Competency: Reforming Our Legal Fictions

Charles P. Sabatino, JD
Suzanna L. Basinger

Commission on Legal Problems of the Elderly
American Bar Association
Washington, DC

In Western jurisprudence, the concept of competency is a legal presumption. It rests upon the assumption that each of us, at adulthood, is best able to decide what is in our best interest, and that we ought to be left alone to pursue our own choices (Meisel, 1989).

Incompetency, or incapacity, is a term that defines, or attempts to define, when a state may take actions to shatter this assumption and limit the individual's right to make decisions about his or her person or property based on disability (Parry, 1985, p. 370). In truth, incompetency is a legal fiction. This means that it is a construct treated as a fact, whether or not is it really so, because it is recognized as having utility. Here, we are referring to legal incompetency, or more accurately, legal incapacity, and not clinical or de facto incompetency.

There is great confusion in both legal and clinical practice over terminology with respect to mental capacity (Meisel, 1989). In this article, we will use the terms “incompetency” and “incapacity” interchangeably, although “incapacity” is the preferred term, increasingly used in both case law and legislation. It avoids the “all or nothing” connotation of “incompetency” as well as other historical baggage of the term.

The analysis below traces certain core themes in the statutory evolution of incapacity in the context of guardianship proceedings. The term “guardianship” is used here to refer to the judicial process for appointing a manager or decision maker over the personal and/or financial affairs of an incapacitated person, regardless of the particular term or terms used in any specific jurisdiction. An aim of this analysis is to bring into focus the historical, value-driven subjectivity of the law, even as contemporary statutes have attempted to refine criteria for determining capacity to more scientifically justifiable standards. The conclusion proffered at the end of this review suggests that, no matter how articulate, detailed, or comprehensive the draft legislative definitions or substantive standards, incapacity determinations for all but the clearest cases will depend on a malleable weighing process—that is, the judicial task ultimately is to weigh medical variables, social variables, and a constellation of very practical variables, relating to the need for state intervention in a unique human situation.
Judicial discretion will not easily be contained by more elaborate statutory definitions of incapacity. Instead, because the determination unavoidably remains a weighing of multiple variables, the more vital protector of individual rights in the context of guardianship is the procedural component—what we call due process. We can and must require that determinations of incapacity in judicial proceedings be premised on a thorough fleshing out of all perspectives, especially the perspective of the putative ward, and the interplay of these perspectives. This article does not address the nature or utility of particular assessment instruments or theories. Kapp (1990, pp. 15-24) and others such as Anderer (1990), Grisso (1986), Nolan (1984, pp. 210-218), and Silberfeld and Fish (1994, pp. 53-74) accomplish that task. The goal here is to shine a clear light on the legal basis of state intervention and its search for objectivity.

INCAPACITY AS LEGAL FICTION

First, let us consider the nature of the legal concept of incapacity. The title of this article refers to it as a legal fiction. Labeling the concept a legal fiction does not mean that the concept lacks reality, legitimacy or consequence. To the contrary, legal fictions exist to meet sometimes very powerful social needs and values, and such fictions can have far-reaching consequences. One of the most notorious and consequential legal fictions was incorporated into our country’s Constitution. The concept of slaves as chattels was a legal fiction with painfully real consequences until the passage of the 13th Amendment. Another largely moribund legal fiction proclaimed husband and wife to be one, a fiction that effectively restrained the independent status of women, especially with respect to property matters, for generations.

Lon Fuller’s treatise on legal fictions describes several functions of legal fictions, noting their pervasive use in the law, often as a way to reconcile a specific legal result with some premise or postulate (1967, p. 51). He delineates the ways in which fictions serve the process of legal evolution by introducing new law in the guise of the old, so that change will be less threatening to the stability of the law, and thus more readily accepted. Legal concepts such as delivery and possession of property, fraud, and trusts have undergone extensive expansion in meaning through the use of fictions embracing the notions of constructive possession, constructive fraud, or constructive trusts, and so on. One commentator noted, as far back as 1917: “The fiction is frequently resorted to in the attempt to conceal the fact that the law is undergoing alteration at the hands of the judges” (Smith, 1917, p. 150). Thus, in this sense, legal fictions are a kind of linguistic cover. In a more positive light, Julius Stone in his treatise on the function of law, describes legal fictions as the “swaddling clothes” of legal change (1968, p. 459).

Fictions have other purposes, as well. They are sometimes used for convenience. Many have been invented in order to expound legal doctrine already in existence, rather than to change it. In this sense, they have been likened to a “convenient shorthand” (Fuller, 1967, p. 54). For example, the fiction of “corporate personality” serves as an abbreviation for a cluster of legal rights and obligations that would be terribly bothersome to spell out repeatedly in discourse (Fuller, 1967, p. 55).

Why do we need the legal fiction of incompetency? The answer may be fairly straightforward: because we need a trigger to tell us when a state legitimately may take action to limit an individual’s rights to make decisions about his or her own person or property. The underpinning of this legal fiction is the doctrine of parens patriae—the obligation of the
sovereign to care for the vulnerable and less fortunate (Brakel, 1985, pp.9-20). Even though the roots of parens patriae go back centuries in our legal system, there is nothing about the doctrine that pinpoints exactly when the doctrine should “kick in” and permit state intervention into an individual’s affairs.

That is where definitions of incapacity become important. They are the triggers defined by society. Recognizing incapacity as a legal fiction is important, precisely because a fiction is determined by prevailing values, knowledge, and even the economic and political spirit of the time. In other words, the criteria or elements needed to establish legal incapacity are products of society’s prevailing beliefs concerning individual autonomy and social order, tempered by the restraint of legal precedent. Just as societal values and needs evolve over time, so will the legal criteria for capacity and incapacity. Yet, at any point in historical time, we tend to rely capacity and to make it a static “thing” to be discovered. As Margulies perceptively notes, “Capacity is a shifting network of values and circumstances” (1994, p. 1073).

**EVOLUTION OF A FICTION**

As a starting point to understanding the evolution of the fiction of incapacity, it is important to realize that we have never had a national consensus on a standard for declaring an individual to be incapacitated (Anderer, 1990). Nevertheless, common themes run through the variability, and these themes shed a useful light on present assumptions in our legal system concerning autonomy, aging, and disability.

Let us begin with a paradox in the law’s approach to incapacity. On the one hand, our legal system has always recognized situation-specific standards of competency, depending on the specific event or transaction—such as capacity to make a will, marry, enter into a contract, vote, drive a car, stand trial in a criminal prosecution, and so on (Parry, 1985, p. 435). A finding of incapacity in any of these matters could nullify or prevent a particular legal act. On the other hand, at least until very recently, determinations of competency in the context of guardianship proceedings were quite the opposite. They routinely were very global, generalized determinations of one’s ability to manage property and personal affairs. Moreover, a finding of incompetency in this latter area traditionally justified quite intrusive curtailments of personal autonomy, and resulted in a virtually complete loss of one’s civil rights (Frolik, 1981, pp. 599-660; Horstman, 1975, pp. 215-236).

