

## **Client Capacity In A Divorce**

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As our clients age, many develop dementia. Dementia is a class of mental disorders, which includes Alzheimer's Disease. Among people over 85 years old, dementia is believed to effect about 50%. This is a serious and, many suspect, growing problem. Life expectancy has lengthened, but the mind may not keep up.

We are also beset by a variety of mental illnesses in the population at large, regardless of age. In the United States, researchers estimate that in any given one year period, depressive illnesses affect 12 percent of women (more than 12 million women) and nearly 7 percent of men (more than six million men). A difficult relationship, a financial problem, or any stressful change in life patterns, whether the change is unwelcome or desired, can trigger a depressive episode in vulnerable individuals. National Institute of Mental Health, *Depression* (2008). People who are able to cope under normal circumstances may be pushed over the edge into mental illness by the stress of a divorce proceeding.

This is a particular problem for family lawyers. The decline into depression, dementia or mental illness may be very slow and gradual. Clients are not well one day and incapable the next. No flashing lights signal the change. To recognize and address the problem, you need to know several things.

First, I'd like to describe a scenario in which you are faced with a client who you believe lacks capacity. Second, I'll review your ethical responsibilities and the standards for capacity to divorce. Third, I'll discuss the tools—particularly medical examinations and opinions—that are available to help you and your client. Finally, I'll address what happens if you decide that your client lacks capacity.

### **A. The Decline of Dennis Crane.**

People can get divorced at any age. I imagine that you have all had clients over 70 years of age getting divorced. As a family law attorney, you have many elderly clients. One of them, Mr. Dennis Crane, has been a client for many years, having been divorced five times. While he has had many wives, he has remained loyal to you as his divorce lawyer. He is now petitioning to divorce for the sixth time, this time from Shirley Schimdt-Crane. Shirley is contesting the dissolution. He has children from his first marriage, but not his current marriage.

You arrange to meet Denny at the Starbucks in the lobby of the courthouse. You are sitting at one of the small tables, gazing longingly at the pictures of the county board representatives displayed there, when you hear a commotion at the security check point.

There is Denny, being wanded by the Andy Frains. They remove three handguns and a Bowie knife from his person. He is standing there, not threatening anyone, but clearly confused by the attention. After Mark Curran's deputies confiscate Denny's armory, he is released and walks toward the Starbucks. At first, he does not appear to recognize you, but you chalk that up to the trauma of the search. You wave your hands and he approaches you.

Then you notice that there is another man behind Denny. Denny takes a seat, and the other man stands next to him. You introduce yourself to Denny and he says, "Yes, glad to see you." You introduce yourself to the man behind Denny and he tells you that he is Denny's friend, Alan Shore.

You begin to discuss the issues before the court that morning. In particular, you tell him that Shirley is asking for temporary maintenance in an amount equal to his monthly income. You advise Denny to object, but he demurs. Alan tells Denny that she is taking advantage of him and opines that Denny needs to stand up for himself, he's always letting Shirley push him around. Alan tells you that Denny has been recently diagnosed as suffering from dementia of the Mad Cow Type.

You tell Alan that you need to speak with Denny privately. He asks why and tells you that they have no secrets from each other. You tell Alan that anything you say to Denny in front of him is not attorney-client privileged and that Shirley's evil divorce lawyer will be able to question Denny or Alan about it later. You ask Alan to wait at the courtroom door and he leaves.

You ask Denny whether he wants to make any offer to Shirley for temporary maintenance. He asks what do you think. You tell him that her demand is too high but that some maintenance may be ordered by the judge. He stares off into space. You ask him what you should offer to Shirley's evil divorce lawyer, and he asks you what you think. You tell him a third of his income, and Denny nods.

