

## Dealing with Capacity Issues in a Divorce

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*Because of the rise of the “boomer divorce,” family law attorneys will need to become comfortable with assessing a client’s capacity to engage in the divorce process.*

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divorce action.

Capacity issues in divorce will most likely become more common as clients age and the prevalence

of elder divorce increases. Between 1990 and 2010, the divorce rate among adults aged 50 and older doubled.<sup>1</sup> Almost one in ten divorcing individuals is older than 64 years of age.

One of the most common causes of incapacity in older individuals is dementia. The prevalence of dementia among older individuals

The first question to consider when dealing with a divorce or legal separation involving an elderly or disabled client is, “Does he or she have the capacity to represent himself or herself in this action?”

This article will provide some practical guidance on assessing the client’s capacity to participate in a

### Introduction to the Issue

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*More frequently, couples over the age of 50 are divorcing for one reason or another. For the attorneys who represent them, the so-called “boomer divorce” presents special issues that can impact divorcing clients in their retirement years.*

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A “boomer divorce” can present issues with legal capacity, social security benefits, long-term care benefits and the client’s estate plan.

However, divorce is not the only time we will need to consider the

special implications of a “boomer” client. Discussing the implications of long-term care issues will also be important for our clients considering a prenuptial agreement before entering a marriage.

This issue of the *Wisconsin Journal of Family Law* is dedicated to giving family law attorneys an overview of the different issues that arise with a “boomer” client so the attorney can better identify the issues and seek help when necessary.

steadily increases from age 60, in which about one percent of the population is impacted, to individuals age 85 and older, in which 30 to 45 percent of the population has some form of dementia.

Dementia is not a specific disease, but rather an overall term that describes a wide range of symptoms associated with a decline in memory or other thinking skills severe enough to reduce a person's ability to perform everyday activities. Not all individuals with dementia are incapacitated. In terms of capacity, it is the impairment of certain decision-making and cognitive functions that can result in incapacity.

What are the decision-making and cognitive functions necessary for legal capacity? At its most basic level, a client must have legal capacity in order to make an informed, intelligent and voluntary decision to address legal issues. Attorneys should presume that a client has legal capacity, but should not rely upon this presumption – the initial determination as to a client's capacity is the attorney's responsibility.

A hallmark feature of dementia and other cognitive disabilities is lack of insight; thus, we cannot rely upon the client to expressly alert us when capacity is an issue. Sometimes we cannot rely upon family or friends of clients to alert us, either.<sup>2</sup>

In the legal world, capacity is decision specific: capacity to make a will, capacity to contract, capacity to marry, and capacity to make a health care decision. Capacity is also person-specific. The attorney must consider the entire person – education, personality, culture. The attorney must also consider whether there are other issues impacting communication: language, hearing impairments, speech issues, and mental illness.

A lack of capacity should not be confused with having other disabilities. For example, an

individual with severe post-stroke aphasia may have capacity even though the disability significantly impedes that individual's ability to communicate. Nevertheless, the attorney must accommodate communication barriers and other disabilities so that the client's decision can be clearly and reliably communicated.

According to Wisconsin's Rules of Professional Conduct for Attorneys, lawyers have an obligation when working with clients of diminished capacity to maintain a normal attorney-client relationship as far as reasonably possible.<sup>3</sup> The rule also provides guidance on determining capacity: "In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision; variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician."

In determining whether a client has capacity, the attorney should start by defining the decision to be made. Remember, capacity is decision-driven, so clients who are not obviously globally impaired may still have capacity to make some legal decisions while not being able to make others. In the context of divorce in Wisconsin, it does not appear that there is any specific statute or case in which the capacity to participate in a divorce is defined, but we can draw from similar areas of the law.

The statutory definition of capacity to marry states that if a person is competent to enter into a contract, that person is competent to marry.<sup>4</sup> However, the Wisconsin Supreme court recently took a different

approach in a case dealing with post-death annulment of a marriage and held that the capacity to marry is analogous to a person's capacity to make or revoke a will.<sup>5</sup>

Because of the financial elements of the divorce, another analogy might be that of a tort action. When addressing capacity in the context of entering a settlement in a tort action, the court considered the following factors to determine competency under Wis. Stat. section 807.10: (1) the person's ability to reasonably understand pertinent information; (2) the person's ability to rationally evaluate litigation choices based upon that information; and (3) the person's ability to rationally communicate with, assist and direct counsel.

The court concluded that if a client cannot reasonably understand the information, cannot rationally choose between available alternatives in the context of litigation, or cannot rationally communicate with, assist and direct counsel based upon pertinent information due to mental illness, even assuming the zealous assistance of counsel, the client is mentally incompetent.

### **Here are some practical steps an attorney can take to assess capacity:**

1. Meet with the client in person. Even with technological tools like Skype, there is no substitution for an in-person consultation. Meet with the client alone, at least at the beginning of your first in-person consultation. It is not uncommon for individuals with diminished capacity to rely heavily upon children, spouses and friends to speak for them. While this assistance can be extremely important in normalizing the attorney-client relationship (once core capacity is established), well-meaning supporters may

have a tendency to speak for the client or to cue the client with leading questions making it difficult for the attorney to determine the client's independent ability to speak for himself or herself.

