

Clinical vs. Legal Capacity The Assessment Process in Guardianship And the Role of the Examining Committee

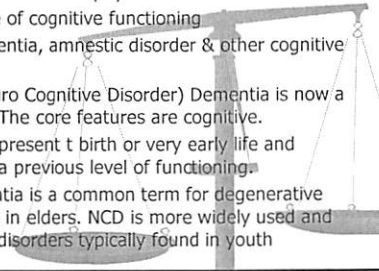
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What is Dementia

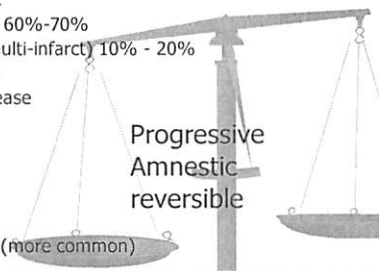
- Dementia is not an illness – it is a group of symptoms that may accompany a variety of diseases or physical conditions
- It is a global disturbance of cognitive functioning
- DSM IV – Delirium, dementia, amnesic disorder & other cognitive disorders
- 2013 DSM 5 – NCD (Neuro Cognitive Disorder) Dementia is now a sub-category of NCD's. The core features are cognitive.
- "Impaired cognition not present t birth or very early life and represents decline from a previous level of functioning"
- DSM 5 notes that dementia is a common term for degenerative dementia typically found in elders. NCD is more widely used and encompasses TBI's and disorders typically found in youth



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Common Dementia Causing Diseases and Conditions

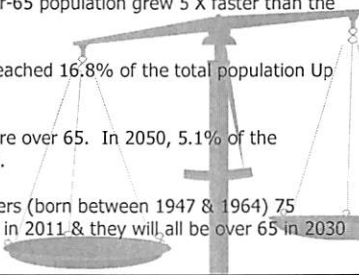
- 70+ diseases and conditions result in varying degrees of mental impairment
 - Alzheimer's disease - 60%-70%
 - Vascular dementia (multi-infarct) 10% - 20%
 - Huntington's disease
 - Creutzfeldt-Jakob disease
 - Parkinson's disease
 - Depression
 - Anxiety disorders
 - TBI
 - Delusional Disorder
 - Lewy Body Dementia (more common)



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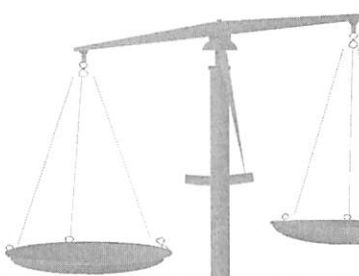
2020 Census

- 1920 - 2020 U.S. the over-65 population grew 5 X faster than the total population.
- The Over 65 population reached 16.8% of the total population Up from 13% in 2010.
- In 2020, 1 in 6 people were over 65. In 2050, 5.1% of the population will be over 85.
- Driven by the baby boomers (born between 1947 & 1964) 75 Million started to retire in 2011 & they will all be over 65 in 2030



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OK So What about Capacity ?



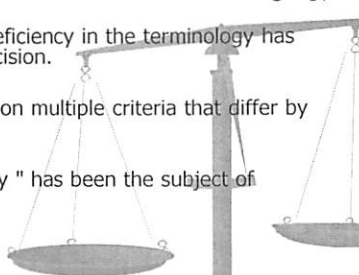
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ABA Commission on Legal Problems of the Elderly (Now Commission on Law and Aging)

The most serious deficiency in the terminology has been its lack of precision.

Incapacity is based on multiple criteria that differ by state.

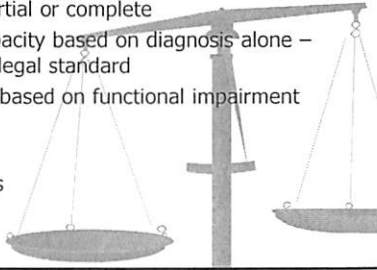
The term "incapacity " has been the subject of much debate



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ABA Suggest's Five Elements

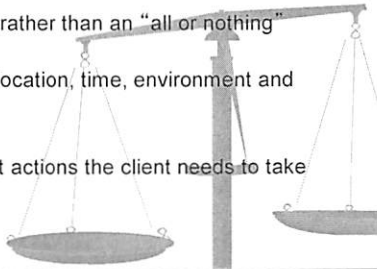
- Incapacity may be partial or complete
- Do not measure incapacity based on diagnosis alone – Relate diagnosis to a legal standard
- Determine incapacity based on functional impairment over time
- Evaluate risk of harm
- Use finding, not labels



