ESTATES, TRUSTS, POWERS OF ATTORNEY, MENTAL COMMITMENTS, AND GUARDIANSHIPS: DEALING WITH FIREARMS

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ESTATES, TRUSTS, MENTAL COMMITMENTS, AND GUARDIANSHIPS: DEALING WITH FIREARMS

INTRODUCTION

Not all estate planners give thought to firearms in the planning process, any more than they do a detailed inventory of your tools. Much improvement is needed in the education of attorneys to inquire about firearms, firearm supplies, and NFA firearms. Once a person possessing firearms dies, with or without a Will, firearms can be a problem. Are firearms a consideration in the Will? Is there a Gun Trust, fully funded and appropriately drafted? If, does the Decedent own an NFA firearm such as a silencer? Will a Court appointed administrator sell firearms that the Decedent treasured to a stranger? Will anyone know where the Decedent would have left his firearms? Trusts created during life (intervivos) or at death (testamentary) come with their own protections and problems. Finally, mental issues, incapacity, invoking the use of powers of attorney and guardianship, which a large focus of this article, may deprive the incapacitated of all firearms and ammunition, as well as hamper the lives of those with whom the incapacitated resides.

I. THE ESTATE PLAN:

Attorneys need a better awareness of firearms. There is no other asset that can cause as much strife as firearms. You can poll one hundred lawyers who do primarily estate planning and maybe five will ever inquire as to the ownership of firearms. Maybe one has seen or drafted a gun trust. Yet, the entire plan could fail, the firearm issue could generate discord, and your executor could get sued, or even indicted. Those who practice in the area of firearms should educate any estate planning attorney they encounter to make the firearm ownership inquiry routine rather than the exception. Some consideration should be given to the fact firearms not left as a specific bequest are sold first to pay debt. The order of sale to pay debts should be considered in any plan.

A. Choosing Your Fiduciary

It is evident that you should choose your executor wisely and talk to that person about serving. If you asked the average person what they want in an executor, the first words are honest and trustworthy. But what if your executor dislikes firearms? Is afraid of firearms? Fails to understand the value or legacy of firearms? You want to guard your firearms like you guard your other assets. The executor should be familiar with your firearms, as well as your accessories and supplies, such as reloading equipment, ammunition, extra magazines/clips and the like. There should be discussion on the firearms you value most in case debt causes the firearm collection to be diminished. Your executor should also know when your firearms status changes, such as the creation and funding of a Gun Trust or other changes in the status of the firearms, such as the acquisition of NFA firearms. Just as you would discuss other changes in circumstance, your client should fully educate their fiduciary on their firearms.

1. Prohibited Persons

The Estates Code defines persons disqualified or unsuitable to serve as Executors in Section 304.003. It states:

A person is not qualified to serve as an executor or administrator if the person is:

(1) incapacitated;

(2) a felon convicted under the laws of the United States or of any state of the United States unless, in accordance with law, the person has been pardoned or has had the person's civil rights restored;

(3) a nonresident of this state who:

(A) is a natural person or corporation; and

(B) has not:

(i) appointed a resident agent to accept service of process in all actions or proceedings with respect to the estate; or

(ii) had that appointment filed with the court;

(4) a corporation not authorized to act as a fiduciary in this state; or

(5) a person whom the court finds unsuitable.

TEX. ESTATES CODE § 304.003. If firearms are involved, one must also consider a broader list than the above. Another consideration when firearms are involved is the definition of Prohibited Persons if you own firearms. 18 U.S.C. 922(g) defines prohibited persons as:

a. felons
b. fugitives from justice
c. persons addicted or users of illegal drugs
d. persons who have been involuntarily committed
e. illegal aliens and persons with non-immigrant visas
f. persons who renounced their citizenship
g. persons the subject of protective orders and similar orders
h. persons convicted of crimes of domestic violence

So if you represent a firearms owner or collector, you have two different statutes, Federal and State, to consider in drafting. If the division, sale and transfer of firearms is a part of the estate plan, the executor cannot be a Prohibited Person.

2. Successors.

As estate planners, we always hope the client's first choice for a fiduciary will be able to serve. This is not always the case. They die, become incapacitated, or even refuse. If you are truly concerned about firearms, the successor must be as willing to follow wishes and protect firearms as avidly as your primary choice. So at least one of your backup fiduciaries should be just as informed as the primary fiduciary and none should be Prohibited Persons.

3. Education in Advance.

Firearms are not familiar to everyone. Despite the desire to adhere to the wishes of your client, chosen executors need some basic education. The things you need to impress upon clients should include the following:

a. safe locations
b. safe combinations
c. keys to gun storage
d. firearms left out for protection
e. storage outside the homestead
f. location and copies of inventory of firearms
g. basic care of firearms
h. persons to not handle firearms
i. insurance and carrier
j. Gun Trust or not
k. copy of Gun Trust and how funded
l. general gun accessories and ammunition location and value
m. immediate firearms concerns at death.

Keep in mind that passing away with no one knowing how to find keys or knowing combinations can be an extremely expensive situation. There have been several estates where expensive safes were damaged and even destroyed as a personal representative attempted to perform their duties. There have been estates completed and then a friend or fellow collector comes forward stating the list was at Decedent's employer, or at a gun store.

B. Choosing Firearm Beneficiaries

A lawyer cannot tell a client to whom to leave their estate. It should be the duty of a lawyer to at least explain the issues of leaving firearms to those who cannot accept them and explain how decisions can create problems and expense for your estate. No "plan" is perfect but advance planning can help the estate plan remain intact at death.

1. Equalization.

If your client states the desire to leave firearms to certain persons, but realizes that one or more falls under "Prohibited Persons," it is incumbent to ask if the client is seeking equality in the plan. For example, your client has two children, one a Prohibited Person, and firearms valued at $100,000.00. If he leaves his or her firearms to one child, does he or she wish to equalize the bequest? If the estate plan says "I leave my estate to my children in equal shares in the plan, your executor is left to figure out the equalization, the value of the firearms and how to make all of the plan work. The Prohibited Person may demand half of the firearms This can be further complicated by an insolvent estate where the residuary doesn't have enough cash to equalize, and firearms, all or part, must be sold in order to make the equal distribution.

2. Later Prohibited Persons.

Also, the planner should at least consider some attention to the possibility that a beneficiary could become a Prohibited Person after the plan is in place. Should such event occur, the intent may not be to sell that beneficiary's firearms, but to keep them in the family. The bequest should address such contingency, if at all possible. Perhaps a definition of Prohibited Person and sole discretion to the Executor to decide not just how, but if an equalization occurs.

