Ga. Guardianship and Conservatorship § 4:39

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Chapter 4. Guardianships of Adults

§ 4:39. Ethical ramifications of representing clients with diminished capacity

In the practice of guardianship and conservatorship law, lawyers are often called upon to represent individuals whose capacity may be in question.[1] In so doing, lawyers are bound by the State Bar of Georgia Rules of Professional Conduct (GRPC),[2] particularly GRPC 1.14, which is entitled "Client with Diminished Capacity." GRPC 1.14(a) begins by stating the basic proposition that the lawyer should strive to maintain a "normal client-lawyer relationship" even if a "client's capacity to make adequately considered decisions in connection with a representation is diminished."[3] The first official Comment to this rule notes that "a client with diminished mental capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being."[4]

An American Bar Association Legal Ethics Opinion states that the obligation to maintain a normal client-lawyer relationship "implies that the lawyer should continue to treat the client with attention and respect, attempt to communicate and discuss relevant matters, and continue as far as reasonably possible to take action consistent with the client's directions and decisions."[5] Maintaining a normal client-lawyer relationship entails abiding by several other of the rules of professional conduct. For example, GRPC 1.2 dictates that the client, not the lawyer, directs the representation and the lawyer generally "shall abide by a client's decisions concerning the scope and objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued."[6] GRPC Rule 1.4 requires the lawyer to keep the client promptly and reasonably informed about matters relating to the representation. GRPC 1.6 requires the lawyer to maintain client confidences. GRPC 1.7 through 1.9 prohibit the lawyer from engaging in actions that would constitute conflicts of interest.

Comment 1 to GRPC 1.14 recognizes that "when the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects." For example, Comment 4 to GRPC 1.2 states: "In a case in which the client appears to be suffering from diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14."[7] GRPC 1.14 also recognizes, as described below, that the strict confidentiality rule of GRPC 1.6, while controlling even if the client has diminished capacity, may be slightly less narrowly construed for certain clients with diminished capacity.

On the other end of the spectrum, GRPC 1.14(b) calls for the lawyer to step out of the "normal client-lawyer relationship" and take "reasonably necessary protective action" under certain circumstances. The lawyer may take protective action only if the lawyer "reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest."[8] Possible protective actions that are suggested by GRPC 1.14 and Comment 5 include "consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian"[9] as well as "consulting with family members,[10] using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decisionmaking tools such as durable powers of attorney or consulting with support groups, professional services,

adult-protective agencies or other individuals or entities that have the ability to protect the client." [11] GRPC 1.14(c) states that when a client is in need of protective action, "the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests." Despite this implied authority, lawyers should be very restrained in disclosing confidential information and should consider carefully the ramifications before making a disclosure. [12]

Questions relating to a client's capacity may arise in a number of circumstances. When a new client arrives for the initial appointment, the lawyer should assess at that point whether the client is capable of entering into an attorney-client relationship. [13] Comment 6 of GRPC 1.14 offers the lawyer some guidance as to how to assess the client's capacity: "In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician." [14] As discussed in §§ 4:6 and 5:6, supra, an individual for whom a petition for guardianship or conservatorship has been filed is entitled to be represented by counsel. In this type of case, the lawyer should zealously represent the client's expressed wishes rather than try to second-guess what may be best for the individual. The role of advocating for that individual's best interest is left to the guardian ad litem.

Cases from other jurisdictions have indicated that a lawyer owes a duty to assess whether the client has the requisite legal capacity to enter into the transaction at issue. [15] However, these cases stress that this is a duty that flows to the client only and not to those who would benefit from the transaction (such as the beneficiaries of the client's will). [16] Imbedded in this duty is the duty to be alert for potential signs of incapacity and to make a reasonable inquiry. [17]

Another question that may arise for a lawyer is the degree to which the lawyer of a client for whom a guardian or conservator has been appointed can continue to represent the client. If the lawyer is hired by the guardian or conservator, the lawyer probably represents the fiduciary, but may also owe a duty to the ward, particularly if the fiduciary is acting against the ward's best interest. [18]

