FINDING INCOMPETENCY IN GUARDIANSHIP: STANDARDIZING THE PROCESS

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I. INTRODUCTION

Guardianship arises under the state power of parens patriae.[1] The Supreme Court has recognized the "beneficent function" of the doctrine,[2] and it is codified in state guardianship and conservatorship statutes ostensibly to promote the best interests of the ward.[3]

On its surface, the doctrine of parens patriae appears to have a benevolent purpose. This "beneficent function" is, however, a double-edged sword. While guardianship protects an individual from inability to meet personal needs for care and safety or to manage personal financial resources, it also suspends that individual's liberty to make decisions[4] and "reduce[s] the status of an individual to that of a child, or a nonperson."[5]

A series of stories published by the Associated Press in 1987 described the harsh results of some guardianship actions.[6] In one case, an elderly woman,

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1. Parens patriae is a power inherited from English law where the Crown assumed the "'care of those who, by reason of their imbecility and want of understanding, are incapable of taking care of themselves.'" NICHOLAS N. KITTRIE, THE RIGHT TO BE DIFFERENT 59 (1971) (quoting L. SHELFORD, A PRACTICAL TREATISE ON THE LAW CONCERNING LUNATICS, IDIOTS, AND PERSONS OF UNSOUND MIND 6 (1833)).

For a brief historical background, see Daniel B. Griffith, *The Best Interests Standard: A Comparison of the State's Parens Patriae Authority and Judicial Oversight in Best Interests Determinations for Children and Incompetent Patients*, 7 ISSUES L. & MED. 283, 287 (1991).

2. Late Corp. of the Church of the Latter Day Saints v. United States, 136 U.S. 1, 57 (1890).

3. *See, e.g.*, N.H. REV. STAT. 464–A:1 (1992) ("It is the purpose of this chapter to promote and protect the well-being of the proposed ward in involuntarily imposed protective proceedings."); *In re* Browne, 370 N.E.2d 148, 150 (Ill. App. Ct. 1977) ("The paramount concern in the selection of a conservator is the best interest and well being of the incompetent.").

4. Suspended liberties include choosing where to live, the right to vote, to marry, to contract, to make or revoke a will, and to freely make mistakes. Winsor C. Schmidt, *Guardianship of the Elderly in Florida*, FLA. BAR J., March 1981, at 189–90.

5. *Id.* at 190.

The specter of oppression may lurk behind the desire to protect the weak and infirm. "'Some paradox in our nature leads us, when we have made our fellow men the objects of our enlightened interest, to go on to make them the objects of our pity, then of our wisdom, ultimately of our coercion.'" Annina M. Mitchell, *The Objects of our Wisdom and our Coercion: Involuntary Guardianship for Incompetents*, 52 S. CAL. L. REV. 1405, 1433–34 (1979) (quoting L. TRILLING, THE LIBERAL IMAGINATION: ESSAYS ON LITERATURE AND SOCIETY 215 (1953)).

6. Associated Press, *Guardians of the Elderly: An Ailing System* (1987). A series of articles reporting on a nationwide investigation of guardianship laws exposed their harmful and

Minni Monhoff, found it almost impossible to terminate an unwanted and apparently unneeded guardianship.[7] A neighbor, motivated by good intentions, initiated a petition to place the 81 year-old under guardianship.[8] The court turned the petition over to an appointed lawyer who determined that institutionalization was in Ms. Monhoff's best interests.[9] Minni was declared incompetent, removed from her home, and placed in the custody of a nursing home.[10] The striking, but not uncommon, twist to this story is that her court-appointed lawyer waived a hearing without consulting her, and the court did not hear any testimony opposing the order, despite Minni's adamant opposition.[11] Whatever standard the court applied in finding Minni incompetent, it is clear that the court had little, if any, objective information about her functional incapacities.[12]

The elderly are particularly susceptible to legal incompetency or incapacity because aging increases the likelihood of incapacitating illnesses such as Alzheimer's disease, stroke, and heart disease.[13] As the "baby boom" generation grays, the need for legal guardians will most certainly grow. As a result, many concerned legal and health professionals have examined the effectiveness of legal protections available to prospective and extant wards.

News reports in the last half of the 1980s about guardianship abuses motivated many state legislatures to overhaul their guardianship statutes.[14] The

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exploitive potential on the most vulnerable citizens. The articles were published in over 300 newspapers throughout the country. Over 2200 cases were examined. Patterns of due process and monitoring failures were discovered. Some of the abuses that were revealed included lack of legal representation among two-thirds of the cases, lack of required medical evidence in forty percent of the files, and missing accountings of the wards' funds in fifty-one percent of the cases. The worst examples of abuse concerned neglected elderly wards who were essentially abandoned by the judicial arm of the state and left to die at the hands of an indifferent public guardian.

7. Fred Bayles & Scott McCartney, *Guardianship: Minni Monhoff Didn't Want Protection; She Wanted Freedom*, L. A. TIMES, Sept. 27, 1987, at A2.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. Functional incapacities refer to inabilities that are observable through conduct. *See infra* note 33 for an example of a statute that requires evidence of functional deficits for the appointment of a guardian.

