospital in Provo on two separate occasions (once before signing the will and once right after signing the will) and "was somewhat eccentric and erratic . . . and ultra-thrifty to the point of being stingy," where the testimony demonstrated that the decedent had a good reason for changing his will and understood what he was doing. *In re Chongas' Estate*, 202 P.2d 711, 713-714 (Utah 1949).

(3) *In re Guardianship of Cornia*: In this case, the Utah Supreme Court upheld the appointment of a guardian for an individual who "had become incompetent in recent months," but refused to find that the decedent lacked testamentary capacity at the time she executed her will, which occurred two years prior to the appointment of the guardian, pointing out that "the test as to capacity to execute a will . . . is quite different from the requirements . . . relating to the appointment of a guardian."² *In re Guardianship of Cornia*, 546 P.2d 890, 893 (Utah 1976).

² A guardian may be appointed for an individual upon the court's finding that the person is "incapacitated" and that "the appointment is necessary or desirable as a means of providing continuing care and supervision of the incapacitated person." Utah Code Ann. § 75-5-304(1). The Utah Uniform Probate Code defines "incapacity" as "any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or other cause, except minority, to the extent of lacking sufficient understanding or capacity to make or communicate responsible decisions." *Id.* § 75-1-201(22).

(4) In re Buttars' Estate: In this case, the Utah Supreme Court upheld a trial court's decision that the decedent had testamentary capacity, even though the decedent "was eccentric in her actions and forgetful at times of some things," where at the decedent's request the decedent's son drove the decedent to an attorney's office, the decedent met with the attorney and described her wishes, the attorney prepared a will on the spot that was signed by the decedent in the presence of the attorney and another witness, and a doctor testified that the decedent was competent at the time of signing her will. In re Buttars' Estate, 261 P.2d 171, 174 (Utah 1953).

(5) Estate of Richards: In this case, the Utah Supreme Court noted that the subscribing witnesses' testimony about the decedent's competence could be "discounted" because witnesses "have an interest by way of vindicating the propriety of their conduct," and found that there was sufficient evidence to sustain the trial court's ruling that the decedent lacked testamentary capacity to sign a codicil, where the decedent signed the codicil five days before her death, "was fluctuating between diabetic coma and insulin shock, was often semi-comatose and was stuporous while the subscribing witnesses were there for the purpose of executing the codicil." Estate of Richards, 297 P.2d 542, 547-548 (Utah 1956).

(6) Estate of Astill: In this case, the Utah Supreme Court noted that "one may be something considerably less than bright of mind and yet be sufficiently competent to make a valid will," but held that a decedent did not have testamentary capacity where a neighbor testified the decedent "had been acutely disturbed for many weeks" around the time of signing the will and where a doctor's diagnosis – made 34 days after the decedent signed his will – stated that the decedent was a "confused elderly gentleman whose speech was incoherent, [who] had poor muscular coordination, was not able to care for himself [and] exhibited an organic confusional state in which he was not aware of the time, place and had difficulty remembering things." Estate of Astill, 381 P.2d 95, 97 (Utah 1963).

(7) Estate of Holten: In this case, the Utah Supreme Court held that a testator possessed testamentary capacity even though she had an eccentric personality and was "69 years of age, physically weak, pessimistic, distrustful, somewhat forgetful and because of her paranoid tendencies often felt that her rights were being invaded by others." Estate of Holten, 404 P.2d at 29.

(8) In re Hansen's Will: In this case, the Utah Supreme Court held that it was improper to admit the testimony of two lay witnesses regarding the testator's sanity, where one witness never had a conversation with the testator and based his opinion on what he heard his mother say about the testator five years before the trial, and where the other witness based his opinion on a single incident involving the testator that occurred ten to twelve years before the testator's death and did not support the inference drawn by the witness. See In re Hansen's Will, 167 P. at 261.

(9) In re Hanson's Estate: In this case, the Utah Supreme Court upheld a trial court's decision to admit testimony of witnesses who had only limited contact with the testator at the time the will was made because the testimony was "commensurate with the witnesses' observations." In re Hanson's Estate, 52 P.2d 1103, 1113 (Utah 1935).

B. Undue Influence

1. **Requirements.** In analyzing claims of undue influence, the Utah courts have said that:

there must be an exhibition of more than influence or suggestion, there must be substantial proof of an overpowering of the testator's volition at the time the will was made, to the extent he is impelled to do that which he would not have done had he been free from such controlling influence, so that the will represents the desire of the person exercising the influence rather than that of the testator.

