




**2022
ON WITH LIFE
CONFERENCE**

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**CLINICAL
ASSESSMENTS IN
SUBSTITUTE
DECISION-MAKING**

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MEDICAL CAPACITY

- Capacity is not the same as competence
 - Competence is a legal term and determined by a judge
 - Capacity is a clinical term, and optimally determined by myriad of clinicians
- Capacity is related, but not the same as an impaired mental states
- IN THEORY - capacity is determined for each decision (or specific capacities)
- Ultimately, capacity is the ability assessment and classification of *functional* deficits
 - This can change with variations in situational demands



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CAPACITY

Cognitive impairment can reduce capacity

- Diminished capacity doesn't mean completely incapacitated
- Is the individual incapacitated / incompetent?
- How do you determine whether an individual can still make informed decisions?

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CAPACITY

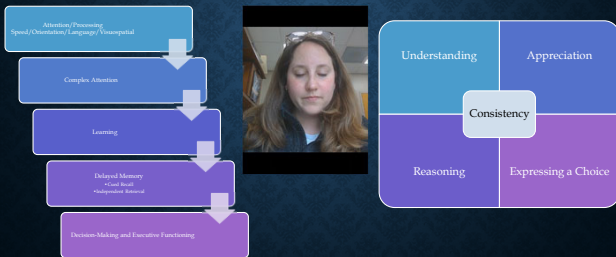
Factors:

1. Short-term memory
2. Long-term memory
3. Reasoning and logic
4. Decision-making skills

People with diminished capacity may still be able to handle their own legal and financial affairs

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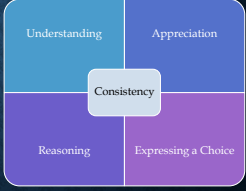
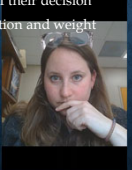
MEDICAL CAPACITY



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MEDICAL CAPACITY

- *Understanding* information relevant to the decision
 - Providing information alone is inadequate to predicate meaningful choice
- *Appreciation* of the significance of the information, their situation, and implications of their decision
- *Reason* through relevant information and weight options
- *Expressing a choice*
- *Consistency*

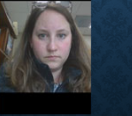



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MEDICAL CAPACITY

- Other considerations:
 - Demands of the task
 - Demands of case specific decision
 - Situational variations in demands
- Capacity can change
- Risk and threshold for determining capacity

	Low Risk	High Risk
Low Reward		Risky heart transplant
High Reward	Accepting Tylenol for pain management	



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LEGAL CAPACITY

Attorneys can represent clients with diminished capacity

- Ethics Rules: "Lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client"
- Capacity is presumed
- Doing questionable or unwise things does not necessarily mean incompetent

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LAST WILL AND TESTAMENT

- Names an Executor to administer the Will
- Identifies the beneficiaries who will receive assets
- In writing, signed by the Testator, and witnessed

A Will disposes of your property after death

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LEGAL CAPACITY

Testamentary Capacity

Relatively low bar:

1. Know the nature and extent of property
2. Know the "natural objects of one's bounty" (heirs)
3. Articulate the desired distribution
4. Understand the nature of the instrument being executed

Know what you have, who you want to give it to, and the fact that the Last Will and Testament accomplishes those goals

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LEGAL CAPACITY

Testamentary Capacity

Factors to consider:

1. Orientation as to time and place
2. Medical records
3. Medications
4. Ability to speak one's mind
5. Sense of humor

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LEGAL CAPACITY

Testamentary Capacity

Things that are not dispositive of lack of capacity:

1. Minor mistakes of fact
2. Old age
3. "Childishness"
4. Mental weakness
5. Bad decision-making

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LEGAL CAPACITY

Testamentary Capacity

Key takeaway here is that Wills don't require a lot of capacity.

You can still be cognitively impaired and have the ability to make a Last Will and Testament that disposes of your property after death.

