

# “LEGAL ISSUES RELATED TO CAPACITY”



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**This is general information on some of the laws in Louisiana dealing with legal capacity, which can be a complex subject. It is not advisable to try to resolve any such problems without first consulting an attorney.**

## **I. Legal Issues Involving Capacity (or the lack thereof)**

### **A. Legal Capacity**

Capacity is presumed

It begins at age 18 (Under 18, a tutor makes decisions)

A court can take away capacity for physical or mental impairment

### **B. Delegating Capacity - Power of Attorney**

Must be freely given by someone with capacity

Should be limited

Need not be written, except in special circumstances (health care)

The person's agent is accountable, has the responsibility to act prudently

### **C. Taking Away Legal Capacity – Interdiction**

A court process is required

Used when an infirmity causes the person to consistently be unable to:

make reasoned decisions regarding care of his person or property  
or communicate those decisions

Should be limited

A Curator manages the person's affairs

Quick when substantial harm to health, safety, property is imminent

Can be lifted by the court when the person gets better

### **D. Judicial Commitment (Short-term medical help under R.S. 28:54)**

Used for the mentally ill or those suffering from substance abuse

The person must be a danger to self or others or gravely disabled

The court will order a medical exam

It is unrelated to the person's competency (see above)

Physician's emergency certificate for immediate, temporary custody

### **E. Medical Consent (Substituted judgment under R.S. 40:1299.58.5)**

Competent people make their own decisions to get or refuse treatment

This power may be delegated by a durable power of attorney

If the person is incompetent and has no health care POA, no tutor/curator:

The patient's spouse (if they are not separated);

The adult child of the patient;

The patient's parents;

The patient's brothers and sisters;

The patient's grandparents or grandchildren.

### **F. Wills (About Disposition of Property)**

Wills are a form of donation

The person writing the will must have the legal capacity to make one

It must be written and special forms required

### **G. Living Will (Advance Medical Directive)**

The person makes their own decisions, there is no substituted judgment

The person must be competent to execute a living will

It is limited to terminal and irreversible illnesses

The person selects types of treatment desired and/or unwanted

#### H. Trusts (Property Management)

Starts with a legal instrument

It divests control over assets put into the trust

They are usually used for estate planning purposes

Can be used to help manage property

Can be made while living or testamentary (in your will)

### II. Misconceptions

A. People will ask for help when they need it

B. A spouse or the children will know what to do when a parent needs help

C. The spouse or oldest child makes the decisions

D. Family members can “take over” a spouse’s or parent’s affairs

E. You can “get” power of attorney over a spouse or parent at any time

F. Interdiction is simple

### III. How Can You Tell When Someone Needs Help?

A. Responsibilities:

mail is unopened, papers are piling up, bills are unpaid, prescriptions are unfilled, the food supply is low, the home is not well maintained, the car has new dents and scratches.

B. Financial:

frequents gambling casinos on a regular schedule, is using credit cards to charge medications and food, bills are unpaid, bank balance rapidly declining, but nothing to show for it.

C. Cognitive:

memory lapses, confused, losing reasoning skills, gets lost, repetitive, wears the same clothes over and over, cannot recall the names of familiar people or objects, unable to complete a sentence.

### IV. How to Approach the Subject?

A. Engage in discussion:

Is anything bothering you?

Is there something you would like to talk about?

Do you need help with anything?

I see (hear) that you're upset. Would you like to talk about it?

I can see (hear) that this is very important to you.

B. Offer limited assistance:

What can you do about this problem?

What have you done so far to solve the problem?

What are your options?

Given what you already know, what do you think is your next step?

Who can help you with this?

- C. Don't give advice, ask more questions:
  - Can you tell me more about this?
  - How do you plan to accomplish what you want?
  - If your plan doesn't work, what else will you do?
- D. If rebuffed, get help:
  - Other family members
  - Family doctor
  - Clergy
  - District Attorney or Legal Services

**V. Related Handouts** - "Advance Medical Directives", Medical Power of Attorney and Living Will forms and booklet

**VI. Elder Abuse Statute**

- A. Citation - LA Revised Statutes Title 14, Section 403.2
- B. Purpose:
  - to protect adults who cannot physically or mentally protect themselves;
  - who are harmed or threatened with harm;
  - through action or inaction;
  - by themselves, the individuals responsible for their care or other parties
- C. Provides for:
  - Mandatory, confidential reporting;
  - Protective Services without regard to income;
  - least possible restriction on personal and civil rights;
  - mandatory investigation;
  - court orders for access to home or adult
- D. Remedies
  - refer to District Attorney for criminal prosecution of abuse or neglect;
  - contact DA/Legal Services to get court orders for:
    - counseling;
    - injunctions;
    - medical/psychiatric exams/treatment;
    - protective services;
    - social services;
    - temporary placement;
    - interdiction of adult who lacks capacity to consent;
- E. A court process is required for all court orders