

Advising the Older Client: Tips & Traps

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INTRODUCTION

I was born in 1950. That means I've passed age 65, the milestone we Americans typically use to delineate people who are "old" from the rest of us. One of the main reasons we use age 65 is because for many years that was the age at which qualified workers could begin to draw Social Security retirement benefits. As the number of Americans over age 65 increases, it becomes increasingly important for attorneys to be aware of particular issues involved with representing the older client. Therefore, this presentation addresses some tips and traps for representing clients "of a certain age."

PART ONE – SINGLE TRANSACTION CONSERVATORSHIPS

The Alabama Uniform Guardianship and Protective Proceedings Act governs the appointment of guardians and conservators. Ala. Code § 26-2A-101, *et seq.* (1975). An often-overlooked strategy found within the statute, however, can be of particular use for clients in need of nursing home care.

In re Jane Doe, Incapacitated

Consider this scenario. Jane Doe is 82 years old, and unmarried. After suffering a stroke, she is admitted to the hospital and treated. She is ready for discharge but cannot return to her home. Instead, she will require nursing home care, probably for the remainder of her life. Jane has not executed a power of attorney or advance directive.¹

Jane Doe has a total of \$12,000 in her checking and savings account. She receives \$3,300 per month in combined monthly income (\$1,500 in Social Security, and a pension of \$1,800). She owns no real property, and sold her car a few years ago when she stopped driving.

Jane Doe has one adult daughter, Betty Doe who lives an hour away. Betty cares very much for her mother, but has a family of her own and works full time. Betty would like to help care for Jane, but in reality, she has limited time to commit.

In this scenario, Jane needs to be discharged from the hospital to a nursing home. However, no one has legal authority to make medical decisions for her. In addition, no one has legal authority to gather the five years' worth of financial records required to support her Medicaid application, nor does anyone have access to her accounts to pay her bills or help her spend down below Medicaid limits.

While Jane has some resources, she does not have sufficient resources to make a full-blown conservatorship economical. Almost all of her monthly income will ultimately be

¹ See attached sample petition and order for *In re Jane Q. Doe, Incapacitated*.

contributed to the cost of her nursing home care, so there will be very few transactions to account for once she is admitted to nursing home and receiving Medicaid benefits.

In such a case a single transaction conservatorship may be useful. Ala. Code § 26-2A-137 (1975) states as follows:

Protective arrangements and single transactions authorized.

(a) If it is established in a proper proceeding that a basis exists for the appointment of a conservator or protective order as described in § 26-2A-130, the court, without appointing a conservator, may authorize, direct, or ratify any transaction necessary or desirable to achieve any security, service, or care arrangement meeting the foreseeable needs of the protected person. Protective arrangements include payment, delivery, deposit, or retention of funds or property; sale, mortgage, lease, or other transfer of property; entry into an annuity contract, a contract for life care, a deposit contract, or a contract for training and education; or addition to or establishment of a suitable trust.

(b) If it is established in a proper proceeding that a basis exists for the appointment of a conservator or protective order as described in § 26-2A-130, the court, without appointing a conservator, may authorize, direct, or ratify any contract, trust, or other transaction relating to the protected person's property and business affairs if the court determines that the transaction is in the best interest of the protected person.

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

Ala. Code § 26-2A-137 (1975). This section contemplates that a "limited conservator" or "conservator for a single transaction" may be appointed without establishing a full-blown conservatorship.

In Jane Doe's case, we may ask the court to appoint a limited conservator to gather her financial records, access her funds and spend it down pursuant to Medicaid rules,² and to sign

² This may include, e.g., the cost of the conservatorship proceeding, paying off any of Jane's debts, establishing a burial fund for her, or funding her health care costs for a short period of time. It could also include the establishment of a supplemental needs trust to hold excess assets to pay for her supplemental needs, while allowing her to achieve Medicaid eligibility.

and file her Medicaid application. Once the enumerated tasks are completed, the limited conservator may report to the court and be relieved of further liability.

A significant advantage to this proceeding is that it eliminates the need for annual or final accountings, which require notice and hearing. It also eliminates the need for a surety bond. Notice of the proceeding must be given to the same individuals entitled to notice in a full-blown conservatorship proceeding. The burden of proof for the appointment of a single-transaction conservator is the same as that for a full-blown conservatorship. The appointment of a guardian ad litem, court representative, and physician are also required as with an ordinary conservatorship proceeding.

Jane Doe's daughter, Betty Doe may be a good candidate to serve as special conservator. But given the fact that she has a job and responsibilities of her own, she may not be inclined to take on the responsibility. In that case, a qualified attorney may be a good choice to gather the financial paperwork and to navigate the complex Medicaid eligibility rules.

Betty Doe is in a better position to serve as Jane's guardian, however. This is an ongoing obligation but it does not require a bond, nor does it require Betty to do the heavy lifting for the Medicaid application process. While Betty is responsible for making medical decisions and supervising her mother's care, in reality she will not be required to take actual physical custody of her mother, because Jane will require ongoing long-term care in a nursing home.

