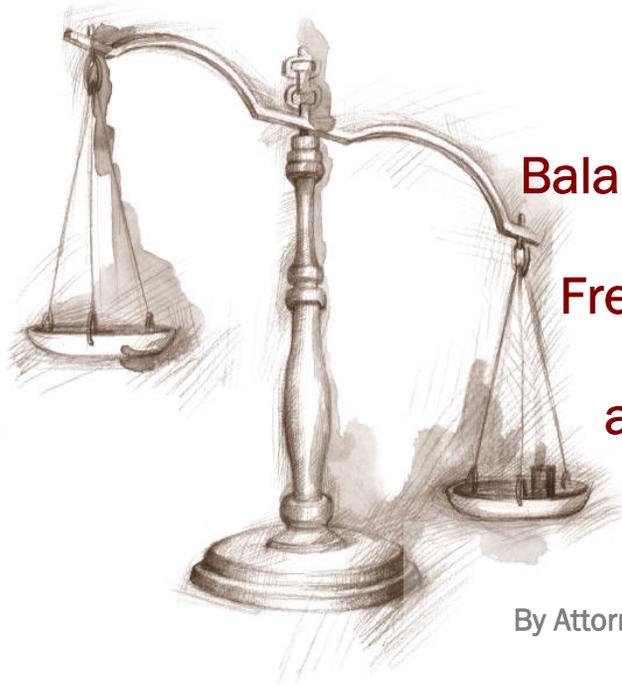


*Continuing Legal Education Course Highlights:*  
 Representing The Incapacitated, or the Possibly Incapacitated Client



**Balancing Autonomy,  
 Free Will,  
 and the Safety of Elders**

By Attorney John L. Roberts, Longmeadow, Massachusetts (413) 567-5600

Taking time to understand the degrees of competence that are required for different types of decisions is the first step toward helping an elder and his or her family plan for the future.

Lower Level of Competence		Higher Level of Competence			
<b>Appoint a Health Care Agent:</b>  The elder must be able to communicate desire to appoint the agent, and understanding of the significance of the appointment.	<b>Appoint a Power of Attorney</b>  Must understand that he/she is relinquishing control over their assets. Must trust the proposed POA and explain why that person is appropriate.	<b>Testamentary Capacity to Execute a Will</b>  The elder must know: A) who family is, including any deceased children B) general knowledge of assets C) reasoning as to why they are making distributions in the will.	<b>Make Complex Health Care Decisions</b>  Is the elder taking medications? If not, is there sound reason? Does the elder know the risks/benefits of treatment for an illness/condition?	<b>Transfer the House by Deed</b>  This means giving away the equity in their biggest asset.  Is the child pushing for this?	<b>Manage Finances; Engage in Medicaid Planning</b>  Are bills being paid on time? Is the house being foreclosed? Insurance up to date? Credit card build up? Is there exploitation?

## COMPETENCY: A CHANGING CONCEPT FOR EVERYONE

Capacity and Competency are fluid concepts. All of us notice how our levels of attention and competency fluctuate to some degree. For elders, the changes in competency can be dramatic.

**In *Guardianship Of Zaltman*** 65 Mass. App. Ct. 670 (2006) the Court pointed out how a person's competency can change over time. Simply because at an earlier point the ward was found "incapable of taking care of herself by reason of mental illness" did not make it a foregone conclusion that she was not competent to select counsel in her Guardianship proceedings. The trial Judge did not personally ascertain ward's desires and intentions, so the case was sent back to the Probate Court..

The law recognizes many different levels of competency:

***Talbot v. Chamberlain***, 149 Mass. 57, 59 (1889) ("changing domicile and making a will require competent mental capacity, and decree of guardianship on the basis of insanity is not conclusive of the want of capacity to do either");

***Matter of Moe***, 385 Mass. 555, 567-568 (1982) ("person may be adjudicated legally incompetent to make some decisions but competent to make other decisions"); ***Rogers***, 390 Mass. at 495, 497 ("[Even] a person diagnosed as mentally ill and committed to a mental institution is still considered to be competent to manage his personal affairs");

***Guardianship of Bassett***, 7 Mass. App. Ct. 56, 63 (1979) (mentally retarded person had "decision-making capability" as to "some but not all of his personal affairs". Court has broad equitable powers to limit a guardianship in order to allow the ward to handle some of his affairs on his own.

## TESTAMENTARY CAPACITY

The capacity to make a will is discussed in [\*O'Rourke vs. Hunter\*](#), 466 Mass. 814 (2006).

**Testamentary Capacity:** Testatrix was free from delusion and understood the purpose of the will, the nature of her property, and the persons who could claim it. "The critical question is whether the testator was of sound mind at the time the will was executed. . . .a person may possess testamentary capacity at any given time and lack it at all other times."

**Undue Influence:** These factors indicate undue influence: (1) unnatural disposition has been made (2) by a person susceptible to undue influence to the advantage of someone (3) with an opportunity to exercise undue influence and (4) who in fact has used that opportunity to procure the contested disposition through improper means"

**In this case:** The detailed (and unchallenged) chronology provided by the testatrix's attorney of her meetings and communications with her client confirm the correctness of the judge's conclusion.

The Testatrix's will was drafted by an attorney not previously known to the proponent. The attorney met with the testatrix alone on several occasions to discuss her wishes; the proponent was not present when the testatrix signed her will. Contestant had as much access to her mother as did the proponent, visiting her mother in the nursing home almost every day.