One explanation of this paradox is the nature of the judicial process itself. Specific standards of incompetency for discrete transactions arose through the process of case adjudication. Judges adjudicate specific disputes brought before them about specific transactions. So it is fairly predictable that situation-specific standards of incompetency would emerge. Guardianship, on the other hand, historically sought not to adjudicate specific transactions but rather the status of the person. Moreover, over time the standards for this adjudication of status became shaped primarily by legislators, and not by court-made principles.

Guardianship goes back at least as far as the 14th century English law, De Praerogativa Regis, which articulated the concept of special protection for those lacking the ability to care for themselves. It permitted the king to manage the lands and profits of estates of two classes of mentally disabled persons: “idiots,” that is those born without reason; and “lunatics,” that is those who later in life lost capacity (Brakel, 1985, p. 10). The concept behind the English law actually shows up earlier in Roman law, at least as early as the time of Cicero (Brakel, 1985, p. 9).
As the original model for present day guardianship statutes, the English law was not, as we might hope, driven primarily by humanitarian concerns. It was driven by concern about the management of property, not about care of persons with disabilities. The law was only relevant to the property class where chaos in management might contribute to disorder in the realm. Where the alleged incompetent did not possess substantial property, guardianship proceedings were rare.

Following this pattern, several of the American colonies passed legislation designed to protect the estates of “insane persons” (Brakel, 1985, pp. 9-20; Deutsch, 1949). Gradually, this basic schema of legally sanctioned paternalism received a clear statutory foundation in all states in the form of guardianship laws. These laws, however, shared the social bias of the original concept in that they were largely concerned about and focused on the management of property and not on the care of the elderly (Alexander & Lewin, 1972; Schmidt et al., 1981). Protection and management of the ward’s personal affairs was essentially unregulated and came much later in the law’s development.

**Status-Based Incompetency**

More important, these laws established an amorphous status test for incompetency. Courts and juries could bestow the labels “idiot,” “insane person,” “lunatic,” “non composit mentis,” and the like with enormous discretion. A requirement that the person be unable to care for himself or herself was included in or added to many of these statutes, but the requirement was largely tautological with the label. The finding of incompetency reduced the putative ward to the legal status of an infant.

Some of the archaic language actually remained entrenched as late as the 1990s. For example, until 1991, the Rhode Island statute permitted the appointment of a guardian of the person or estate

of any idiot, lunatic, or person of unsound mind, of any habitual drunkard, or of any person who from excessive drinking, gaming, idleness or debauchery of any kind, or from want of discretion in managing his estate, so spends, wastes, or lessens his estate or is likely so to do, that he may bring himself or his family to want or suffering, or may render himself or family chargeable upon the town for support. (Rhode Island General Laws, 1969)

Similarly, until 1987 Alabama permitted the appointment of a guardian for persons of “unsound mind,” defined to include “idiots, lunatics or the insane.” As legal fictions, these labels might aptly be characterized as “linguistic covers” to justify the state’s preservation of stable property interests within its borders and to prevent the person from becoming a burden on the state (Fuller, 1967, p. 51).

One interesting status category is the puritanical designation of “spendthrift,” a not uncommon reason for guardianship until the 1970s or so. Massachusetts still has a spendthrift guardianship provision much like Rhode Island’s:

A person who, by excessive drinking, gaming, idleness, or debauchery of any kind, so spends, wastes or lessens his estate as to expose himself or his family to want or suffering, or the department of public welfare, to charge or expense for his support or for the support of his family, may be adjudged a spendthrift. (Massachusetts General Laws, 1999)

While the term “spendthrift” is not equivalent to mental incapacity, it nevertheless illustrates a status approach to disability, based unashamedly on judgments about one’s behavior. Yet, unlike the fiction of incompetency, spendthrift provisions at least have the attribute of being more direct about the economic values and purposes furthered by guardianship law.
In time, the status approach was refined in most states in two important respects. First, the laws gradually incorporated a more medical approach to adjudicating one's status; and second, most states required a finding that the disabling condition cause some dysfunctional behavior (Parry, 1985, p. 395).

**Disabling Condition Tests**

The medical approach required the finding of one or more types of disorders or disabling conditions as a prerequisite for determining incapacity. This new fiction reflected, in part, the ascendency of modern medicine's authority in our culture during the middle part of the 20th century. In guardianship proceedings, it enabled diagnostic labels to flourish and weigh heavily in determinations of capacity. By the 1960s, the distinction between mental disability and legal disability became increasingly blurred (Horstman, 1975, p. 225). At the same time, the distinction between involuntary commitment and guardianship likewise blurred under the medical model. Civil commitment proceedings sought increasingly not only to protect the public from harm (a function of the state's police power), but also to protect the individual from self-inflicted harm and to impose therapeutic objectives upon the individual (a function of the state's parens patriae power) (Horstman, 1975, pp. 215-236; Kittrie, 1971; Parry, 1985, p. 370).

With respect to the disabling condition labels used, a 1990 monograph by the American Bar Association found that 34 states included "mental illness" among the specified disabilities; 15 included "mental retardation" or "developmental disability"; 31 referred to chronic use of drugs or chronic intoxication; 33 included "physical illness" or "physical disability"; 15 included "advanced age"; and 34 states used audaciously general terms such as "mental deficiency," "mental disability," "mental condition," "mental infirmity," "weakness of mind," or "in need of mental treatment" (Anderer, 1990). This list is not exhaustive; the array of potential disabilities is quite broad.

A survey of state law in 1999 shows only modest change overall in the use of disabling condition labels. Today, 28 states include "mental illness" among the specified disabilities; 15 include "developmental disability"; 32 include "mental deficiency"; 37 include "physical disability"; 27 refer to "chronic drug use"; 22 refer to "chronic intoxication"; and 27 include "advanced age."1

The finding of one of these putative disabilities presumably offers a sense of objectivity to the adjudication process, although critics of the mental illness paradigm of behavior would find little comfort in this laundry list of disabling conditions (Kittrie, 1971; Szasz, 1984). The requirement to find a disabling condition ostensibly serves to limit the state's power under an objective, scientific standard. However, any real limitation is belied by the fact that, according to the 1990 ABA report, 27 states concluded their list of disabilities by adding "or other cause" (Anderer, 1990); and today, 16 states include the "other cause" category. Thus, the range of disabling conditions may be as broad as the judge's imagination.

**Functional Behavior (Outcome) Tests Linked to Disability**

Along with the disabling conditions criteria came the addition of a second prong to the test for incapacity—a causally connected dysfunctional behavior test. In order to find incapacity, the disabling condition must result in a functional impairment with respect to one's *ability to manage his or her property or person*. This element of capacity theoretically distinguishes
clinical incapacity from legal incapacity. In other words, the existence of a behavioral impairment introduces an element of “social necessity” which, unlike the diagnostic task, is within the court’s purview and expertise to assess. If the state does not intervene, so the presumption goes, some significant harm will occur to the individual in issue.

While necessity may be a proper conceptual trigger of the parens patriae power, the functional behavior tests which are used to measure it have been notoriously nebulous. Indeed, the functional tests found in state law epitomize statutory draftsmanship at its vaguest and most subjective point. Common phraseology includes the criteria “incapable of taking care of himself”\textsuperscript{113}; “unable to provide for personal needs and/or property management”\textsuperscript{114}; “incapable of taking proper care of the person’s self or property or fails to provide for the person’s family”\textsuperscript{114}; or “substantially incapable of managing his or her property or caring for himself or herself.”\textsuperscript{116}

It is fairly obvious that these kinds of tests openly invite judgments of incapacity based upon the judge’s opinion of the reasonableness of one’s behavior, essentially, a subjective outcome test. You act crazy, therefore, you must be crazy. Of course, one of the disability labels also had to fit. In concept, it was the disability label that distinguished a “sick” individual, in need of the state’s paternalistic intervention, from a competent person who chooses to act eccentric, foolish, crazy, or even self-destructively. In practice, however, the protection is largely illusory.

A quaint but illuminating 1962 probate court opinion from Ohio demonstrates the potential for arbitrariness and capriciousness inherent in the broadly framed two-pronged test. The case, \textit{In re Tyrrell},\textsuperscript{119} presented probate Judge Williams with a dispute concerning 85-year-old Mr. Walter Tyrrell, allegedly a victim of a designing person, Mrs. Wise.

The judge’s opinion states the problem:

The evidence discloses that since October 1961 [Mr. Tyrrell] has given Mrs. Wise in excess of two thousand dollars. These have been checks ranging in amounts from ten to fifty dollars.

It is undisputed that Mr. Tyrrell has been an individual who had the good fortune of making considerable money in his earlier days and he also was a gentleman with expensive tastes.

... The ward now has as his life’s savings some ten thousand dollars worth of bank stock.

(p. 253)

Judge Williams summarizes the in-depth process used to obtain clinical evidence:

In chambers, immediately preceding the hearing, the [petitioner] requested that two medical doctors... be permitted to examine Mr. Tyrrell. This request was granted. For approximately fifteen minutes they had the opportunity to examine the alleged ward in the jury room.

The testimony of the doctors for the proponents was to the effect that a guardian was needed because the alleged ward was subject to undue influence... The one medical examiner asked Mr. Tyrrell why he had given money to Mrs. Wise and he said that he had given it to her because he felt that she needed it. (p. 253)

Judge Williams describes the two-prong test to be applied:

[T]he Court, before appointing a guardian for an alleged incompetent, should be fully and completely satisfied that the claimed infirmity or infirmities... are of such a nature and character as to prevent such person from fully and completely protecting herself and property interests from those about her who would be inclined to and would take advantage of such person in the way of securing her property or means without giving proper service or value therefor... In applying this principle as enunciated, the Court must first find that a mental infirmity exists, then secondly, find that said infirmity prevents him from dealing at arm’s length. (p. 253)
Finally, the judge weights the evidence against the standard. On the positive side, Judge Williams noted initially that Mr. Tyrrell “sat at the opponent’s table and followed the testimony of the witnesses quite carefully,” and that he “still had a remarkable memory for past events” (p. 253).

Furthermore:

It is undisputed that Mr. Tyrrell has been an individual who had the good fortune of making considerable money in his earlier days and he also was a gentleman with expensive tastes. The witnesses had knowledge of the expensive parties that he had given for the benefit of his friends. Approximately twenty years ago, when his earning days were over, he retrenched and began to live within his income.

The opponents [of the guardianship petition] claim that Mr. Tyrrell is the same person today that he was earlier in his life; that he is still a spender and one who is extravagant and that he is still showering gifts. (p. 253)

However, the judge was ultimately swayed by the absurdly scant evidence of incapacity. He provides the following analysis:

With respect to the present status of the individual, the Court observed the following: that his smile at times is not normal; his eyes do not focus properly at all times; his gait and reflexes are not normal; and that he is not laying his cane aside, but is dropping it. These are indications of the lessening of the gentleman’s mental capacities. Just what has caused this is not known to the Court. In any event, there has been a deterioration that would be called mental illness.

The second question which must be answered is, can he deal at arm’s length? There are instances which have been cited which indicate that he can. However this gentleman has parted with some two thousand dollars during the last six months and there is no indication that he received proper service or value therefor. In review of this, the Court must find, and does so find, that he is subject to undue influence. . . . The necessary elements to establish a guardianship having been substantiated, it is the finding of the Court that a guardian of the person and estate be appointed. (p. 253)

Judge Williams’ analysis certainly falls below the level of thoroughness and objectivity that we would ideally expect in guardianship decisions. Yet his larger mistake may have been in demonstrating explicitly a type of ageist and arbitrary analysis that more often occurs subtly under the broad two-pronged test for competency.

**Meeting Essential Needs and Endangerment Elements**

Many states responded to the obvious subjectivity of the broad two-prong test by attempting to further refine the dysfunctional behavior prong. These states took the broad language of “incapable of taking care” of oneself and sharpened it to focus on the ability to take care of the “essential requirements for the person’s physical health or safety (e.g. Alaska, Arkansas, Florida, Kansas, Oregon).” The “essential requirements” language has several variations. Some states provide a list of essential requirements, such as: “inability to meet personal needs for medical care, nutrition, clothing, shelter, or safety (Idaho, Minnesota, New Hampshire).”

Connecticut expands this list further by referring to an “inability to provide medical care for physical and mental health needs, nutritious meals, clothing, safe and adequately heated and ventilated shelter, personal hygiene and protection from physical abuse or harm . . .”

Connecticut and several other states add a requisite finding that the inability endangers the person in some way. Thus, Connecticut requires a resulting “endangerment to such person’s health.” Missouri requires a finding that “serious physical injury, illness, or disease is likely
to occur.”21 And New Hampshire requires a finding that the person “is likely to suffer substantial harm. . . .”22 These endangerment and essential needs provisions raise the threshold for findings that the person is incapable of caring for himself, but they do not eliminate the possibility of unrestrained speculation by judges.

Given the shortcomings of both prongs of the above test—the disability prong and the behavior prong—it was inevitable that, sooner or later, some states would throw out either or both elements of these tests or substitute something else. Not surprisingly, both courses have been taken. The following changes represented attempts, not always successful, to refine the trigger we call incapacity so as to be more sensitive to levels of impairment and to situational differences in impairment.

