Capacity to Make Medical Decisions

Medical capacity is a central focus of probate conservatorship proceedings. The issue arises in one of three contexts: (1) a petition for a general conservatorship of the person; (2) a petition for a limited conservatorship of the person; (2) a petition focused solely on medical decisions.

A limited conservatorship proceeding involves only adults with intellectual and developmental disabilities. A general conservatorship may involve a variety of adult respondents: a senior alleged to be in cognitive decline; an adult alleged to have dementia; an adult with cognitive issues arising from an injury; and adult with cognitive issues caused by a medical illness; and adults with intellectual and developmental disabilities. A proceeding focused solely on medical issues could involve adults in those same categories.

Regardless of which of these three proceedings is involved, the legal question that must be addressed by a capacity assessment professional and by the court is basically the same. The question is whether the evidence presented by the petitioner and elicited by the assessment process establishes that the adult lacks the capacity to make medical decisions.

There are substantive and procedural *legal standards* that must be followed for both a clinical assessment and a judicial determination of incapacity. Adherence to these standards is a prerequisite for an order taking away the right to make the medical decisions from an adult and transferring such authority to a temporary or permanent conservator. *Professional* and *ethical* standards for capacity assessment professionals also apply.

Professional Ethics and Standards

Since capacity determinations in conservatorship proceedings are often made by psychologists, proper forensic practices should conform to the "Ethical Principles of Psychologists and Code of Conduct" of the American Psychological Association. Psychologists must act only within their boundaries of competence. (Section 2.01(a))

In California, licensed psychologists are authorized to administer and interpret tests of mental abilities and functioning of an individual. (Business and Professions Code Section 2903) However, just because they are authorized to do so does not mean they can render a *reliable* forensic opinion of the medical decision-making capacities of someone alleged to have dementia or someone with intellectual and developmental disabilities.

If a psychologist does not have sufficient education, training, and experience in the assessment of incapacity to make medical decisions when the cognitive impairment may be associated with or caused by declining age or may be the result of one or more disabilities, he or she should not undertake such an evaluation process. (Section 2.01(b))

Furthermore, when assuming a forensic role, psychologists must be familiar with the judicial or administrative rules governing their roles. (Section 2.01(f)) Therefore, if they are making an assessment of medical capacity decision-making in the context of a conservatorship proceeding, they must be familiar with statutes and judicial decisions that apply to this context. This would include the client's rights under the Americans with Disabilities Act, the California Lanterman Act, and the California Unruh Civil Rights Act. If payment for the evaluation is coming from state funding, Government Code Sections 11135-11137 would also apply.

Capacity assessment psychologists should also be aware of their duty to provide necessary supports, services, and accommodations to ensure that clients with serious disabilities have effective communication and meaningful participation in the evaluation process. Failure to adhere to applicable nondiscrimination laws could result in a challenge to the evaluation, a complaint to the professional licensing board, and a lawsuit for malpractice or unlawful discrimination.

Similar standards, duties, and consequences would apply to physicians and psychiatrists for noncompliance with their codes of ethics and rules of professional conduct.

Probate Code

The Probate Code governs the transfer of authority for medical decisions to a conservator. The following are summaries of relevant sections. These statutes should be considered in view of legislative recognition of the fundamental right of individuals to make their own medical decisions.

General or Limited Conservatorships

The following sections govern the assessment of capacity by qualified professionals as well as the adjudication of capacity by the court in the context of a conservatorship proceeding.

Section 1880. If the court determines that there is no form of medical treatment for which the conservatee has the capacity to give informed consent, the court shall (1) adjudge that the conservatee lacks the capacity to give informed consent for medical treatment; and (2) give the conservator of the person the powers specified in Section 2355. That section gives the conservator exclusive authority to make health care decision for the conservatee that the conservator in good faith determines to be necessary.

Section 1890. No court order under Section 1880 may be granted unless supported by a declaration executed by a licensed physician or licensed psychologist within the scope of his or her licensure. The declaration must state that the conservatee or proposed conservatee lacks the capacity to give an informed consent for any form of medical treatment and the reasons therefor.