3. Beneficiary Dies Prior to Testator.

There should also be an inquiry into descendants of your primary beneficiaries. As an example, if a primary beneficiary dies before the testator, leaving a felon and a minor as descendants, the estate plan is again faced with the complication of the testator's intent if the firearms were not meant to be sold. The lack of funds, lack of a contingency plan, or agreement of the beneficiaries causes confusion and possible litigation.

C. Identifying Firearms, Supplies and Accessories.

If your client is a firearms collector and you are not, you may be puzzled or bored at the detail in which the client describes the collection, the differences in hand guns that sound alike, and the value of accessories, ammunition, reloading equipment and the like. Well maintained collections tend to always increase in value, and a collector takes pride in the increase in value. The planner needs to help the client develop a way to list, describe, group and/or categorize the collection. Even a fellow collector cannot properly handle an ill-defined collection, and will be forced to guess.

1. Executor Has a List.

The easiest way to deal with a changing collection is to add language to the Will that reads similar to the following:

> "At my death, I may leave a list addressed to my Executor of collections and other items, excluding cash assets, that I possess and pass by my Will to specific persons. This letter and list is a specific bequest that shall be honored by my Executor."

This sounds like a simple solution, right? But no. Typically, a person will do a new Will and either forget the letter and list to the executor, fail to update it or re-date it, fail to place it with the Will, or fail to make it identifiable at that list. For example, when the "Last" Will is probated, the letter or list may predate the Will. This leads to questions of a "new" letter or list that has been destroyed or that the "Last" Will revoked the letter or list of a prior date. There is no perfect way to remedy issues with a letter or list. One way to attempt to fix potential problems is as follows:

"The letter or list to my executor may be dated prior to my Last Will and Testament but remains valid unless my Last Will revokes such letter or list, or states the date of a subsequent list or letter."

The opposite of "fixing" the letter or list problem occurs when the executor is a beneficiary, the Testator tells the executor to tear up the list or the Testator give the beneficiary/executor a new list and he or she decides not to disclose it as it diminishes the beneficiary/executor's bequests. Thus, if the "listing" is not in the Will, issues can arise.

2. Collection Described in Will.

Collectors of anything valuable are an estate planning nightmare. Firearms are particularly problematic in that there are differences among sellers, buyers, manufactures, and collectors about description. It can intensify the cost of estate planning to describe each and every firearm by description, year, serial number, etc. It is also impossible to keep up or be correct in the description. If the collection is large, the firearm description is subject to scriveners error and omitted listings. The collection is further complicated by attempting to group accessories, tools, ammunition and other items so that they reach their intended beneficiary. If a listing is included in the Will, there should be a catch all for ill-described or additional firearms, giving the executor sole and absolute discretion to divide anything in question and releasing the fiduciary for his or her decisions, regardless of how perceived.

3. Later Sales and Acquisitions.

Regardless of the method by which the drafter identifies the collection, most collections of firearms change. The testator gives a gift, trades, buys new firearms, sells them, and the list and/or description in the Will will not match the collection. If the testator is diligent about the letter to the Executor, the estate process works in a more efficient manner. If, however, the collection changes and the Will is never updated, the collection and the Will listing will not match. Thus, again, the administration of the estate plan is more difficult.

D. Updating Your Estate Questionnaire.

Most planners have an estate questionnaire. A sample from our office is attached as **Exhibit A**. As you can see, there is very little in the way of focus of details of any collection. If you do Gun Trusts, or if you do not, you should afford any sort of collector a more detailed questionnaire so that the collector realizes or at least considers the need to more closely consider the bequest of firearms, or seek an expert and create a gun trust. A suggested addendum to a will questionnaire is attached as **Exhibit B**.

1. Existence of Firearms.

Even if your practice is not geared toward handling large collections of firearms, it is important to bring up the existence of firearms. Even a short discussion of firearms could lead to more specific drafting or the creation of a Gun Trust. Planners are remiss if they have no discussion of items like firearms.

2. Existence of Prohibited Persons as Beneficiaries.

Just as the questionnaire should include an inquiry as to who you intend to leave firearms to, by adding a brief definition of Prohibited Persons, the Testator can examine the beneficiaries and realize that a "share and share alike" or a specific bequest to certain persons of firearms will not work out at the Testator's death. It can be handled to the extent possible prior to death.

3. NFA Firearms.

The National Firearms Act (NFA) is extremely strict. It is not legal for any person to possess a Title II firearm other than the registered owner. These firearms include machine guns, silencers, destructive devises, etc. It is a crime punishable by up to ten (10) years in prison and up to $250,000.00 in fines. If the NFA firearms are not in a Gun Trust, then your client may put his executor and beneficiaries at risk. The existence of Title II items at death poses its own problems.

4. Existence/Need for Gun Trust.

As a planner, if you learn of the existence of Title II items in the firearms collection, a reasonable inquiry is how they are held. If they are held in a Gun Trust, the next inquiry is if their named executor is a trustee, and if the Gun Trust is correctly funded with all NFA items. If not, there are few options for the transfer of these items at death. The process is discussed in Sean Healey's comprehensive article, Gun Trusts and Firearms Issues In Probate Matters.

II. INTERVIVOS TRUSTS AND TESTAMENTARY TRUSTS:

Trusts can be created during life and funded. They are typically accompanied by a pour over Will, which funds any remaining assets into the trust at death. Other trusts, for minors, incapacitateds, or just because you want assets in trust, can be funded by way of a testamentary trust included in your Will. Regardless of the type of trusts, there are many considerations on who to pick as trustee, and what to fund into the trust. If the trust creates multiple trusts as death, there are also restrictions on what should fund the different trusts. Firearms should be transferred into the intervivos trust, or trust during lifetime by Bill of Sale.

A. Drafting

1. Picking a Trustee or Trustees

Unlike an executor, you can pick a trustee who has a criminal record, if you think this is a good idea. There is not a clear statute or caselaw on felons as trustees. If firearms are involved, once again you must consider the prohibited persons and the physical location of the trustee in relation to the beneficiary receiving firearms. The Federal and State laws affecting firearms will apply in both possessing the firearms and distributing them to the beneficiaries.

2. Picking Beneficiaries

The pot into which to place trust assets is also important. If the Beneficiary cannot accept the firearms, it leaves the trustee attempting to decide what to do and may involve Court intervention.

3. Minor as a Beneficiary

When you leave firearms to a minor, the bequest will most likely fail. The Settlor may believe a bequest to a minor is actually an "okay idea, and believe these firearms will be held by the parent of a minor". You must specifically state that a parent can hold the firearms as a natural parent. Are parents of the minor beneficiaries "Prohibited Persons"? If there are no instructions, does the Trustee just sell the firearms and fund the minor's trust? Does the minor, now an adult, have a cause of action for the loss of valuable firearms? Does the trustee need the Court for protection, and if so, how? Minors, with no other drafting, cannot take possession of the firearms. You must be 21 to own a handgun and/or ammunition exclusively for the handgun. If a minor is 18 or older, he or she can own/possess a rifle and/or shotgun.

