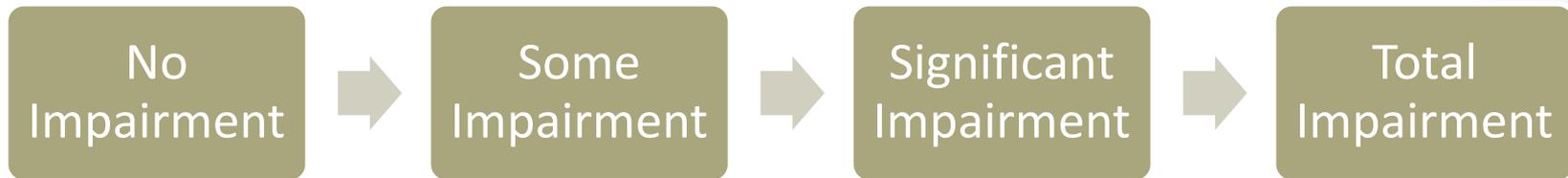


Decision-Making in Delaware

A presentation of the Office of the Public Guardian

- Assess basic capacity
- Describe options for assisted decision-making in Delaware
- Explain briefly how they work
- Use knowledge in case circumstances
- Discuss obtaining services from the Office of the Public Guardian

Objectives



The goal is to determine what the individual is able to do and then use that ability to resolve present and future decision-making challenges.

Sooner rather than later.

Guardianship should only be sought if there are no possible alternatives.

Can they make their own decisions?

Do they have a basic understanding of simple documents?

Are these abilities increased with supports?

Spectrum of Capacity

SPECTRUM OF CAPACITY IN DECISION-MAKING

| No impairment of Capacity | Some impairment of Capacity | Significant impairment of capacity | Lacks decision-making capacity |
|--|--|--|--|
| <p>No restriction on decision making</p> <p>Understands the nature and intent of documents and can execute documents, such as AHCD, POA, Will, Contract.</p> <p>Understands both simple and complex fact presentations and is able to process information</p> <p>Can make decisions with or without assistance</p> <p>May seek assistance if helpful</p> | <p>No restriction on decision making</p> <p>May still execute documents including AHCD, POA/DPOA, Contract, Will and Supported Decision Maker Agreement; if adult understands the nature and intent of document.</p> <p>Needs assistance with understanding or processing information to make simple and complex decisions</p> | <p>May still execute an documents including AHCD, POA/DPOA, Contract, Will and Supported Decision Maker Agreement; if adult understands the nature and intent of document.</p> <p>May not be able to understand or process information to make simple and complex decisions</p> <p>If attending Dr. determines adult cannot make medical decisions; if there is an AHCD it will be followed. If no AHCD, Dr. may name a Surrogate Decision Maker for medical decisions only.</p> | <ul style="list-style-type: none"> •Is not able to execute any documents. •Is not able to understand or process information to make simple and complex decisions •If attending Dr. determines adult cannot make medical decisions; if there is an AHCD it will be followed. If no AHCD, Dr. may name a Surrogate Decision Maker for medical decisions only. •If there is a DPOA, it will be followed. •Court of Chancery of Delaware will make determination of mental incapacity and appoint a guardian of property and/or person. |

Life Decisions range from Simple to Complex:

- What's for dinner?
- Where do I live?
- What medical care do I want? Everything from whether or not to get a flu shot to deciding how to treat a life-threatening disease.
- Financial Decisions: Spending or saving, renting or buying, credit cards, and general money management. Do I get a job? Do I qualify for Social Security Disability?
- Behavioral decisions: Relationships? Who comes into my home? Are there drugs or alcohol or other stuff? Is it illegal?
- Deciding who to trust: Defending against cons and scams, filtering out danger.

Capacity and Competency

- Black's Law Dictionary defines capacity as the “mental cognitive ability to understand the nature and effect of one's acts”.
- The ABA, in a handbook published for Psychologists regarding the *Assessment of Older Adults With Diminished Capacity* (ABA Website) discusses the distinction between the term “capacity” and “competency”, and indicates that “Some recommend that the term competency be used only to refer to a legal finding, with the term capacity to refer to clinical findings”. p. 13
- Capacity is understood to be situation specific. The legal system recognizes the situation-specific nature of capacity, depending on the particular event or transaction, making a will, getting married, entering into a contract, or standing trial, for example. *Id.* at p.15

Starting Point

- The starting point in the law is a presumption that adults possess the capacity to undertake any legal task they choose, unless they have been adjudicated as incapacitated to perform the task in the context of guardianship. (Id.)
- The abilities that are relevant to a person's capacity to make reasoned decisions regarding treatment:
 - Ability to evidence a choice
 - Ability to understand relevant information
 - Ability to appreciate the situation and its likely consequences
 - Ability to manipulate information rationally.

