

Legal Standard for Incapacity and Incompetency

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WHY ARE WE TALKING ABOUT THESE ISSUES?

- Common Questions when working with Disabled and Elderly:
 - Competency to make medical decisions
 - Ability to make legal decisions/Testamentary Capacity
 - Ability to live independently/Safety Issues



THE BALANCE BETWEEN AUTONOMY AND PROTECTION

- Vulnerable Individuals in Society include patients with mental illness and dementia
- Autonomy is presumed
- The Court is available to help make decisions about when someone is in need of protection
- But the burden on the moving party is to show that the proposed ward is NOT competent



IS THERE A DIFFERENCE BETWEEN INCAPACITY AND INCOMPETENCY?

- Yes, there is a difference.
 - Incapacity is a clinical determination by a clinician or medical provider
 - Competency is a *legal* determination by a Court

POSSIBLE SCENARIOS WHEN WORKING WITH THE ELDERLY AND DISABLED

1. Resident/Patient with ability to make all decisions;
2. Resident/Patient with limited ability AND the person has advanced directives in place → *May need capacity determination*
3. Resident/Patient with limited ability AND the person DOESN'T have advanced directives → *May need capacity determination*
4. Resident/Patient with no ability AND the person has advanced directives in place; → *May need capacity determination*
5. Resident/Patient with no ability AND the person DOESN'T have advanced directives but family gets along and has access to funds;
6. Resident/Patient with no ability AND the person DOESN'T have advanced directives and family cannot agree → *May need judicial determination of competence*

WHO DETERMINES INCAPACITY OR INCOMPETENCY?

- Incapacity is typically determined by a physician or other provider and this may be required to “vest” authority in another person (power of attorney, trustee)
- Incompetency is determined by a judge as part of a judicial proceeding like a guardianship or conservatorship



WHAT IS INCAPACITY?

- MN Stat 524.5-102 Subd. 6. **Incapacitated person.** individual who, for reasons other than being a minor, is
 - impaired to the extent of lacking sufficient understanding or capacity to make or communicate responsible personal decisions; and
 - who has demonstrated deficits in behavior which evidence an inability to meet personal needs for medical care, nutrition, clothing, shelter, or safety, even with appropriate technological assistance.

WHEN IS AN INCAPACITY DETERMINATION NEEDED?

- If a person has legal documents like a Power of Attorney, Health Care Directive and/or Trust, an incapacity determination may be required to shift power to a successor

WHEN IS AN INCAPACITY DETERMINATION NEEDED?

- Example: Resident of an ALF has noticeable changes in behavior such as forgetting items, late payments, and confusion regarding daily tasks. Employees at the facility are concerned and contact the resident's first contact (daughter).

WHEN IS AN INCAPACITY DETERMINATION NEEDED?

■ **Sample language from a Trust Document:**

- *Incapacitated.* A person referred to herein is “incapacitated” only when a guardian or conservator of his or her person or estate has been judicially appointed or when his or her personal physician has stated that such person is unable to manage his or her financial affairs, or as to a trustee, the financial affairs of the trust, with adequate competence. Any reference to a trustee’s “incapacity” refers to a period when the trustee is “incapacitated.” In order to determine if I am incapacitated, I appoint any co-trustee then serving with me, or the successor trustees named in this trust, as my personal representative under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and I direct that any health care provider that has or may provide treatment or services to me shall release any and all of my individually identifiable health information or personal health information which may be relevant to the determination of incapacity to the co-trustee or successor trustees upon request. Any trustee other than myself shall provide a HIPAA release appointing a personal representative as a condition of acceptance to act as trustee.

POWERS OF ATTORNEY

- Document by which you (the *principal*) appoint someone (the *attorney-in-fact*) to manage finances.
- Can be used for a specific purpose or for general use.
- Can be effective immediately or may “spring” to life

SPRINGING POWER OF ATTORNEY

VS. REGULAR POWER OF ATTORNEY

Springing Power of Attorney

- Includes language that obligates the named successor(s) to obtain a written opinion about capacity of Principal before the document can be used by the successor

Regular Power of Attorney

- No Certification of capacity required-can be used immediately

REVOCAABLE (LIVING) TRUSTS

- ✓ Provides *lifetime management* of property
- ✓ Settlor can *revoke or amend* trust
- ✓ Terms dictate *distributions at death*

HEALTH CARE DECISIONS

- A patient always has the right to direct her own care unless or until:
 - The patient's provider determines that the patient lacks understanding of:
 1. Their underlying condition
 2. Nature, risks, and benefits of treatment
 3. Alternatives
 4. Consequences of refusing treatment

HEALTH CARE DIRECTIVE

- Written statement of preferences.
 - ✓ Designate a *health care agent*/successors.
 - ✓ Instructions for health care.
- Optional Information.

PHYSICIANS' ORDERS

- ✓ DNR/DNI - Do not resuscitate; do not intubate.
- ✓ POLST – Provider order for life-sustaining treatment.



GUARDIANSHIP

- Court process – usually involuntary
- Most restrictive of civil rights
- Cost
- Not your choice!



HEALTH CARE DIRECTIVE(HCD)

Patient with HCD

- Makes decision for herself until doctor deems patient incapable of doing so then agent authority “kicks in”

Patient without HCD

- Makes decisions for herself until doctor deems patient incapable of doing so then legal next-of-kin is consulted. If disagreement among legal next-of-kin then Guardianship

WHAT IF NO POA OR HCD?

- If a resident/patient has no Power of Attorney and decisions need to be made and expenses paid, the next-of-kin or someone may need to seek a Conservatorship;
- If a resident/patient has no Health Care Directive and there is a dispute or lack of clarity about who can make decisions then the next-of-kin or someone may need to seek a Guardianship

GUARDIANSHIP/CONSERVATORSHIP

GUARDIANSHIP

- Decisions regarding health care treatment, end of life and where someone resides

CONSERVATORSHIP

- Decisions related to the legal and financial interests of a person

GUARDIANSHIP/CONSERVATORSHIP

- Both Guardianship and Conservatorship are a judicial proceeding
- This is where the legal standard for *incompetence* would be applied/decided
- Can be expensive and time consuming (also humiliating and possibly deflating for the person whose competence is being debated)
- “Best Interests” standard
- There may be a conflict for attorneys that are encouraged (under ethical rules) to advocate for the client’s expressed wishes

CAPACITY FOR CERTAIN TASKS/DECISIONS

- To make a will or other testamentary document
- To get married/divorced
- To handle money
- To make a contract
- To drive
- To practice a profession
- To give informed consent

Level of capacity depends on the complexity of the decision/issue/task

CAPACITY REQUIRED FOR CERTAIN TASKS

- Testamentary Capacity
 - Must know and understand the document
 - Must know and understand the nature, extent and condition of estate
 - Must know and understand natural object of bounty
- Undue Influence

SUBJECTIVE DETERMINATIONS

- More subjective determinations are used to decide if someone can sign a power of attorney or health care directive
- Look at totality of circumstances
 - Consistency or lack thereof compared to past practices
 - Relational aspects of the “helper”
 - Deviation or similarity to previous documents
 - Same lawyer, financial person or sudden change requested

CASE STUDIES

- Health Care Agent daughter, Power of Attorney is the son
- No Health Care Directive, 3 children
- Health Care Directive but no financial power of attorney
- Resident in your facility is exhibiting behavior suggesting their memory is changing
- Open Example Discussion

THANK YOU FOR YOUR
ATTENTION!

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