4. Incapacitateds as Beneficiaries

There is no way to determine if you will need the trust for an incapacitated person when you die, unless the person is incapacitated as of the drafting. Bad things happen and in the rush to care for a loved one, your client does not think first of their trust, or will containing the firearms. A catchall provision is useful giving the trustee the absolute discretion to sell or unequally divide firearms should an incapacitated person be a beneficiary. Incapacitated can also be a term of discretion encompassing substance abuse, etc. and have the trustee be the determining factor on incapacity and to have absolute discretion in deciding not to allow the firearms to go to a beneficiary.

5. When to Create a Gun Trust

Sometimes, after careful thought and planning, an intervivos or testamentary trust will not satisfy the client or protect their firearms. If you are not comfortable with Title II weapons, following laws on transfer, shipping, possession and the like, you may wish to steer the client toward a Gun Trust. One caveat is to not undertake such a trust if it is not in your expertise. There are many Gun Trusts that will not withstand scrutiny. Also make sure the Gun Trust coordinates with the entire estate plan.

B. Statutory Protection and other Trustee Issues

1. Draft to Protect From Civil Liability

If you are going to draft an estate plan to handle firearms, the drafter should at least familiarize themselves with Chapter 46 of the Texas Penal Code. There is no certain way to draft for total protection from civil liability at all, much less for criminal liability for the mishandling of firearms. You should give your trustee the ability to seek any help they need, indemnify them as much as possible, and instruct your client to talk to his trustee about finding competent counsel.

It is important to consider both state and federal laws in drafting and administering testamentary and intervivos trusts containing firearms. There is a safe passage provision to allow

a trustee to transport firearms and ammunition from one state to another, if the items can be legally possessed. Learn the firearm laws in the state of administration and any other state the trust assets may eventually need to go.

2. NFA Trust Protection

Know that a Gun Trust can allow a Trustee to possess NFA, Title II firearms and weapons it might not otherwise possess. The same protection does not allow a mere trustee of an intervivos or testamentary trust the same protection. The immediate identity of NFA firearms is a must. If a client has no idea, leave them alone. Putting them in a car, handing them off or trusting a friend to hold them are all horrible ideas. Have a professional come look at them.

3. Keys, Combinations and Protection

If you want trusts to work as intended, information is essential. If you wish the firearms to remain safe and secure, and eliminate or lower risk to others or lower the risk of theft, you must trust the trustee with combinations, keys, instructions, care, and security for these firearms. An untrusting owner must decide between having his entire collection mistreated, harmed, neglected or destroyed in attempting to locate, catalog and inventory the firearms; or trusting, educating and informing the trustee. Firearms need to be safe now, and at the client's death.

III. INVENTORYING AND DISTRIBUTING THE ESTATE

A. Inventory to Beneficiary/Court

Firearms are typically listed separately on an inventory. If possible, an affidavit in lieu of inventory should be filed of public record. Thieves have access to public data and an inventory gives them a shopping list. It is custom to list each firearm by make, model and serial number. Most gun dealers can assist you in locating the serial number on the firearm. You will not always be able to pinpoint a year of manufacture. Locate any lists, receipts, insurance or any document which can assist in accurate reporting. If you must file a public inventory, the items, including firearms should not be in a vacant house, unprotected.

B. Valuing

Insurance on firearms is a good method for obtaining values. Many gun dealers offer both informal and formal appraisal services. It is wise to get a quote as some do a flat fee appraisal while other appraisals are by the piece. In a taxable estate, the formal appraisal is usually provided to the IRS. If there are expensive pieces of re-loading or repair equipment, you should get a value on these larger pieces.

IV. INTESTATE SUCCESSION

An entire article could be written on the difficulties of passing away without a will. Can you imagine a potential client, anti-gun, anti-weapon, who walks into a loved one's home after death? There is a safe full of firearms, massive amounts of ammunition, and reloading equipment. Now, finding no will, he wants to be appointed administrator. His or her first thought is to get rid

of all firearms. Or, your potential client is not disqualified, but gets appointed and realizes he or she, or heirs at law are Prohibited Persons

A. No Will

If the Decedent has no will, the expense of administering the estate can triple or quadruple. Thus, if the anti-gun administrator is appointed, the firearms go quickly, as usually to any interested buyer. Also, any administrator may be forced to liquidate the firearms to pay debts as no order is left by Decedent as to what is sold first, and firearms are readily marketable.

B. No Chosen Personal Representative

One reason to promote estate planning and Gun Trusts is to pick your representative. The family where there is no will may meet and pick an administrator based on convenience to estate property, time to spend, family vote or any number of factors. In no way will the Decedent's wishes be fulfilled unless it is by accident. Again, all the firearms go by the way of the advice given to the Court appointee by their chosen counsel.

C. Heirs as Firearm Recipients

If you die without a will, the Estates Code decides your heirs. See Estates Code §§201.001 and 201.002. A flow chart which may simplify the discussion of heirs at law is attached as **Exhibit C**. The administrator or personal representative has the right to possess firearms and get what could be called a "pass". *See* 27 CFR 479. This speaks directly to NFA firearms. However, this does not exceed the term of the administration. You also are charged with a duty to not distribute firearms to Prohibited Persons, and a duty to follow all of the transfer rules for NFA firearms.

V. POTENTIAL DISABILITIES THAT AFFECT CAPACITY

A. Assessing a Problem

There are numerous physical as well as mental issues that can render a client temporarily or permanently incapacitated. As lawyers, we do not possess the tools to "diagnose" our clients. We do, however, possess the insight to realize that something is "off" or that certain responses or a lack of response is more than a client just being difficult. In planning, we should always be alert to possible disorders. This awareness should heighten if the client discusses the use and ownership of firearms.

B. Potential Disabilities

A disability is generally defined as a limitation on a person's ability to perform socially-defined roles and tasks within a sociocultural and physical environment.[1] Disability is the "gap between the person's capabilities and the environment's demand."[2] While a person's disability will not always result in incapacity, the ability to recognize the most frequently encountered conditions and disorders may be a factor in deciding whether further action, such as invoking a

[1] *See generally* Michael Lichtenstein, M.D., M.Sc., *Capacity - The Medical Perspective,* STATE BAR OF TEXAS ELDER LAW COURSE, Ch. 10 (2000) (discussing capacity issues as defined in the medical field).
[2] *Id.* at 3.

power of attorney or seeking a guardianship, as appropriate. The following is a brief overview of potential disorders that may impact a decision to seek help for a client. Specifically, each description details whether the condition is permanent and progressive or if it is treatable.[3]

1. Mental Incapacity

Mental capacity relates to the requisite ability to appreciate the effect of a choice and understand the nature and consequences of such choice. The ability to make such choices is contingent on the process used to reach his or her decision. Generally, a person has the requisite mental capacity to contract when they are able to reach their decision as a result of the following four-step process:

- Understanding the relevant information regarding the choice;
- Appreciating the likely consequences of each choice;
- Manipulating the information rationally; and
- Communicating a stable decision.

