Estate Planning
&
Probate Section
Presents

Capacity

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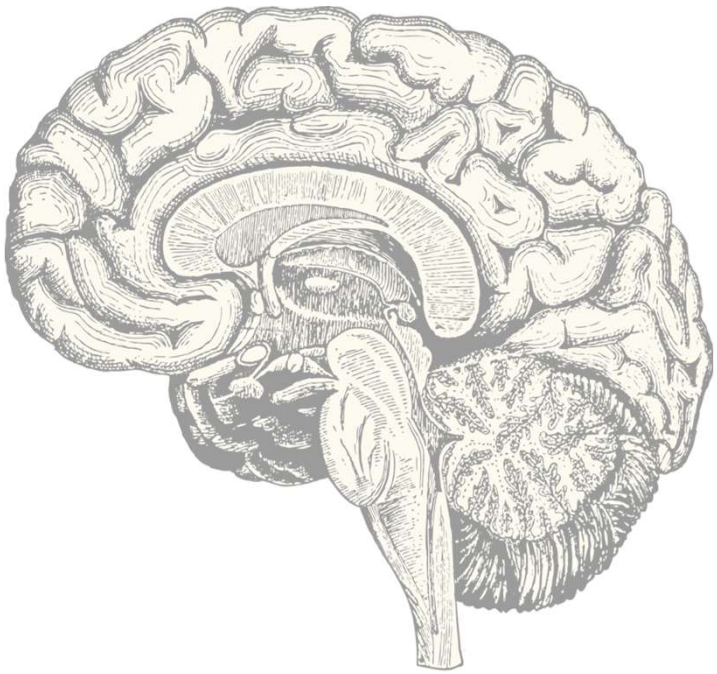
1

Goals for Today

- Consider a couple perspectives on capacity
- Explore the conditions that cause significant mental deficits
- Learn what capacity assessments are looking at



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2

Who Are We?

How Are We Handling Questions Today?

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3

3

What is Capacity?

- The ability to perform an act
- The mental skill needed to engage in legal actions and complete documents

4

4

Medical/Psychological Perspective

- Ability to carry out a specific task
- Regardless of the underlying diagnosis
- Temporary or permanent
- Focus on improving limitations

5

5

Legal Perspective

- A competence determined by the court
  - (See Probate Code §§810-812)
- Requires a significant mental deficit
  - Diagnosis is not enough
- Deficit impairs the ability to make relevant decisions

6

6

Legal Perspective

- Doctor must evaluate proposed Conservatee under §811 criteria
- See GC-335 Capacity Declaration
- Is all or nothing

7

7

Dementia

AKA

Major Neurocognitive Disorder (Major NCD)

A clinical syndrome

multiple cognitive deficits, usually including memory impairment

functional decline

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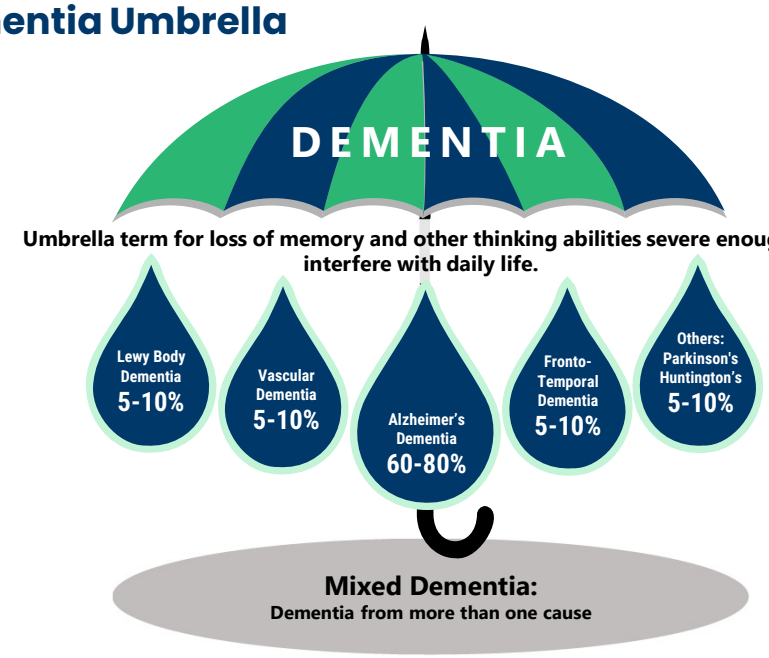
The Dementia Umbrella



