

Florida Guardianship Examining Committee Training

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Agenda

- Overview and Introduction
- Training Requirements
- Goals of the training
- Guardianship in Context
- Florida Guardianship Law & Process
- Rights of Incapacitated Persons
- Clinical Evaluation in Guardianship Proceedings
- References

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Overview and Introduction

- This training was developed in accordance with Florida Statutes 744.331(3)(c) and (d), which mandates that examining committee members complete training on evaluation of persons subject to guardianship proceedings
- Professionals completing this training are not “certified” or “qualified” examiners—they have simply completed the state-referenced training

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Training Requirements

- Florida requires that examining committee members complete a minimum of 4 hours of initial training on the guardianship examination process and, every 2 years thereafter, 2 hours of additional training (liberally applied in some circuits to include any relevant continuing education)
- The court can waive the initial training requirement for a person who has served for 5 or more years on examining committees

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Training Requirements

- If the examining committee member wishes to obtain the required continuing education on the Internet or by viewing a video course, permission must first be obtained from the chief judge of the circuit, or the judge's designee
- All examining committee members must file an affidavit with the court indicating completion of required courses, or that the training will be completed within 4 months of their initial appointment

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Goals of the Training, Participants Will Be Able To:

- | | |
|---|--|
| • Describe rights at issue in guardianship proceedings | • Evaluate those who are subject to guardianship proceedings |
| • Describe the guardianship petitioning, examination, and adjudication processes in Florida | • Write reports that effectively describe their evaluations and findings |

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Poll Questions 1 & 2

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Guardianship in Context

- American culture places great value on autonomy and independence, and this manifests in many laws, including the law of guardianship
- Adults are presumed to have the capacity to make decisions about their finances, health care, legal circumstances, and personal circumstances without interference from others
- A subset of adults experience impairments that compromise their ability to make competent decisions about various matters and, in these cases, certain rights are transferred, restricted, or revoked

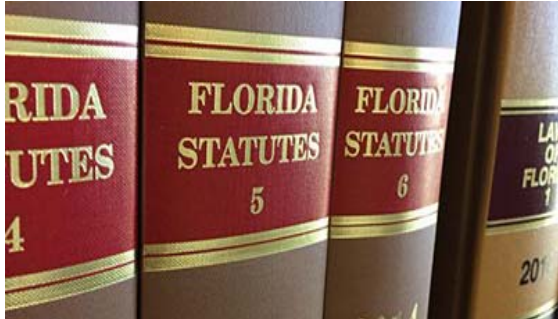
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Guardianship in Context

- Advanced age is not a requirement for establishing a guardianship, which is sometimes used with other populations (e.g., younger persons with disabling brain injuries)
- Because some persons who are in need of guardianships do not come to the attention of the court, guardianships are probably established with a subset of all persons who actually need them
- Given the law and process, guardianship can be problematic when used with persons whose impairing conditions wax and wane (e.g., bipolar disorder)

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Guardianship in Florida: The Law & Legal Process



The Old System and the New System

- Historically, legal incapacity was tied to an underlying medical diagnosis
- “Incompetent” described a person believed to be impaired because of mental illness, sickness, excessive use of alcohol or drugs or other mental or physical condition so that s/he was incapable of caring for him/herself or managing his/her property
- In 1989 Florida’s guardianship law was revised substantially based on the findings of the Study Commission on Guardianship Law (Florida Statutes 744.1012)

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Florida Guardianship Law, FS 744.1012

- Emphasizes that
 - All involved are to be sensitive to the very personal nature of the matters and inquiry
 - The examinee’s functional abilities be the focus of the legal inquiry and assessment
 - Limited guardianships are to be instituted whenever possible in order to emphasize autonomy and minimize restriction of rights

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The Limited Guardianship

- “Although many cases may require plenary guardianship, such total control is unnecessarily intrusive and demeaning to a person whose loss of competence is only partial...Thus, there is a distinct need for limited guardianships tailored to individual capacity and restricted to those aspects of a ward’s life which clearly require attention.” (1989 Study Commission on Guardianship Law)