Estate of Ioupe, 878 P.2d at 1174 (emphasis added) (quoting In re Lavelle's Estate, 248 P.2d 372, 375-76 (Utah 1952)).

2. Presumption in Cases of Confidential Relationships

a. **Presumption.** The Utah courts have said that “[u]ndue influence is presumed where a confidential relationship exists between the testator and the beneficiary of the will.” Id. (emphasis added).

b. **Definition of Confidential Relationship.** Such “[a] confidential relationship arises when one party, after having gained the trust and confidence of another, exercises extraordinary influence over the other party.” Id.

(1) **Attorney-Client Relationship.** The attorney-client relationship is presumed to be confidential. Id.; see also Estate of Swan, 293 P.2d at 686 (upholding trial court's decision that testator was under “undue influence,” where testator signed a will prepared by her attorney that made substantial gifts to the attorney and another confidential advisor).

(2) **All Other Relationships.** The Utah Supreme Court has said that “[in] all other relationships the existence of a confidential relationship is a question of fact.” Estate of Ioupe, 878 P.2d at 1174 (emphasis added).

(3) **Family Relationships.** “While kinship may be a factor in determining the existence of a legally significant confidential relationship, there must be a showing, in addition to the kinship, of a reposal of confidence by one party and the resulting superiority and influence on the other party Mere confidence in one person by another is not sufficient alone to constitute such a relationship.” Id. (emphasis added); see also id. (upholding trial court's decision that decedent's sister did not exert any “undue influence” over decedent, where contestants alleged that a confidential relationship existed between decedent and his sister solely by virtue of their kinship).

II. Practical Applications

A. Addressing the Questions of Mental Capacity and Undue Influence

1. **Diminished Capacity.** With most clients, the term “diminished capacity” is more descriptive and fitting than “incapacity.”

2. **Cannot Diagnose, but Must Assess Mental Capacity.** Lawyers are not trained to diagnose mental disability, but they usually know a diminished capacity issue when they see it. Cf. See Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Potter, J., concurring) (stating, with respect to “hard-core pornography,” that “I know it when I see it”). Lawyers cannot ignore signs of diminished capacity or incapacity when dealing with clients, and must assess whether a client has mental capacity.³

- (a) **Observe and interpret** signs of diminished capacity
 - (i) Focus on decisional abilities, not cooperativeness or affability
 - (ii) Pay attention to changes over time; history is important
 - (iii) Beware of age stereotypes
 - (iv) Consider whether mitigating factors could explain the behavior

(b) **Evaluate understanding** in relation to the specific legal elements of capacity for the transaction at hand

- (i) Note the legal elements of capacity for the task at hand
- (ii) Compare the client’s understanding, appreciation and functioning with the relevant legal elements
- (iii) The client’s decisional process will be implicit and intuitive, as well as explicit and conscious. The attorney’s role is to present information, answer and ask questions, gently probe and query and weigh client responses and thought processes.

(c) Consider the **degree of risk to the client** and the **ethical factors** set out in Comment 6 to Utah Rule of Professional Conduct 1.14⁴

- (i) Ability to articulate reasoning behind the decision.
- (ii) Variability of state of mind.
- (iii) Appreciation of consequences.
- (iv) Substantive fairness of decisions.
- (v) Consistency with lifetime values.
 - The lawyer may only know the client’s lifetime values if the attorney-client relationship is one of long standing.
 - Individuals can change their values framework as they age.

³ The following suggestions and comments are taken directly from Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers, Robert J. Rosepink, Symposium II at ACTEC 2006 Annual March 10, 2006 Meeting.

⁴ Utah Rule of Professional Conduct 1.14, entitled “Client with Diminished Capacity,” along with Comment 6 and other helpful commentary, is set forth in its entirety as Exhibit A.

(d) Complete the legal analysis

(i) Professional judgment: The conclusion is ultimately a professional judgment that is aided by the systematic consideration of signs of incapacity, the client's understanding of the legal transaction and the factors enunciated in Utah Rule of Professional Conduct 1.14.

– Some quick “mental tests” have been developed to assist in the assessment of a person's mental capacity. The most popular “mini-mental state examination” or “MMSE” is the “Folstein Test.” This is a brief 30-point questionnaire test (administered in about 10 minutes) that is used by clinicians to screen for cognitive impairment, and is often given to suspected dementia patients. This test is copyrighted and owned by Psychological Assessment Resources. It is not recommended that attorneys administer this test.