In the courtroom, Shirley's evil divorce lawyer pulls you aside and tells you that the parties have already reached an agreement on temporary maintenance. You tell him that Denny did not say anything about this and that you did not know about any agreement. Shirley's evil divorce lawyer assures you that, yes, they made an agreement over the phone the night before, and that Denny told Shirley she could have whatever she wanted. You then go over to Denny and ask him. He does not acknowledge whether he did or did not have a phone conversation with Shirley the night before, but does say, "That's fine." You ask him if that means you should agree to Shirley's outrageous demand, and he asks what you think. Alan Shore, sitting next to Denny, pokes him in the side and says, "No, don't agree to that. Speak up for yourself." Denny looks at you.

The case is then called and you ask the judge for time to respond. Shirley's evil divorce lawyer tells the judge that the parties made an agreement and that you are just stalling so that you can increase your fee. The judge continues the case for a week.

You, Denny and Alan adjourn back to the Starbucks. There, you ask Denny about his telephone conversations with Shirley and tell him that he should not make any agreements without talking to you first. Denny apologizes. Alan asks if this will delay the divorce, and tells you that Denny wants to get divorced soon.

You ask Denny why he needs to get divorced soon, and he looks at you for a long time. He tells you that Shirley is not his friend anymore. Finally, he says that he wants to go home. Alan then asks how much are you charging Denny? You tell him that this is between you and Denny. Alan and Denny then leave.

What should you do? Denny has given you no clear direction. Every time you ask him what he wants to do, he asks you what he should do. Shirley is pushing him from one side and Alan from the other. He appears befuddled in the middle of a tug-of-war.

## **B. The Ethical Rules and Standards For Capacity.**

What, if anything, to do? As a lawyer, you are not a starship commander, roaming the universe doing justice. You do not have the right or the authority to dispense justice. Denny has not objected to Shirley's demand for all of his income. You, however, cannot agree to this.

**1. RPC 1.14.** Fortunately, you do have some guidance: the Illinois Supreme Court's Rules of Professional Responsibility. Rule 1.14 is titled *Client Under A Disability* and says:

- (a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability, or some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship.
- (b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client, only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.

You could withdraw as his attorney in the divorce. This seems like a cowardly way out. Mr. Crane still regards you as his lawyer. He still asks for your guidance in making decisions. He has a reasonable expectation that you will not simply turn your back on him. But he is unable to give you clear direction.

Can you maintain a “normal client-lawyer relationship” as required by 1.14(a)? Probably not. Can Denny “adequately act” in his own interests? Probably not. So you need to either withdraw or seek a guardianship.

**2. Capacity.** People, including Mr. Crane, are presumed to have full mental capacity. In the past, we called “capacity” competency, but the term “incompetent” was deemed pejorative in modern parlance, and so now we refer to capacity. The words are used synonymously. Capacity in the legal sense is, of course, not a person’s size (most Americans increase in *that* capacity as they age), but rather the mental ability to legally change something, whether it be the ownership of an asset or a legal relationship such as getting married.

Whether Mr. Crane has capacity depends on what he wants to do. Capacity in the law is used not in a general sense, but rather in relation to specific acts. Divorcing Shirley requires one level of capacity, which I’ll call Marital Capacity. Agreeing to pay temporary maintenance, or entering into a binding marital settlement agreement, requires a different level of capacity, Contractual Capacity.

This has always been the law in Illinois. The Supreme Court enunciated this principal in 1892:

“There are numerous legal proceedings where insanity or mental incapacity may be shown, and the rule for establishing the degree of insanity must of necessity vary, depending, as it must, upon the object or purpose for which the insanity is to be proved. \* \* \* What might be regarded insanity or mental incapacity in the one case would not necessarily be insanity in another. No definite rule can be laid down which will apply to all cases alike.” *Snyder v. Snyder* (1892), 142 Ill. 60, 67, 31 N.E. 303.

There are many legally recognized standards for capacity. Here are seven commonly used standards, which is not by any means an exhaustive list. These standards demonstrate how the law regularly defines capacity in relationship to an act. Let’s go through them briefly.

**a. Ability To Transact Ordinary Business.** This also called *contractual capacity*. In *Flynn v. Troesch*, 373 Ill. 275, 26 N.E.2d 91 (1940), the Illinois Supreme Court upheld a marriage which had been contested on the basis that the husband was mentally incompetent on the day of the marriage, stating: “[T]he same mental strength necessary to the transaction of business is not necessary to enable the party to contract a marriage, though he must be capable of understanding the nature of the act, and sustained the marriage.” 373 Ill. 275, 292-93, 26 N.E.2d 91.

