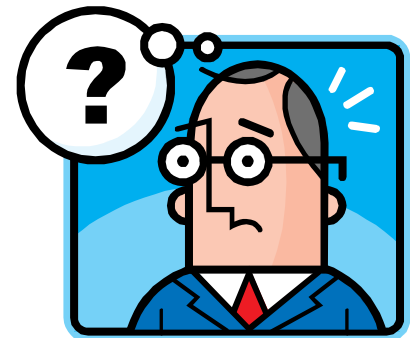


# Levels of Capacity for Executing Legal Documents

# Cognitive Limitations

Dementia: loss of mental ability caused by physical changes in the brain severe enough to interfere with normal activities of daily life.



# Cognitive Limitations (cont.)

- Loss of Memory and one of the following:
- Deterioration of Language
- Impairment of motor activities
- Failure to recognize objects
- Inability to plan or monitor complex behavior
- Can become disoriented, neglect hygiene, become violent and act inappropriately with strangers

# Medical Power of Attorney

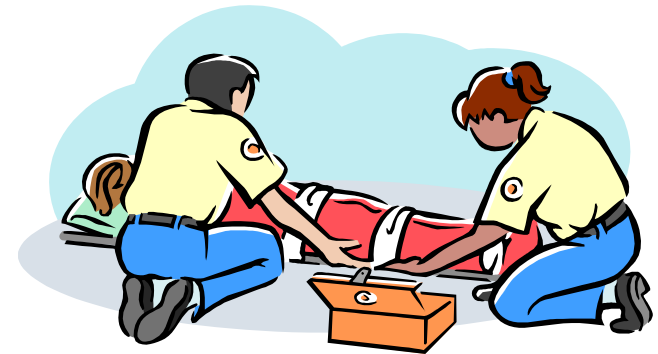
- \*Principal designates agent to make healthcare decisions for him
- \*Usually a springing power effective when a physician certifies the principal incompetent
- \*Can be revoked orally or in writing
- \*Void if principal and agent are married and get a divorce

**Procedures must carefully followed!**



# Directive to Physicians

- Can be oral or in writing
- Can be revoked orally or in writing
- Doctor must be informed to be an effective revocation
- If principal has appointed agent under MPA, agent can execute directive but decision must be what the



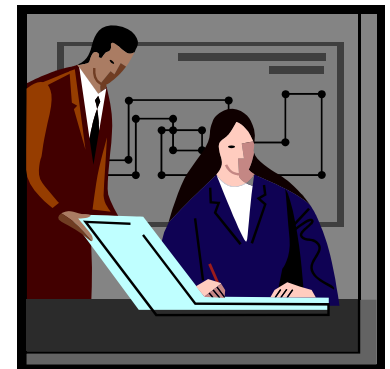
Directive to Physicians

# Capacity Level to Execute MPA and Directive

Capacity to make healthcare decisions is the ability based on reasonable medical judgment to understand and appreciate the nature and consequences of a treatment decision, including the significant benefits and harms of and reasonable alternatives to a proposed treatment decision

Ability to understand the issue or question and the consequences of that decision

**This is Decisional Capacity and is in the middle ground of capacity levels**



- Decisional Capacity

# Statutory Durable Power of Attorney

Agent has the authority to oversee person's income and assets

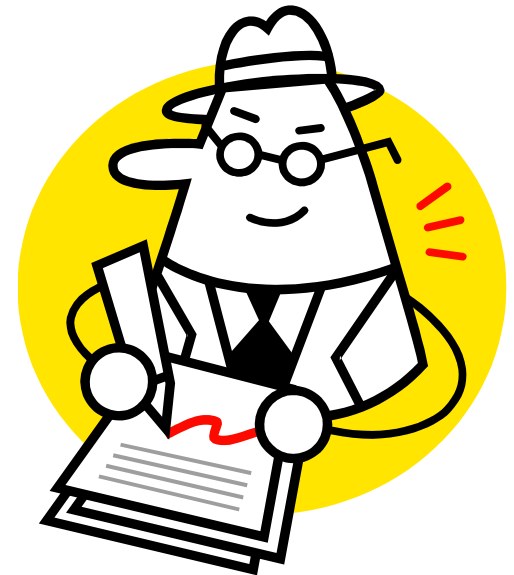
Can be effective immediately or upon incapacity.

Should specify clearly the circumstances when the agent's authority starts

Principal can appoint two agents and all decisions must be made jointly

Dangerous document: potential for abuse

Principal must have capacity to contract.



- Contractual Capacity

# Contractual Capacity

- **Ability of a person to appreciate the effect of what he is doing and understand the nature and consequences of his acts and the business he is transacting.**
- **The capacity is determined at the time the document is executed.**



# Revocable Trusts

- Grantor is usually original trustee but should he become incapacitated, a successor trustee takes over
- Trust should include definition of incapacity and method for determining incapacity
- Capacity requirement found in Sect. 112.007 Texas Property Code

# Revocable Trusts (cont.)

- **Sect. 112.007 Texas Property Code:**
- **Person has the same capacity to create a trust by declaration, intervivos or testamentary transfer or appointment that the person has to transfer, will or appoint free of trust. ????**

# Revocable Trusts (cont.)

- All states generally agree that the capacity to create a trust requires the creator to understand the nature and consequences of the trust document
- Uniform Trust Code: testamentary capacity
- *Dildine* Case: contractual capacity
- Other jurisdictions: contractual capacity

# Contractual Capacity

- Highest Level of Capacity
- Trust is a complex document which includes powers and limitations of the trustee, when the successor trustee will step in, distribution of assets and other legal issues

# Declaration of Appointment of Guardian

- Designate who person would want to be guardian but more important who they do not want to be guardian
- Sect 1104.204 Texas Estates Code- witness attests that declarant appeared to be of sound mind
- Sound mind defined as testamentary capacity

# Testamentary Capacity

- Sufficient mental ability at the time of execution to understand the business in which the testatrix is engaged, the effect of her act in making the will and the general nature and extent of her property.
- The person must be able to identify their heirs and the property they hold
- Determined by looking at evidence to the actual day the will is executed- “a lucid interval”

# The Attorney's Role

- Balance your duty of representation vs. client making an unsound decision due to dementia
- If evidence of financial abuse or self-neglect-attorney client privilege is waived.
- Model Rules-attorney can take some protective action such as seeking appointment of guardian if the lawyer believes the client cannot act in his own interest
- Harris County-let probate courts know and they can appoint GAL's

# Attorney's Role (cont.)

- Scenario: client with dementia brought to your office by third party
- Who is your client?
- Is there undue influence?
- Meet privately with your client and spend extra time to assess the situation



# Summary

- Three levels of capacity: Contractual (the highest); Decisional (middle level) and Testamentary (the lowest)
- Trusts, POA: **Contractual**-appreciate the effect of what he is doing; understand the nature and consequences of his act and the business he is transacting
- MPOA, Directives: **Decisional**-ability to understand the issue and the consequences of that decision

Thank You for Your Attention!