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LEGAL CAPACITY

Capacity to Contract

- Degree of mental competence required to enter a contract
- Higher than that necessary for executing a Will
- A Power of Attorney is a contract

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LEGAL CAPACITY

Capacity to Contract

Factors to consider:

1. Consistence about persons names as agents under POA
2. Ability to recall information
3. Reasoning
4. Planning
5. Ability to anticipate outcomes

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LEGAL CAPACITY

Testamentary Capacity v. Capacity to Contract

➤ Testamentary capacity is unilateral (one-sided)

➤ What do you own and who do you want to give it to

➤ Capacity to contract is bilateral (two-sided)

➤ Negotiating (even with yourself) to name somebody to make decisions on your behalf

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OPTIONS

Alternative Decision-Making Options

1. Nothing
2. Power of Attorney
3. Guardianship / Conservatorship

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INDEPENDENCE

Individual is not legally incompetent

- Release for medical information
- Execute a Power of Attorney for future incapacity
- Explore contingencies
- Ask questions

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POWERS OF ATTORNEY

- Health Care Power of Attorney
 - Directs another person to make medical decisions if you cannot
- Final Disposition Act Designation
 - Designate someone to make decisions about your funeral arrangements and disposition of remains (included in HCPOA)
- Advance Medical Directive (Living Will)
 - Makes your wishes known concerning end-of-life care
- Durable Financial Power of Attorney
 - Designates someone to make financial decisions

Your agent ("attorney-in-fact") is your decision-maker

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POWER OF ATTORNEY

Health Care Power of Attorney

- Nominates someone to make medical decisions for you
- Triggered when you cannot speak on your behalf
- Includes the authorization to withdraw or withhold life-sustaining measures
- Should include HIPAA waiver

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POWER OF ATTORNEY

Health Care Power of Attorney

- Does not give access to insurance information or finances
- Does not contain burial or funeral instructions
- Is not recognized by Social Security Administration

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POWER OF ATTORNEY

Living Will

- Often goes with a Health Care Power of Attorney
- Gives instructions to medical agent
- Can be DNR, or more nuanced options

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POWER OF ATTORNEY

Durable Financial Power of Attorney

- Designates an agent to handle financial affairs
- Can be broad ("plenary") or limited in scope
- Should name alternate agent
- Can be triggered immediately, or upon future incapacity

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POWER OF ATTORNEY

Durable Financial Power of Attorney

- Does not give right to make health care decisions
- Can be easily revoked
- Is not recognized by Social Security Administration

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CASE EXAMPLE: ASSIGN POWER OF ATTORNEY

Domain	Information
Case details	<ul style="list-style-type: none"> 41-year-old gentleman; severe TBI as a result of a MVC Brain imaging: basal ganglia, hippocampi, and cerebellum, DAI in frontal lobes and right ventral brain stem
Referral:	Can they assign POA for medical and financial decisions?
Threshold	???
Communication Style	No spontaneous speech. Communicate via: <ul style="list-style-type: none"> Yes/No Number of fingers to indicate a choice
Language/Visuospatial	<ul style="list-style-type: none"> Receptive: 100% accurate for Y/N, could complete simple and complex commands, could listen to a story and accurately answer Y/N Visuospatial: Limited by vision deficits
Attention/Processing Speed/Orientation	<ul style="list-style-type: none"> Oriented Could hold up to 5 choices in mind Attention limited by fatigue
Memory	<ul style="list-style-type: none"> Could recall a list of words over days
Executive Functioning Deficits	<ul style="list-style-type: none"> Good verbal abstraction Could deduce which was more restrictive (POA vs. Guardianship)

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CASE EXAMPLE: ASSIGN POWER OF ATTORNEY

