INCAPACITY

Definition

Capacity is a legal requirement for all individuals in all legal matters, and the standard for determining capacity *does vary* based on the activity, and *is governed* by case law, as suspected. The term is interchangeable with competence.

Capacity relates to the issue of **age**; minors do not have the capacity to enter into legal contracts. They may do so at their and the other party's agreement, but they are not legally responsible to do what they have contracted to do, hence, others will rarely enter into such contracts.

Physical capacity generally does not enter into legal cases except in terms of qualifying for disability or workers' compensation, or at times, as a defense to breaking a contract requiring physical ability.

Mental Capacity is the one we are most concerned with in this group, obviously. The following are the rules for evaluating whether an individual has the mental capacity to do the legal act in question:

Deeds and Contracts

The standard, or test, for capacity in these matters is: Whether, at the time the instrument was executed, the grantor possessed sufficient mental capacity to understand the nature of the transaction and to agree to its provisions. (A party is not required to exercise good judgment or to make wise decisions, as long as s/he understands the nature and character of the agreement and the consequences of entering into it.)

Powers of Attorney: If the individual meets this standard when executing a *durable* power of attorney, no subsequent disability affects the attorney in fact's ability to act under the power of attorney. Three caveats: First, the standard must be met at the time it is executed. Second, it must include the durability language, or it is prone to challenge upon later disability. Three, VA does not statutorily require anyone to accept power of attorney, so if any company or bank refuses to accept it, there is no legal means to force them to accept the attorney in fact's authority under it.

Advance medical directives are the same as powers of attorney, and are often called health care powers of attorney when they appoint an individual to make medical care decisions for the principal.

Wills and Trusts

The standard is the same for both. Sec. 55-546.01 For wills, the operable legal term is "testamentary capacity." The standard is that the person must be capable of recollecting his/her property, the natural objects of his/her bounty and their claims upon him/her, knowledge of the business in which s/he is engaged (s/he is writing a will to dispose of their assets after his/her death) and how s/he wishes to dispose of his/her property.

Neither sickness nor impaired intellect is sufficient, standing alone, to render a will invalid. The testator need not retain all the force of intellect which s/he may have had at a former period, and under certain circumstances may even be legally incompetent to transact other business. Wooddy v. Tailer,

114 Va. 737, 741, 77 S.E. 498, 500 (1913). Fields v. Fields, 255 Va. 546, 499 SE2d 826 (1998) citing Tabb v. Willis, 155 Va. 836, 859, 156 Se 556, 564 (1931). . "Mental weakness is not inconsistent with testamentary capacity." Gilmer v. Brown et al., 186 Va. 630 (1947) citing Greene v. Greene, 145 Ill. 264, 33 N.E. 941. **S.C. Rule 1.14 (a)**

The standard for writing wills and trusts is lower than for entering into contracts and deeds, and transacting ordinary business.

This standard applies to changes and revisions to wills and trusts, as well as their initial formation documents. Trusts do not need the formality of wills to be executed, but they have the same capacity standard. It also applies to everything a person does with his/her own assets or estate.

Joint Ownership: the standard is that of entering into contracts, at the time it is done. Subsequent incapacity of an owner will not affect the status of the other owner(s).

Guardianship and Conservatorship

In order to have a guardian appointed over an individual, the following **statutory definition of incapacity** must be met: "Incapacitated person" means an adult who has been found by a court to be incapable of receiving and evaluating information effectively or responding to people, events, or environments to such an extent that the individual lacks the capacity to: (i) meet the essential requirements for his health, care, safety, or therapeutic needs without the assistance or protection of a guardian or (ii) manage property or financial affairs or provide for his support or for the support of his legal dependents without the assistance or protection of a conservator. A finding that the individual displays poor judgment alone shall not be considered sufficient evidence that the individual is an incapacitated person within the meaning of this definition..

A guardian is responsible for day to day care and health management of the *ward* and a conservator is responsible for managing their money. If individuals receive Social Security Disability Income only, or that and other disability benefits where there is a representative payee acting on their behalf, the appointment of a conservator for them is not necessary or recommended, because of the onerous reporting requirements attendant to that office.

The proceeding to obtain guardianship or conservatorship involves a court case where the person who desires to take responsibility for the disabled individual petitions the court for guardianship (and possibly conservatorship, at the same time). A guardian *ad litem* is appointed to stand in the place of the disabled individual and inform the court of what is in his/her best interest. If the disabled individual does not want a guardian appointed for him, or another person does not want the petitioner to obtain it, the matter is contested, and the guardian *ad litem* informs the court if he believes the disabled individual needs an attorney appointed for him as well; the attorney appointed would be to represent the *desires* of the disabled individual, as opposed to his or her best interests. The court hearing requires medical evidence and notice to the disabled individual and living adult family members, to satisfy the constitutional due process requirements for taking away the person's liberties.