This four-step process must be applied to each decision, which could be hundreds a day. Thus, when dealing with educated clients (or lawyers), their education may allow them to mask many difficulties. A person may have sufficient mental capacity to make certain decisions, but not others. This is the logical result of the application of this process to choices or decisions that involve varying levels of complexity and consequences.

Potential mental incapacity can result from a number of disorders, diseases, and conditions. Although a thorough discussion is beyond the scope of this Article, common causes of medical incapacity include:

- Dementia disorders, such as Alzheimer's, Leewy Bodies, Picks, etc.;
- Cerebrovascular diseases such as stroke and multi-in-fact dementia;
- Depression;
- Alcohol and drug abuse and addiction;
- Vitamin deficiency such as Vitamin B12, Potassium, or Folic Acid;
- Thyroid imbalances or diseases; and
- Diseases that affect the central nervous system, such as syphilis and AIDS.

2. Manic and Bipolar Disorders

Persons with manic or bipolar disorders are particularly difficult because they can interact well in certain settings. A person who is both manic and depressive will have huge mood swings, ranging from irrational fears and hopelessness, to unwarranted giddiness. In mania, the person is expansive, euphoric, and full of good humor. They can sometimes seem happy about bad things. But, when criticized, the person becomes irritable, argumentative, and threatening. In the depressive mode, the person is sad, tearful, hopeless in the extreme, and even suicidal. The client may miss deadlines and meetings with no word or call. At times, they may lack the requisite capacity to handle certain matters, be susceptible to influence, or make poor decisions. However, whether they meet the standard of incapacity that requires a guardianship is often difficult to prove.

[3] *Supra* note 3; s*ee also* Richard C. Simons, M.D., UNDERSTANDING HUMAN BEHAVIOR IN HEALTH AND ILLNESS (3d ed. 1985) (discussing various personality disorders).

This particular disorder is difficult to control, as medications can control the disease temporarily, but then may not control the ups and downs as effectively as time goes on.

3. Organic Brain Syndrome

Organic Brain Syndrome ("OBS") is characterized by a temporary or permanent dysfunction of the brain. The direct cause of the dysfunction is unknown, and this makes treatment with medication a hit or miss proposition. There is a loss of brain function in all OBS cases. The loss of function presents itself opposite from the acquisition of functions during the person's growth; for example, the first brain function that is lost is the intellectual or cognitive function. The next functions that deteriorate are motor skills and consciousness. A person suffering from OBS may be difficult to identify because he or she may be having a good day when first encountered, and then hours later begin to fade. Only after significant interaction will signs of incapacity become evident. If the attorney spends the day with the person, the loss of the cognitive function may be evident. At first, the loss may seem normal, but the effect on daily work will become apparent.

4. Chronic Alcoholism and Drug Dependency

It is estimated that 15 million Americans abuse alcohol.[4] The International Classification of Disorders (ICD-10) uses the following criteria to diagnose alcoholism:

Men: 3 to 7 drinks almost every day or 7 or more drinks at least 3 times a week.
Women: 2 to 5 drinks almost every day or 5 or more drinks at least 3 times a week.

The use of alcohol or drugs does not necessarily correlate to incapacity or need for a guardian. But chronic and prolonged use can lead to permanent impairment or susceptibility to undue influence. It is often very difficult to obtain guardianship when the incapacity is related to drug or alcohol use. The client will enter treatment, get sober, but will need monitoring in order to stay sober. Also, chronic alcoholism can decrease brain function and reasoning and may even become permanent.

5. Dementia and Alzheimer Diagnosis

Senile dementia is sometimes referenced as being age-related. References to multi-infarct disease, or mini strokes, may also suggest impairment and can contribute to dementia. From cross-examining psychiatrists, although some forms of memory loss can be treated, it appears that Alzheimer's or multi-infarct dementia is progressive and irreversible. However, before filing a guardianship proceeding on a client with Alzheimer's, consideration should be given to a person's willingness to consider evaluation and treatment. Dementia is also irreversible, and the client should use the time of stabilized mental capacity to handle their affairs. Moreover, lawyers should secure proof of their client's stabilized capacity in writing at or near estate planning execution.

C. Warning Signs

As with many of these cases, it is often difficult to initially gauge a person's incapacity or a disability that could lead to bad judgment, exploitation, confusion, and inability to focus. As

[4] *Alcohol Facts and Statistics*, National Institute of Alcohol Abuse and Alcoholism, https://www.niaaa.nih.gov/alcohol-health/overview-alcohol-consumption/alcohol-facts-and-statistics (last visited July 1 2018).

lawyers, we have limited exposure to our clients. But some of the more common warning signs include:

- Memory problems evidenced by excessive reliance on third parties to provide basic information and detail;
- A tendency to avoid answering questions that relate to memory recall, or "masking;"
- "Covering," which is answering a question with a glib response such as "everyone knows that;"
- Repeated conversations regarding the same issues or concerns that have been previously responded to;
- Unusual reliance on another person for their basic daily needs such as food, shelter, clothing, and communication needs, commonly referred to in medical records as "ADLs" or "activities of daily living;"
- Signs of hypochondria, particularly when faced with a client meeting, or deadline;
- Obsessive/compulsive behavior;
- Victim-like behavior, such as the inability to perceive the contribution of one's own actions to the current situation, but deflecting the inability to focus onto others;
- Significant mood swings in short periods of time, contributing to difficulties in making rational decisions;
- Unreasonable suspicions, such as believing a friend is an enemy, stealing money, or trying to harm them without any factual or logical basis;
- Manic/depressive or otherwise inappropriate behavior, such as behaving extremely jubilant for no reason at a serious time, or being depressed, sad, and tearful when all is going well and there is no perceived problem (this can even occur in court or in depositions);
- Anxiety disorders or illnesses which prevent the client from leaving his or her home on various days and/or the inability to subject themselves to a group of persons; this can also manifest itself as agoraphobia and other phobias (panic disorder is an example);
- Substance abuse disorders to the degree that the client is incoherent, and communication is limited to days when the client has not abused the substance;
- Major depression to the degree that there are changes in appetite, sleep patterns, energy, concentration, and possibly feelings of hopelessness and suicidal thoughts (note that these are often not shared with their lawyer, friends, or family members);
- Schizophrenia, or schizophrenia-affective disorders which, when not controlled, result in delusions, disorganized speech, and possibly hallucinations (these may not have exhibited themselves on the date of marriage but usually appear before age of forty);
- Amnesic disorders that are difficult to address, such as fluctuating dementia, Alzheimer's, early-onset dementia, Leewy Bodies, etc.; and
- Psychopharmacological disorders such that the client is non-compliant with medications, over-medicates, or abuses both prescribed over-the-counter medications, and/or illegal drugs.