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The Nature of Incapacity

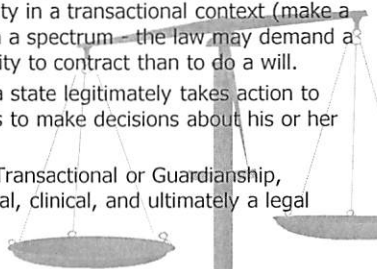
- Fluid or incremental rather than an “all or nothing” condition
- May depend on the location, time, environment and other factors
- May be transient
- May depend on what actions the client needs to take



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Two Views of Legal Capacity

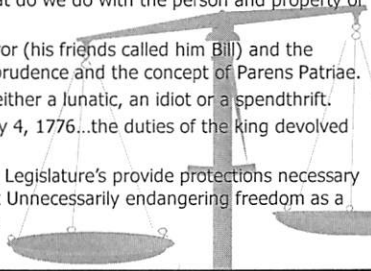
- **Transactional** – When the law establishes specific standards to determine legal capacity in a transactional context (make a will, contract, etc.) Its on a spectrum – the law may demand a higher standard of capacity to contract than to do a will.
- **Guardianship** – When a state legitimately takes action to limit an individual's rights to make decisions about his or her own person or property.
- **Conclusion** – Whether Transactional or Guardianship, incapacity is a professional, clinical, and ultimately a legal judgment



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A Look at Capacity in the Guardianship Context (From the 9th Century to the 21st Century)

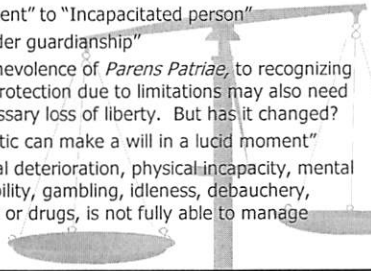
- The Basic question was what do we do with the person and property of incapacitated persons
- 1066 – William the Conqueror (his friends called him Bill) and the beginnings of modern jurisprudence and the concept of *Parens Patriae*.
- At Common Law you were either a lunatic, an idiot or a spendthrift.
- English Common Law to July 4, 1776...the duties of the king devolved on the State Legislature's.
- Primary challenge - How do Legislature's provide protections necessary for a ward's welfare without Unnecessarily endangering freedom as a result of the zeal to protect.



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Legislative Trends

- History of guardianship law in the U.S. reveals that benevolent intent has often been borne by the wards and paid for with their freedom.
- From "lunatic" to "incompetent" to "Incapacitated person"
- From "ward" to "person under guardianship"
- Shift in philosophy from benevolence of *Parens Patriae*, to recognizing that individuals who need protection due to limitations may also need protection from the unnecessary loss of liberty. But has it changed?
- Florida 1961 – "Even a lunatic can make a will in a lucid moment"
- Illinois - "Because of mental deterioration, physical incapacity, mental illness, developmental disability, gambling, idleness, debauchery, excessive use of intoxicants or drugs, is not fully able to manage person or estate".

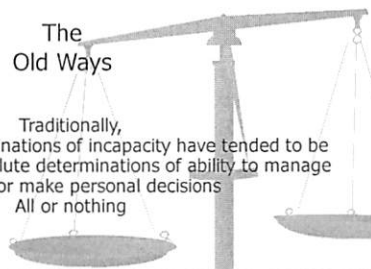


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Capacity in the Guardianship Context How Has It Evolved Since 1776

The Old Ways

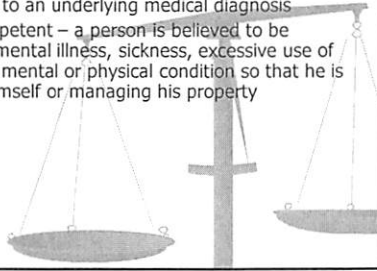
Traditionally,
guardianship determinations of incapacity have tended to be
routinely global – absolute determinations of ability to manage
property or make personal decisions
All or nothing



