



## Joint Estate Planning and Elder Law Sections CLE Program Webinar January 26, 2022

### **Welcome/Announcements and Introduction**

David Gower, Estate Planning and Probate Law Section Chair

Lenita AuBuchon, Elder Law Section Chair

**12:00 PM – 1:00 PM**

### **Program**

#### **Is It Too Late to Create an Estate Plan For Your Client With Dementia?**

Karen Mills, Aronberg Goldgehn, Dr. Zoran M. Grujic, MD, Northwestern Medicine, and Kim Butrum, Silverado

You just met with a potential new client interested in an estate plan, only to realize that they may have cognitive impairment and you are concerned whether or not the client is capable of understanding the documents and their purpose. Join us for this presentation as we explore how a medical doctor determines legal capacity, common dementia signs and symptoms to look for, and effective communication tips for your clients with dementia.

### **Link to Evaluation**

The evaluation must be completed to receive CLE credit.

<https://www.surveymonkey.com/r/EstateElder01262022>

### **Next Meeting**

**Elder Law** - February 16<sup>th</sup> – [Social Security Planning for Widows](#) - James Sullivan, Fairhaven Wealth Management

**Estate Planning** - February 23<sup>rd</sup> – [Strategies for Retaining Trust and Estate Planning Privacy Under the New Illinois Trust Code](#) – Richard Kuhn, Kuhn, Heap & Monson



**DCBA Events:** January 27th - [Lawyers Lending a Hand](#) - Project C.U.R.E., Woodridge  
February 12<sup>th</sup> - High School Mock Trial Invitational - Email Robert Rupp at [rrupp@dcba.org](mailto:rrupp@dcba.org) to be a volunteer judge.  
February 24, 2022 - [Legal Answers Online Virtual Clinic](#)

### **Renew Your Court Pass**

All 2021 Court ID's expire January 31, 2022. As soon as you receive confirmation of your ARDC registration for 2022, you can renew your court ID through the DCBA website at this link - <https://www.dcba.org/page/courtid>. The renewal fee is \$25 payment, and your 2022 extension stickers will be mailed January 15th. For a new ID or to renew in person, bring your ARDC card and \$35 payment to the DuPage County Bar Center from 8:30 AM - Noon, Monday - Friday. There will be no in-person renewal in the courthouse. Save time and money by renewing online and renew before January 31st to avoid reactivation delays.

### **DCBA OnDemand CLE is Available on IICLE:**

Members can find the link to The Illinois Institute for Continuing Legal Education (IICLE) catalog on the DCBA website under the menu item **CLE & Events**→**IICLE Online Library**. You must be logged into your DCBA Membership Profile to view courses for free or at a reduced price.

### **View & Print CLE Certificates through the DCBA Website:**

Members can view and print their certificates for any DCBA CLE program attended by first signing into their account on the DCBA website. Hover over the **CLE & Events** menu item and select **Find My CLE Credits**. This page will list all the CLE credits earned with DCBA. To the left of each program is an icon to print or email the Statement of Credit. You can find certificates for all CLE credits earned in Illinois by signing into your account on the MCLE Board website.



Dr. Zoran Grujic is board certified in psychiatry, neurology, and sleep medicine, and has served as an Assistant Professor of Neurology at both the Northwestern University Feinberg School of Medicine and at the University of Chicago Pritzker School of Medicine. He is currently Director of The Memory Assessment Program at Central DuPage Hospital, Northwestern Medicine, and is the Medical Director at Silverado in St. Charles, where he oversees and guides the care of residents.

