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Teaching Trusts & Estates and Elder Law: Pedagogy for the Future, 117 Penn St. L. Rev. 987 (2013)

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Transcript

Teaching Trust & Estates and Elder Law: Pedagogy for the Future*

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Nina A. Kohn, *Syracuse University College of Law*
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Panelists

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Lawrence A. Frolik, *University of Pittsburgh School of Law*
Richard L. Kaplan, *University of Illinois College of Law*
Katherine C. Pearson, *Penn State Dickinson School of Law*
Michael L. Perlin, *New York Law School*
Mary Radford, *Georgia State University College of Law*
Robert Whitman, *University of Connecticut School of Law*

* An edited transcript of a panel presentation given in New Orleans on January 5, 2013, as part of the Association of American Law Schools (AALS) Aging and the Law and Trusts and Estates Joint Program. This transcript is part of the *Penn State Law Review's* annual symposium edition. For a summary of the symposium, see Katherine C. Pearson, Introduction to Symposium Issue, *Capacity, Conflict, and Change: Elder Law and Estate Planning Themes in an Aging World*, 117 PENN ST. L. REV. 979 (2013).

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I. INTRODUCTION

BARRY

KOZAK:

(Co-Moderator)

Welcome to this joint meeting. I'm Barry Kozak from The John Marshall Law School. I'm the director of our elder law curriculum and the chair of the Section on Aging and the Law. At the last meeting, my colleague, William LaPiana, who represents the Trusts and Estates Section, approached me and said, "You know, maybe it's time for these two sections to have a joint discussion." We think that what we came up with will be interesting, at least to those of us who are at the front of the room.

The idea started with the conflicts of interest between estate planning documents and elder law documents. Elder law attorneys are worried about people spending their money on quality of life while they are alive. Estate planning attorneys focus on transferring wealth through gifts during life and upon death. There are more conflicts of interest than you might think.

Then, we started talking about it, and we thought about the pedagogy: some students may only take a trusts and estates class, and some students may

only take an elder law class. The idea that started this panel is how could we, as instructors in either elder law or estate planning, or some of us who do both, understand the different conflicts of interest and better prepare our students when they go out in the world and become estate planning attorneys or elder law attorneys.

So, we have three panels today and three moderators. The first panel will discuss mental capacity conflicts of interest. The second panel will look at conflicts of interest of family members who are also beneficiaries of the documents, and the third panel will highlight some trust protection clauses. Questions should be asked in the final minutes of each respective panel.

Let me introduce Susan Cancelosi, who will moderate the first panel. Susan is currently the chair of the Employee Benefits Section, and, as of 12:15 p.m. today, the Chair of the Section on Aging. Professor Cancelosi teaches at Wayne State. Susan, why don't you make your introductions.

II. FIRST PANEL: PEDAGOGY ON CAPACITY ISSUES

SUSAN
CANCELOSI:
(Co-Moderator)

Thank you. My introduction will be incredibly quick because I don't want to take time away from our really wonderful substance. We have three people on this starting panel: Katherine Pearson from Penn State Dickinson, Bob Whitman from University of Connecticut, and Michael Perlin from New York Law School.

We're going to hear each of the speakers for about ten minutes and then stop with five minutes at the end before our next panel. I've read their articles, and they are delightful and fascinating.

A. *Avoiding Undue Influence*

KATHERINE
PEARSON:
(Panelist)

Thank you very much, Susan. I'm going to get right into my topic. The working title of my current research is *Avoiding Undue Influence by Recognizing Dementia and Impaired Decisional Capacity*, and our subtitle is *In the Legal Trenches*.

My colleagues, who are here in spirit, are Ann Kolanowski, the director of the Hartford Center of Geriatric Nursing Excellence at Penn State University, and one of our former Penn State colleagues who is now at the University of Alabama, Rita Jablonski.

A number of years ago, the three of us began working together because we saw that, in both the medical and legal professions, there are obvious concerns about decisional capacity. We wondered whether there was overlap or some type of a dividing line between our approaches.

We collaborated by inviting the law side into the medical school and nursing school, and inviting the medical professionals, particularly people from the Geriatric Center of Nursing Excellence, into the law school to discuss issues of mental capacity, specifically dementia. The medical professionals have shared with us testing tools they use in assessing decisional capacity. For example, the *MacArthur Competence Assessment Tools for Clinical Research and Treatment* are often recommended because they evaluate four key components: the ability to understand disclosed information; the ability to appreciate the information as it is applied to oneself; the ability to use the information to reason; and the ability to express a choice or preference. We contrasted the MacArthur Competence Assessment Tools with guidelines offered by the American Bar Association in cooperation with the American Psychological Association. For example, the ABA offers online a set of guidelines and a sample

“capacity worksheet” for lawyers to use to organize and document their assessment.¹

One of the things I have started doing when teaching elder law classes is to invite a medical professional to speak about the several forms of dementia that may affect older adults, including Parkinson’s type of dementia, or frontotemporal lobe dementia, sometimes called Pick’s Disease. Frontotemporal lobe dementia is a particularly complicated form of dementia because the symptoms can begin to manifest quite early in life, sometimes in the person’s 50s, and not be recognized as a form of dementia. It often involves impaired judgment, so the people will often do things that others find strange without anyone perceiving that this could be part of a larger mental capacity issue.

When the students hear about these different types of dementias, sometimes the response is, “This is all fascinating, but what does it mean to me as a lawyer?” So, what we do is take that to the next step and say, “Okay, what does it mean to understand mental capacity either as a medical professional or as an attorney, and why might our views conflict?”

As a teaching tool, we use a 20-minute version of a short film called *Last Will and Embezzlement*. The documentary is also available in a longer form and both the short and long versions are interesting and provocative.²

The documentary features Mickey Rooney and the dramatic, and very sad, story about his family. The documentary also presents the story of Pamela Glasner’s father who had advanced dementia and was residing in a care facility. An attorney and

1. ABA COMM’N ON LAW AND AGING & AM. PSYCH. ASS’N, ASSESSMENT OF OLDER ADULTS WITH DIMINISHED CAPACITY: A HANDBOOK FOR LAWYERS (2005).

2. LAST WILL AND EMBEZZLEMENT (Starjack Entertainment 2013).

other people visited him in the care facility and had him sign transactional documents that transferred money and property. The question for our students was, "How could this possibly happen?" We use the documentary to set up a provocative discussion about what it means to have decisional incapacity and how lawyers may be witting or unwitting parties to financial abuse.

We also talk about the different roles of lawyers, including long-time trusted family lawyers, single instance transactional lawyers, or as professionals with special expertise in wills and trusts or elder law. The next stage of our class conversation is talking about whether, and to what extent, lawyers pause to evaluate capacity. I think the answer (as a practical matter) is very rarely, although I hope the "elder law" classes are helping change that pattern.

Unless someone suggests to the lawyer that an individual lacks capacity, lawyers are unlikely to test capacity. Even when there is a question, the lawyers may rely on the famous "moment of lucidity." In one case involving a challenge to a real estate transfer, the trial judge upheld the transaction, noting that, even though the signer may have appeared perfectly coherent one minute and two minutes later appeared confused, the signing of the key document occurred while the individual was "coherent or in a lucid interval."³

The lawyer may wait to think about capacity until after a challenge is raised. If the next day, or month, or year, somebody says the person was incapacitated, well, then the attorney expresses the viewpoint that, while the person was sitting in the law office, that person had capacity. As lawyers, we express confidence in our untested observations about capacity, and we document our opinions

3. *Farnum v. Silvano*, 540 N.E.2d 202, 204 (Mass. App. Ct. 1989) (overturning the trial court's finding of capacity, despite conceding that actions "during a lucid interval can be a basis for executing a will").

carefully as the transactional lawyer. My concern is that lawyers receive adequate education on how to assess capacity. My concern is that we may spend too much time educating them on how to document their opinion, however formed.

Rather than pretend that it is an easy decision to make, one of the challenges I raise with my students is, "Is it that easy or not?" I present students with a "hypothetical" that we can later reveal is not hypothetical at all. As an example, I describe a gentleman who is in his 80s and who had a very high profile professional career. He had an opportunity to do an advance estate plan perhaps ten years before the date in question, and, at that time, made the decision to do several estate planning transactions but to create only a power of attorney in favor of his wife and not in favor of anyone else in the family.

As time progressed, the individual's powers diminished somewhat, and everybody recognized that. Eventually, the wife said, "I really feel that perhaps we ought to have a power of attorney for our children," and she executed one in favor of her children so that the children would be agents. But she asked "What about my husband? What if I predecease him? I'm the only agent named. Shouldn't we have him do a power of attorney for our children as well?"

The problem was that, by this time, the person had fairly advanced dementia, and he had chosen not to execute a power of attorney naming children as agents earlier in his life. He had the opportunity, and he didn't sign the power of attorney that made any child an agent. And ask the law students, "If you're the attorney whom the wife consults and you know that history, what do you do? What's the reality of that?"

