

IS YOUR CLIENT LOSING IT: *How Know and What to Do*

Willamette Valley Estate Planning Council
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I. HOW DO YOU KNOW IF YOUR CLIENT IS INCAPACITATED?

- A. Claudia Burton: Recognizing Incapacity
 - 1. The Prevalence of Dementia: 20% at age 80; 33% at age 85; and 50% of those older than 85.
 - 2. Executive Function: What is it? The ability to implement, monitor, follow through. This means balance checkbooks, understand investment choices, and contractual capacity
 - a. Executive Function can be impaired before other deficits are obvious. Conversational speech is preserved longer. See slide p. 36. The fact that a client can sound perfectly normal discussing the weather, their kids, or the basketball game on TV last night does not mean the client understands that the vacuum cleaner salesman is not really his friend.
 - 3. Anosognosia. Anosognosia is the lack of insight into deficits in functioning and/or the appreciation of significance of deficits. See slide p. 31. There are physical problems with prefrontal cortex or right parietal lobe which is also a feature of some mental illness. You are not going to be able to reason with this person. 38% -- full insight; 38% some cognitive deficits but denied that it affected them; 23% no insight that anything at all was wrong
 - 4. Mini Mental Status Exam. MMSE are not helpful. The exam doesn't measure executive functioning. See slide p. 33.
 - 5. Options. Use open-ended questions or ask people to paraphrase. See pp 39-42.
 - a. Examples:
 - now, remind me about how much you get from your pension?
 - and where do we have your investment account? How are we doing on that CD, are we getting a good rate? ("Oh yes, it's fine" vs. "well, we're getting 2%")
 - verify info [EG MSA/dog/vet]
 - now, what is it you want to accomplish by changing your trust?
 - 6. Legal Definitions of Incapacity
 - a. "Incapacitated" for guardianship: "Incapacitated" means a condition in which a person's ability to receive and evaluate information effectively or to communicate decisions is impaired to such an extent that the person presently lacks the capacity to meet the essential requirements for the person's physical

health or safety. “Meeting the essential requirements for physical health and safety” means those actions necessary to provide the health care, food, shelter, clothing, personal hygiene and other care without which serious physical injury or illness is likely to occur. ORS 125.005(5).

- b. “Financially incapable” for conservatorship: “Financially incapable” means a condition in which a person is unable to manage financial resources of the person effectively for reasons including, but not limited to, mental illness, mental retardation, physical illness or disability, chronic use of drugs or controlled substances, chronic intoxication, confinement, detention by a foreign power or disappearance. “Manage financial resources” means those actions necessary to obtain, administer and dispose of real and personal property, intangible property, business property, benefits and income. ORS 125.005(3).
- c. Testamentary Capacity. Legal tests for determination of testamentary capacity are whether at time of making will testator comprehended the nature of the act in which he was engaged, whether he knew nature and extent of his property, whether he knew the persons who might be the objects of his bounty, and whether he was cognizant of scope and reach of provisions of will. This is the same capacity required for creating a trust or funding a trust under ORS 130.500(1).
- d. Contractual Capacity. The ability to understand the natural consequences of a transaction. There is no Oregon authority on the mental capacity that a principal must have to execute a valid power of attorney. In other states, there have been cases that have defined what capacity is required to execute a power of attorney. In *Golleher v. Horton*, 715 P2d 1225, 1228 (Ariz App 1985), the court determined that the best test was whether the person is capable of understanding in a reasonable manner, the nature and effect of his act. Consider asking yourself whether the client is able to appreciate the natural consequences of the act.

B. Beth Nevue: Recognizing Incapacity

- 1. Assessment Tools.
 - a. KELS - what it is and what it measures.
- 2. Who administers assessments?
- 3. Whom do you ask and how do you ask for assessments?
 - a. Assessments in the hospital.
 - b. Assessments coordinated through the primary physician.