Section 1881. A conservatee is deemed unable to give informed consent to any form of medical treatment pursuant to section 1880 if, for all medical treatments, the conservatee is unable to respond knowingly and intelligently to queries about medical treatment or is unable to participate in a treatment decision by means of a rational thought process.

In order to make this determination, it must be shown that the individual is unable to understand at least one of the following elements: (1) the nature and seriousness of any illness, disorder, or defect that the individual has or may develop; (2) the nature of any medical treatment that is recommended or may be recommended; (3) the probable degree and duration of any benefits and risks of any medical intervention that is being or may be recommended, and the consequences of lack of treatment; and (4) the nature, risks, and benefits of any reasonable alternatives.

It must also be shown that one or more of the mental functions listed in Section 811 is impaired and there is a link between the deficit and the conservatee's inability to give informed consent. The deficits listed in Section 811 are: alertness and attention; information processing; and thought process. These deficits may only be considered if a deficit alone or in combination with others

significantly impairs the ability to understand the consequences of decisions regarding medical care.

Medical-Only Conservatorships

Probate Code Sections 3200-3212. These sections govern the assessment and adjudication of medical capacity decision-making outside of an existing conservatorship proceeding. Sometimes a petition is made for a specific medical procedure. This may occur when a person refuses treatment that a loved one believes is essential to avoid death or serious health consequences. It may also occur when someone wants medical treatment but the health care provider believes the person lacks capacity to give informed medical consent.

When either of these circumstances exist, a petition may be filed to determine if the patient has the capacity to make a health care decision concerning an existing or continuing condition. It may also be filed to determine if the patient lacks the capacity to make a health care decision concerning a specific treatment. (Section 3201)

Capacity Declaration Form

As mentioned above, a court may not issue an order transferring medical decision-making authority from an individual to someone else in a conservatorship proceeding unless a capacity declaration has been filed by a licensed physician or a licensed psychologist. (Section 1890) The Judicial Council has adopted a standard capacity declaration form (GC-335) for mandatory use in conservatorship proceedings.

Judicial Council Advisory Committee

Last year, the Probate and Mental Health Advisory Committee of the Judicial Council formed a Conservatorship and Legal Capacity Subcommittee. The subcommittee has identified several areas of tension between statutory standards for establishing a conservatorship, standards for determining lack of capacity, typical use of the declaration form, and the information and conclusions sought from clinical evaluators from the form. It is soliciting the opinions of medical and mental health practitioners through a team of collaborators at the Keck School of Medicine at the University of Southern California. Recommendations from the subcommittee are likely to be circulated to the public for comment in the spring of 2020.

Recommendations on Medical Capacity

The overwhelming majority of probate conservatorship petitions are decided without an evidentiary hearing. Some are decided without the respondent having the benefit of an attorney. In too many cases, the conservatee or proposed conservatee never appears in court so the judge may never have even one face-to-face encounter with the individual whose rights may be taken away. The judges who decide these cases and issue orders transferring medical decision-making authority to a conservator rely heavily on the documents in the court file, especially on the capacity declaration form filed by the doctor or psychologist.

There is simply not enough information in the standard form to ensure due process and a just result for conservatees and proposed conservatees. The information that is included in the capacity form (GC-335) and attachment (GC-335a) is not sufficient for a judge to make an informed and reliable

determination that all of the factual findings required by the Probate Code have been met. There is also inadequate information about the qualifications of the practitioner to render a dependable opinion on the matter and to demonstrate that the evaluation process is fair and reliable.

Since most judicial determinations of capacity to make medical decisions are rendered on the basis of documents without the benefit of testimony, the paperwork before the judge should include much more information than is currently required by these Judicial Council forms.

Additional information should be included in the form to bring to the attention of the court and the parties: potential conflicts of interest of the evaluator, the methodology used, whether there was ADA compliance, the objectivity of the evaluator, and his or her competence.

