

Provided by **Amy M. Burger**  
**Walny Legal Group**

## Challenging Capacity in Special Needs Planning

An estate planning attorney visits a dying client to amend his Last Will & Testament. A financial advisor receives a call from an elderly client who wants to change her beneficiary designation to her next-door neighbor. These scenarios cause the attorney or advisor to ask, does this individual have the capacity to make these decisions? Estate or financial planning often raises issues of capacity. While the requirement of capacity to make decisions is firmly established, the definition of capacity and who determines when a person has capacity is less certain.

Legal capacity is defined as “the attribute of a person who can acquire new rights, or transfer rights, or assume duties, according to the mere dictates of his own will, as manifested in juristic acts, without any restraint or hindrance arising from his status or legal condition.”<sup>1</sup> As a basic principle of human rights—every individual is presumed to have capacity until proven otherwise. An incapacitated person means an individual who, for reasons other than being a minor, is unable to receive and evaluate information or make or communicate decisions to such an extent that the individual lacks the ability to meet essential requirements for physical health, safety, or self-care.<sup>2</sup> Definitions of capacity and incapacity are further distinguished by the type of decision being made.<sup>3</sup> Making a will only requires testamentary capacity, i.e. the knowledge of one’s objects and property, whereas contractual capacity, the knowledge one is entering into an agreement with another, is required to create a power of attorney or trust.<sup>4</sup>

As a basic principle of human rights - every individual is presumed to have capacity until proven otherwise.

For special needs planners, the issue of capacity has become the pivotal topic of discussion as society realizes that people with disabilities have historically been denied their inherent right to make decisions.<sup>5</sup> Despite the presumption of legal capacity, this doctrine has not been applied to people with disabilities in several legal constructs.<sup>6</sup> The most pervasive example is the guardianship process in which most jurisdictions have streamlined the process to make it easier for a parent to obtain guardianship over an adult child with a disability. Courts often presume that the adult child with a disability needs a guardian; therefore, due process for the individual with a disability is quickly minimized to save the parent from the financial burden of an extensive guardianship proceeding.<sup>7</sup> This streamlined process made the

<sup>1</sup> Black’s Law Dictionary (10<sup>th</sup> ed.).

<sup>2</sup> Uniform Guardianship Act § 102(5) (1997).

<sup>3</sup> *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers* (2005) at 5.

<sup>4</sup> *Id.* at 5-7.

<sup>5</sup> Kristin Booth Glen, *Changing Paradigms: Mental Capacity, Legal Capacity, Guardianship and Beyond*, 44 Colum. Human Rights L. Rev. 93,139-140 (2012).

<sup>6</sup> Nina A. Kohn, et al., *Supported Decision-Making: A Viable Alternative to Guardianship?*, 177 Penn. St. L. Rev. 1111, 1116 (2013).

<sup>7</sup> *Id.* at 1117.

The AEP® Alert and Technical Corner are brought to you by the National Association of Estate Planners & Councils.

This material may not be duplicated.

presumption of legal capacity easily rebuttable, and in some cases, created the opposite presumption for a person with a disability wherein that person was presumed incapacitated and had the burden of proving his capacity by undergoing a cognitive or psychological exam.<sup>8</sup>

This presumption shifted in 2006 with the United Nation's adoption of Article 12 of the Convention of Rights for People with Disabilities. Article 12 states that:

- [1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.
4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.
5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.]<sup>9</sup>

The adoption of Article 12 dispelled the historic notion that people with disabilities are legally incapacitated and set forth the legal principals that: 1) people with disabilities are presumed to have the same legal capacity to make their own decisions; and 2) because of this presumption, governments, courts, and society should take proactive measures to ensure that people with disabilities have support to make decisions, specifically financial decisions. Article 12 dictates that courts and legislative bodies have an affirmative duty to ensure people with disabilities can exercise their decision-making ability rather than removing this ability with substituted decision making (i.e. guardianship). The context of Article 12 derived from legal scholars and social scientists who reshaped the definition of legal capacity, explaining that an inability to communicate in traditional ways does not equal to incapacity.<sup>10</sup> Technological advances also demonstrated that nonverbal individuals with autism or severe motor deficiencies can still make decisions with the appropriate supports. Supportive decision making has been subsequently defined as "a series of relationships, practices,

---

<sup>8</sup> *Id.* at 1117-18.

<sup>9</sup> Convention on the Rights of Persons with Disabilities, Gen. A. Res. 61/106, U.N. Doc. A/RES/6/106 (Dec. 13, 2006), available at <http://www.un.org/disabilities/convention/conventionfull.shtml>. (Last visited Apr. 15, 2018).

<sup>10</sup> Robert D. Dinerstein, *Implementing Legal Capacity Under Article 12 of the UN Convention on the Rights of Persons with Disabilities: The Difficult Road from Guardianship to Supported Decision-Making*, 19 *Hum. Rts Brief* 8 (2012).

The AEP® Alert and Technical Corner are brought to you by the National Association of Estate Planners & Councils.