D. Texas Disciplinary Rules of Professional Conduct, Rule 1.02(g)

There is a duty for lawyers to report or take action regarding clients that are incapacitated.[5] Attorneys could use the same guidelines in dealing with law partners or associates who have compromised capacity issues and even with opposing counsel, since lawyers have such a high fiduciary duty to clients. It is not overreaching to have a duty to protect fellow lawyers, and to protect your clients from themselves and others.

1. Attorney-Client Relationship

Rule 1.02 of the Texas Disciplinary Rules of Professional Conduct addresses the scope and objectives of an attorney-client representation. Rule 1.02 provide as follows:

> (a) Subject to paragraphs (b), (c), (d), (e), (f), and **(g),** a lawyer shall abide by a client's decisions:
>
> (1) concerning the objectives and general methods of representation;
>
> (2) whether to accept an offer of settlement of a matter, except as otherwise authorized by law;
>
> (3) In a criminal case, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify.
>
> . . .
>
> **(g) A lawyer shall take reasonable action to secure the appointment of a guardian or other legal representative for, or seek other protective orders with respect to, a client whenever the lawyer reasonably believes that the client lacks legal competence and that such action should be taken to protect the client.[6]**

The comments to Rule 1.02 provide additional guidance with regard to the duties imposed by Rule 1.02. Comment 12 clarifies that Rule 1.02(a) assumes that the lawyer is legally authorized to represent the client.[7] It provides that the "usual attorney-client relationship is established and maintained by consenting adults who possess the *legal capacity* to agree to the relationship."[8] Comment 12 also recognizes that an attorney may be entitled to represent a client suffering from a disability but provides that the "relationship can be established only by a legally effective appointment of the lawyer to represent a person."[9] However, unless the lawyer is legally authorized to act for a person under a disability, the attorney-client relationship does not exist for the purpose of Rule 1.02.[10]

VI. 2017 EXPANSION OF RIGHTS UNDER STATUTORY POWER OF ATTORNEY

After change after change to the Power of Attorney Act, the legislature's 2017 modifications to the statute have hopefully made the statutory durable power of attorney more flexible and acceptable. In the litigation arena, the flexibility may allow for more logical solutions to divorce, guardianship, corporate, and capacity-related litigation. Unfortunately, the space limitations of

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[5] TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.02(g), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (West 2005) (Tex. State Bar R. art. X, § 9.
[6] TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.02(a), (g) [emphasis added].
[7] TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.02(a) cmt. 12.
[8] *Id.* [emphasis added].
[9] *Id.*
[10] *Id.*

this Article preclude a long discussion of these changes; for more detail, see Texas Estates Code Section 751.101 et seq. A summary of the changes in powers under a statutory power of attorney is as follows:

A. Expanded Powers of Agent

1. Create, amend or revoke intervivos trusts; (this could include Gun Trusts)
2. Make gifts:
    a. Generally limited to annual exclusion amount; (could be considered as way to get firearms away from an incapacitated)
    b. Consistent with principal's intent (if known) or best interest;
3. Create or change rights of survivorship, such as:
    a. Putting limitations on who can be beneficiary;
    b. Typically, must be related, or someone obligated to support by law;
4. Create or change beneficiary designations (life insurance/P.O.D.); and
5. Delegate authority under the Power of Attorney.

Additional provisions include:

1. The agent is not a fiduciary until he/she accepts appointment, and such fiduciary duty is only imposed while he or she is acting as agent.

2. Co-agents can act independently unless Power of Attorney states otherwise.

3. An agent has the power to name successor agent after those named by principal.

4. After September 1, 2017, compensation and reimbursement are allowed unless stated otherwise.

5. Expanded powers after September 1, 2017, also include minerals interests, mail, pets, homestead and digital assets.

B. Acceptance of Statutory Durable Powers of Attorney By Third Parties

Chapter E of the 2017 act is designed to require reasonable acceptance of powers of attorney. The financial institutions formerly presented a roadblock to using the power of attorney in times of incapacity through their unwillingness to adhere to these documents. These new provisions intend to balance the rights of the principals and the rights of the third parties asked to rely on the instrument. A summary of the acceptance changes are as follows:

1. The institution must accept or reject the document in a period of time.
2. The institution can rely on certification of agent, letter of counsel and English translation.
3. There are only certain reasons to reject and the institution must advise agent in writing.
4. There is now protection for acceptance in good faith.
5. There is a limited cause of action against the institution for refusal to accept the instrument.

C. Changes in Duties of Agent Under a Power of Attorney

There is no glamour in acting as an agent. It is a labor of love and the duty to account requires good record keeping, prohibits commingling, and includes other duties not required of handling your own personal funds. The duties have always been there, but some changes to the duties in 2017 include:

a. A duty to preserve an estate plan done with capacity;
b. A duty to act when there is knowledge of a breach by a co-agent;
c. A duty to know when powers are temporarily suspended if the court appoints a temporary guardian and the order does not say otherwise.

VII. MENTAL COMMITMENTS

Mental commitments are covered under the Texas Health & Safety Code, not the Estates Code. The commitment and hospitalization of clients or attorneys suffering from mental illness in Texas is civil and not criminal in nature. The procedure, including the affidavit and warrant, are completely private and confidential. In very limited circumstances, a court order can obtain copies, usually redacted. Probate Courts, in certain circumstances, have access to these records. There is no public database where you can locate the names of person who have been mentally committed. Sometimes a client or attorney needs the "wake up" call that a commitment can give. It is a chance to get help, medication, therapy, and other options to avoid a guardianship and possibly the loss of a license, in occupations where licenses are required, OR A STATUS OF A Prohibited Person and loss of the ability to own and possess firearms.

A. Definitions

1. The term "Mental Illness" is defined as an illness, disease, or condition that either (1) substantially impairs a person's thought, perception of reality, emotional process, or judgment or (2) grossly impairs behavior as demonstrated by recent distributed behavior.[11] This definition does not include a person suffering from epilepsy, senility, alcoholism, or a mental deficiency. However, a person who suffers from a mental illness along with another condition is still subject to commitment under the Code.

