

**REPRESENTING MISS DAISY:  
ETHICAL CONSIDERATIONS WHEN A CLIENT HAS DIMINISHED  
CAPACITY, AND ESTATE PLANNING FOR INCAPACITATED  
INDIVIDUALS WITH PLENTY OF ACTUAL MARBLES  
(AND OTHER ASSETS TOO!)**

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## I. INTRODUCTION

*Boolie Werthan:* What I need is for somebody to drive my mother around.

*Hoke Colburn:* Well, if you don' mind my askin', sir—how come she's not hirin' for herself?

*Boolie Werthan:* See, it's kind of a delicate situation.

*Hoke Colburn:* Oh, yessir, yessir...done gone around the bend a little bit. Well, now, that'll happen as they get old...

*Boolie Werthan:* Oh, no, she's all there. Too-much-there is the problem!<sup>1</sup>

As estate planning attorneys we are often confronted with the realities of clients, particularly long time clients, with the realities of diminishing capacity much like Hoke Colburn was eventually presented with the mental slipping of the titular Daisy Werthan. As you may remember, at the beginning of the story, Miss Daisy was mentally there, “Too-much-there” as the quote states; however, as she continued to age, eventually Miss Daisy became incapacitated, as we would legally define the term. Clearly a woman of means, if Daisy, or even Boolie, had walked into your office looking to undertake estate planning would she still have that capacity? What options are available even if it was too late for Miss Daisy to help herself?

Whether it is initial estate planning or changes to an existing estate plan made necessary by changes in family situations, amendments to tax law, or a need to plan for benefits, the fact that a client may have become incapacitated, all may not be lost. The purpose of this paper to look at issues in dealing with estate planning clients with diminishing capacity as well as what options are available to the modern Texas practitioner whether your client is showing early warning signs or have already diminished beyond the point of undertaking their own estate planning.

Section II will look toward the issues of diminishing capacity and recognizing how that might look.

Section III will review recent changes to the Texas Disciplinary Rules of Professional Conduct related to representing clients with diminishing capacity.

Section IV will review the differences between contractual capacity and testamentary capacity which may allow the client to undertake their own estate planning without other additional extraordinary measures as well as potential pitfalls in that course of action.

Section V will discuss estate planning through the use of a power of attorney including the so called “hot powers” to the benefit of the estate of the individual with diminished capacity.

Section VI will examine the powers of a court to grant a guardianship for the purpose of allowing a guardian of the estate to undertake estate planning for a person under a guardianship.

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<sup>1</sup> *Driving Miss Daisy*, directed by Bruce Beresford (1989, The Zanuck Company).

## II. SIGNS OF DIMINISHING CAPACITY IN A CLIENT

Although not a specific disease, dementia is the general term for an impaired ability to remember, think, or make decisions that interferes with every day activities.<sup>2</sup> “Of those in the United States at least 65 years of age, there [were] an estimated 5.0 million adults with dementia in 2014 and projected to be nearly 14 million by 2060.”<sup>3</sup> Generally individual patients’ dementia continue to progressively decline in functioning with time and the symptoms of dementia may become severe enough to interfere with daily functioning.

A very basic understanding of dementia and its relationship to legal capacity can assist us to better communicate with clients and serve their interests, as well as provide advice and family and agents of the ailing clients. A substantial portion of the information contained in Section II is incorporated with the express permission of Mr. Fleming, from *Representing Clients With Diminished Capacity*, Robert B. Fleming, 25<sup>th</sup> Annual Advanced Estate Strategies Course, State Bar of Texas, April 2019.

### A. Common Causes of Dementia

Although Alzheimer’s disease the most common cause of dementia, there are a number of other conditions that can cause dementia. However, it is important to note that not all causes of dementia are degenerative. Additionally, some causes of dementia are treatable; therefore, diagnosis of dementia’s underlying cause is important.

#### *1. Alzheimer’s Disease*

Alzheimer’s is the most common of the diseases that produce dementia which accounts for over 60% of cases.<sup>4</sup> Specific “changes in the brains of people with Alzheimer’s disease, including a degeneration of nerves and lowered levels of chemicals in the brain that carry complex messages back and forth between nerve cells,” lead to progressively more acute forgetfulness.<sup>5</sup> This often begins with mild forgetfulness, but may progress to affect language, reasoning, understanding, reading and writing.<sup>6</sup> “Eventually people with Alzheimer’s disease may become anxious or aggressive, and even wander from home.”<sup>7</sup> Alzheimer’s as a progression that cannot be reversed; however, treatment regimens are being developed to slow the progression.<sup>8</sup>

“Family history is the most important risk factor; in fact having a first-degree relative with Alzheimer’s disease increases the risk of developing the disease by 10 to 30 percent.”<sup>9</sup>

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<sup>2</sup> Centers For Disease Control, Alzheimer’s Disease and Healthy Aging, see <https://www.cdc.gov/aging/dementia/index.html>.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*, see also Fleming, *Representing Clients With Diminished Capacity*.

<sup>6</sup> Fleming, *Representing Clients With Diminished Capacity*.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

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