In this instance, the special conservator could effectively gather all of Jane's records from any banks or other financial institutions. In addition, because Jane receives too much monthly income to qualify for Medicaid, a Qualified Income Trust could be established by the single-transaction conservator pursuant to an order of the probate court.

Qualified Income Trusts and Supplemental Needs Trusts

Medicaid is a means-tested program, meaning that individuals with excess resources cannot qualify. Currently, an individual with more than \$2,205 per month in income is

disqualified for Alabama nursing home Medicaid. A single applicant cannot have more than \$2,000 in non-exempt assets to qualify, while a married applicant may be able to set aside some marital assets for the protection of their well spouse living in the community (i.e., not living in a nursing home).

The current cost of nursing home care in Alabama is about \$6,000 per month. As noted above, the Alabama Medicaid Agency requires an applicant have no more than \$2,205 per month in income in order to qualify. In Jane Doe's case, her gross monthly income is in excess of that amount (\$3,300), but far short of being enough to cover her \$6,000 per month cost of care. As a result, Medicaid permits the creation of a Qualified Income Trust (also known as "Miller Trust") for this very purpose. *See* 42 U.S.C. §1396p(d)(4)(B) and Ala. Admin. Code r. 560-X-25-.10(4)(a).

Once established, the QIT permits Jane to meet the income requirement for Medicaid, notwithstanding the fact that she receives more than the permitted amount. This is because essentially all of the funds which flow through her QIT each month will be contributed to the cost of her nursing home care. In addition, if there are any excess funds remaining at the time of her death, they must be distributed to Medicaid to help repay them for the benefits Jane received during her lifetime. In practice, however, the QIT rarely has a significant balance at death.³

At the time of the Petition, however, Jane's resources also exceed the Medicaid cap of \$2,000. Therefore, she must "spend down" some of her resources before she can qualify for Medicaid.

From Jane's checking account, \$2,000 could be set aside for Jane's use under Medicaid rules, another \$5,000 could be earmarked as a burial fund, and the remainder could be applied to the cost of the conservatorship proceeding or her healthcare costs, as appropriate. Once Jane has

³ Pursuant to the Alabama Uniform Power of Attorney Act (effective January 1, 2012) the authority to create, amend, or revoke an inter vivos trust must be expressly and specifically granted by the terms of the POA. Ala. Code § 26-1A-201(a)(1). In practice, many powers of attorney do not contain this specific authority. Without it, an agent lacks legal authority to establish a QIT on behalf of a patient, and court action is required.

been admitted to an appropriate facility and Medicaid eligibility established, the limited conservator can report his or her actions to the probate court and be relieved of further responsibility.

Alternatively, if Jane has sufficient excess resources, a Supplemental Needs Trust could be established for her benefit. Funds held in an SNT may be used to supplement a patient's standard of living by paying for things that Medicaid does not cover. For example, SNT funds could be used to pay the additional monthly cost of a private room, rather than a semi-private room in a nursing home.

Supplemental Needs Trusts are primarily a creature of federal law, but applicable to state law as a condition of our state's participation in the Medicaid program.⁴ For patients with even a relatively small amount of excess funds, an account may be established with the Alabama Family Trust for a very reasonable cost. *See* Ala. Code § 38-9B-1 (1975), et seq. The catch is that any excess funds remaining in a patient's Alabama Family Trust account at death must first be used to repay Medicaid for costs expended on the patient's care. As with the establishment of a QIT, a Supplemental Needs Trust could be established with the use of a single transaction conservatorship.⁵

For Jane Doe, once Medicaid eligibility is established, there is no need for an ongoing conservatorship. In order to maintain her Medicaid eligibility, Jane's assets cannot exceed \$2,000.⁶ In addition, Jane should not be accumulating many assets because all but \$30 per month of her income must be contributed to the cost of her care.

⁴ *See* Ala. Code § 19-3B-1101 (1975); *see also* 42 U.S.C. §§ 1396p(d)(4)(A), 1396p(d)(4)(B), and 1396p(d)(4)(C).

⁵ Ala. Code § 26-2A-137(b) (1975). "If it is established in a proper proceeding that a basis exists for the appointment of a conservator or protective order . . . the court, without appointing a conservator, may authorize, direct, or ratify any . . . trust . . . relating to the protected person's property and business affairs if the court determines that the transaction is in the best interest of the protected person."

⁶ Note that nursing homes often establish patient accounts to hold these small amounts of money (if necessary) and apply the funds to patient's miscellaneous personal needs (e.g., a visit to the beauty parlor).

PART TWO – LEGAL CAPACITY

When dealing with elder clients, legal capacity is a common issue. When determining whether an individual has legal capacity, the first question should always be: “capacity to do *what?*”⁷ There are different standards for legal capacity to enter into a contract, to execute a power of attorney, or to execute a will or revocable living trust.⁸

The Presumption of Competence – But When?

The law “presumes every person sane and casts the burden of establishing insanity on the one asserting it.” Equitable Life Assur. Co. of the U.S. v. Welch, 195 So. 554, 558 (Ala. 1940); see also Cordell v. Poteete, 331 So. 2d 400, 402-403 (Ala. Civ. App. 1976).