Then, of course, for the law students, I add a little extra color to the story because, in this instance, the

individual was a federal judge. I disclose that in fact, the individual is my father, and I'm the oldest daughter. And I'm the one who knows he can still sign his name, and my mother also noticed that he can sign his name still and that he trusts people enough to sign documents offered to him. We know we have only the right motivations to ask him to sign a new power of attorney, but should we do so if we really know in our heart of hearts that he lacks true capacity?

I ask the students to consider whether the scenario is different if it is your parent. Is it different if you are the lawyer representing that client with the history? Is it different if you know nothing about that history, but you are in the presence of an older gentleman who, in fact, will sign his name in front of a notary who comes to your office? Is it an easy decision or not?

Using simple power of attorney exercises, and asking the students to compare their potential roles as attorneys depending on their knowledge of the individual's background, are useful exercises.

I'm actually going to stop now because I want to make sure that we have plenty of time for our other speakers, and also I want to thank everybody who worked with our team at Penn State Dickinson School of Law because we're very pleased with the cooperation we're getting from everybody.

As you ask questions, please identify yourself because we would like to include you in the transcript that will be part of this symposium issue of the *Penn State Law Review*.

B. Proposing a Unitary Standard for Capacity Determinations

BOB WHITMAN: Good Morning. I'll try to keep this short. My paper concentrates on the legal rules. I am not, as our last speaker, going to talk about the possibility of using psychiatrists and psychologists. I believe that the determination is to be made by the lawyer using the legal rules.

The lawyer is not the judge of capacity. The lawyer knows that ultimately a court or a jury will actually make the determination. Thus, in a doubtful case, I believe that the lawyer has to proceed taking careful notes and so forth.

I've tried it the other way. At one time, I took a client to a psychiatrist, and she insisted that I come into the room and so forth. From a practical point of view, it doesn't work at all. It chews up an enormous amount of time, and it can get you into more difficulty than you want.

The rules, as I say, are paramount. Therefore, I start out from a practice point of view because much of what I have learned and taught is through practice with the concept of the package. The client comes in, and the client wants a will, a trust, revocable or irrevocable, a health care power, a durable power of attorney, and a living will.

Now, we probably all know that the will has the least amount of requirement of capacity unlike, for instance, capacity of the contract which some of these others have. My article traces the historical development of each of the standards of capacity for each of the items in the package. Not surprisingly, standards come from Roman law, from early English common law, and they vary, but only slightly.

In my own practice, I never thought that I could divide the items in the package and say to a client, "Well, we can do a will because that's a lower

standard, but we can't do a trust because that's a higher standard of capacity."

Somewhat recently, I took an informal survey of members of ACTEC, the American College of Trusts and Estates Counsel, asking if anybody would break up the package in terms of capacity. Nobody would break up the package, and that's very important because we have a set of legal rules that do not reflect the actual goings-on in practice.

For that reason, I have been thinking that my article is a tribute to Lord Mansfield and Karl Llewellyn because they believed that, in order to have just law, you've got to find out what's being done, and then you've got to create the law to reflect that because of the changing times.

I advocate a unitary standard applicable to transferring assets, gifting, execution of the durable power of attorney, creating a health care power, creating a revocable or irrevocable trust, or creating a will. The standard is the following: does the individual understand the property to be dealt with, the natural objects of the bounty, and how the acts to be done will affect the client, and whether the intent of the client will be carried out?

I think this unitary standard would advance us a great deal and make it much simpler for law students to understand. Then, if they want to choose the other route and go to the psychiatrist or the psychologist, I have to warn them that, in practice, that's not going to work out in a practical kind of way. Thank you very much.

C. Seeking International Standards for Mental Disability Guardianships

MICHAEL
PERLIN:
(Panelist)

My article is going to be somewhat different from both of the ones you've heard already, and I expect all of the ones you're to be hearing afterwards.

The title is "*Striking for the Guardians and Protectors of the Mind*": *The Convention on the Rights of Persons with Mental Disabilities and the Future of Guardianship Law*.

My friends in the audience will know where that quote comes from. For those of you who are not my friends yet, it's from Bob Dylan's song, *Chimes Of Freedom*, which I heard live most recently at the Barclays Center.

I'm going to talk about the international human right implications of guardianship proceedings, and I have to say my mind has been pinballing listening to what was said in the first two talks. As for my background, I am not part of this group at all. My background is in criminal procedure and mental disabilities law, and there's been so much written in those areas about whether there can be a unitary standard.

This whole notion of moment of lucidity, which is rejected on the criminal side 100 percent, is not what I'm talking about either.

In most nations of the world, certainly in virtually every civil law nation, the entry of a guardianship order is the civil death of the person who is affected. They're stripped of all their legal capacity in everything having to do with finance and property, but also stripped of their rights to vote, to give consent to medical treatment, to marry, and to have a family.

Guardianship is used very frequently in other places. There are about 80,000 people under guardianship in Hungary⁴ and at least 300,000 in

4. István Hoffman & György Könczei, *Legal Regulations Relating to the Passive and Active Legal Capacity of Persons with Intellectual and Psychosocial Disabilities in Light of the Convention on the Rights of Persons with Disabilities and the Impending Reform of the Hungarian Civil Code*, 33 LOY. L.A. INT'L & COMP. L. REV. 143, 166 n.171 (2010).

Russia.⁵ Consider now the U.N. Convention on the Rights of Persons with Disability (CRPD),⁶ which, ignominiously, our Senate failed to ratify last month by several votes, although this will come up again and hopefully will be ratified.

The CRPD is the most important international human rights document ever drafted on behalf of this population, and it speaks to guardianship instead of paternalistic guardianship laws that substitute the guardian's decision over the decision of the individual.⁷ The CRPD model is one of supported decision-making.⁸

Here's the issue. What impact, if any, will the CRPD and other international human rights law documents have on guardianship practice around the world and in the United States? In the article, I look at why guardianship is considered civil death. I also look at domestic law, the CRPD, and then I raise some red flags that have to be confronted in this inquiry.

How do we know that the lawyers assigned to represent individuals subject to guardianship are going to be doing an adequate job? To what extent are domestic judges going to take this seriously, and what happens in those parts of the world, like Asia and the Pacific, where there is no regional human rights tribunal that litigants can go to⁹ as they can in Europe and, to a lesser extent, in Africa and South and Central America?¹⁰

5. See *Russian Constitutional Court Criticises "Abusive" Guardianship Law*, MENTAL DISABILITY ADV. CTR. (June 28, 2012), available at <http://bit.ly/10xc3mY>.

6. See *Convention on the Rights of Persons with Disabilities*, UNITED NATIONS ENABLE, <http://bit.ly/6yIrm> (last visited Mar. 18, 2013).

7. See, e.g., Michael L. Perlin, *Promoting Social Change in Asia and the Pacific: The Need for a Disability Rights Tribunal to Give Life to the UN Convention on the Rights of Persons with Disabilities*, 44 GEO. WASH. INT'L L. REV. 22 (2012).

8. See Leslie Salzman, *Rethinking Guardianship (Again): Substituted Decision Making as a Violation of the Integration Mandate of Title II of the Americans with Disabilities Act*, 81 U. COLO. L. REV. 157, 161 (2010).

9. See Perlin, *supra* note 7.

10. See generally MICHAEL L. PERLIN, *INTERNATIONAL HUMAN RIGHTS AND MENTAL DISABILITY LAW: WHEN THE SILENCED ARE HEARD* (2011).

I'm going to be writing about all of these issues in my article. As I have said already, guardianship is seen as a kind of civil death, especially, but not exclusively, when people are institutionalized. Institutional abuse is rampant in these cases. And, with the exception of a few courageous lawyers working for an NGO in Budapest and elsewhere in Eastern Europe,¹¹ the Mental Disability Advocacy Center, nobody seems to care very much.

The U.N. Secretary General has issued a report excoriating the way this guardianship is done in other parts of the world. It's terribly wrong. There have been some cases. A case called *Stanev v. Bulgaria*,¹² a tremendous case, saying that the way guardianship is done violates different sections of the European Convention on Human Rights.

In the story about Stanev, somebody comes to his home and takes him to an institution for adults with mental disorders. The transfer is made by his guardian, whom he had never met, and the guardian "hands him off" to the director of the institution. Stanev was never told about this. No one said how long he was going to be there.

Ten years later, the lawyers of the Mental Disability Advocacy Center went to court and were successful in obtaining a monetary judgment (as if money really mattered at this point).

We're not talking solely about Bulgaria or central and eastern Europe. There are examples from China, Guana, Mexico, all over.¹³ This violates

11. See MENTAL DISABILITY ADV. CTR., www.mdac.info (last visited Mar. 18, 2013).

12. *Stanev v. Bulgaria*, App. No. 36760/06, Eur. Ct. H.R. (2012), available at <http://bit.ly/Typ5zW>.