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THE OLD MODEL

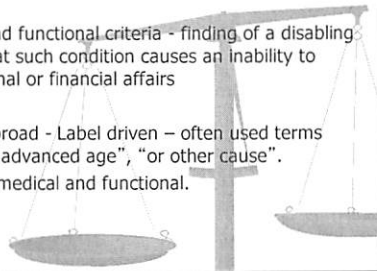
- Legal incapacity was tied to an underlying medical diagnosis
- (Florida Pre-1989) Incompetent – a person is believed to be incompetent because of mental illness, sickness, excessive use of alcohol or drugs or other mental or physical condition so that he is incapable of caring for himself or managing his property



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1960's paradigm

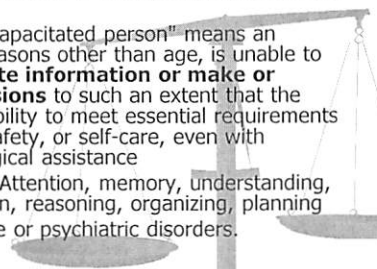
- Combination of medical and functional criteria - finding of a disabling condition and a finding that such condition causes an inability to adequately manage personal or financial affairs
- Based on diagnosis
- Medical criteria was very broad - Label driven – often used terms such as "physical illness", "advanced age", "or other cause".
- Two-pronged approach – medical and functional.



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Latest Trend - Cognitive functioning

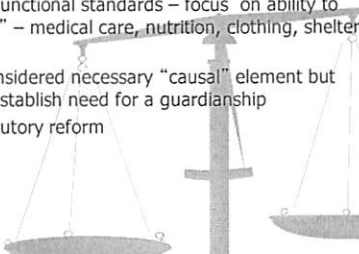
- "Supplement or replace one or both prongs of traditional test.
- 1997 – UGPPA - "Incapacitated person" means an individual who, for reasons other than age, is unable to **receive and evaluate information or make or communicate decisions** to such an extent that the individual lacks the ability to meet essential requirements for physical health, safety, or self-care, even with appropriate technological assistance
- Common Problems – Attention, memory, understanding, expressing information, reasoning, organizing, planning
- Caused by – Cognitive or psychiatric disorders.



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1990's

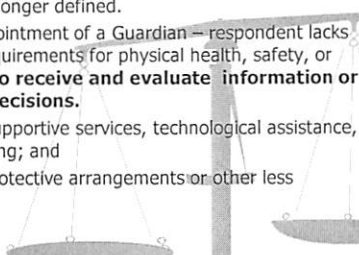
- Move toward more specific functional standards – focus on ability to provide for “essential needs” – medical care, nutrition, clothing, shelter, safety.
- Mental condition may be considered necessary “causal” element but not a sufficient element to establish need for a guardianship
- Florida Example – 1989 Statutory reform



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UGCOPA 2017

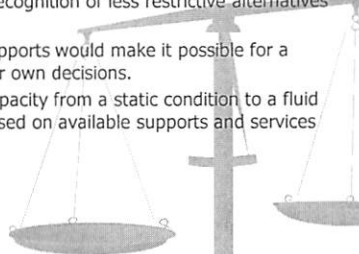
- Incapacitated Person is no longer defined.
- Section 301 - Basis for appointment of a Guardian – respondent lacks ability to meet essential requirements for physical health, safety, or self care because **unable to receive and evaluate information or make or communicate decisions.**
- Even with appropriate or supportive services, technological assistance, or supported decision making; and
- Needs cannot be met by protective arrangements or other less restrictive alternatives.



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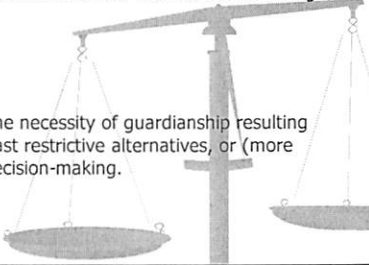
Reflects a Shift in legal and Cultural Approaches to Capacity

- In addition to statutory recognition of less restrictive alternatives to guardianship
- Consideration of what supports would make it possible for a person to make his or her own decisions.
- Shifts the approach to capacity from a static condition to a fluid state that can change based on available supports and services



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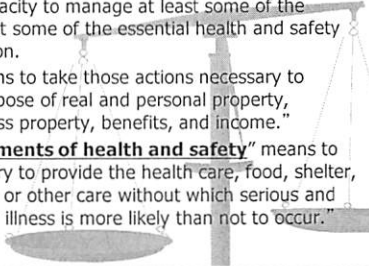
Conclusion



- All state Guardianship statutes have one or more of the following components:
 - A disabling condition
 - Cognitive functioning
 - Behavioral functioning
- In addition, they address the necessity of guardianship resulting from the risk of harm or least restrictive alternatives, or (more recently) with supported decision-making.

