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Capacity Issues and Consequences

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I. Introduction

   Lawyers who represent older clients or clients with a disability have always been faced with the issue of client capacity to enter into a fee agreement, to make decisions about the representation, and to execute documents. The need to assess the mental capacity of clients has become more pressing as people live longer, there is increased awareness of the rights of the elderly and disabled, and the law becomes more complex. But lawyers receive no formal training in capacity assessment. They don’t feel comfortable in performing the role of psychiatrist or mental health worker. The purpose of this chapter is to introduce lawyers representing older clients or clients with a disability to the tools necessary to understand capacity issues and protect their clients.

   Assessment of a client’s competence provides the lawyer with insight into the client’s ability to live and function in the community and to undertake activities that may have significant legal ramifications. Based on an objective test or standard, the lawyer may choose a course of action ranging from proceeding with normal representation of the client, through seeking an independent medical or psychological assessment, to petitioning a court for protection of the client.

   There are serious consequences to a person’s being found incapacitated, including loss of freedom and the high cost in dollars and emotional distress that come with a court proceeding. On the other hand, failure to recognize incapacity can have disastrous results for the person allowed to sign documents or make decisions with legal consequences without full understanding of the potential ramifications.

II. Defining Capacity and Incapacity
   A. Incapacity as a Legal Concept
      1. Presumption of Capacity
         §3.2 Incapacity is a legal concept and a determination made by a court. The definition of incapacity varies by jurisdiction and has evolved over time, but the one thing the various definitions have in common is the principle that all adults are presumed competent until proved otherwise. The burden is on the contestants to prove that an individual is incompetent. In re Estate of Wood, 374 Mich
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278, 132 NW2d 35 (1965); Vollbrecht v Pace, 26 Mich App 430, 182 NW2d 609 (1970). Capacity may be defined as the lack of all of the elements of incapacity. A medical opinion of capacity remains only an opinion until a judicial ruling on the evidence is given.

2. Michigan Law

§3.3 The Estates and Protected Individuals Code (EPIC) defines incapacitated individual as “an individual who is impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or other cause, not including minority, to the extent of lacking sufficient understanding or capacity to make or communicate informed decisions.” MCL 700.1105(a). A legally incapacitated individual is “an individual, other than a minor, for whom a guardian is appointed under this act or an individual, other than a minor, who has been adjudged by a court to be an incapacitated individual.” MCL 700.1105(i).

A determination of incapacity in Michigan requires a probate court finding by clear and convincing evidence. The court must then make a further finding that a guardian is “necessary as a means of providing continuing care and supervision of the incapacitated individual.” MCL 700.5306(1).

The standard for appointment of a conservator is a two-pronged finding by clear and convincing evidence that “[t]he individual is unable to manage property and business affairs effectively for reasons such as mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, or disappearance” and “[t]he individual has property that will be wasted or dissipated unless proper management is provided, or money is needed for the individual’s support, care, and welfare or for those entitled to the individual’s support, and that protection is necessary to obtain or provide money.” MCL 700.5401(3)(a), (b).

A person is rarely totally incapacitated. The statute recognizes that capacity is task specific. It may depend on the type of transaction or decision to be made and the surrounding circumstances. For instance, a person may be able to handle personal safety and hygiene but not financial matters. EPIC recognizes this by calling for the appointment of a limited guardian when possible and granting a guardian “only those powers and only for that period of time as is necessary to provide for the demonstrated need of the incapacitated individual.” MCL 700.5306(2), (3). Likewise, MCL 700.5407(1) authorizes the court to “encourage the development of maximum self-reliance and independence of a protected individual” and “may authorize a protected individual to function without the consent or supervision of the individual’s conservator in handling part of his or her money or property, including authorizing the individual to maintain an account with a financial institution.”

