



LEGAL STANDARDS FOR CAPACITY

“When I am an old woman I shall wear purple/With a red hat which doesn’t go, and doesn’t suit me...” Penned in 1961 by the English poet Jenny Joseph at age 29, “Warning” is hailed as the most popular post-war poem in the UK. The poet muses about making up for the sobriety of youth: going out in slippers in the rain, picking flowers in other people’s gardens, and eating only bread and pickles for a week.

The truth is, we would be alarmed to see our loved one behave so, with labels such as dementia, self-neglect, and elder abuse. “Warning” is used in trainings of professionals, including doctors and attorneys, who serve elderly people with diminished capacity.

Caring for a loved one is a difficult balancing act between empowerment and protection. Families often lack basic knowledge about complex capacity issues they encounter. A better understanding will help identify planning opportunities and the right time for intervention.

Below is a brief summary of general legal standards of capacity for common transactions and decisions.

First, the most fundamental tenets: Legal adults are presumed to have capacity until proven otherwise; you have the right to make bad decisions.

Testamentary capacity

You know the natural objects of your bounty and understand the nature and extent of your property, and you can interrelate such knowledge and understanding to create a rational plan to dispose of property. The ability to manage all your affairs is not necessary; you need the requisite capacity only at the time of executing the will—not before or after.

Contractual capacity

You understand the nature and effect of the business transaction. If the transaction is complicated, a higher level of understanding is necessary.

Durable power of attorney

The requisite capacity to appoint an agent to handle your financial and legal affairs is the same as contractual capacity.

Health care decisions

You understand the benefits and risks posed by a medical treatment and alternatives to the proposed treatment, and you can communicate your decisions.

Donative capacity

You understand the nature and purpose of the gift and the extent of property to be gifted, and you know the natural objects of your bounty and the effect of the gift.

Capacity to convey real estate

You understand the nature and effect of the transfer at the time of executing the deed.

Clinical assessments must consider the specifics, nuances, and temporality of one’s capacity; appreciating the multifaceted nature of the ability to manage one’s own affairs is essential to self-determination and compassionate caregiving.

Ms. Joseph died in 2018. Her beloved poem has inspired the Red Hat Society, for women over 50 to explore the power of fun and friendship.

