



JOHNBURNS

ESTATE & ELDER CARE LAW, PLLC

AGING WITH GRACE

RESOURCES TO NAVIGATE YOUR GOLDEN YEARS CONFERENCE

September 23, 2021

Speaker Disclosures

- Speakers have no relevant financial relationships that relate to this presentation.

Basic Premise

- *Every human being of adult age and sound mind has the right to determine what shall be done with his own body.*

Schloendorff v. Society of New York Hospital, U.S. Supreme Court 1914

Autonomy

- The individual's right to self—determination and respect
- Associated concepts involve informed/valid consent, truth-telling, confidentiality, and the right to refuse treatment
- Corresponding duty: DO not interfere with the autonomy of others

Myths About Decision Making

1. Decision Making Capacity (DMC) and competency are the same
2. DMC is an “all or nothing phenomenon
3. Cognitive impairment equals lack of DMC
4. Lack of DMC is a permanent condition
5. Only mental health experts can assess DMC

Myth 1: Decision Making Capacity Equals Competency

■ Decision Making Capacity

- *DMC is a clinical assessment of a patient's ability to make specific healthcare decisions*
- *Clinicians assess decision making capacity*

■ Competency

- *Competency is a legal determination of the patient's ability to make their own decisions in general*
- *Courts, not clinicians, determine competency*

Decision Making Capacity

- Task Specific: High stakes decisions require a higher level of decision-making capacity
- Time Specific: Can the patient make the decision at this time?
- Logical: Is the decision in alignment with the patient's goals and values?
- Consistent: Does not change one's mind every time you ask

Legal Capacity

- Consider the Activity
 - *Will*
 - Object of bounty
 - Property
 - Disposition
 - *Gift*
 - Same as Will + economic ramifications
 - *Contract*
 - Nature and effect of the act and business being transacted
 - Understanding of what is being done and acting in reasonable manner
 - Individual granting Durable Power of Attorney must have contractual capacity

Myth 2: DMC is an “All or Nothing” Phenomenon

- A patient lacking DMC to make one decision does not necessarily mean lack of ability to make all decisions
- Decisions about healthcare vary in their benefits, risks and complexities
- Even patients deemed “incompetent” should be allowed to participate in decision making as they are able

Myth 3: Cognitive Impairment Equals Lack of DMC

- DMC and cognitive ability are related but NOT the same thing
- DMC refers to the patient's ability to make healthcare decisions
- Cognitive ability encompasses a broad range of processes including attention, comprehension, memory and problem solving
- Some patients who lack DMC may score high on cognitive tests while others who perform poorly may be able to make some healthcare decisions

4 Elements of DMC

- Ability to communicate choices
- Ability to understand proposed treatment and the alternatives
- Ability to understand/appreciate the consequences of accepting or declining the suggested treatment
- Ability to reason

Myth 4: Lack of DMC is a Permanent Condition

- Lack of DMC is not always permanent and can be short-lived especially in patients with evolving medical conditions
- Delay major decisions if possible
- Temporarily incapacitated:
 - *Delirium*
 - *Anesthesia*
 - *Pain medication*
 - *Transient mental syndrome*
 - *Hypoxia*

Myth 5: Only Mental Health Experts Can Assess DMC

- Primary Care Providers: Know the patient and family, most aware of values/cultural/religious views, and best able to evaluate capacity
- Psychiatric: In cases of significant depression or major mental illness
- Geriatric Consultation and Medical Panels: For cases with unusual complexity and/or conflict

C.U.R.V.E.S

- C – Can the patient Choose and Communicate the treatment preference?
- U – Does patient Understand the risks, benefits, alternatives and consequences?
- R – Can patient Reason and explain decision making process?
- V – Is decision consistent with patient's Value system?

If the answer to any one is “no” it is unlikely that patient has capacity

- E – Is it an Emergency?
- S – Is there a Surrogate decision maker

Case Study: Sally and Sue

- 78 Years Old
- Live Alone
- History of Falling
- On coumadin
- Need Therapy – unable to perform Activities of Daily Living
- Likely benefit from rehab
- Patients refuse to remain in Nursing Home

Sally and Sue, Part II

	<i>Sally</i>	<i>Sue</i>
■ Understanding	NH staff can assist me if I fall and goal is to make me stronger	NH is for folks who can't take care of themselves
■ Appreciation	If I fall, I am on coumadin, and I could bleed to death.	I don't fall. I'll be fine! Why would I bleed to death? I'm not falling.
■ Rational Reasoning	Quality of life; Previous bad NH experience.	I don't need it. I can take care of Myself.