2. The term "Mental Health Facility" is defined as a mental health facility that can provide 24-hour residential and psychiatric services and the

a. Is operated by the Texas Department of State Health Services (DSHS);
b. Is a private mental hospital licensed by DSHS;
c. Is a community center, a facility operated by or under contract with a community center, or another entity designated by DSHS to provide mental health services;

B. The Commitment Process

The commitment process must be broken down into three parts so that it can be better understood: (i) emergency detention; (ii) protective custody; and (iii) commitment. Each serves the purpose of protecting a person who constitutes a danger to themselves or others.

1. Emergency Detention Without a Warrant (Peace Officer) - § 573.001

A warrantless detention is the preferred method of emergency detention because of the very nature of a situation requiring intervention: The Code requires an officer to have sufficient reason to believe (1) that a person is mentally ill and (2) that because of such illness, a substantial risk of harm to self or others exists unless immediate restraint is employed.[12] If an officer encounters a person who truly meets the criteria for emergency detention, there should never be time to secure a warrant. A peace officer without a warrant may take into custody any such person

[11] TEX. HEALTH & SAFETY CODE ANN. §571.003(14) (West 2013).
[12] TEX. HEALTH & SAFETY CODE ANN. §571.001(a).

suffering from mental illness, may transport the person to the nearest appropriate inpatient mental health facility—or a mental heal facility deemed suitable by the local mental health authority if an appropriate inpatient mental health facility is not available—and may immediately file an application with the facility for the person's detention. No detention is permitted in a private facility without the consent of the head of such facility.

2. Emergency Detention with a Warrant - § 573.011

Any adult may file an Application for the Emergency Detention of another. If the application is granted, a warrant is issued. Before issuance of an emergency warrant is approved, there must be adequate and credible information presented so that a reasonable decision may be formulated to protect the rights of the individual against the rights of society in general. The determination of what may be adequate and credible information is very difficult and can be accomplished only on a case-by-case basis. The sole purpose of the issuance of these warrants is to protect the individual or others when a substantial imminent risk of serious harm exists and immediate intervention or restraint is necessary to prevent injury. Thus, both the facts that form the basis for the requested warrant and the person who furnished these facts play a key role in the decision-making process. Therefore, the court can require the applicant to appear and be examined in order to attest the adequacy and credibility of the information furnished.

Peace officers are under similar constraints when exercising their authority under the warrantless detention provision contained in the Code. The same can be said of physicians and psychiatrists when performing their duties during preliminary examinations after emergency detention.

The applicant must have reason to believe and must believe all four of the following: (1) the person evidences mental illness; (2) there exists a substantial risk of serious harm to self or others; (3) such risk of harm is imminent unless the person is restrained; and (4) such belief is based on specific recent behavior, overt acts, attempts, or threats. In the application, the applicant must state and describe the following in detail: (1) the basis for the risk of harm; (2) the behavior, acts, attempts, or threats that from the basis of the applicant's belief; and (3) the relationship of the applicant to the individual. Any other available relevant information may accompany the application.[13]

3. Mental Commitment Evidence

a. Elements for Commitment

Under §§ 574.034(a) and 574.035(a), the necessary elements for involuntary inpatient commitment are that the proposes patient is mentally ill and as a result

(1) The proposed patient is likely to cause serious harm to himself or
(2) The proposed patient is likely to cause serious harm to others; or
(3) The proposed patient
   a. Is suffering severe and abnormal mental, emotional, or physical distress; and
   b. Is experiencing substantial mental or physical deterioration of the proposed patient's ability to function independently, which is exhibited by the proposed patient's inability, except for reasons of indigence, to provide for the proposed patient's basic needs, including food, clothing, health or safety; and

[13] TEX. HEALTH & SAFETY CODE ANN. § 573.011.

c. Is unable to make a rational and informed decision as to whether to submit to treatment.

b. Sufficiency of Evidence

The burden of proof shall be to prove each element of the applicable criterion by "clear and convincing" evidence.[14] Clear and convincing evidence is defined as the measure of proof that produces a firm belief or conviction in the mind of the fact-finder as to the truth of the allegations sought to be established.[15] Clear and convincing evidence is an intermediate evidentiary standard that requires more than a preponderance of evidence but less than a reasonable-doubt standard.[16] It is the State's burden to meet the elements for commitment.[17] The state defends the commitment and its validity.

The clear and convincing evidence necessary for an order for inpatient mental health services must include expert testimony and, unless waived, must include evidence of a recent overt act or a continuing pattern of behavior that tends to confirm either (a) the likelihood of serious harm to the proposed patient or others; or (b) the proposed patient's distress and the deterioration of ability to function.[18] In a hearing for temporary mental health services, the evidence of the recent overt act or continuing pattern of behavior may be waived.[19]

c. Order for Temporary Mental Health Services - § 574.034

An Order for Temporary Mental Health Services shall state that treatment is authorized for not longer than 90 days.[20] The judge may enter an order committing the person to a mental health facility for inpatient care.[21] Alternatively, the judge may enter an order requiring the patient to participate in mental health services in outpatient care, including, but not limited to, programs of community MHA centers or services by private psychiatrists and psychologists.[22] The period of commitment for inpatient or outpatient services is for a period not to exceed 90 days. The court shall not specify any period shorter than 90 days nor more than 90 days upon an Application for Temporary Mental Health Services.

Under a determination for temporary or extended mental health services, a judge may advise, but may not compel, a proposed patient to participate in counseling, to refrain from the use of alcohol or illicit drugs, or to receive treatment with psychoactive medication as specified by an outpatient mental health services plan.[23]

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[14] TEX. HEALTH & SAFETY CODE ANN. §§ 574.034(a), 574.035(a); *see also* Addington v. Texas, 441 U.S. 418 (1979).
[15] State v. Addington, 588 S.W.2d 569, 570 (Tex. 1979).
[16] *Id.*
[17] *In re* J.S.C., 812 S.W.2d 92, 94 (Tex. App.—San Antonio 1991, no writ).
[18] TEX. HEALTH & SAFETY CODE ANN. §§ 574.034(d), 574.035(e) (West 2017); *see also In re* Breeden, 4 S.W.3d 782 (Tex. App.—San Antonio 1999, no pet).
[19] TEX. HEALTH & SAFETY CODE ANN. § 571.034(f).
[20] TEX. HEALTH & SAFETY CODE ANN. § 574.034(g).
[21] *See* TEX. HEALTH & SAFETY CODE ANN. §§ 571.034, 571.035.
[22] *See* TEX. HEALTH & SAFETY CODE ANN. §§ 571.034(b), 571.035(b), 574.037.
[23] TEX. HEALTH & SAFETY CODE ANN. §§ 574.034(j), 574.035(j).

