

ASSESSING CAPACITY

Adult's Choice vs. Involuntary Intervention

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Reasons for Capacity Evaluations

- Capacity to make medical decisions (Need for Health Care Proxy?)
- Safe and Appropriate Discharge Planning
- Assess older adults vulnerability to abuse
- Determine the need for a guardian
- Civil or Criminal Proceedings
- Evaluation of persons ability to manage finances (Need for Power of Attorney?)

Case 1

Jane is a 74 year old female with frequent infections and worsening memory loss. She has no ability to manage her medications, her apartment smells strongly of urine, frequently losses her laundry in various apartment buildings but has been current with all of her bills. She was admitted to a hospital and the hospital will not discharge her back to the community because they have determined that she lacks capacity and would not be safe in the community. She has two children and a close friend that want her to live in the community.

Case 2

Betsy is a 75 year old single woman with mental illness and a Court appointed guardian over her person and property. She has end stage renal disease and is refusing dialysis. She states that she understands that without dialysis she will pass away in the near future.

Case 3

Ben is a 73 year old single man with an irreversible medical condition who refuses to accept or comprehend his medical condition, and he refuses to use his own funds to meet his financial needs. His sister out of state has been paying some of his bills for years.

Assessing Legal Capacity

- Must be judged according to a standard set by **that person's own habitual or considered standards of behavior and values**, rather than by conventional standards held by others.

Assessment of Decision-Making Ability in Cognitively Impaired Older Adults: A Medical and Legal Perspective
Michele A. Haber, MD, MSSW, MPH and Charles P. Sabatino, JD



Incapacities

- The legislature hereby finds that the needs of persons with incapacities are as diverse and complex as they are unique to the individual

Mental Hygiene Law Section 81.01

(7)

Balancing Act

- ***Balance between*** desires to protect persons from potentially harmful decisions and deeply held beliefs about the inviolability of individual choice.



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(8)

Factors that can affect Capacity

- Stress, grief, depression
- Reversible medical conditions or medications
- Hearing or vision loss
- Educational, socio-economic, language or cultural background

Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers

(9)

Different Levels

- Capacity depends on the task at hand.
- The competence level for creating a will is much lower than competence needed to enter into a contract.
- Other types of capacity:
Driving – Marriage – Medical Decisions

(10)

Assessing Capacity For Medical Decisions

- Interview: who, what, why, when, and where?
- Objective Testing
- Functional Assessment Tools
- Cognitive Assessment
- Capacity domains are vulnerable to neurological, medical and psychiatric conditions.

Involuntary Care & Treatment

- A person has a mental illness for which care and treatment as patient in a hospital is essential to such person's welfare and whose judgment is so impaired that he is unable to understand the need for such care and treatment.

McKinney's Mental Hygiene Law § 9.01

(12)

Rivers v. Katz, 67 N.Y.2d 485, June 10, 1986

- Involuntarily committed mental patient had the right to refuse antipsychotic drugs absent “a judicial determination that the patient lacked the capacity to make a reasoned decision with respect to [the] proposed treatment”.
- Neither the fact that the [patients] are mentally ill nor that they have been involuntarily committed, without more, constitutes a sufficient basis to conclude that they lack the mental capacity to comprehend the consequences of their decisions to refuse medication.
- Accepted that mental illness often strikes only limited areas of functioning leaving other areas unimpaired, and consequently, that many mentally ill persons retain the capacity to function in a competent manner (Id. at 494).

[13]

Short-Term Involuntary Protective Services Orders

1. Definitions. When used in this section unless otherwise expressly stated or unless the context or subject matter requires a different interpretation:
 - (a) “endangered adult” means a person, age eighteen or over who is:
 - (i) in a situation or condition which poses an imminent risk of death or imminent risk of serious physical harm to him or her, and
 - (ii) lacking capacity to comprehend the nature and consequences of remaining in that situation or condition, provided that:
 - a. refusal by the adult to accept protective services shall not in itself be sufficient evidence of such lack of capacity; and
 - b. mental illness shall not in itself be sufficient evidence of such lack of capacity.