# **Legal Capacity: Is It Too Late to Create an Estate Plan for your Client with Dementia?**

# Today's Speakers



**Karen R. Mills,  
Aronberg  
Goldgehn**



**Dr. Zoran Grujic  
Cognitive  
Behavioral  
Neurologist**



**Kim Butrum MS, RN, GNP  
Senior Vice President ,  
Clinical Services,  
Silverado Senior Living**

# **“Is it Too Late to Create an Estate Plan for a Client with Dementia?”** @2022

**Presented to the DuPage County Bar Association  
January 26, 2022**

**Karen R. Mills, Aronberg Goldgehn**



# What is Capacity?

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Answer...It Depends



# **What is Testamentary Capacity?**

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**Testamentary capacity is the mental ability of a person to make or alter a will.**

**To execute a valid will in Illinois, testators must be at least 18 years of age and be of sound mind and memory.**

# **What is Testamentary Capacity?** (Cont'd)

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**The creator of the will must possess the mental capacity to know and remember their family members, understand the nature and character and relative value of the assets they own, and develop a plan to distribute their property upon their death.**

# What Lack of Testamentary Capacity Means

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- ✓ Lack of testamentary capacity may be grounds to dispute the validity of a will in Illinois.
- ✓ The law presumes that a person possesses the mental capacity to execute a will unless it is proven otherwise.
- ✓ The person seeking to invalidate a will bears the burden of providing the testator lacked the capacity to create a will at or near the time the document was signed.

# Medical Decisions

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# **Powers of Attorney**

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- ✓ **Power of Attorney for Health Care**
- ✓ **Power of Attorney for Property**

# What is Guardianship?

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**Guardianship is a legal relationship in which one person is appointed by a Court to make personal and property related decisions for someone who no longer can make decisions for himself.**



# Can a Disabled Adult with a Guardian Execute a Will?



# Trusts



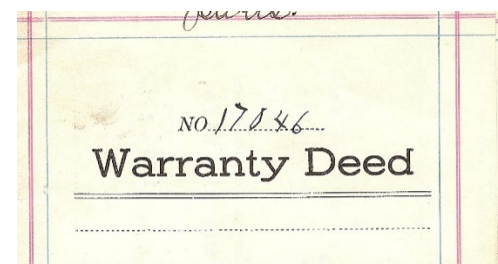
The key question in determining whether the trust in question is more like a will or more like a contract.

- ✓ Irrevocable Trust
- ✓ Supplemental Needs Trust
- ✓ Life Insurance Trust
- ✓ Revocable Trust



# Contracts and Deeds

The requirements to execute contract or deed are the highest on the capacity spectrum. The individual must have sufficient mind and memory to comprehend the nature and effect of their actions, to exercise their own will, cope with the consequences, and to protect his or her interests.



# Is your Antenna Up?

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# Tools for the Estate Planner Practitioner's Tool Kit



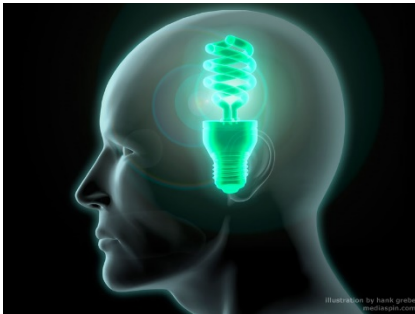
- **Assessment of Mental Capacity**



# Assessing Capacity

**First and foremost:**

- **Can they see?**
- **Can they hear?**
- **Can they understand?**



# Assessing Capacity (Cont'd)

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What does it mean “Can they understand?”

## Decisional Capacity

- An ability to understand relevant information;
- An ability to appreciate the situation and its likely consequences;
- An ability to reason; and
- An ability to confirm a choice.

# Tools for the Estate Planner Practitioner's Tool Kit (Cont'd)



- **Meet with client on more than one occasion.**
- **Ensure family members and friends are not present for your meetings.**
- **When the meeting is finished, step out of the meeting and ask the client's family/friends how he or she is doing.**

# Tools for the Estate Planner Practitioner's Tool Kit (Cont'd)



- Ask staff to sit on meetings with client and document their observations about client's goals, objectives, demeanor and reactions.
- Explain to staff that they may be called upon to testify in a future action if there is a challenge regarding the estate plan.
- Consider videotaping the client reviewing and signing their estate plan.

# Tools for the Estate Planner Practitioner's Tool Kit (Cont'd)



- Create a paper trail as you go.
- Request a physician's letter of capacity.