If the lawyer was already representing the individual when the guardianship or conservatorship was imposed, the "normal client-lawyer relationship" language of GRPC 1.14 seems to presume that the representation will continue. [19] In *Estate of McKitrick*, [20] the Court of Appeals examined a situation in which a lawyer who had been hired by a client for whom a guardianship petition had been filed continued to represent her during the guardianship. On January 4, 2013, Lorraine McKitrick's son, Thomas, was appointed to serve as her conservator and her daughter to serve as her guardian. Prior to these appointments, Lorraine had retained counsel to represent her. Around March 2013, Thomas filed a "petition to maintain previously established estate plan and for continuing powers to invest." Lorraine, through her counsel, objected, citing Thomas's conflict of interest due to his "potential death benefit" from Lorraine's estate. The probate court ruled in the son's favor, noting that he did have a conflict, but that there was no showing of resulting harm to Lorraine. At the hearing, the question of counsel's authority to serve as counsel for Lorraine was also raised. Following the hearing, counsel filed a "notice of intent to continue as ward's attorney." Counsel appealed the probate court's order on Lorraine's behalf, and the Court of Appeals affirmed the ruling as to Thomas's conflict. [21] Lorraine's second complaint on appeal was that the probate court had set an hourly rate at which her hired counsel could bill for his services. The fee agreement between Lorraine and her counsel provided as follows:

> The Client agrees to pay the Firm a retainer of $2,700.00 to try and cover the case through its completion. The Firm will provide the Client with periodic billing statements detailing the work performed during the billing period, the number of hours and fractions thereof expended in performing the work, the nature and amount of the expenses incurred during the billing period, the amount transferred out of the escrow account in payment of the services performed, expenses incurred during the billing period, and the amount remaining in the escrow account.

The Court of Appeals vacated the probate court's ruling and remanded for the probate court to consider parol evidence on the issue. The court confirmed that the parties contemplated an hourly rate—otherwise provisions referencing the number of hours worked and the escrow account would have been rendered meaningless. (Some of the judges dissented regarding the attorney fees, concluding that the agreement must be construed to provide only for a flat fee of $2,700 instead of an hourly rate, because in resolving ambiguities, the construction should go most strongly against the drafter of the agreement.) However, the probate court limited the hourly rate to that of a Cobb circuit court-appointed attorney ($45 per hour). Lorraine, through her counsel, admitted that the agreement mistakenly omitted the rate at which the firm would bill its hourly work, but asserted that the ambiguity was explained by a billing statement presented at the hearing. Thomas disputed that any billing statements were tendered as evidence at that hearing. However, there was no transcript in the record to confirm or deny it, and the probate court did not give any explanation as to how it reached the chosen billing rate. The Court of Appeals determined that it could not have been the intent of Lorraine and her counsel that there was no specified hourly rate and that the ambiguity could be resolved by consideration of parol evidence. Accordingly, the court vacated the opinion on this issue and remanded for that purpose.

Footnotes

1 A highly useful resource for lawyers who are in this situation is the American Bar Association/American Psychological Association, Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers. Another helpful source of guidance is the ACTEC (American College of Trust and Estate Counsel) Commentaries on the Model Rules of Professional Conduct, which are available on the public side of the ACTEC website, http://www.ACTEC.org. The ACTEC Commentaries discuss the applicability of the ABA Model Rules of Professional Conduct to the consultative and counseling functions that most estate planning and elder law lawyers perform. Also useful is Flowers & Morgan, Ethics in the Practice of Elder Law (ABA 2013).

2 The GRPC are modeled after the ABA Model Rules of Professional Conduct (MRPC), which have been adopted in some form in every state except California.

3 GRPC 1.14(a). The diminished capacity to make decisions may be caused by "minority, mental impairment or … some other reason." GRPC 1.14(a).

4 Comment (1) provides the following examples: "For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions." It is noteworthy that O.C.G.A. §§ 29-2-16(b) (discussed in § 2:12, supra) and 29-3-7 (discussed in § 3:4, supra) allow the court to consider a minor's preference when appointing a guardian or conservator for the minor. In Kesterson v. Jarrett, 291 Ga. 380, 728 S.E.2d 557 (2012), a case in which the issue was whether a child could be excluded from her own personal injury trial, the Georgia Supreme Court cited GRPC 1.14 for the following proposition: "[A] bright 17-year-old party about to head off to college may well have a greater awareness of her legal proceedings and ability to assist in them than many a sui juris adult. And counsel may benefit from their clients' recollection of the events being disputed, or knowledge of the witnesses, or views on how the case should be conducted, or simply their presence in court, even if the client is not fully competent."