[14]

McKinneys Social Services Law § 473-a.

In the Matter of Rose S., 293 A.D.2d 619; 741 N.Y.S.2d 84 (2nd Dept., 2002)

Supreme Court hearing Article 81 petition found to have erred in declaring that a health care proxy executed by AIP was valid. Appellate Division, Second Department, found that although every adult is presumed competent to appoint a health care agent and thus the burden of proving mental incompetence is generally upon the party asserting it, where there is medical evidence of mental illness or a mental defect, the burden shifts to the opposing party to prove by clear and convincing evidence that the person executing the document in question possessed the requisite mental capacity.

Matter of Restaino (AG) 37 Misc.3d 586, 950 N.Y.S.2d 687, 2012 N.Y. Slip Op. 22236 Supreme Court, Nassau County, August 29, 2012

- Based upon the foregoing, it should be clear that the legislative intent behind the enactment of the Family Health Care Decisions Act was for the express purpose of filling the gap where a person does not have a designated health care agent by executing a health care proxy. It is this court's opinion that the Family Health Care Decisions Act was clearly never meant to be a replacement for a court appointed guardian under article 81 of the Mental Hygiene Law. This court finds that any residential facility, such as petitioner, which commences a guardianship proceeding under article 81 of the Mental Hygiene Law claiming a person is incapacitated should not limit its application to a special guardian of the property for purposes of Medicaid applications and payment of outstanding debt, but should also move for a guardian of the person

GUARDIANSHIP

- The determination of incapacity shall be based on clear and convincing evidence and shall consist of a determination that a person is likely to suffer harm because:
 1. the person is unable to provide for personal needs and/or property management; and
 2. the person cannot adequately understand and appreciate the nature and consequences of such inability.

McKinney's Mental Hygiene Law § 81.02

[17]

GUARDIANSHIP

- “The legislature finds that it is desirable for and beneficial to person with incapacities to make available to them the least restrictive form of intervention which assists them in meeting their needs but, at the same time, permits them to exercise the independence and self determination of which they are capable.”

McKinney's Mental Hygiene Law § 81.01

[18]

Guardianship

- This standard does away with the labels of incompetency and substantial impairment in Articles 77 and 78 and their requirement of some underlying illness or condition.
- The former standard encouraged the use of diagnostic labels and conclusory statements that a person could not care for himself or herself to satisfy the legal criteria of incompetency or impairment and discouraged any consideration of the specific effects, if any, of those diagnoses on the actual ability of the person to function in everyday life.
- **The court should regard guardianship as a last resort and should assess the advantages and disadvantages of alternatives to guardianship, deciding on guardianship only when it clearly benefits the person who is the subject of the proceeding and when the alternatives are not sufficient and reliable to meet the needs of the person.**

(19)

McKinney's Mental Hygiene Law § 81.02

Guardianship

(c) In reaching its determination, the court shall give primary consideration to the functional level and functional limitations of the person. Such consideration shall include an assessment of that person's:

1. management of the activities of daily living, as defined in subdivision (h) of section 81.03 of this article;
2. understanding and appreciation of the nature and consequences of any inability to manage the activities of daily living;
3. preferences, wishes, and values with regard to managing the activities of daily living; and
4. the nature and extent of the person's property and financial affairs and his or her ability to manage them.

(20)

McKinney's Mental Hygiene Law § 81.02

ACTIVITIES OF DAILY LIVING (ADL)

- "activities of daily living" means activities such as, but not limited to, mobility, eating, toileting, dressing, grooming, housekeeping, cooking, shopping, money management, banking, driving or using public transportation, and other activities related to personal needs and to property management.