# Dead Celebrities...What They Can Teach Us About Estate Planning

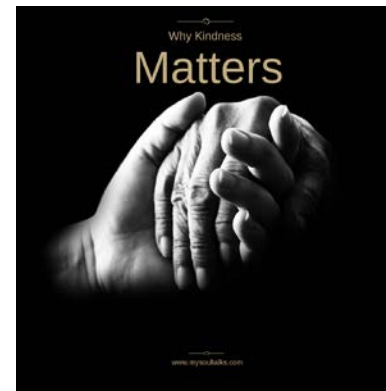


# Dead Celebrities...What They Can Teach Us About Estate Planning (Cont'd)

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# Closing



*“Too often we underestimate the power of a touch, a smile, a kind word, a listening ear, an honest compliment, or the smallest act of caring, all of which have the potential to turn a life around.”*

**-Leo Buscaglia**

# Questions?



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**Karen R. Mills, Member**  
**Aronberg Goldgehn**  
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**312/923-7330**  
**[Karen.mills@agdglaw.com](mailto:Karen.mills@agdglaw.com)**

# Determining Legal Capacity

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Dr. Zoran Grujic

Cognitive Behavioral Neurologist

January 26, 2022

# What is Capacity?

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- Capacity is the basis of informed consent. Patients have medical decision-making capacity if they can demonstrate understanding of the situation, appreciation of the consequences of their decision, and reasoning in their thought process, and if they can communicate their wishes.

# What is Competence?

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- Competency, or competence, is a legal term defined as the ability of an individual to participate in legal proceedings, which includes their ability to make medical decisions. Determinations of competence are made by a **judge** and not by a physician.

# Tools

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- Assessment tools
- **Capacity evaluation tools:**
  - Aid to Capacity Evaluation (ACE)
  - Hopkins Competency Assessment Test (HCAT)
  - Understanding Treatment Disclosure
  - MacArthur Competence Assessment Tool for Treatment
  - Assessment of Capacity for Everyday Decisions (ACED)
- **Cognitive evaluation tools:**
  - Mini-Mental State Examination
  - Montreal Cognitive Assessment

# Barriers

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- Communication barriers
  - Hearing
  - Vision
  - Language
  - Education

## The decision-making abilities, their definitions, and questions to assess them

Decision-making ability	Definition	Sample questions
Understanding	The ability to state the meaning of the relevant information (eg, diagnosis, risks and benefits of a treatment or procedure, indications, and options of care).	After disclosing a piece of information, pause and ask the patient: "Can you tell me in your own words what I just said about [fill in the topic disclosed]?"
Expressing a choice	The ability to state a decision.	"Based on what we've just discussed about [insert the topic], what would you choose?"
Appreciation	The ability to explain how information applies to oneself.	To assess appreciation of diagnosis: "Can you tell me in your own words what you see as your medical problem?" To assess appreciation of benefit: "Regardless of what your choice is, do you think that it is possible the medication can benefit you?" To assess appreciation of risk: "Regardless of what your choice is, do you think it is possible the medication can harm you?"
Reasoning	The ability to compare information and infer consequences of choices.	To assess comparative reasoning: "How is X better than Y?" To assess consequential reasoning: "How could X affect your daily activities?"

Instructions: The usual flow of a capacity assessment begins with the clinician disclosing the relevant facts for a decision and an assessment of the patient's understanding of those facts. Next, the clinician asks for the person's choice, followed by an assessment of their appreciation and reasoning about the choice, and concluding with a reassessment of choice. During the reassessment of choice, pay attention to the logical consistency of the choice based on the reasoning provided.