- c. Assessments through Home Health.
 - d. Assessments for Driving.
4. How are assessments paid for?
- C. Heather Gilmore: Recognizing Incapacity
1. Red Flags that Assessment May Be Necessary.
- a. Lack of ability to paraphrase.
 - b. Use of humor to cover deficits.
 - c. Lack of ability to predict natural consequences.
 - d. Change in level of scrutiny of work.
 - e. Change in quality of information provided from prior years.
 - f. Change in type of questions asked by client with regard to choices.
 - g. Problems in working with impaired clients who have good social skills.
 - h. Influence and the client with limited capacity or lack of capacity.
2. How to Get a Client or a Family to Participate in Assessment
- a. Potential Loss of the Client
 - i. Liability Issues
 - ii. Potential that You Already Do Not Have a Client
 - iii. Character of Relationship with the Client
 - iv. Good Long Term Commitments to the Well-Being of Clients
 - b. Avoiding Embarrassment of Client
 - i. Business Terms - explain what your professional rules require of you.
 - ii. Appeal to Client's Frugality - if they spent the money to plan, they may as well use the plan.
 - c. Denial by the Client or the Client's Family.
 - i. If the client doesn't think there are any problems, does the client think the client's family sees any problems.
 - ii. If the family doesn't see any problems, where do you go. Consider agreeing, but let's just ask so we don't have any questions about this transaction we're doing.
 - d. Anosognosia - Inability to Recognize the Deficits.

- i. What if the family wants the assessment and the doctor or client won't participate. HIPAA issues, insurance issues, description of incapacity in a trust.
 - ii. Getting the client's permission to seek help from others.
 - iii. Can You Get the Client to the Doctor and Coordinating with the Doctor.
- e. What Could an Assessment Say and How Does that Apply to Your Practice.
- i. Understand the terminology.
 - ii. Consider the natural progression of the deficit.
 - iii. If the client still has the ability to participate, put a plan in place with the client's cooperation identifying benchmarks to tell you when the client should no longer participate.
- f. Follow Up with an Impaired Client.

II. WHAT TO DO IF YOUR CLIENT IS INCAPACITATED

- A. Claudia Burton: What to Do If Your Client Is Incapacitated
1. Substitute decision maker for health care
 - a. Health Care Advance Directive (now includes ability to place person with dementia in gero psyche unit for limited period of time). Must be done before incapacity. Allows substitute decision-maker to authorize or decline medical treatment. Revocable. Attending Physician makes the determination of whether the person is incapable of making health care decisions. ORS 127.505(14).
 - b. Mental Health Advance Directive must be executed in advance by person with capacity at the time of execution. Revocable.
 - c. Guardian. The standard and findings the court has to make are found in ORS Chapter 125. There is a petition filed, a visitor must be appointed, there can be objections and a hearing may be required.
 2. Substitute decision maker for finances

- a. Power of Attorney. Powers of Attorney must be done ahead of time by competent principal. The agent only has the authority granted to the agent under the power of attorney.
 - i. Not universally accepted because of issues with fraud and undue influence. Best practice is to clear the POA with relevant financial institutions ahead of time while principal has capacity. Often the institution will require the principal to complete the institution's own form of POA.
 - ii. Issues with "Springing" Powers of Attorney. Does MD have to certify? Does the attorney hold the original in escrow in his or her office?
 - b. Trusts.
 - i. Has to be done ahead of time by competent (testamentary capacity) principal.
 - ii. Funding - need to make sure all relevant assets are transferred into the trust.
 - iii. Trusts don't help with managing things like pension income (won't be payable to trustee), IRA's, Social Security, Credit Cards.
 - c. SS Rep Payee
 - i. Limited Powers and Rights - only for Social Security income.
 - ii. The person who wants to be the representative payee applies to & reports to Social Security Administration.
 - d. Conservator standard and findings court has to make are found in ORS Chapter 125.
- B. Beth Nevue: What to do if your client is incapacitated.
- a. Care and Safety Issues.
 - i. Driving
 - ii. Self-neglect and other safety issues in the home or in a facility
 - iii. Adult Protective Services - Anonymous Reporting
 - b. Implementation of Substituted Judgment
 - i. How does the baton get passed for health care decision making.
 - ii. Guilt issues faced by substitute medical decision makers.