The issue is whether the person had sufficient capacity at the moment of the transaction at issue. See Cagle v. Casey, 405 So. 2d 28 (Ala. 1981) (“The appellants had the burden of proving to the reasonable satisfaction of the trial court that the grantor was incompetent at the very time of the transaction.”).

Even if an individual can be shown to lack capacity at a particular time, that fact does not give rise to a legal presumption that the individual lacked capacity at a later date. “Proof of insanity or mental incompetency at intervals, or of a temporary character, creates no presumption that it continued up to the time of the transaction, and the burden is upon the attacking party to show insanity at the very time of the transaction.” Equitable Life Assur. Co. of the U.S. v. Welch, 195 So. 554, 558 (Ala. 1940); see also Hall v. Britton, 113 So. 238 (Ala. 1927).

In Murphree v. Senn, the Alabama Supreme Court determined that the fact that an executrix who acted “temporarily crazy” was not sufficient to prove lack of testamentary capacity at a later date:

It may be stated further, that if it were shown from the facts stated, that so far back as 1870 or 1871, testatrix acted, on one occasion, like she was temporarily

⁷ This concept is very well explained in Hugh M. Lee’s *Alabama Elder Law*, published by Thompson West.

⁸ See “Legal Capacity Quick Reference” at the end of this paper.

crazy, that fact would not even tend to show that she was without testamentary capacity in December, 1891, when she executed her will, unless such mental aberration were shown to have had some connection with her condition at the latter date, by proof of intervening periods of mental disturbance. **The inquiry in such cases is directed to the mental capacity of the party at the time of the execution of the will.**

That was the issue on that point, tendered by contestants, in their allegation that testatrix was then mentally incapable of executing the will; and the burden was on them to establish that fact, to the satisfaction of the jury. There was no evidence outside of that referred to, given by these two witnesses, that tended to support this allegation, and that was not pertinent. Generally, without more, in the case of a person shown to have been of continuous, exceptional testamentary capacity, the fact that she was temporarily beside herself 20 years previously, would not show that she continued to be or was deranged, when she made her will.

If it were shown that a testator was insane at any time prior to the making of the will, this fact would not support the presumption, that the insanity continued to the making of the will, unless it were also shown, that the insanity was habitual and fixed. **The burden was on contestants to establish such incapacity before the proponent could be called on to show, that the will was made in a lucid interval.**

Murphree v. Senn, 18 So. 264 (Ala. 1895) (citations omitted).⁹

Powers of Attorney

To execute a valid power of attorney, the principal must “understand and comprehend” what he is doing at the time the power of attorney was signed. Queen v. Belcher, 888 So. 2d 472, 477 (Ala. 2004). The burden to prove the invalidity of a POA for lack of capacity is upon the party attacking its validity.

Jurisdiction over a controversy regarding the validity of a power of attorney (or to have one set aside for lack of capacity) is probably proper in the Circuit court.¹⁰

To have a POA set aside for lack of capacity, it must be shown that either (1) the principal lacked capacity at the time the POA was executed, or (2) that the principal was “habitually or permanently incompetent.” Id. If the second method is used to satisfy the initial

⁹ See also Hubbard v. Moseley, 75 So. 2d 658 (Ala. 1954) in which the court stated: “We will, however, refer to the principle that evidence of prior insanity will not sustain a claim that it continued to the time of executing the will “unless it were also shown that the insanity was habitual and fixed. The burden was on contestants to establish such incapacity before the proponent could be called on to show, that the will was made in a lucid interval.”

¹⁰ Four counties have granted probate judges equity jurisdiction concurrent with the circuit courts, but under two sets of rules. See Acts of Alabama 1971, No. 1144 (Jefferson and Mobile Counties); see also Ala. Const., Amendment 758 (Pickens and Shelby Counties).

burden of proof, then the burden shifts to the proponent of the document to demonstrate that it was signed during a “lucid interval.” Id.

The Alabama Supreme Court recently reaffirmed these principals in Troy Health & Rehab v. McFarland, 187 So. 3d 1112 (Ala. 2015). In that case the party attacking the validity of the POA failed to demonstrate “insanity at the very time of the transaction.” The court also found that general evidence that the principal was diagnosed with “altered mental status” and “alcohol persistent dementia,” as well as three different medical evaluation forms indicating inability to properly identify the year, month or day of the week, was not sufficient to prove “habitual or permanent incompetence.” Id. (“A diagnosis of dementia does not determine dispositively that a person is ‘permanently incompetent,’ as that term is used to describe the mental incapacity necessary to justify the avoidance of a power of attorney.”). Id.

When the issue of whether an individual presently has capacity is before the court, the issue is the capacity of the alleged incompetent at the time of trial, not at some other time. Hornaday v. Hornaday, 48 So. 2d 207, 208 (1950).

Expert Medical Testimony Alone is not Dispositive of Capacity Questions

Competency is ultimately a legal question, not a medical question. While the expert testimony of a physician is certainly evidence to be weighed by the judge or jury, it is not dispositive of whether an individual had capacity at the relevant time.