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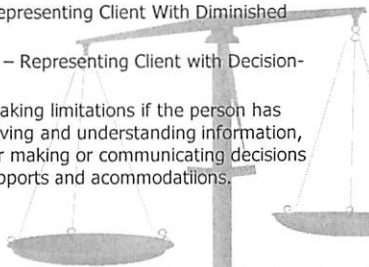
Florida - 744.102(10) Incapacitated person



- **"incapacitated person"** means a person who has been judicially determined to lack the capacity to manage at least some of the property or to meet at least some of the essential health and safety requirements of such person.
- **"Manage property"** means to take those actions necessary to obtain, administer, and dispose of real and personal property, intangible property, business property, benefits, and income."
- **"Meet essential requirements of health and safety"** means to take those actions necessary to provide the health care, food, shelter, clothing, personal hygiene, or other care without which serious and imminent physical injury or illness is more likely than not to occur."

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The Latest



- ABA Model Rule 1.14 – Representing Client With Diminished Capacity
- Discussion Draft Revision – Representing Client with Decision-Making Limitations
- "A person has decision-making limitations if the person has substantial difficulty receiving and understanding information, evaluating information, or making or communicating decisions even with appropriate supports and accommodations.

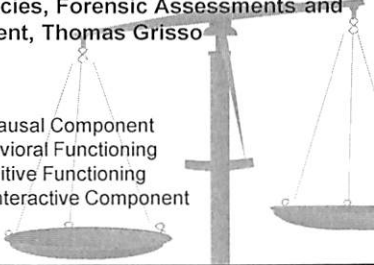
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Let's Look at Clinical Capacity

Evaluating Competencies, Forensic Assessments and Instrument, Thomas Grisso

Key Elements


1. Assessment of the causal Component
2. Assessment of Behavioral Functioning
3. Assessment of Cognitive Functioning
4. Assessment of the Interactive Component



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Who does the Assessment

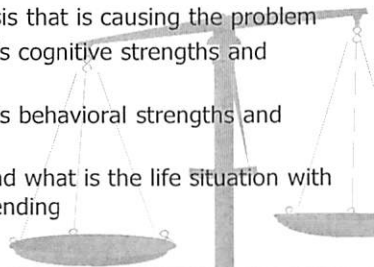
Psychiatrist
Psychologist
Neuropsychologist
Physician
Other Mental Health
Professional
(Nurse, NP, LCSW, Etc.)



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Clinician's Address 4 Questions

- What is the diagnosis that is causing the problem
- What are the client's cognitive strengths and weaknesses
- What are the client's behavioral strengths and weaknesses
- Who is the client and what is the life situation with which the are contending



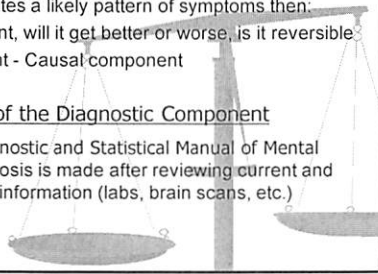
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Diagnostic Component

- What causes the incapacity – Alzheimer's, Stroke, TBI, PTSD, Anxiety
- When established, it indicates a likely pattern of symptoms then:
- Is it temporary or permanent, will it get better or worse, is it reversible?
- Equivalent legal component - Causal component

Assessment of the Diagnostic Component

Likely found in DSM 5 (Diagnostic and Statistical Manual of Mental Disorder). Psychiatric diagnosis is made after reviewing current and past problems and medical information (labs, brain scans, etc.)