Capacity is best determined by a face-to-face interview using a series of open-ended questions that relate to the medical decision at hand. The goal of the interview is to evaluate at least one of the four decision-making abilities: understanding, expressing a choice, appreciation, and reasoning. All four abilities do not need to be assessed in every interview; the selection of which ability or abilities to assess is based on factors specific to the decision being made. Any clinician can assess a patient's capacity by applying the skills of a semi-structured interview at the bedside or in the clinic

# Legal Capacity: Is It Too Late to Create an Estate Plan for your Client with Dementia?

Kim Butrum MS, RN, GNP  
Senior Vice President , Clinical Services

# Recognition

- Cognitive Impairment is common as we age, how does one know if it is simply “aging” or something else?
- Is that the important question? Yes for purposes of treatment.
- From a legal standpoint, let’s consider one’s capabilities and deficits.

# Definitions

- Understanding the typical deficits seen in MCI and early Alzheimer's Disease can help you recognize symptoms that require further evaluation

# Dementia

**Multiple cognitive deficits, both memory and**

- **Executive function** (planning, organizing, sequencing)
- **Aphasia** (language skills)
- **Apraxia** (motor skills)
- **Agnosia** (sensory interpretation)

Interferes with work, social activities or relationships

Not occurring exclusively during delirium

DSM-IV-TR criteria

# Mild Cognitive Impairment

- Mild cognitive symptoms either memory or other deficits
- Does not cause significant functional impact
- 12-15% of patients diagnosed with MCI progress to Alzheimer's Disease per year; often the earliest symptoms of a dementia (prodrome)

# Dementia with Mild Impairment

- Anosognosia (lack of awareness of an illness)
- Frontal system dysfunction/executive  
(Disinhibition, impulse control, judgement  
inattention)
  
- Driving
- Finances
- Legal and Financial Planning

# Functional Assessment Questionnaire

(Pfeffer 1982)

Rate the patient's level of performance on each of the following tasks using this scale: 0 = normal; 1 = has difficulty but does by self; 2 = requires assistance; 3 = dependent.\*

- \_\_\_ Writing checks, paying bills, and keeping financial records (for example, balancing a checkbook)
- \_\_\_ Assembling tax records and making out business and insurance papers
- \_\_\_ Shopping alone for clothes, household necessities, or groceries
- \_\_\_ Playing a game of skill (for example, bridge or chess) or working on a hobby
- \_\_\_ Heating water for a cup of coffee or tea and turning off the stove
- \_\_\_ Preparing a balanced meal
- \_\_\_ Keeping track of current events
- \_\_\_ Paying attention to and understanding a television show, book, or magazine
- \_\_\_ Remembering appointments, family occasions, and medications
- \_\_\_ Traveling out of the neighborhood (for example, driving or arranging to take buses)