13. See, e.g., *Ghana: People With Mental Disabilities Face Serious Abuse*, HUM. RTS. WATCH (Oct. 2, 2012), <http://bit.ly/SzzC8w> (citing example from Ghana); Roger Bill, *Plenary Guardianship: Persons with Disabilities Made Vulnerable*, MCGILL BLOGS (July 10, 2012, 4:10 PM), <http://bit.ly/11gni5q> (citing example from Mexico); CHINESE HUM. RTS. DEFENDERS, *THE DARKEST CORNERS: ABUSES OF INVOLUNTARY PSYCHIATRIC*

international human rights law. It violates due process. It violates basic human dignity.

What about the United States? Well, at best, guardianship provides personal care and property management that an individual with a disability can't handle alone. At worse, it deprives him of decision-making authority for which he does have capacity. It used to be historically an all-or-nothing test.¹⁴ That's changed, on paper at least.

There are procedural protections in most jurisdictions. In reform statutes, there are rights to notice, counsel, and due process hearings, and the presumption is that guardianships should be limited rather than plenary. In addition, there are now divisions between guardianship of property and guardianship of the person. Many current statutes make this clear.¹⁵ There is a huge gap between law on the book and law in action, and that's something that needs to be addressed.

Courts have to tailor guardianship orders to afford the incapacitated individual the maximum amount of independence possible, and the guardianship should be given powers only in specific, limited areas where the individual requires assistance.

The CRPD rejects the medical model, instead adopting the human rights social model. That has to force us in both the United States and every other nation to reconceptualize the notion of guardianship provisions.

COMMITMENT IN CHINA 12 (2012), available at <http://bit.ly/YBkK23> (citing example from China).

14. See, e.g., BARRY R. FURROW ET AL., *BIOETHICS: HEALTH CARE LAW AND ETHICS* 247 (3d ed. 1997).

15. See, e.g., Debra H. Kroll, *To Care or Not to Care: The Ultimate Decision for Adult Caregivers in a Rapidly Aging Society*, 21 *TEMP. POL. & CIV. RTS. L. REV.* 403, 435-36 (2012).

Leslie Salzman has written about this¹⁶ and about how current guardianship laws in the United States very often violate the Americans with Disabilities Act. I think Leslie's work is spot on.

The most important domestic case to consider these issues is the New York State case of *In Re Mark C.H.*¹⁷ Judge Glen, who is in the audience, wrote on why the CRPD found that guardianship appointments need to be subject to the requirements of periodic recording and review, and why Article 12 of the Convention needs to be followed to prevent these kinds of abuses.¹⁸

Access to supported decision-making is now the preferred norm by international treaty. As I was putting my computer together on Friday to get to the airport, what is the last thing I see on my Westlaw feed? A case that Judge Glen decided on December 31, 2012.

What a way to celebrate a new year and a retirement. In *In re Guardianship of Dameris L.*, Judge Glen talks about how section 17A of the New York guardianship statute is constitutionally suspect because of international human rights.¹⁹ Unfortunately, not too many of Judge Glen's colleagues in New York or in any other state have been following this line.

I said that there are some red flags. There are four. I'm just going to name them now because I have received my three-minute warning.

One, the need for dedicated counsel, and those of you who heard me speak before have heard me harp on this extensively.²⁰ Two, the need for

16. See, e.g., Salzman, *supra* note 8.

17. *In re Mark C.H.*, 906 N.Y.S.2d 419 (N.Y. Surr. Ct. 2010).

18. *Id.* at 433.

19. *In re Guardianship of Dameris L.*, 956 N.Y.S.2d 848 (N.Y. Surr. Ct. 2012).

20. See, e.g., Michael L. Perlin, "I Might Need a Good Lawyer, Could Be Your Funeral, My Trial": A Global Perspective on the Right to Counsel in Civil Commitment

alternative non-institutional guardians because, in many places, the guardian—the institution—becomes a de facto guardian, and that is just wrong. Number three, the question of whether domestic courts will actually take this seriously. And, number four, what I alluded to before, is that we need to consider the case of Asia and the Pacific where there is no regional tribunal.

In my article, I spent quite a bit of time talking about therapeutic jurisprudence (TJ) as something to look at. This portion of the paper discusses the need to use the voice, the need for voluntariness,²¹ and I think that is so important in the guardianship process.

But I don't think anyone has yet looked at guardianship/international human rights/TJ all at the same time. The guardianship literature teaches us that a TJ approach promotes autonomy and is likely to improve the quality of life for the person under guardianship. It seems to me the IHR literature tells us that TJ—this is the way Bruce Winick wrote about this, God rest his soul—will help the general state of human rights.²²

In this article, Bruce was talking about Hungary and Bulgaria, but the issues go far beyond those two nations. I think the CRPD—and I said this to Professor Amy Ronner before this Joint Meeting began—reflects a certain principle that you articulated: how does law actually impact a person's life? I think that, if we look at the guardianship process, these reforms are entirely prompted with TJ and with procedural justice

Cases, and Its Implications for Clinical Legal Education, 28 WASH. U. J.L. & SOC'L POL'Y 241 (2008).

21. See, e.g., Amy D. Ronner, *The Learned-Helpless Lawyer: Clinical Legal Education and Therapeutic Jurisprudence as Antidotes to Bartleby Syndrome*, 24 TOURO L. REV. 601, 627 (2008).

22. Bruce J. Winick, *Therapeutic Jurisprudence and the Treatment of People with Mental Illness in Eastern Europe: Construing International Human Rights Law*, 21 N.Y.L. SCH. J. INT'L & COMP. L. 537, 572 (2002).

values by privileging voices, autonomy, and participation. I think that, if we do that, we will meaningfully bring the CRPD's mandates to our citizens under this system.

International human rights law has the capacity to restructure guardianship law around the world. It's not going to have any real life values unless there are lawyers willing to do it and judges like Judge Glen willing to enforce the law.

The mandates of international human rights law scream out for a universal overhaul of guardianship law in practice, and I hope that my talk today and the article in the *Penn State Law Review* makes some of us think about this more. Thank you.

BARRY KOZAK:
(Co-Moderator)

I'll start with a question. I guess this is more for Michael Perlin. I appreciate everything you said, and I'm agreeing with you, but specifically in American elder law, if the court gets involved and there's guardianship, then it's an official guardianship proceeding. Do you see any way to filter that down, not to a formal guardianship adjudicated by a judge, but to where a physician may step in and declare that someone is incapacitated? That is, could you have a type of voluntary durable power of attorney that says, "If the physician steps in and says that Dad is incapacitated, then the children take over." (I tell all my students in elder law class that the loving happy families are out there, we just don't read about them in court cases.)

MICHAEL
PERLIN:
(Panelist)

That's a great question. Also, you're right about unhappy families certainly. I've not thought about that idea before, but, as you said it, what came to my mind was a Supreme Court decision from 1992 in the case of *Zinerman v. Burch*,²³ finding that, even if somebody appears to be voluntarily entered into a psychiatric hospital, there has to be some

23. *Zinerman v. Burch*, 494 U.S. 113 (1990).

kind of due process mechanism to make sure that the voluntariness is truly voluntary.²⁴

The plaintiff in *Zinermom* is found wandering down a highway in Florida. He goes to the hospital. They ask him to sign the papers. He says, “Oh, don’t tell me. I’m signing myself into heaven!” That was the heart of the case.

And I am wondering in terms of a durable power of attorney if a person is in danger of losing certain property rights—no one is being locked up, so it’s certainly different for *Winnebago County*²⁵ or *Youngberg*²⁶ purposes—but I am wondering whether there should be some kind of a third-party judicial consideration. Not necessarily a full adversarial hearing, but something.

This is a great question. I’ve given it zero thought, so this is clearly on the fly, which a teacher should never do, but I’m doing it, obviously, and I think that is possibly a new reform to suggest.

BARRY KOZAK: (Co-Moderator) In Illinois (and it’s done in all 50 states, certainly), the durable power of attorney statute was amended in 2010, and it now gives the court jurisdiction to look at the fiduciary duties of different agents that take power of attorney. And, as Bob Whitman said, whether it’s on the books or not, who knows what they’re doing in practice, but at least it’s on the books.

BOB WHITMAN: (Panelist) I’d like to mention the idea of a fiduciary accounting, which is used where there is some question of duties. It doesn’t have to be all that formal, but it does bring out issues, and those can be brought before a court. Fiduciary accountings in Connecticut are used for that purpose.

24. See Michael L. Perlin, *A Law of Healing*, 68 U. CIN. L. REV. 407, 428 (2000).

25. *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189 (1989).

26. *Youngberg v. Romeo*, 457 U.S. 307 (1982).

KATHERINE
PEARSON:
(Panelist)

I notice that we have several people in the audience with hands raised.