The testimony of the doctor, although expert testimony on the question of incompetence, is to be given such weight as the trier of facts deems warranted, for the opinion of an expert as to insanity is not conclusive on the trier of fact, but is to be weighed like other evidence, and the trier of fact may totally reject the expert’s testimony even though it is without conflict. Here, there was a conflict between the doctor’s testimony and that of the plaintiff. And, where there is a conflict in the testimony of witnesses, the trier of fact has the duty to resolve it as best it can under the circumstances. The trial court resolved this conflict in favor of the competence of defendant.

Cordell v. Poteete, 331 So. 2d 400, 403 (Ala. Civ. App. 1976) (citations omitted).

In Smith v. Smith, 48 So. 2d 456 (Ala. 1950) (cited above by Poteete) the Alabama Supreme Court discussed the role of expert testimony regarding the issue of competency, concluding that even uncontroverted expert testimony is not dispositive of the issue of capacity:

It is, of course, true that where the evidence of [experts] is in conflict with the testimony of lay witnesses on the issue of insanity, the court is prone to accord more weight to the testimony of the [experts] than to the testimony of nonexpert witnesses.

But the rule to which we have referred is not an inflexible rule. The opinions of expert witnesses as to insanity are not conclusive on the jury, but are to be weighed like other evidence and the jury may reject all expert testimony, though it is without conflict In other words the judgments of experts or the inferences of skilled witnesses even when unanimous and uncontroverted are not necessarily conclusive on the jury.

Smith v. Smith, 48 So. 2d 546, 551 (Ala. 1950) (citations omitted).

In Lawrence v. First Nat'l Bank of Tuskaloosa, the court explained that lay testimony as to the soundness of a testator's mind is proper in the context of a will contest:

[U]nder Alabama law even a lay witness may testify in a will contest that another person was 'of sound mind' or 'mentally sound' or 'mentally competent' without transgressing the rule prohibiting testimony on the ultimate fact . . . provided the proper predicate has been laid. As stated in *Ex parte Lee*, 506 So. 2d 301, 303 (Ala. 1987):

'To lay a proper predicate for the admission of such an opinion, a witness must first have testified: (1) to facts showing that he had an adequate opportunity to observe such defendant's conduct in general, and (2) to his personal observation of specific *irrational* conduct of the defendant.'

Lawrence v. First Nat'l Bank of Tuskaloosa, 516 So.2d 630 (1987).

The standard for testamentary capacity in Alabama is low

The standard for testamentary capacity in Alabama is exceedingly low. Alabama case law provides the following standard:

"The law presumes that every person has the capacity to execute a will, and the burden is on the contestant to prove the lack of testamentary capacity. To possess testamentary capacity, one must be able to recall the property to be devised, the desired disposition of the property, and the persons to whom he or she wishes to devise the property."

Ex Parte Helms, 873 So 2d 1139, 1147 (Ala. 2003).

This concept has also been codified in the Probate Code, which provides that “[a]ny person 18 or more years of age who is of sound mind may make a will.” Ala. Code § 43-8-130 (1975). The law “presumes that every person of full age has such testamentary capacity,” and a person “may make a valid will “even though he or she is not competent to transact the ordinary business of life.” Barnes v. Willis, 497 So. 2d 90, 91-92 (Ala. 1986).

Note also that Alabama Uniform Trust Code explicitly states that the capacity required to execute a valid revocable living trust is identical to the capacity required to execute a last will and testament:

The capacity required to create, amend, revoke, or add property to a revocable trust, or to direct the actions of the trustee of a revocable trust, is the same as that required to make a will.

Ala. Code § 19-3B-601 (1975). On the other hand, it appears from the comments to the trust code that the capacity required to create an irrevocable trust is higher than that required to make a will or revocable trust. *See* Ala. Code § 19-3B-402, Uniform Comment, *Requisite Mental Capacity*.

Appointment of a Conservator Does Not Necessarily Deprive a Ward of Testamentary Capacity

Even when a conservator has been appointed, that fact alone does not mean that the ward necessarily lacks testamentary capacity. The law is clear that the standard for capacity to transact “ordinary business affairs” is *higher* than the standard for testamentary capacity. Queen v. Belcher, 888 So. 2d 472 (Ala. 2004).¹¹ Whether to appoint a conservator is based upon that higher standard—the ability to transact ordinary business affairs—not the lower standard applicable to testamentary capacity.

¹¹ Note that in Queen v. Belcher, the court held that a trust agreement is “an inter vivos conveyance of property, and is, therefore, subject to the standard governing conveyances.” This ruling was issued prior to Alabama’s adoption of the Uniform Trust Code in 2006. As discussed herein, § 19-3B-601 has reversed that rule, and now explicitly states that the capacity to create, amend, revoke or add property to a revocable living trust is the same as testamentary capacity.

In addition, the power to make a will is excluded from the powers exercisable on behalf of a ward by a conservator or the court.¹² Because “a ward thus retains testamentary *authority*, the conservatorship statute clearly indicates that the ward may also retain testamentary *capacity*.” Toler v. Murray, 886 So. 2d 76, 78-79 (Ala. 2004) (emphasis original); *see also* Ala. Code § 26-2A-136(d) (1975) (“a determination that a basis for appointment of a conservator or other protective order exists *has no effect otherwise on the capacity of the protected person*.”) (emphasis added).