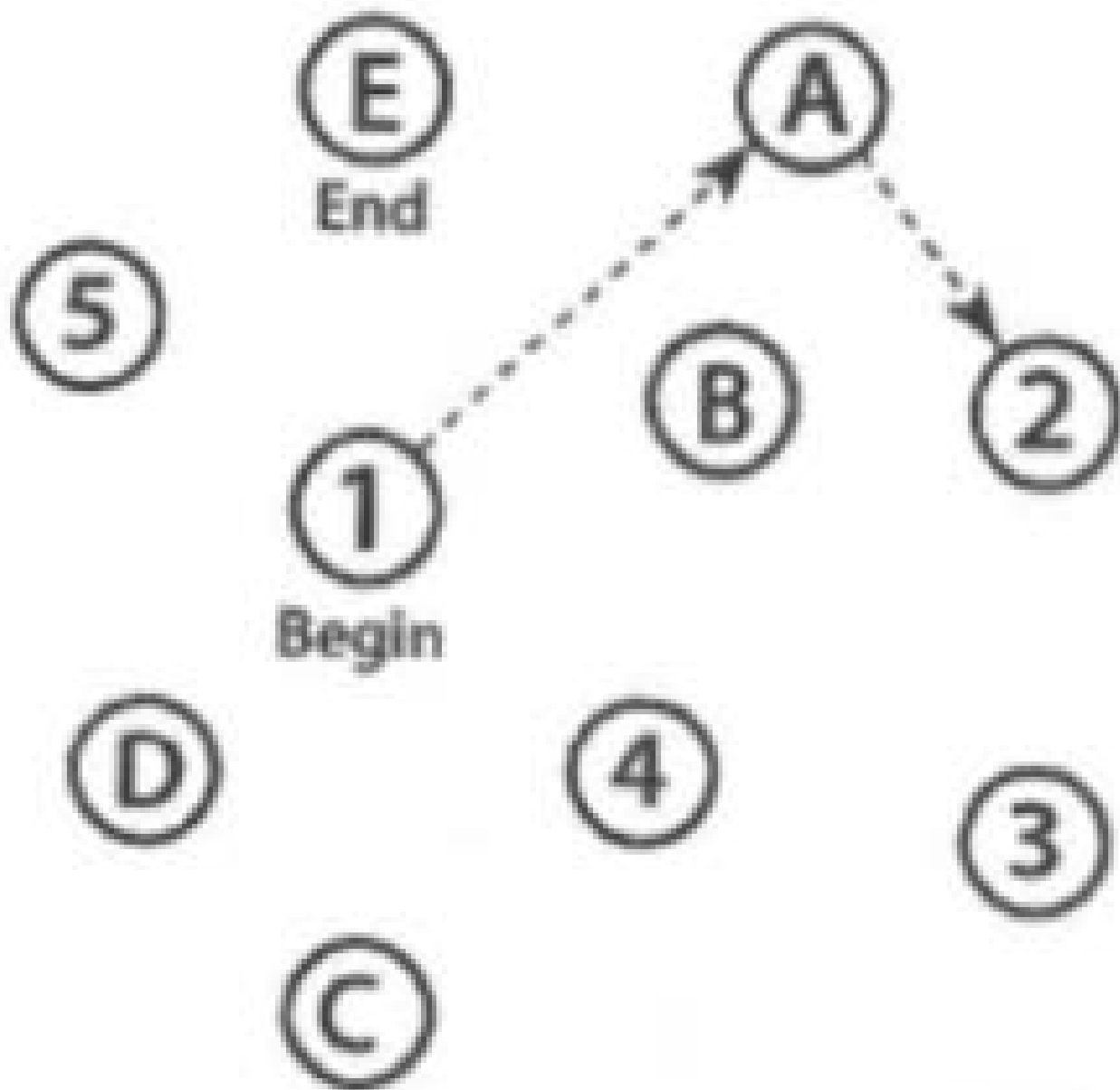
Score: \_\_\_\_\_

*\*—Two other response options also can be scored: 0 = never did the activity but could do it now; 1 = never did the activity and would have difficulty doing it now.*

Scoring: The score is obtained by adding together the points for the 10 items. A total of 30 points is possible.

Score interpretation: The higher the score, the poorer the function (i.e., the greater the impairment). A cutoff point of 9 points (i.e., patient is dependent in three or more activities) is recommended.





[0]

Draw CLOCK (Ten past eleven)  
(3 points)

[0]

Contour

[0]

Numbers

[0]

Hands

# Driving and Dementia

- 38% of those who failed an on the road test still thought they were safe (Anosognosia)
- 40% of patients studied had been in an accident after the diagnosis of the disease
- 11% had caused accidents
- 44% had gotten lost routinely
- 75% continually drove below the speed limit.

(Friedland et al, 1988); Hunt et al, 1992)

# Common Driving Errors

- Incomplete stop at stop sign
- Not utilizing turn signals
- Failure to check blind spots
- Not looking side-to-side (scanning)
- Not keeping the car in proper lane
- Driving too fast for existing conditions
- Making wide right turns
- Improperly using the gas and brake pedals.

(Fitten et al, 1995)

# Communication Tips

- Avoid open ended questions
- Use gestures
- Don't argue or reason, acknowledge and validate
- Limit choices
- Restate and rephrase
- Avoid distractions
- Slow down!!!
- Eye contact

# Resistance

Remember being right doesn't necessarily translate into a positive outcome

Slow gentle approach

Distract, put that rapid forgetting to work for you (using validation)

# Thank you! & Any Questions?

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