The following questions should be addressed in an addendum to the capacity declaration form:

1) The name of the person who scheduled the appointment;
2) The name of the person who paid the fees;
3) Any prior contact of the evaluator with petitioners, proposed conservators, or their attorneys;
4) Who was present during the evaluation;
5) Extent of prior medical relationship of the evaluator with the person evaluated;
6) What ADA assessment was done prior to the evaluation to determine what supports and services might be necessary to ensure effective communication by the person evaluated and meaningful participation of that person in the evaluation process;
7) Training and experience of the evaluator to interact with and evaluate people with developmental disabilities or seniors with dementia or other adults with cognitive issues;
8) How much time was spent during the evaluation process;
9) What persons other than the respondent were interviewed;
10) What documents were reviewed;
11) A list of all medications the person evaluated has been taking prior to and at the time of the evaluation and whether those medications might have side effects that affect the performance of the person during the evaluation;
12) Whether the effect of these medications was ruled out as a source of the incapacity;
13) Whether the respondent is suffering from depression and whether such depression was ruled out at the source of some or all of the incapacity.

Since judges are so pressed for time, the addendum should also contain a short and concise narrative about the practitioner's opinion and the basis for the opinion. It should also state the degree of certainty of the practitioner's opinion that there is no form of medical treatment for which the conservatee has the capacity to give informed consent. Is the opinion supported by reasonable suspicion, probable cause, preponderance of evidence, or clear and convincing evidence. The practitioner should know the definition for each degree of proof.

Recommendations on Personal Presence

Form GC-335 asks the practitioner to render an opinion on the whether the conservatee or proposed conservatee is able to attend the court hearing: (1) on a particular date or (2) in the foreseeable future.

An individual has a constitutional right to attend court hearings involving a significant deprivation

of liberty. (People v. Nguyen (2011) 194 Cal.App.4th 774, 780) Probate Code Section 1823 also confers a right to attend conservatorship hearings. The ADA places an obligation on the court to ensure that a litigant with disabilities has effective communication and meaningful participation in court proceedings. Such attributes are lacking when someone does not attend a hearing.

Of course, constitutional and statutory rights can be waived. But any waiver of rights must be knowing and intelligent. Therefore, in order to effectively waive the right to personal presence at a conservatorship hearing, a conservatee or proposed conservatee would have to be properly informed by someone, in an ADA compliant manner, of the purpose of the hearing, his or her right to attend, and the value to the individual and benefit to the court of his or her presence in court. If the individual does not appear and a court investigator or someone else tells the court that the person does not want to appear at the hearing, the court has no way of knowing whether that decision was truly knowing and voluntary. There are no procedural safeguards in current law to ensure such.

There are two areas where additional safeguards should be required.

Medical Inability to Attend. With respect to the practitioner's opinion that an individual is unable to attend a hearing or hearings due to medical inability, the specific reasons for that medical inability should be described in detail. To comply with the ADA, there should also be an opinion on whether presence would be possible if certain supports or services were provided by the court to the individual. If the practitioner is unsure of this, the practitioner should recommend that an ADA needs assessment be done by a qualified professional to make this determination.

Capacity to Waive Presence. The medical capacity declaration form should ask the practitioner to render an opinion on the individuals's capacity to waive his or her right to attend court hearings. The practitioner should evaluate the individual's ability to understand the consequences of the proceedings, the benefit to the individual of personal presence, and the value to the court of having the individual at the hearing and the ability to make an *informed* decision on presence in court.

There is little attention paid to the presence or absence of respondents in court hearings. It is almost as if their ability to see and hear what is happening, and the possibility of them contributing to the process, are irrelevant. This perception should be corrected. They are central to the proceedings.

Capacity for Power of Attorney

If a proposed conservatee has executed a medical power of attorney or health care directive prior to the initiation of the conservatorship proceedings, Form GC-335 should ask the practitioner to assess whether the individual had the capacity to execute the document at the time it was signed. Such previously executed documents should not be ignored or lightly dismissed as they often currently are. If such capacity existed at the time, then the document should be honored and medical decision-making authority should not be delegated to a conservator.

The Legislature intended a "durable" power of attorney to survive incapacity. This intent is violated when judges ignore or dismiss such a document without compelling reasons to do so – reasons that should be supported by clear and convincing evidence that the document is void.

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