13. In 1987 it was estimated that there were over one-half million elderly wards with public or private guardians. Claud Pepper, *Abuses in Guardianship of the Elderly and Infirm: A National Disgrace*, Sept. 25, 1987 (Claud Pepper, Chairman, Sub-Committee on Health and Long-Term Care, House Select Committee on Aging), *in* Allison P. Barnes, *Florida Guardianship and the Elderly: The Paradoxical Right to Unwanted Assistance*, 40 U. FLA. L. REV. 949, 952 n.11 (1988). In that same year, over 11,000 individuals in Florida alone were eligible for guardianship assistance but did not receive a legal guardian. Winsor C. Schmidt & Roger Peters, *Legal Incompetents' Need for Guardianship in Florida*, 15 BULL. AM. ACAD. PSYCHIATRY L. 69, 78 (1987). Florida has a disproportionately large elderly population and has been the focus of many research studies on guardianship.

14. An overview of various reforms among the states is reported in Judith McCue, *The States are Acting to Reform Their Guardianship Statutes*, 131 TR. & EST. 32 (1992). Reforms have been undertaken in many states to ensure that due process safeguards are implemented. Areas of concern include the petitioning process, right to counsel, right to notice, definition of incapacity, evidentiary requirements to prove incapacity, selection of guardians, and monitoring of guardianship.

One important change implemented by state legislatures has been to replace the term "incompetency" with the term "incapacity." The construct of incompetency has been considered too imprecise for purposes of guardianship, and its meaning may be confused with other types

Associated Press investigation reported many failures and deficiencies within the existing guardianship system.[15] In 1987, experts from several disciplines convened to draft a model statute and issue other recommendations for guardianship legislation.[16] In addition, a number of articles have been published addressing specific areas of guardianship in need of reform.[17] Federal[18] and state legislatures have responded.[19]

This Note focuses on methods of achieving fair, accurate, and uniform judicial determinations of incompetency at guardianship hearings. Improvements in incompetency determinations can be achieved by redefining "incompetency" as functional incapacity, mandating the use of standardized functional evaluations on proposed wards to identify their functional deficits, and using public funds to pay for them. Hence, three recommendations are made. First, legislatures are encouraged to revise their guardianship statutes to incorporate objective standards of incapacity. This will assist the courts in determining when a guardianship defendant is legally incapacitated. Second, legislatures should enact a requirement that all proposed wards be evaluated for functional deficits before the guardianship hearing is conducted. Competency experts will then have objective evidence about a defendant's incapacity to present to the tribunal. Finally, these examinations should be ordered by the

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of legal incompetencies in criminal prosecutions and civil commitment. Incapacity more aptly suggests the effects of mental disabilities on cognitive processing and functional skills necessary for self-care and the management of one's financial resources. *See* John Parry, *Selected Recommendations From the National Guardianship Symposium at Wingspread*, 12 MENTAL & PHYSICAL DISABILITY L. REP. 398, 403 (1988). The statutory and common law criteria for incompetency in guardianship is different from that in criminal and civil commitment actions. For example, dangerousness to others is one distinguishing prerequisite for civil incompetency. The standard of proof is another. Whereas defendants tried for civil commitment must be found incompetent beyond a reasonable doubt, guardianship defendants must usually be found incompetent by clear and convincing evidence. *See* note 126, *infra*.

15. Fred Bayles & Scott McCartney, *Guardianship: Few Safeguards*, L. A. TIMES, Sept. 27 1987, at A2 (characterizing guardianship as "a dangerously burdened and troubled system that regularly puts elderly lives in the hands of others with little or no evidence of necessity, then fails to guard against abuse, theft and neglect."); *see supra* note 6.

16. The conference was organized by the American Bar Association Commissions on Mentally Disabled and Legal Problems of the Elderly, and is reported in *Guardianship: An Agenda for Reform, Recommendations of the National Guardianship Symposium and Policy of the American Bar Association*, 13 MENTAL & PHYSICAL DISABILITIES L. REP. 271 (1988) [hereinafter *Wingspread*].

17. *See, e.g.*, Anne K. Pecora, *The Constitutional Right to Court-Appointed Adversary Counsel for Defendants in Guardianship Proceedings*, 43 ARK. L. REV. 345 (1990) (right to counsel); Winsor C. Schmidt et al., *A Descriptive Analysis of Professional and Volunteer Programs for the Delivery of Public Guardianship Services*, 8 PROB. L. J. 125 (1988) (public guardians); John W. Parry & Sally Balch Hurme, *Guardianship Monitoring and Enforcement Nationwide*, 15 MENTAL & PHYSICAL DISABILITIES L. REP. 304 (1991) (monitoring of guardianship); MELVIN T. AXILBUND, EXERCISING JUDGMENT FOR THE DISABLED: REPORT OF AN INQUIRY INTO LIMITED GUARDIANSHIP, PUBLIC GUARDIANSHIP AND PROTECTIVE SERVICES IN SIX STATES, (ABA Commission on the Mentally Disabled ed., 1979) (limited guardianship); Anita F. Ratcliffe, *Guardianship of Incapacitated Adults in Utah*, 1982 UTAH L. REV. 427 (1982) (vagueness of statutory definition of incompetency).