LAURA
ROTHSTEIN:
(Audience
Participant)

Hi, Laura Rothstein from University of Louisville. My question is, due process is important, but what about the transaction cost? If it is burdensome, you start consuming assets. Is there a process that isn't expensive so that you're not giving up assets?

MICHAEL
PERLIN:
(Panelist)

What Professor Laura Rothstein asked is what about the expense in our effort to provide due process: are you in danger of dissipating the estate. I think that's a serious and important question.

One of the issues is to what extent counsel should be provided, to what extent are the rights that a person could lose here sufficiently significant that, in fact, they would have a right to counsel. And there have been all sorts of recommendations in the last several years about the need for a "civil *Gideon*," and this might be another area where this might come into play.

It's clearly an issue. And, like Barry Kozak said, you only read about unhappy cases. You also only hear about the rich cases, and there's much more than that, but I believe it can be done more simply, and I believe—even though I'm always skeptical about mediation in cases of economic imbalance—that when it comes to people with modest resources, there may be ways of doing this to make it a bit more cost effective.

Again, I certainly have not thought that part out. These are very important issues, but I think we might want to expand who should be included—that is, the universe of people to whom some kind of legal aid is made available.

JUDGE KRISTIN BOOTH GLEN:
(Audience Participant) I'm a recently mandatorily retired surrogate of New York County and future professor at City University of New York Law School, and I just wanted to call your attention to something that might be under the radar for you which is kind of paradoxical. At least in New York, guardianship is now being used primarily—this is in New York County—to do pre-mortem planning.

Oftentimes, it's the one child who thinks the other child has the power of attorney and is transferring the parent's property to himself or herself. So we're moving toward a more restrictive intervention in these interfamily disputes about where the money is going to go in a way that I don't think guardianship—putting aside all other issues—was ever intended for, but it has now become the weapon of choice in these situations.

The durable power of attorney is also subject to attack after the grantor's death through a discovery and turnover proceeding in which a disgruntled heir has another chance to set it—and any transfers made pursuant to it—aside.

KAREN BOXX:
(Audience Participant) My name is Karen Boxx. I'm from the University of Washington at Seattle. My question is that it sounds like you're applying the rules of international human rights to the appointment process. I think there has been some attention on the guardianship reform in the United States in that respect, but my question is: have you thought about applying those principles to the guardian as appointed because then you fall off a cliff, and the courts aren't supervising, and that's where the real harm happens, after appointment.

MICHAEL PERLIN:
(Panelist) That's in the part of the paper I didn't present to the audience. I have thought about that. I think it's terribly important. The case that I mentioned, the *Mark C.H.* case,²⁷ which Judge Glen decided about

27. *In re Mark C.H.*, 906 N.Y.S.2d 419 (N.Y. Surr. Ct. 2010).

three years ago, talked about a similar situation, and both Leslie Salzman's article²⁸ and an article by Henry Dlugacz and Christopher Wimmer recently²⁹ talked about that extensively. So yeah, that's also being discussed. Thank you very much.

SUSAN
CANCELOSI:
(Co-Moderator)

That brings us to time on our first panel. Thank you everyone.

III. SECOND PANEL: CONFLICTS OF INTEREST IN ESTATE AND TRUST DOCUMENTS

BARRY KOZAK:
(Co-Moderator)

That was a fascinating start to the program. We're going to shift gears now. We're now assuming someone has mental capacity and is doing the planning, and we're going to consider conflicts of interest within the family. Specifically, conflicts with family members who are both beneficiaries under the will and agents under the durable power of attorney.

I'm going to introduce Nina Kohn. The speakers' academic papers are a little more in detail, but today it's going to be more of a discussion about how do we as professors teach these different concepts in our estate planning classes and in our elder law classes.

Nina Kohn is a professor at Syracuse University School of Law, and she will introduce her panel.

NINA KOHN:
(Co-Moderator)

We have three great panelists today. We have Lenore Davis who has a private estate practice that covers New York and New Jersey. We have Richard Kaplan, who is the Peer and Sarah Pedersen Professor of Law at the University of Illinois, and we're going to round it out with Mary

28. See Salzman, *supra* note 8.

29. Henry Dlugacz & Christopher Wimmer, *The Ethics of Representing Clients with Limited Competency in Guardianship Proceedings*, 4 ST. LOUIS U. J. HEALTH L. & POL'Y 3312 (2011).

Radford, who is the Marjorie Fine Knowles Professor of Law at Georgia State and the president of the American College of Trust and Estate Counsel (ACTEC).

A. Important Issues in Estate Planning: A Practitioner's Perspective

LENORE DAVIS: Thank you. I think the area we're discussing now is encapsulated by Veruca Salt in Willy Wonka and the Chocolate Factory: "Daddy, I want an Oompa-Loopma, and I want it now." After 20 years of practicing trust and estates and elder law, I thought it was time to go back for an LL.M. in tax, and Professor LaPiana invited me to join the LL.M. tax program at New York Law School. He was also my faculty advisor.

So I handed my nine kids and the keys to the minivan to my husband, and I said, "Catch you in three years." After three years was over, as I was completing the LL.M. in tax, Professor LaPiana approached me and we discussed my teaching estate planning for the LL.M. We spent extensive amounts of time discussing how we wanted the estate planning class to come together, and we were in agreement that it should be a very practical class.

What we came up with was a request to the IT department to set up a wiki program. Instead of giving fish to the students, of course, we would teach the students how to fish.

We set up these wikis, and we assigned to each student a basic trust and estate document. The end story and part of the midterm was to not only research it, comment on it, and upload it to the wiki, but to comment on all the other students' wiki documents to see how each student would improve the other student wiki documents.

The core purpose was to provide those who wanted to enter the area of trust and estates to have in hand 15 to 20 documents as his/her starter forms library.

In recent years, my practice had experienced a surge in intra-family conflict/abuse cases. Two summers ago, as I was teaching my first semester, two such cases burst onto the popular scene.

One was *Celeste Holm's* case,³⁰ and the other one was the *Brooke Astor* case.³¹ And, again, in a summer semester, you go from 14 weeks to 7 weeks, and that happened in about the fifth week. Although it was week 5 out of a 7-week semester, I determined that there was great practical pedagogical value in reviewing the issues set forth in these cases, with an eye in determining how best to avoid them via estate drafting tools, and how best to deal with these issues as the conflicts arise.

As the significance of these issues became clear, and as the lesson evolved, ultimately the name of the segment was "Attorney Intervention on Behalf of Client Grantors Against Trustee Beneficiaries." Long title, but it says it all.

And, what pedagogical value was there? It was important. As a trust and estate attorney, I can easily tell when I look at a will whether the drafter or attorney does probate work. If it's missing an *in terrorem* clause or an affidavit of attesting witnesses, I suspect that the attorney may not regularly do probate work because if he did, he would anticipate the future and issues that might arise that an *in terrorem* clause and an affidavit of attesting witnesses addresses.

So now, we come into a new part of my practice, which is surging, unfortunately, and it is quite sad. That is, cases where beneficiaries are turning on their relatives.

30. See, e.g., John Leland, *Love and Inheritance: A Family Feud*, N.Y. TIMES (July 2, 2011), <http://nyti.ms/15K1TDZ>.

31. See *Brooke Astor*, N.Y. TIMES (Mar. 28, 2012), <http://nyti.ms/11faSuH>; see also John Eligon, *Settlement in Battle over Astor Estate Is Reached*, N.Y. TIMES (Mar. 28, 2012), <http://nyti.ms/HhsjCx>.

And, what pedagogical value was there to the two cases? Well, how can we avoid conflicts between grantors and trustee beneficiaries, and the answer is in the new Power of Attorney rules. I know that most attorneys hated the New York 2010 updates to the powers of attorney, but, amongst the changes in the power of attorney, there was a section for monitors. And, of course, in trust documents, you could always appoint monitors or trust protectors.

When discussing with clients who they want as fiduciary in their trust, we always raise the question, “Why not a corporate fiduciary?” (especially if there are millions of dollars at stake). And, they say, “No, we don’t want to pay for a corporate fiduciary. We don’t want to pay the maintenance.”

So, whom do they turn to 99.9 percent of the time? Their relatives. And, of course, the conversation goes like this: “You understand, Mrs. Smith, that the root of the word trust is trust. You know that the root of the word trustee is trust. Do you trust these people?” They inevitably say, “With everything and my whole heart they will never turn against me.” My practice is busy dealing with the after effects of these famous last words.

One way I teach my students to avoid these conflicts is to appoint monitors in powers of attorney and trusts, who are non-beneficiaries, have business acumen, and optimally are familiar with the affairs of the client, e.g., her financial planner, accountant, etc. The other is to appoint as co-trustee or co-attorney a corporate fiduciary.

I understand—I get the corporate fiduciary problem. I understand you trust your children with all your heart. Yet please do me a favor and for your powers of attorney and for your trust, let’s get monitors. Monitors will not interfere with the daily running of your trust and with your attorneys, but

monitors will ensure that there isn't greed, self-interest, and will have standing to go to court and raise these issues quickly and efficiently so they can be easily resolved.

