SELECT ELDER LAW ISSUES IN PROBATE

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Elder Law as a distinct body of law is a relatively new concept, with no formal definition. According to the National Academy of Elder Law Attorneys ("NAELA"), Elder Law is "defined by the clients to be served. In other words, the lawyer who practices Elder Law . . . works primarily with seniors."

If that definition seems over-simplified, it is. At least to some extent, an Elder Law attorney is a general practitioner. The fact is that the elderly face many of the same legal problems as the rest of the population. Such general issues may include estate planning, guardianships and conservatorships, and family law matters.

Other issues are more specific to the elderly. These may include navigating the complexities of Medicare, Medicaid, and Social Security eligibility, or dealing with elder abuse and long-term care issues.

In my practice, the court of first resort is often the probate court. In probate court, you may find relief for a client who requires a guardian to make medical decisions, or for a client who needs a conservator to manage their assets. In more serious cases an involuntary commitment may be required. In addition, relief can sometimes be obtained more quickly in the probate court, which can save a client time and expense.

This handout focuses on two areas. Part One addresses the use of single transaction conservatorships for elderly clients in need of long-term care. Part Two addresses the issue of legal mental capacity, and the varying standards of capacity required depending upon the transaction in question.

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 elderly patients 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.

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 $1,800.00). 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 the reality is 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 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 her money below Medicaid limits.

While Jane has some resources, she does not have sufficient resources to make a full-blown conservatorship practical. Almost all her monthly income will ultimately be 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.
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> (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 Section 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.
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> (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 Section 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.
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> (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,[1] and to file and sign 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

[1] 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.

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 $2,523 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 $8,000 per month. As noted above, the Alabama Medicaid Agency requires an applicant have no more than $2,523.00 per month in income in order to qualify. In Jane Doe's case, her gross monthly income is in excess of that amount ($3,300.00), but far short of being enough to cover her $8,000 per month cost of care. As a result, Medicaid permits the creation of Qualified Income Trusts (also known as "Miller Trusts") 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 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 the benefits Jane received during her lifetime. In practice, however, the QIT rarely has a significant balance at death.[2]

[2] 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.

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 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 ("SNT") could be established for her benefit. Funds held in such a trust 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.[3] 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.[4]

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[3] *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).

[4]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

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.[5] 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.

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*?"[6] 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.[7]

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

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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."

[5] 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).

[6] This concept is very well explained in Hugh M. Lee's *Alabama Elder Law*, published by Thompson West.

[7] *See* "Legal Capacity Quick Reference" at the end of this paper.

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 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.**
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> 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.
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> 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).[8]

[8] 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."

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.[9]

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 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 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.

[9] 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).

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. 25 456 (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.
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> 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):
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> '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).[10] Whether to appoint a conservator is based upon a version that higher standard—the ability to transact ordinary business affairs—not the lower standard applicable to 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.[11] 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

[10] 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.

[11] 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.

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*).[12] 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 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).[13]

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

[12] "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).

[13] 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.

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 Sections 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 necessaries furnished him, 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**.**
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> . . . .

> "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.
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> 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:
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> '[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."[14]	HIGH
Deed	Whether grantor had "sufficient capacity to understand in a reasonable manner the nature and effect of the act which he was doing."[15]	HIGH
Power of Attorney	The ability to understand and comprehend one's actions.[16]	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 . . . ."[17]	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."[18]	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."[19]	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."[20]	LOW
Irrevocable Living Trust	"To create an irrevocable trust, the settlor must have capacity during lifetime to transfer the property free of trust."[21]	HIGH

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

[15] 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.*").

[16] Queen v. Belcher, 888 So. 2d 472 (Ala. 2004).

[17] Ala. Code § 26-2A-130 (1975).

[18] *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

[19] 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 . . . .'").

[20] Ala. Code § 19-3B-601 (1975).

[21] 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).