

# Boulder COUNTY

## BAR ASSOCIATION

# MENTAL CAPACITY STANDARDS

JONATHAN LEINHEARDT, ESQ.

As Americans live longer, an increasing number are being diagnosed with dementia, characterized by significant memory loss. Therefore, attorneys will have more elderly clients with questionable mental capacity, including those wanting to make a will, enter into contracts, or dissolve their marriage (or civil union). Accordingly, Colorado attorneys should be familiar with the various standards of mental capacity, including testamentary capacity, contractual capacity, and capacity for bringing or defending a legal action. This article examines these different standards.

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Senior Law  
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### ***Testamentary Capacity***

Testamentary capacity requires a relatively low level of mental ability or acuity. A person has testamentary capacity if he or she is an "individual eighteen or more years of age who is of sound mind." C.R.S. § 15-11-501. Colorado uses two different types of tests to determine if a person is of "sound mind" and has testamentary capacity: the "*Cunningham* test" and the "insane delusion test." The "*Cunningham* test" enunciated in *Cunningham v. Stender*, 255 P.2d 977, 981-82 (Colo. 1953), states that mental capacity to make a will requires that the testator:

- a. understands the nature of his act;
- b. knows the extent of his property;
- c. understands the proposed testamentary disposition;

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# STANDARDS CONTINUED

- d. knows the natural objects of his bounty; and
- e. the will represents his wishes.

*Id.*; *Breeden v. Stone*, 992 P.2d 1167 (Colo. 2000).

The *Cunningham* and insane delusion tests are not mutually exclusive. *Breeden*, 992 P.2d at 1171. “The insane delusion test ordinarily involves situations in which the testator, although in possession of his general faculties, suffers from delusions” that materially affect the disposition in the will. *Id.* at 1172. “In Colorado, a sound mind includes the presence of the *Cunningham* factors and the absence of insane delusions that materially affect the will.” *Id.*

A person does not lack testamentary capacity merely because he has been adjudicated incompetent for the purposes of appointing a conservator or guardian. See, e.g., C.R.S. § 15-14-409(4) (“the appointment of a conservator or the entry of another protective order is not a determination of incapacity of the protected person”); *Estate of Romero*, 126 P.3d 228 (Colo.App. 2005) (appointment of guardian was not determination of testamentary capacity).

## **Contractual Capacity**

In Colorado, “every person is presumed by the law to be sane and competent for the purpose of entering into a contract.” *Forman v. Brown*, 944 P.2d 559, 562 (Colo.App. 1996); see *Hanks v. McNeil Coal Corp.*, 168 P.2d 256 (Colo. 1946). A contract may be invalidated by a person’s lack of contractual capacity. The legal test is whether the person “was incapable of understanding and appreciating the extent and effect of business transactions in which he engaged.” *Hanks*, 168 P.2d at 260; *Forman*, 944 P.2d at 562 (“a person is incompetent to contract when the subject matter of the contract is so connected with an insane delusion as to render the afflicted party incapable of understanding the nature and effect of the agreement or of acting rationally in the transaction”).

A party can be incapacitated for some purposes and still have the capacity to contract. *Id.*; *Davis v.*

*Colorado Kenworth Corp.*, 396 P.2d 958 (Colo. 1964) (inability to form criminal intent because of insanity was not determinative of whether buyer should be entitled to recover money judgments for sums paid on voidable contracts to purchase certain items). In essence, similar to testamentary capacity, contractual capacity requires that the testator merely understand the *nature* and *effect* of his act.