In *Hagenson v. Hagenson*, 258 Ill. 197, 101 N.E. 546 (1913), the Supreme Court found:

Perhaps the same degree of mental strength is not required as is essential in the transaction of business, involving the exercise of judgment, reason, and experience sufficient to enable the party **to compete with an antagonist designing to obtain an advantage and to protect his own interests**, yet he must be capable of entering understandingly into the relation of marriage. There is no clear dividing line between competency and incompetency, and each case must be judged by its own peculiar facts. (Emphasis supplied),

Thus, the ability to make a contract is higher than the level of capacity required to marry.

As the Illinois Supreme Court explained long ago, **“that mental strength to compete with an antagonist and understandingly to protect his own interests is essential to the transaction of ordinary business...”** *Down v. Comstock*, 318 Ill. 445, 454, 149 N.E. 507, 511 (1925). A higher degree of mental capacity is required to make a valid deed than to execute a will. *Akerman v. Trosper*, 95 Ill. App. 3d 1051, 420 N.E.2d 1148 (3d Dist. 1981); *Moneta v. Hoinacki*, 394 Ill. 47, 67 N.E.2d 204 (1946).

Since the standard to make a contract is higher than the standard to marry, a person could have the ability to divorce but be unable to enter into a marital settlement agreement which is, after all, a contract.

**b. Marital Capacity.** “[T]o enable a party legally to contract a marriage he or she must be capable of understanding the nature of the act; ...if the party possesses sufficient mental capacity to understand the nature, effect, duties, and obligations of the marriage contract into which he or she is entering, the marriage contract is binding.” *Larson v. Larson*, 42 Ill. App. 2d 467, 473, 192 N.E.2d 594 (1963).

A similar level of capacity is required to divorce. “The test of the mental capacity required for filing a petition for dissolution of marriage is whether the petitioner has sufficient mental capacity to understand fully the meaning and effect of the petition and whether the petitioner is able to determine in his own interest that he desires a final separation. (citation omitted) This is, in essence, the same test of mental capacity required for entering into a marriage.” *Marriage of Kutchins*, 136 Ill. App. 3d 45, 47, 482 N.E.2d 1005 (1985) (internal citations omitted). A person can be an adjudicated disabled person yet still have the ability to marry or divorce.

**c. Disabled Person.** A “disabled person” means: “[A] person 18 years or older who (a) because of mental deterioration or physical incapacity is not fully able to manage his person or estate, or (b) is a person with mental illness or a person with a developmental disability and who because of his mental illness or developmental disability is **not fully able to manage his person or estate**, or (c) because of gambling, idleness, debauchery or excessive use of intoxicants or drugs, so spends or wastes his

estate as to expose himself or his family to want or suffering, or (d) is diagnosed with fetal alcohol syndrome or fetal alcohol effects. 755 ILCS 5/11a-2.

Note the standard: *Not fully able*. That's me on most mornings. Any diminution in capacity will render a person "disabled" within the meaning of the Probate Act. A guardianship, however, is another step. Guardianships should only be created for a disabled person if it is necessary to protect that person. To establish a guardianship for a person's estate, the court must find not only disability, but also that "it has been demonstrated by clear and convincing evidence that because of his disability he is unable to manage his estate or financial affairs . . . ." 755 ILCS 5/11a-3.

