CAPACITY IN THE PROBATE CONTEXT

Pertinent Points of Law

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"***. . . my soul aches to know, when two authorities are up, neither supreme, how soon confusion may enter 'twixt the gap of both and take the one by the other.***"

William Shakespeare, *Coriolanus,* Act III, Scene i (emphasis added)

PART I

Colorado law has a capacity problem. That does not necessarily mean Colorado has more laws than needed, although with about 400 bills enacted annually, one might scrutinize the need for so many annual legislative additions into an already crowded Colorado Revised Statutes. In the context of this article, though, Colorado's capacity problem does not refer to overburdened courts and judges, although they most certainly are.

As analyzed here, Colorado's problem of legal capacity is one of definitional quality, not quantity. Where legal capacity is most consequential – mental capacity in respect to directing legal counsel, executing wills and other estate planning instruments, being subject to guardianship and protective proceedings, entering into contracts and testifying as a witness – Colorado lawyers could be forgiven for losing their way, as some segments of the trail are rather poorly marked. This article specifically will identify and attend to those particular dilemmas resulting from our law governing mental capacity in the prominent civil contexts of estate planning, representation by counsel, guardianship and conservatorship, where a call for improved guidance has become evident and warranted.

State of the Law – the Various Concepts of "Sound Mind"

Colorado has thresholds for certain cognitive capacities that might be justifiably characterized as relatively low. One of those, for example, is the capacity of a witness to testify. Generally, persons are presumed competent to testify unless excluded by the Rules of Evidence or Colorado Statute.[1] Witnesses of course must be excluded if they actually lack personal knowledge of the matter at issue.[2] As to mental capacity, persons "of unsound mind" at the time called upon to testify may not do so.[3] Witnesses can be "excluded because they are 'of unsound mind at the time of their production for examination.' Section 13-90-106, C.R.S. 1973; *Williams v. People*, 157 Colo. 443, 403 P.2d 436."[4]

The Colorado Witnesses statute, Article 90 of Title 13, does not specifically define "unsound mind." Noting that "insanity does not conclusively render a witness incompetent," case law *circa* 1977 emphasized functional and practical capacity for the particular purpose of

testimony: appreciation of the nature of the witness oath and capability of accurate recollection. Of course there must also be testimonial value: "The traditional test is 'whether the witness has intelligence enough to make it worthwhile to hear him at all and whether he feels a duty to tell the truth.' " McCormick on Evidence §62 (E. Cleary 2d ed. 1972).[5]

Interestingly enough, Article 20 of Title 16 of the Colorado Revised Statutes, pertaining to extradition of persons of "unsound mind," actually supplies a statutory definition. A "[p]erson of unsound mind" includes the terms "insane person," "mentally ill person," "person with a mental illness," "person with a mental health disorder," and "mentally incompetent person."[6] Such definitions plainly cannot apply to witnesses, however, because the Colorado Supreme Court has ruled that even those adjudicated as, for lack of a better term at that time in history, "insane," might have testimonial capacity.[7] Further, witnesses whom hypnosis has placed into a "state of relaxation" remain competent to testify.[8]

The Probate Context

Using the term "unsound mind" absent a statutory definition forces an inverse deductive reasoning, which inevitably leads us to identify what "unsound mind" is <u>not</u>. Thus, our search for the clearly defined concept of "sound mind" naturally brings us into the probate context, where the issue of sound mind is pre-eminently significant and defined.[9] Indeed, "sound mind," is a statutory condition precedent for valid execution of testamentary instruments.[10]

So, we return to the ultimate question: What is "sound mind," especially with respect to intent and cognizance at a specific time? Proof of declarant's "sound mind" is a condition precedent to admissibility of a dying declaration, but such "sound mind" is not statutorily defined.[11] By way of *dicta*, the Court of Appeals has described the elements of sound mind of a dying declarant: "Finally, we look at the finding that the victim was of sound mind when he made his declarations. There was evidence that the victim was in a great deal of pain and that he was having trouble breathing. There was also evidence that he began to drift off at times. However, everyone who was present when the victim made the statements and who testified at trial stated that the victim <u>was conscious and alert and was answering the questions appropriately</u>."[12] Sound mind in the probate context comprises requisite knowledge of certain specific matters, including general knowledge of one's property, knowledge of one's natural heirs, understanding of how the subject instrument will treat those persons and understanding that it represents one's wishes.[13]

Alas, our law does not *directly* define "sound mind" in a fashion universal to every application of the term. Instead, our law defines "sound mind" *indirectly*, by resorting to definitions specific to certain functions and actions that depend on sound mind for their validity. Defining mental capacity in such a functional way serves the egalitarian interest in precluding the excessively intrusive constraint of generalization, which can lead to stereotyping, contrary to both our fundamental constitutional principles of individual autonomy and due process. Unfortunately, tangible issues of mental capacity arise in complex human settings and interactions involving

multiple functions, where our piecemeal approach to defining such capacity invites foreshortened comparisons and fosters untenable outcomes.