– Sharon Gardner, a participant on a panel discussion at a February 25, 2005 ACTEC committee meeting, suggested the following sample test:

– Draw a clock with hands at 8:20 a.m. and 8:20 p.m.

– Name 18 animals in one minute

– Name 3 people at the beginning of a conversation and ask the client to name them again at the end of that conversation

(ii) Capacity conclusions:

– Intact: No or very minimal evidence of diminished capacity.

– Mild problems: Some evidence of diminished capacity, but insufficient in attorney's judgment to preclude representation in proposed transaction.

– More than mild problems: Substantial evidence of diminished capacity sufficient to warrant attorney consultation with mental health professional, or referral of client for a formal professional assessment of capacity.

– Severe problems: Client lacks the capacity to proceed with the transaction and the representation.

(iii) Uncertainty: If the attorney feels uncertain as to whether the observed problems represent “mild” versus “more than mild” issues, this would be an indication to consult with a clinician.

3. **Must Also Assess Possibility of Undue Influence.** In preparing a client's estate plan, lawyers should also assess whether the client's expressed desires are the result of undue influence. Bennett Blum, M.D., a physician specializing in geriatric psychiatry, has developed the “IDEAL” protocol to assist in the assessment of undue influence. The factors in the “IDEAL” protocol are:

Isolation - from information, friends, relatives or usual advisors
Dependency - on the perpetrator for physical and/or emotional support and information
Emotional manipulation - in the form of promises or threats or a combination of both
Acquiescence - the victim's apparent consent or submission
Loss - financial loss⁵

4. **Forging Ahead.** If an attorney decides to proceed with the representation of a client with diminished capacity, he must be aware that litigation may ensue and should take steps to ensure the estate plan can survive a legal attack.

B. Practical Steps to Avoid Litigation Involving Competency and Undue Influence⁶

1. Document and Preserve the Attorney-Client Relationship

(a) **Identify the Client.** Husband and wife, jointly. Husband or wife, separately. Parent or children.

(b) **Document the Relationship.** Prepare a written engagement letter that identifies the client and sets forth the scope of representation.

(c) **Protect the Relationship.** Meet alone with the client and take directions only from the client. Deal only with the client in all matters, including scheduling appointments and correspondence.

(d) **Accept Payment Only From the Client.**

2. Ask Hard Questions and Obtain the Answers

(a) What is the state of your physical and mental health?

(b) Do you have any children who might try to claim you are not mentally competent?

(c) Do any of your children have hard feelings against you or any of your other children?

(d) Do any of your children believe that you have "financially favored" any of your other children during your lifetime?

(e) Whether you leave your assets in equal or unequal shares, are any of your children likely to feel that is "unfair"? If so, why?

3. Review All Relevant Documents

(a) Current estate planning documents

(b) Decrees of divorce or documents relating to property settlements

(c) Premarital and postmarital agreements

(d) Deeds for real property

⁵ Bennett Blum, M.D., The "IDEAL" Protocol for Undue Influence - An Introduction, NCPJ Life & Times, Volume 2, Number 7, Spring, 2003, at 16.

⁶ The suggestions set forth in this Part II.B, for the most part, are taken directly from Bombproofing the Estate Plan to Anticipate and Avoid Litigation, Bruce Stone and Bruce S. Ross, ACTEC Annual Meeting, March 2001, and Avoiding Estate Litigation: Let Him Who Desires Peace Prepare for War, John W. Spears, Jr.

