

## Capacity to Make Decisions

When we talk about guardianships and conservatorships, the word “incapacitated” comes up over and over. Is someone *incapacitated* and in need of a guardian or conservator? A judge must decide that a person is *legally incapacitated* before ordering a guardianship. In video one of this series, we reviewed the legal definition of an “*incapacitated person*” for guardianship purposes. All of this begs other questions: What is capacity? How is it determined? And is there a distinct line between capacity and incapacity? You already know the answer to that last question. Determining capacity is not a one-size-fits-all approach. All of us have different capacities to do different things. Some of us know how to fix cars. Some of us don’t. All of us need help making some decisions. We each have different decision-making abilities, about different things, even at different times of the day. Let’s take Janet as an example.

Janet is a 46-year-old adult with an intellectual disability. She lives at a group home with other adults with disabilities. Janet is able to take care of all of her daily needs, but a house mom helps her cook meals. Janet is not able to drive. But Janet does have a job. She works several hours each weekday doing light assembly. When it comes to her medical care, Janet is able to direct most of her treatment, with varying levels of help from her parents. She always follows the advice of her doctors and nurses. But when it comes to finances, Janet has difficulty understanding financial transactions and is unable to manage her personal finances. She needs someone else to handle money for her.

Janet has the ability to make decisions on many aspects of her life, but needs assistance with other tasks. Does she need a guardian or conservator? It doesn’t sound like it. She is able to communicate her decisions. And, there’s no indication that her decisions are harmful or that she needs protection. The question then becomes: How does Janet get the help she needs?

Something called “supported decision-making” may be part of the answer. With supported decision-making, the individual (Janet in our case) remains at the center of the decision-making process, consulting with a network of trusted supporters. Janet’s supporters help explain the choices to Janet so she understands the options. They help Janet focus her attention, weigh the options, and ultimately decide. Janet’s supporters can also help communicate her choices to others. Let’s explore the supported decision-making concept a little more and think about Janet’s medical care.

To make medical decisions, a person must be able to provide what’s called *informed consent*. Informed consent is the process in which a medical provider educates a patient about the risks, benefits, and alternatives of a given procedure. You may have experienced this process yourself before undergoing a medical procedure. The patient must then make a voluntary decision about whether to undergo the procedure. In Janet’s case, Janet’s parents can help her understand the risks, benefits, and alternatives of a proposed procedure, a minor surgery for example. And with that assistance, Janet may be able to voluntarily consent to the surgery. That’s supported decision-making.

But what happens if Janet, even with help, can’t understand a procedure and provide informed consent? Does she now need a guardianship? Not necessarily. In videos three and four we will

discuss advance planning and powers of attorney. Janet may have the capacity to execute powers of attorney appointing her parents as her agents. She could appoint her dad, for example, as her agent for finances and property. Maybe she decides to appoint her mom as agent for healthcare decisions. If that were the case, Janet's mom could consent to treatment whenever Janet can't provide her own informed consent.

So instead of asking whether someone is incapacitated, let's first talk about a person's capacity *to* make decisions. We should focus on a person's abilities, where they may need help making decisions, and the best ways to provide that assistance. We believe that every person has the right to make choices to the fullest extent of their ability. Guardianship and conservatorship should be a last resort.

In the next few videos, we will talk more about the alternatives to guardianship and conservatorship, and how you can set your own plans in place if you need it.