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Florida Guardianship Law, FS 744.1012

- Requires that
 - Persons participate, to the degree possible, in all decisions that affect them
 - The rights and financial resources of persons be protected and well managed
 - Less restrictive alternatives to guardianship be used whenever possible, such as
 - Advance health care directives
 - Durable power of attorney
 - Trust
 - Representative payee for Social Security benefits

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Advance Health Care Directive

- The principal provides written instructions regarding medical decisions that are to be made when s/he is unable to make medical decisions at the end of life (living will)
- Health care surrogate appointment (a person appoints an agent to make medical decisions for him/her in the event of incapacity (this person’s authority continues even if guardian is appointed))

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Health Care Proxy

- A person authorized by statute to make medical decisions for an incapacitated principal when the principal fails to appoint a surrogate
- A default, priority listing of proxy designation is established by statute – guardian, spouse, adult children, etc.
- The proxy's authority begins when the physician determines the patient lacks capacity to make medical decisions

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Durable Power of Attorney

- Executed in order to appoint an agent to handle one's property, as if the agent was the principal
- Does not preclude the person from handling his or her property
- Continues to be effective even when the principal becomes incapacitated
- Filing of incapacity proceedings suspends power of attorney and the agent's authority unless related (parent, spouse, child, or grandchild)

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Trust

Legal document signed by an individual (settlor), who transfers legal title to his/her property to individual named in trust (trustee), who holds title for the benefit of someone else (beneficiary) under binding terms outlined in the Trust instrument

Provides for disposition of property during life and at death under terms of the trust without going through the probate process

- Revocable or irrevocable
- Provides for successor trustee on incapacity of grantor or designated trustee

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Poll Question 3

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Initiating Guardianship Proceedings & the Examination Process



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Petition to Determine Incapacity and Appointment of a Guardian

- The petition can be filed by any interested person (e.g., family member, neighbor, nursing home administrator) and is to identify
 - The factual basis for the petition-including underlying impairments (if known)
 - The rights that the subject of the petition may not be able to exercise
 - The reason a guardian needs to be appointed
 - Any known less restrictive alternatives

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Petition to Determine Incapacity and Appointment of a Guardian

- The examining committee is to be appointed no less than 5 days after the petition is filed
- The court appoints an attorney for the AIP (alleged incapacitated person), who represents the AIP's wishes consistent with the rules of the Florida Bar

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The Examining Committee

- Three members
 - 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*
- Examining committee members must attempt to consult with the AIP's attending physician

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The Examining Committee

- Examining committee members 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
- Committee members cannot be related to or associated with each other, the parties, the attorneys, or judge
- At least one committee member must have knowledge of the type of incapacity alleged

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The Examining Committee

- Committee members 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)
- Examining committee members cannot be appointed to serve as guardians of persons they have examined

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The Examining Committee

- Examining committee members are to have access to, and may consider previous examinations, e.g., (recognize the need to be impartial and balanced in review of collateral information).
- “Habitation plans”
- School records
- Psychological and psychosocial evaluations *voluntarily* provided by the AIP

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Examining Committee Member Responsibilities

- Remain cognizant of the legislature’s goal that the least restrictive alternative be made available to persons who have some capacity to manage their affairs
- Presume capacity, and not assume the need for a guardianship simply based on the filing of a petition to determine incapacity

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Examining Committee Member Responsibilities

- Remember that guardianship is a legal response that involves important rights and...
- Act in a way that does not compromise the AIP's rights (e.g., one should allow the presence of the court appointed attorney during the examination, if requested)
- Recognize that the adjudicatory hearing is an adversarial proceeding in which one's opinions about the AIP may be subjected to scrutiny and challenge

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Examination/Report Components/Logistics

- Physical examination (by qualified healthcare professional)
- Functional assessment of psycholegal abilities that are identified as potentially impaired in the petition (by qualified healthcare professional)
- Mental health assessment (by qualified healthcare professional)