- (e) Relevant documents governing business entities in which the client has an ownership interest
 - (f) Trust documents where the client is a grantor, trustee or beneficiary
 - (g) Beneficiary designations for insurance policies and retirement plans
- 4. Document the Client's Mental Capacity**
- (a) Prepare contemporaneous written notes and memoranda to the file
 - (b) Videotape the signing ceremony
 - (i) Videotape of a client explaining her reasons for a particular dispositive scheme may deter a contest
 - (ii) Videotaping may actually highlight or exaggerate a flaw in the execution of the documents or some of the client's mental difficulties
 - (iii) Unless the attorney videotapes every client who signs a will and trust document, the fact that the attorney videotaped a particular client could be used to raise doubts about that client's capacity
 - (c) Obtain formal diagnoses of the client's mental capacity, if needed
 - (i) The client's personal physician and a geriatric psychiatrist
 - (ii) Lists of geriatric psychiatrists in the Salt Lake City area are available on the internet
- 5. Proofread the Will or Trust (Twice) and Send Drafts to the Client to Review Before the Signing Ceremony**
- 6. Include a Statement About the Client's Diminished Capacity and Why the Client Has Chosen the Particular Dispositive Scheme**
- 7. Insert a Penalty Clause ("In Terrorem" Clause) in the Will or Trust**
- (a) **What is a "penalty clause"?** A will or trust will often include a "penalty clause" that requires a beneficiary to forfeit his or her share of the estate or trust if he or she "contests" or "challenges" the will or trust.
 - (b) **What qualifies as a "contest" or "challenge" that will trigger a penalty clause?**
 - (i) A lawsuit asking a court to construe the provisions of a will or trust document most likely will not constitute a "contest" or "challenge" that triggers a penalty clause. See In re Ikuta, 639 P.2d 400, 407 (Haw. 1981) (holding that action to construe the terms of a will was not a "contest" under the will's penalty clause); but see In re Peppler, 971 P.2d 694, 696-697 (Colo. Ct. App. 1998) (holding that beneficiary's attempt to probate decedent's 1992 will was

an attack on decedent's 1984 will that invoked the penalty clause of the 1984 will).

(ii) A lawsuit alleging that the testator or grantor was incompetent or subject to undue influence at the time the will or trust was executed will generally constitute a "contest" or "challenge" that triggers a penalty clause.

(c) **Anti-penalty Clause Statutes.** Utah has adopted an "anti-penalty clause" statute, which states that "[a] provision in a will purporting to penalize an interested person for contesting the will or instituting other proceedings relating to the estate is unenforceable if probable cause exists for instituting proceedings." Utah Code Ann. §75-2-515 (emphasis added). Utah also has an "anti-penalty clause" statute that applies to trusts. See *id.* §75-7-112 ("A provision in a trust instrument purporting to penalize a beneficiary by charging the beneficiary's interest in the trust, or to penalize the beneficiary in another manner, for instituting a proceeding to challenge the acts of the trustee or other fiduciary of a trust, or for instituting other proceedings relating to the trust is unenforceable if probable cause exists for instituting the proceedings.") (emphasis added).

(d) **Probable Cause.** Although Utah courts have not interpreted the Utah anti-penalty clause statute's "probable cause" language, courts in other states interpreting identical statutes generally have defined "probable cause" as "the existence, at the time of the initiation of the proceeding, of evidence which would lead a reasonable person, properly informed and advised, to conclude that there is a substantial likelihood that the contest or attack will be successful." *In re Shumway*, 9 P.3d 1062, 1066 (Ariz. 2000) (en banc) (emphasis in original); *In re Peppler*, 971 P.2d at 697 (same). Those same courts also have held that reliance on the independent advice of legal counsel is indicative of probable cause, although not determinative, but that good faith alone is insufficient to show probable cause. See *In re Peppler*, 971 P.2d at 697-698; *In re Shumway*, 9 P.3d at 1066.

8. Develop and Follow a Standard Signing Ceremony

(a) **Follow the formalities for execution.** Make sure you follow the formalities for executing the documents, with two witnesses and a notary public present during the entire signing ceremony. (If you cannot make a prima facie case that the will was properly executed, the party desiring to challenge the will or trust will win without having to prove mental incapacity or undue influence at the time of signing.)

- (b) **Exclude all “non-essential” persons.** Do not allow “non-essential” persons to participate in the signing ceremony. (This can be a distraction and, if a “non-essential” family member (i.e., a child) is present, it could lead to claims of undue influence.)
- (c) **Place.** Conduct the signing ceremony at your office, if possible.
- (d) **Routine.** Use the same signing ceremony routine every time.
 - (i) Meet alone with the client to review the will; introduce the witnesses and the notary to the client; allow the witnesses and the client to engage in “small talk” for a moment if they have not met previously; ask basic questions of the client (whether she has read the will, whether it contains her desired dispositive scheme, etc.); read the acknowledgment language to the client; read the self-proving affidavit to the witnesses; and have the client, the two witnesses and the notary sign the will.
 - (ii) Adherence to such a routine may serve as evidence that the routine was followed in a particular case. See Utah Rule of Evidence 406 (“Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.”)
- (e) **Self-proving will.** Always employ a “self-proving will” to avoid having to locate witnesses later to establish the due and proper execution of the will. See Utah Code Ann. §75-2-504 (“A will may be simultaneously executed, attested, and made self-proved, by acknowledgment thereof by the testator and affidavits of the witnesses, each made before an officer authorized to administer oaths under the laws of the state in which execution occurs”)