**Functional Behavior Test Alone**

Rejecting the reliance on diagnoses and labeling, California and a very few other states turned to a pure behavioral impairment test. California law states in part: “A conservator of the person may be appointed for a person who is unable to provide properly for his or her personal needs for physical health, food, clothing, or shelter. . . .”23 Washington State, while labeling the putative ward “incapacitated,” defines that term with a purely behavioral standard: The individual has a significant risk of personal harm based upon a demonstrated inability to adequately provide for nutrition, health, housing, or physical safety.”24

In neither state must a disabling condition be established. Application of the California standard relies heavily on construction and application of the term “unable.” Yet, the standard itself gives no guidance to distinguish whether the inability is, for example, a mental inability or merely a physical impairment that afflicts an otherwise mentally functional person. Nor does it provide guidance to distinguish the person who chooses (on some level) an aberrant lifestyle from the person who is not able to understand alternatives or to make a choice.

“Demonstrated inability” in the Washington statute perhaps strengthens the evidentiary standard but does not really shed additional light on the nature of what must be proved, although Washington adds an additional explanation in the same statute articulating what the statute does not mean: “Age, eccentricity, poverty, or medical diagnosis alone shall not be sufficient to justify a finding of incapacity.”25

**Cognitive Functioning**

In contrast to the California strategy, other states chose to replace either the disability condition test, or the behavioral test, or both, with a test that focuses more precisely on deficiencies in cognitive functioning. In essence, this represents an effort to define what California and other states mean by “inability.” This approach is embodied in the guardianship provisions of the Uniform Probate Code, first promulgated in 1969, expanded and separately published in 1982 as the Uniform Guardianship and Protective Proceeding Act (UGPPA), and then revised and republished in 1997. The 1982 UGPPA retained the disabling condition prong of the test, but replaced the behavioral prong with a test of cognitive ability. The 1982 UGPPA used the following definition:

“Incapacitated person” means any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or other cause (except minority) to the extent of lacking sufficient understanding or capacity to make or communicate responsible decisions. (UGPPA, 1982)26
Of course, the term "responsible decisions" still kept the door wide open to significant value judgments based on the court's opinion of what is a "responsible" outcome of a decision. In addition, this test did not limit in any way the types of decisions to which the incapacity must relate. That is, the test on its face did not distinguish decisions of greater or lesser consequence.

Some states modified or eliminated the "responsible decisions" language in the standard and instead included a recitation of the types of decisions relevant to the determination. These states echo the "essential needs" and endangerment limitations referred to earlier. For example, Arkansas uses the language "...to make or communicate decisions to meet the essential requirements for his health or safety or to manage his estate."27

Significant revisions made to the UGPPA in 1997 remove the disability test altogether. The new UGPPA states:

"Incapacitated person" means an individual who, for reasons other than being a minor, 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. (UGPPA, 1997)28

This formulation combines a cognitive functioning test and a behavioral test focusing on essential needs while removing the invitation for the court to speculate on whether the person's decisions are "responsible." This version also adds the final words "even with appropriate technological assistance," reemphasizing the fact that a person is not necessarily in need of a guardian simply because they are disabled, especially where the person can become functional with the proper aid or device.

**Health-Care Decisions Statutes**

Numerous states have separate health decisions or advance directive statutes that incorporate some form of cognitive functioning test (Choice in Dying, 1993). For example, the District of Columbia's Health-Care Decisions Act defines "incapacitated individual" as:

An adult individual who lacks sufficient mental capacity to appreciate the nature and implications of a health-care decision, make a choice regarding the alternatives presented or communicate that choice in an unambiguous manner (1988).29

A fairly similar version of this definition is incorporated into the Uniform Health-Care Decisions Act, approved in August 1993, by the National Conference of Commissioners on Uniform State Laws:

"Capacity" means an individual's ability to understand the significant benefits, risks, and alternatives to proposed health care, and to make and communicate a health-care decision (1993).30

These enactments reflect a now widely accepted view that capacity in the health care context is a matter of the person's ability to make reasoned decisions. Thus, the term is more accurately referred to as "decisional" capacity. Also implicit in the standard is a better appreciation of the decision-specific notion of capacity. That is, the level of capacity needed to make a particular decision depends on the complexity and consequence of that decision.

The health-care decisions context differs from the guardianship context in two significant ways. First, the issue concerns incapacity to perform a specific task, that is, to make a particular health-care decision. Because of this specificity, it is generally conceded that a finding of general incapacity in a guardianship proceeding should not give rise to a
presumption of incapacity to make a health-care decision, nor should inability to make a health-care decision be dispositive of the issue of capacity in a guardianship proceeding (Applebaum, Lidz, & Meisel, 1987).

A second difference is that most of the health-care decisions statutes defer entirely to clinical determinations of capacity. The determinations are made outside the courtroom by health care providers. Many prescribe detailed procedural formalities for certification and documentation of incapacity by one or more physicians. For example, the New York Health Care Proxy Act of 1990\(^1\) requires the following:

A determination that a principal lacks capacity to make health care decisions shall be made by the attending physician to a reasonable degree of medical certainty. The determination shall be made in writing and shall contain such attending physician’s opinion regarding the cause and nature of the principal’s incapacity as well as its extent and probable duration. The determination shall be included in the patient’s medical record. For a decision to withdraw or withhold life-sustaining treatment, the attending physician who makes the determination that a principal lacks capacity to make health care decisions must consult with another physician to confirm such determination. Such consultation shall also be included within the patient’s medical record.\(^2\)

The New York provision prescribes additional procedural safeguards for patients whose incapacity results from mental illness or developmental disability. The certification of incapacity then triggers the operation of an advance directive or the recognition of a surrogate decision maker.

Physician certification, at best, ensures objective medical decision making. At worst, it is just a formality for the record. In either case, it provides no answer to the underlying question of how to assess the cognitive functioning of the individual. While the clinical literature provides a burgeoning variety of assessment standards and protocols, no one way to assess cognitive functioning has garnered consensus (Kapp, 1990, pp. 15-24).