Other Alternatives

Emergency Custody Orders: If an adult is incapable of making an informed decision regarding their care as a result of **physical injury or illness**, a petition for an emergency custody order can be filed by a concerned person. The standards here are that a licensed physician must determine that the person is incapable of making an informed decision as a result of physical injury or illness, and that the medical standard of care indicates that testing, observation and treatment are necessary to prevent imminent and irreversible harm. The person is then **transported to an emergency room**, and evaluated by a licensed physician. If the physician deems that the person is incapable of making an **informed decision or communicating the decision due to a severe physical or mental disorder** and the medical standard calls for testing, observation or treatment of the disorder within the next 24 hours to prevent death, disability or a serious irreversible condition, the court or a magistrate may issue an order authorizing temporary detention for that purpose, and the treatment can not exceed 24 hours unless the Court extends it under 37.2-1101. A licensed physician must make a determination as to whether temporary detention is necessary within four hours (sec. 1103 E).

Judicial Authorization of Treatment: Circuit or District Court judges can issue treatment authorization under Section 37.2-1101 for adults with physical or mental disorders if it finds by clear and convincing evidence that the person is incapable of making an informed decision or incapable of communicating it due to a physical **or mental** disorder and the proposed treatment is in the best interest of the person. Anyone can request this authorization by filing a petition in court or with the special justice of the county or city where the ill person resides or where the place of treatment is located.

Medical Treatment for Persons Incapable of Making Informed Consent: For people who are patients or residents of a hospital or facility operated by the Department of Mental Health, Mental Retardation and Substance Abuse Services or to someone who is receiving case management services from a community services board or behavioral health authority who is incapable of giving informed consent to the treatment **by reason of mental illness or mental retardation**, if there is no legal representative authorized to give consent and a reasonable effort has been made to advise the next of kin of the need for surgical, medical or dental treatment, and no reasonable objection is made by or on behalf of the incapacitated person, and two physicians (or two dentists, or some combination), state in writing that they have made a good faith effort to explain the necessary treatment to the individual and they have probable cause to believe that the person is incapacitated and unable to consent to the treatment by reason of mental illness or mental retardation and that delay in treatment might adversely affect recovery. This provision applies **only to treatment of physical injury or illness**, and not to any treatment for mental, emotional or psychological condition.

Respite and emergency care for treatment of mental conditions is governed by 12 VAC35-200.

Timing Requirement

Competency/Capacity is relevant ONLY at the time the act is done (the time of execution of the document), etc., not before or after.

Evidence of Capacity

The law presumes that every adult party who executes an agreement is mentally competent to enter into it, but the other party may rebut that presumption and show incapacity of the principal. They must show it by a preponderance of the evidence, and is based on facts and the individual in particular, as well as

the act itself and the standard applied to it. Incapacity can be proven with eyewitnesses to the act (hence, the proof requirements of the will), and general character witnesses' testimonies are not given as much weight. Great weight is given to the testimony of the individual's physician in deciding capacity. The appointment of a guardian for the person **is not conclusive evidence** that they are incapable of performing the legal act (it affects the outcome, but does not determine it), or even a commitment to an insane asylum! Reed v. Reed, 108 Va. 790, 62 SE 792; Rust Reid, 124 Va. 1, 97 S.E. 324.

Practice Points

1) Attorney's Responsibility: The attorney who is retained to write a will or power of attorney for an individual must determine if they believe the person has such capacity to execute the document. However, if the individual appears to be *borderline*, the attorney should write the documents, because of the importance of testamentary freedom. (from the commentary on ethical standards for attorneys); p. 212 of manual. MPRC 1.14

2) Guardianships

   I believe everyone in this group is in favor of giving elderly and disabled people as much freedom and autonomy as they can manage without endangering themselves legally, materially (in terms of property), physically, emotionally or mentally. Wills and powers of attorney provide that autonomy to elders and disabled individuals when they are capable of making those decisions. I recommend that you refer ALL people you work with to an elder law or estate planning attorney if they do not have those documents in place.

   A guardianship appointment replaces the ward's autonomy and decision-making power. Individuals' rights are severely compromised when a guardian is appointed for them. Their rights to vote, contract, etc. are at issue, though not automatically relinquished. Their right to dispose of their property is the last right to go, as discussed earlier.

   However, if your client is mentally incapable of making choices and understanding the "objects of their bounty," and especially if they have no bounty and have not worked out a legal scheme to provide for their needs and quality of life, their caretakers should see an attorney about obtaining guardianship over them. Parents of individuals of limited capacity should seek the counsel of an attorney regarding obtaining guardianship over their disabled child(ren) after they reach majority age. After reaching majority age, health care providers and others may balk at providing care to the individual, and the guardianship appointment resolves those issues, among others. Standby guardians can also be appointed in the event of an emergency when the caretaker is injured or unable to care for the ward for some reason.