d. Order for Extended Mental Health Services - § 574.035

An Order for Extended Mental Health Services shall state that treatment is authorized for not longer than 12 months.[24] The court cannot enter an order for extended commitment unless (1) the clear and convincing burden of proof standard is met for all mental illness elements; (2) findings are made that the condition of the patient will last longer than 90 days; and (3) the patient has been an inpatient under court order pursuant to the Texas Mental Health Code or the Texas Code of Criminal Procedure for at least 60 consecutive days in the last 12 months.[25] The court shall not specify any period shorter than twelve months on an extended commitment. "The court cannot make its findings solely from certificates of examination for mental illness but shall hear testimony."[26]

C. Effect of Mental Commitment on Firearm Possession

1. Privacy of a Mental Commitment

As discussed supra, a mental commitment is confidential. The records on how, why and where a person was committed is confidential. There are only rare circumstances where anyone can get a court order for even limited information on a mental commitment. The idea of confidentiality is to encourage help and preserve employment, licenses, dignity and the like. The anonymity of the mental commitment process seems to conflict with the definition of Prohibited Persons, and the ownership/possession of firearms by Prohibited Persons.

2. 18 USC 922

The entirety of 18 USC 922(d) and (g) read as follows:

(d) It shall be unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person—
(1) is under indictment for, or has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
(2) is a fugitive from justice;
(3) is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));
(4) has been adjudicated as a mental defective or has been committed to any mental institution;
(5) who, being an alien—
(A) is illegally or unlawfully in the United States; or
(B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));
(6) who [2] has been discharged from the Armed Forces under dishonorable conditions;
(7) who, having been a citizen of the United States, has renounced his citizenship;

[24] TEX. HEALTH & SAFETY CODE ANN. § 574.035(h).
[25] TEX. HEALTH & SAFETY CODE ANN. § 574.035(a)–(b).
[26] House v. State, 222 S.W.3d 497, 500 (Tex. App.—Houston [14th Dist.] 2007, pet. denied).

(8) is subject to a court order that restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child, except that this paragraph shall only apply to a court order that—
(A) was issued after a hearing of which such person received actual notice, and at which such person had the opportunity to participate; and
(B)
(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or
(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or
(9) has been convicted in any court of a misdemeanor crime of domestic violence.
This subsection shall not apply with respect to the sale or disposition of a firearm or ammunition to a licensed importer, licensed manufacturer, licensed dealer, or licensed collector who pursuant to subsection (b) of section 925 of this chapter is not precluded from dealing in firearms or ammunition, or to a person who has been granted relief from disabilities pursuant to subsection (c) of section 925 of this chapter.

. . .

(g) It shall be unlawful for any person—
(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
(2) who is a fugitive from justice;
(3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));
(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;
(5) who, being an alien—
(A) is illegally or unlawfully in the United States; or
(B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));
(6) who has been discharged from the Armed Forces under dishonorable conditions;
(7) who, having been a citizen of the United States, has renounced his citizenship;
(8) who is subject to a court order that—
(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;
(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and
(C)
(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

> **(ii)** by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or
> **(9)** who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S. Code § 922

The clear wording of both (d) and (g) would indicate that anyone who has been "committed to any mental institution," cannot be (1) sold a firearm, (2) given a firearm, or (3) possess a firearm. This begs the question "who will know?". The reporting to appropriate authorities inadequate and many involuntary commitment reportings fall through the cracks. If the firearm is left to a beneficiary who has been committed, the executor/trustee may not be privy to any knowledge of the event. There is no statute in the Texas Estates Code that requires any due diligence to try to discover any involuntary mental commitments. How would anyone make such a sensitive inquiry?

D. Law Enforcement Seizing of Firearms

A peace officer can seize firearms. Under § 573.001, the firearms can be seized, and the law enforcement officer will issue a receipt for any firearm found in the possession of the person they believe to be mentally ill. The firearm does not have to be used in the commission of a crime, but due to fear of bodily harm to the person taken into emergency detention or fear of harm to others. A copy of the Receipt and Notice of Rights for Seized Firearms is attached as **Exhibit D**. Note that under Art. 18.191, TEX. CODE CRIM. PROC., and § 573.001 Texas Health and Safety Code, certified notice must be given on timeframe and procedure to gain return of the firearm. The reality of this form is a mentally impaired person may give no information or incorrect information on their next of kin, and the firearms may never be returned.

VIII. GUARDIANSHIP

A. Definition

Guardianship is an extreme step and should be only considered if all other avenues of help fail. If the compromised client is at such a state of mind to be judicially declared incompetent, then his or her career is at an end and firearms ownership is at risk. The same can be said of any employment as few employers will hire on or continue to employ incapacitated persons. A guardianship is a judicial declaration that a person fits the following definition pursuant to the Texas Estates Code §1002.017.

An Incapacitated Person is:

(1) a minor;

(2) an adult who, because of a physical or mental condition, is substantially unable to:

(A) provide food, clothing, or shelter for himself or herself;

(B) care for the person's own physical health; or

(C) manage the person's own financial affairs; or

(3) a person who must have a guardian appointed for the person to receive funds due the person from a governmental source.[27]

With firearms, the existence of a guardianship requires the guardian to take the firearms to the exclusion of the incapacitated. The question of selling the firearms to care for the incapacitated is usually answered with a yes. If the firearms are in a Gun Trust or even an intervivos trust, the firearms may be preserved. A guardianship ends all powers of attorney and the ability to now fund a trust or a gun trust.

B. Medical Evaluation

If a client is impaired, he or she will not submit to a medical evaluation wherein the results are shared with the court and others. A guardianship requires a medical exam and letter by a Texas doctor where the exam is within 120 days of filing. When a guardianship is filed, it may necessitate a request for an Independent Medical Examination. The motion can be filed with the Application for Guardian. It normally will not be heard until the person on which the guardianship is filed is provided an attorney ad litem, who represents them as an appointed attorney. The Estate Code requires four (4) days' notice in order for the Motion for Mental Exam to be heard. A copy of the form doctor's letter is attached as **Exhibit E**, to demonstrate the types of questions the physician is required to answer. Note that no question on the doctor's letter addresses the continued ownership of firearms. This author knows of <u>no</u> physician who would certify the need for a guardian and state the person could possess <u>any</u> form of weapon. This is not going to happen.

C. Designations of Guardian

1. <u>Before Need Arises</u>

Persons who are concerned that they may lose capacity and that their power of attorney will be ignored may designate the person they wish to be guardian and set forth the order of preference of who is appointed. Clients who are reluctant to sign powers of attorney due to fear of their being abused may agree to execute a designation of guardian as some form of protection. *See* TEX. ESTATES CODE § 1104.202.