The Mix-and-Match Approach

Returning now to the guardianship context, the cognitive legal standard has been literally mixed and matched with other conventional elements in a variety of ways. The types of statutory tests used are indicated in brackets in the excerpts below:

- Like the 1997 UGPPA, some states connect the cognitive functioning test to the behavioral test of meeting essential requirements of health and safety.\(^3\) For example, the Oregon law provides:

  "Incapacitated" means a condition in which a person’s ability to receive and evaluate information effectively or to communicate decisions is impaired \([\text{COGNITIVE TEST}]\) to such an extent that the person presently lacks the capacity to meet the essential requirements for the person’s physical health or safety. \([\text{ESSENTIAL NEEDS TEST}]\)\(^4\)

- Like the 1982 UGPPA, some states link the disabling condition element to the cognitive functioning test.\(^5\) For example, the Arizona law states:

  "Incapacitated person" means any person who is impaired by reason of mental illness, mental deficiency, mental disorder, physical illness or disability, chronic use of drugs, chronic intoxication or other cause, except minority \([\text{DISABLING CONDITION TEST}]\) to the extent that he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person \([\text{COGNITIVE TEST}]\).\(^6\)
• Some have linked three elements: disabling condition, cognitive functioning, and behavior impairment.\textsuperscript{37} For example, the Arkansas law states:

"Incapacitated person" means a person who is impaired by reason of a disability such as mental illness, mental deficiency, physical illness, chronic use of drugs, or chronic intoxication \textit{disabling condition test}, to the extent of lacking sufficient understanding or capacity to make or communicate decisions \textit{cognitive test} to meet the essential requirements for his health or safety or to manage his estate \textit{essential needs test}.\textsuperscript{38}

• At least a few states have chosen to combine a little bit of everything in the shopping cart into one grand (and complicated) standard for incapacity. North Dakota is an example:

"Incapacitated person" means any adult person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, or chemical dependency \textit{disabling condition test} to the extent that the person lacks capacity to make or communicate responsible decisions \textit{cognitive test} concerning that person’s matters of residence, education, medical treatment, legal affairs, vocation, finance, or other matters \textit{essential needs test}; incapacity endangers the person’s health or safety \textit{endangerment test}.\textsuperscript{39}

The North Dakota example, unfortunately, may illustrate an exasperating tendency of legal drafters to solve problems of vagueness by adding more verbiage. It may bolster an appearance of objectivity, but it does not necessarily reflect the way decisions about capacity are really made.

NEW FICTIONS OR NO FICTIONS?

The accumulation of definitional components eventually forces us to reassess our fictions and perhaps chart a direction that will improve the fictions, redefine them, or move beyond definitional fictions altogether. Fuller suggests that: “A fiction dies when a compensatory change takes place in the meaning of the words or phrases involved, which operates to bridge the gap that previously existed between the fiction and reality” (1967, p. 51). We have had an historical gap in the law between the fiction called “incompetency” and the reality of needing a justifiable trigger for state intrusion in the personal autonomy of its citizens. What if any “compensatory changes” have taken or are taking place in our statutory elements of incapacity?

First, it may be argued persuasively that the disabling condition element has become superfluous as a definitional standard in the law of guardianship. Historically, the labels have provided little more than an aura of objectivity without substance. In its place, the clinically based cognitive functioning tests provide a sufficiently objective and justifiable core element, though not the only element, of any legal test of capacity. While tests of cognitive functioning are varied and often rightfully subject to criticism, they nevertheless offer a sufficiently validated tool for identifying an inability to function versus ways of functioning that merely deviate from social norms.

However, by debunking disabling condition requirements in definitions of incapacity, it is not suggested that diagnosis should be entirely discarded from consideration. Rather, diagnosis remains important, but for other reasons. From the clinician’s standpoint, diagnosis
remains essential as the first step in the process of cure or clinical management. It assigns patients to a clinical category about which there is knowledge of prognosis (Roca, 1994, p. 1177). This knowledge is most relevant to decisions about whether and to what extent guardianship may be an appropriate intervention. For example, let us imagine two individuals, one diagnosed with Alzheimer’s disease and the other with major depression. In neither case does the diagnosis itself tell us to what extent their ability to understand, make, or communicate decisions is impaired. That question is the focus of the cognitive functioning test. However, assuming that one finds a significant level of cognitive impairment in both individuals, the diagnosis of Alzheimer’s disease implies that the level of functioning will almost certainly grow worse. In contrast, the condition of major depression is likely to be treatable and will improve. In the latter case, guardianship may therefore be less necessary or should be significantly limited in scope or duration.

Another conclusion that emerges from this cumulative experience with capacity standards is that, while a cognitive functioning test may be a necessary component, it is not sufficient in itself to establish incapacity in the guardianship context. Some form of consequential behavior element remains essential to tests of capacity. This is so because courts necessarily look beyond the cognitive functioning level of the individual and ask the question, "So what?" In other words, if the individual is cognitively impaired but is not in any danger of serious injury or loss, then so what? There is no need or justification for guardianship in that instance. For example, consider the difference in consequence between two individuals who, let us assume, clearly meet tests of cognitive incapacity. However, one of these individuals has established surrogate decision makers for all his or her affairs through the use of powers of attorney and related legal instruments. The other person has done no advance planning. Assuming no confounding factors, a guardianship simply cannot be justified in the first case, but may be essential to the well-being of the individual in the latter.

So how do we distinguish among these kinds of cases? Using dysfunctional behavior tests such as, “Incable of taking proper care of himself or his property” to answer the "So what?" question does not work. They are overly subjective and vague, and do not account for the individual’s total circumstances. In the example above, such a test would seem to justify a guardianship for both persons described, since neither, individually, can handle his or her affairs.

A test that looks at consequential behavior needs to be constrained without adding new pretenses. One element of constraint is dictated by an aspect of the parens patriae principle that is often overlooked—that of necessity. The king is responsible to take care of those who are vulnerable, but only when it is necessary. Necessity depends not just on the nature of one’s disability, but on the environment and circumstances in which one lives. The element of necessity of court involvement has not expressly appeared in any of the tests we have discussed so far, except insofar as the essential needs and endangerment component discussed earlier indirectly addresses the issue.

Essential needs and endangerment tests, however, do not go far enough, for they still focus primarily on the respondent’s abilities alone. Again, if applied to our two hypothetical individuals, they may still fail to distinguish between the two. Necessity, in this example, remains the real issue in defining the trigger for state intervention.

The 1997 revisions to the UCPA go one step further in addressing necessity by clarifying that the individual’s inability to meet essential needs must be assessed in light of “appropriate technological assistance.” However, this does not go far enough.

A more promising approach would incorporate necessity as an essential component of incapacity. The District of Columbia accomplishes this by defining incapacity as follows:
"Incapacitated individual" means an adult whose ability to receive and evaluate information effectively or to communicate decisions is impaired [COGNITIVE TEST] to such an extent that he or she lacks capacity to manage all or some of his or her financial resources or to meet all or some essential requirements for his or her physical health, safety, habilitation, or therapeutic needs [BEHAVIORAL TEST] without court-ordered assistance or the appointment of a guardian or conservator [NECESSITY TEST].

The New York guardianship uses a slightly different approach. The state does not incorporate the concept of necessity into the definition of incapacity, but it clearly and explicitly requires a finding of both incapacity and necessity for the appointment of a guardian:

The court may appoint a guardian for a person if the court determines: (1) that the appointment is necessary to provide for the personal needs of that person, including food, clothing, shelter, health care, or safety and/or to manage the property and financial affairs of that person; and (2) that the person agrees to the appointment, or that the person is incapacitated as defined in subdivision (b) of this section.

Though the two approaches differ conceptually, they are similar in function and consequence in that a finding of necessity is a threshold requirement for state intervention in the form of guardianship.

Table 1 lists 28 states and the District of Columbia that have made necessity a component of the incapacity determination in either of these two ways. That is, they either incorporate the concept into the very definition of incapacity, or they require a finding of both incapacity and necessity before a guardian may be appointed. Unfortunately, eight of these states incorporate the necessity element ineffectively because they permit appointment of a guardian if "necessary or desirable" or "necessary or convenient." For instance, Colorado states:

The court may appoint a guardian as requested if it is satisfied that the person for whom care is sought is incapacitated and that the appointment is necessary or desirable as a means of providing continuing care and supervision of the incapacitated person.

Two objections to the element of necessity are likely here. One is that necessity has nothing to do with any clinical notions of capacity. This is true. It is a corollary or variant of the principle of "least restrictive alternative," a principle born of the civil commitment reform movement of the 1960s and 70s, but now a widely acknowledged principle in guardianship reform (Comment, 1980; Frolik, 1998, p. 347; Gottlich & Wood, 1989, pp. 426-432; Hurme, 1995, p. 163; Rein, 1992, p. 1882). The problem in some states that employ this principle is that it is not applied until after the adjudication of incapacity when decisions must be made about the type and degree of authority of the guardian. The principle needs to be applied as a threshold requirement to guardianship. Ten jurisdictions, also listed in Table 1, do exactly that. They impose the least restrictive alternative criteria as a prerequisite to, but not a component of, the determination of incapacity. These jurisdictions illustrate a third way to mandate a finding of necessity as a threshold requirement. Again, while the approach is conceptually distinguishable, it is similar to the District of Columbia and New York approach in function and consequence.

A second likely criticism of a necessity test is that the concept is no less elusive of definition than other tests we have discussed. This criticism would be entirely valid but for an important difference. The conventional tests of capacity have tended to focus primarily on the characteristics of the individual and not on the context in which he or she lives and acts.
Conventional legal tests of capacity still normally result in a global “yes” or “no” finding, despite attempts to expand the use of limited guardianships. Necessity properly implies, or should imply, a weighing of multiple variables, and a weighing of the possible harms and benefits of court intervention versus other options, taking into account the individual’s interactive context, that is, his or her living situation, family, caregivers, the types of decisions that have to be made, alternative legal arrangements that are already in place, and so on.

Altman, Parmalee & Smyer suggest a similar approach to questions of informed consent, arguing that the legal elements of informed consent should be viewed as a process embodying a complex interplay among personal, environmental, and social factors (1992, pp. 1671-1704). This approach to assessment eschews cookbook psychology and offers no easy shortcuts. However, it focuses honestly on the right questions, and it is the type of decision-making courts are actually most suited to make, so long as court resources for investigation and the procedural framework are conducive to a full hearing of the harms, benefits, and alternatives.

The accompanying notes in Table 1 illustrate several language variations in state guardianship laws used to incorporate necessity or least restrictive alternative into the front end of the adjudicative process. All the illustrated approaches establish a “front end” or threshold requirement for court intervention that enables us to defictionalize the capacity trigger for court intervention. They make explicit the substantive and practical difference between clinical incapacity and legal incapacity. The latter must be based on necessity.

Some of these states and several others use the notions of necessity or least restrictive alternative at the back end, too—that is, after the adjudication of incapacity when decisions must be made about the type and degree of authority of the guardian. For example, the West Virginia law provides: “[T]he powers [of the guardian] shall not extend beyond what is absolutely necessary for the protection of the individual.” This designation of the guardian’s powers occurs after the initial finding of the need to appoint a guardian, that is, a finding of legal incapacity. Table 1 does not include these back-end provisions. A few states, such as Illinois, incorporate necessity into both stages of the adjudication in a single provision of the statute. The Illinois statutes provides:

Guardianship shall be utilized only as is necessary to promote the well-being of the disabled person, to protect him from neglect, exploitation, or abuse, and to encourage development of his maximum self-reliance and independence. Guardianship shall be ordered only to the extent necessitated by the individual’s actual mental, physical and adaptive limitations.

Despite differences in the form of “necessity” provisions, the incorporation of the concept into the front end adjudication of legal incapacity has become prevalent among guardianship statutes.

**Beyond Definitions**

The above-quoted subsection of the New York statute goes on to incorporate several evidentiary and procedural mandates and limitations on the court’s decree of guardianship:

In deciding whether the appointment is necessary, the court shall consider the report of the court evaluator, as required in paragraph five of subdivision (c) of section 81.09 of this article, and the sufficiency and reliability of available resources, as defined in subdivision (a) of section 81.03 of this article, to provide for personal needs or property management without the appointment of a guardian. Any guardian appointed under this article shall be granted only those powers which are necessary to provide for personal needs and/or property management
of the incapacitated person in such manner as appropriate to the individual and which shall constitute the least restrictive form of intervention, as defined in subdivision (d) of section 81.03 of this article.49

The New York language helps to emphasize the principal consequence of defictionalizing conventional definitions of legal incapacity. As we peel away the fiction of incapacity as some “thing” and attempt to ask the right questions, we are faced with balancing a complex array of variables affecting an individual’s functioning and welfare. In this posture, the importance of procedural protections looms ever greater. Procedural protections work to ensure that putative wards are fully informed, properly evaluated, zealously defended, and that the issues are fully developed and heard, and an intervention is finely tuned to the needs and preferences of the individual. Moreover, such procedural protections may serve to wean judges away from too heavy a reliance on isolated clinical conclusions. The literature indicates that judges’ determinations of capacity have been, and continue to be, heavily influenced by clinical opinions concerning capacity (Bulcroft, Kielkopf, & Tripp, 1991, pp. 156-164; Iris, 1988, pp. 39-45; Mahler & Perry, 1988, pp. 856-86).

Determinations of incapacity in the guardianship context will almost always require the exercise of considerable judgment. Given that reality, the thoroughness of the process of deliberation is as important if not more important than the substantive standard applied. An examination of recommended procedural and evidentiary protections is beyond the objectives of this article. However, much of the guardianship statutory reform occurring today focuses on these procedural protections for potential wards. These procedural protections include:

- Improved notice to the alleged incompetent and use of plain language
- Enhanced content requirements of guardianship petition
- A meaningful right to counsel
- Presence of the alleged incompetent at the hearing
- Conduct of hearings in strict accordance with due process principles
- Confidentiality of records
- The use of multidisciplinary assessment resources, trained court visitors, investigators, and guardians-ad-litem to ensure full and fair development of the evidence and an adequate evidentiary record
- Specific guidelines for drafting and limiting court orders for guardianship
- Priorities in selection of guardian
- Effective training and monitoring of guardians
- Enhanced procedures for modifying or terminating a guardianship (ABA, 1989; Hurme, 1991; UGPPA, 1997).