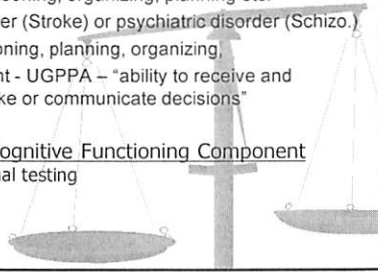
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Cognitive Functioning Component

- Common cognitive problems – attention, memory, understanding or expressing information, reasoning, organizing, planning etc.
- Caused by cognitive disorder (Stroke) or psychiatric disorder (Schizo.)
- Examples – memory, reasoning, planning, organizing,
- Equivalent legal Component - UGPPA – "ability to receive and evaluate information or make or communicate decisions"

Assessing the Cognitive Functioning Component

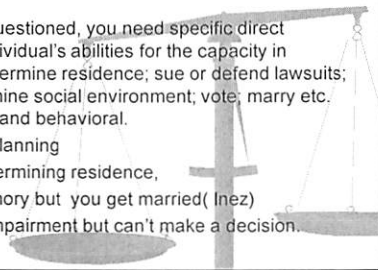
Clinical Interviews and formal testing



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Behavioral Functioning Component

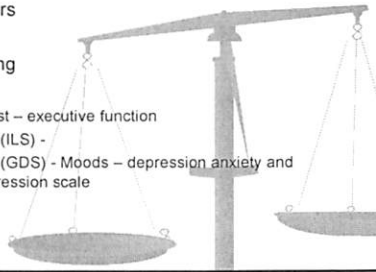
- Many traditional clinical assessments end after diagnosis and cognitive assessment
- When legal capacity is questioned, you need specific direct information about the individual's abilities for the capacity in question e.g. Florida, determine residence; sue or defend lawsuits; manage property; determine social environment; vote; marry etc. You need both cognitive and behavioral.
- Cognitive – organizing, planning
- Behavioral – Travel, Determining residence,
- Impaired short-term memory but you get married(Inez)
- No apparent Cognitive impairment but can't make a decision. (Gail)



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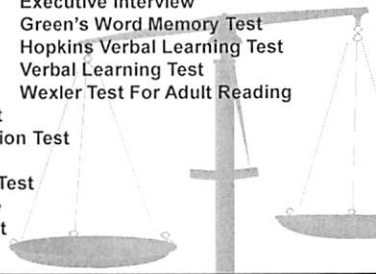
Assessment of Functional Behavior

- Reports of family members
- Direct observation
- Performance based testing
- Functional instruments
 - Wisconsin Card Sorting test – executive function
 - Independent Living Scales (ILS) -
 - Geriatric Depression scale (GDS) - Moods – depression anxiety and psychoses – Geriatric Depression scale



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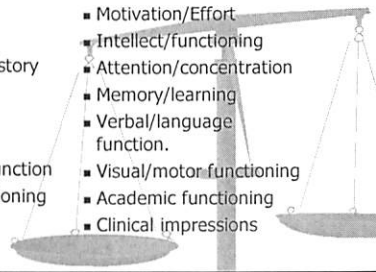
- | | |
|----------------------------------|-------------------------------|
| Animal Naming Test | Beck Anxiety Inventory |
| Boston Naming Test | Beck Depression Inventory |
| Clock Drawing Test | Executive Interview |
| Finger Tapping | Green's Word Memory Test |
| Grooved Peg Board Test | Hopkins Verbal Learning Test |
| Stroop Color Word Test | Verbal Learning Test |
| Trail Making Test | Wexler Test For Adult Reading |
| Rey Complex Figure Test | |
| Visual Search and Attention Test | |
| Wechsler Memory Scale | |
| Wisconsin Card Sorting Test | |
| Wechsler Adult Int. Scale | |
| Wide Range Achievement | |



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Sample Neuropsychological Report

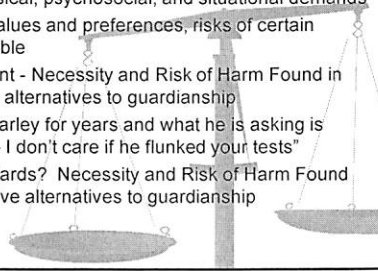
- | | |
|---------------------------|-----------------------------|
| ■ Referral | ■ Tests Administered |
| ■ Background | ■ Motivation/Effort |
| ■ Medical History | ■ Intellect/functioning |
| ■ Psychological History | ■ Attention/concentration |
| ■ Symptoms | ■ Memory/learning |
| ■ Behavioral Observations | ■ Verbal/language function. |
| ■ Visual Spatial Function | ■ Visual/motor functioning |
| ■ Executive Functioning | ■ Academic functioning |
| ■ Competency | ■ Clinical impressions |
| ■ Diagnosis | |