5 ABA Op. 96-404. This ABA opinion was issued under an earlier version of ABA Model Rule of Professional Conduct 1.14. North Carolina Formal Ethics Opinion 16 (Jan. 1999) illustrates the contours of maintaining a normal client-lawyer relationship. In the case covered by this opinion, the lawyer was asked by the husband of an allegedly incapacitated wife to investigate why she had been removed from the family home. The lawyer met with the wife, who indicated that she wanted the lawyer to represent her and that she wanted to go home to live with her husband rather than becoming a ward of the state. Although the lawyer noticed abnormalities in the wife's behavior, he also noted extended periods of lucidity and a consistent desire on her part not to have a guardian appointed for her. At the hearing, the state Department of Social Services (DSS) claimed the lawyer had "no standing or authority" to object on behalf of the wife. The wife testified at the hearing and could not identify the lawyer as her lawyer but did express a desire to be returned to the family home. A guardian was appointed for the wife and the lawyer appealed on her behalf. DSS objected to the lawyer's continued representation of the wife, who had now been declared "incompetent." The ethics opinion cited Rule 1.14 and stated that "if [the lawyer] is able to maintain a relatively normal client-lawyer relationship and [the lawyer] reasonably believes that Wife is able to make adequately considered decisions in connection with her representation, [the lawyer] may continue to represent her alone without including the guardian in the representation." The opinion also stated that the "lawyer owes the duty of loyalty to the client and not to the guardian or legal representative of the client, particularly if the lawyer concludes that the legal guardian is not acting in the best interest of the client."

6 But see In re W.L.H., 292 Ga. 521, 739 S.E.2d 322 (2013), in which the lawyer for a child who had been adjudicated a "deprived child" appealed the adjudication on the child's behalf, even though the court-appointed guardian ad litem had declined to appeal. The Supreme Court found that the child had no standing to appeal through his lawyer. Citing GRPC 1.2 and 1.14, the Court stated that "the child's attorney, unlike a guardian ad litem, must attempt to maintain a normal client-lawyer relationship with the child, and the attorney must defer to the child's wishes regarding the ultimate objectives of representation." The Court found that the guardian ad litem was the "legal protector of a child's best interests in deprivation hearings" and thus that the child could only appeal a deprivation finding through his guardian ad litem. However, in a case decided shortly after the W.L.H. case, In re R.L., 321 Ga. App. 837, 743 S.E.2d 502 (2013), the Court of Appeals found that a child did have standing to appeal a deprivation finding through his attorney. In this case, the guardian ad litem did not object.

7 This Comment was cited by the Georgia Supreme Court in Humphrey v. Walker, 294 Ga. 855, 757 S.E.2d 68 (2014). The question at issue was whether the lawyer for a client in a death penalty trial had provided ineffective assistance of counsel by not pursuing a professional mental health evaluation after the client had refused to have evidence of his mental health developed. The Court noted that the lawyer had good reasons for believing that his client might not be competent to stand trial but had balked when his client objected to the evaluation. The Court affirmed the grant of the writ of habeas corpus, finding that the lawyer's failure to pursue the mental health evaluation was deficient and that this deficiency prejudiced the client.

8 An example of a lawyer taking reasonably necessary protective action on behalf of his client appears in In re Clark, 202 N.C. App. 151, 688 S.E.2d 484 (2010). In that case, the guardian of a woman who had suffered severe brain injury as the result of an accident hired lawyers to represent the woman in her lawsuit against those who caused the accident and to aid in setting up a special needs trust with any recovered funds. The parties settled the accident litigation, but then the husband of the woman sought to have her guardianship terminated or, alternatively, to have himself appointed to replace the current guardian. One of the lawyers had cause to believe that the husband's motive in urging his wife to terminate the guardianship was to allow the husband himself access to the settlement funds. The lawyer objected to the termination of the guardianship but withdrew his objection when the parties agreed that the bulk of the settlement funds would be placed into an irrevocable special needs trust. The husband and wife then objected to the fees the lawyer had charged and sought to have the lawyer sanctioned because he had failed to maintain a "normal attorney-client relationship" with the woman. The court refused to sanction the lawyer, citing subsection (b) of Rule 1.14. The appellate court noted that the trial court had found "as a