For more information on guardianship and conservatorship generally and on alternatives that preserve a client’s autonomy to the extent possible, see chapter 5.
§3.4 Advising Clients on Elder and Disability Law

B. How Capacity Differs from Competence

§3.4 The terms incompetent and incapacitated are often used interchangeably, and the distinction between the two has disappeared. Capacity has become the more commonly used term. This may be because competency seems to be an “all or nothing” label at a time when there is an increasing body of knowledge about the nuances of capacity. Historically, incompetency refers to a legal status rather than to a medical condition. Thus, legal incompetency occurs when a court finds a person is in need of a guardian because of being incapacitated. Lawrence Frolik, Legal and Practical Consequences of Incapacity, ElderLaw Rep (Oct 1989). For more discussion of this topic, see Arthur C. Walsh et al., Mental Capacity: Legal and Medical Aspects of Assessment and Treatment §1.15 (2d ed 1994).

C. Types of Incapacity

1. Transient or Permanent

§3.5 Incapacity may be transient. “A man may at one time be competent and at another incapable—one who in his normal state is perfectly competent may be wholly incompetent when under the influence of wine, or opiates, or fever, or other severe and painful disease.” Longford v Purdon, 1 L.R. Irish 75 (1887).

In day-to-day activities, capacity may come and go. A determination that a client has capacity to do a specific act must be made at the time of the act, such as the date and time the will is executed. A client meets with an attorney to discuss an estate plan before the date of execution and has another appointment, sometimes months later, to execute the documents. If the client had capacity when the plan was discussed, but not when it was executed, should this mean the estate plan will not be valid? In a 1960 Michigan case, a woman met with her attorney before having a stroke and discussed the proposed provisions of her will, the creation of a trust for her son, and the names of the trustees. After the meeting, but before executing the will, she suffered several severe strokes. At the time of signing, she could speak only to indicate yes or no, and a nurse moved her arm so that she could make an X as her signature. The validity of the documents was challenged. In this case, the woman’s regular physician and a neurologist both said she could understand what she was proposing to do, and the court upheld the documents. In re Estate of Beiter, 361 Mich 661, 106 NW2d 166 (1960). It is not clear how a court would address the more difficult situation in which the testator is not able to understand the estate plan at the time of execution.

2. Specific or Global

§3.6 Incapacity may be referred to as global or specific. Global incapacity refers to a person’s inability to handle the totality of his or her life affairs. Specific incapacity refers to a person’s inability to perform a particular skill. It is possible for a person to be generally competent to handle day-to-day affairs but not competent to perform a task requiring specific competency. Conversely, it is
possible that a person could be competent to perform a specific task yet fail to possess global competency.

Incapacity may be specific to a topic or subject matter. A woman who was otherwise competent and lucid was unable to comprehend the topics of amputation of her feet and possible death if the amputation did not take place. In court, she looked at her feet and refused to recognize the obvious fact that they were dead, black, and shriveled and refused to consider the eventuality of death due to her bodily deterioration. For this reason, the state was granted custody of the woman and given the ability to make medical treatment decisions. *State Dep't of Human Servs v Northern*, 563 SW2d 197 (Tenn Ct App 1978).

### 3. Capacity to Perform Specific Tasks

#### a. Testamentary Capacity

Courts have found that there are varying degrees of capacity or competency required for different tasks. Most states differentiate between testamentary capacity (e.g., ability to sign a will) and contracting capacity (e.g., ability to enter into an arrangement for long-term skilled care). Some states have a separate standard for capacity to make inter vivos gifts.

Before April 1, 2010, MCL 700.2501 addressed capacity to make a will in one sentence, stating simply that a person must be “of sound mind.” This standard was fleshed out in the caselaw to include three specific elements concerning the ability of the testator (1) to comprehend the nature and extent of his or her property, (2) to recall the natural objects of his or her bounty, and (3) to determine and understand the disposition of property that he or she desires to make. *In re Merrill's Estate*, 326 Mich 351, 358, 40 NW2d 179 (1949); *Vollbrecht v Pace*, 26 Mich App 430, 434, 182 NW2d 609 (1970). A testator did not lack testamentary capacity although he did not recall that he owned property with his daughter but learned of it before executing the will. His inability to recall some bank accounts before the will was executed did not demonstrate that he had forgotten about any portion of his property. *Heinz v Heinz (In re Estate of Heinz)*, No 264155 (Mich Ct App Feb 13, 2007) (unpublished).