18. *See* Carol A. Mooney, *Guardianship Reform: A Federal Mandate*, 4 PROB. & PROP. 48 (Mar.-Apr. 1990).

19. For example, since 1987, at least five states have made legislative changes to ensure the legal representation of prospective wards at guardianship hearings. Improvements in notice, court review of guardianships, and evidence requirements to establish incapacity have been made in a number of states. *See* Judith McCue, *The States are Acting to Reform Their Guardianship Statutes*, 131 TR. & EST. 32 (1992).

court and paid for by public funds so that all alleged incompetents will have their rights and liberties protected from indefinite statutory standards and judicial uncertainty.

In Section II, three models of statutory definitions of incompetency in guardianship are described. Then, Section III discusses common problems courts have in making incompetency determinations at guardianship hearings because of the lack of objective evidence. Reasons for the dearth of objective evidence at a hearing include vague statutory definitions of incompetency, broad judicial discretion that reduces the incentive for demanding better evidence, and misconceptions about legal incompetency among medical and mental health experts. Finally, remedies for these problems are considered in Section IV. Recommended changes in guardianship proceedings include writing objective standards into statutory definitions of incapacity and requiring each proposed ward to undergo a standardized evaluation for functional deficits as a prerequisite to the guardianship hearing.

II. THE STRUCTURE OF INCOMPETENCY IN GUARDIANSHIP STATUTES

The evidence considered in a guardianship hearing depends upon the guardianship and conservatorship laws[20] of the state.[21] Each state sets forth its own definition of incompetency in its guardianship and conservatorship statutes.[22] Once a court determines that the defendant meets the statutory criteria, a guardian or conservator is appointed to provide for her safety and care or to manage her property.[23]

Most states' conservatorship laws and their counterpart guardianship laws are based on the same model of incompetence.[24] However, conservators and

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20. Generally, a conservator is charged with the care of a person's estate. A guardian cares for the person and, in some states, for the estate. The terms guardian and guardianship as used in this paper also embrace conservator and conservatorship. There are some differences between guardianship and conservatorship, but the difference depends upon the state, and their meanings are not the same in all states.

Another relevant distinction is between plenary and limited guardianship. In a plenary guardianship the guardian cares for the person and the estate. A limited guardianship allows the guardian to make decisions for the ward's person, but not for the estate. Moreover, a limited guardian can be restricted to making decisions concerning only certain functions of a person's care, allowing the person to make her own choices and decisions about matters for which her capacity to understand and communicate is not impaired.

See BRUCE D. SALES ET AL., DISABLED PERSONS AND THE LAW (1982) for a compendium of guardianship and conservatorship statutes from the 50 states and the District of Columbia.

21. Each of the 50 states and the District of Columbia has their own set of guardianship and conservatorship statutes. *Id.*

22. *See, e.g.*, ARIZ. REV. STAT. ANN. § 14–5101(1) (Supp. 1992):

> "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, to the extent that he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person.

Id.

23. *E.g.*, ARIZ. REV. STAT. ANN. § 14–5101 (Supp. 1992) (definition of "incapacitated person"); § 14-5303 (Supp. 1992) (appointment procedure for guardian); § 14-5401 (Supp. 1992) (appointment of conservator).

24. *E.g.*, MINN. STAT. ANN. § 525.54 (West 1992). Minnesota ties together its

guardians may serve different functions that benefit the ward. The conservator usually controls only the ward's property while the guardian cares for the ward's person and property.[25] However, the ward's need for intervention in both instances is usually determined by the same judicial process.[26] Because the capacity to manage one's estate may be closely linked with the capacity to care for one's person, the definitions of incapacity under the guardianship and conservatorship laws within a jurisdiction are closely related. Thus, although much of the discussion in this note focuses on incompetency as defined by guardianship laws, the same considerations generally apply to conservatorship laws. This section focuses on statutory definitions of incompetence in guardianship proceedings.

Commentators have analyzed the various statutory definitions.[27] A widely accepted scheme describes three approaches designated as the causal link model, the Uniform Probate Code (UPC) model, and the functional model.[28]

A causal link statute defines incompetence in terms of diagnostic categories of mental disabilities.[29] These disabilities are assumed to inhibit or destroy the ability to care for oneself or one's property.[30] The UPC model connects a mental or physical condition to cognitive functioning such that the condition renders an individual incapable of understanding, communicating, or making responsible decisions.[31] The third model statute focuses on specific

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guardianship and conservatorship laws in the same probate regulations.

25. THOMAS GRISSO, EVALUATING COMPETENCIES: FORENSIC ASSESSMENTS AND INSTRUMENTS 268 (1986).

26. *See supra* note 24.

27. Lawrence A. Frolik, *Plenary Guardianship: An Analysis, a Critique and a Proposal for Reform*, 23 ARIZ. L. REV. 599, 653 (1981); GRISSO, *supra* note 25, at 270; Bobbe Shapiro Nolan, *Functional Evaluation of the Elderly in Guardianship Proceedings*, 12 L. MED. & HEALTH CARE 210 (1984).