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Examination/Report Components/Logistics

- An effort must be made to contact the examinee's attending physician
- To be offered are diagnoses, prognoses and recommended course(s) of treatment for any disorders/impairments that are considered to impact the AIP's decision-making capacity
- Failure to carry out any statutorily-required responsibility must be explained

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Examination/Report Components/Logistics

- Reports must be submitted within 15 days after appointment and, if unable to comply, the examiner must notify the court in writing in the same manner the report is submitted
- 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)

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Evaluation/Report Components/Logistics

- Reports must identify who was present during the examination and who answered questions
- Each committee member must prepare and submit his/her own report
- A copy of each committee member's report must be provided to the petitioner and the AIP's attorney within 3 days after it is filed with the court, and at least 10 days before the hearing

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Examination/Report Components/Logistics

- The petitioning attorney and AIP may oppose introducing the reports into evidence by filing a written objection that identifies the basis. If the objection is timely filed, the Rules of Evidence apply to admissibility
- The guardianship petition is dismissed if a majority of the committee (i.e., 2/3) opine that the AIP is without any impaired capacity

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Examination/Report Components/Logistics

- Committee members are entitled to a reasonable fee as determined by the court. Most examiners are provided a flat fee that is adopted by the circuit
- If the AIP is adjudicated incapacitated, fees are paid by the guardian from the ward's property or, if the ward is indigent, by the state; *committee member fees are not paid by the guardian until a court order approving fee payment is signed at the final hearing*
- If the petition is dismissed, the committee members' fees are paid by the state as expert witness fees

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Poll Q 4

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Poll Q 5

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Rights of Persons Adjudicated Incapacitated



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Rights of Incapacitated Persons Generally

- Some rights are never removed
- Some rights are removed or restricted but not delegated
- Some rights are removed or restricted and delegated

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Important Rights That Are Never Removed

- Annual and continuing review of guardianship
- Consideration of restoration of capacity and access to courts, counsel, and visitors
- Humane treatment
- Qualified guardian
- Remain as independent as possible
- Proper education
- Prudent financial management
- Notice of and appearance in proceedings

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Rights That are Removed or Restricted,
but Not Delegated

- Marry (removed)
- Vote (removed)
- Have a drivers license (removed)
- Seek or retain employment (removed or restricted)

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Rights that are Removed or Restricted
and Delegated

- Contract (if this right is removed, the right to marry, even if not removed, becomes subject to prior court approval)
- Sue and defend lawsuits
- Apply for government benefits
- Travel
- Manage property or make any gift or disposition of property

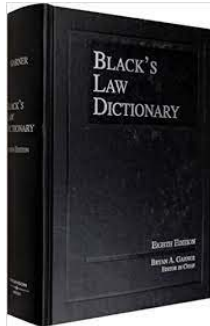
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Rights that are Removed or Restricted
and Delegated

- Personally apply for government benefits
- Determine residence
- Consent to medical treatment
- Make decisions about social environment

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Some Important Definitions



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Functional Impairment, F.S.744.102(10)

- Florida is among the few states which use functional impairment alone as a standard for decision making about capacity
- *A person is incapacitated not simply because of the presence of an illness or condition, but because of inability to personally accomplish necessary tasks as the result of an underlying illness or condition*

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Functional Impairment, F.S.744.102(10)

- “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

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Capacity To Manage Property
FS 744.102(12)(a)

- “Means to take those actions necessary to obtain, administer, and dispose of real and personal property, intangible property, business property, benefits, and income”

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Capacity to Meet the Essential Requirements
of Health and Safety, FS 744.102(12)(b)

- “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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Due Process Protections for Persons Subject
to Guardianship Proceedings



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Due Process Protections

- Independent legal counsel is required, an attorney is appointed by the court
- Reading of formal notice by the AIP's attorney is required
- The attorney represents the AIP through the hearing and filing of the initial report of the guardian
- The hearing must be recorded

