

# CAPACITY AND THE AGING BRAIN

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## INTRODUCTION

- Summary of Presentation
  - Science of Dementia
    - What is dementia and different types
    - What are its effects
    - What are the challenges for those working with someone with dementia
    - How can you recognize the signs
  - Legal Aspects and Concerns
    - What is capacity to make a donation
    - Why you should be worried about undue influence
    - Tips and best practices for a donor with capacity concerns

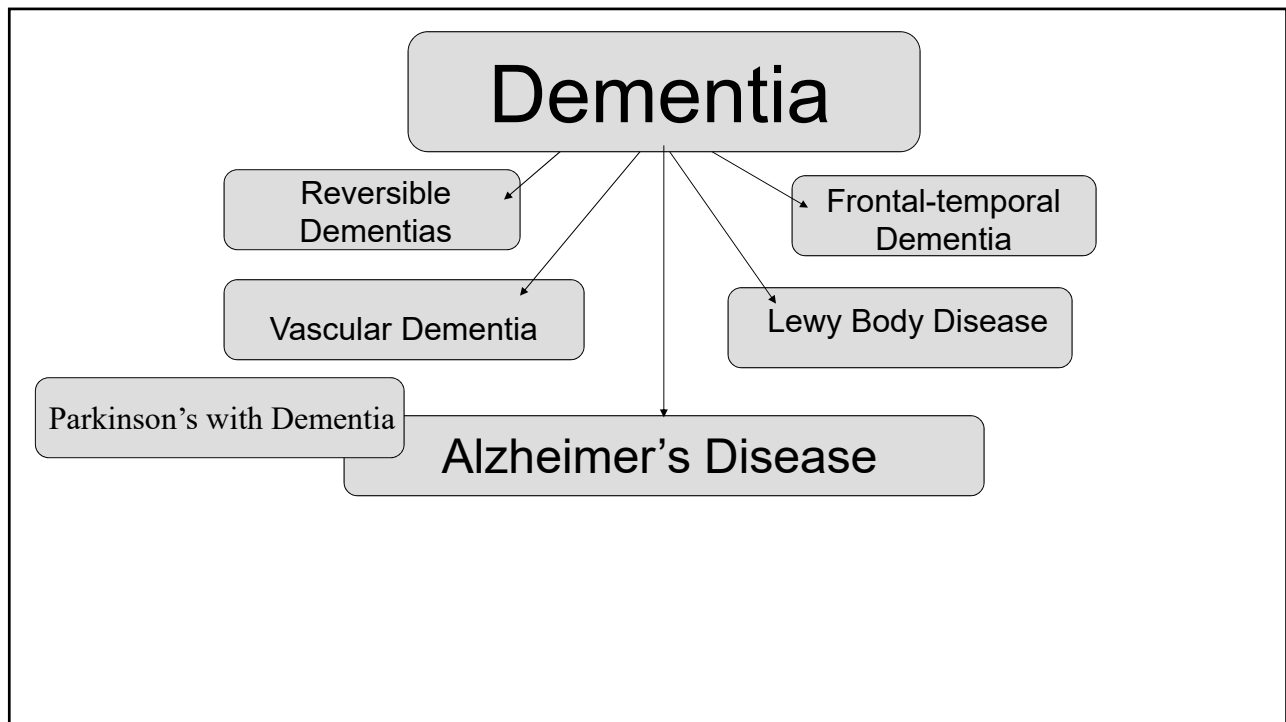
## Current and Projected Prevalence Rates of AD



## Dementia?

**Dementia is a condition of global deterioration of memory and cognition that impairs thought and social functioning.**

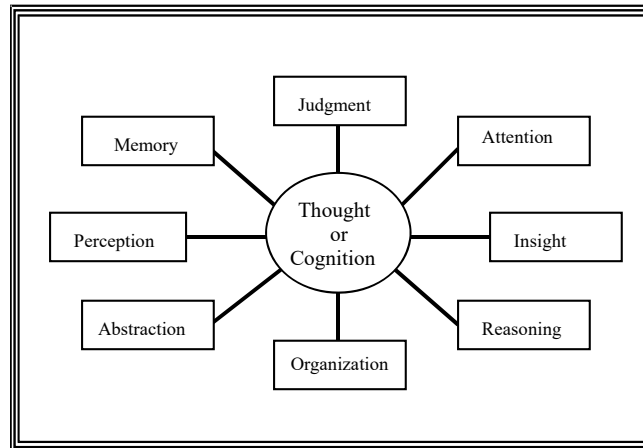




## Five Cognitive Domains Affected by Dementia

- Short Term Memory
- Language
- Executive Function
- Visual/Spacial
- Behavior

## Important Elements of Thought



## Reasoning

### Problems

- breakdown of connection between thoughts, objects, events, and actions
- behavior becomes more random and self-centered

### Caregiving Issues

- can't reason with the person
- can't bargain or negotiate
- person will, increasingly, not think in cause and effect terms

## Insight

### Problems

- inability to determine your strengths and weaknesses
- lack of awareness of lack of awareness
- not concerned about glaring issues

### Caregiving Issues

- they feel that they are fine
- they believe they continue to do things and at the same level of skill (i.e cooking)
- often they are unsafe

## Judgment

### Problems

- increasingly make poor choices
- safety issues
- may lead to hesitancy or impulsivity
- insensitivity to others

### Caregiving Issues

- assume responsibility for safety -- but don't overprotect
- remember: "It's not Personal"

## Abstraction

### Problems

- loss of conventional concepts (time, distance, relationships)
- person increasingly concrete in thought
- inability to think in hypotheticals -- “what ifs”

### Caregiving Issues

- providing directions -- need to be more and more concrete
- can't depend on abstraction to affect behavior
- (no “If” . . . “then” thinking)