2. Ask open-ended questions. When interviewing the client, do not ask leading questions. Yes or no answers tell you nothing. Individuals with diminished capacity often have experienced the loss of capacity over time and have most likely developed ways of accommodating their limitations with social cues, head nods and smiling. Remember, a yes or no is the correct answer 50 percent of the time. Open-ended questions are essential to determine the client's ability to articulate his or her goals for the representation. A client must be able to rationally choose between alternatives. Remember, a choice that you do not agree with does not indicate incapacity. The key is the client's ability to choose and to explain why this choice is being made.
3. Take practical steps to enhance communication. Face the client directly, speak slowly and clearly, and have good eye contact (try to limit the amount of time looking down while taking notes). Reduce any outside noise as much as possible and ask if the client has a good side for hearing or any other preferences for communication. When scheduling an appointment ask if the client prefers a certain time of day. Individuals with challenges to their capacity often have "good days" and "bad days." Many older clients find they are mentally sharper

at certain times of the day or even on certain types of days.

4. Watch for some of these "red flags:" Repeating similar questions without appearing to note that the question was just addressed; difficulty finding words and or staying on topic; making strange or off-topic statements at inappropriate times; difficulty expressing choice and/or articulating goal and alternatives.<sup>6</sup>

An attorney who has considered the legal decision at issue, the individuality of the client, and the temporal, as well as the other contextual challenges a client has to capacity, and who has followed the practical guidelines above, has done his or her professional best to assess client capacity. If a client exhibits many "red flags," cannot articulate why he or she is consulting with a lawyer or what he or she wants to achieve with the representation in the most basic manner, the client is likely incapacitated.

If the client is incapacitated, the next step is to determine whether the client has a legal representative who can help him or her through the divorce process. First, determine whether the client has an agent under a durable power of attorney with authority to represent the client in a lawsuit. If the client has an agent with this authority and the agent is willing to serve in that capacity, then the agent may stand in the place of the client. If the client does not have an agent with this authority, then a guardianship action will be necessary.

To determine which type of guardian is necessary, consider what the guardian will be required to do in the divorce or legal separation. If the incapacitated client is the petitioner in the divorce or legal separation, then a guardian of the person will be necessary to file the action and testify that the marriage

is "irretrievably broken" (or "broken" in the event of a legal separation), in addition to a guardian of the estate. If the incapacitated client is the respondent, then a guardian of the estate may be all that is necessary to enter into a financial settlement on the client's behalf. In the event the guardianship action is for the sole purpose of the divorce or legal separation, you may also consider requesting a temporary guardianship for the sole purpose of the divorce or legal separation action and not pursuing a permanent guardianship if it is unnecessary.

Courts will sometimes want to appoint a guardian ad litem (different from a guardian) for an incapacitated client in divorce proceedings. However, it is not necessary and it is often better to save the client the expense of a guardian ad litem.

Both agents under a power of attorney and guardians are fiduciaries and have the responsibility to act according to the principal's/ward's best interests. When the client is incapacitated, his or her attorney should be proactive and write a letter to the judge explaining that the client is incapacitated, that the agent or guardian is authorized to act in the client's place, and that because the agent or guardian is a fiduciary acting in the client's best interests, a guardian ad litem is not necessary to protect the client's best interests. Enclose a copy of the Durable Power of Attorney or Order Appointing Guardian for the judge's review.

Guardians ad litem are traditionally appointed in family law cases to determine what is in a minor child's best interests. An incapacitated adult is different from a minor child because the adult is a party to the action and may have a legal representative (agent or guardian) appointed to represent him or her in the action.

Conversely, a minor child is not a party in the action, but the child's best interests need to be considered, which is the role given to the guardian ad litem. Because the parents' interests could be adverse to the child's best interests, the child does not have a legal representative outside of a guardian ad litem who can perform this role. An incapacitated adult, however, has either appointed an agent to act as his or her legal representative or the court has appointed a guardian to act as his or her legal representative.

If you have explained why a guardian ad litem is unnecessary for an adult, but the judge still orders the appointment of a guardian ad litem, then advocate for the appointment of a guardian ad litem who is educated in elder law issues. Family courts are accustomed to appointing from the list of guardians ad litem with training in representing minor children. In the elder divorce context, the judge should instead look to the list of guardians ad litem the guardianship court uses

containing guardians ad litem trained in representing adults.

When working with the guardian ad litem, it is important to educate him or her on any unique issues involved in the case because of the client's age or disability. This may include eligibility rules for public benefits, especially as they relate to assets and income for purposes of property division and support.

With the appropriate legal representative in place, the client and his or her representative is able to proceed with the divorce action and make any decisions necessary to further the divorce process.

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## Endnotes

- 1 Susan L. Brown and I-Fen Lin, "The Gray Divorce Revolution: Rising Divorce among Middle-Aged and Older Adults, 1990-2010," *Oxford Journal of Gerontology*, Oct. 19, 2012.
- 2 For an informative, funny, and insightful article on this subject see Michael Kinsley, "Have you lost your Mind? More Bad News for Boomers," *The New Yorker*, April 28, 2014.
- 3 See [SCR 20:1.14 Client with diminished capacity](#).
- 4 Wis. Stat. § 765.01.
- 5 *In re the estate of Nancy Ellen Laubheimer* 2013 WI 76.
- 6 There is a helpful "Capacity Worksheet for Lawyers," addressing the warning signs, in *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers*, ABA and APA, 2005, p. 23. The worksheet lists many "red flags."