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Due Process Protections

- At any hearing the AIP has the right to:
 - Be present (can waive appearance)
 - Remain silent and refuse to testify (refusal to testify cannot be used as evidence of incapacity), or testify
 - Present evidence, call witnesses, and confront and cross-examine witnesses
 - Request the hearing be open or closed

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The Adjudicatory Hearing



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The Adjudicatory Hearing

- Incapacity must be established by *clear and convincing evidence*

- The standard of clear and convincing evidence is a very high standard but can be met where there is conflicting medical evidence but a unanimous examining committee opinion of total incapacity (*Manassa v. Manassa*, 738 So.2d 997, Fla. 1st DCA 1999)

- See also *Losh v. McKinley*, 86 So.3d 1150 (Fla. DCA 2012); *In re Bryan*, 550 So.2d 447 (Fla. 1989); *Smith v. Smith* 917 So.2d 400 (Fla. DCA 2005).

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The Adjudicatory Hearing

- Although their presence can be demanded, examining committee members typically do not appear at these hearings, rather, their reports are primarily relied upon

- Examining committee members who testify are subjected to an oath

- The attorney who represents the AIP has an ethical duty to challenge the petition if requested by the AIP

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Least Restrictive Alternatives, FS 744.331(6)(b)

- In any order declaring a person incapacitated the court must find that alternatives to guardianship were considered and that no alternative to guardianship will sufficiently address the problems of the ward

- Durable power of attorney

- Advance health care directive

- Trust

- Representative payee

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Less Restrictive Alternatives to Guardianship

- Case management?
- Jointly held assets?
- Being cared for at home by caregivers?
- Health care surrogate?
- Role of alternative dispute resolution – F. S. Ch. 44.407 Eldercares Coordinator

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Types of Guardianships

- Emergency Temporary Guardianship
- Voluntary Guardianship
- “Permanent” Guardianship
 - Limited
 - Plenary

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Emergency Temporary Guardianship

- The court may appoint a guardian on an emergency basis for up to 90 days upon finding that there is “an imminent danger that the physical or mental health or safety of the person will be seriously impaired or his property is in danger of being wasted, misappropriated, or lost unless immediate action is taken”
- May be extended an additional 90 days
- The court specifies the powers and duties of guardian

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Voluntary Guardianship

- Without adjudication, the court may appoint a guardian of property of a person who, though “mentally competent,” is incapable of the care, custody, or control of his or her own property
- Requires certificate of physician stating the individual is competent and understands the nature of guardianship and the delegation of authority
- Annual plans require the physician's statement of capacity

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“Permanent” Guardianships

- Limited Guardianship: a guardian in which some rights are retained by the ward
- Plenary Guardianship: A guardianship in which all legally relevant rights have been removed or transferred

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Restoration of Rights, F.S.744.3215(1)(c)

- A person who has been adjudicated incapacitated has the right to be restored to capacity at the earliest possible time
- Reversible impairments
- FS 744.464 – Suggestion of Capacity – Requires one physician's (MD or DO) report – the standard of proof for restoration is a preponderance of the evidence

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Clinical-Forensic Assessment in Florida Guardianship Proceedings



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About What the Examiner Must be Knowledgeable

- Guardianship law and process
- Clinical conditions likely to impact a person's decision making capacity
- How forensic practice differs from therapeutic practice
- The examiner's role and responsibilities
- How to assess relevant decision-making capacity

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Differentiating Therapeutic and Forensic Pursuits



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Therapeutic Practice v. Forensic Assessment

	<u>Therapeutic</u>	<u>Forensic</u>
Client	Patient	Court
Goal of Evaluation	Assist/treat patient	Inform legal decision maker
Decision maker	Patient	Court
Professional's Stance	Advocacy, aligned	Objective, detached
Confidentiality	Standard	None

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Therapeutic Practice v. Forensic Assessment

	<u>Therapeutic</u>	<u>Forensic</u>
Significance of Diagnosis	High	Moderate
Informed Consent	Almost always required	Typically not required
Presumed Response Style	Candid	Candid, Guarded
Sources of Information	Examinee/patient	Examinee and collateral info