Contradictions and Mixed Messages – How Dilemmas Develop

Capacity to contract and capacity to make a valid will both require sound mind.[14] "In *Hanks*," the Colorado Supreme Court declared, "we noted that contractual capacity and testamentary capacity are the same."[15] Predating the modern specialized fields of neuropsychological testing and retrospective forensic assessment of capacity, that 72-year-old opinion is unhelpful to our current analysis, beyond reference as a humorous anecdote.

In the 1930s one Mr. Lee Hanks, a "prosperous" Colorado farmer and businessman originally from Nebraska, purportedly concocted a secret medicinal cure for the equine disease of fistula. The formula "was compounded principally of ground china, brick dust, burnt shoe leather and amber-colored glass. If the infection was in the horse's right shoulder, the mixture was to be poured in the animal's left ear, and if on the left shoulder then in the right ear."[16] After 1937, Mr. Hanks "increasingly devoted his efforts and money to the compounding and attempted sale of this concoction, his business judgment became poor and he finally deteriorated mentally to the point that on May 25, 1940, he was adjudicated insane and his son was appointed conservator of his estate."[17]

Hanks warrants close scrutiny. It could have been stated, bluntly in the coarser vernacular of the time, that Mr. Hanks was a crackpot,[18] but the Court drew a clear distinction between the "insane delusions" he suffered in respect to his horse remedy and his mental function in respect to the transactions at issue with the defendant coal company. Accordingly, the Court affirmed the Weld County District Court's validation of those transactions, against the challenge filed by his son, whom the district court had appointed as Hanks's conservator upon "adjudicate[ing him] insane . . . ."[19] Recognizing the general "presumption of sanity," the Court stated, "The legal test of Hanks' insanity is whether 'he was capable of <u>understanding and appreciating the extent and effect of business transactions in which he engaged</u>.' "[20] Then the Court enunciated the core holding adopted over a half-century later in *Breeden*:[21] "One may have insane delusions regarding some matters and be insane on some subjects, yet capable of transacting business concerning matters wherein such subjects are not concerned, and such insanity does not make one incompetent to contract unless the subject matter of the contract is so connected with an insane delusion as to render the afflicted party incapable of understanding <u>the nature and effect of the agreement</u> or of acting rationally in the transaction."[22]

On such basis, the Court insightfully discerned the specific distinction that, although Hanks suffered an "insane delusion . . . with reference to the efficacy of the horse medicine, . . . there is no evidence of delusions or hallucinations in connection with [the transaction at issue] . . . there is no basis for holding voidable his sale here involved on the ground of his insanity."[23] What has now become problematic is the <u>way</u> the Court in *Hanks* arrived at such a distinction, as it stated,

"Contractual capacity and testamentary capacity are the same."[24] The Court took its cues from considering the combination[25] of a 1915 Kansas Supreme Court opinion, *Wisner v. Chandler*,[26] and a 1937 Wyoming Supreme Court opinion, *Kaleb et al v. Modern Woodmen of America*.[27] In *Wisner*, a will contest, the Kansas Supreme Court actually derived its guidance from the court of King's Bench, as constituted in 1601.[28]

> When a will has been made after some or many of the symptoms of senile dementia have been observed, the law does not say: These symptoms prove the testator had senile dementia; senile dementia destroys the mind; consequently the will was made by one of unsound mind. The question of testamentary capacity remains, in substance and effect, just what it was in the *Marquess of Winchester's Case*, decided by the court of King's Bench at the Trinity term, held in the forty-third year of the reign of Queen Elizabeth [I]:
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> "And because it appeared by divers witnesses, and by many notorious circumstances, that the said Marquess, being sick *et multa provectus senectute*, was not of sane and perfect memory, such as the law requires at the time of the making of the said supposed will (for by law it is not sufficient that the testator be of memory when he makes his will, to answer familiar and usual questions, but he ought to have a disposing memory, so that he is able to make a disposition of his lands with understanding and reason; and that is such a memory which the law calls sane and perfect memory)." *Marquess of Winchester's Case*, 3 Coke's Reports, 302, 77 Eng. Reports . . . .[29]