MCL 700.2501 was amended in 2010, replacing the terminology “of sound mind” with “sufficient mental capacity.” MCL 700.2501(2) defines the elements of “sufficient mental capacity” as follows: the individual must have the ability to understand that he or she is providing for the disposition of his or her property after death, the ability to know the nature and extent of his or her property, and the ability to know the natural objects of his or her bounty. In addition, the individual must have the ability to understand, in a reasonable manner, the general nature and effect of his or her act in signing the will or trust.

Because the standard for a finding of testamentary capacity is less than that for a finding of legal incapacity, a person for whom a guardian or conservator has been appointed or who suffers from mental illness may have the capacity to make a will.
§3.8 Advising Clients on Elder and Disability Law

b. Capacity to Make a Trust

§3.8 MCL 700.7601 makes the capacity required to create, amend, revoked, or add property to a revocable trust, or to direct the actions of the trustee of a revocable trust, equivalent to the capacity required to make a will. This is one of the few areas in which the Michigan Trust Code changed existing Michigan law, which, although unsettled, generally had been thought to be the higher standard required for entering into a contract.

Capacity required to make an irrevocable trust has not been changed by the statute and is left to common law.

Some earlier cases discussing, somewhat tangentially, the standard to make a trust are *Wies v Brandt*, 294 Mich 240, 293 NW 773 (1940) (trust made while grantor was under guardianship transferring all property to guardian as trustee set aside by court as result of undue influence and fraud); *Groening v McCambridge*, 282 Mich 135, 275 NW 795 (1937) (trust void due to grantor’s incapacity); and *Osterhof v Grand Haven State Bank*, 239 Mich 313, 214 NW 178 (1927) (trust set aside when grantor illiterate, unfamiliar with legal documents, and unappreciative of legal effect of trust).

c. Capacity to Enter into a Contract

§3.9 The mental capacity to enter into a contract is sufficient mind to understand, in a reasonable manner, the nature and effect of the act. To avoid a contract, not only must a person have been of unsound mind or insane when it was made, but the unsoundness or insanity must have been of such a character that the person had no reasonable perception of the nature or terms of the contract. *Howard v Howard*, 134 Mich App 391, 352 NW2d 280 (1984); *Van Wagoner v Van Wagoner*, 131 Mich App 204, 346 NW2d 77 (1983); *Star Realty, Inc v Bower*, 17 Mich App 248, 169 NW2d 194 (1969).

In *re Erickson Estate*, 202 Mich App 329, 508 NW2d 181 (1993), deals with capacity to change the beneficiaries of an annuity. The opinion equates capacity to contract with capacity to change beneficiaries. The test is described as “whether the insured then had sufficient mental capacity to understand the business in which the insured was engaged, to know and understand the extent of the insured’s property, how the insured wanted to dispose of it, and who are dependent upon the insured.” *Id.* at 332–333. Specifically, the court found that the insured had difficulty understanding financial matters but understood the idea of naming his nieces rather than his church as beneficiaries.

Powers of attorney, MCL 700.5501, and patient advocate designations (PADs), MCL 700.5506, are contracts and require the principal to be competent or “of sound mind” to consent to the creation of the relationship. The Michigan Do-Not-Resuscitate Procedure Act, MCL 333.1051 et seq., requires a person to be “of sound mind” to execute a Do-Not-Resuscitate Order. Like a PAD, it must be signed by at least two witnesses who attest that the declarant appears to be of sound mind and under no duress, fraud, or undue influence.
The reporter’s comment to MCL 700.7601 indicates that changing the standard in MCL 700.2501 for capacity to make a will has aligned the standards for capacity to make wills, revocable trusts, durable powers of attorney, and beneficiary designations. Thus, when “sound mind” is a requirement to execute a document, the requirements in MCL 700.2501 would apply.

d. Capacity to Act as a Fiduciary

§3.10 Frequently, the standard for determining when a fiduciary is disabled or no longer competent to act in that role is addressed in the document creating the fiduciary relationship. However, there may be times when it is necessary to petition the probate court to deal with fiduciary incapacity. In Reed v Newberry, 292 Mich 476, 483, 290 NW 874 (1940), the standard seems to be a requirement that a court remove a trustee, if incompetent, before damage is suffered by the trust beneficiaries.

e. Informed Consent to Make Medical Decisions

§3.11 The standard for capacity to make medical decisions is the ability to give informed consent. The landmark case dealing with the concept of informed consent is Canterbury v Spence, 464 F2d 772 (DC Cir 1972). This case established the requirement that a person making a health care decision be of “sound mind” and able to “evaluate knowledgeably the options” at the time the decision is made. Id. at 780. The opinion also reiterated the importance of autonomy in making health care decisions.