While competent adults may designate a person to serve as the guardian of their estate and/or person in the event of future incapacity, the declarant may also disqualify named individuals from serving in this capacity. The designation or disqualification must be in writing, signed by the declarant, attested to by two or more witnesses, and a self-proving affidavit must be attached to the document. The designation/disqualification is revocable and any designation favoring a spouse is void should they subsequently divorce.[28]

The Designation of Guardian Before Need Arises is an excellent backup measure to other alternative actions that can be taken to obviate the need for a guardianship, such as a durable power of attorney and/or revocable management trust or even Gun Trust. The clear

[27] TEX. EST. CODE ANN. § 1002.017 (West 2013).

[28] TEX. EST. CODE ANN. § 1104.211 (West 2014).

language of the Texas Estates Code Section 1104.212 can be a settling factor in a contested guardianship if a person other than the person designated files to be guardian, or if the person expressly disqualified by the designation applies to be guardian. The language is as follows:

> Unless the Court finds that the person designated in the declaration to serve as guardian is disqualified or would not serve the best interest of the Ward, the Court shall appoint the person as guardian . . . .[29]

This section indicates two things: (1) a strong preference of the proposed incapacitated person, and (2) that the court shall be the deciding factor. As you can see, this section makes specific reference to the court as the fact finder. This strong language can assist in settlement of a contested guardianship prior to trial.

2. State Who You Do Not Want as Guardian

The beauty of designation of a guardian is that a person can designate no one, but simply list the persons who they do not want to serve as guardian. It is still called a designation, but is actually an "un"-designation of that person or persons, who, in the client's incapacity, they might not realize would be the worst choice for care of the ward or their assets.

3. State Specific Instructions

Although there is no provision to add instructions on assets in a designation of guardian, it puts a court and counsel on notice of your strong feelings about various issues, including firearms. You could state that you do not wish any person to be appointed guardian who does not agree your firearms can only be sold as a last resort. (Note, if you have no Will, this will become irrelevant at death). A copy of a Designation of Guardian is attached as **Exhibit F**.

D. Steps in a Guardianship

The requisite steps to initiating a guardianship are as follows:

1. The Filing of the Application
   a. Appointment of attorney ad litem
   b. Possible visit by court investigator
   c. Possible appointment of guardian ad litem if warranted (to determine best interest)

2. Service Requirements
   a. Client who is incapacitated must be personally served always – this cannot be waived
   b. Parents, spouse, siblings served
   c. Agent under power of attorney served

3. Medical Evidence
   a. Gather known medical from home

[29] TEX. EST. CODE ANN. § 1104.212 [emphasis added].

b. Use power of attorney with HIPAA release
c. May require Independent Medical Exam and hearing if no medical available

4. Trial or Hearing
   a. Citation on the proposed incapacitated must be returned for ten days
   b. Doctor's letter is hearsay
   c. Must have agreement for admission of medical without the live physician testimony

5. Burden of Proof
   a. Is always on Applicant
   b. Must be clear and convincing evidence as to:
      (1) Incapacity
      (2) Best interest of person to have guardian
      (3) The person's rights will be protected by guardianship
      (4) Least restrictive alternative
      (5) Supports and services and alternatives will not work
   c. Must be by Preponderance
      (1) All other issues
      (2) Disqualification/eligibility
      (3) Specific functions can and cannot do
   d. Must be recurring acts of incapacity over last 120 days

6. Order of Guardianship
   a. Must address voting (§ 11.002 Texas Election Code)
   b. Must address driving (§ 521.201 Texas Transportation Code)
   c. Must address possessing firearms (§ 1202.201 Texas Estates Code) (Restoration)
   d. Must address ammunition (18 U.S.C. § 922(d)(4)) and 922(g)

E. Practical Advice

1. Liability of Incapacitated and Guardian

A Guardianship will not shield the impaired client, attorney, or the law firm from being sued over the acts and omissions of the incapacitated person and use or misuse of a firearm. In fact, it may not ever stop a deposition, and will not stop. The existence of a guardianship does not render a person unable to testify or to give his deposition.[30] However, there is a rebuttable presumption of incapacity as to what the client says, so the testimony may be precluded. The adjudication also does not protect the attorney or client from standing trial in a criminal proceeding.[31] To stand criminal trial, incapacity is a separate jury trial. The person must know (1) right and wrong, and (2) be able to assist their attorney.

[30] *See* Mobile Oil Corp v. Floyd, 810 S.W.2d 321 (Tex. App.—Beaumont 1991, no writ).
[31] *See* Koehler v. State, 830 S.W.2d 665 (Tex. App.—San Antonio 1992, no writ).

Further, there is personal liability on a guardian for allowing an incapacitated to do things the person is adjudicated to do. These include owning or possessing a firearm and driving. So, if your client is a guardian, you cannot "leave grandpa a gun for protection."

2. Disqualification

The section of the Estates Code relating to disqualification is Section 1104.351 *et seq*. Unlike adverse interest, disqualification is typically a jury issue. It is not a matter of law unless the evidence merits a motion for summary judgment. The following criminal disqualifications are self-evident:

a. any sexual offense;
b. aggravated assault;
c. injury to a child, elderly or disabled;
d. abandoning or endangering a child;
e. terroristic threat; or
f. continuous violence against the family of the incapacitated.

There are many bases for an allegation of disqualification. The Estates Code provides no laundry list of guidance of all disqualifications. However, the Estates Code does list certain "catch all" phrases for disqualification such as "notoriously bad" and "unsuitable". Some of the more common alleged disqualifications under Estates Code 1104.351 are:

a. Being a minor;
b. Being incapacitated;
c. Being unsuitable;
d. Being notoriously bad;
e. Being a party to a lawsuit with incapacitated;
(1) May be cured by guardian ad litem;
f. Being a person with an adverse claim;
g. Being incapable;
h. Being a non-resident without a resident agent;
i. Being indebted to the incapacitated;
j. Being disqualified by a Designation of Guardian; or
k. Being the subject of a family violence order.[32]

IX. CONCLUSION

Firearms need to be a question in every estate plan. It is important to be cognizant in every plan to ask about firearms and specifically NFA firearms. It is also important to deal with the distribution of firearms and the careful removal of firearms in mental commitments and guardianships. If clients protect their firearms by trusts and Gun Trusts, put a Statutory Power of Attorney in place that allows a trust to be funded, and if all else fails designate a guardian who will honor your wishes and protect your firearms, there is hope for firearms to remain in families or as legacies.

[32] TEX. EST. CODE ANN. § 1104.351 (West 2014).