Failures of these procedural protections are widespread and plague our system of guardianship. Even where procedural protections are included in state law, they may be diluted in their implementation, because of a lack of resources, lack of interest, or an abundance of ageism in the form of: “We know what’s best for Mrs. Doe without subjecting her to the torture of an adversarial proceeding.”

A final story illustrates the problem better than theory. Vira Colson, an 88-year-old resident of Maine, became the subject of a guardianship dispute in 1993. A temporary guardian was appointed for her on March 19, 1993, and a permanent guardian 2 months later
<table>
<thead>
<tr>
<th>Must Find “Necessity” To Establish Guardianship</th>
<th>“Must Find That Guardianship Is Least Restrictive Alternative”</th>
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<td>Arkansas [2] [7]</td>
<td>New Mexico [C]</td>
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<td>Colorado [1] [4]</td>
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</tr>
<tr>
<td>Hawaii [1]</td>
<td>Virginia [F]</td>
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</tbody>
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**Necessity Language**


[6] Appointment is necessary either because the property will be wasted or dissipated unless proper management is provided or because the property is needed for the support, care, or well-being of such adults or those entitled to be supported by such adults. Ga. Code Ann. § 29-5-1(a)(2) (1999) (for property only); S.C. Code Ann. § 62-5-401(2) (Law. Co-op. 1999) (for property only).


[9] Necessary to provide for the personal needs of that person, including food, clothing, shelter, health care, or safety and/or to manage the property and financial affairs of that person. N.Y. Pub. Health Law § 81.02(a)(1) (McKinney 1999).


[13] The necessity for the appointment of a guardian (or a finding that the respondent is in need of assistance from the court) are to be proved. . . . Iowa Code Ann. § 633.556 (West 1999); Tenn. Code Ann. § 34-11-126 (1998); Wyo. Stat. Ann. § 3-2-104(a) (Michie 1999).

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**Least Restrictive Alternative Language**

[A] No less restrictive form of intervention is available which is consistent with the person's welfare and safety. Md. Est. & Trusts Code Ann. § 13-705(b) (1998).


[E] The court shall not appoint a guardian or limited guardian if the court finds that the needs of the proposed ward are being met or can be met by a less restrictive alternative or alternatives. R.I. Gen. Laws § 33-15-4(a)(1) (1998).


[G] Court must find that the respondent's identified needs cannot be met by less restrictive means, including use of appropriate technological assistance. U.G.P.P.A. § 311(a)(1) (1997).

* The table includes only provisions that specify the criteria for initial appointment of a guardian. It does not include similar provisions that the court may subsequently have to follow in determining the scope of guardianship or extent of the guardian’s authority.
on May 26, 1993. Her case was appealed to the Maine Supreme Judicial Court but was later withdrawn. Maine’s guardianship law is based upon the 1982 UGPPA, and thus, it defines “incapacitated person” as

any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or other cause except minority to the extent that he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person.\(^5\)

The Maine statute, like that of many other states, provides for the right of the respondent to attend the hearing, for the appointment of a court visitor, a guardian-ad-litem, and/or an attorney, and for evaluation by a physician or psychologist who is expected to provide a diagnosis, a description of the person’s actual mental and functional limitations and prognosis.\(^2\) The petitioning party, in this case Mrs. Colson’s son, is required to file a guardianship plan with the court, specifying how the ward’s needs will be met. Finally, the court is required to grant guardianship orders “only to the extent necessitated by the incapacitated person’s actual mental and adaptive limitations. . . .”\(^5\)

According to the statement of evidence filed by Mrs. Colson’s attorney,\(^4\) Mrs. Colson was not present at her temporary guardianship hearing on March 19, 1993. Her son testified without being put under oath that “an emergency existed regarding his mother’s real estate in that there was a possible chance that his mother may be convinced to convey her house to satisfy her husband’s debts.”\(^5\) Her husband was in a hospital at the time. The son “based his conclusion on a past experience of his brother’s former wife.”\(^5\) The only other information the son provided to the court was that “his mother was in need of care and a place to live, that her eyesight was a problem, that she needs better nutrition, that she eats at odd hours and that she needs her home cleaned. He further stated that maybe his mother could remain in her own home.”\(^5\) The judge appointed the son full temporary guardian and special conservator.

Pending the hearing for a permanent guardian, the judge appointed a visitor, who was a secretary by occupation. The record is silent as to her qualifications to act as a visitor. The visitor met Mrs. Colson at her home once with the son present. As to Mrs. Colson’s home, the visitor’s report states that the exterior presents a “tidy” appearance but the inside has “a powerful odor of uncared for animals.” Paper napkins were dropped on the floor where animals had apparently had “accidents.” Moreover, the kitchen was cluttered and had “unwiped spills.” However, the visitor saw only the kitchen, therefore, “could not judge the rest of the house.”\(^38\)

The visitor noted that Mrs. Colson could find her way around her own home by steadying herself on walls and furnishings but would probably have difficulty in unfamiliar surroundings and obviously had trouble seeing detail.\(^59\) She also reported that she informed Mrs. Colson of the hearing and tried to explain what a guardian and conservator meant, but that she did not think that Mrs. Colson understood the implications fully. Significantly, she also noted that Mrs. Colson did not want to relinquish her independence and have her son act as her guardian, and that she just wanted her complete freedom. As to Mrs. Colson’s desire to attend the court hearing, the visitor reported that Mrs. Colson “probably does” but that she did not say so “outright.”\(^60\) Three daughters of Mrs. Colson who did not live in the same geographic area were not contacted by the visitor.\(^61\) Her was the chore worker contacted. The visitor’s report was never given to or served upon Mrs. Colson.\(^5\)

On or before the hearing for permanent guardianship on May 26, Mrs. Colson’s son admitted her to a nursing home. At the hearing, the judge heard from only the son and the son’s attorney. Mrs. Colson was neither present, nor represented by anyone.\(^6\) In the record were
the son’s petition, the visitor’s report, and a doctor’s letter. Apparently, no guardianship plan was submitted until after the hearing, despite being required as a precondition. The doctor’s letter, in its entirety, stated the following:

I have observed Mrs. Colson over the past 10 years. It has been quite dramatic over the last 12 to 18 months that she has had a marked cognitive decline. Specifically she is not at all as sharp as she had been. Home Health has reported that her home situation is deteriorating, i.e.: her home is no longer as spotless as it was, disorganized and disheveled. She has had close family support but her caring for herself alone or present family setting is certainly problematic. Her functional limitations as per her decreasing mental faculties are certainly there. Diagnosis: Decreasing cognitive function and flawed judgment. Prognosis: Mrs. Colson also has had a marked weight loss. This is being investigated. This would certainly color the situation from being less than desirable to quite grave.44

As a result of this hearing, the court appointed the son full guardian and conservator.