McKinney's Mental Hygiene Law § 81.03

(21)

Matter of Curtis, 40 Misc3d 1233 (A) ; 975 N.Y.S. 2d 708 (Surr. Ct., Dutchess Cty 2013); affirmed 130 A.D.3d 722 (2nd Dept., 2015)

- The decedent was the recipient of a \$10,000,000.00 structured settlement for injuries. The Surrogate dismissed the objections to the probate of the decedent's will in which the decedent named her live-in home health aide as her primary beneficiary, noting that, although the decedent was found to be an incapacitated person in a proceeding brought under MHL Article 81, she nevertheless possessed testamentary capacity. The Surrogate further held that the objectant had failed to sustain her burden of proving that the will was the product of undue influence, noting that the facts that aide had become a "motherly-figure" to the decedent and that the aide spent a lot of time with her, was not sufficient.

Matter of Doar (L.S.), 39 Misc. 3d 1242A; 975 N.Y.S. 365 (Sup. Ct., Kings Cty. 2013)

- This case is but one version of the all-too familiar tale of an elderly individual, afflicted with dementia who becomes so impaired that he is lulled into a trusting relationship and a false sense of security by a predator. Sadly this case is not an isolated incident of financial exploitation of the incapacitated. Often seniors afflicted with dementia, in the twilight phase between capacity and incapacity, are exploited in plain sight with devastating consequences to the victims. The predators are seldom held accountable. *10
- Efforts to redress elder abuse are still in their infancy. However, similar challenges have been met and tremendous strides made in “difficult to prosecute” cases such as domestic violence, child abuse and sexual offenses. If our community is serious about protecting its most vulnerable adults, new initiatives and coordinated strategies must likewise be developed and implemented.

Matter of Loftman (Mae R.), 123AD3d 1034; 999 N.Y.S. 2d 166 (2nd Dept. 2014)

Appellate Division held that clear and convincing evidence of incapacity existed where a 91 year old woman, who relied heavily upon daily assistance from others, executed a Power of Attorney, Health Care Proxy and Will in favor of a neighbor who had procured the attorney who had drafted those documents. The court found significant that the AIP had stated to the Court Evaluator that she had no recollection of executing such instruments and that she wished to leave her estate to her family. The Appellate Division also stated that witnesses testified that the AIP had stated that the neighbor "makes me say things I don't mean and then I forget."

**IN THE MATTER OF DAVID C.; 294 A.D.2d 433
(N.Y. App. Div. 2002 -2nd Dept.)**

- A precarious housing situation and meager financial means do not, without more, constitute proof of incapacity such that a guardian is warranted under Mental Hygiene Law § 81.02

In Re CHAIM A.K., Pursuant to SCPA Article 17-A., . 26 Misc.3d 837, Aug. 21, 2009, Surrogate's Court, New York County, New York.

- Evidence was insufficient to establish that parents' adult son was mentally retarded or developmentally disabled and that he was incapable of managing himself or his affairs by reason of that disability, as required to entitle parents to appointment as guardians of son as a mentally retarded person under Surrogate's Court Procedure Act; although two medical doctors checked boxes on forms that stated their conclusions that son was developmentally disabled and that the condition was permanent in nature or likely to contrive indefinitely, another doctor's detailed records showed a man with serious psychiatric and emotional problems,... and it was at least as likely, if not more likely, that unquestioned difficulties and his "impaired ability to understand and appreciate the consequences of decisions" were due to mental illness rather than developmental disability or mental retardation, as would render a guardianship over son as an alleged incapacitated person (AIP) more appropriate. [McKinney's SCPA 1750](#); [McKinney's Mental Hygiene Law § 81.01](#).

Matter of D.D., 2015 NY Slip Op 25364, Surrogate's Court, Kings County

- The mother and brother of D.D. petitioned to become 17-A Guardians. D.D. has a diagnosis of “Down syndrome with Low Mild Mental Retardation.”
- He is able to work and has an active social schedule involving family, friends, and participation in recreational programs.
- It was not demonstrated to the satisfaction of the Court that Guardianship pursuant to Article 17-A was the least restrictive means to address D.D.'s needs where the presence of supported, instead of substituted, decision making was available.

In the Matter of the GUARDIANSHIP OF DAMERIS L., Pursuant to SCPA Article 17–A; 38 Misc.3d 570, Surrogate's Court, New York County, New York. Dec. 31, 2012.