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Interactive Component

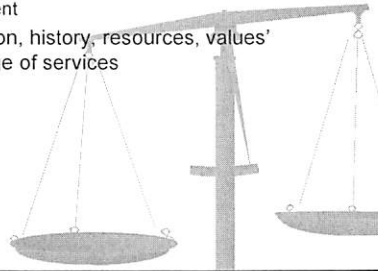
- Accounts for personal, physical, psychosocial, and situational demands
- Incorporates the persons values and preferences, risks of certain situations, resources available
- Equivalent Legal Component - Necessity and Risk of Harm Found in concepts of least restrictive alternatives to guardianship
- "I have known my client Charley for years and what he is asking is consistent with his values – I don't care if he flunked your tests"
- Relation to the Legal Standards? Necessity and Risk of Harm Found in concepts of least restrictive alternatives to guardianship
- The shed lady



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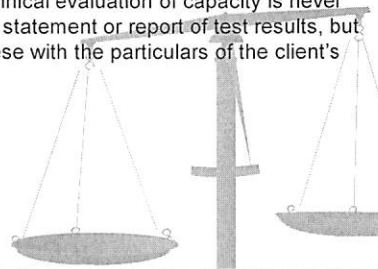
Assessment of Interactive Component

- Direct questioning of Client
- Determine their situation, history, resources, values' preferences, knowledge of services

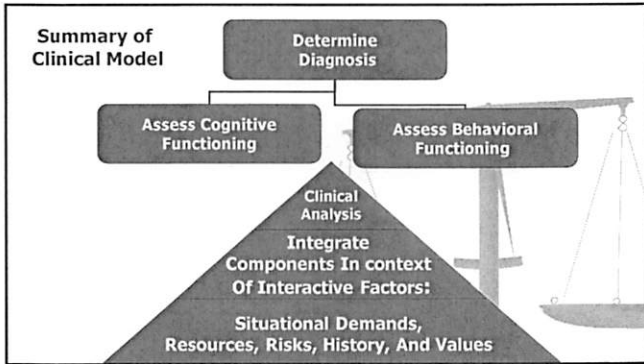


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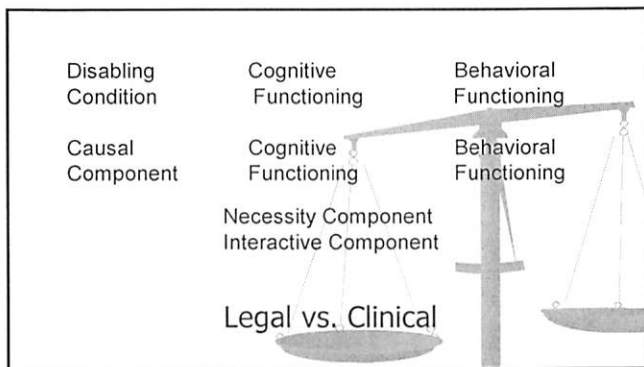
The outcome of a clinical evaluation of capacity is never merely a diagnostic statement or report of test results, but an integration of these with the particulars of the client's life situation



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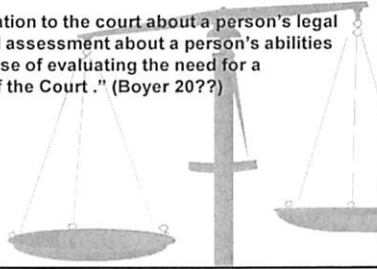
Distinction between clinical model and Legal

- Why is the distinction important?
- "The distinction is emphasized because some clinicians may confuse clinical and legal uses of the term competence and thus intervene without legal authority" ... "one useful approach to avoiding such confusion is to be quite specific in language use: for example, to refer to one's clinical evaluation as a clinical assessment of abilities and capacities for the purposes of evaluating the need for guardianship" (Moye)

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The Clinician's Job

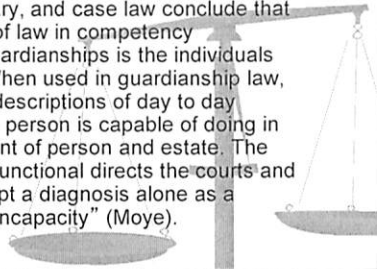
"Not to make a recommendation to the court about a person's legal Capacity, but to do a clinical assessment about a person's abilities and capacities for the purpose of evaluating the need for a guardianship which is job of the Court ." (Boyer 20???)