28. *See* Nolan, *supra* note 27.

29. An example of a causal link statute is the 1983 definition of incompetency in the Ohio Code:

> "Incompetent" means any person who by reason of advanced age, improvidence, or mental or physical disability or infirmity, chronic alcoholism, mental retardation, or mental illness, is incapable of taking proper care of himself or his property or fails to provide for his family or other persons for whom he is charged by law to provide....

OHIO REV. CODE ANN. § 2111.01(D) (Anderson 1983).

30. In the traditional formulation of incompetency, the defendant is classified as belonging to such categories as senile, improvident, or insane. Such a condition is assumed to be the cause of broadly described propensities such as "likely to dissipate property," "unable to care for self," "and likely to be deceived by artful and designing persons."

Under a causal link statute, a petitioner can "prove" a defendant's incompetency by calling in a physician to testify that the defendant has one of these conditions.

31. A large number of states have revised their statutes to conform with the cognitive model of incompetence as expressed in the UPC. The operative words in the UPC definition are "lacking sufficient understanding or capacity to make or communicate responsible decisions." *E.g.*, ARIZ. REV. STAT. ANN. § 14–5101(1) (Supp. 1992). Unlike the first model, where the debilitating condition is connected to the defendant's incompetence in carrying out moral and social obligations, this model connects the condition to the individual's ability to make rational decisions. In practice, this kind of statute does not protect the defendant any more than the first, largely because the court must make a value judgment about whether the defendant can make *responsible* decisions. Nolan, *supra* note 27, at 213. Moreover, inferences about cognitive functioning are based on unspecified indicia. The attempt by the writers of the UPC model to refocus the analysis of incompetency on psychological factors seems to have accomplished little practical improvements in the system.

functional deficits[32] that impair normal daily activities.[33]

The functional model[34] is gaining support among lawmakers as a basis for assessing incapacity.[35] This trend may be partly due to the recommendations made by attendees at *Wingspread*,[36] where at least five reasons for adopting a functional model were articulated.[37] First, a functional emphasis on incapacity recognizes that incapacity may be partial or complete.[38] Second, legal standards rather than clinical standards need to be met.[39] Third, functional impairment can change over time and does not necessarily reflect a permanent condition.[40] Fourth, functional incapacities are likely to impair the ability to manage personal or financial affairs and cause substantial harm to the individual.[41] And fifth, labels that are used for diagnostic purposes, such as schizophrenic, or that identify a person by a prominent characteristic, like homeless, old, or strange, are considered an insufficient basis for a finding of incapacity.[42] Functional descriptions preclude the use of these often-stigmatic labels. In addition, legislatures are becoming increasingly convinced that specific behavioral indices of incapacity can be more objectively documented than a putative mental state of incompetency.[43]

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32. Since the *Wingspread* Conference, there has been a growing trend among states to incorporate a functional definition of incapacity in their guardianship laws. For example, Connecticut defines "incapable of caring for one's self" by referring to "the person's 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 and which results in endangerment to such person's health." CONN. GEN. STAT. ANN. § 45a-644(c) (West Supp. 1992).

This kind of statute informs the court about the kinds of evidence that will support a prima facie case for guardianship and what facts are needed to make a legal determination of incompetency. Quite often, informal functional assessments are offered as evidence. Nolan, *supra* note 27, at 213.

33. Some statutes are more specific than others about what constitutes a functional deficit. The current Utah Code defines, in part, an "incapacitated person" as one who:

> has unusually bad judgment, highly impaired memory, or severe loss of behavior control to the extent that the person is unable to care for his or her personal safety or is unable to attend to and provide for such necessities as food, shelter, clothing, and medical care, without which physical injury or illness may occur.

UTAH CODE ANN. § 75-1-201(18) (Michie 1993). The New Hampshire Code defines "functional limitations" more specifically as "behavior or conditions in an individual which impair his or her ability to participate in and perform minimal activities of daily living that secure and maintain proper food, clothing, shelter, health care or safety for himself or herself." N.H. REV. STAT. ANN. § 464-A:2(VII) (1992). Moreover, incapacity is considered a legal disability under the New Hampshire Code if the evidence of inability "occurred within 6 months prior to the filing of the petition and at least one incidence of such behavior must have occurred within 20 days of the filing of the petition for guardianship." N.H. REV. STAT. ANN. § 464-A:2(XI) (1992). For clinical examples of functional deficits, see Nolan, *supra* note 27, at 211.

34. Nolan, *supra* note 27, at 213. This model is based on a non-diagnostic, therapeutic approach favored by workers in gerontology and mental health. *Id.*

35. *See* McCue, *supra* note 14, at 37.

36. See Parry, *supra* note 14, at 403, for a summary of reforms suggested at *Wingspread*.

37. *Id.* at 404.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. Since 1987, at least nine states have enacted legislation requiring evidence of incapacity before a guardian can be appointed. McCue, *supra* note 14, at 36.