## **Capacity to Bring or Defend Legal Action**

As with other civil actions, married adult parties generally have the capacity to bring or maintain a dissolution action in their own name. McGuane & Hogan, *Capacity to Maintain Action*, 19 Colo. Prac., Family Law & Practice § 11:6 (2d ed.). That there is some question concerning a party’s mental capacity does not, without more, mean an incapability of instituting or defending an action. *Id.*

One’s capacity to bring or maintain a divorce action requires an understanding of the nature and effect of the act and the responsibilities created thereby. See *In re Marriage of Sorensen*, 166 P.3d 254, 256 (Colo.App. 2007) (in determining whether to appoint guardian ad litem in divorce action, husband could introduce evidence that wife understood nature and significance of divorce proceeding, was able to make decisions on her own behalf, and had ability to communicate with and act on advice of counsel). A court may appoint a GAL when the court is reasonably convinced that a party “is not mentally competent effectively to participate in the proceeding.” *Id.*

For purposes of “capacity” under C.R.C.P. 17, an “incompetent person” includes one who is “mentally impaired to the degree of being incapable of effectively participating” in legal proceedings. See *May v. Colorado Civil Rights Comm’n*, 43 P.3d 750, 755 (Colo.App. 2002), citing *People in Interest of M.M.*, 726 P.2d 1108, 1119 (Colo. 1986) (even where evidence demonstrated party had “mild, but significant dementia” and his “medical condition could significantly impair his

# STANDARDS CONTINUED

memory, judgment and cognitive abilities,” the party’s mental condition would not render him incapable of effectively participating in legal proceedings).

Other states have found that similar to the capacity for executing contracts, a person’s capacity to contract for a valid marriage, or to dissolve the marriage, requires an understanding of the nature of the contract for marriage or dissolution and the responsibilities created by same. *See Syno v. Syno*, 594 A.2d 307 (Pa.Super.Ct. 1991); *In re Marriage of Kutchins*, 482 N.E.2d 1005 (Ill.App.Ct. 1985); *Higgason v. Higgason*, 516 P.2d 289 (Cal. 1973).

In Colorado, while guardians clearly have the power to commence and maintain a dissolution of a marriage action (C.R.S. § 15-14-315.5), and conservators may prosecute or defend actions, claims, or proceedings to protect the protected

person’s assets (C.R.S. § 15-14-425[2][x]), they do not have the power to appear on behalf of their wards as if it were a pro se action. *See In re Marriage of Kanefsky*, 260 P.3d 327 (Colo.App. 2010) (non-lawyer guardian or conservator must proceed in conjunction with licensed attorney to avoid unauthorized practice of law).

Given our aging population, more attorneys will be called upon to determine whether their client possesses or possessed the requisite mental capacity to execute a will, form a contract, or file for divorce. It is important to recognize Colorado’s standards and definitions for each.

About the author: Jonathan Leinhardt, Esq., is a Member of Stevens, Littman, Biddison, Tharp & Weinberg, LLC. He is the former chair of the BCBA Elder Law Section.

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PERSONAL INJURY. WORKERS' COMPENSATION. BUSINESS LITIGATION. INSURANCE DISPUTES.

# CALENDAR OF EVENTS

**Wednesday, September 4**

**PARALEGAL**

**ROUND UP - OPEN HOUSE**

4:30 - 6:00 PM @ BCBA Offices

(3269 28th Street)

Free to attend

**Please click here to register**

**Thursday, September 5**

**ALL SECTIONS**

**LONGMONT CLE - COURT PROCEDURES & LITIGATION**

**Presented by Courtenay Patterson**

Dickens Tavern (300 Main Street, Longmont)

\$41 CLE & Lunch, \$31 New Lawyer, \$16 Lunch only

**Please click here to register**

**Thursday, September 12**

**ALL SECTIONS**

**SIDE BAR: LEGISLATIVE UPDATE**

**Presented by Amy Larson**

4:00 - 6:00 PM @ BCBA Offices

(3269 28th Street)

\$35 CLE and social, \$20 New Lawyer, \$10 No CLE

**Please click here to register**

**Tuesday, September 17**

**EMPLOYMENT**

**IMMIGRATION EMPLOYMENT LAW FOR**

**NON-IMMIGRATION LAWYERS**

**Presented by Jon Sirkis, Esq.**

Noon - 1:00 pm BCBA Offices

(3269 28th Street)