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From Legal Standard to Forensic Assessment

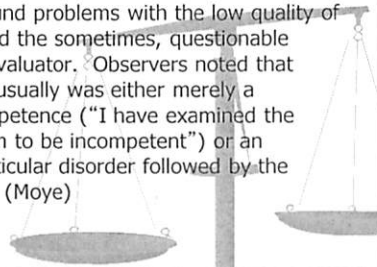
- "Statutes, commentary, and case law conclude that the central question of law in competency determinations for guardianships is the individuals functional abilities. When used in guardianship law, "functional refers to descriptions of day to day capacities – what the person is capable of doing in everyday management of person and estate. The strong emphasis on functional directs the courts and clinicians not to accept a diagnosis alone as a justification for legal incapacity" (Moye).



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What Does Research Say About Guardianship Capacity Assessments

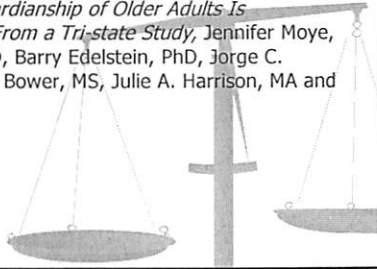
- "Pre 1980 reviews found problems with the low quality of clinical evaluations and the sometimes, questionable qualifications of the evaluator. Observers noted that examiners testimony usually was either merely a conclusion about competence ("I have examined the individual and find him to be incompetent") or an identification of a particular disorder followed by the conclusory comment" (Moye)



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Research

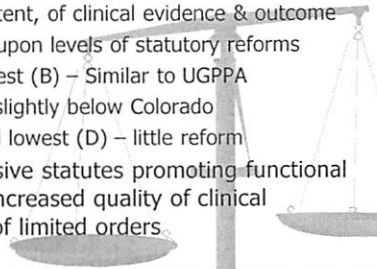
- *Clinical Evidence in Guardianship of Older Adults Is Inadequate: Findings From a Tri-state Study*, Jennifer Moye, PhD, Stacey Wood, PhD, Barry Edelstein, PhD, Jorge C. Armesto, PhD, Emily H. Bower, MS, Julie A. Harrison, MA and Erica Wood



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The Results

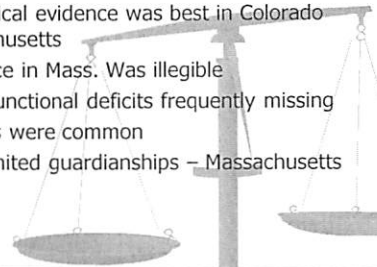
- 298 cases from PA, MA, CO
- Analyze quality & content, of clinical evidence & outcome
- Statutes rated based upon levels of statutory reforms
 - Colorado rated highest (B) – Similar to UGPPA
 - Pennsylvania rated slightly below Colorado
 - Massachusetts rated lowest (D) – little reform
- States with progressive statutes promoting functional assessments have increased quality of clinical testimony and use of limited orders



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Findings

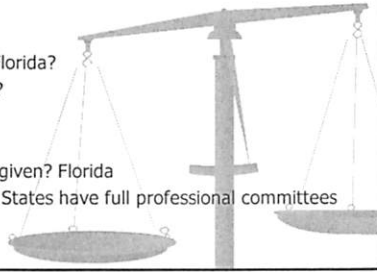
- Quality of written clinical evidence was best in Colorado and worst on Massachusetts
- 2/3 of written evidence in Mass. Was illegible
- Evidence of specific functional deficits frequently missing
- Conclusory comments were common
- Colorado had 34% limited guardianships – Massachusetts had 1



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What to Look for in the Examination Process

- Who examines? Florida?
- How selected? Florida?
- How results presented? Florida?
 - Written report? Florida?
 - Testimony ? Florida
 - Verified affidavit
- What evidentiary weight given? Florida
- Wide State diversity Few States have full professional committees



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Weaknesses Of The Examination Process

- No professional examination
- No examination
- Lack of focus on functional abilities
- Over reliance on instruments like the MMSE MoCA
- Useful but not a diagnostic instrument
- Time constraints
- Low compensation



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Examination Process in Florida



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Florida - 744.102(10) Incapacitated person

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- **"Meet essential requirements of health and safety"** means to take those actions necessary to provide the health care, food, shelter, clothing, personal hygiene, or other care without which serious and imminent physical injury or illness is more likely than not to occur."