fact that [the lawyer] genuinely believed that Mr. Clark was attempting to obtain control over Ms. Clark's personal injury settlement for his own purposes and that it would not be in Ms. Clark's best interests for her competency to be restored … . As long as Ms. Clark's competency had not been restored, [the lawyer] had a duty to exercise his best judgment on behalf of his client, which is exactly what the trial court found that he did."

9 GRPC 1.14(b).

10 Comment 3 to GRPC 1.14 provides: "The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the lawyer should consider such participation in terms of its effect on the applicability of the attorney-client evidentiary privilege." Interestingly, the Comment accompanying ABA MRPC 1.14 makes a much more definitive statement about the attorney-client privilege. This Comment states: "The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege." To date no court has ruled that the attorney-client privilege remains intact despite the presence of family members at the client conferences, so lawyers should be wary of relying too heavily upon this statement made by the ABA.

11 GRPC 1.14, Comment 5.

12 Comment 8 expands upon this concept: "Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one."

The Bar Association of the State Bar of New Hampshire issued an ethics opinion, N.H. Bar Ass'n Ethics Comm., Op. 2014-15/5, that discusses whether a lawyer, over the client's objection, may disclose confidential information in the case of suspected elder abuse. The opinion pointed out that Rule 1.14 relaxes the confidentiality rules when a client is suffering from diminished capacity and is at risk of substantial physical, financial or other harm unless action is taken. The opinion also pointed out that, even if the client is not suffering from diminished capacity, Rule 1.6 allows a client to disclose confidential information "to prevent reasonably certain death or substantial bodily harm." (The Georgia version of Rule 1.6 allows disclosure "to prevent serious injury or death.") Citing ethics opinions from other states that dealt with a client's threat to commit suicide, the New Hampshire opinion concluded that a lawyer who has made the proper determination of risk can engage in limited disclosure of client information even over the client's objection. The opinion pointed out, however, that "[m]ere suspicion that elder abuse or other forms of harm might be occurring is not adequate to trigger" an exception to the confidentiality rule. The opinion also strongly urged lawyers to consider the consequences of a disclosure of information to a third party. For example, if the information about the suspected abuse is reported to an outsider, that information might require the outsider to report the suspected action to Adult Protective Services, or some similar agency. (See discussion in § 4:36, infra, of Georgia's mandatory reporting requirements.) The APS investigation, in turn, might lead to the initiation of guardianship proceedings, a change in living arrangements, or even incarceration of a member of the client's family, all of which outcomes the client may not want. The opinion cautioned lawyers to consider carefully the ramifications of triggering a reporting requirement and always to consider less draconian measures.

The 5th Edition of the ACTEC Commentaries addresses the confidentiality issue as follows:

> The role and obligations of lawyers with respect to elder abuse varies significantly among the states. Some states have made lawyers mandatory reporters of elder abuse. *See, e.g.,* Tex. Hum. Res. Code § 48.051(a)-(c) (2013) (Texas); Miss. Code Ann. § 43-47-7(1)(a)(i) (2010) (Mississippi); Ohio Rev. Code Ann. § 5101.61(A) (2010) (Ohio); A.R.S. § 46-454(B) (2009) (Arizona); Mont. Code Ann. § 52-3-811 (2003) (Montana) (exception where attorney-client privilege applies to information). Other states have broad mandatory reporting laws that do not exclude lawyers. *See, e.g.,* Del. Code Ann. Tit. 31, § 3910. The exception to the duty of confidentiality in MRPC 1.6(b)(6), that allows disclosure to comply with other law, should apply, but disclosure would be limited to what the lawyer reasonably believes is necessary to comply. In states where there is no mandatory reporting duty of lawyers, a lawyer's ability to report elder abuse where MRPC 1.6 may restrict disclosure of confidentiality would be governed by MRPC 1.14 in addition to any other exception to MRPC 1.6 (such as when there is a risk of death or substantial bodily harm). In order to rely on MRPC 1.14 to disclose confidential information to report elder abuse, the lawyer must first determine that the client has diminished capacity. If the lawyer consults with other professionals on that issue, the lawyer must be aware of the potential mandatory reporting duties of such professional and whether such consultation will result in reporting that the client opposes or that would create undesirable disruptions in the client's living situation. The lawyer is also required under MRPC 1.14 to gather sufficient information before concluding that reporting is necessary to protect the client.