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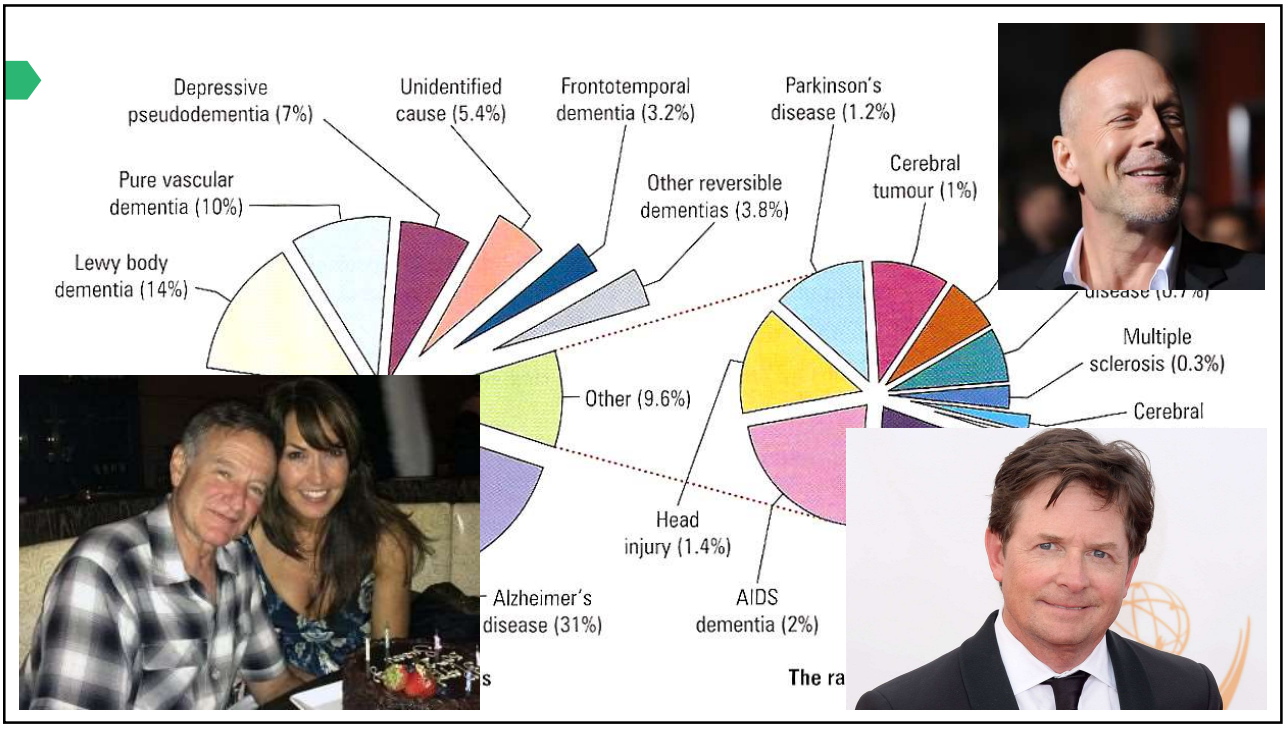

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Diagnosis
≠
Disability/Lack of Capacity

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Diagnosis

↓

Symptoms/Signs of the Diagnosis

↓

Specific Functional Deficits

(e.g. Attention, Concentration, Memory, Executive Functioning)

↓

Disability/Lack of Capacity in the Specific Domain

12

12

13

SCHIZOPHRENIA (OR MORE INFREQUENTLY SCHIZOAFFECTIVE DISORDER)

- Originally called "Dementia Praecox"

[Latin - Very Early]

  - Recognized that this may lead to very early permanent cognitive deficits

- Neuropsychological Testing while evaluee is **actively psychotic is not valid**, and has a high chance of falsely demonstrating temporary cognitive deficits that may not be present when psychosis is effectively controlled

14

14

PSEUDODEMENTIA

- "Depression-Related Cognitive Dysfunction"
- Sometimes difficult to diagnose in the absence of collateral information.
- Looks like Dementia (usually deficits in memory, executive functions, and speech and language).
- But, with effective treatment (i.e. medications, ECT) resolves.