Essential elements of informed consent are that (1) the patient must understand the medical procedure, including a description of the procedure, its risks, benefits, and alternatives; (2) consent must be voluntary; and (3) the patient must be mentally competent to give consent.

Colorado has adopted a standard for the execution of a medical directive called decisional capacity, under which the person must have the ability to provide informed consent to, or refusal of, medical treatment. This is an attempt at bridging the gap between the legal concept of capacity and medical usage of the informed consent standard. Colo Rev Stat §15-18.5-101(1)(b).

Physicians may be more comfortable than lawyers with the assessment process but usually do not understand the differences between legal and medical analysis of capacity. Different techniques of capacity assessment exist among physicians, psychologists, geriatricians, and lawyers. In the assessment of capacity to make medical decisions, it is sufficient to have a rational decision-making process. Courts have codified these assessments as task-specific.

To understand the differences, it is interesting to compare a description of testamentary capacity as expressed in legal terms and in medical terms. Testamentary capacity expressed in legal terms requires that an individual be able to comprehend the nature and extent of his property, to recall the natural objects of his bounty, and to determine and understand the disposition of property that he desires to make. The same standard expressed in medical terms requires a person to possess functional autonomy, working memory, orientation, attention, and calculation and
not to be suffering from loss of significant intellectual functioning (ability to think, remember, reason) or from cognitive impairment (ability to learn). Medical analysis of competency and legal assessment of testamentary capacity may be approached from different perspectives and use different vocabulary but should come to similar conclusions. See Susan F. Buchanan & James W. Buchanan III, Mental Competence and Legal Capacity Under Colorado Law: A Question of Consistency, 90 Colo Law 1813, 1813–1814 (Sept 1990).

III. Why Do Lawyers Need to Understand Capacity?

A. Serving Clients

1. Helping Clients Maintain Their Independence and Freedom of Choice

§3.12  Lawyers have a duty to advise their clients about the legal consequences of their decisions on medical and financial matters and to give them the tools to help them carry out their wishes. On the other hand, lawyers may have a duty not to carry out their clients’ instructions if they are not able to understand the consequences or are subject to fraud or undue influence. Making this distinction may require lawyers to walk a very fine line.

Sickness, eccentricity, and old age do not automatically indicate incapacity. A client who makes what appears to the lawyer to be a foolish or eccentric decision is not necessarily incapacitated. Unless the client is unable to understand the consequences of the decisions, he or she is entitled to make independent decisions. A lawyer must not fall into the trap of implementing his or her own idea of what is in a client’s best interest.

Freedom of choice is important in the American legal system. Declaring a person to be an incapacitated individual removes the right to choose. The process often casually deprives the incapacitated individual of civil rights in a way that would not be tolerated in other settings. Lawyers representing the elderly and disabled are in a unique position to help preserve their clients’ right to choose. At the same time, they have a duty to protect their clients from unnecessary harm and exploitation. For these reasons, lawyers practicing in this area need to educate themselves about the law as it relates to the issue of client capacity, to understand how that law functions on a practical level, to be informed about the nature of their clients’ disabilities, and to find strategies for maximizing capacity.

2. Protecting Clients Who Become Incapacitated

§3.13  The attorney-client relationship is based on contract, so the first issue to be addressed when a client appears to be incapacitated is whether the client is able to enter into a fee agreement. Lawyers may have a responsibility to clients with whom they have had an ongoing relationship that began before capacity issues arose to act as de facto guardian or to seek other protection. Determining that it may not be in the client’s best interests to do what he or she requests is one of the difficult decisions lawyers face. Knowing when to seek guardianship, conservatorship, or a protective order and when to seek outside professional advice or obtain a formal or informal assessment are skills that the attorney must develop.