Statutes based on the functional model provide better judicial guidance for making determinations of incapacity than the other models. Under a functional model, a guardianship defendant must be found deficient in performing basic functions of daily living before the court can intervene.[44] Statutes generally list these functions, which often include the ability to feed, clothe, and seek health care and safety for oneself,[45] in order to direct the court's attention to the defendant's observable conduct as well as to the defendant's mental status.[46]

In contrast, the UPC model does not encourage objective fact-finding.[47] Instead, it directs a court's attention to the same or similar disabling conditions listed in causal link statutes as the primary basis for determining incapacity.[48] That is, the court continues to rely on the same kinds of testimony relied on pursuant to the causal link statutes.[49] Thus, the ultimate determination of incompetency effectively remains in the hands of physicians who report to the court on whether or not they believe the defendant to be incapacitated. Even though their reports lack documentation of functional deficits,[50] these reports can be quite persuasive.[51]

Functional definitions offer an improvement. They focus the court's attention on objective evidence of incapacity. They also make it easier for the court to follow formal rules of evidence[52] and advocacy because of the court's greater attention to the facts rather than opinions. In the absence of documented facts about the defendant's deficits, the guardianship hearing lapses into an informal procedure that may infringe on the defendant's right to due process and potentially impair that person's other civil rights.[53] An important practical effect of a functional definition of incapacity is to reduce the court's paternalism and raise the status of the guardianship defendant to that of a defendant in

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44. *See, e.g.*, N. H. REV. STAT. ANN. § 464–A:2(VII), (XI) (1992).

45. *Id.*

46. For example, the Minnesota Code requires that cognitive deficits must be coupled with observed behavioral deficits in meeting "personal needs for medical care, nutrition, clothing, shelter, or safety" to evidence incapacity. MINN. STAT. ANN. § 525.54(2) (West 1992).

47. For example, consider the definition of incapacity from the Idaho Code:

"'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 that he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person...." IDAHO CODE § 15-5-101(a) (Michie 1993). This statute offers no objective basis for deciding whether the defendant is making responsible decisions. *See also In re* Boyer, 636 P.2d 1085, 1087 (Utah 1981) (guardianship imposed under UPC standard).

48. *E.g.*, IDAHO CODE § 15-5-101(a) (Michie 1993).

49. *See supra* note 29 and accompanying text.

50. Physicians are accustomed to documenting numerical facts such as blood levels of constituent elements and temperatures. Gerald K. Goodenough, *The Lack of Objectivity of Physician Evaluations in Geriatric Guardianship Cases*, 14 J. CONTEMP. L. 53, 54 (1988). When they testify about the incompetency of their patient, however, they have little or no objective facts about their patient's performance to document. *Id.* Their testimony, therefore, consists of conclusory statements about a patient's condition rather than the patient's performance. *Id.*

51. *See infra* note 58.

52. *See* Parry, *supra* note 14, at 404. "The emphasis should be on the quality of the evidence and the training and expertise of those providing the testimony, rather than on the professional identities of those who testify." *Id.*

53. *Id.*

any other type of civil litigation.

III. PROBLEMS IN ADJUDICATING INCAPACITY

Vaguely written statutes give little guidance to the fact finder[54] and do not adequately protect defendants from the unnecessary suspension of their rights.[55] A court is therefore left to decide which evidence it will accept in determining incompetency. In eliciting evidence, the court may find it either convenient or necessary to rely on the opinions of medical experts to inform the court about the meaning of incompetency.[56] Instead of adjudications based on objective facts, guardianship hearings can become rubber-stamp procedures[57] for endorsing the opinions of doctors and psychiatrists who testify at the proceedings.[58]

Coupled with the imprecise statutory standards of incompetency, the lack of a requirement for legal counsel[59] may create insurmountable difficulties for a defendant who wishes to challenge the guardianship petition. Courts considering guardianship petitions often fail to adhere to the formal structure of the adversarial process.[60] They may treat hearsay evidence with the same deference as non-hearsay,[61] ignore the statutory standards of incompetence,[62] and defer to

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54. *In re* Reyes, 152 Ariz. 235, 236, 731 P.2d 130, 131 (1986).

55. Giaccio v. Pennsylvania, 382 U.S. 399 (1966), states:

> It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case.

Id. at 402-03. *See also In re* Boyer, 636 P.2d 1085 (Utah 1981) (finding incompetency statute under guardianship code so vague as to deny due process); Matter of Conservatorship of Goodman, 766 P.2d 1010 (Okla. App. 1988) (finding guardianship statute based on age unconstitutional). *But see* Edding v. Estate of Sievers, 789 S.W.2d 706 (Tex. 1990) (explaining that probate has broad discretionary powers in approving guardianship, even where the ward is capable of performing some tasks in caring for himself and his property).

56. *See infra* notes 61–63.

57. Bayles & McCartney, *supra* note 7, at A2.

58. Judges have been observed to rely on legal conclusions stated by doctors who were called in to offer a medical diagnosis. *See* Richard R. Pleak & Paul S. Appelbaum, *The Clinician's Role in Protecting Patients' Rights in Guardianship Proceedings*, 36 HOSP. & COMMUNITY PSYCHIATRY 77, 78 (1985) (finding that the judge demanded that a physician, but not legal counsel, be present at a guardianship hearing).