What happens, though, if we don't have monitors in trusts and we don't have monitors in our powers of attorney? Well, now attorneys have to intervene. Thus, we're going to talk about two interventions. There are mandatory interventions by attorneys, and there are optional interventions. Let's talk first about mandatory interventions by attorneys.

We have the model in Rule 1.14 on a client with diminished capacity.³² We have Restatement Third of the Law Governing Lawyers, Section 24, about clients with diminished capacity.³³ We have a case decided by Judge Glen that I often quote, which is *Cheney v. Wells*,³⁴ and it's a fantastic road map for when attorneys can withdraw as counsel and how they have to ensure that there's a guardian or replacement for themselves if they're in the middle of litigation.

Let's talk about when it's mandatory. If you are in the middle of representing a client, it is mandatory that you not leave them high and dry. That means, if you want to settle the case, it has to be settled, unless you go to court and have a guardian appointed. The attorney may not settle the case on behalf of a client with diminished capacity.

On the optional side, you've got the question of "show me the money." If you want to take on the case that is not mandatory to take on, you're doing it for the money. So you are hired by one of the family members or by some uninterested party for a guardianship proceeding, and you have to let them know that there's no guarantee that the court will

32. MODEL RULES OF PROF'L CONDUCT R. 1.14.

33. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 24 (2000).

34. *Cheney v. Wells*, 877 N.Y.S.2d 605 (N.Y. Surr. Ct. 2010).

require the alleged incapacitated person's estate pay for your representation.

You also must let them know, as in the *Brooke Astor* case, that just because Brooke Astor's grandson, Philip Marshall, loved his grandmother and started the guardianship petition and wanted to be appointed guardian, there's no guarantee that the guardianship will be granted and that the petitioner would automatically become said guardian.

What happened in the *Brooke Astor* case is they decided there was no abuse by Anthony Marshall of his mother, but once the family got the authorities involved, it was stepped up to a criminal case. Not only did they criminally indict Anthony Marshall, the son, they indicted Frank Morrissey, his attorney, and the case was elevated to fraud. So, that guardianship was what brought the matter to light. That guardianship went to the wayside, and now both Mr. Marshall and Mr. Morrissey are looking at possible jail time.

Finally, when determining what is in your client's best interest, whether you should intervene in these kinds of matters, let me ask you a question, I say to my students, "If you were doing this on behalf of a client, let's ask the final questions. Would Mrs. Astor have wanted her 85-year-old son placed in jail? Would Mrs. Astor have wanted \$20 million—which represents greater than 10 percent of her estate—used for legal fees?"

So we end with Hippocrates who said, "First, do no harm." And that's where I leave you.

B. Important Questions of Conflict of Interest

RICHARD
KAPLAN:
(Panelist)

Good morning. I presume everyone has a copy of the handout. There are extra copies if you do not have one. Today, I will focus on the conflicts of interest in some common arrangements as seen in trusts and estates law versus elder law.

The first page of the handout³⁵ has the title “Financial Surrogate,” and the situation is a teaching hypothetical adapted from an article that appeared in *Virginia Lawyer*.³⁶ It’s a fairly simple diagram. The son and father are previous clients. They have had wills done, but now the father supposedly needs some assistance with bill paying. The son has come to you and asks for your assistance in creating a joint bank account between him and his father.

A joint bank account is one of three typical financial surrogacy arrangements. It’s actually the least expensive and the most rudimentary. The other financial surrogacy arrangements are the durable power of attorney for property and the “living” or revocable trust.

The most common financial surrogacy arrangement is an adult child simply becoming a joint bank account owner and holder, and that’s what the son is proposing here. From an elder law standpoint, this is a very cost-effective means of enabling the father to stay current on his bills, and for the son to take over his father’s financial affairs more generally.

From a trusts and estates perspective, however, if, as is typically the case, the son has a sibling (in this case, a sister who is a co-legatee of the father), and if the father’s will leaves half to each

35. See *infra* Exhibit 1.

36. John E. Donaldson, *Ethical Considerations in Advising and Representing the Elderly*, VA. LAW., Mar. 1991, at 14 (situation #1).

of them, the potential exists for the testamentary plans of the father to be countermanded. That is, the son can drain the account and thereby disinherit his sister.

This is the basic conflict of interest. The Model Rules indicate that you can represent a person in this situation,³⁷ but you need to have disclosure.³⁸ Under Model Rule 1.7, this disclosure must be made in writing, but to whom is the disclosure made, and will it make much of a difference?³⁹

At this point, the discussion must begin with what Professor Barry Kozak said, which is, “Why are we assuming that this is necessarily an evil son?” That question brings up a virtual checklist of what you might want to know about the son to determine whether you are comfortable with this arrangement. The son might be a loving and attentive person who is not going to take advantage of this situation. On the other hand, the son will be empowered to drain the account before his sister can do anything about it, so the question is: “What’s the likelihood of his doing so?”

This problem leads us to a detailed fact inquiry. Does the son have a drug problem, or is he chemically dependent in other ways? Is he addicted to gambling, or maybe has business losses? Perhaps the son is behind on his own student loans and needs cash. Or in a more positive vein, the son might have his own children who are now of college age and they need money to go to college. Under any of these scenarios, the son might think to himself, “All I’m doing is accelerating my inheritance to when I actually need the money.” As you can see, a variety of financial stresses might cause the son to want to drain the account.

37. MODEL RULES OF PROF'L CONDUCT R. 1.7(b)(1).

38. *Id.* R. 1.7(b)(4).

39. *See id.* cmt. 20.

The contrary proposition, of course, is that no such financial stresses may exist, and we shouldn't presume that the son will drain the account. Nevertheless, when this situation is considered in class discussions, students often conclude that there is just too much power to place in the hands of the son.

So the question then becomes, "How can you solve the problem that the client came in with—namely, that the father needs some assistance with financial affairs?" The son is saying, "I am here, ready and able to step up to the plate. If you don't like my arrangement, what do you suggest?" That is, simply saying that the joint bank account should not be done is not an adequate response to the father's predicament.

One approach is to ask yourself, "What exactly concerns you about the joint bank account?" The answer is, of course, that the son will drain the account. In that case, one response might be to reduce the account balance. That is, older people oftentimes have large amounts of cash in their bank account, often much more than their foreseeable needs. In fact, the amount may even exceed the FDIC limit (currently \$250,000), and in the lowest-yielding available investment to boot.

This might be an appropriate occasion to take some of that money *out of* the bank account, move it into certificates of deposit, U.S. Treasury bills, or some other investment to reduce the exposure of the father to having the son drain the account. The son will still be able to pay the bills, and, while the potential remains of his draining this account, we have at least minimized the potential harm.

However, this approach may not be acceptable to the son, in which case we have more reason to be suspicious of the son's motivations for the joint bank account. However, if the concern is that the bank account is too large and poses too much of a temptation, then perhaps the solution is lowering the amount in the account.

After a certain amount of prodding, students often conceive of an even better solution. Virtually all of the students have automatic payment arrangements for their utility bills. So, we can ask the son, "Exactly what kinds of bills are you worried about the father missing payments on?" They are typically the critical sorts of utilities: water, electricity, perhaps cable. All of these services can be arranged with automatic debits, leaving the bank account's ownership undisturbed and thereby avoiding any potential problem with the will.

To be sure, this approach won't take care of Home Shopping Network, which you can't set up as an automatic debit, but I'm just not too worried about that particular obligation. If we're worried about the heat being turned off, or the power being cut off, then the solution might be to have automatic debits—in combination or as an alternative to—reducing the amount of the account. This way, critical bills are paid without possibly compromising the father's testamentary plans.

On the other side of the handout, you'll see a different hypothetical.⁴⁰ This situation involves a mother who is living with your client, named Betsy. Mom previously lived with Betsy's older sister, Ann, before Ann died and left one grandchild.

40. See *infra* Exhibit 2 (adapted by the author from John E. Donaldson, *Ethical Considerations in Advising and Representing the Elderly*, VA. LAW., Mar. 1991, at 14 (situation #4)).

We're assuming that Mom has plenty of capacity and sufficient assets as well. Mom could probably live on her own, at least in an assisted living facility or a retirement community, but she wants to live with family. She expressed that desire previously by living with Ann, and she has now lived with Betsy for a while.

Betsy is fine with this arrangement, but, as everyone knows, having an older person in your household is, shall we say, a mixed blessing. There are restrictions on what can be served for dinner and when parties can be held. And, in any case, Betsy has four kids, and Ann had only the one child.

The will is *per stirpes*, which is typical of that generation, meaning that half of Mom's assets will go to each of the sisters' sides. Since Betsy has four kids, she has now asked the attorney to change just one word in the will: where it says "stirpes," put in "capita." Just one little change. How much can that hurt?

