

“Legal Issues Related to Capacity”

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

- A. Legal Capacity
 - Default is capacity
 - 18 or over (Under 18, tutor makes decisions)
 - Court can take away 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 special circumstances (health care)
 - Agent is accountable, has responsibility to act prudently
- C. Taking Away Legal Capacity – Interdiction
 - Court process
 - Infirmity causes person to consistently be unable to:
 - make reasoned decisions regarding care of his person or property
 - communicate those decisions
 - Should be limited
 - Curator manages affairs
 - Quick when substantial harm to health, safety, property is imminent
 - Can be lifted
- D. Judicial Commitment (Short-term medical help under R.S. 28:54)
 - Mentally ill or suffering from substance abuse
 - Danger to self/others or gravely disabled
 - Court order for medical exam
 - Unrelated to competency
 - 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
 - Power may be delegated by durable power of attorney
 - If incompetent and 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)
 - Form of donation
 - Must have capacity to make one
 - Must be written, special forms required
- G. Living Will (Advance Medical Directive)
 - Person makes decisions, no substituted judgment
 - Must be competent to execute
 - Limited to terminal and irreversible illnesses
 - Person selects types of treatment desired/unwanted

H. Trusts (Property Management)

- Legal instrument
- Divests control over assets put into trust
- Usually used for estate planning
- Can be used to help manage property
- 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 Handout - “Planning for Incapacity”, a self-help guide to Medical Powers of Attorney and Living Wills

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. Court process required for all court orders

VII. NOTES: