Introduction

Background

- Guardianships for older adults are increasing.
- Guardianship law and practice is undergoing dramatic revision.
- Definitions of capacity have evolved to reflect modern understandings of brain dysfunction, functional abilities, and the law:
  - Capacity is task specific, not global.
  - Capacity can fluctuate.
  - Capacity is situational.
  - Capacity is contextual.
- Determining capacity in older adults with complex impairments can be difficult.
- Limited guardianships based on partial loss of capacity can be challenging to craft.

Goals of This Book

- To provide practical tools for capacity determination.
- To address the needs of a wide audience of judges.
- To improve communication between judges and healthcare professionals.
- To provide resources useful in identifying less restrictive alternatives and fashioning limited guardianship, while recognizing that plenary guardianship often may be appropriate.
- To call attention to temporary and reversible causes of impairment in older adults.
- To assist courts in enhancing the capacity of older adults.

Use of This Book

- Forms and resources referenced herein are available online to download for ready use and modification at http://www.abanet.org/aging; http://www.apa.org/pi/aging; and http://www.ncpj.org. The symbol “□” indicates that additional information can be found in the online version of the book.
- Forms and resources may be reproduced for use in guardianship proceedings (for other uses, refer to copyright page).
- Although the forms are generally relevant, each form will need to be modified to suit local practices. Judges are encouraged to freely adapt forms to jurisdictional needs and laws.
- This book is generally consistent with the Uniform Guardianship and Protective Proceedings Act or UGPPA.
## The Role of Judges in Capacity Determinations

### Judges Balance Multiple Goals

- Decide capacity in a manner that balances well-being and rights.
- Promote self-determination.
- Identify less restrictive alternatives to guardianship.
- Provide guidance to guardians.
- Make determinations of restoration.
- Craft limited guardianship when appropriate.

### What Is Limited Guardianship?

- A limited guardianship is a relationship in which the guardian “is assigned only those duties and powers that the individual is incapable of exercising.”

- The concept of limited guardianship is promoted in the UGPPA and the *National Probate Court Standards*, which directs probate judges to “detail the duties and powers of the guardian, including limitations to the duties and powers, and the rights retained by the individual.”

- In some cases, such as coma or advanced dementia, individuals are totally impaired by their medical condition. In other cases, a fine tuned assessment may help to identify specific areas—even if relatively small in scope—in which the individual may retain rights.

- Examples of limitations to guardianship include rights retained by an individual to:
  - Determine living arrangements.
  - Spend small amounts of money.
  - Make and communicate choices about roommates.
  - Initiate and follow a schedule of daily and leisure activities.
  - Establish and maintain personal relationships with friends and relatives.
  - Determine degree of participation in religious activities.

### Benefits of Limited Guardianship

- Maximizes the autonomy of the person with diminished capacity.
- Is directly responsive to the concept of the least restrictive alternative.
- Supports an individual’s mental health.
- Encourages the guardian to take into account the wishes of the individual, moving the relationship more toward collaboration and compromise.

### Risks of Limited Guardianship

- In some cases, the elder is at risk for or has been subject to abuse, and the use of limited guardianship could keep the elder at some degree of continuing risk. In these cases, plenary guardianship may be the appropriate protective mechanism.