Well, as you can see, if this will is *per stirpes*, then Ann's child is going to receive 50 percent while Betsy's four children will split the other 50 percent. If you change the will to *per capita*, Betsy's family *in toto* will basically go from receiving 50 percent to receiving 80 percent of the estate.

From a trusts and estates standpoint, this scenario raises the issue of undue influence. Mom is living in Betsy's home at this moment. Even if you were not otherwise conflicted, there's a high probability that this will is going to be invalidated if challenged, so what are we really accomplishing by changing the distribution pattern?

A typical student response to this situation is to refer Betsy to an unconflicted attorney for purposes of changing Mom's will. That attorney

will undoubtedly interview Mom, and will ask the question, “Why do you want to change your will?” Mom might then say, “Well, I really don’t want to. This is the will that my deceased husband and I created. We have two children. Everything goes *per stirpes* to each side of the family.” (She may not use the phrase “*per stirpes*,” but she will express the basic idea of an equal distribution.)

Then the attorney says, “Where are you living now?” Mom’s response then is, “I’m living with Betsy. She brings this up during every dinner. I’m getting tired of it. I just want to have it done.”

Now the previously unconflicted attorney may feel that, even though she’s had no prior relationship, she does not want to participate in this will revision because there could be a challenge on the basis of undue influence.

In other words, there is no guarantee that referring Mom to another attorney will lead to a changed will. The only certainty is that referring the matter to another attorney will give Betsy the sense that you’re abandoning her. And she may decide to take her other business elsewhere in the future.

Nevertheless, from an elder law standpoint, Betsy is providing an important and genuine benefit to Mom. Betsy is an unpaid family caregiver providing care that is undoubtedly more reliable than what is available from paid caregivers, and is enabling Mom to avoid moving into an institution.

Indeed, what if you were to ask Betsy, “Exactly what is your problem?” She might reply, “Well, I’m living with this older woman; there’s a lot of stress. I am working my butt off.”

You respond, “Did you say ‘working?’ Do you want to be compensated?” Her response: “Yes, I think that I should be paid. I’ve earned it.”

This response leads us to consider whether a family caregiver agreement is appropriate here, an issue that I discuss in a *Virginia Tax Review* article.⁴¹ A family caregiver agreement is a contract between the family caregiver and the care recipient, and is not intended to be overreaching or unfair to anyone. We can make some quick calls to local paid caregivers and get an hourly rate, and that would be the amount used for the contract.

There will be income tax implications for Betsy from the family caregiver agreement,⁴² but if her concern is that she is not being paid for her considerable efforts and inconvenience, we have now solved that problem. Family care agreements are often used in the Medicaid context,⁴³ but they are an increasing phenomenon, even in Canada where there is no Medicaid issue.⁴⁴

Nevertheless, if the concept of paying a family member to provide care is abhorrent, then an alternative might be to make a series of *inter vivos* gifts. *Inter vivos* gifts are not restricted by the will. Mom could give an equal amount to each of the five grandchildren, which would basically accomplish what Betsy wanted to begin with.

To be sure, such gifts will probably not constitute the entire amount that is in Mom's estate, but this approach leaves the will undisturbed and avoids the undue influence issues that revising the will would implicate. Incidentally, and this feature might appeal especially to Mom, a program of annual gifts provides an incentive to Betsy to make sure that Mom is alive and well so that she can continue to make such gifts, while changing the will is an approach that creates a financial

41. Richard L. Kaplan, *Federal Tax Policy and Family-Provided Care for Older Adults*, 25 VA. TAX REV. 509, 526-34 (2005).

42. *Id.* at 528.

43. *Id.* at 533-34.

44. See generally Richard L. Kaplan, *Formalizing the Informal: Family Care Agreements in Canada and the United States*, 1 CANADIAN J. ELDER L. 52 (2008).

incentive for Mom's early demise. Thank you very much.

NINA KOHN: Now we have our third panelist, Mary Radford.
(Co-Moderator)

C. Important Family Concerns: In What Capacity Do We Represent You?

MARY RADFORD: Thank you. I'm just going to follow up on Lenore Davis's and Richard Kaplan's theme. That is, how we can teach our students about the conflicts that will arise between family members, both in elder law (where we're concerned with "lifetime planning"), and trusts and estates (where we're concerned with "death time planning").

I often find that I have students in my elder law classes who haven't taken trusts and estates yet or may not ever take it, and vice versa. Therefore, I try, particularly in my elder law class, to bring up hypotheticals that will cause them to understand that, if you only know about elder law, you may not help a client make the right decisions. And if you're only focusing on estate planning, you also may not help a client make the right decisions.

The case study that I use is inspired by the facts of a true case from Georgia.⁴⁵ It involved an individual who married for the second time, we'll call her Judy, and she married the brother of her first husband, James. James, of course, had been married before and had two children.

(As I always explain to my students, the synonym for "stepmother" is "litigation." I think that's one of the few things the students actually remember that I ever taught them because they will come back constantly and remind me of that.)

45. See *Howard v. Estate of Howard*, 548 S.E.2d 48 (Ga. Ct. App. 2001).

James already had a will leaving everything to his two children, Kim and Lee. Judy gets a little worried and says, “You know, your brother didn’t do that well. He didn’t leave me very much, and I’m a little worried about what is going to happen to me when you die.” And James says, “Don’t worry, we’ll take care of this right now,” and James sets up the ubiquitous joint bank account in his name and Judy’s name for \$500,000. Judy puts \$5,000 into it. Now everything seems fine. Unfortunately, James becomes incapacitated, and his daughter, Kim (who, by the way, is the beneficiary under his will), becomes his guardian.

The elder law attorney representing the guardian, Kim, tells Kim that she is to marshal all of her father’s assets. That includes, of course, closing any joint bank accounts and bringing any assets in those joint accounts that belong to him back into his sole ownership.

Kim is not guilty in this case. Kim has been told by her elder law attorney that this is what guardians do. On the other hand, what’s happened is that the guardian, Kim, has unwittingly completely destroyed a very important component of the estate plan of James.

A good estate-planning attorney, of course, would never recommend the joint bank account as a way to approach this problem with James and Judy. But as we’ve been talking about and alluding to in several situations today, the efficiency and the ease of a joint bank account unfortunately makes that the “estate plan” of a lot of people.

Now, James had obviously enough money. He should have hired an attorney, but, of course, he needed the money and did not want to spend it on something so frivolous as an attorney to help him. So what happens now? Well, in the case, when James died, the money belonged to him. Judy came in and said, “There was an estate plan in

place,” and the court said, “Where’s your proof?”

I then think with my students, when you’re in a situation like this, what do you do? The first question is, “Whom do you represent?” Often, as we well know, there is a conflict between husbands and wives, and I fear most estate planning attorneys don’t think about that enough when the couple comes in together and says, “We would like you to represent us.” The students and I have a long discussion on the concept of joint representation and when it’s appropriate. In fact, if any of you need a good teaching tool on this issue, ACTEC has written commentary to the Model Rules of Professional Conduct, and they’re available on the ACTEC website.⁴⁶ They have a great description of when you should engage in separate representation, and when you should engage in joint representation.

Let’s take the matter further for our attorneys-to-be, our students. Kim has now come to you. You’ve been representing James, and perhaps Judy. Now you represent Kim. Unfortunately, that happens quickly. Attorneys tend to fall into this mode of being the family lawyer, so I try to alert my students to the fact that every time you take on a new member of the family—or even any time you take on a new engagement in the family—you have to think of it as a new matter. (Of course, I always suggest a new engagement letter, and I hope we will be training a crop of attorneys who will be having engagement letters in their files. But I think if all of us who have been around for some time were to poll our friends of our same age group, we would find engagement letters are not commonly used.) Therefore, that sparks the discussion of the new engagement, and the potential for conflict of interest.

46. See AM. COLL. OF TRUST & ESTATE COUNSEL, <http://www.actec.org> (last visited Mar. 18, 2013).

Then I take James and Judy, and I change the hypothetical completely. I say, okay, James lives for another ten years; then he dies. The bank account is still in place, and Judy gets her \$500,000. His estate is worth about \$3 million. Judy is the executor under his will. (Now the students start to laugh because they understand that maybe there could be a conflict when the stepmother is the executor.) Judy is deciding whether to take her elective share. That brings up, of course, a whole range of philosophical questions as to whether the elective share should reflect what would have been James' wishes—whether James, in fact, should have given her more than the \$500,000.

The key issue now for my students is that Judy is a fiduciary because she is an executor. Her job is to fulfill the wishes of her husband, the decedent, but she's also in a position as an individual that may cause her to want to override his estate plan by taking her elective share. So we talk about how people will unwittingly end up in these innocent but difficult situations. It's not the case of somebody pilfering daddy's money, but the client has fallen into this situation partially because the client hasn't been guided well by the client's attorney.