Sally and Sue Recap

■ Sally

■ Able to:

- *State a choice*
- *Demonstrate general understanding*
- *Demonstrate appreciation*
- *Exhibit rational reasoning*

Sue

Able to:

State a choice

Demonstrate general understanding

Not Able to:

Demonstrate appreciation

Exhibit rational reasoning

Powers of Attorney

- Must have Capacity
- Requisite Capacity can vary depending on the type of Power of Attorney
- DO NOT ASSUME Decision-Making Authority based on Relationship

Financial Powers of Attorney

- Financial Powers of Attorney may be General or Limited
- Financial Powers may be Immediate or Springing
- Financial Powers may be Durable

Health Care Directives

- Health Care Powers are O-N-L-Y effective if the patient (i) cannot make a decision or (ii) cannot communicate a decision
- Health Care Power of Attorney
- Living Will
- Advance Care Directive

Limitations and Drawbacks

- All POA's are not created Equal
- Depends on Willingness of Third Party to Accept it.
- Broader is better

Alabama Statutory Form

GRANT OF GENERAL AUTHORITY

I grant my Agent and any successor Agent general authority to act for me with respect to the following subjects as defined in the Uniform Power of Attorney Act, Chapter 1A, Title 26, Code of Alabama 1975:

If you wish to grant general authority over all of the subjects enumerated in this section you may SIGN here:

OR

If you wish to grant specific authority over less than all subjects enumerated in this section, you must INITIAL by each subject you want to include in the Agent's authority:

- ☐ Real Property as defined in § 26-1A-204
- ☐ Tangible Personal Property as defined in § 26-1A-205
- ☐ Stocks and Bonds as defined in § 26-1A-206
- ☐ Commodities and Options as defined in § 26-1A-207
- ☐ Banks and Other Financial Institutions as defined in § 26-1A-208
- ☐ Operation of Entity or Business as defined in § 26-1A-209
- ☐ Insurance and Annuities as defined in § 26-1A-210
- ☐ Estates, Trusts, and Other Beneficial Interests as defined in § 26-1A-211
- ☐ Claims and Litigation as defined in § 26-1A-212
- ☐ Personal and Family Maintenance as defined in § 26-1A-213
- ☐ Benefits from Governmental Programs or Civil or Military Service as defined in § 26-1A-214
- ☐ Retirement Plans as defined in § 26-1A-215
- ☐ Taxes as defined in § 26-1A-216
- ☐ Gifts as defined in § 26-1A-217

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GRANT OF SPECIFIC AUTHORITY (OPTIONAL)

My **Agent MAY NOT** do any of the following specific acts for me UNLESS I have INITIALED the specific authority listed below:

(CAUTION: Granting any of the following will give your Agent the authority to take actions that could significantly reduce your property or change how your property is distributed at your death. **INITIAL** the specific authority you WANT to give your Agent.)

- ☐ Create, amend, revoke, or terminate an inter vivos trust
- ☐ Make a gift which exceeds the monetary limitations Section 217 of the Uniform Power of Attorney Act, but subject to any special instructions in this power of attorney
- ☐ Create or change rights of survivorship
- ☐ Create or change a beneficiary designation
- ☐ Authorize another person to exercise the authority granted under this power of attorney
- ☐ Waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan
- ☐ Exercise fiduciary powers that the principal has authority to delegate

Protective Proceedings

- Usually in Absence of Power of Attorney – but not always
- Two Types: Guardianship and Conservatorship
- Guardianship: Authority to Make Personal Care Decisions
- Conservatorship: Authority to Make Financial Decisions

Starting the Process

- Guardianships – Emergency and/or Permanent
- If Emergency, Physician must state lack of ability to make decisions or care for oneself.
- Emergency Guardianships effective for 30 days; May be extended
- Guardian *ad Litem* will be appointed
- Physician's evaluation required if seeking permanent Guardianship/Conservatorship
- Conservatorships require Surety Bonds and Ongoing accountings

Notable and Notorious Cases

- *Bashinsky* – Tried to fire employees
- *John Witherspoon* – Bigamy
- *Huguette Clarke* – Recluse
- *Amanda Bynes* – Mental Illness
- *Brian Wilson* – “Pet Sounds”
- *Joni Mitchell* – Aneurysm
- *Casey Kasem* – Parkinson’s
- *Mickey Rooney* – Elder Abuse

.....But the Most Famous



.....and in case you forgot



Commitment Proceedings

- Don't Count on it
- Depends entirely on bed availability
- Best Efforts Often Thwarted
- Criminal vs. Civil
- Limited Duration