59. Forty-four percent of the 2200 cases studied by the Associated Press went through the guardianship process without legal representation. *Computer Analysis Yields Portrait of Elderly Wards*, L. A. TIMES, Sept. 27, 1987, at A2.

The right to counsel is considered fundamental to a fair hearing:

> Without counsel to advise the alleged incompetent of available rights and options, to advocate his interests, and to prepare the best possible case to resist the imposition of a guardian, the prospective ward is destined to lose. The few "rights" granted will not be invoked by the alleged incompetent and the "hearing" will become a meaningless formality.

Mitchell, *supra* note 5, at 1419.

60. *See infra* note 63. Observers of incompetency hearings have described the hearings as both procedurally and substantively lax. Pleak & Applebaum, *supra* note 58, at 78.

61. Courts have accepted letters and affidavits in lieu of direct testimony from physicians. *See* Peter M. Horstman, *Protective Services for the Elderly: The Limits of Parens Patriae*, 40 MO. L. REV. 215, 252 (1975).

62. *See* Roger Peters et al., *Guardianship of the Elderly in Tallahassee, Florida*, 25 THE GERONTOLOGIST 532, 535 (1985) (finding, in a study of forty-two guardianship hearings, that "[j]udges ... did not appear to solicit additional behavioral or psychiatric evidence regarding

the opinions of physicians.[63] Without mandatory legal representation defendants are seldom able to avail themselves of due process safeguards.[64] Consequently, most of the cases where judges grant guardianship on insufficient grounds never reach a reviewing court because the wards do not have legal counsel.[65]

These considerations underscore the need for clear objective criteria of incompetency in guardianship laws. The courts have dealt with poorly drafted statutes by deferring to the opinions of experts about the competency of defendants.[66] This section looks at the role that legislatures, the courts, and the medical and mental health professionals play in perpetuating the current deficiencies in the guardianship system.

A. Statutory Issues

New standards for incapacity have been urged upon policy makers for at least a decade.[67] Recent modifications of guardianship laws in some states reflect a shift in the paradigm of incompetency. This shift is highlighted by the recent preference for the term "incapacity" over the traditional "incompetency."[68] The Uniform Probate Code[69] uses the term "incapacity" for

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functional incompetence of the potential ward. In most cases, the diagnosis provided by the examining committee was reiterated verbatim by the court in adjudicating incompetency."). Moreover, despite statutory requirements for specific behavioral information, examination reports did not provide such information in 90% of the cases reviewed. *Id.* at 536.

63. Observations were recorded from 27 guardianship hearings in a New York county orphan's court, Pleak & Appelbaum, *supra* note 58, at 77. Most of the petitions rested on vague allegations of incompetency and medical diagnostic labels such as organic brain syndrome or senility. *Id.* at 78. The extent of the judges' inquiries was to ask potential guardians and physicians, if available, about the respondents' inability to manage their property, care for themselves, or make or communicate responsible decisions, according to statutory criteria. *Id.* The authors concluded that the clinician's role in protecting the rights of prospective wards was crucial, especially since "judges simply ratified the physician's opinions, making [the doctor's] accuracy of crucial importance." *Id.*

64. Opposition to the appointment of a guardian by a prospective ward arose in only 11% of the cases investigated in Kris Bulcroft et al., *Elderly Wards and Their Legal Guardians: Analysis of County Probate Records in Ohio and Washington*, 31 THE GERONTOLOGIST 156, 161 (1991).

65. *See* Lawrence Friedman & Mark Savage, *Taking Care: The Law of Conservatorship in California*, 61 S. CAL. L. REV. 273, 283 (1988) (legal representation at conservatorship proceedings found in only 21 out of 135 cases); Associated Press, *supra* note 6 (out of more than 2200 guardianship court cases analyzed, only 44% of the wards had legal representation); Pleak & Appelbaum, *supra* note 58, at 78 (1985) (no legal representation among 27 psychiatric patients subject to guardianship determinations).

66. *See supra* notes 61–63 and accompanying text.

67. In SALES ET AL., *supra* note 20, a model guardianship statute was proposed which adopted

> a functional definition of disability. Rather than emphasizing the possible conditions which may cause a partial or total disability[,] it focuses on the extent to which an impairment of an individual's ability to understand and appreciate the facts necessary to reach an informed decision and to convey that decision impedes that individual from taking those actions necessary to protect his or her physical health or safety and/or manage his or her financial resources.

Id. at 535. Functional evaluations of prospective wards as a basis for making determinations of incompetency have been strongly advocated by Nolan, *supra* note 27. The 1979 revision of the California Probate Code designated as incompetent "any person who, in the case of a guardianship of the person, is unable properly to provide for his own personal needs for physical health, food, clothing, or shelter, and, in the case of guardianship of the estate, is substantially unable to manage his own financial affairs." CAL. PROB. CODE § 1460 (West 1979).