The question I then ask is, "If you represented James and you perhaps represented James and Judy jointly, and you know what James' wishes were, what do you do when Judy comes to you after his death and says that she wants you to represent her?" The first question for the lawyer should be, "In what capacity do you want me to represent you?" In other words, "Do you want me to represent you as the executor of James' estate, or as an individual who is potentially a beneficiary of his estate?"

If Judy says she wants you to represent her as both the fiduciary and as an individual, then we try to analyze if the attorney can do that. Lastly, can Judy, as a fiduciary, come in and shatter this estate plan? Of course, it's legal for her to ask for her elective share. This brings up a very important issue that I think all of us struggle with in our classroom: at what point do you move beyond the Model Rules, beyond professional responsibility, into moral questions relating to your clients? What is your job as an attorney when those moral issues come up?

I want to keep us on time, so I'm going to leave you with all those questions.

NINA KOHN:
(Co-Moderator)

I think we have about two or three minutes for questions.

JOSHUA TATE:
(Audience
Participant)

Hi, I'm Josh Tate from Southern Methodist University. I have a question for Lenore, and it relates to your comment that if you see a will without a "no contest" clause, you know that it wasn't written by an estate planner.

Of course, there are a number of situations where the "no contest" clause won't work. In some states, including mine, if a contest is brought in good faith and for just cause (or probable cause), it doesn't work. Obviously, if the contest is successful, it doesn't work. Moreover, if you don't leave enough money to the person that it's directed against and they don't care about it, then it doesn't work.

What I'm wondering is, say you have a situation where the testator is young enough and has kids that are young enough that the kids have not yet completely disappointed, and there's no conflict at this point. If you put a "no contest" clause in, and you explain what it is supposed to do, is there any danger that it might lull the client into a false sense of security?

LENORE DAVIS: The question is, “Does placing an *in terrorem* clause in a will provide false hopes for the client in thinking that his will is objection-proof?”
(Panelist)

My answer to you is that, regardless of what jurisdiction you’re from, I think an *in terrorem* clause should be placed in as the first line of defense. As I mentioned, in New York and New Jersey, which are neighbors, there are very different views on *in terrorem* clauses. In New York, there’s strong support for an *in terrorem* clause, but that’s not the case in New Jersey.⁴⁷

Yet you also have to understand that many children will not hire their own attorneys to find out how strong an *in terrorem* clause is. They’ll look at this clause and they’ll say, “Oh, if I object, I’m going to lose it all. I don’t even want to risk losing it all.” I don’t know how strong it’s going to be or how strong it is, but just looking at it can be a deterrent for children or beneficiaries.

NINA KOHN: One more question.
(Co-Moderator)

PHYLLIS SMITH: Hi, I’m from Florida A&M College of Law, and I have a question about the *per stirpes/per capita* issue. It becomes more interesting if Ann is the one who is the client who’s coming in wanting to get the will changed because she has one child and Betsy has four children. If Ann is the one who survived after Betsy provided the care first, would you recommend that same option of gifting more to the one grandchild versus the other four?
(Audience Participant)

47. N.J. STAT. ANN. § 3A:2A-32 (West 2013); see also *Haynes v. First Nat’l Bank of N.J.*, 432 A.2d 809 (N.J. 1981).

RICHARD
KAPLAN:
(Panelist)

That is an interesting but different hypothetical. The situation that I set up is the more natural pattern; that is, the younger child is the survivor. But as a pedagogical matter, after students feel that they have resolved my issue, you could certainly change the pattern and ask whether their analysis would be different in the reverse situation.

By the way, on the undue influence point respecting gifting, there is a lower burden, and there is also less of a paper trail with *inter vivos* gifts than with testamentary dispositions. If the short-changed donees question the amount of their gifts, the donor is still alive—unlike the situation with testamentary transfers—and might explain, for example, that “well, I’m giving this amount because this is what I want to do,” or “these are Christmas presents,” or “I’m just following the advice of the estate planning attorneys I see quoted in the *Wall Street Journal* every day.”

Barry had talked about the ACTEC commentary sample Model Rules for examples and pedagogy. If you find yourself teaching an elder law course and you’re not immersed in some of these issues, there’s also the National Academy of Elder Law Attorneys, NAELA.org, and they have something called aspirational standards.⁴⁸ They look at the Model Rules, not as extensively as ACTEC does, but they consider how to apply the Model Rules in the elder law context. If you find yourself teaching some elder law issues in your estate planning class, feel free to look at them and you’ll get some good examples.

48. NAT’L ACAD. OF ELDER LAW ATT’YS, ASPIRATIONAL STANDARDS FOR THE PRACTICE OF ELDER LAW WITH COMMENTARIES (2005), available at <http://bit.ly/XndZ4P>.

IV. THIRD PANEL: TRUST PROTECTOR CLAUSES

BARRY KOZAK: (Co-Moderator) Now we're moving to the final panel where I'll introduce Bill LaPiana, and he'll introduce the one speaker on this panel. Bill and I put this program on together, even though I'm moderating. He represents the Trusts and Estates Section, and he is the Rita and Joseph Solomon Professor of Wills, Trusts and Estates, and the Director of the Estate Planning Graduate Tax Program at New York Law School.

BILL LaPIANA: (Co-Moderator) It is my great pleasure to introduce Larry Frolik of the University of Pittsburgh. There's a lovely symmetry to this in that I started out as a law professor at the University of Pittsburgh. Larry was my colleague, something I appreciate enormously, and it just seems very right to be able to introduce him to talk about trust protectors, an issue of enormous and growing importance.

LARRY FROLIK: (Panelist) Thank you.

I want to talk about trust protectors because trusts are becoming increasingly interesting. Trusts and trust protectors are more important than ever for several reasons. In particular, in elder law classes, I'm reconsidering how much time I devote to trusts because I *have* to teach trusts now in that course. I can't assume that they will have had a course in trusts and estates.

Why are trusts so important these days? First, the irrevocable trust that was popular in the old days is dying. It's almost impossible now to create a trust that is truly irrevocable. That tide's going out relatively fast.

The irrevocable trust is going because society is more and more willing to overturn a settlor's wishes as expressed in a trust. If you're new to the field, it doesn't seem that important. However, if you look over the last 40 or 50 years

of case law, you will see a tremendous change in irrevocable trusts. That change has led to the concept of having someone down the line in the years to come who can act on behalf of the testator or the settlor to modify that trust so you don't have to go to court.

The second reason, which is fascinating, is the growth of the use of trusts not just to avoid probate. The use of trusts has exploded in the last few years.

The reasons we're seeing trusts being used so much are the following: the fear that large family assets will be lost to divorce, lack of confidence in the abilities of heirs to manage money, and the potential for disability and/or dementia of a surviving spouse or child. It's also a recognition that guardianship is a failure of private planning; there's no reason for your client to ever need guardianship because you can better manage property by the use of a trust. As far as health care personal decisions are concerned, you can do that through the appointment of a surrogate decision-maker. And, of course, there's the fact that no one in their right mind would ever sign a power of attorney to control many assets. It's good for managing a small bank account to pay the bills, but it's certainly not something you want to deal with very valuable financial assets. If you have significant financial assets, you create a trust. It could be a revocable trust, but you certainly don't leave large assets sitting out there to fall into a power of attorney for all the reasons that have been explained earlier.

I think we're going to see that, as people age, they're increasingly going to transfer assets into an *inter vivos* trust as a standard practice. They're also going to leave their assets to their offspring, decedents, and spouses in trusts so that they can protect those assets.

Once you have these trusts, the question becomes, “How do I know down the line that the trust will do what I want?” Because, as has been pointed out, most trusts eventually have corporate trustees or family trustees that you don’t have a lot of confidence in.

I think it would be irresponsible for any lawyer not to tell their client that they cannot depend on family members as trustees. Family members are not to be left alone with large amounts of money. They don’t know how to invest it, how to manage it, or how to distribute it over long periods of time. Moreover, it creates family conflict leading to all the problems we’ve seen in the cases discussed today. Again, I can’t imagine any lawyer who wouldn’t advocate at least a joint corporate trustee. Having said that, I also have limited confidence in corporate trustees. The corporate trustee is the guy who went to business school, ended up in the trust department, and now he is managing trust funds. He likely doesn’t know how to invest money any better than many individual trustees.

A solution is the trust protector. The concept is, “Who’s watching the trustee?” It can be a trust protector. The trust protector is someone who can oversee the trustee. And this is also why it is relevant in elder law, because we know elder law is now increasingly picking up on the special needs trust concept as a way of protecting heirs in their later years when they may suffer a loss of capacity.

The idea is to create a special needs trust for disabled beneficiaries or a trust designed to protect the surviving spouse if she becomes demented and can’t watch out for her own financial interests. The trust paradigm assumes that a beneficiary will watch out for himself or herself. It assumes that the beneficiary is the watch bird watching the trustee. And, if the beneficiary doesn’t like what

the trustee is doing, the beneficiary can resort to the courts and say, "I don't think they're doing right by me."