\$35 CLE & Lunch, \$20 New Lawyer, \$10 lunch only

**Please click here to register**

**Wednesday, September 18**

**BUSINESS**

**FOOD AND BEVERAGE 2019**

**Presented by Fern O'Brien**

12:00 - 1:00 PM @ BCBA Offices

(3269 28th Street)

\$35 CLE & Lunch, \$20 New Lawyer, \$10 Lunch only

**Please click here to register**

**Thursday, September 19**

**FREE LEGAL CLINIC IN BOULDER**

5:30 PM @ BCBA Offices

(3269 28th Street)

**Please click here to volunteer**

**Tuesday, September 24**

**CRIMINAL**

**FALL ETHICS ROUND UP WITH ATTORNEY**

**REGULATION COUNSEL**

**Presented by Bryon M. Large & JP Moore**

2:30 - 4:30 PM @ BCBA Offices

(3269 28th Street)

\$40 2 CLE + .5 ethics, \$25 New Lawyer

**Please click here to register**

**Thursday, September 26**

**NATURAL RESOURCES / ENVIRONMENTAL**

**ENERGY & UTILITY LEGISLATION UPDATE**

**Presented by Mark Detsky**

4:00 - 6:00 PM @ BCBA Offices

Presented at BCBA Offices

(3269 28th Street)

\$35 CLE & Social, \$20 New Lawyer, \$10 No CLE

**Please click here to register**

## SEPTEMBER SIDE BAR – LEGISLATIVE UPDATE

The BCBA is pleased to introduce our inaugural Side Bar program on Thursday, September 12 from 4-6 pm. The first hour will be a CLE presented by Amy Larson from the Colorado Bar Association on bills that affect lawyers passed in the current session of the legislature. We will then have a networking and social hour with appetizers, wine and beer included.

Amy Larson served as the CBA's lead lobbyist since 2006 before taking on her current position as Deputy Executive Director and COO. Amy has more than 25 years' experience in a variety of association, corporate, and intergovernmental leadership capacities. She has worked for The Alex Group, Aponte & Busam Public Affairs, and Brownstein, Hyatt & Farber, acting as a principal political consultant, policy advisor, and partner of strategic initiatives for clients in the legal, technology, and education communities. She was the director of public affairs for Storage Technology Corporation; the executive director for the American Electronics Association; a marketing and public relations professional for Price Waterhouse, LLP in its Dispute Analysis and Corporate Recovery practice group; and the manager of government affairs at the Institute of Certified Financial Planners.



# PRESIDENT'S PAGE

## JENNIFER LORENZ

It has been a rough summer for Colorado cyclists. If you ride a bike you've probably heard that in the month of July alone four cyclists were killed on the front range. That's a lot.

I frequently commute to work on my bike. And it's scary. Thankfully in Boulder most people are familiar with our bike culture and are conscientious of cyclists on the road. I live in Louisville and my office is in downtown Boulder. One morning on my way to work I was cruising down South Boulder Road when my water bottle cage inexplicably came loose. It was hanging from my bike frame, barely holding on by one loose screw. I pulled over to see what happened. I had not even unclipped my pedal when a silver haired man in a drop top Porsche pulled over and was offering me assistance. All I needed was a basic Allen wrench to refasten my water bottle screws. The man handed me a multi-tool and told me that he kept a handful of bike tools in his car in case he came across someone in need of assistance. He told me to keep the multi-tool and I have kept it in my bike bag ever since.

Not everyone is as lucky as I was and not all drivers care to actually share the road. I drive a car and I ride a bike. I know it's difficult when you're driving through Boulder and cyclists are darting in and out of traffic and speeding through stop signs. Some cyclists obey traffic laws, but all too many don't. My mantra when I'm riding- if I cannot do it in my car, I should not do it on my bike. That includes weaving through traffic, blowing stop lights and riding on sidewalks. It's difficult as a cyclist because many cities have their own laws regarding bicycle operations. As we lawyers know, ignorance of the law is not an excuse. Below is a portion of the Colorado Revised Statute addressing cycling. Summer may be coming to an end but in Colorado we ride 12 months out of the year. Stay safe.



