

Protecting Elders' Wishes in End of Life / Hospice Circumstances

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What are the elder's wishes?

- * Does the elder have capacity to state what his/her/their wishes are?
- * What is the level of capacity needed?
 - Amorphous (no clear bright line test)
 - Capacity declaration
 - MMSE/MOCHA
 - Doctor's letter

What if the elder has memory problems, cognitive issues, or mental illness?

- * Interestingly enough, the elder can have a wide variety of cognitive issues and still be able to state wishes.
- Probate Code sections 810-813 deal with “legal mental capacity”
- 810 is illustrative:
- The Legislature finds and declares the following:
 - (a) For purposes of this part, there shall exist a rebuttable presumption affecting the burden of proof that all persons have the capacity to make decisions and to be responsible for their acts or decisions.
 - (b) A person who has a mental or physical disorder may still be capable of contracting, conveying, marrying, **making medical decisions**, executing wills or trusts, and **performing other actions**.
 - (c) A judicial determination that a person is totally without understanding, or is of unsound mind, **or suffers from one or more mental deficits so substantial that, under the circumstances, the person should be deemed to lack the legal capacity to perform a specific act, should be based on evidence of a deficit in one or more of the person’s mental functions rather than on a diagnosis of a person’s mental or physical disorder.**

Probate Code section 811

- A determination that a person is of unsound mind or **lacks the capacity to make a decision or do a certain act**, including, but not limited to, the incapacity to contract, to make a conveyance, to marry, to make medical decisions, to execute wills, or to execute trusts, **shall be supported by evidence of a deficit in at least one of the following mental functions, subject to subdivision (b), and evidence of a correlation between the deficit or deficits and the decision or acts in question:**
 - * see code section for many, many examples 😊
 - * Think incapacity versus the act in question: Tom Brady (hurt knee - incapacity to “sprint” but can still throw...so he has capacity to throw, but may not have the capacity to run a sprint)
 - HS basketball players (athletic, young, can pretty much “do it all” but may not be able to jump high enough to dunk a basketball (capacity to play basketball, but incapacity to dunk))

Remember Tom Brady 😊

- Again, just because there is “old age” or the person cannot do what they used to be able to do, they may still be pretty darn good.
- Even if the person is now “slower” than before, they can still be able to do the minimum needed to be independent.
- Remember, the standard is pretty low – the default is everyone over 18 has capacity. Think about your local 18-year olds. You may not like their choice of music, hair color, significant other, lifestyle, but unless you can show they are incapable of making a decision, then they are free to do so from a pure capacity analysis

Undue influence and pressures by others

- This is the gray area
- When do we “know” that a person is being unduly influenced?
- How do we know the decision is not that of the person but that of someone else?
- Indicia of undue influence
 - Drastic sudden change late in life
 - Cutting out of long-term family for stranger
 - Seige mentality

If incapacity then are there estate planning instruments?

- Was there anything in place when the person had capacity and was not subject to outside pressures/influences
 - AHCD (immediate decision making or on incapacity?)
 - POA for Health Care (immediate decision making or on incapacity?)
 - Written instructions (immediate decision making or on incapacity?)
 - Recordings
 - POLST (physician orders for life-sustaining treatment)
 - <https://capolst.org/>
 - Now in over 10-languages
- Even with these items, if there is a dispute or a battle of competing or conflicting “wishes,” family members, doctors.... then the courts will likely need to get involved. Think Terry Shiavo.

Conservatorship

- This is the most drastic action taken when a person is deemed unable to fend for themselves and needs court protection/supervision
- Legal standard is **clear and convincing evidence**.
- Court determines what the person's wishes are or what is in the best interests of the person *even if the person can express wishes*.
- Think Britney Spears

End of life/Hospice

- Generally a person has been diagnosed with a terminal condition
- Has 6-months or less to live
- Can live longer and sometimes much longer
- Hospice of the East Bay - For those of us in Contra Costa County
<https://www.hospiceeastbay.org/>

- Supportive palliative care

Bruns House

* for inpatient hospice care for persons with acute symptoms

<https://www.hospiceeastbay.org/services/brunshouse>

Palliative care

- Palliative care is specialized medical care for people living with a serious illness, such as cancer or heart failure. Patients in palliative care may receive medical care for their symptoms, or palliative care, along with treatment intended to cure their serious illness. Palliative care is meant to enhance a person's current care by focusing on quality of life for them and their family

How to protect the elder's wishes

- If the elder has capacity (family meeting - with lawyer if the elder has one, estate planning, documented wishes, and if all else fails court)
 - Action to enforce compliance with EP
 - Conservatorship
 - EATRO
 - Civil action for elder abuse (WIC 15610.07 “...**other treatment with resulting physical harm or mental suffering.**” or deprivation by someone in charge of the elder of goods/services that are necessary to avoid physical harm or mental suffering.

If elder no longer has capacity or has “questionable capacity”

- If the elder lacks capacity or has questionable capacity – then the analysis should be nearly the same (family meeting - with lawyer if there is one for the elder, estate planning, documented wishes, and if all else fails court)
 - Action to enforce compliance with EP
 - Conservatorship
 - EATRO
 - Civil action for elder abuse (WIC 15610.07 “...**other treatment with resulting physical harm or mental suffering.**” or deprivation by someone in charge of the elder of goods/services that are necessary to avoid physical harm or mental suffering.

Philosophy, Theory, and Reality

- People should “know” as much as they can about their end of life decisions and the law.
 - People change over time (do you want the same person in charge?)
 - Responsibilities change over time (single, married, divorced, children, spouses of children etc...)
 - The law changes over time (assisted suicide, life support, DNR etc.)
- Very difficult, very personal decisions. Should be given the highest level of respect and deference.

Some suggestions from CA attorney General

- **Gathering Information for Decision-Making.** Talk with your doctor, family, close friends and other trustworthy advisors about your health care wishes, questions and concerns.
- **Prepare Your Advance Health Care Directive.** After learning your options and discussing your wishes, prepare an [Advance Care Directive](#). Keep a personal copy in a safe and accessible place, while letting key people know of your intentions. Consider addressing [Palliative Care/Pain Management](#) and [Hospice Care](#) in your advance health care plan.
- **Prepare An Estate/Financial Plan.** By developing an [Estate/Financial Plan](#), you can avoid surprises and help protect the long-term health of your assets. While difficult to predict future needs, it would be useful to learn what kind of financial assistance you may be able to receive under your health insurance plan, disability insurance plan and [Medicare](#). Address in advance your wishes for the often-taboo subject of funeral arrangements. Information is available from the California Department of Consumer Affairs.
- **Keep Information Safe And Accessible.** Your best plans will not be any good unless you and others can refer to them.
- <https://oag.ca.gov/consumers/general/care>

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Provider: CCCBA #393

Course #:

Venue Address: Contra Costa County, Concord, CA, 94520

Title of Activity Elder Law Discussion Forum #3 | Protecting Elders' Wishes in End of Life /

Date of Offering: 9/14/2021 12:00 PM - 01:15 PM

Venue: ~ONLINE with CCCBA~

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Overall Teaching Effectiveness

Knowledge of Subject Matter

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Overall Teaching Effectiveness

Knowledge of Subject Matter



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Speakers: Konstantine Demiris
Date of Activity: 9/14/2021
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