III. The Facts

A. Common Fact Patterns That Should Put You on Alert

1. A client’s history of guardianship or conservatorship proceedings
2. A client’s poor physical or mental health
3. A client who has trouble making decisions and is difficult or angry
4. A client’s spouse or child makes the initial contact
5. A client’s second marriage, with children from prior marriage(s), where either the spouse or children make the initial contact
6. A client who suddenly wants to implement a “non-traditional” testamentary scheme, leaving a spouse or children with little or nothing
7. A client’s desire to implement a sudden or drastic deviation from a prior testamentary scheme

B. Case Studies

1. **Carmen:** Carmen has been your client for 20 years. You have updated her will on three separate occasions. Her most recent will was signed two years ago, and under that will, she left her assets as follows: 40% to child 1, 40% to child 2 and 20% to child 3. She told you at that time she was leaving a smaller share to child 3 because of problems child 3 had caused in the family, and that she hoped to “even things up” if child 3 remedied those problems. Carmen was entirely competent at that time. Child 1 now brings Carmen to your office, and tells you that child 3 has remedied the problems he caused in the family and that Carmen wants to update her will to leave her assets in equal shares to her three children. You discuss this issue with Carmen, and it is very apparent that she has no idea what is going on. Child 1 then tells you that Carmen has been “formally diagnosed with dementia.” What do you do?
2. **William:** You first met with William three years ago, on his 100th birthday. You prepared a pourover will and a revocable trust for him at that time, and he was adamant that he be the sole trustee of his trust, and that child 2 be the alternate trustee. He has two children. His trust leaves his assets 10% to child 1 and 90% to child 2. Child 2 lives with William. Child 2 now calls you and tells you that William wants to designate child 2 as a co-trustee under the revocable trust, and asks you to prepare the necessary documents and come by William’s home to have William sign those documents. What do you do?
3. **Jack:** You don’t know Jack. Jack’s daughter calls you and tells you Jack wants to meet with you (as you were referred by Jack’s best friend, a longstanding firm client) to update his trust. Jack’s daughter tells you that Jack’s current trust leaves everything to Jack’s second wife, and that Jack wants to revise his trust to leave one-half of his assets to his six children and one-half of his assets to his second wife. Jack’s daughter tells you that Jack is mentally fine, but that he is confined to his bed, and asks you to come to Jack’s home. You tell Jack’s daughter that you will need to meet with Jack privately to discuss these issues with him. You arrive at Jack’s home, and you are invited into Jack’s bedroom. Jack is in bed, and his six children are seated around his bed. You talk briefly with Jack and his six children, and you are fairly confident that Jack has mental capacity. You ask the children to leave the room so that you can discuss Jack’s wishes with him, but the children refuse to leave, insisting that they want to be involved in the discussion. Jack doesn’t seem to care whether the children stay or go. What do you do?
4. **Neil:** You have never met Neil. His brother calls you and asks if you can meet with Neil at Neil’s home, as Neil’s kidneys are failing and it is difficult for him to leave the home. You go to Neil’s home, where Neil’s brother invites you to sit in the living room. Neil’s brother proceeds to tell you that Neil has expressed on many occasions a desire to alter his existing will (which leaves everything to his children) to make some minor provisions for Neil’s brother and Neil’s girlfriend. You sense that Neil’s brother is telling the truth, and he tells you that Neil is “not doing

well” that day and that Neil is not able to discuss his testamentary wishes with you. You tell Neil’s brother that you need to talk with Neil before you can prepare an updated will. Neil’s brother calls you the next day, informs you that Neil’s condition is worsening and that he only has lucid moments once or twice a day, and asks you to please prepare an updated will for Neil so that it can be ready for Neil to review and sign during a lucid moment. What do you do?