### CRS §42-4-1412: Operation of bicycles and other human-powered vehicles

(1) Every person riding a bicycle or electrical assisted bicycle shall have all of the rights and duties applicable to the driver of any other vehicle under this article, except as to special regulations in this article and except as to those provisions which by their nature can have no application. Said riders shall comply with the rules set forth in this section and section 42-4-221, and, when using streets and highways within incorporated cities and towns, shall be subject to local ordinances regulating the operation of bicycles and electrical assisted bicycles as provided in section 42-4-111.

...

(3) No bicycle or electrical assisted bicycle shall be used to carry more persons at one time than the number for which it is designed or equipped.

(4) No person riding upon any bicycle or electrical assisted bicycle shall attach the same or himself or herself to any motor vehicle upon a roadway.

(5)(a) Any person operating a bicycle or an electrical assisted bicycle upon a roadway at less than the normal speed of traffic shall ride in the right-hand lane, subject to the following conditions:

# PRESIDENT'S PAGE CONTINUED

(I) If the right-hand lane then available for traffic is wide enough to be safely shared with overtaking vehicles, a bicyclist shall ride far enough to the right as judged safe by the bicyclist to facilitate the movement of such overtaking vehicles unless other conditions make it unsafe to do so.

(II) A bicyclist may use a lane other than the right-hand lane when:

(A) Preparing for a left turn at an intersection or into a private roadway or driveway;

(B) Overtaking a slower vehicle; or

(C) Taking reasonably necessary precautions to avoid hazards or road conditions.

(III) Upon approaching an intersection where right turns are permitted and there is a dedicated right-turn lane, a bicyclist may ride on the left-hand portion of the dedicated right-turn lane even if the bicyclist does not intend to turn right.

(b) A bicyclist shall not be expected or required to:

(I) Ride over or through hazards at the edge of a roadway, including but not limited to fixed or moving objects, parked or moving vehicles, bicycles, pedestrians, animals, surface hazards, or narrow lanes; or

(II) Ride without a reasonable safety margin on the right-hand side of the roadway.

(c) A person operating a bicycle or an electrical assisted bicycle upon a one-way roadway with two or more marked traffic lanes may ride as near to the left-hand curb or edge of such roadway as judged safe by the bicyclist, subject to the

following conditions:

(I) If the left-hand lane then available for traffic is wide enough to be safely shared with overtaking vehicles, a bicyclist shall ride far enough to the left as judged safe by the bicyclist to facilitate the movement of such overtaking vehicles unless other conditions make it unsafe to do so.

(II) A bicyclist shall not be expected or required to:

(A) Ride over or through hazards at the edge of a roadway, including but not limited to fixed or moving objects, parked or moving vehicles, bicycles, pedestrians, animals, surface hazards, or narrow lanes; or

(B) Ride without a reasonable safety margin on the left-hand side of the roadway.

(6)(a) Persons riding bicycles or electrical assisted bicycles upon a roadway shall not ride more than two abreast except on paths or parts of roadways set aside for the exclusive use of bicycles.

(b) Persons riding bicycles or electrical assisted bicycles two abreast shall not impede the normal and reasonable movement of traffic and, on a laned roadway, shall ride within a single lane.

(7) A person operating a bicycle or electrical assisted bicycle shall keep at least one hand on the handlebars at all times.

(8)(a) A person riding a bicycle or electrical assisted bicycle intending to turn left shall follow a course described in sections 42-4-901(1), 42-4-903, and 42-4-1007 or may make a left turn in the manner prescribed in paragraph (b) of this subsection (8).

## BOULDER COUNTY BAR FOUNDATION THE 2019 GRANT CYCLE ENDS SOON

The Boulder County Bar Foundation grant cycle is beginning and will be accepting applications. The Foundation funds legally related organizations and programs in Boulder County. The grant application is on the BCBF website and can be accessed here. All applications are due September 15. If you have any questions, please email [laura@boulder-bar.org](mailto:laura@boulder-bar.org).