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Therapeutic Practice v. Forensic Assessment

	<u>Therapeutic</u>	<u>Forensic</u>
Demonstrated Concern	High	High
Respect for Privacy	High	High
Respect for Dignity	High	High
Effort to Gain Cooperation	High	High

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Poll Q 6

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Distinguishing Therapeutic & Forensic Roles

- Health care professionals typically focus on identifying and treating symptoms and conditions, in forensic contexts they focus on describing relevant aspects of the person's functioning for the court
- Because there is no treatment relationship, examinees are not patients, and healthcare professionals do not establish a therapeutic alliance with, or become advocates for, examinees
- In a guardianship proceeding the person who is being examined is not the health care professional's "patient," but the "examinee"

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Distinguishing Therapeutic & Forensic Roles

- In guardianship proceedings, the examiner's client is not the examinee, but the court who appointed the professional
- As an examining committee member, the professional's task is to assess and inform the court about the examinee's abilities as they may be affected by underlying impairments/conditions, so that the court can make a more informed decision about the person's need for guardianship

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Distinguishing Therapeutic & Forensic Roles

- **The ultimate decision maker is not the health care professional or the examinee, but rather, the judge-** who will determine whether the examinee's capacities are impaired such that some rights should be transferred, restricted, or removed
- Because there is no treatment relationship, the examiner owes no duties of confidentiality or privilege—indeed, the express purpose of the examination is to gain information about the examinee for purposes of sharing it with the court

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Distinguishing Therapeutic & Forensic Roles

- Because the examination is ordered by the court the examiner can conduct the evaluation without the consent, or over the objection, of the examinee, although the examiner will inform the examinee of the nature and purpose of the examination and try to enlist the examinee's participation
- Diagnosis, which is of primary importance when it comes to planning treatment, is less important in forensic evaluation contexts like guardianship

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Distinguishing Therapeutic & Forensic Roles

- Because there is no perfect relationship between any diagnosis and the various capacities that are the subject of guardianship proceedings (e.g., make financial decisions, make healthcare decisions, vote, marry), specific diagnoses are less critical and the evaluation is about much more than diagnosis
- Diagnosis is not without relevance, however, insofar as it can provide information about whether any observed deficits can be remedied with treatment, and the person's ability to exercise rights over time

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Distinguishing Therapeutic & Forensic Roles

- Because *patients* typically come to health care professionals voluntarily seeking treatment, we assume they are candid since this is necessary for appropriate diagnosis and intervention
- Because *examinees* in guardianship proceedings are rarely participating voluntarily, and because of what is at stake, it would be naïve to assume that they are completely candid or forthcoming when being evaluated, e.g., examinees may be guarded if they wish to avoid restriction or transfer of rights

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Distinguishing Therapeutic & Forensic Roles

- Because healthcare professionals assume *patients* to be honest and candid, they often rely solely on patients' self reports, along with test results
- In guardianship proceedings and other forensic contexts, examiners are foolish to rely solely on the examinee's self report given concerns about response style—they seek and pay more attention to collateral data

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Distinguishing Therapeutic & Forensic Roles

- Potentially relevant collateral data in guardianship proceedings include, but may not be limited to
 - information included in the guardianship petition,
 - observations and opinions of treating physicians and other healthcare professionals familiar with the examinee's functioning and adjustment
 - observations of family members, neighbors, and friends familiar with the examinee's functioning and adjustment
 - information included in financial, legal, social service and other records

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The Guardianship Examination



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The Examination Task

- Assess and richly describe the examinee's physical, emotional, behavioral, and cognitive functioning, and associated limitations (if any)
- Richly describe the examinee's legally relevant abilities (psycholegal capacities) and how they may be affected by any identified impairments/disorders
- Identify interventions that may remedy any deficits in psycholegal abilities

