

Capacity for Social Decisions

The right to make social decisions arises routinely in limited conservatorship proceedings involving adults with intellectual or developmental disabilities. Courts consider, and regional centers make recommendations, whether a proposed limited conservatee should retain the right to make his or her own social decisions. The issue may also arise in general conservatorship proceedings.

Since a capacity determination is a mixed question of law and fact, it is important for capacity assessment professionals to be aware of constitutional and statutory provisions protecting the social decision-making rights of all Americans, including those with cognitive or other disabilities.

Legal Principles

The following constitutional and statutory principles are implicated in court orders, or directives from conservators, which restrict the social rights of conservatees.

State Action. The federal Constitution protects individuals from "state action" that infringes on their rights. A judicial order restricting social rights is a form of state action.

Fourteenth Amendment. The Fourteenth Amendment to the United States Constitution protects the "liberty" of United States residents. The Fourteenth Amendment is binding on the states. The Fourteenth Amendment makes First Amendment protections applicable to the states. The liberty provision in the Due Process Clause of the Fourteenth Amendment protects freedom of choice in certain highly personal areas, including family relationships. A conservatee has a constitutional right to decide which family members to associate with and which ones to avoid. The parent of an adult child does not have the right to enlist the power of the government to force or pressure an adult child to visit with the parent. The parent has no statutory right to visitation with an adult child, and even if such a statutory right were created, it would violate the federal constitutional rights of the adult child. The same is true regarding visitation rights of a child with an elderly parent.

First Amendment. The First Amendment protects freedom of speech and association. Freedom of association includes the freedom not to associate. Freedom of speech includes the freedom from "forced listening." A court order requiring visitation or a conservator's directive pressuring a conservatee to visit someone he or she does not want to visit is a form of state action violating the conservatees freedom not to associate and freedom from forced listening. Making a conservatee become a "captive audience" is unconstitutional.

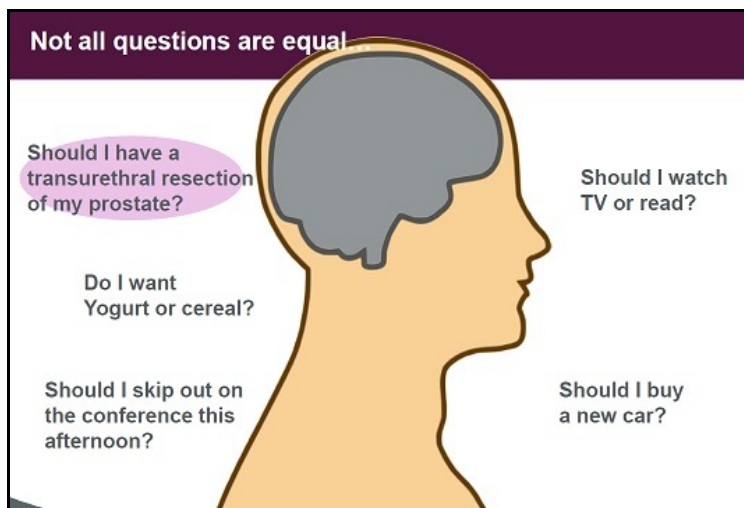
The United States Supreme Court has clarified that: "Freedom of association . . . plainly presupposes a freedom not to associate." (Roberts v. Jaycees (1984) 468 U.S. 609). Adults regularly exercise their freedom of association in connection with family relationships. They may choose to visit their relatives or they may choose to reject contact with them. No one has the right to override an adult's decision to associate with or not associate with a particular person.

Statutory Presumptions. California law presumes that a limited conservatee will retain his or her social rights unless they are affirmatively removed by a court order. California law directs that the limited conservatorship system should encourage limited conservatees to be as independent as possible. The Lanterman Act was passed by the California Legislature decades ago. It affirms that people with developmental disabilities have the same constitutional rights as all people. (Welfare and Institutions Code Section 45502) This includes "a right to make choices in their own lives" including in the area of "social interaction."

Burden of Proof. These constitutional principles and statutory presumptions require that the person seeking to restrict the social rights of a conservatee should have the burden of proof. Those seeking to protect these rights should be able to rely on these presumptions and the court should require the party seeking restrictions to proceed as the moving party. The court should require evidentiary proof that such restrictions are: (1) factually necessary, (2) serve a compelling state interest, as opposed to a private interest or desire of a party; (3) are necessary to further the state interest; (4) are the least restrictive alternative. Due to the fundamental nature of the constitutional rights being restricted, the court should require clear and convincing evidence. These legal requirements should be taken into consideration when a capacity assessment professional is asked to evaluate capacity to make social decisions. What is the risk of retaining social rights? Is there a history of tangible harm when the individual has made social decisions in the past? Is there a compelling need for restriction? Are there less restrictive alternatives to a complete loss of social rights?

Other Requirements. Even if the court grants authority to a conservator to make social decisions for the conservatee, that authority should never involve the conservatee being required or pressured to visit with someone against his or her will.

Assessment Process



The greater the risk of harm, the greater the level of capacity should be required to make a decision. Almost everyone has the capacity to decide what clothes to wear or how to style their hair. Someone who may lack capacity to make major medical or financial decisions, may easily have the capacity to make their own social decisions – especially decisions regarding those with whom they do not want to associate.

While some decisions are rooted primarily in intellect and mental judgment, others are based primarily in emotions. Decisions that are *truly* social are generally driven by emotions. “I like that person or I don’t like that person and therefore I want to be with them or I don’t want to be with them.” Especially since there is little harm in not socializing with someone, a person should never be deprived of the right to say “no” to unwanted social interactions. No one would dare to argue that a judge or a conservator should have the authority to order a person to have sex with someone when they do not want to. The same should be true for social interactions.

While minor children may not have a legal right to choose their friends or who they will hang out with, an adult with disabilities should have wide latitude in making social choices. Only for compelling reasons should a person lack legal capacity to make their own social decisions. For example, if there has been a history of social decision-making that has actually caused serious harm to the individual, then the risk of future harm may outweigh the right to make social decisions without any restrictions. Absent such evidence, however, a capacity assessment professional recommending the restriction of social rights should be required to show exactly how the retention of these rights will harm the person and specifically what clear and convincing evidence exists to support an opinion that social rights should be restricted.