In *Kaleb*, an insurance contract dispute, the Court concluded, in pertinent part: "We cannot hold that there was no substantial evidence to support the finding of the trial judge. There were grounds for the belief that the insured, though physically and mentally weakened, had sufficient reason to enable him to understand the nature and effect of the questioned act. Opinions that the insured was unable to attend to business affairs were probably based largely on his physical disabilities that made it difficult for him to see and hear and get about."[30]

Where *Breeden* parroted the *Hanks* statement that contractual and testamentary capacity "are the same," the Court in both opinions ignored its own observation of the distinction between the elements of contractual and testamentary capacity. Citing *Kaleb* as noted above, the *Hanks* opinion stated the fundamental standard for contractual capacity. Indeed, *Hanks* stated essentially the same standard by reference to prior Colorado case law: "The legal test of Hanks' insanity is whether 'he was incapable of understanding and appreciating the extent and effect of business transactions in which he engaged.' *Ellis v. Colorado Nat. Bank*, 90 Colo. 489, 10 P.2d 336, 340 [1932]."[31]

Despite the ambiguity in the foregoing rulings, we know that, in fact and in practice, the standard for contractual capacity is explicitly not the same as the standard for testamentary

capacity. The elements are clearly distinguishable. On testamentary capacity, *Breeden* chiefly references the seminal opinion in *Cunningham v. Stender*: "After *Lehman,* this court further refined the test for sound mind in 1953 in the landmark case *Cunningham v. Stender,* when we held that mental capacity to make a will requires that: (1) the testator understands the nature of her act; (2) she knows the extent of her property; (3) she understands the proposed testamentary disposition; (4) she knows the natural objects of her bounty; and (5) the will represents her wishes. 127 Colo. 293, 301, 255 P.2d 977, 981–82 (1953)."[32] Put differently, while the testator and contracting party must possess cognitive comprehension of the nature and effect of their acts, the elements of such comprehension differ between the two. Different elements of comprehension arguably require different levels of capacity – higher and more complex, or lower and less complex – logically contrary to the "they are the same" determination.

Of course, the chief holding and development of *Breeden* was the determination that testamentary capacity required the unification of the *Cunningham* elements and the absence of "insane delusion" materially affecting the transaction, as analyzed by *Hanks*. "As such, the *Cunningham* and insane delusion tests, although discrete, are not mutually exclusive. In order to have testamentary capacity, a testator must have a sound mind. In Colorado, a sound mind includes the presence of the *Cunningham* factors *and* the absence of insane delusions that materially affect the will. As noted above, insane delusions are often material to the making of the will, and thus will defeat testamentary capacity."[33] As referenced in and incorporated by *Breeden*, the *Hanks* opinion recognized, as noted above, "One may have insane delusions regarding some matters and be insane on some subjects, yet capable of transacting business concerning matters wherein such subjects are not concerned . . . ."[34]

Oddly enough another Colorado Supreme Court opinion, *Estate of McCrone*, was not cited in *Breeden* and *Hanks* but predated both. *McCrone* foretold the relevant analysis and issue: "A person is not incompetent to make a will because he has been adjudicated to be of unsound mind or incapable of managing his property, and a guardian of his person or estate has been appointed, or because he has been confined in an insane hospital. Conversely, a judgment declaring a person to be of sound mind is not conclusive as to his competency."[35]

Such views cause no consternation as far as they go, in view of the contexts in which they were enunciated. Besides the questionable pronouncement that testamentary and contractual capacity are one and the same thing, the current practitioner difficulty with applying the *Hanks-Breeden* conundrum does not arise because *Breeden* created the unified standard for testamentary capacity. It arises because of the last two decades of case-law development concerning the distinction *Breeden* incorporated from the *Hanks* insane-delusion analysis. The development, and varied application, of that distinction is what leads to insensible and untenable consequences.