This leads to an often litigated point: Does a guardian have the authority to seek a divorce for the disabled person? Changing marital status has long been considered to be so personal a decision that even if a person is adjudicated to be a disabled person and a guardian is appointed, the guardian does not have the authority to sue for divorce. *In re Marriage of Drews*, 115 Ill.2d 201, 503 N.E.2d 339 (1986); see also, *Pyott v. Pyott*, 191 Ill. 280, 288, 61 N.E. 88 (1901) (guardian may not seek annulment of marriage). However, once the dissolution action has been begun by the spouse, a guardian who is subsequently appointed may continue the action. *In re Marriage of Burgess*, 189 Ill.2d 270, 725 N.E.2d 1266 (2000). A guardian can, however, defend a divorce action. *Iago v. Iago*, 168 Ill. 339, 341-42, 48 N.E. 30 (1897)

The decision in *Drews* was based on the enumerated powers under the Probate Act, which do not expressly include any authority in connection with divorce. The decision in *Burgess* stresses relies on the guardian's general powers. The Burgess Court points out that other very personal decisions can be made by the guardian even though they are not delineated in the Probate Act, such as to withdraw artificial nutrition and hydration (see *In re Estate of Longeway*, 133 Ill.2d 33, 45-46, 549 N.E.2d 292 (1989); *In re Estate of Greenspan*, 137 Ill.2d 1, 16, 558 N.E.2d 1194 (1990)), to consent to an adult ward's adoption ( *In re Adoption of Savory*, 102 Ill.App.3d 276, 277-78, 430 N.E.2d 301 (1981)), or to consent to an abortion on behalf of a disabled ward ( *In re Estate of D.W.*, 134 Ill.App.3d 788, 791, 481 N.E.2d 355 (1985)). Why these personal decisions are within the guardian's powers while the ability to institute a divorce is not is unexplained.

**d. Testamentary Capacity.** Incredibly, "a person may be of unsound mind and memory to some extent, but still be capable of making a will . . . ." *Challiner v. Smith*, 396 Ill. 106, 124, 71 N.E.2d 324 (1947); *Grosh v. Acom*, 325 Ill. 474, 156 N.E. 485 (1927). A person has sufficient mental capacity to make a will if, at the time he executes the document, he has:

- (1) The ability to know the nature and extent of his property;
- (2) The ability to know the natural objects of his bounty; and
- (3) The ability to make a disposition of his property in accordance with some plan formed in his mind.

It is not necessary that the person actually know these things. It is necessary only that he have the mental ability to know them. IPI Will Contests, 200.05; *Beyers v. Billingsley*, 54 Ill. App. 3d 427, 437, 369 N.E.2d 1320, 1328, (3d Dist. 1977).

Mr. Crane could have the capacity to make a new testamentary plan, whether by will or by living trust, but lack the ability to name a current trustee and to make a deed transferring his property to that trustee. *Ptaszek v. Konczal*, 7 Ill. 2d 145, 130 N.E.2d 257 (1955); *Ring v. Lawless*, 190 Ill. 520, 60 N.E. 881 (1901); *Greene v. Maxwell*, 251 Ill. 335, 96 N.E. 227 (1911).

**e. Ability to stand trial in a criminal case.** “The test of mental competence is the ability of the accused to understand the nature of the proceedings against him and to adequately aid in the preparation of his defense.” *People v. Olmstead*, 32 Ill.2d 306, 205 N.E.2d 625.)

**f. The Ability To Drive.** “Because the public has a compelling interest in safe roads, a driver’s expectations of privacy are significantly diminished. Highway driving is a privilege and not a right. Drivers must demonstrate knowledge of driving rules and their own capacities.” *People v. Jung*, 192 Ill. 2d 1, 5, 733 N.E.2d 1256 (2000).

**g. Ability to Consent to or Withhold Medical Decisions.** Capacity to make medical decisions is determined under the Illinois Healthcare Surrogate Act. Under the Act, “decisional capacity” is defined as “the ability to understand and appreciate the nature and consequences of a decision regarding medical treatment or forgoing life-sustaining treatment and the ability to reach and communicate an informed decision in the matter as determined by the attending physician.” 755 ILCS 40/10; *Collins v. Lake Forest Hosp.*, 213 Ill. 2d 234, 821 N.E.2d 316 (2004).

## **C. The Relationship with Medical Concepts of Capacity.**

Obtaining a medical opinion is a natural and reasonable step in determining capacity. A medical report is required for the creation of a guardianship. 755 ILCS 5/11a-9. Medical definitions of competency and legal definitions are often like ships passing in the night. The two are created by very different groups of people for different purposes and with different aims.