13 See Anaya v. Coello, 279 Ga. App. 578, 632 S.E.2d 425 (2006). Attorney hired after an adult was incapacitated in an automobile accident lacked authority to enter into settlement agreement with insurer for motorist who was driving the automobile. Attorney was not retained by passenger before he became incapacitated, no guardian had been appointed for passenger at time attorney was hired, and family members lacked the legal capacity to hire attorney on passenger's behalf. It is important to remember that, under Georgia law, even if a guardian or conservator has been appointed for an individual, that individual retains the right "individually or through the ward's representative or legal counsel" to bring an action relating to the guardianship or conservatorship. O.C.G.A. §§ 29-4-20(a)(5), 29-5-20(a)(5), discussed in §§ 4:16, 5:13, supra. These statutes override the statement in Levenson v. Oliver, 202 Ga. App. 157, 413 S.E.2d 501 (1991), that an adult for whom a guardian had been appointed lacked the capacity to hire an attorney to represent her. O.C.G.A. § 29-5-20(a)(5) was cited in In re Estate of McKitrick, 326 Ga. App. 702, 757 S.E.2d 295 (2014), which is discussed later in this section.

14 The American Bar Association/American Psychological Association, Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers, p. 33 suggests the following as appropriate diagnosticians: physicians, geriatricians, geriatric psychologist, forensic psychologist or psychiatrist, neurologist, neuro-psychologist, geriatric assessment team; referrals from local Area Agency on Aging, American Psychiatric Association, American Psychological Association. A newer addition to this list would be a geropsychologist. The Handbook suggests that the consultation may be one that is strictly between the lawyer and the evaluator, with the lawyer providing the facts without disclosing the client's identity. Alternatively, the lawyer may suggest that the individual herself undergo an evaluation. Appendix 2 of the Handbook provides a sample letter for the lawyer to send to the evaluator to provide the legal context in which the evaluation will be used.

15 The ACTEC Commentaries to MRPC 1.14 speak of this requirement in the context of the capacity to make a will: "If the testamentary capacity of a client is uncertain, the lawyer should exercise particular caution in assisting the client to modify his or her estate plan. The lawyer generally should not prepare a will, trust agreement, or other dispositive instrument for a client who the lawyer reasonably believes lacks the requisite capacity. On the other hand, because of the importance of testamentary freedom, the

lawyer may properly assist clients whose testamentary capacity appears to be borderline. In any such case the lawyer should take steps to preserve evidence regarding the client's testamentary capacity." See Sullivan v. Sullivan, 273 Ga. 130, 539 S.E.2d 120 (2000), in which a lawyer who prepared a will had doubts about the client's capacity on the day the will was executed. The lawyer allowed the execution to proceed but upon returning to her office wrote a "Memo to File in Anticipation of Litigation." At trial, the lawyer testified that she thought that the testator's capacity was in the "grey area" but she believed that if he was going to sign the will, he needed to do so that day. The jury found that the testator had lacked testamentary capacity and been the victim of undue influence.

For a more detailed discussion of the lawyer's duty to assess whether the client has testamentary capacity, see Radford, Redfearn: Wills & Administration in Georgia § 4:2.

16 See, e.g., Moore v. Anderson Zeigler Disharoon Gallagher & Gray, 109 Cal. App. 4th 1287, 135 Cal. Rptr. 2d 888 (1st Dist. 2003). In this case, children of a testator sued the law firm that assisted the testator in altering his estate planning documents, alleging that the lawyers should have realized that the testator's capacity was questionable due to pain, illness and medications. Although recognizing that in some cases an attorney does owe a duty to non-clients, the court held that "an attorney preparing a will for a testator owes no duty to the beneficiary of the will or to the beneficiary under a previous will to ascertain and document the testamentary capacity of the client." The court said that a holding to the contrary could compromise the lawyer's duty of loyalty to his client. "The attorney who is persuaded of the client's testamentary capacity by his or her own observations and experience, and who drafts the will accordingly, fulfills that duty of loyalty to the testator. In so determining, the attorney should not be required to consider the effect of the new will on beneficiaries under a former will or beneficiaries of the new will." See also Chang v. Lederman, 172 Cal. App. 4th 67, 90 Cal. Rptr. 3d 758 (2d Dist. 2009); Logotheti v. Gordon, 414 Mass. 308, 607 N.E.2d 1015 (1993).

17 See, e.g., In re Hughes Revocable Trust, 2005 WL 2327095 (Mich. Ct. App. 2005), holding that the attorney had "a responsibility to assess his client's mental capacity." The lawyer in this case had been told that the testator was often confused. When he met with the testator and her husband, the husband did all the talking. The court criticized the attorney for making no attempt to determine the testator's capacity. See also Logotheti v. Gordon, 414 Mass. 308, 607 N.E.2d 1015 (1993), where the Court stated, "[a]n attorney owes to a client, or a potential client, for whom the drafting of a will is contemplated, a duty to be reasonably alert to indications that the client is incompetent or is subject to undue influence and, where indicated, to make reasonable inquiry and a reasonable determination in that regard. An attorney should not prepare or process a will unless the attorney reasonably believes the testator is competent and free from undue influence." See also Persinger v. Holst, 248 Mich. App. 499, 639 N.W.2d 594 (2001). There, a lawyer was contacted by two former clients about drafting a will and power of attorney for a widow to whom the clients were not related. The lawyer met with the widow, drafted both documents and supervised their execution. The power of attorney named one of the former clients as agent and the will named him as the sole beneficiary of her estate. The former client used the POA to divert money and property to himself. A conservator was appointed for the widow four months after she had signed the documents and the conservator sued the lawyer for legal malpractice. The court refused to find the lawyer liable. "In this case, defendant [the lawyer] made reasonable inquiry into Fuite's [the widow's] understanding of the nature and legal effect of the power of attorney that she requested before its execution. Although Fuite was subsequently adjudicated incompetent, at the time she executed the power of attorney defendant exercised reasonable professional judgment with regard to its execution. Further, even if defendant was mistaken, 'mere errors in judgment by a lawyer are generally not grounds for a malpractice action. [Cit.]' This is not a case where defendant had actual knowledge that Fuite was incompetent. Similarly, the record fails to reveal overt or unmistakable signs of incompetency, or other extraordinary circumstances that would reasonably lead defendant to conclude that Fuite was incapable of understanding the nature and consequences of her actions."

18 Comment 4 to GRPC 1.14 provides: "If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters

involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).” See also Fickett v. Superior Court of Pima County, 27 Ariz. App. 793, 558 P.2d 988 (Div. 2 1976) (“We are of the opinion that when an attorney undertakes to represent the guardian of an incompetent, he assumes a relationship not only with the guardian but also with the ward.”); FLA Atty. Gen. Advisory Legal Op. 96-94 (“Since the ward is the intended beneficiary of the guardianship, an attorney who represents a guardian of a person adjudicated incapacitated and who is compensated from the ward's estate for such services owes a duty of care to the ward as well as to the guardian.”).

19 The ACTEC Commentaries to MRPC 1.14 provide: “A lawyer who represented a client before the client suffered diminished capacity may be considered to continue to represent the client after a fiduciary has been appointed for the person. Although incapacity may prevent a person with diminished capacity from entering into a contract or other legal relationship, the lawyer who represented the person with diminished capacity at a time when the person was competent may appropriately continue to meet with and counsel him or her. If the client became incapacitated while the lawyer was representing the client, that very incapacity may preclude the client from terminating the attorney client relationship.”

20 In re Estate of McKitrick, 326 Ga. App. 702, 757 S.E.2d 295 (2014).

21 Because Lorraine had failed to include a transcript of the hearing when she filed her appeal, the Court of Appeals was compelled to presume that the evidence was as the probate court found and that the probate court's judgment was correct on the issue.

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