Disturbance Upon Ultimate Application – How Dilemmas Play Out

As noted, based on *Hanks*, adopted by *Breeden*, a person simultaneously may have capacity for some transactions or decisions but not others. Citing to *Breeden* and to *McCrone*, the Colorado Court of Appeals in 2004 came to the natural, indeed statutory, conclusion that an adjudication of statutory incapacity for purposes of conservatorship does not equate to a determination of testamentary incapacity. In *Estate of Gallavan*, a will contest case, the Court ruled:

> The appointment of a conservator does not include a finding of "incapacity." In fact, when decedent wrote her will, the version of § 15-14-408(6) then in effect provided that "[a]n order ... determining that a basis for appointment of a conservator ... exists, has no effect on the capacity of the protected person." Colo. Sess. Laws 1979, ch. 451, § 153-5-408(6) at 1626 (repealed effective January 1, 2001). Similarly, the current statute, § 15-14-409(4), C.R.S. 2003, states that appointment of a conservator "is not a determination of incapacity."
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> Thus, the statute explicitly states that findings which warrant appointment of a conservator *do not* equate to a determination of testamentary incapacity.[36]

Accordingly, in *Gallavan* the Court of Appeals affirmed the trial court's judgment denying the contestant's petition for adjudication of intestacy. In the next year, the Court of Appeals, citing *Gallavan* as well as *Breeden* and *Hanks*, undertook a seemingly natural yet dramatic extension of the analysis. *Estate of Romero*[37] involved a gentleman, Robert Romero, diagnosed with mental illness and protected under a Uniform Veterans Guardianship Act guardianship.

Upon Mr. Romero's death, his children petitioned for intestacy, as against their father's formal will, based on allegations of testamentary incapacity and undue influence. "In support of their assertions, they relied primarily on the uncontested facts that decedent suffered from mental illness and that he had been a protected person under a Veterans Administration (VA) guardianship over his financial affairs."[38] The will essentially devised the vast majority of the several hundred thousand dollars of Mr. Romero's accumulated VA benefits to his surviving sister.

At trial in the Denver Probate Court, the contestants presented expert witness testimony from the physician who treated Mr. Romero for schizophrenia. While the physician testified that the decedent suffered from auditory hallucinations, the physician was unable to connect them with the execution of the decedent's will. "After considering all the evidence, the probate court found that contestants did not prove by a preponderance of the evidence that decedent was not of sound mind when he executed his will. The court held that neither the evidence of mental illness nor the mere existence of a VA guardianship was sufficient, in and of itself, to prove lack of testamentary capacity. It further found that decedent's sister had provided ample evidence that the will was a voluntary act and was not the product of undue influence."[39]

Citing to *Breeden's* references to the *Cunningham* standards and the *Hanks* insane-delusion analysis, the Court of Appeals affirmed, despite the evidence that the decedent "could not articulate" the value of his estate, although he knew it comprised accumulated VA benefits. The

Court referred to the *Cunningham* concept that, for the estate-value element of "sound mind," it is sufficient that the testator generally understands "the nature and extent of the property to be bequeathed."[40] However, the Court of Appeals did extend the analysis somewhat. What the decedent, Mr. Romero, did not know, according to the evidence admitted, was that his estate "was valued at approximately $90,000 when the will was executed and approximately $450,000 at decedent's death."[41]

Furthermore, although Mr. Romero was subject to a VA guardianship, entailing a different standard than for guardianship of an adult pursuant to the Colorado Uniform Guardianship and Protective Proceedings Act (CUGPPA),[42] the Court held, citing to *Gallavan* (which, of course, involved a conservatorship) and other portions of the Act, that appointment of a guardian or conservator does not in and of itself constitute lack of testamentary capacity."[43] A portion of the *Romero* opinion thus seemed to conflate VA guardianship with conventional CUGPPA adult guardianship. The Court of Appeals nevertheless conferred significant weight to C.R.S. § 28-5-219, a VA guardianship section stating, comparably to the corollary CUGPPA sections, "neither the fact that a person has been rated incompetent by the VA nor the fact that a guardian has been appointed for the person shall be construed as a legal adjudication of insanity or mental incompetency."[44] "Thus," the Court noted, "Colorado statutes explicitly state that the findings that warrant appointment of a guardian or conservator do not equate to a determination of testamentary incapacity."[45]

What then causes bewilderment was *Romero's* citation to *Breeden* and *Hanks* as follows: "We also note that the supreme court has held 'that contractual capacity and testamentary capacity are the same.' "[46] The reiteration of a conclusion seemingly weakened by internal contradiction in *Hanks*, not to mention the experience of practical reality, was not necessary to the ultimate ruling in *Romero*. More recent permutations of our law of capacity have taken the insightful discernment of functional capacities toward pushing the envelope, all the while without challenging the at-least-questionable, 72-year-old holding that testamentary and contractual capacity are the same.