**1. Medical Examinations.** Dementia is typically the result of physiological changes in the brain. After death, the brain of a person with Alzheimer’s type dementia exhibits marked atrophy. The disease can be well diagnosed using pre-death tests.

Dementia is a disease. The DSM-IV *Diagnostic Criteria for Dementia* requires a diagnosis of (a) memory impairment and (b) one of four other dysfunctions: (i) Aphasia (inability to find words); (ii) Apraxia (loss of the ability to execute or carry out learned purposeful movements); (iii) Agnosia (loss of ability to recognize objects, persons,

sounds, shapes, or smells); or Executive Dysfunction (inability to plan or make decisions). Thus, dementia is not just loss of memory.

There are a series of tests that can be used to diagnose dementia. The most famous is certainly the Mini-Mental State Examination. This test takes less than 15 minutes, and experts consider it to be a good screening exam. Although Mini-Mental can tell if there is a problem, it does not diagnose the precise mental deficit.

**2. Medical Opinions.** Having Mr. Crane seen by a neurologist would probably be ideal. If possible, and if his family will cooperate, a medical examination will benefit him and give more guidance. If the family won't cooperate to help Mr. Crane, then your path to the probate court is clear.

It is worth noting that from an evidentiary standpoint (that is, from a legal standpoint), there is no greater weight given to the testimony or opinion of a physician than there is to a lay person in judging capacity. Just the same, when I'm trying to assess the capacity of an individual, I certainly listen carefully to anything a treating physician has to say, and I think that any judge or jury does also. Even though a physician's opinion may not be decisive *de jure*, it may will be *de facto*.

Medical competency has been defined as the ability to understand and appreciate the nature and consequences of a decision regarding medical treatment or forgoing life-sustaining treatment and the ability to reach and communicate an informed decision. Thus, it is both the ability to make a decision and the ability to communicate that decision.

I once heard a psychiatrist explain that the same person may have the ability to make decisions over what to order from a menu for lunch but not have the ability to consent to a risky surgical procedure. Medical competency is to some extent a balancing act: the greater the consequences of a decision, the higher the ability required. Doctors seek to balance individuals' rights to make decisions for themselves with the responsibility to protect people who, because of illness, cannot protect themselves.

On several occasions, I have had physicians provide written opinions that clients were mentally competent to make wills, finding testamentary capacity, even though I believed that the persons lacked capacity. To some extent, I think this is because we weighed the consequences differently. Many people, including physicians, do not place a high value on protecting expectancies. I, on the other hand, being likely to outlive the client and likely to have the client's disappointed heirs question the changes made to his estate plan, am more sensitive to the gravity of testamentary decisions.

#### **D. What to do about Mr. Crane.**

In Mr. Crane's case, you decided that he could not protect himself and that he was in the middle of a struggle between Shirley and Alan. He wants to get divorced because Shirley is no longer his friend, so he may have the capacity to divorce, but he does not

seem able to “compete with an adversary”, such as Shirley, so he may not have the capacity to reach contractual agreements. Therefore, pursuant to RPC 1.14(b), you decide that Denny cannot “adequately protect” his own interests, so you must file a petition to have a guardian appointed for him.

One of the first difficulties that you find when you file a petition to have a client declared disabled is that you have no one to nominate as the guardian. You are very uncomfortable nominating yourself. You should not make a choice between the spouse and the friend, as that is clearly not an appropriate role for them. You could nominate the public guardian, but that also seems inappropriate, and the public guardian will normally only act when there are no willing family members. In the end, you can nominate no one, and effectively just punt that decision to the court. There are other difficulties as well, such as obtaining the Medical Report. This can be done later in the guardianship process.

Naturally, filing a petition alleging that your client is crazy may not strengthen the attorney-client relationship. This is almost certainly the end of the attorney-client relationship. However, your duty is always to place the client’s interests first, and even if the client does not want the protection of the court, the client may need that protection.