This material may not be duplicated.

arrangements, and agreements, of more or less formality and intensity, designed to assist an individual with a disability to make and communicate to others decisions about the individual's life."<sup>11</sup>

Although the United States has yet to fully embrace supportive decision making, states have acknowledged that the equal protections for people with disabilities under the Americans with Disabilities Act (ADA) and the 14<sup>th</sup> Amendment compel society to reevaluate the traditional guardianship process.<sup>12</sup> In 2012, a New York judge invalidated a guardianship, holding that the guardianship failed to meet substantive due process because its interference of a person's rights was not by the least restrictive means possible.<sup>13</sup> In 2017, the Uniform Guardianship, Conservatorship, And Other Protective Arrangements Act (UGCOPAA) included within it a provision that mandates courts to make protective arrangements that are the least restrictive and maintain the rights of the person with the disability to the greatest extent possible.<sup>14</sup> In upholding "the least restrictive means" test, states have alter their guardianship statutes to include more limited and person specific provisions.<sup>15</sup>

Other states have enacted or proposed legislation that allows for supportive decision making as an alternative to guardianship. Chapter 94A of the Delaware Code is titled Supportive Decision Making and establishes that all people are presumed to have the legal capacity to make decisions.<sup>16</sup> The Texas Estate Code allows for a substitute for guardianship and states that a person's inability to communicate shall not be interpreted as mental incompetence.<sup>17</sup> These state codes also establish a process for supportive decision making and provide statutory supportive decision making agreements to be signed and witnessed. In addition to state support decision making statutes, the passage of the Able Act in 2014 provided more financial independence for people with disabilities.<sup>18</sup> The Able Act eliminated the need to create a special needs trust if the person with a disability inherited less than \$100,000.

As the United States embraces supportive decision making, alternatives to guardianships, and financial independence for people with disabilities, practitioners must be aware of their state laws and consider their ethical and legal obligations to persons with disabilities whose capacity is under question. Opponents of supportive decision-making legislation express concern that it does not provide sufficient protection for people with disabilities, a population that is more susceptible to fraud and abuse. In planning for a person with special needs, an attorney or advisor should presume the person with a disability has capacity until shown otherwise and use current legislation to ensure the estate or financial plan provides both sufficient freedom and protection. Attorneys and advisors should also avoid templated documents to ensure their planning is tailored to the person with a disability and that the restriction of rights is limited.

Meeting with the client to have a more in-depth conversation often provides reassurance of the client's capacity. Attorneys and advisors should have in depth conversations with people with disabilities so that they do not automatically assume the individual is incapacitated. If the person with the disability has difficulty with verbal communication, attorneys and advisors should also not assume a family member or caregiver can speak on the person's

---

<sup>11</sup> *Id.* at 10.

<sup>12</sup> See *Kohn* at 1117-20.

<sup>13</sup> In the Matter of the Guardianship of Dameris L., Pursuant to SCPA Article 17-A, Surrogate's Court: County of New York, No. 2009-0892, at 16. (Dec. 28, 2012). The opinion is available at <http://caselaw.findlaw.com/ny-surrogates-court/1619828.html>.

<sup>14</sup> Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (UGCOPAA).

<sup>15</sup> American Bar Association, State Adult Guardianship Summary: Directives of Reform 2017, *Commission on Law and Aging*, available at [https://www.americanbar.org/content/dam/aba/administrative/law\\_aging/2017\\_legislative\\_summary\\_fnl.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/law_aging/2017_legislative_summary_fnl.authcheckdam.pdf) (last visited Apr. 16, 2018).

<sup>16</sup> Del. Code tit. 16, § 9401A-9410A

<sup>17</sup> Tex. Est. § 1357.056

<sup>18</sup> 26 USC 529A: Qualified ABLE programs

The AEP® Alert and Technical Corner are brought to you by the National Association of Estate Planners & Councils.

This material may not be duplicated.

behalf. Therefore, attorneys and advisors may need to build relationships with neutral third parties, such as a local disability organization, who can facilitate unfettered communication between you and your client with a disability. Most estate planners know that a person may not require a will as part of his estate plan even though the person may want one. Similarly, not every person with a disability requires a guardianship even though the family may want one. Attorneys and advisors should make their own determinations regarding the level of capacity of the person with a disability and then implement an estate or financial plan that is in accord with that person's capacity. These plans may include new legislative tools, such as Able Accounts or Supportive Decision Making Agreements, to allow the individual with a disability to retain his decision making.

*Amy M. Burger is an attorney at Walny Legal Group LLC who focuses on Special Needs Planning and has lived her life with the challenges of a special needs individual.*

The AEP® Alert and Technical Corner are brought to you by the National Association of Estate Planners & Councils.

This material may not be duplicated.

1120 Chester Ave., Ste. 470 · Cleveland, Ohio 44114 · (866) 226-2224 · [www.NAEP.org](http://www.NAEP.org) · [admin@NAEP.org](mailto:admin@NAEP.org)