Alternatives for Assisted Decision-Making

When you still have capacity and make decisions, or execute documents:

- Supported Decision Making
- Representative/Substitute Payee
- Case/Care management systems (Support)
- Release forms (For gathering information)
- Durable Power of Attorney / Immediate effect

When you lack decision-making capacity:

- Surrogate Decision Making
- Advanced Health Care Directive/Agent
- Durable Power of Attorney/Effective upon disability
- Guardianship

Delaware Supported Decision Making

- Serves individuals who can make decisions, but who need or could benefit from assistance in gathering, reviewing, or interpreting information
- The role of the Supporter is to assist the adult in gathering and assessing information, and in evaluating the options, responsibilities and consequences of the adult's life decisions, including those about health care, financial decisions, and support services.
- The Supporter is chosen by the Principle. The Supporter does not have individual authority to make decisions.
- Supported Decision Making Agreement must be signed by the adult, two witnesses, and the appointed Supporter.
- Agreement is executed and witnessed, and indicates what type of assistance is needed and what the supporter has permission to do.
- May be revoked by individual.

Elements to a Supported Decision Making Agreement

Adult may enter in to a supported decision-making agreement when:

- It is voluntary, in writing , and dated.
- The adult understands the nature and effect of the agreement.
- It designates at least 1 supporter.
- Identify the types of decisions for which the supporter is authorized to assist, and which they may not.
- The agreement must be signed by each party in the presence of 2 adult witnesses able to serve under Section 9405(A).
- The agreement must be accompanied by a declaration page, signed by each supporter and in the presence of witnesses.
- Declaration page must contain the supporters relationship to the adult; the supporter's willingness to act as a supporter and supporter's acknowledgement of the duties of a supporter.
- Individuals who can serve as a supporter is limited by section 9406A(b)

Surrogate Decision Making

- A surrogate may make health care decisions to treat, withdraw or withhold treatment for an adult patient if the patient has been determined by the attending physician to lack capacity and there are no alternatives.
- This determination shall be confirmed in writing in the patient's medical record by the attending physician.
- Without this determination and confirmation, the patient is presumed to have capacity and may give or revoke an advance health care directive or disqualify a surrogate. 16 Del.C. Sec. 2507

Who can be a Surrogate Decision-Maker?

- The spouse, unless a petition for divorce has been filed;
- An adult child;
- A parent;
- An adult sibling;
- An adult grandchild;
- An adult niece or nephew;
- An adult aunt or uncle.

OR

Another adult, other than a paid caregiver, who exhibits concern for the patient, is familiar with the patient's personal values, and who is reasonably available may act if the adult patient is in an acute care setting or is a client of the Department of Health and Social Services and none of the listed individuals are eligible or available to act.

Advanced health-care directives, and Powers of Attorney



Advanced Health Care Directives and Powers of Attorney may be created by:

- All adults who have a modest level of capacity, who are **aware and able to understand the nature and effect of the document**, may execute these documents.
- Do not require a lawyer to execute.

May be found online at:

<http://courts.delaware.gov/help/poa.aspx>

<http://www.dhss.delaware.gov/dsaapd/powerof.html>

Advanced Health Care Directive (AHCD)

An adult who is mentally competent may...execute a power of attorney for healthcare...” (16 Del.C. Sec. 2503 (a)(2)), and that “an individual is presumed to have capacity to make a health care decision and to give or revoke an advance health-care directive”(16 Del.C. 2514(b)).

The capacity to execute an Advanced Health Care Directive (AHCD) and/or a Durable Power of Attorney (DPOA) is regarded to be the same as testamentary capacity, as long as an individual is aware of the nature of the document and the general character of what it does, they are able to execute it.

Capacity to execute AHCD and POA

- “On the question of...capacity to execute the...power of attorney, the parties refer to the legal standards for evaluating a claim of lack of testamentary capacity. In *In re Estate of West*, Del.Supr., 522 A.2d 1256 (1987), the Delaware Supreme Court held ‘The standard is that one who makes a will must, at the time of execution, be capable of exercising thought, reflection and judgment, and **must know what he or she is doing**’. (Emphasis added).

Advanced Health Care Directive

- An advance health-care directive becomes effective upon a determination that the person lacks capacity, and when the advance health-care directive is to be applied to the providing, withholding or withdrawal of a life-sustaining procedure, the advance health-care directive shall become effective only upon a determination that the declarant lacks capacity and has a qualifying condition.
- An advance health-care directive ceases to be effective upon a determination that the declarant has recovered capacity.

Requirements of Execution

An advance health-care directive must be:

- In writing
- Signed by the declarant or by another person in the declarant's presence and at the declarant's expressed direction
- Dated
- Signed in the presence of 2 or more adult witnesses (refer to statute for limits on witnesses. 16 Del. C. Sec 25)

Durable Power of Attorney

- A Durable Personal Power of Attorney is durable because it is designed to survive the incapacity of the principal. It is personal because it relates only to personal assets and interests, not routine business matters that are specific event targeted and short lived, and it is a power of attorney because it allows one person, the principal, to give authority to another person, the agent, to act on the principal's behalf.
- It relates only to financial matters; it does not relate to health care decisions.
- It may either take effect immediately, or only take effect upon the principle's incapacity as documented by a doctor.

Components of the Durable Power of Attorney:

1) Notice to Principal, a one page document which must be signed by the principal-the person giving the power to another, an agent. The purpose of the Notice to Principal is to provide in simple language an explanation of what the power of attorney means to them.