## COMPETENCE TO CONSENT TO MEDICAL TREATMENT

Legal competence is different from the ability to make medically rational decisions. Massachusetts Courts give respect to the expressions a person who is facing a decision to undergo medical treatment. In ***Lane v. Candura***, 376 N.E.2d 1232, 1235-36 (1978) the Court dismissed a Guardianship petition, even though the person involved had made a decision that appeared certain to cause her death. The Court decided that the irrationality of a patient's decision not to submit to surgical procedure that could save her life didn't justify the conclusion that her capacity to make decisions was impaired to the point of legal incompetence.

In ***Guardianship of Arlene***, 67 Mass.App.Ct. 1115 (2006) (Table, Unpublished Text in WESTLAW: 2006 WL 3349572) Appeals Court noted that the Probate Court decree for Guardianship had extended only to the making of informed treatment decisions. So, by implication, the ward was still free to handle her own personal and financial affairs.

On the issue of antipsychotic medication the court noted the ***Rogers*** substituted judgment factors: (1) the individual's expressed preferences; (2) her religious convictions; (3) impact on her family; (4) probability of adverse side effects from treatment; (5) individual's prognosis with treatment; and (6) her prognosis without treatment; special emphasis placed on the ward's own testimony.

Other substituted judgment cases: ***Superintendent of Belchertown State Sch. v. Saikewicz***, 373 Mass. 728, 752-753 (1977); ***Guardianship of Roe***, 383 Mass. 415, 443-448, 412 N.E.2d 40, 52, 62 (1981) (few medical procedures more intrusive than antipsychotic meds; spectrum of medical care and circumstances do not permit courts to make universal rules in anticipation of cases involving different treatment.

## CAPACITY TO CONSENT TO PROTECTIVE SERVICES

The protective services laws and regulations issued by the Department of Elder Affairs protect people over the age of 60 from abuse and neglect. The capacity to consent to involvement by protective services workers depends on the elder's ability to understand and appreciate the nature and consequences of his or her decisions, including the benefits and risks of and alternatives to any proposed services. Case workers look at individual circumstance when they investigate neglect:

- (a) elder's ability to meet her/his own needs.
- (b) a history of dependence on a caretaker
- (c) elder's capacity to consent.
- (d) expectation or desire of elder of continuing to receive care provided by the caretaker.

Financial exploitation is defined in the law as the non-accidental act or omission by another person without the consent of the Elder causing substantial monetary or property loss to the Elder or substantial monetary or property gain to the other person which gain would otherwise benefit the Elder, but for the act or omission of the other person.

The law recognizes that financial exploitation may result from consent obtained as a result of misrepresentation, undue influence, coercion or threat of force by the other person. Financial exploitation may not result from a *bona fide* gift or from any act or practice by another person in the conduct of a trade or commerce prohibited by MGLc.93A,§2.

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This article was adapted from a Continuing Education Course presented to the National Academy of Elder Law Attorneys at Northampton, Massachusetts on February 27, 2008. The outline is for information and educational purposes only. It is not legal advice or opinion. Legal advice can only be provided to you by a competent professional who understands your unique circumstances.

## CAPACITY TO CONTRACT – THE COMPREHENSION THAT IS REQUIRED FOR IMPORTANT TRANSACTIONS

The capacity to enter into a serious financial transaction is illustrated in these two contrasting cases. In one, the elder was clearly taken advantage of by a neighbor who convinced her to sign a real estate deed. In the second, more recent case, the elder clearly expressed the intention to transfer ownership of his house. He challenged his deed years later, at the urging of other family members who were themselves seeking an advantage.

In *Farnum vs. Silvano*, 27 Mass. App. Ct. 536 (1989) Court explained how competence to enter into a contract presupposes something more than a transient surge of lucidity, such as when a person is briefly able to execute a will. From a testator we ask only awareness of the natural objects of bounty. The choice among those objects may be seen by other people as arbitrary, but the maker of a will is allowed to be arbitrary in making gifts.

In contract, the act of entering into a contract requires reciprocal obligations. Competence to contract involves not merely comprehension of what is "going on" but an ability to comprehend the nature and quality of the transaction, together with an understanding of its significance and consequences. When a person has a history of mental incapacity, the court requires a baseline of reasonableness for the transaction.

In this case the Court rescinded the conveyance of a home on Cape Cod for \$65,000 to her neighbor. It was not rational to part with a major asset for a cut-rate price. The Court rejected the idea that Viola Farnum enjoyed a "lucid interval" when she conveyed her house to Joseph Farnum

**Elder Law Practice Point:** Capacity is situational.

In *Ward v. Ward*, 70 Mass. App. Ct. 366 (2007), an attorney had explained to Arthur Ward, Sr. the "pros and cons" of conveying ownership of his two family house in Belmont to his son. The attorney explained that transferring the house, worth \$600,000, would be irrevocable.

Arthur, Sr. could not rescind this deed, which was intended to provide for his son, Arthur, Jr. The desire to rescind the deed was based on nothing more than a change of his mind. That was not enough to rescind the transaction, even if Arthur, Sr. believed he could do so when he signed the deed, which kept a life estate for him.

A deed can be rescinded for fraud. But Arthur, Jr., did not exercise any undue influence in the procurement of the deed, and he did not breached any fiduciary duty owed to his father, Arthur, Sr. Arthur, Jr. did not even know that his father had signed the deed until years later. His sisters encouraged their father to rescind the deed, after encouraging their father to make other changes in his estate planning favorable to them.

**Elder Law Practice Point:** Capacity is judged by a Notary Public. There is no rescission when a person makes a unilateral mistake about the legal consequences of the deed.

More Articles from Attorney John L. Roberts: [How An Elder Law Attorney Prepares a Will that Protects Your Interests](#)

[Behavior that Justifies a Will Contest](#) [Cases Where Avoiding Probate Caused Costly Problems](#)