


Decision Making Capacity Determination and Declaration

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Objectives of this section

By the end of this session, participants will be able to:

- Define decision making capacity
- Express the importance of capacity determination
- Explain how capacity declaration is used in the legal system




Capacity Determination

Demonstrate understanding

- Pros and cons
- Advantages and disadvantages
- Consequences


■ Consistent with

- Prior medical decisions
- Overall world view about health care




Decision Making Capacity

- Not all or nothing
 - May be partial or aided
- Not automatically lost with Psych or Dementia diagnoses
- Specific to circumstance
 - May change with mental status
 - Different levels of difficulty




Importance

- Protect the patient
 - Respect their autonomy
 - Prevent mistreatment
- Protect the family
 - Internal conflicts
- Protect the health professional/hospital
 - Legal responsibility




Informed Consent

- Capacity determination at core
- Formal or informal
 - Implied or inferred
- Determines who makes decisions

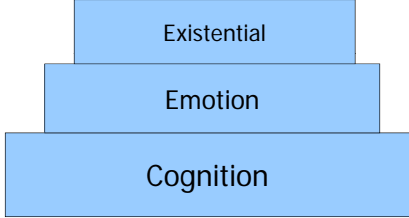


Referrals

- Psychiatry
- Psychology
- Geriatrics
- Palliative medicine
- Ethics
- Risk management




Building Blocks



Existential


Emotion

Cognition




Emotional Capacity

- "Undue Influence"
 - Cognitively intact
- Emotionally controlled
 - Unable to resist emotionally
 - Emotions impair judgment
- Out of usual pattern
 - Isolated
 - Controlled environment
 - Fear abandonment or loss




Existential Capacity

- Existential
 - World view
 - View of self
- Struggle with the foreign
 - Challenges from outside
 - "How could this happen to me?"




Myths About Decision Making

- Same as Competency
- All or Nothing
 - Must be sole – unassisted
- Only about cognition
- Impaired by pain medication
- Psych patients lack capacity
- All about the content of decision




Capacity Declaration Form

- What we look for
- What is important
- Testimony examples
- Common mistakes
- Why is the form the way it is




Probate Code Section 1881

Inability to give informed consent
to medical treatment




Probate Code Section 1881

- Conservatee is deemed unable to give IC to medical treatment if unable to respond knowingly and intelligently to queries about medical treatment
- Or is unable to participate in a treatment decision using rational thought process




Probate Code Section 1881

- Capacity determination by court is based upon finding of inability of conservatee to understand at least one of the following:
 - Nature and seriousness of any illness, disorder or defect
 - Nature of recommended medical treatment
 - Probable degree and duration of risks and benefits of medical intervention and consequences of lack of treatment
 - Nature, risks and benefits of any reasonable alternatives




Probate Code Section 1881

- Court must determine one or more of mental functions listed in Probate Code Section 811(a) is impaired and that there is a link between the deficit or deficits and the conservatee's inability to give informed consent




Probate Code Section 811 Deficits in Mental Function

- A determination that a person lacks capacity to make a decision must be supported by evidence of deficits in at least one of the following mental functions:
 1. Alertness and attention which may include:
 - Level of arousal or consciousness
 - Orientation to time, place, person and situation



Probate Code Section 811 Deficits in Mental Function


2. Information Processing which may include:
 - Short and long term memory
 - Ability to understand or communicate with others, verbally or otherwise
 - Recognition of familiar objects and familiar persons
 - Ability to understand and appreciate quantities
 - Ability to reason using abstract concepts
 - Ability to plan, organize and carry out actions in one's own rational self-interest
 - Ability to reason logically



Probate Code Section 811
Deficits in Mental Function

3. Thought Processes: Deficits may be demonstrated by the following:

- Severely disorganized thinking
- Hallucinations
- Delusions
- Uncontrollable, repetitive or intrusive thoughts



Probate Code Section 811
Deficits in Mental Function

4. Ability to modulate mood and affect

- May be shown by presence of pervasive or recurrent state of **inappropriate** euphoria, anger, anxiety, fear, panic, depression, hopelessness, or despair helplessness, apathy or indifference

Determination of Decision-Making Capacity: An Interdisciplinary Training

Beth Lewis, J.D. June 5, 2009

**The capacity declaration is filed with the court under separate cover to support the proposed conservator's request for probate appointment and request for powers. Sometimes it is filed as part of a separate petition.

I. SIGNIFICANCE OF FORM -- CAPACITY DECLARATION FORM HAS 3 FUNCTIONS:

- A. Can an individual attend a hearing?
Just because someone is confused by the proceedings or becomes upset is not a medical reason
- B. A finding that an individual lacks the capacity to make medical decisions gives the conservator exclusive authority to make health care decisions for the conservatee.
 - The Public Guardian always likes general medical power in all cases but needs the finding of lack of capacity. In LPS conservatorships– specific, in Probate conservatorships – general.
- C. When the individual suffers from dementia then the proposed conservator needs to file the dementia addendum

II. DEMENTIA FORM:

- A. Should have put lines in the form but they did not. Good thing- nobody expects you to write a book. Form stinks, should have lines but if you do not write in the facts to support the request then court does not have the evidence.
- B. Statute requires specific legal findings under Probate Code 2356.5. The court wants to make sure that an individual's rights are protected, therefore, court needs evidence to support the granting of dementia powers.
 - An individual can be placed in a Secured Perimeter Residential Care Facility only upon the court's finding by clear and convincing evidence that the person lacks the capacity to give informed consent, has deficits, would benefit from the placement, and the placement is the least restrictive.
 - Medications – lacks capacity, deficit, needs/benefit from meds.

**Rest of form re: deficits important for findings on dementia

III. COMMON MISTAKES

- **Not dated (need date because it is under penalty of perjury), not signed, doctor Does not list his/her address, no doctor name, illegible, conclusory statement (e.g. has dementia)
- **Dementia form does not include facts court needs to rely on for why conservatee needs restricted placement and psychotropic medication.
- **Sometimes we will withdraw request for powers for tactical reasons