What this current state of affairs means is that, since neither guardianship nor conservatorship constitutes a determination of testamentary incapacity, neither poses an obstacle to respondent engagement of counsel absent an evidentiary finding of specific incapacity to do so. New sections enacted to the CUGPPA, effective in 2016, explicitly affirm the right of the person subject to guardianship or conservatorship to representation by counsel of the "person's choosing . . . unless the court finds by clear and convincing evidence that the [protected person or ward] lacks sufficient capacity to provide informed consent for representation by a lawyer."[47] Where such an issue might arise, as in possible cases of either the over-litigious or "rogue" lawyer representing the respondent or the lawyer actually selected and directed by another person in the respondent's life, perhaps an undue influencer, the new sections enhance the likelihood of an evidentiary hearing, as well as professional evaluation / expert testimony,[48] on the specific issue of capacity to contract and/or provide informed consent to counsel. Indeed, the definition of

"informed consent" bears more resemblance to contractual capacity. C.R.P.C. 1.0(e) states that informed consent "denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." It reasonably may be inferred that the person's comprehension of the lawyer's adequate communications constitutes a condition precedent to the validity of the person's agreement.

Fortunately, counsel representing, or potentially representing, those persons subject by court adjudication to guardianship and conservatorship finally have recent guidance, besides C.R.P.C. 1.14, Client with Diminished Capacity, on the issue of informed consent. "The lawyer's effective and efficient representation of any client depends on the client's ability to receive, analyze, and process information and advice received from the lawyer, and to accurately inform the lawyer regarding information relevant to the representation."[49] Those considerations thus can become the specific subjects of professional evaluation, diagnostic testing, adverse expert testimony and evidence at hearing.[50] Bear in mind that, in the case of a person adjudicated, by clear and convincing evidence,[51] as needing a guardian appointment, such evaluation likely means an evidentiary hearing on whether or not that person had the capacity to provide such informed consent to counsel. The question demanding proof is whether that person "is unable to effectively receive or evaluate information or both or make or communicate decisions to such an extent that the individual lacks the ability to satisfy essential requirements for physical health, safety, or self-care, even with appropriate and reasonably available technological assistance."[52] The key to this proof is that the correct type of evaluation must be identified.

PART II will be in the next publication of Council Notes: In addressing the practical, real world applications of our varied law of capacity, as practiced by providers and experts, Part II also acknowledges the new reality that cognitively compromised persons' views and "expressions of preference" more often must undergo discrete capacity evaluation before court appointees should act in concert with them.

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[1] CRE 601; *People v. Coca*, 39 Colo. App. 264, 266, 564 P.2d 431, 433 (1977).
[2] CRE 602.
[3] C.R.S. § 13-90-106.
[4] *People v. Norwood*, 37 Colo. App. 157, 163, 547 P.2d 273, 279 (1975).
[5] "Adjudication of insanity does not conclusively render a witness incompetent, See *Howard v. Hester*, 139 Colo. 255, 338 P.2d 106 (1959), and there need not be a formal adjudication of sanity prior to testifying. *State v. Moorison*, *supra*. Rather, a rebuttable presumption arises. A person adjudged incompetent may testify so long as the trial court determines through appropriate *voir dire* examination and proper testimony in camera that, regardless of sanity, the witness appreciates and understands the nature and obligation of the oath and is capable of accurate recollection and narration." [Citations omitted]. *People v. Coca*, *supra*, note 3. (Emphasis added). *See*, *also*, *People v. Trujillo*, 40 Colo. App. 220, 223, 577 P.2d 297, 299 (1977), *overruled by People v. Chavez*, 621 P.2d 1362 (Colo. 1981).