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Role of The Examining Committee

- In incapacity proceedings in Florida an examining committee's primary function is to give its opinion on the alleged incapacitated person's ability to perform a variety of functions in twelve areas including as an example, voting, determining residency, traveling, managing property, and consenting to medical treatment

Rights of Persons Determined
to be Incapacitated F.S. 744.3215

Rights that can never be removed
Rights that can be removed and not delegated
Rights that can be removed and delegated

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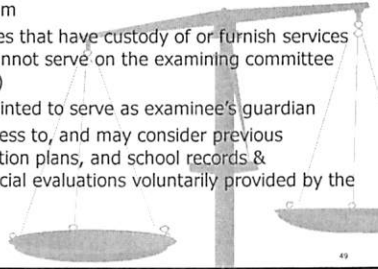
The Examining Committee

- Three members appointed when petitions filed
 - Psychiatrist or other physician
 - Remaining members must be a psychologist, gerontologist, RN, Nurse Practitioner, licensed social worker, other physician, *or other professional with relevant expertise*
- Must attempt to consult with the AIP's attending physician
- Cannot be related to or associated with counsel for the petitioner or guardian
- The AIP's attending physician cannot serve on the examining unless good cause is shown

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The Examining Committee

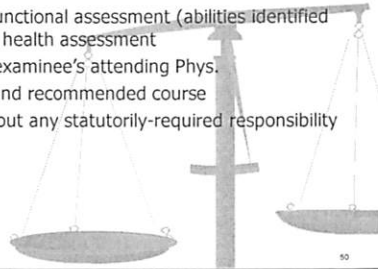
- Must be able to communicate in the language the AIP speaks, using an understandable medium
- Employees of any agencies that have custody of or furnish services or subsidies to the AIP cannot serve on the examining committee (e.g., nursing home staff)
- Members cannot be appointed to serve as examinee's guardian
- Members are to have access to, and may consider previous examinations, and habitation plans, and school records & Psychological & Psychosocial evaluations voluntarily provided by the AIP



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Examination/Report Components/Logistics

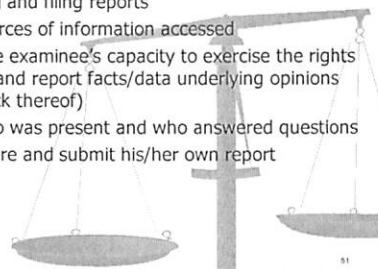
- Physical examination, functional assessment (abilities identified in petition, and mental health assessment)
- Make effort to contact examinee's attending Phys.
- Diagnoses, prognoses and recommended course
- Explain failure to carry out any statutorily-required responsibility



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Examination/Report Components/Logistics

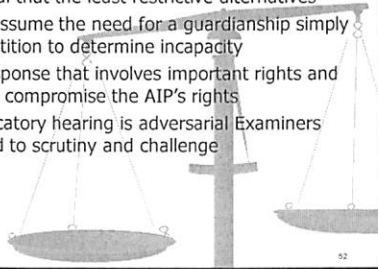
- Time limits for completing and filing reports
- Reports must identify sources of information accessed
- Reports must describe the examinee's capacity to exercise the rights identified in the petition, and report facts/data underlying opinions about any capacity (or lack thereof)
- Reports must identify who was present and who answered questions
- Each member must prepare and submit his/her own report



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Best Practices – Not Statutory

- Recognize legislature's goal that the least restrictive alternatives
- Presume capacity, & not assume the need for a guardianship simply based on the filing of a petition to determine incapacity
- Guardianship is a legal response that involves important rights and act in a way that does not compromise the AIP's rights
- Recognize that the adjudicatory hearing is adversarial Examiners opinions may be subjected to scrutiny and challenge



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