- c. Obligations of substitute medical decision maker.
- C. Heather Gilmore: What to Do If Your Client Is Incapacitated.
- a. Communication issues
 - i. Who can you talk to about what
 - ii How do you get paid?
 - iii Methods of Communication with Impaired Clients
 - b. Lack of Ability to Contract
 - i. Engagement letters are meaningless, representations made by clients are meaningless. Consents or instructions given by clients are meaningless. Acceptance of Investment Risk is meaningless. Tax decisions/choices are meaningless.
 - ii. Ability of Attorneys to Obtain Court Order Confirming Representation - may include the need to have the court review attorney fees
 - c. Potential for Financial Exploitation.
 - i. Protecting Yourself - if your client didn't have the ability to contract and you are earning a fee, how can you justify the fee?
 - ii. Protecting Your Client from Others.
 - iii. Coordination with Estate Planning Team (get consent while the client has capacity.)
 - iv. Documenting your File - Client clearly cannot fill out a tax planner and used to be able to, you complete it for them or you do the taxes without it. Client clearly does not know what you are talking about, you raise the question, client is in denial, you continue to represent client. Watch out for the double-edged sword. You can't have it both ways.
 - d. Start Now.
 - i. Don't make inappropriate assumptions, client only writes down prescription and physician medical expenses. Consider whether client has a "housekeeper" necessary due to client's inability to get around.
 - ii. Set up the file to ask questions while the client is still able. Don't rely on the tax planner note book. Don't rely on client questionnaire and past information you have about the client. Ask each year so the

questions aren't new when the client may be struggling and respond defensively.

- iii. What should you do with the client who just came in?

- f. Representing an Incapacitated Person
 - i. Limit the Scope of Services
 - ii. Consider requiring additional signatures
 - iii. Try a team approach.
- g. Working with the Substitute Decision Maker
 - i. See the document giving them authority.
 - ii. Consider whether the document authorizes the new client to act.
 - iii. Confirm what the "new client" wants you to do when approached by the original client.
 - iv. Obtain consent to let the other team members know about the change in client.
 - v. Consider a pass the baton meeting with the team.

APPENDIX 1 - Client who has some insight to challenges and some ability to be involved with the passing of the baton.

Dear Client:

It was nice to visit with you on [date]. As we discussed, things have been changing for you. In the past, you gave me permission to talk to your attorney/accountant/financial planner about your affairs so that we can work as a team to provide you with the best service possible. I understand that I still have your permission to talk to _____.

I recall that in 1999, you did a [trust or power of attorney] with your attorney. It is so helpful to have a copy of that in my file. My file reflects that you paid [insert amount of fees or say a good amount of money] in attorney fees to create a plan to help you manage your affairs as you age. In our conversation, we talked about the potential to use some of the provisions of the plan that your attorney created for you and that you already paid for so that you get the benefit of all that planning.

I think it would be helpful if we set up a time to sit down together with your [insert name of trustee or agent] to make sure that we have everything in order and to discuss the benefits of using your plan. OPTIONAL LANGUAGE: If you'd like, we can also invite [name of attorney] so we can make sure to take advantage of any helpful suggestions he has. I encourage you to talk to [name of agent or trustee] and ask him/her what day and time would work, and then call my office to schedule

the appointment. I look forward to hearing from you. If you have any questions, please let me know.

APPENDIX 2 - For Clients with limited insight or ability to respond to issues.

Dear Client:

It was nice to hear from you on/It was nice to see you on [insert date]. As we discussed, it was difficult for you to [describe what the client had problems with]. It is important for you to be able to fully understand what your investment options/tax consequences/ planning choices are so that I can effectively help you. If you are not able to fully understand, my ability to help you is limited and I may need to resign. My preference would be to continue to help you with the assistance of [insert name of agent, successor trustee or attorney].

I have suggested that you consider resigning as trustee/ naming _____ as a co-trustee/ allow _____ to work with you to use your power of attorney so that your needs are met and you get the full benefit of my assistance. At this time, it is appropriate to use the back up plan you put in place in [insert year]. In the past, you have given me your permission to talk to this person about your affairs so that we could work together to help you in the best way possible.

I suggest that you share this letter with [insert name of attorney, agent, successor trustee or trusted person for client] so that you can consider what you would like to do. You previously signed a plan and gave us instructions on what to do. I want to make sure that I follow your instructions and respect your wishes as expressed in your plan. I am so glad that you have a plan in place so that we can continue to work for your benefit. If you have any questions, please call me or have [name of trusted person, agent under POA or successor trustee] call me.