68. The replacement of the term incapacity for incompetency reflects an effort by state

the purpose of shifting "the focus from diagnosed mental illness to functional ability and decisional capacity."[70]

By orienting the adjudication toward the question of incapacity, the guardianship hearing protects the defendant from the potentially harmful effects of a vague incompetency standard.[71] If found to be legally incapacitated, the defendant does not have to bear the stigma of "incompetency."[72] "Incompetency" suggests that one is mentally and possibly morally unfit. "Incapacity" more accurately suggests that functional deficits are incremental and possibly temporary rather than absolute and final.[73] Under a standard of incapacity, the specific needs of the defendant can be addressed, and a court can fashion the least restrictive form of assistance[74] for the ward. Finally, an incapacity standard, which focuses the court's attention on functional deficits, discourages the paternalism often practiced by the court when it employs the incompetency standard.[75] In short, incapacity is more relevant than incompe-

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legislatures to direct a court's attention away from the putative mental state of a defendant and refocus the court's attention upon the defendant's functional capacity. *See* Parry, *supra* note 14, at 403.

69. U.P.C. § 5–103(7) (West Supp. 1993).

70. William M. Altman & Patricia A. Parmelee, *Discrimination Based on Age: The Special Case of the Institutionalized Aged, in* HANDBOOK OF PSYCHOLOGY AND LAW 408, 414 (Dorothy K. Kagehiro & William S. Laufer eds., 1992). A gathering of experts from several disciplines at *Wingspread* supported the view that functional incapacities are more pertinent than incompetency to issues of guardianship. Parry, *supra* note 14, at 403.

Competency is a construct relevant to civil commitment. For example, the defendant is subject to the appointment of a total guardian if he is found incompetent. Framing disabilities as incapacities allows the court to make more precise determinations, "to limit incapacity determinations to the narrowest scope necessary to address an individual respondent's particular situation." *Id.* at 403.

71. The great potential for infringing on "the tremendous liberty interests at issue in a guardianship proceeding" has been illustrated in Katz v. Super. Ct. 141 Cal. Rptr. 234 (1977), and analyzed by Mitchell, *supra* note 5, at 1407. In *Katz*, the California Court of Appeals set aside a lower court's judgment giving temporary guardianship over several adult members of a religious organization (Moonies) to their parents so that the members could be "deprogrammed." The appellate court found that the allegations of incompetency were unsupported by the evidence, the standards were unconstitutionally vague, and the guardianship violated the defendants' rights of freedom of association. *Katz*, 141 Cal. Rptr. at 244, 251, 256. Mitchell, *supra* note 5, observed that "[t]he lower court proceedings in *Katz* dramatically demonstrated the relative ease with which ... guardianship statutes can be used by virtually any individual to impose total control over another person (always in the latter's 'best interests') *by labelling that person as mentally incompetent.*" *Id.* at 1407 (emphasis added).

72. Nolan reports that the stigmatizing effects of guardianship traumatized some nonterminal patients to the point where they starved themselves to death. Nolan, *supra* note 27, at 210 n.19.

73. Stephen J. Anderer, *A Model for Determining Competency in Guardianship Proceedings*, 14 MENTAL & PHYSICAL DISABILITY L. REP. 107, 108 (1990).

74. A comment from the Alabama Code explains the purpose for least restrictive guardianship arrangements:

> The impetus for "limited guardianship" has been a call for more sensitive procedures and for appointments fashioned so that the authority of the protector will intrude only to the degree necessary on the liberties and prerogatives of the protected person. In short, rather than permitting an all-or-none status, there should be an intermediate status available to the courts through which the protected person will have personal liberties and prerogatives restricted only to the extent necessary under the circumstances. The court should be admonished to look for a least-restrictive protection approach.

ALA. CODE § 26–2A–1 (1975).

75. Courts often make paternalistic judgments that they believe are in the best interests of a guardianship subject, especially when they believe that a subject's actions are not "reasonable."

tency to issues of guardianship.[76]

B. Judicial Issues

Because the criteria for incompetency is vague and a physician or psychiatrist is presumed to be uniquely skilled in diagnosing incompetency,[77] judges may too readily grant a guardianship based on the report of a physician.[78] States that have not adopted functional criteria in their statutory definitions of incompetency force their courts to focus on the petitioning party's proof of the proposed ward's mental disorder and only incidentally on specific evidence of functional disabilities.[79] As a result, judges often overlook established evidentiary rules of the adversarial system.[80]

See Altman & Parmelee, *supra* note 70, at 414. For an example of judicial paternalism, see S. Van McCrary & A. Terry Walman, *Procedural Paternalism in Competency Determination*, 18 L. MED. & HEALTH CARE 108 (1990) (describing a case in which a patient who refused to undergo brain surgery for a life-threatening condition was found incompetent to decide based on the hearsay opinion of her physician). Because incompetency has been a legally vague concept in guardianship, the courts have acted as though the proposed ward is presumed incompetent even before the hearing begins.

76. The incompetency standard is appropriate where a state's police powers are invoked to protect others, as in civil commitment proceedings or in criminal prosecutions.