Mrs. Colson’s case may not be the norm for guardianship cases. Many, if not most, guardianship cases present clear-cut scenarios of incapacity by the time they reach the court. However, neither is Mrs. Colson’s case an anomaly. In every state, there are other Mrs. Colsons who may be determined prematurely to be incapacitated, not because statutory definitions and standards are terribly defective, but because the due process protections are not in place or not used. She needed representation; she needed a thorough evaluation; she needed alternative resources explored that would enable her to stay where she wanted; and she needed a court system that would follow its own legislative mandate to intervene only to the extent necessitated by the person’s actual limitations. In the end, Mrs. Colson may or may not need a guardian. We simply do not know for sure based upon what is shown by the record, because the necessary work of assessment and deliberation failed dismally.

Such procedural protections have been a high priority of the American Bar Association’s Commission on Legal Problems of the Elderly and others who have been advocating guardianship law reform for some time. While states have been very active in the late 1980s and 1990s in guardianship reform—improving both the substantive standards and procedures—states have not yet been willing or able to dedicate the resources needed to carry out the spirit of these guardianship reform laws. Indeed, in the final analysis, the problem is largely one of money and resources.

CONCLUSION

The case of Mrs. Colson illustrates a simple truth in the search for realistic legal definitions of incapacity or incompetence: When all the fictions are put aside, the more important protection for questionably competent individuals is procedure, not substance. Finely articulated substantive standards are important, and this chapter has suggested ways to improve and “defictionalize” those standards. Specifically, three elements have been articulated: a cognitive test, a consequential behavioral test focusing on essential needs, and a necessity-for-court-involvement test involving a weighing of the individual’s personal, environmental, and social context. The District of Columbia and New York statutes provide examples of these criteria.

Substantive standards, though, represent only part of the picture. They are doomed to accomplish little in terms of protecting individual autonomy, unless procedural rights are realistically recognized and enforced. The key to evaluating the substantive factors is thorough assessment and thorough deliberation with the emphasis in the judicial arena on
procedural protection. The American Bar Association guidelines (1989) provide a useful framework for procedural reform. Unfortunately, these procedural protections require more time, more resources, and more complexity—elements that neither legislators nor public administrators warm up to easily. Yet, our success at defictionalizing the notion of “capacity” will primarily depend, not so much on changes to statutory definitions, but on our retooling of the process for determining capacity and the need for guardianship. In the real world, autonomy is messy . . . and expensive.

NOTES

1 Mr. Sabatino is the Assistant Director of the American Bar Association’s Commission on Legal Problems of the Elderly in Washington, DC.
2 Ms. Basinger is a law clerk for the American Bar Association’s Commission on Legal Problems of the Elderly and a May 2000 Juris Doctor candidate at American University’s Washington College of Law.
3 17 Edw. 2, cs. 9, 10 (1324).
7 Includes use of other terms such as mental “incapacity,” “disability,” “impairment,” “retardation,” or “condition.”
8 Includes use of other terms such as physical “disability,” “illness,” “infirmity,” “degeneration,” “incapacity,” “injury,” or “condition.”
9 Includes use of other terms such as “drug dependency,” “chemical dependency,” “addiction to drugs,” “chronic substance abuse,” “continued consumption or absorption of substances,” “use of controlled substances,” or “habitual user of cocaine, opium or morphine.”
10 Includes use of other terms such as “alcohol dependency,” “chronic alcoholism,” “chronic use of alcohol,” “inebriety,” “habitual use of alcohol,” “the use of alcohol,” “excessive use of intoxicants,” “habitual drunkard,” or “continued consumption or absorption of substances.”
11 Includes use of other terms such as “infirmities of aging,” “senility,” “mental degeneration,” or “mental deterioration.”
13 N.Y. Mental Hyg. Law, § 81.02(b) (1999).
20 Id.
25 Id. § 11.88.010(1)(c).
30 Uniform Health-Care Decisions Act § 1(3) (1993).
32 Id. § 2983.
41 District of Columbia Guardianship, Protective Proceedings, and Durable Power of Attorney Act of 1986, D.C. Code Ann. § 21-2011(11) (1999). See also S.D. Codified Laws § 29A-5-302 (1999) ("A guardian may be appointed for an individual whose ability to respond to people, events, and environments is impaired to such an extent that the individual lacks the capacity to meet the essential requirements for his health, care, safety, habilitation or therapeutic needs without the assistance or protection of a guardian.") (emphasis added); Va. Code Ann. § 37.1-134.6 (Michie 1999)

'Incapacitated person' means an adult who has been found by a court to be incapable of receiving and evaluating information effectively or responding to people, events, or environments to such an extent that the individual lacks the capacity to (i) meet the essential requirements for his health, care, safety, or therapeutic needs without the assistance or protection of a guardian or (ii) manage property or financial affairs or provide for his or her support or for the support of his legal dependents without the assistance or protection of a conservator. (emphasis added); W. Va. Code § 44A-1-4(3) (1998)

'Protected person' means an adult individual, eighteen years of age or older, who has been found by a court, because of mental impairment, to be unable to receive and evaluate information effectively or to respond to people, events, and environments to such an extent that the individual lacks the capacity: (A) To meet the essential requirements for his or her health, care, safety, habilitation, or therapeutic needs without the assistance or protection of a guardian; or (B) to manage property or financial affairs or to provide for his or her support or for the support of legal dependents without the assistance or protection of a conservator. (emphasis added); Vt.

42 N.Y. Mental Hyg. Law, § 81.02(a) (McKinney 1999).


49 N.Y. Mental Hyg. Law, § 81.02(a) (McKinney 1999).

50 In re Colson, Law Docket No. LAW-WAL-93-349 (Me. 1993).


52 Id. § 5-303.

53 Id. § 5-304(a).

54 Appellant’s Statement of Evidence or Proceeding, In re Colson, Law Docket No. LAW-WAL-93-349 (Me. filed July 19, 1993).

55 Appellant’s Statement at 2.

56 Id.

57 Id.

58 Appellant’s Statement at 5.

59 Id.

60 Appellant’s Statement at 6.

61 Appellant’s Statement at 5.

62 Appellant’s Statement at 6.

63 Appellant’s Statement at 7.

64 Appellant’s Statement at 4.

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Conn. Gen. Stat., § 45a-644(c) (West 1999).


17 Edw. 2, cs. 9, 10 (1324).


Idaho Code § 15-5-3-4(b) (1999).


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N.Y. Mental Hyg. Law § 81.02(b) (McKinney 1999).
Uniform Health-Care Decisions Act § 1(3) (1993).

Offprints. Requests for offprints should be directed to Charles P. Sabatino, JD, Assistant Director, ABA Commission on Legal Problems of the Elderly, 740 Fifteenth Street, NW, Washington, DC 20005.