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Preliminary Issues

- Competence and capacity lie along a continuum--dichotomies that are developed by the law (e.g., "has capacity" or "lacks capacity") while necessary are, to some degree, arbitrary
- Decisions about capacity are ultimately legal judgments, that can be informed by the health care professional's inquiry into the examinee's
 - Clinical functioning
 - Social circumstances
 - Decision making abilities

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Preliminary Issues

- There are few, if any, physical disorders that, in and of themselves, impair decision making capacity
- With rare exception, there is not a perfect relationship between any mental disorder and (in)capacity to make important life decisions
- Lack of knowledge oftentimes indicates lack of capacity, but may not

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Preliminary Issues

- Knowledge oftentimes indicates capacity, but may not (e.g., in cases in which the examinee has simply memorized matters in an anticipation of evaluation)
- The focus of the evaluation is on specific rights/capacities, identified by Florida law

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Guardianship Examination Process

- Pre-evaluation Preparation
- Guardianship Evaluation
- Opinion Formation
- Report Writing

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Pre-Examination Preparation

- Review order and petition
- Gather relevant background information
 - Attempt third-party interviews if indicated (e.g., primary care provider, petitioner, others with knowledge of the examinee)
- Seek assistance from attorneys in obtaining and reviewing relevant records (e.g., medical, mental health, financial, legal, educational)

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Examination Process

- Consent/notification
- Relevant history-taking
- Focused assessment of functional abilities
- Mental status examination
- Testing (if any)

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Consent/Notification

- If the evaluation has been ordered by the court informed consent is not required and, in theory, examiners can conduct the evaluation over the objection or without the explicit consent of the examinee
- Examiners are always required to inform examinees about the nature and purpose of the examination, and should always seek their cooperation

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Relevant History

- Addressing history up front may reduce the examinee's anxiety and facilitate rapport
- Insight into the examinee's clinical functioning can be gathered simply by considering not only s/he communicates, but how it is communicated
- Comparing history gathered from the examinee to information that is known from other sources can provide insight into the examinee's clinical functioning (e.g., memory, response style)

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Relevant History

- What's relevant?
- We do not know what's relevant until we ask, but there are certainly some aspects that likely deserve at least minimal inquiry in all cases
 - Social
 - Educational
 - Vocational
 - Medical
 - Mental health and substance use

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Assessment of Psycholegal Capacities

The legal guidance that follows accurately reflects the general approach to legal definitions of task specific capacities*

*Citations are from *Assessment of Older Adults With Diminished Capacity, A Handbook For Lawyers*, 2nd ed., American Bar Association Commission on Law and Aging/American Psychological Association (ABA/APA) and where appropriate, Florida Statutes

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Contract

Legal Guidance

- “a general test of understanding cognitive in nature...whether the person possesses sufficient mind to understand, in a reasonable manner, the nature, extent, character, and effect of the act or transaction.” (ABA/APA p. 17).

Clinical Inquiries

- Appreciation of the legal nature of contracting and the implications
- Ability to reason and deliberate on issues
- Reasoning surrounding recent, anticipated, or hypothetical contracts

Make Health Care Decisions

Legal Guidance

- “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” (ABA/APA, p. 19).

Clinical Inquiries

- Knowledge and appreciation of conditions
- Knowledge and appreciation of interventions, risks, and benefits
- Ability to make a rational, self-interested decision

Make Health Care Decisions

Legal Guidance

- “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” (ABA/APA, p. 19)

Clinical Inquiries

- Capacity to make rational, self interested decisions free of impairment
- Reasoning surrounding recent, anticipated, or hypothetical contracts

Marry

Legal Guidance

- “whether there is capacity to understand the nature of the marriage contract and the duties and responsibilities which it creates” (ABA/APA, p. 21).