15

15

NEURODEVELOPMENTAL DISABILITIES (INTELLECTUAL, AUTISM)

- By themselves, despite cognitive deficits are generally not diagnostically considered a Major Neurocognitive Disorder
- However, some of these may predispose the person to the early on-set of a Major Neurocognitive Disorder
- Legally often addressed through Limited Probate Conservatorships

16

16

DSM-5 DIAGNOSTIC CRITERIA FOR MAJOR NEUROCOGNITIVE DISORDERS (ABBREVIATED)

- A. Evidence of significant cognitive decline based on concern by knowledgeable person or substantial impairment in cognitive performance.
- B. Cognitive deficits interfere with independence in everyday activities.
- C. Do not occur exclusively in the context of a Delirium.
- D. **The cognitive deficits are not better explained by another mental disorder (e.g. Major Depressive Disorder, Schizophrenia)**

17

17

SUBSTANCE USE DISORDERS (NEUROTOXINS)

- Alcohol, the classic example.
- Methamphetamine. Severe damage to brain over years can make it largely indistinguishable from Schizophrenia. Difference is cause, on-set, course.
- Inhalants (glue, gasoline) aka "Huffing" – leads to "Swiss Cheese Brain"

18

18

What Can We Do?

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19

Gently Question Reasoning

- Do they understand the general problem?
- Do they grasp that they are at risk?
- Can they provide a plan or consider yours reasonably?

20

20

Gently Question Reasoning:
Can they explain the reasoning that led to their decision?

- Is their decision consistent with their stated goals and objectives?
- Do they understand the consequences of their decision?
- Is their decision consistent with their known long-term commitments and values?

21

21

Types of Capacity

22

22

Grounds for Will Contests

- Lack of Testamentary Capacity
- Undue Influence
- Fraud
- Unlawful Will

23

23

TESTAMENTARY CAPACITY, Probate Code Section 6100.5

- Testamentary Capacity, applies to the making of a will or simple trust. The signee must have knowledge of their assets, their descendants, and the nature of the testamentary action.

- Note, the court, in Marriage of Greenway (2013) 217 Cal. App. 4th 628, 642, identified testamentary capacity as, "exceptionally low."

24

24

Undue Influence, W&IC Section 15610.70

- (a) "Undue influence" means excessive persuasion that causes another person to act or refrain from acting by overcoming that person's free will and results in inequity. In determining whether a result was produced by undue influence, all of the following shall be considered:
  - (1) The vulnerability of the victim. Evidence of vulnerability may include, but is not limited to, incapacity, illness, disability, injury, age, education, impaired cognitive function, emotional distress, isolation, or dependency, and whether the influencer knew or should have known of the alleged victim's vulnerability.
  - (2) The influencer's apparent authority. Evidence of apparent authority may include, but is not limited to, status as a fiduciary, family member, care provider, health care professional, legal professional, spiritual adviser, expert, or other qualification.
  - (3) The actions or tactics used by the influencer. Evidence of actions or tactics used may include, but is not limited to, all of the following:
    - (A) Controlling necessaries of life, medication, the victim's interactions with others, access to information, or sleep.
    - (B) Use of affection, intimidation, or coercion.
    - (C) Initiation of changes in personal or property rights, use of haste or secrecy in effecting those changes, effecting changes at inappropriate times and places, and claims of expertise in effecting changes.
  - (4) The equity of the result. Evidence of the equity of the result may include, but is not limited to, the economic consequences to the victim, any divergence from the victim's prior intent or course of conduct or dealing, the relationship of the value conveyed to the value of any services or consideration received, or the appropriateness of the change in light of the length and nature of the relationship.
- (b) Evidence of an inequitable result, without more, is not sufficient to prove undue influence.

