Autonomy, Capacity and Undue Influence: The Right To Decide v. Abuse

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Overall Objectives
To bridge ethical, medical and legal views of capacity and autonomy.
To describe how capacity is assessed.
To describe various conditions that impair capacity.
To describe common forms of undue influence.

The Orange County/UCI

The Forensic Center
A collaboration between 9 agencies:
» UCI College of Medicine
» Adult Protective Services
» District Attorney's Office
» Sheriff
» Public Administrator/Public Guardian
» Human Options
» Community Service Programs
» Long-Term Care Ombudsman
» HCA Older Adult Services

Part One: The Conceptual Basis

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Objectives For Part One
To understand capacity definitions
To be able to list the component skills of capacity
To be able to list three causes of incapacity

Four Concepts Are Critical To Understanding Abuse
Autonomy
Vulnerability
Undue Influence
Capacity

AUTONOMY:
TO GOVERN ONE’S SELF.
AUTONOMY IS THE HIGHEST PRINCIPLE IN LEGAL, PSYCHOLOGICAL AND MEDICAL ISSUES

AUTONOMY MEANS YOU HAVE THE RIGHT TO MAKE YOUR OWN DECISIONS, GOOD OR BAD, STUPID OR SMART, WHETHER OTHERS AGREE OR NOT, AS LONG AS YOU HAVE THE CAPACITY TO MAKE THEM AND YOU ARE NOT UNDULY INFLUENCED.

You Can Choose To Live This Way....
Or This Way...

You can give all your money to your heirs

Or you can give it to a stranger...

As Long As You Have Capacity

and

You are not unduly influenced

But if you lack these, you could be subject to

ABUSE from others or

NEGLECT of yourself
Autonomy Became The Dominant Principle In The 1960's

Before then, the dominant principle was beneficence.
Disability cases and end of life cases changed things.
Other principles expanded this, such as informed consent and full disclosure.

Vulnerability:
Any Condition Severe Enough That Another Person Could Use It To Unduly Influence You or Take Advantage of You.

Lack of capacity is one of them.

Most Vulnerable Conditions Are Diagnosable Disorders

Undue Influence
exerting inappropriate influence over a vulnerable person in order to change his/her decision or behavior.

Capacity:
The Legal Definition
Varies From State to State
Depends upon the kind of transaction involved
Most Involve Two Things

Key Phrase in California Probate Code 812
The Person Must “Understand and Appreciate”
- “Understand” can be assessed by having person re-state key facts regarding decision or act or process information adequately.
- “Appreciate” requires ability to relate information to one’s own circumstance, to identify consequences to self and others of the decision, to weigh risks against benefits for self.
Capacity: The Psychological Counterpart

The ability to adequately process information
(The understand portion)

In order to
Make and appreciate a decision based on that information
(The appreciate portion)

Capacity Is Not Absolute:

It Is Relative To The Complexity Of The Decision To Be Made

You can have capacity to make one kind of decision but not another.

Capacity Relates To Being Able To Make a “Decision”

What’s a “Decision”?
The rational evaluation of alternatives a person may select, choosing the one that is best for oneself and understanding the implications of that choice.

Issue:

How Much Capacity Is “Enough” Capacity?

Well….what are you trying to decide?

Everyday Decisions Involving Different Levels Of Decision

What do you want for lunch?
Where should we go on vacation?
What is a good investment today?
Should I change jobs?
Do you want to have sex?
Which Would You Let A 12 Year-old Decide?
Legal/Medical Decisions Of Different Levels
Testamentary capacity
Do you want to get married?
Contractual capacity
Having open heart surgery
Participation in research.

Assessment of Capacity Is The Most Common Question Asked In Referrals To The Forensic Center

Capacity Is Not The Same As Diagnosis
A diagnosis such as dementia, mental retardation or mental illness does not tell you the person's capacity.
Capacity must be individually assessed.

Capacity Is Not The Same As IQ
Regardless of IQ, capacity still has to be tested.
IQ measures, in many respects, acquired knowledge and is an averaged score.
Capacity assessment measures, in a sense, the “machinery of the brain”.

Capacity Is Not Equivalent To Physical Changes In The Brain
Brain scans neither prove nor disprove capacity.
They do provide good correlative evidence

What’s The Capacity Here? And Here?

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Capacity Is Not The Same As Competency
Capacity is a clinical term
Competency is a legal term

Four Conditions That Impair Capacity Under The Law
Cognitive Impairment
Severe Mood Disturbance
Perceptual Distortion
Thought Processing Defects

In geriatrics, about 75% of the problems with capacity are due to cognitive issues.

Assessing Capacity: A Three-Step Process

Step One: Can The Person Process Information And Think Logically In General?
(Does the machinery work?)

You have to actually test for it. Common mistake is to assume person is OK.

Processing Information For Capacity Purposes Requires At A Minimum
1. Attention, concentration, orientation
2. Short-term memory: auditory, visual
3. Learning ability
4. Long-term memory and retrieval
5. Language: comprehension and fluency
6. Reading, writing, arithmetic
7. Fund of knowledge: current events and basic understanding.
Can The Person Think Logically, Rationally and Abstractly In General?

These abilities are collectively referred to as “Executive Functions”

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Step Two: Ruling Out (Or In) Other Deficits That Impair Capacity

Evaluation of serious mood disturbances (e.g., depression).

Evaluation of perceptual disturbances (e.g., hallucinations).

Evaluation of thought processing deficits (e.g., delusions).

Step Three: The Interview

Appreciating *This* Decision (Also Gets At Undue Influence)

Reasons for the decision
Consequences of the decision
Benefits and risks of the decision
Alternatives considered
Consistency of the decision

To Prove Abuse Based On Lack Of Capacity, You Have To “Connect The Dots”

1. The person to the disorder.
2. The disorder to how it affected capacity.
3. The (lack of) capacity to that specific act.
4. The lack of capacity to the time of the specific event.

Examples From Abuse Cases

- Why don’t you want to take your medication?
- Why do you want to get married?
- Why did you have sex with the bus driver?
- Why are you leaving all your money to the church?
Useful References


Case Example

Dan lives with his wife of 37 years; he is 78 years old. You are involved because the wife complained to neighbors that Dan won’t let her use the phone, go shopping for food and he won’t take his medicines. You were called by the neighbor. You find that Dan is cognitively intact and says he is doing these things because he is being “zapped” by satellites controlled by the government. He dresses with foil under his clothes to stop the zapping. He refuses to go to the doctor.

Does he have capacity?

What do you do?