Accordingly, the Alabama Supreme Court has held that a “person may execute a valid will, even if he or she is *not competent to transact ordinary, everyday affairs*. A determination to appoint a conservator is not tantamount to an adjudication of *testamentary capacity*.” Toler v. Murray, 886 So. 2d 76, 79 (emphasis original; citations omitted).

Under prior law, a ward of the court for whom a curator had been appointed pursuant to Ala. Code § 26-7A-1, *et seq.* could not effectively execute “any instrument in writing” without prior court approval. Ala. Code § 26-7A-7 (1975) (*repealed*).¹³ In Barnes v. Willis, 497 So. 2d 90 (Ala. 1986), the court construed that statute and held that term “any instrument in writing” included a last will and testament. Id. As a result, the court held that a ward subject to a curatorship could only make a valid will with court approval, after prior notice and hearing. Id. at 92. But even under prior law, the fact that a ward was subject to a curatorship was not dispositive of the ward’s testamentary capacity:

The “sound mind” test still remains the standard for determining testamentary capacity. Our holding merely requires that the factual question of testamentary capacity be determined at the § 26-7A-7 hearing, rather than when the will is contested. It is possible that one who is sufficiently mentally incapacitated to require a curator may still possess mental capacity to make a will, because testamentary capacity may be less than the competency to transact the ordinary business of life. **A determination to appoint a curator is not an adjudication**

¹² As to the court, *see* Ala. Code 1975, § 26-2A-136(b)(3); as to the conservator, *see* Ala. Code 1975, §§ 26-2A-152(a) and -154.

¹³ “A ward of the court, under Code 1975, § 26-7A-1 *et seq.*, is someone unable to manage his or her own property, for either physical or mental reasons, and whose property, therefore, requires management by a court-appointed curator.” Barnes v. Willis, 497 So. 2d 90 (Ala. 1986).

of testamentary capacity. In regard to situations where the ward is physically incapacitated but mentally competent, the statute may still be applicable and provide a measure of protection; but we do not reach that issue in this case because the record is silent as to the reasons for the appointment of a curator for Carter.

Barnes v. Willis, 497 So. 2d 90, 92 (Ala. 1986).¹⁴

Appointment of a Guardian May Cast Doubt Upon Testamentary Capacity

As noted above, everyone is presumed to have capacity until proven otherwise. When the testator has an ongoing lack of capacity—habitual or permanent insanity in the terms of the older cases—then the burden shifts to the proponent of the will to demonstrate that the will was executed during a lucid interval.

In Houston v. Grigsby, the court held that the fact that a guardianship had been imposed upon the testator was sufficient to shift the burden to the proponent of the will to demonstrate a lucid interval:

Sanity being the normal condition of the human mind, the law presumes that every person of full age has sufficient mental capacity to make a will, and casts on the contestant, in the first instance, the burden of proving mental incapacity at the time the will was executed, but, when the contestant has established habitual, fixed, or permanent insanity, as distinguished from spasmodic or temporary insanity at a time prior to making the will, the burden of proof is then shifted to the proponent, and he is required to show that the will was executed during a lucid interval. We think proof of the adjudication of insanity and that the intestate was under guardianship of the probate court when she executed the will was sufficient to cast upon the proponent the burden of establishing testamentary capacity when the will was made. The adjudication, however, is conclusive of insanity only at the time of the inquisition, and not anterior or subsequent thereto.

Houston v. Grigsby, 116 So. 686 (Ala. 1928).

Avoiding a Contract based upon incompetency of party

Contracts entered into by an incompetent are void in most instances, pursuant to Ala.

Code § 8-1-170:

Except as provided in § 8-1-171 and § 8-1-172, and contracts of fire and tornado insurance wherein the insane person is the beneficiary, all contracts of an insane person are void; but he and his estate shall be liable for necessities furnished him,

¹⁴ See also Toler v. Murray, 886 So. 2d 76, 78-79 (Ala. 2004) discussed herein, and holding that a ward under a conservatorship still retains testamentary capacity.

which may be recovered upon the same proof and upon the same conditions as if furnished to an infant.

The burden is on the person who wishes to avoid a contract based upon incompetency pursuant to § 8-1-170:

Our rule in such a case is that a party cannot avoid, free from fraud or undue influence, a contract on the ground of mental incapacity, unless it be shown that the incapacity was of such a character that, at the time of execution, the person had no reasonable perception or understanding of the nature and terms of the contract.

. . . .

“The well-settled law in Alabama is that contracts of insane persons are wholly and completely void. See, *Williamson v. Matthews*, 379 So. 2d 1245 (Ala. 1980); Ala. Code 1975, § 8-1-170.

