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Mental Capacity:

A Proposal to Address the Weak Link in Long-Term Care Planning

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By
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A. Changing How We Think About Defining Mental Capacity.

The one thing we know about mental capacity is this:
When you lose it, you won't know it.

Unknown source

Houston elder law attorney Wesley Wright uses an analogy from the oil and gas industry of planning upstream or downstream. ***This paper's goal*** is to address ***upstream*** planning with the question: Are there ways to change the ***definition*** of capacity (and thus incapacity) in documents to promote more effective implementation of plans and more protection for the principal?

The topics of capacity and competence are exhaustive. This paper does not address underlying medical conditions leading to loss of capacity. The topic of **d*ecision-making for and by individuals with diminished capacity***—including surrogate decision-making, substituted judgment, and supported (or assisted) decision-making—is critical, but is, again, not the focus of this paper. Those matters are *downstream*; the goal of this paper is to consider options *upstream*.

B. A Bird's-Eye View—Considering Incapacity Definitions When Drafting.

Options:	***Client Interest:***	***Control:***	***Question:***	***Answer:***	***Incapacity Definition = the Trigger:***
Common definitions of *incapacity* are imperfect, but *better* definitions require much more careful choices, more planning, and more detailed drafting.	Clients may rebuff an attorney's suggestion to plan extensively for that period when ***you do not have the capacity to avoid exploitation but you think you are doing great.***	The prospect of losing mental capacity (and control) is devastating; many people will not acknowledge the possibility. All planning options that include voluntary relinquishment of control before complete incapacity may be rejected.	Should attorneys offer clients options that clients need but do not want?	Yes; clients must know that creeping incapacity can derail their plans. More clients will want to consider protection for this period *when they understand the risks, costs to loved ones, and options.*	*Even when* a client is willing to consider planning for *creeping incapacity* and an attorney drafts otherwise ideal documents, the planning and documents—and protection of the client's property and objectives—may go to waste unless there is a definition of incapacity that triggers implementation of the plans.

C. Objectives of This Paper. The objectives of this paper are gentle ones, including: (1) to suggest that elder law attorneys be kind to themselves in tackling this topic, which is exhaustive, laden with emotion and risk, and without clear conclusions, (2) to discuss why we do not have satisfactory solutions, (3) to promote more realistic and creative approaches to addressing the risks of declining capacity with tremendous amounts of sympathy and respect for age-appropriate changes in a client's priorities, and (4) to understand the events that can cause a perfect storm of risks, leading to exploitation by those who do not love the client—and even by those who do.

D. So Many "Key" Topics. Capacity topics to address include: (1) definition(s) commonly used, (2) why the definition of "incapacity" is a pivot point, (3) sad stories of those who lost control due to temporary capacity declines, (4) examples of terrible fiduciaries who have quickly determined that an individual was incapacitated when they could have provided support, respecting the individual's autonomy, (5) examples of tragic results when there were good intentions—why no good deed goes unpunished when *incapacity* is linked with *fiduciary duty*, (6) examples of clients who depleted the "people" resources in their lives through extensive demands, (7) whether attorneys should give capacity tests to clients, (8) how to dispel myths about perfect fiduciaries, dream teams, and precision timing on control transfers, (9) *blame shifting* to fiduciaries who are trying to administer fatally-flawed plans, (10) the blaming of property owners who were never presented with options that were available to them for protection and control while capacity declined, (11) suggestions for re-drafting legal documents with some of the adjustments that we could make, and (12) differences in financial decision-making capacity and health/living decision-making capacity. We will address only several in this paper.

E. Sad/Tragic Stories about Loss of Autonomy. As elder law attorneys, we have witnessed heartbreak, killer stress, and unnecessary disasters far too many times once an individual is incapacitated—or has been diagnosed or labeled as incapacitated. A few short sketches of cases follow; we have all seen many variations on these examples:

- Bob Brown lived in his home with no assistance until finally, when he was vision impaired, he let one of his sons act as his power of attorney agent. His daughter-in-law hustled Bill into a facility where he died in less than a week. He had pleaded with his family to let him go home, noting it was his clear preference, but they said home was unsafe.

- John Jones lived alone until he caught the flu, which was going around, and ended up in the hospital. When he recovered, his family had leased out his home. *See the movie That Evening Sun with Hal Holbrook and his real-life wife, Dixie Carter (her last film).*

- Lois Larsen appointed her friend's daughter, Lisa, as her power of attorney agent. When Lois was in the hospital and incapacitated, Lisa took over, promptly paying herself generously while moving Lois to a crowded shared room in an undesirable facility. Lois could not prove that her incapacity had only been temporary. *See the movie Win Win with Paul Giamatti as a beleaguered and ultimately exploitive attorney who became the property owner's court-appointed guardian.*

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