Domain	Information
Understanding information	Correctly answered Yes/No questions pertaining to POA limitations
Reasoning	<i>Could not state reasoning</i>
Expressing a Choice	Easily expressed a choice from Y/N and options
Appreciation	<i>Could not state appreciation</i>
Consistency	Answer was the same across clinicians, social work, over days and sessions
Verdict	
<p>Capacity is a complex issue that contains multiple concepts including appreciating the context, understanding options and their consequences, expressing a choice, and explaining the reasoning behind that choice. Also, as evaluators must also consider consistency in his choice expression, as well as the risk level of the choice being assessed. At this time, it is believed that this PS is capable of making his own decisions including his ability to assign power attorney for medical and financial decisions. He does not require guardianship as he can clearly and consistently state his choice, particularly when communications tools are used as described above. He can learn and understand his options and their consequences. It should be stressed that those working with this PS on complex decisions should be skilled in using his communication techniques and tools. He may not be able to express his reasoning or voice dissent when the "right" option isn't available, which is why his POA or supportive decision maker should be someone he trusts and is familiar with his background. Additionally, this PS may benefit from "consistency checks" if possible, such as asking the same question in multiple ways or across many contexts, situations, and overtime.</p>	

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GUARDIANSHIPS AND CONSERVATORSHIPS

➤GUARDIANSHIP: Gives someone else control over the person:

- Housing
- Medical care
- Services

➤CONSERVATORSHIP: Gives someone else control over assets:

- Paying bills
- Investing or liquidating assets
- Selling real estate

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THE PROTECTED PERSON

Is a person whose “decision-making capacity is so impaired that the person is unable to care for personal safety or provide necessities such as food, shelter, clothing, or medical care, without which physical injury or illness might occur”

OR

Is a minor

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GUARDIANSHIPS AND CONSERVATORSHIPS

➤Necessary when someone is not competent to execute a POA

➤Necessary when someone is a danger to themselves or others

➤Necessary when someone has revoked a valid POA

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CASE EXAMPLE:

Domain	Information
Case details	30-year-old woman, gunshot wound to the temporal/parietal lobes
Referral:	Can she participate in the case? Guardian?
Threshold	TWO LEVELS of risk here...
Communication Style	<ul style="list-style-type: none"> Nonverbal in her presentation Point, shake her head, and write
Language	<ul style="list-style-type: none"> Expressive: unreliable, Y/N was accurate 67% of the time for concrete information, 25% with complex info, perseverance noted when writing Receptive: Verbal abstraction/categorization was chance level
Attention/Processing Speed/Orientation	<ul style="list-style-type: none"> Oriented when presented from FO2 or FO4 Difficulties tracking conversation, required repetition of info
Memory	<ul style="list-style-type: none"> Extremely variable: at times could remember across days, others could not recall in a session
Executive Functioning Deficits	<ul style="list-style-type: none"> Extremely poor, verbal abstraction was about chance level

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CASE EXAMPLE:

Understanding	<ul style="list-style-type: none"> Cannot express understanding due to unreliable expressive language
Reasoning	
Expressing a Choice	
Appreciation	
Consistency	<ul style="list-style-type: none"> Extremely variable across sessions
Verdict	
POA/Guardian	At this time, it is believed that this PS cannot effectively communicate her decision, nor is it clear that she can understand all information presented to her. This PS would benefit from an alternative decision maker, such as a guardian. At the very least, this PS should still be offered the chance to learn and express a choice and participate when she can, such as those in a supported decision-making model.
Participate in Case	It is believed that this PS is an unreliable historian both with regards to autobiographical and semantic information, and she could not reliably answer open-ended and abstract questions such as those that may be a part of a forensic investigation. At this time, this PS would not be a reliable witness or participant in the investigation, particularly when considering the risk of such decisions.

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FOCUS ON INDEPENDENCE

Consideration of less-restrictive alternatives

- Requires the Court to consider options
- Burden is on the Court, not the parties to the action, to provide alternatives
 - Social Security Representative Payee
 - Power of Attorney
 - Interpreters
 - Disability-related assistance (e.g. writing or reading)
 - Case management
 - Money management programs

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FOCUS ON INDEPENDENCE

Consideration of less-restrictive alternatives

- Limited Conservatorship
 - For the sale of real estate
 - To apply for benefits (Social Security disability, VA, or Medicaid)

- Voluntary Conservatorships have been repealed
 - Protected person can still file own petition
 - Has to go through the entire process

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KEY TAKEAWAYS

1. Different levels of competency and capacity
2. Options available for someone with cognitive impairment
3. Courts give great deference to doctors' opinions
4. Very difficult to challenge if properly documented
5. Document everything!

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QUESTIONS?



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