In *McAlister v. Deatherage*, 523 So.2d 387, 388 (Ala. 1988) . . . this Court explained the cognitive (understanding) test that Alabama adopted in order to determine whether a contract can be avoided because of insanity:

‘[To] avoid a contract on the ground of insanity, it must be satisfactorily shown that the party was incapable of transacting the particular business in question. It is not enough that he was the subject of delusions not affecting the subject-matter of the transaction, nor that he was, in other respects, mentally weak. A party cannot avoid a contract, free from fraud or undue influence, on the ground of mental incapacity, unless it can be shown that his insanity . . . was of such character that he had no reasonable perception or understanding of the nature and terms of the contract.’

Mason v. Acceptance Loan Co., Inc., 850 So. 2d 289 (Ala. 2002).

Legal Capacity Quick Reference

Instrument/Transaction	Legal Capacity Required	Standard
Contract	The ability to understand and comprehend one’s actions. To avoid contract of an incompetent under Ala. Code § 8-1-170, must demonstrate that person had “no reasonable perception or understanding of the nature and terms of the contract.” ¹⁵	HIGH
Deed	Whether grantor had “sufficient capacity to understand in a reasonable manner the nature and effect of the act which he was doing.” ¹⁶	HIGH
Power of Attorney	The ability to understand and comprehend one’s actions. ¹⁷	HIGH
Conservatorship	The inability “to manage property and business affairs effectively for such reasons as mental illness, mental deficiency, physical illness or disability, physical or mental infirmities accompanying advanced age” ¹⁸	HIGH
Guardianship	Alleged incompetent is “impaired by reason of mental illness, mental deficiency, physical illness or disability, physical or mental infirmities accompanying advanced age . . . or other cause (except minority) to the extent of lacking sufficient understanding or capacity to make or communicate responsible decisions.” ¹⁹	HIGH
Last Will & Testament	“[A] Testator need only know his estate and to whom he wishes to give his property, and understand that he is executing a will.” ²⁰	LOW
Revocable Living Trust	“The capacity required to create, amend, revoke, or add property to a revocable trust, or to direct the actions of the trustee of a revocable trust, is the same as that required to make a will.” ²¹	LOW
Irrevocable Living Trust	“To create an irrevocable trust, the settlor must have capacity during lifetime to transfer the property free of trust.” ²²	HIGH

¹⁵ See *Mason v. Acceptance Loan Co., Inc.*, 850 So. 2d 289 (Ala. 2002).

¹⁶ *Wells v. Wells*, 49 So. 3d 216, 222 (Ala. Civ. App. 2010) (“In order to render a deed void, the burden of proof is on the party attacking the conveyance to show the incapacity of the grantor *at the time the conveyance is made.*”).

¹⁷ *Queen v. Belcher*, 888 So. 2d 472 (Ala. 2004).

¹⁸ Ala. Code § 26-2A-130 (1975).

¹⁹ See Ala. Code § 26-2A-105(b)(1975) (“The court may appoint a guardian . . . if it is satisfied that the person for whom a guardian is sought is incapacitated and that the appointment is necessary or desirable as a means of providing continuing care and supervision of the person of the incapacitated person. . . .”); see also Ala. Code § 26-2A-20(8)(1975) (defining “incapacitated person” as “[a]ny person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, physical or mental infirmities accompanying advanced age, 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.”).

²⁰ *Toler v. Murray*, 886 So. 2d 76 (Ala. 2004); see also *Smith v. Vice*, 641 So. 2d 785, 786 (Ala. 1994) (“a testatrix need only have ‘mind and memory sufficient to recall and remember the property she was about to bequeath, and the objects of her bounty, and the disposition which she wished to make—to know and understand the nature and consequences of the business to be performed, and to discern the simple and obvious relation of its elements to each other’”).

²¹ Ala. Code § 19-3B-601 (1975).

²² Ala. Code § 19-3B-402, Uniform Comment, *Requisite Mental Capacity* (citing Rest. 3d of Trusts, § 11, Rest. 2d Trusts §§ 18-22, and Rest. 3d Property: Wills & Other Donative Transfers § 8.1).

IN THE PROBATE COURT OF BEECHUM COUNTY, ALABAMA

IN RE JANE Q. DOE,
an incapacitated individual

CASE NO. 16-99999

**PETITION FOR APPOINTMENT OF
GUARDIAN AND SINGLE TRANSACTION CONSERVATOR**

To the Honorable Chamberlain Haller, Judge of Probate:

The undersigned BETTY DOE ("Petitioner") respectfully petitions the Court pursuant to the Alabama Uniform Guardianship and Protective Proceedings Act, Ala. Code § 26-2A-1 (1975), *et seq.*, and represents unto your Honor in support thereof:

1. That your Petitioner, Betty Doe is an adult resident of Madison County, Alabama who resides at 5 Maple Drive, New Hope, AL 36555.
2. That Jane Q. Doe is an incapacitated person, age 82 years who resides in Beechum County, Alabama at 123 Fake Street, Greenbow, AL 35555, but who is presently located at Central Hospital at 35 Commerce Blvd., Greenbow, AL 35555 where she has been a patient since her admission to that facility on or about March 19, 2019.
3. That Petitioner is the adult daughter of the said Jane Q. Doe.
4. That the following people are entitled to notice of this Petition:

NAME	RELATIONSHIP TO RESPONDENT	ADDRESS
Jane Q. Doe	respondent	123 Fake Street Greenbow, AL 35555 <i>Currently located at:</i> Central Hospital 35 Commerce Blvd. Greenbow, AL 35555
Betty Doe	niece	5 Maple Drive New Hope, AL 36555

5. That the appointment of a guardian and single transaction conservator for Jane Q. Doe is necessary and appropriate in order to manage her medical care and living arrangements, because she is and continues to be incapacitated by reason of mental deficiency, physical illness and/or mental infirmity.

6. That the appointment of a guardian and single transaction conservator is necessary because the said Jane Q. Doe is suffering from complications of stroke.

7. That the appointment of a guardian and single transaction conservator is in the best interest of Jane Q. Doe, and that it will assure that she will be able to maintain proper and appropriate medical care and living arrangements.

8. That the said Jane Q. Doe has not nominated a guardian and single transaction conservator pursuant to a Power of Attorney, so far as your Petitioner knows and believes.

9. That no other person is seeking appointment as guardian or conservator of the said Jane Q. Doe.

10. That the said Jane Q. Doe owns the following REAL PROPERTY with an estimated value of \$0.00, which produces yearly rental income in the amount of \$0.00:

a. None.

11. That the said Jane Q. Doe owns the following PERSONAL PROPERTY with an estimated value of \$12,000.00:

a. First Bank of Greenbow checking account, estimated balance \$3,000.00.

b. First Bank of Greenbow savings account, estimated balance \$9,000.00.

12. That the said Jane Q. Doe receives the following monthly income:

a. Social Security income of \$1,500.00 per month;

b. U.S. Steel pension income of \$1,800.00 per month.

13. That bond has not been relieved.

14. That because Jane Q. Doe lacks the resources necessary to pay for care in a nursing home, she must apply for benefits with the Alabama Medicaid Agency.

15. That the Alabama Medicaid Agency requires an applicant have no more than \$2,000.00 in assets in order to qualify for nursing home benefits, and also requires applicants to provide sixty months (5 years) of financial records as part of the application process.

16. That without becoming eligible for Medicaid benefits, Jane Q. Doe lacks any other resources with which to pay for her nursing home care, so far as Petitioner knows and believes.

17. That Jane Q. Doe is unable to obtain the financial records on her own behalf, and is unable to appoint an attorney-in-fact to obtain them on her behalf.

18. In addition, the Alabama Medicaid Agency requires an applicant have no more than \$2,199.00 per month in income; and Jane Q. Doe's gross monthly income is in excess of that amount (\$3,300.00).

19. State and federal law, however permit Jane Q. Doe to overcome the fact that her income is in excess of the cap permitted by Medicaid by establishing a Qualified Income Trust (QIT) to hold her monthly income. *See* 42 U.S.C. §1396p(d)(4)(B) and Ala. Admin. Code r. 560-X-25-.10(4)(a).

20. That the said Jane Q. Doe lacks the mental capacity required to establish a QIT on her own behalf, or to execute a power of attorney to appoint an agent to establish a QIT on her behalf, which under the Alabama Uniform Power of Attorney act requires a specific grant of authority. Ala. Code § 26-1A-201(a)(1).

21. That this Court has the authority to appoint a Conservator for a single transaction pursuant to Ala. Code § 26-2A-137 (1975).

22. That your Petitioner respectfully asks this court to appoint her as Conservator for a single transaction pursuant to Ala. Code § 26-2A-137 (1975) consisting of the following components necessary to apply for and secure eligibility for long-term care benefits from the Alabama Medicaid Agency:

- a. The authority to request and obtain any and all financial records of the said Jane Q. Doe from any bank or other financial institution which must be furnished as part of the process for applying for long-term care benefits with the Alabama Medicaid Agency;
- b. The authority to withdraw any funds deposited to Jane Q. Doe's account at any financial institution, and to apply any such funds to Jane Q. Doe's medical bills and/or the costs of this proceeding, or to designate a portion of any such funds as an exempt resource for Medicaid purposes, including but not limited to establishing a burial fund for the benefit of the said Jane Q. Doe; and
- c. To order the creation of a Qualified Income Trust pursuant to 42 U.S.C. § 1396p(d)(4)(B) and Ala. Admin. Code r. 560-X-25-.10(4)(a) in order to qualify Jane Q. Doe for nursing home benefits with the Alabama Medicaid Agency.

23. That Betty Doe is entitled to fifth priority of appointment as Single-Transaction Conservator pursuant to Ala. Code § 26-2A-138 (1975).

24. That Betty Doe is entitled to second priority of appointment as Guardian pursuant to Ala. Code § 26-2A-104(c) (1975).