The legislature, as well, has incorporated least restrictive alternative in liberty curtailment statutes including those dealing with “assisted outpatient treatment” (AOT) (e.g. [Mental Hygiene Law 9.60\[h\]\[4\];\[i\]\[2\]](#) [“Kendra's Law”]),¹⁸ and **854 adult guardianship ([Mental Hygiene Law 81.01](#)) (“The legislature finds that it is desirable for and beneficial to persons with incapacities to make available to them the least restrictive form of intervention which assists them in meeting their needs but, at the same time, permits them to exercise the independence and self-determination of which they are capable”); (see Rose Mary Bailly, Practice Commentaries, 34 A McKinney's Consol. Laws of [N.Y. Mental Hygiene § 81.01](#)) (“The legislature recognized that the legal remedy of guardianship should be the last resort for addressing a person's need because it deprives the person of so much power and control over his or her life”).

To the extent that New York courts have recognized least restrictive alternative as a constitutional imperative (see e.g. [Kesselbrenner v. Anonymous](#), 33 N.Y.2d 161, 350 N.Y.S.2d 889, 305 N.E.2d 903; [Matter of Andrea B.](#), 94 Misc.2d 919, 925, 405 N.Y.S.2d 977 [Fam. Ct., New York County 1978]) it must, of necessity, apply to guardianships sought pursuant to 17–A, as well as under the more recent and explicit Mental Hygiene Law Article 81. Thus, proof that a person with an intellectual disability *needs* a guardian must exclude the possibility of that person's ability to live safely in the community supported by family, friends and mental health professionals.

*In the Matter of the Application of Imre B.R., 2013 N.Y. Misc. LEXIS 3912, *; 2013 NY Slip Op 51466(U)*

- Capacity is defined as the ability to comprehend the nature and consequences of the act of executing and granting, revoking, amending or modifying a power of attorney, any provision in a power of attorney, or the authority of any person to act as agent under a power of attorney (see [General Obligations Law § 5-1501\[2\]\[c\]](#)).
- If Ilona B. R. lacked capacity to understand and comprehend the nature of the transaction, when she signed the power of attorney, then the power of attorney is void (see [Matter of Mildred M.J., 43 AD3d 1391 \[4th Dept 2007\]](#)). The letter submitted in opposition to the order to show cause indicates that on January 19, 2011 "Ms. R. suffer[ed] from moderate to severe Dementia." Initially, this Court notes that there is no medical evidence offered as to Ms. R.'s state of mind at the time of the signing of the power attorney, i.e. December 18, 2010. Nor, does this Court seek to supplant its intellect for that of a physician, so as to indicate whether or not a lack of capacity may or may not be inferred by a statement that Ilona R. suffered from "moderate to severe dementia," a month following her execution of a power of attorney. Moreover, the fact that Ilona R. was diagnosed with "moderate to severe dementia" does not in and of itself, create an issue of fact as to her mental capacity (see generally [Matter of Friedman, 26 AD3d 723 \[3rd Dept 2006\]](#); *leave to appeal denied* [7 NY3d 711](#)).

What do you all think about the other side of the equation?

- "the right" to be an older man or woman, to have a much younger love interest, and to do what I want with my money?
- "the right" to make bad decisions

Case Findings

- A guardianship proceeding was commenced by Adult Protective Services.
- A temporary guardianship was granted with powers to place Jane in an assisted living facility.

Case Findings

- Betsy has resources and receives aid assistance in the home. Despite having been declared incapacitated, her physician believes she has the requisite understanding to refuse dialysis and understands the consequences of this decision.
- Adult Protective Services did not pursue a forced medical intervention.

Case Findings

- A guardianship proceeding was commenced by Adult Protective Services.
- A temporary guardianship was granted and Ben is placed in an Adult Type Home and is taking care of his medical needs.

Resources

- Volume of collected cases on the OCA website (www.courts.state.ny.us/ip/gfs/Art81Collectedcases.pdf)
- Practice Commentaries authored by Professor Rose Mary Bailly