25

25

26

MEDICAL DECISION MAKING CAPACITY

Probate Code Section 813: To have medical capacity a person must be able to:

- Respond knowingly and intelligently to medical treatment questions;
- Participate with a rational thought process;
- Understand all of the following:
  - The nature, seriousness of the illness/disorder
  - The nature of the treatment being offered;
  - The likely benefits of treatment, and duration of same, as well as the consequences of not being treated; and
  - The nature, risks and benefits of alternative treatments;
- Probate Code Section 4609: Summarily lists Medical Capacity as the ability to understand the benefits, risks and alternatives to possible medical treatments.
- Note, if there is not a qualified medical decision maker, medical facilities have decision-tree work arounds.

27

27

Types of Conservatorship

- General Conservatorship (Person/Estate)
  - Temporary
- Limited Conservatorship (Person/Estate)
  - Temporary
- Lanterman-Petris-Short (LPS) Conservatorship
- Limited Conservatorship

28

28

LIMITED CONSERVATORSHIPS FOR INDIVIDUALS WITH NEURODEVELOPMENTAL DISORDERS

- Decide where the conservatee will live (but, NOT in a locked facility).
- Look at the adult's conservatee confidential records and papers.
- Sign a contract for the conservatee.
- Give or withhold consent for most medical treatment (NOT sterilization and certain other procedures).
- Make decisions about the conservatee's education and vocational training.
- Place the conservatee at a state hospital for the developmentally disabled
- Give or withhold consent to the conservatee's marriage.
- Control the conservatee's social and sexual contacts and relationships.
- Manage the conservatee's financial affairs.

29

29

LANTERNMAN-PETRIS-SHORT CONSERVATORSHIPS

- Presently, extremely tight criteria (but see legislative efforts to amend - SB43, Eggman)
- Based on Major Mental Disorder (e.g. Schizophrenia, Schizoaffective Disorder) causing Grave Disability
- The term "gravely disabled" means that a person is presently unable to provide for the person's basic needs for food, clothing, or shelter because of a mental health disorder. [The term "gravely disabled" does not include persons with intellectual disabilities by reason of the disability alone.]
- Must be brought by Public Guardian's Office
- Must be proven Beyond Reasonable Doubt, and conservatee has right to Jury Trial.

30

30

Conservatorship of Person

Court-appointed fiduciary, the conservator, manages the personal care of a person who cannot properly provide for his or her personal needs for physical health, medical care, food, clothing, or shelter.

31

31

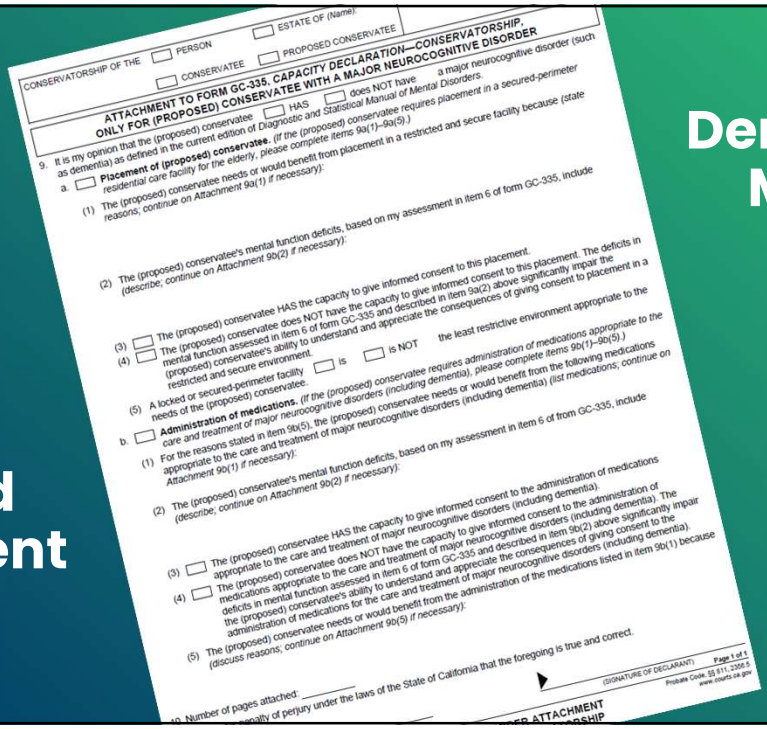
Conservatorship of Estate

Court-appointed conservator manages the financial affairs of a person who is substantially unable to manage his or her own financial resources or to resist fraud or undue influence.