## Perception

### Problems

- misperception -- can't interpret
- potential for overload
- suspiciousness and paranoia

### Caregiving Issues

- knowing how much is enough and too much
- distress related to delusions or hallucinations
- monitor environment, including media

## Attention

### Problems

- harder to stay on task
- easier to become distracted

### Caregiving Issues

- choice of suitable task
- attention to environment: remove distractions
- increasing need for monitoring and refocusing

## Organization

### Problems

- less and less able to establish and remember that things are happening for a purpose
- less able to order actions
- less able to use plan to monitor actions
- size and complexity of tasks become problems

### Caregiving Issues

- sizing the task
- providing just the right amount of order – substitution
- providing appropriate direction (support and prompting)

## Techniques to Help Identify Cognitive Deficits

### Look for Change

- Appearance
- Repetitive questions
- Difficulty understanding complex transactions
- Difficulty organizing (i.e. paperwork)
- Losing lots of things (i.e. important papers, wallet, glasses, car)
- Easily distracted
- Apathy or lack of concern regarding important issues
- Anxious, irritable or paranoid
- Companion seems to be “protecting” them or they look to companion for answers to basic questions
- Deflection instead of straight answers

## Capacity to Make Donative Transfers

- Mental competency is presumed
  - Probate Code § 810(a); *Lintz v. Lintz* (2014) 222 Cal.App.4th 1346, 1351; *Andersen v. Hunt* (2011) 196 Cal.App.4th 722, 730; *Estate of Mann* (1986) 184 Cal.App.3d 593, 602
  - “A person challenging the validity of a trust instrument on the grounds that the trustor lacked capacity to execute the document or did so under the undue influence of another carries the heavy burden of proving such allegations.” *Doolittle v. Exchange Bank* (2015) 241 Cal.App.4th 529, 545
- Standards to defeat the presumption: It depends...
- Difference between capacity to make a will versus a trust or a contract
  - Either may apply to a donative transfer



## Capacity to Make Donative Transfers (cont)

- Testamentary Capacity – Probate Code § 6100.5
  - Understand the nature of the act
    - *i.e.* that donor is making a gift now or in the future
  - Understand and recollect the nature and situation of his/her property/assets
    - *i.e.* the nature of one's bounty
  - Understand and recollect his/her relationships to living descendants whose interests may be affected by the gift
    - *i.e.* the natural object of one's bounty

## Capacity to Make Donative Transfers (cont)

- Contractual Capacity – Probate Code §§ 810-812
  - A deficit in mental function must correlate to the decision or act in question
  - Probate Code § 811(a) – Determination of Lack of Capacity includes:
    - Evidence of deficit in one or more mental functions, and
      - Alertness and attention, information processing, thought processes
    - Evidence of a correlation between the deficit(s) and the decision or act in question

## Capacity to Make Donative Transfers (cont)

- Trend to apply factors in Probate Code §§ 810-812 regardless of whether it is a will or a trust
- Consider a very simple donation if you suspect waning capacity
  - No CRUTs, CRATs CLUTs or CLATs etc.

## Undue Influence Concerns

- What is undue influence
  - Recently codified as “excessive persuasion that causes another person to act or refrain from acting by overcoming that person’s free will and results in inequity.” Probate Code § 86; Welfare & Institutions Code § 15610.70
  - Common law definition: “pressure brought to bear directly on the testamentary act, sufficient to overcome the testator’s free will, amounting in effect to coercion destroying the testator’s free agency.” *Rice v. Clark* (2002) 28 Cal.4th 89, 96.

## Undue Influence Concerns (cont)

- Statutory presumption of undue influence - Probate Code § 21380
- Exceptions – Probate Code § 21382
  - Blood relative, cohabitant, and others
  - “A donative transfer to a federal, state or local public entity, an entity that qualifies for an exemption from taxation under Section 501(c)(3) or 501(c)(19) of the Internal Revenue Code, or a trust holding the transferred property for the entity” is exempt from the statutory presumption of undue influence. Probate Code § 21382(d).

## Undue Influence Concerns (cont)

- Devise to interested witness presumption
  - Evidence Code § 606 places the burden on the “interested witness” to dispel the existence of duress, fraud or undue influence.
- Common law presumption
  - Where the donee is in a confidential relationship with the testator and actively participates in procuring execution of the document and unduly profits from the gift, a presumption of undue influence arises. *Bernard v. Foley* (2006) 39 Cal.4th 794, 800; *Estate of Graves* (1927) 202 Cal. 258, 262-263; *David v. Hermann* (2005) 129 Cal.App.4th 672, 684.
- Presumption overcome by clear and convincing evidence
  - *Rice v. Clark* (2002) 28 Cal.4th 89, 98; *Estate of Baker* (1982) 131 Cal.App.3d 471, 480; *Estate of Mann* (1986) 184 Cal.App.3d 593, 606-614.

## Undue Influence Concerns (cont)

- Factors to prove undue influence (Welf. & Inst. Code, § 15610.70)
  - Victim's vulnerability
  - Influencer's authority
  - Influencer's actions/tactics
  - Equity of result
- Operative common law factors
  - Existence of a confidential relationship
  - A propensity on the donor's part to have his/her free will usurped by the influencer
  - The execution of a document "unduly benefiting" the donee

## Best Practices & Tips

- If gift is part of integrated plan, do not be a witness to the execution of the plan
- Do not locate the estate planner for the donor
- High level of contact is a double edged sword
- Take notes and draft a memo documenting contacts with donor and their stated intentions
- Inquire into why the donor wants to make this gift to your organization
- Be wary of relying on a power of attorney
- Suggest a very simple donation format

QUESTIONS?