[6] C.R.S. § 16-20-102.
[7] *Howard v. Hester*, 139 Colo. 255, 338 P.2d 106 (1959).
[8] "The issue is whether a witness who has been hypnotically relaxed without questioning or suggestion, has thereby been rendered incompetent to testify because the jury does not have a chance to observe the witness' pre-hypnosis demeanor. We hold that such a technique does not make a witness incompetent." *People v. McKeenhan*, 732 P.2d 1238, 1239 (Colo.App. 1986). "Both McKeehan and the People confuse this issue with the one addressed in *People v. Quintanar,* 659 P.2d 710 (Colo.App.1982). The issue there was whether a witness was rendered incompetent to testify after the witness' memory had been hypnotically refreshed. Because of the inherent unreliability of hypnosis, wherein the hypnotist may implant suggestions or encourage the subject to fabricate, we held that testimony by a witness whose memory had been hypnotically refreshed was per se inadmissible as to recollections from the time of the hypnotic session forward. However, we also held that such a witness is not incompetent to testify to pre-hypnosis recollections that have been previously disclosed and recorded. *People v. Quintanar, supra.*" *McKeehan*, *supra*, 732 P.2d 1238, 1239–40.
[9] C.R.S. § 15-11-501; *Breeden v. Stone*, 992 P.2d 1167 (Colo. 2000).
[10] *Id.*
[11] C.R.S. § 13-25-119(1)(d).
[12] *People v. Cockrell*, 2017 COA 125, ¶ 27. (Emphasis added).
[13] *Breeden*, *supra*, note 11, at 1170.
[14] *Breeden*, *supra*, note 11, at 1180-1172.
[15] *Breeden*, *supra*, note 11, at 1170, *citing, Hanks v. McNeil Coal Corp.*, 114 Colo. 578, 168 P.2d 256 (1946).
[16] *Hanks*, *supra*, note 17, 114 Colo. 578, 581, 168 P.2d 256, 258.
[17] *Id.*
[18] "A psychiatrist testified in substance that there were certain mental changes starting as early as 1930 . . .; that it was difficult to state specifically when his incompetency began; that . . . Hanks 'might well be considered without full possession of his faculties to attend to his property adequately' at the time of the sale of his property to defendants in July, 1937, and that it was his opinion that Lee Hanks was incompetent in 1937." *Hanks, supra,* note 16, 114 Colo. 578, 583, 168 P.2d 256, 259.
[19] *Id.*
[20] *Hanks*, *supra*, note 17, 114 Colo. 578, 585, 168 P.2d 256, 260, *citing*, *Ellis v. Colorado Nat'l Bank*, 90 Colo. 489, 10 P.2d 336 (1932). (Emphasis added).
[21] *Breeden*, *supra*, note 11, at 1171.
[22] *Hanks*, *supra*, note 22. (Emphasis added).
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] 95 Kan. 36, 147 P. 849, 852.
[27] 51 Wyo. 116, 64 P.2d 605 (1937).
[28] "*Marquess of Winchester's Case*, decided by the court of King's Bench at the Trinity term, held in the forty-third year of the reign of Queen Elizabeth." *Wisner*, *supra*, note 28.
[29] *Id*.
[30] *Kaleb*, *supra*, note 29.
[31] *Hanks*, *supra*, note 22.

[32] *Breeden*, *supra*, note 11, at 1170.
[33] *Breeden*, supra, note 11, at 1172.
[34] *Hanks*, *supra*, note 22.
[35] *In re McCrone's Estate*, 106 Colo. 69, 71, 101 P.2d 25, 26 (1940).
[36] *In re Estate of Gallavan*, 89 P.3d 521, 523 (Colo. App. 2004).
[37] *In re Estate of Romero*, 126 P.3d 228 (Colo. App. 2005), *cert. den.* (January 9, 2006).
[38] *Id*.
[39] *Romero*, *supra*, note 39, at 230.
[40] *Romero*, *supra*, note 39, at 231.
[41] *Romero*, *supra*, note 39, at 232.
[42] ". . . a mentally incompetent individual subject to guardianship as one who 'lacks the mental capacity to contract or to manage his or her own affairs, including disbursement of funds without limitation.' 38 C.F.R. § 3.353(a)." *Id*.
[43] *Romero*, *supra*, note 39, at 233.
[44] *Id*.
[45] *Id*.
[46] *Id*.
[47] C.R.S. §§ 15-14-319, 15-14-434.
[48] To which a respondent is entitled, in either type of proceeding, pursuant to C.R.S. §§ 15-14-306 and 15-14-406.5 ("At or before a hearing under this part [3 or 4] . . . ."). The authors have had personal case experience with the uniquely specialized area of forensic *capacity* evaluation to provide informed consent to counsel for different courses of legal action.
[49] CBA Formal Ethics Op. 131, adopted September 13, 2017, at 4, citing to CBA Formal Ethics Op. 126, adopted May 6, 2015. *See*, *also*, *e.g.*, the standard health-care professionals utilize for decision-making: whether the patient has the capacity to express informed consent or refusal for medical treatment or a health-care course of action. That is statutorily defined as "decisional capacity" in the Power of Attorney statute, C.R.S. § 15-14-505(4), and the Colorado Medical Treatment Decision Act, at C.R.S. § 15-18-103(6).
[50] *See*, note 50.
[51] C.R.S. § 15-14-311(1)(a).
[52] Definition of "incapacity" for purposes of guardianship, C.R.S. § 15-14-102(5). (Emphasis added).

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