5. **Jane:** Bill and Jane are new clients. You review their existing wills, which leave everything outright to the surviving spouse and then to their four children, in equal shares. Bill and Jane’s net worth is approximately \$9,000,000. You explain that they could avoid a significant amount of federal estate tax if their wills were revised to include a credit shelter trust that would be funded at the first spouse’s death. Bill and Jane agree that is a good idea. You prepare the updated wills and send drafts to Bill and Jane for their review. Two years pass. Bill calls you and apologizes for taking so long to review the documents, and asks if he and Jane can come to your office to sign the updated wills. You meet with Bill and Jane, and Bill explains to you that Jane recently had a stroke, which rendered her unable to communicate verbally, but Bill tells you that “Jane is a Harvard law graduate” and clearly understands what people are saying. You are not sure that is the case, as Jane’s eyes seem “distant” and Bill keeps wiping drool from her mouth. You ask Jane several questions. She is slow to respond, but gives a slight nod or shake of the head to each question. What do you do?
6. **Bob:** Bob and Dorothy (his second wife) come to your office for a consultation. Bob has been diagnosed with cancer and is losing strength daily, and Dorothy tells you that Bob may live for only another week or two. Bob clearly has mental capacity. Bob has no will, but has assets worth approximately \$1,000,000, all of which were acquired during Bob’s and Dorothy’s marriage. Under the current intestacy statute, Dorothy, as the surviving spouse, would receive the first \$50,000 of Bob’s assets, plus one-half of the remaining \$950,000, with the other one-half of that \$950,000 going to Bob’s three children from his first marriage. Bob clearly explains his desired plan – to leave one-half of his assets outright to Dorothy and to leave the other one-half in trust for Dorothy during her lifetime, with the trust assets remaining at her death to be distributed to his three children, in equal shares. You immediately prepare estate planning documents for Bob, and he comes to your office 4 days later to sign the documents. Bob is now in a wheelchair, he has an oxygen tank to assist with his breathing, he is very weak and he cannot communicate verbally. He can barely muster the strength to nod or shake his head, and he can’t hold a pen by himself to sign his documents. You also have concerns about whether he really understands the questions you ask him. What do you do?
7. **Karla:** Karla’s son calls you and tells you Karla’s health is failing and that she wants to change her existing trust document. Karla’s son tells you that Karla’s existing trust document leaves everything to Karla’s two children in equal shares, but that Karla really wants to leave everything

in trust for him during his lifetime (because he has been so good to her and has taken care of her), with the assets remaining at his death to be distributed to the other child. You tell Karla's son that you will need to meet with Karla to discuss these issues. You meet with Karla, and you have some reservations about her mental capacity and about whether her son is exercising undue influence, but Karla does tell you to draw up documents along the lines of what her son had first told you Karla wanted to do. You decide it would be wise to have a geriatric psychiatrist evaluate Karla, and ask Karla if she is comfortable with that approach. Karla agrees to proceed on that basis. You prepare the documents and return to Karla's home at the same time the geriatric psychiatrist is testing Karla. You witness the testing and you are unsure whether Karla is competent, but the psychiatrist tells you "she understands what is happening and she's okay to sign." You review the documents with Karla, and you are still uncertain as to whether she is of "sound mind" — although she can name her children and most of her assets, she has some trouble understanding the "lifetime trust" concept. What do you do?

EXHIBIT A

Utah Rule of Professional Conduct 1.14, Comment 6 (emphasis added):

In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistence of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

Utah Rule of Professional Conduct 1.14 (emphasis added):

- (a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
- (b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.
- (c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Note that, under paragraph (b), if an attorney believes his client may be at risk of financial or other harm, the attorney may (but is not obligated) take action to protect the client.

Utah Rule of Professional Conduct 1.14, Comment 2:

The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must look to the client, and not family members, to make decisions on the client's behalf.

It should be noted that, while Comment 2 expressly allows a family member of a client with diminished capacity to participate in the discussions with the lawyer, such participation may actually lend support to those later attacking the client's mental capacity or claiming the client was subject to undue influence by the participating family member.

The ACTEC Commentaries on the Model Rules of Professional Conduct (3d ed. 1999), at 218-219, offer some helpful guidance in this area:

Testamentary Capacity. If the testamentary capacity of a client is uncertain, the lawyer should exercise particular caution in assisting the client to modify his or her estate plan. The lawyer generally should not prepare a will or other dispositive instrument for a client who the lawyer reasonably believes lacks the requisite capacity. On the other hand, because of the importance of testamentary freedom, the lawyer may properly assist clients whose testamentary capacity appears to be borderline. In any such case the lawyer should take steps to preserve evidence regarding the client's testamentary capacity.