Clinical Inquiries

- Appreciation of the contractual nature of marriage and the associated legal and financial implications
- Knowledge of current status and reasoning surrounding recent, anticipated, or hypothetical marriages
- Susceptibility to coercion or undue influence

Vote

Legal Guidance

- “...court order must state whether the adult subject to guardianship retains right to vote and if not ...include findings that the adult cannot communicate, with or without support, a specific desire to participate in the voting process” (UGCOPPA, §310 Uniform Law Commission, 2017)

Clinical Inquiries

- Appreciation of voting as a right
- Susceptibility to pressure or manipulation
- Knowledge of current events, party affiliation, and recent activities
- Understanding of how to vote

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Apply for Government Benefits

Legal Guidance

- Like capacity to contract. Whether the person possesses sufficient mind to understand in a general nature, the extent, character, and effect of the act or transaction in which the person is engaged.” (ABA/APA, p. 17).

Clinical Inquiries

- Knowledge and ability to assess eligibility for entitlements (e.g., SS or veterans’ benefits)
- Ability to correspond, communicate, understand, and follow through with an application
- Reasoning surrounding current, anticipated, or hypothetical benefits

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Maintain a Driver's License

Legal Guidance

- Like capacity to contract. Has a cognitive element of understanding (rules of the road), and also a physical element of being able to do something. (ABA/APA, p. 17).

Clinical Inquiries

- Appreciation of knowledge of limitations that may impact ability to operate a motor vehicle
- Recent driving experience and examinee's assessment of such

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Travel

Legal Guidance

- Like capacity to contract. Whether the person possesses sufficient mind to understand in a general nature, the extent, character, and effect of the act or transaction in which the person is engaged." (ABA/APA, p. 17).

Clinical Inquiries

- Appreciation of one's physical/cognitive limitations that affect capacity to travel
- Ability to plan, and reasoning surrounding recent, anticipated, or hypothetical travel

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Seek & Retain Employment

Legal Guidance

- Like capacity to contract. Whether the person possesses sufficient mind to understand in a general nature, the extent, character, and effect of the act or transaction in which the person is engaged." (ABA/APA, p. 17).

Clinical Inquiries

- Appreciation of limitations and abilities
- Knowledge of rights and worth
- Ability to protect self in employment contexts
- Ability to carry out work activities

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Respond to or Initiate Lawsuits

Legal Guidance

- Like capacity to contract. Whether the person possesses sufficient mind to understand in a general nature, the extent, character, and effect of the act or transaction in which the person is engaged.” (ABA/APA, p. 17).

Clinical Inquiries

- Knowledge of legal system
- Appreciation of and ability to exercise rights
- Capacity to consult with counsel with make rational, self-interested decisions
- Reasoning and understanding of recent or pending litigation

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Make Gifts or Dispose of Property

Legal Guidance

- Same as testamentary capacity (know generally what you have, who gets it when you die, and how it gets there) and must also be capable of understanding effect of gift on donor's financial security and on dependents. (ABA/APA, p. 18) Note: F.S. 744.3215(3)(d) “to manage property or to make any gift or disposition of property” (Will not mentioned)

Clinical Inquiries

- Knowledge of assets and value, and implications of gifting
- Susceptibility to manipulation or coercion
- Reasoning surrounding recent, anticipated, or hypothetical gifts/gifting

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Manage Finances

Legal Guidance

- “...to take those actions necessary to obtain, administer, and dispose of real and personal property, intangible property, business property, benefits, and income. F. S. 44.102(12)(a). Limited ability to receive and evaluate information and to communicate decisions. ABA/APA p.19

Clinical Inquiries

- Knowledge of assets and liabilities
- Reasoning surrounding recent, anticipated, or hypothetical financial decisions and actions

Make Decisions About Residence

Legal Guidance

- F.S. 744.102 (12)(b). Capacity to meet at least some of the essential health and safety requirements of the person means “to take those actions necessary to provide the health care, food, shelter, clothing, personal hygiene, or other care.

Clinical Inquiries

- Appreciation of any cognitive or physical limitations and associated risk
- Susceptibility to coercion or manipulation
- Reasoning surrounding recent, anticipated, or hypothetical decisions about residence

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Make Decisions About Social Environment

Legal Guidance

- Like capacity to contract, “whether the person possesses sufficient mind to understand in a general nature, the extent, character, and effect of the act or transaction in which the person is engaged.” (ABA/APA, p. 17).