What happens when your beneficiary is incapacitated? Now, they can't do it. They can't watch out for themselves, and that's when trouble arises. And so people in the special needs world have come up with a concept of the protector, but I think it's going to flow right back into other trusts for surviving spouses and offspring who may become disabled down the line or who have financial problems.

The first concept of a protector is the ability to replace the corporate trustee with another corporate trustee. That's an elemental power someone has to have, otherwise you're stuck with the bank, and you can't do anything with them. They don't care about you and your complaints. But if they can be removed, you'd be surprised how soon they will answer your phone calls. So that's the first thing.

The other problem you worry about is, "Does the trust meet future eligibility requirements for governmental benefits?" That's why special needs trust planners are so worried. They are worried that the trust set up today, which currently lets my beneficiary qualify for Medicaid and other governmental programs, may not qualify 30 or 40 years from now. We may need to change that trust.

You can always go to court. Any trust can be modified, but it's much simpler if you were to have a trust protector empowered with the right to modify the trust as needed to carry out the intent of the settlor in light of changes in federal law.

You can also have the trust protector be, as it were, the monitor of the lifestyle of the beneficiary. Someone watching to make sure that the trust is distributing enough funds and in the right form to keep the lifestyle of the beneficiary at an appropriate level.

There are other powers you can give to trust protectors, but these are the ones I think are going to become very commonplace in the future. If you're teaching trusts and estates and you're not talking about protectors, you're not preparing the students for the world to come. And teaching elder law is similar. I think we need to get our students alerted to these protector issues.

There are also some fascinating questions. The first one, of course, "Is a protector a fiduciary?" There are those who argue it shouldn't be. From my standpoint, of course you'd want them to be a fiduciary and hold them to a very high standard, otherwise you get into difficult questions of what is their standard of care.

The second question, "Is this a proactive or a reactive position?" Does the protector have an obligation to take steps to protect the beneficiary or is the trust protector merely empowered to take steps if it thinks something should be done? But if there is an obligation to act, who enforces it? Do we need a protector to watch the protector? Probably not. But the point is, "Can a protector be in trouble if she doesn't take affirmative steps to protect the beneficiary, and, if so, what standards would you judge her by?"

The third question is, "In what document do you appoint the protector?" I've seen people say, "Name the protector outside of the trust in a separate document." I don't like that. Can you actually create a separate document that permits the replacement of the trustee? I'm not sure. You

probably can, but it is an interesting question. How much language are you going to put in the trust about what the protector can do and what kinds of standards they're held to? And then, of course, who replaces the protector? Because you're probably not appointing a corporate protector. The protector is likely to be an individual. You may not want Cousin Harry to be the trustee, but you do think that he can at least carry out the duties of a protector. But what if Harry dies, becomes incapacitated, or just tires of being a protector? How is his replacement determined?

These are just some of the uncertain aspects of trust protectors. Then you have the question, "If you have a power of attorney for other assets, do you want the protector to be able to replace the agent under the power of attorney for the same reason you would allow them to replace the trustee under the trust?" And how does a protector relate to your surrogate health care decision-maker (the person who can sign your client into the assisted living, for example)? That may look like a health care decision, but it is a huge financial commitment. What if the protector thinks that is not in the best interest of the principal? Should the protector be expected to monitor the actions of the surrogate health care decision maker?

If not, you're really letting the surrogate call the shots on how the principal's money is going to be spent. Perhaps the protector should be empowered to replace the surrogate or at least monitor the surrogate, or be empowered to go to court and ask the court to do it.

And should a protector be monitoring a guardian? Despite the best efforts and desire to avoid the use of trusts and the appointment of agents, a court may decide to appoint a guardian.

What's the relationship of the guardian to the protector? Is the guardian going to be able to come in and remove your protector or interfere with the protector?

I think there are many interesting questions to be considered as we start developing protector law. And, as I have said, I think in a trusts and estates course, it should be part of what you cover. It doesn't take long to explain that the settlor should sign a trust at the bottom and then move on to other interesting subjects, such as trust protectors. And, in elder law, we may have to pull back from spending so much time on all the interest of Medicaid planning and start talking more about trusts and trust protectors.

My time is up. I want to thank the organizers for this opportunity to talk to you about protectors.

BILL LaPIANA:
(Co-Moderator)

I think we have time for one or more questions for Larry.

PATRICIA CAIN:
(Audience
Participant)

Hi, I'm from the Santa Clara University School of Law. I'm interested in the trust protector, and I do teach it, but who do you name as a trust protector? That's always the big question for me. Can you name yourself as the lawyer?

LARRY FROLIK:
(Panelist)

As I suggested, family members can be named trust protectors; but what if there aren't family members, or none that you'd want to name as a protector? There are lawyers who are now offering themselves. They are willing to be protectors. You get into enormous conflicts, obviously, if you are the lawyer who drew up the trust. So that is probably not a good idea.

But I think we're going to have people begin to offer themselves as professional protectors. We see it in the guardianship world already, and we're going to see it more in the protector world.

Absent that, I think the alternative would be doing reciprocal appointments with other estate planners in town. It's not a conflict, but it's a comfortable arrangement.

BOB WHITMAN:
(Panelist) Larry, for some time, lawyers in Florida would not take on protector status because they saw it as an invitation to litigation, and I think it is a problem now.

LARRY FROLIK:
(Panelist) It's also an invitation to a paycheck.

BOB WHITMAN:
(Panelist) Well, that's right. But it is a problem.

LARRY FROLIK:
(Panelist) No. You're right.

BARRY KOZAK:
(Co-Moderator) As Larry said, this is maybe not the traditional way of doing estate planning and elder law planning, but as Medicaid planning is being restricted, and as there is more litigation in trusts and estates, maybe that's the future.

SUSAN
CANCELOSI:
(Co-Moderator) We're also seeing guardianship services now, which are similar to the small organizations that used to function solely in the area of indigent services. They're now doing a fee scale basis for this type of work. Some of them have begun to take on modest estates, and that allows it to be more affordable for everyone.

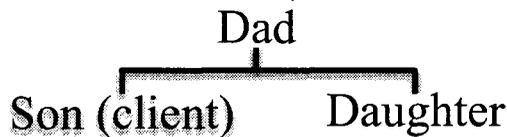
BARRY KOZAK:
(Co-Moderator) Thank you to both the Section on Aging and Law and the Section on Trusts and Estates.

EXHIBIT 1

Association of American Law Schools
Trusts and Estates, and an Aging Population:
What We Need to Know and Teach

Conflicts of Interest Faced by Beneficiary/Agents

Richard L. Kaplan
University of Illinois
January 5, 2013

FINANCIAL SURROGATE?

You have previously prepared wills for both Dad and Son. Dad is having difficulty remembering to pay bills, and Son wants to become Dad's financial surrogate, preferably through a joint checking account. Dad's will divides his estate equally between Son and Daughter.⁴⁹

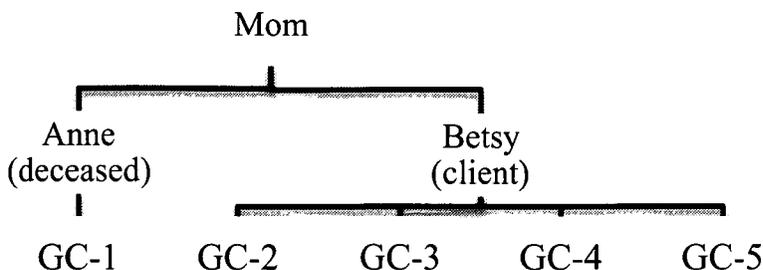
Question: What would you do?

1. Disclosure of conflicts and client confidentiality.
2. Suitability of son as a financial surrogate.
3. Possible impact on father's testamentary plans.
4. Alternative strategies (bank account reduction; automated bill-paying)

49. This hypothetical is adapted from John E. Donaldson, *Ethical Considerations in Advising and Representing the Elderly*, VA. LAW., Mar. 1991, at 14 (situation #1).

EXHIBIT 2

PER STIRPES TO PER CAPITA?



Betsy and her husband are long-time clients. Betsy's mother recently moved into Betsy's home after living with her other daughter, Anne, until Anne passed away. Mom has ample financial resources and is just as sharp as ever. The will that Mom and her late husband prepared leaves everything to their grandchildren *per stirpes*. Betsy wants you to persuade Mom to change her will's distribution pattern to *per capita*.⁵⁰

Question: What do you recommend?

1. Effect of undue influence on validity of will.
2. Referral to another attorney.
3. Family caregiver agreement.
4. *Inter vivos* gifting.

50. This hypothetical is adapted from John E. Donaldson, *Ethical Considerations in Advising and Representing the Elderly*, VA. LAW., Mar. 1991, at 14 (situation # 4).