2)The Durable Personal Power of Attorney itself, which walks the principal through the process of indicating who the agent or agents are, when the power is to come into effect, what powers are included, and whether a previously signed power of attorney is to be revoked.

3)Finally, the Statement to Agent, which has to be signed before the power of attorney can be used---and that can be much later than the date the power is executed by the principal-- tells the agent the duties associated with taking on the job.

Guardianship

Statutory Authority

- Title 12, Chapter 3901
- Court of Chancery
- “By reason of mental or physical incapacity is unable properly to manage or care for their own person or property, or both, and, in consequence thereof, is in danger of dissipating or losing such property or becoming the victim of designing persons or, in the case where a guardian of the person is sought, such a person is in danger of substantially endangering the person’s own health, or of becoming subject to abuse by other person’s or of becoming the victim of designing persons...”
- Incapacity must be established by clear and convincing evidence per case law.
- Court determines scope.

The legal test of “mental incapacity” for guardianship purposes is:

- 1) A pattern demonstrating an inability to recognize as relevant to decisions of significance, facts or considerations that one would expect reasonable and competent persons to recognize as relevant to such a decision;
- 2) A pattern demonstrating an inability to reason with respect to decisions that are relatively simple but personally important, in a way that is internally consistent; or
- 3) The presence of a mental disease or condition that interferes with the operation of the prospective ward’s perceptions or reasoning to such an extent as to raise a substantial likelihood that decisions relating to matters of importance to the person have been affected by that disease or condition.

In re Gordy, 658 A.2d 613, (Del.Ch.) 1994. “Incapacity” is the term used in Delaware for “lack of competence”

Guardianship

Guardianship is established by petitioning the Court of Chancery. Ordinarily the services of an attorney are used. This petition is based on a testimony of a doctor made in writing and submitted to the Court for record. It is not necessary for the doctor to appear personally in Court. When the petition is submitted, the Court orders that all interested parties be notified, including the prospective ward, unless the doctor testifies that it would be detrimental to the person to be notified of the proceedings. At least ten days after that order, a hearing is held, and testimony is taken by the Court if necessary. The Court then decides the issue and enters an order with its decision. Only then does the guardian have legal authority to act on behalf of the ward.

Guardianship Information

- A guardian is a person or institution appointed by the Court of Chancery to manage the affairs of another, called the ward. There are two types of guardianship: of the person, and of the property. A guardian of the person is given the authority to make personal decisions for the ward, like where he will live, and under what conditions, etc. A guardian of the property manages the finances of the ward. The Court may appoint either type of guardian or both person and property, or two separate guardians may be appointed. An institution, such as a bank, may be appointed guardian of the property.
- Please use the resources on the page and on the forms page to learn more about Guardianship in the Court of Chancery.
- <http://courts.delaware.gov/chancery/> (Click on Guardianship in the informational box).

DECISIONS WITHIN THE SCOPE OF THE GUARDIANSHIP OF THE PERSON:

- Where the person lives or receives care.
- Providing for the care, comfort and maintenance of the person with a disability and arranging for the training and education of the person with the disability.
- Shall take reasonable care of the clothing, furniture, vehicle and other personal effects in the immediate possession of the person with a disability and commence guardianship of the property proceedings if other property of the person with a disability is in need of protection.
- May give such consent or approval as may be necessary to enable the person with a disability to receive medical or other professional care, counsel, treatment or service and shall not unreasonably withhold such consent or approval nor withhold such consent or approval on account of personal beliefs held by the guardian or the person with a disability, but shall take such action as the guardian objectively believes to be in the best interest of the person with a disability.

Guardian of Person

The Court shall grant to the guardian of the person such powers, rights and duties which are necessary to protect, manage and care for the person with a disability. The Court may at any time change the powers of the guardian of the person

- The guardian of the property may pay or apply income or principal from the estate as needed for the clothing, support, care, protection, welfare and rehabilitation of the person with a disability, as requested by the person with a disability or the guardian of the person, if any. In exercising this power, the guardian of the property shall consider the cost of support and care of the person with a disability for the expected life of the person with a disability and the needs of any persons dependent upon the person with a disability as may be reasonably anticipated.
- The guardian of the property shall not be required to expend the guardian's own money for the support or care of the property or person.

Guardian of Property

The Court may limit the power of the guardian of the property as conferred on the guardian herein, or may confer any additional power which the Court itself could exercise under § 3901 of this title.

Resources

- "Ten Myths About Decision-Making Capacity, A Report by the National Ethics Committee of the Veterans Health Administration", September 2002; National Center for Ethics in Health Care, veterans Health Administration, Dept. of Veterans Affairs
- "Competency and the Capacity to Make Treatment Decisions: A Primer for Primary Care Physicians" Raphael J. Leo, M.D. Primary Care Companion J Clin Psychaitry 1:5, October 1999
- Advanced Health Care Directives and Durable Power of Attorney information:
- AHCD 16 Del.C. 2503,
<http://www.dhss.delaware.gov/dsaapd/advance1.html>
- DPOA, 12 Del.C. Sec. 49A
- <http://www.dhss.delaware.gov/dlcrp/poa.html>