# 10TH ANNUAL SENIOR LAW DAY

## BRETT E. LANDIS

With just a month and a half to go before the 10th annual Boulder County Senior Law Day takes place this September 28th, volunteers, speakers, sponsors, and the event's Planning Committee are busy. For the past three years, I have had the privilege of being on the Planning Committee for Boulder County Senior Law Day. It has been educational and inspirational for me to watch how much valuable information is provided to our senior community.

Senior Law Day is held around the state of Colorado in eight different counties. In Boulder County, the day's presentations and exhibits provide the public (primarily older adults and those who care for them) with information about legal issues facing the elderly and connects them to legal resources in our community.

Seniors face unique legal issues as they age, and additional guidance and education are often extremely important to their ability to navigate changes in their lives. Some are considering planning for their future and may wish to put advance directives in place now. Many will receive public benefits for the first time and will transition to Social Security and Medicare. Older adults and their caregivers may need to consider long-term care options, as well as the planning that goes into communicating with state health plans and other

administrative agencies. Senior Law Day experts will present on all of these topics this year, helping older adults and their caregivers recognize and prepare for the challenges they may face.

Senior Law Day's keynote speaker this year is Michael Dougherty, our Boulder County District Attorney. Mr. Dougherty will speak to attendees about Elder Fraud and Abuse in Boulder County and nationwide; he will describe what constitutes elder abuse and financial exploitation, and will highlight efforts of local law enforcement, the DA's office, and others in our community who work to combat these crimes and protect victims.

Reports of elder abuse and financial exploitation have increased during the past several years. The National Council on Aging estimates that one in ten Americans over the age of 60 has experienced some form of elder abuse. Furthermore, the National Center on Elder Abuse estimates that financial abuse alone costs seniors \$2.6 billion annually. Experts believe that crimes and financial exploitation involving older adult victims are widely underreported, even as our older adult population grows. According to the Boulder County Area Agency on Aging's Age Well report, in 2015, 19% of all Boulder County residents were seniors; it is expected that in 2040, that percentage will increase to 25%.

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# SENIOR LAW DAY CONTINUED

Senior Law Day will also provide a wonderful opportunity for attendees to connect with a multitude of legal resources in our community. Susan Spaulding, Community Relations Specialist for the City of Longmont, will facilitate the event's ever-popular "Ask-A-Lawyer" sessions; these operate similarly to the monthly legal clinics held around Boulder County throughout the year. "Ask-a-Lawyer" will offer those who sign up free 15-minute appointments with attorneys who have expertise in areas of interest to older adults. Additionally, a resource table at the event will include pamphlets and brochures containing information about local nonprofits that provide legal resources in our community. Also, I will have the honor of presenting a session on "How to Pick a Lawyer," and will go over the process and pitfalls of selecting an attorney, either through the private market or through a nonprofit community resource.

On a personal note, one of my favorite parts of Senior Law Day is noticing how many people in the community are taking advantage of this event. Last year, the event was free to those attendees who registered in advance (as it will be this year as well), and I saw a number of people who had found out about the event through pamphlets available at my office (Boulder County Legal

Services). This reminded me that our community is filled with intellectually curious people who are eager to learn, and it reminded me about how important these public education events are to those members of our community with limited means. It also reminded me to be grateful for the work our volunteers and others throughout the community do to help make events like Senior Law Day possible.

Boulder County's 10th Annual Senior Law Day is September 28, 2019 from 9 AM until 1 PM (doors and exhibits open at 8:00), at the Boulder Jewish Community Center, 6007 Oreg Ave., Boulder, CO 80303. Registration is open at <http://www.bouldercountyseniorlawday.org/>. Anyone wishing to volunteer at the event – either at the "Ask-a-Lawyer" sessions or elsewhere – can contact Senior Law Day planners at [sponsorship@bocoseniorlawday.org](mailto:sponsorship@bocoseniorlawday.org).

About the author: Brett E. Landis is Managing Attorney of Boulder County Legal Services and serves on the Planning Committee for Senior Law Day. Many thanks to Liz Parker at the Boulder District Attorney's Office, Community Protection Division for her editing assistance.