32

32

Locked Placement



ATTACHMENT TO FORM GC-335, CAPACITY DECLARATION—CONSERVATORSHIP.
ONLY FOR (PROPOSED) CONSERVATEE WITH A MAJOR NEUROCOGNITIVE DISORDER

CONSERVATORSHIP OF THE ☐ PERSON ☐ ESTATE OF (Name): ☐ CONSERVATEE ☐ PROPOSED CONSERVATEE

9. It is my opinion that the (proposed) conservatee ☐ HAS ☐ does NOT have a major neurocognitive disorder (such as dementia) as defined in the current edition of Diagnostic and Statistical Manual of Mental Disorders.

a. ☐ **Placement of (proposed) conservatee.** (If the (proposed) conservatee requires placement in a secured-perimeter residential care facility for the elderly, please complete items 9a(1)–9a(5).)

(1) The (proposed) conservatee needs or would benefit from placement in a restricted and secure facility because (state reasons; continue on Attachment 9a(1) if necessary):

(2) The (proposed) conservatee's mental function deficits, based on my assessment in item 6 of form GC-335, include (describe; continue on Attachment 9b(2) if necessary):

(3) ☐ The (proposed) conservatee HAS the capacity to give informed consent to this placement.
(4) ☐ The (proposed) conservatee does NOT have the capacity to give informed consent to this placement. The deficits in mental function assessed in item 6 of form GC-335 and described in item 9a(2) above significantly impair the (proposed) conservatee's ability to understand and appreciate the consequences of giving consent to placement in a restricted and secure environment.

(5) A locked or secured-perimeter facility ☐ is ☐ is NOT the least restrictive environment appropriate to the needs of the (proposed) conservatee.

b. ☐ **Administration of medications.** (If the (proposed) conservatee requires administration of medications appropriate to the care and treatment of major neurocognitive disorders (including dementia), please complete items 9b(1)–9b(5).)

(1) For the reasons stated in item 9b(5), the (proposed) conservatee needs or would benefit from the following medications appropriate to the care and treatment of major neurocognitive disorders (including dementia) (list medications; continue on Attachment 9b(1) if necessary):

(2) The (proposed) conservatee's mental function deficits, based on my assessment in item 6 of from GC-335, include (describe; continue on Attachment 9b(2) if necessary):

(3) ☐ The (proposed) conservatee HAS the capacity to give informed consent to the administration of medications appropriate to the care and treatment of major neurocognitive disorders (including dementia).
(4) ☐ The (proposed) conservatee does NOT have the capacity to give informed consent to the administration of medications appropriate to the care and treatment of major neurocognitive disorders (including dementia). The deficits in mental function assessed in item 6 of form GC-335 and described in item 9b(2) above significantly impair the (proposed) conservatee's ability to understand and appreciate the consequences of giving consent to the administration of medications for the care and treatment of major neurocognitive disorders (including dementia).

(5) The (proposed) conservatee needs or would benefit from the administration of the medications listed in item 9b(1) because (discuss reasons; continue on Attachment 9b(5) if necessary):

10. Number of pages attached: _____

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

(SIGNATURE OF DECLARANT)

Page 1 of 1

Probate Code, §§ 811, 2356.5
www.courts.ca.gov

ATTACHMENT

Dementia Meds

33

33

To Sum Up

- Remember a diagnosis alone does not decided capacity. Consider the effects of that diagnosis and how it particularly causes cognitive deficits that impact decision-making
- Have a strategy for quickly understanding the basics of a client's capacity, as this helps you determine if you need to get a professional evaluation

34

34

Thank You! Any Questions?

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35