WHEREFORE, the undersigned Petitioner prays that this Honorable Court will:

- A. Set a date for a hearing on this Petition;
- B. Appoint a physician to examine the said JANE Q. DOE and make a report in writing to this Court;
- C. Appoint a Guardian ad Litem to represent and protect the interests of the said JANE Q. DOE and make a report in writing to this Court;
- D. Appoint a Court Representative to interview the Petitioner, the person alleged to be incapacitated in her present place of abode, and such others as may be necessary or appropriate to the performance of his or her duties, and to make a report in writing to the Court;
- E. Give Notice of this Petition to JANE Q. DOE by personal service;
- F. Enter an Order appointing BETTY DOE as Guardian for the said JANE Q. DOE;
*
- G. Enter an Order appointing BETTY DOE as Conservator for a single transaction for the said JANE Q. DOE, and authorizing a single transaction, namely: authorizing BETTY DOE to withdraw any funds deposited to Jane Q. Doe's account at any financial institution, and to apply any such funds to Jane Q. Doe's medical bills and/or the costs of this proceeding, or to designate a portion of any such funds as an exempt resource for Medicaid purposes, including but not limited to establishing a burial fund for the benefit of the said Jane Q. Doe, in addition to the authority to request and obtain any and all financial records of the said Jane Q. Doe from any bank or other financial institution which must be furnished as part of the process for applying for long-term care benefits with the Alabama Medicaid Agency; and
- H. Enter an order granting such additional relief as may be meet and proper in the premises.

Respectfully submitted,

Raley L. Wiggins
Attorney for Petitioner

STATE OF ALABAMA)
MADISON COUNTY)

BETTY DOE, being duly sworn, deposes and says that the facts averred in the above petition are true according to the best of her knowledge, information and belief.

Betty Doe, Petitioner

Sworn to and subscribed before me this the ____ day of _____, 20____.

Notary Public
My Commission Expires:_____

Attorney for Petitioner:

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IN THE PROBATE COURT OF BEECHUM COUNTY, ALABAMA

**IN RE JANE Q. DOE,
an incapacitated individual**

CASE NO. 16-99999

**ORDER GRANTING PETITION FOR
GAURDIANSHIP AND SINGLE TRANSACTION**

This cause came on to be heard on September 15, 2016 on the petition for the appointment of a Guardian and Single Transaction Conservator over the person and property of Jane Q. Doe, Incapacitated, as filed by Betty Doe, pursuant to the Alabama Uniform Guardianship and Protective Proceedings Act; and it now appears to the Court that venue and jurisdiction are proper; and that notice of the proceedings has been given to those entitled and proof of same filed.

Present in Court with regard to these proceedings were, to-wit: Raley L. Wiggins, Esq., Betty Doe, Petitioner, Vincent LaGuardia Gambini, Esq., Guardian ad Litem, and William W. Bibb, Court Representative.

Upon due consideration of the pleadings, evidence and sworn testimony adduced in this matter, the Court finds that said ward is a protected person and as a result thereof is unable to manage her property and business affairs; and the basis for the appointment of a Guardian and a Single-Transaction Conservator has been duly established in this case and that the best interest of Jane Q. Doe will be served by the following relief:

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED BY THE COURT that said petition for appointment of Guardian over the person of Jane Q. Doe, Incapacitated, is hereby granted; and that Betty Doe is hereby appointed as Guardian;

IT IS FURTHER ORDERED that Betty Doe is appointed as Special Conservator, pursuant to § 26-2A-137, Code of Alabama (1975), for the limited purpose of:

1. Accessing and withdrawing any funds from any banking or financial institution or other source in the name of Jane Q. Doe. If any funds are located, a checking accounting is to be established for the purpose of applying the funds to the costs of this proceeding and any outstanding medical bills, or to designate a portion of any such funds as an exempt resource for Medicaid purposes, including but not limited to establishing a burial fund for the benefit of the said Jane Q. Doe, Incapacitated.
2. Authority to request and obtain any and all financial records, in the name of Jane Q. Doe for the last five (5) years preceding her admission date into Central Hospital, Greenbow, Alabama, in order to support her application for long-term care benefits with the Alabama Medicaid Agency; and
3. Betty Doe is hereby ordered to execute all documents necessary to establish and fund a Qualified Income Trust pursuant to 42 U.S.C. § 1396p(d)(4)(B) and Ala. Admin. Code r. 560-X-25-.10(4)(a) on behalf of Jane Q. Doe, and is likewise empowered to execute any and all documents on behalf of the said Betty Doe, incapacitated necessary to cause any sources of recurring monthly income to be diverted to and automatically deposited to such Qualified Income Trust, and to serve as Trustee of such Qualified Income Trust.

IT IS FURTHER ORDERED that the costs of this proceeding in the amount of \$1,910.50, which includes a Guardian ad Litem fee of \$_____ for Vincent LaGuardia Gambini, Esq., a Physician fee of \$_____ for Dr. Beauregard Payne, and a Court Representative fee of \$_____ for William W. Bibb, be taxed against the Estate of Jane Q. Doe, Incapacitated, FOR THE RECOVERY OF WHICH LET EXECUTION ISSUE;

IT IS FURTHER ORDERED that Betty Doe, as Special Conservator, shall file a written report of the funds received and distributed, including copies of the cancelled checks or receipts as proof of same on behalf of Jane Q. Doe, Incapacitated.

DONE this the ____ day of _____, 20____.

Hon. Chamberlain Haller
Judge of Probate
Beechum County, Alabama