Clinical Inquiries

- Susceptibility to coercion and manipulation
- Ability to rationally assess abilities, limitations, and risk for harm or manipulation
- Ability to advocate for self
- Reasoning surrounding recent or anticipated, or social environment decisions

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A Note About Vulnerability to Manipulation



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Vulnerability to Manipulation


- People may be more vulnerable to manipulation as a function of a number of factors, including
 - Compromised judgment resulting from some impairment in emotional, behavioral, or cognitive functioning
 - Isolation
 - Physical or other impairments that make them dependent on others who may be motivated to take advantage of them
- In some cases, guardianship proceedings may be instituted in response to such manipulation

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Report Writing

	
Psychological Studies in Education Philadelphia, PA 19122-6099 (215) 261-8000	
CONFIDENTIAL PSYCHOLOGICAL REPORT	
Name: Liam Garrison	Evaluation Date: 1/11/2019-2/4/2019
Date of Birth: 1/11/2010	Date of Report: 2/12/2019
Age: 9 years, 2 months	Client Number: 4561-2019
Reason for Referral	
Liam's parents are worried that their son is beginning to fall behind in school and hope to understand his strengths and weaknesses better so that they can be more effective when they assist him with his schoolwork. They strongly suspect that their son has attention problems that were missed in a previous evaluation.	
Procedures for Evaluation	
• Interviews with Liam, his parents, and his teacher • Wechsler Intelligence Scale for Children, Fifth Edition (WISC-V) <small>© 2014 Pearson Education, Inc. or its affiliate(s). All rights reserved. WISC-V is a trademark of Pearson Education, Inc.</small>	

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Report Writing: General Issues

- Many circuits provide report shells that we suggest you either supplement or not use because they discourage comprehensive description of the examinee's functioning and capacities

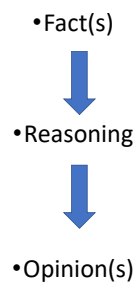
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Report Writing: General Issues

- The purpose of the report is to communicate to the audience (i.e., judge and attorneys)
 - what the examiner did,
 - the data the examiner considered (and did not consider),
 - the facts the examiner uncovered,
 - the opinions the examiner formed about the examinee's functioning, and the factual bases,
 - the opinions the examiner formed about the examinee's ability to exercise the rights at issue, and the underlying reasoning

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Report Writing



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Recommended Report Format

- Identifying Information & Notification
- Relevant History
- Current Clinical Functioning
- Diagnosis(es)
- Description of Psycholegal Capacities at Issue
- Summary & Opinions

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Good Guardianship Evaluations & Reports

- Identify how much time was spent with the examinee
- Identify sources of information accessed and not accessed
- Only include “expert” opinions
- Provide a factual basis for any important opinions offered

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Good Guardianship Evaluations & Reports

- Use language, terms, and concepts that the intended audience (i.e., judges, attorneys) understands
- “Dis-complicate” complicated matters
- Are not diagnosis-focused
- Do not simply infer a lack of capacity based on the presence of a diagnosis or condition

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Good Guardianship Evaluations & Reports

- Are not test-focused
- Do not draw conclusions about an examinee's psycholegal capacity solely on a test score
- Do not base opinions about the examinee's capacity simply on his or her knowledge or lack thereof
- Richly describe the examinee's mental state and functioning

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Good Guardianship Evaluations & Reports

- Richly describe the examinee's capacity to make rational, self-interested decisions about the various matters at issue, and how these abilities are affected by mental (or physical) impairment
- Identify any interventions that may assist in the examinee's functioning and allow some retention of rights, and indicate to the court if re-examination might be considered

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Final Questions



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Meetings with Circuit Representatives



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- ABA/APA Assessment of Capacity in Older Adults Project Working Group (2007). Assessment of Older Adults with Diminished Capacity: A Handbook for Psychologists. Washington, DC: ABA/APA.***
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