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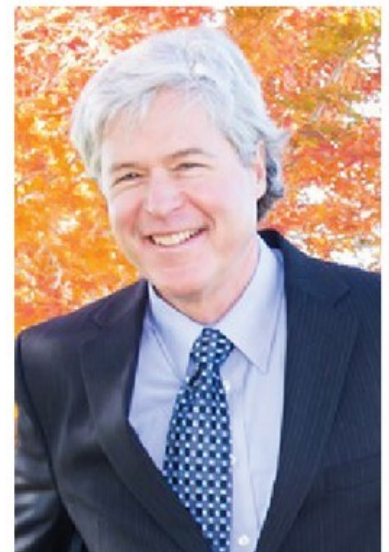
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## PROFESSIONALISM ON CALL

September 2	Tom Rodriguez	303.604.6030
September 9	Karl Kumli	303.447.1375
September 16	Tripp DeMuth	303.447.7775
September 23	Peggy Goodbody	303.440.5736
September 30	Anton Dworak	303.776.9900

The Professionalism Committee assists lawyers, clients, and other members of the community with questions or complaints about behavior by lawyers that fails to meet generally accepted standards of professionalism and courtesy, or that is contrary to the BCBA Principles of Professionalism.

The Professionalism Committee does not address allegations of criminal or ethical violations by lawyers, as regulated by the Colorado Rules of Professional Conduct, and any such violations should be addressed to the Office of Attorney Regulation Counsel.

## BOULDER COUNTY FREE LEGAL CLINIC

The dates have been set for the 2019 Free Legal Clinics at the BCBA Office (3269 28th Street, 2nd Floor), the Lafayette Senior Center (103 Iowa Avenue), and the Longmont Senior Center (910 Longs Peak Ave) from 5:30 - 7:30 pm. Volunteers are always needed. Please contact Laura at [laura@boulder-bar.org](mailto:laura@boulder-bar.org) if you can help in Boulder or Lafayette, or [susan.spaulding@longmontcolorado.gov](mailto:susan.spaulding@longmontcolorado.gov) if you can help in Longmont.

**Longmont: November 19**

**Boulder: September 19, December 19**

**Lafayette: October 15**

## PRO BONO REFERRALS

Seven cases were referred during the month of July. Thank you to the following attorneys:

**Eve Canfield**  
**Christina Ebner**  
**Judson Hite**  
**Chris Jeffers**  
**Mary Street**

Thank you to the following mediators who accepted pro bono referrals in June and July:

**Robert Cooper**  
**James Lionberger**

## PRO SE VOLUNTEERS

**Josh Anderson**  
**Jennifer Huston**  
**Zachary LaFramboise**  
**Joan Norman**

## PRO BONO CORNER

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## BCBA JOBS BOARD NOW ACTIVE

We have added a Jobs Board and classified page to the BCBA website; [please click here to view](#). Do you have a job posting or classified you would like listed on the BCBA Jobs Board? The pricing for these listings is for 30 days: \$40 for current BCBA members, \$60 for non-members. Submitted listings will also run in the BCBA newsletter. [Please click here](#) to submit your listing.

## WELCOME NEW BCBA MEMBERS

Molly Hogan

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**EXPERIENCED PUBLIC SECTOR ATTORNEY.** The Longmont, Colorado office of Lyons Gaddis has an opening for an experienced public sector attorney to join the firm's government practice group, which represents school and special districts. The ideal candidate will have 2 to 8 years' experience in public sector work, with a desire to practice education law and local government work. Candidates will have a passion for providing exceptional client service, developing strong client and community connections, and either live in Northern Colorado or be willing to relocate. If you are interested in joining our team and your background aligns with our needs for this position, please reply with a letter of introduction, as well as a resume and a writing sample to [careers@lyonsgaddis.com](mailto:careers@lyonsgaddis.com).

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# Boulder<sup>COUNTY</sup> BAR ASSOCIATION

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