> [T]he trend has been to completely separate civil commitment from findings of incapacity; to look at incapacity from a functional perspective emphasizing respondents' abilities to deal with their lives based on their own needs and values; and to limit incapacity determinations to the narrowest scope necessary to address an individual respondent's particular situation. In other words, the terminology has become far more precise.

Parry, *supra* note 14, at 403.

77. For example, in Smeed v. Brechtel, 567 P.2d 588, 589 (Or. 1977), the opinion of a psychiatrist that the appellant was unable to manage her property was held to be sufficient to sustain a guardianship. "The psychiatrist testified that the protected person is often out of touch with reality and 'at her worse she has delusions which affect her behavior.' The psychiatrist also testified about the protected person's 'profound indecisiveness' which makes her susceptible to other people's influence." *Id.* at 589. No other evidentiary basis appears to have been offered by the psychiatrist, and no other was accepted by the court. The court found "the testimony of the relatives to be largely conflicting, confusing and unpersuasive." *Id.* at 589.

78. *See supra* notes 61–63 and accompanying text.

"The difficulty courts have in making [competency] decisions, the prestige of the expert, and other factors can converge to give the expert's opinion considerable influence on the ultimate legal decision." GRISSO, *supra* note 25, at 10. *See also* Dean T. Jost, *The Illinois Guardianship for Disabled Adults Legislation of 1978 and 1979: Protecting the Disabled From Their Zealous Protectors*, 56 CHI.-KENT L. REV. 1087 (1980). "A frequent criticism of guardianship actions in the past has been that courts have abdicated to physicians the responsibility of making the legal decision on the need for guardianship." *Id.* at 1100.

79. Too much emphasis may be placed on the diagnosis of a disorder and too little on specific incapacities. Allison P. Barnes, *Florida Guardianship and the Elderly: The Paradoxical Right to Unwanted Assistance*, 40 U. FLA. L. REV. 949, 954 (1988).

80. *E.g., In re* R.S., 470 N.W.2d 260 (Wis. 1991) (trial court's admitting into evidence a psychologist's written report without requiring the psychologist to testify was overturned because the report constituted hearsay evidence for which no hearsay exception applied). *See* Madelyn Anne Iris, *Guardianship and the Elderly: A Multi-Perspective View of the Decisionmaking Process*, 28 THE GERONTOLOGIST 36 (1988). Her study follows several cases through the adjudicatory process. The court's decisionmaking role is described as shallow. "Adjudication decisions are based primarily on a review of the evidence presented in the petition, by the guardian ad litem, and in the medical report." *Id.* at 44.

See also Kris Bulcroft et al., *Elderly Wards and Their Guardians: Analysis of County Probate Records in Ohio and Washington*, 31 THE GERONTOLOGIST 156, 162 (1991) (criticizing the adjudication process for failing to include "standardized and reliable assessments of competence," and finding that courts routinely relied upon "sketchy, inconclusive, and

Judicial determinations of incompetency based on vague statutory standards also render the whole process inherently unfair. A judge may decide two similar cases differently. Any external pressures on a judge, such as a crowded docket, could easily add to the uncertainty of the outcome of a guardianship hearing. Moreover, judges from different courts may apply their own personal standards and apply different indicia of incompetency. Thus, the same defendant could theoretically be subjected to different standards within the same jurisdiction or by the same court on different days of the week.

C. Competency Experts

The use of testimony from treating physicians at guardianship hearings has been widely criticized because the testimony often contains legal conclusions masquerading as medical facts.[81] Incompetency is a legal conclusion[82], not a medical or psychological determination.[83] Physicians and psychiatrists diagnose and evaluate patients for therapeutic or rehabilitative purposes. The criteria they use in their clinical evaluations of mentally or physically disabled patients may be much different from that required for determining the threshold level of legal incompetency.[84] Notwithstanding their ignorance of the legal meaning of incompetency or incapacity, expert witnesses offer, usually at the court's request, opinions on the ultimate legal question of incompetency based on their clinical observations of the defendant.[85]

A court's reliance on the testimony of a proposed ward's physician may be grossly inappropriate.[86] The physician may know little about the defendant's

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frequently outdated" reports from physicians that were "devoid of specific assessments of competence."); Roger Peters et al., *supra* note 62, at 535, 536 (reporting on 42 hearings, all resulting in findings of incompetency by judges who relied on the medical and psychiatric terminology found in the reports of physicians and psychiatrists rather than on statutory criteria). "[I]n about 90% of cases reviewed, examining committee reports did not provide specific behavioral information for the court that is statutorily required (Florida Guardianship Law, FLA. STAT. ch. 744.331(1) (1983)) pursuant to an adjudication of incompetency." *Id.* at 536.

81. *See* GRISSO, *supra* note 25, at 8–10 (1986).

82. There are several species of legal competencies, including competency to stand trial, competency to consent to treatment, and competency to care for oneself. *Id.* at 15. Legal competency is a construct, that is, a condition or state that is not directly observable. *Id.* at 14. While there may be a strong tendency to define legal competency in terms of mental states, an operational definition is likely to be more useful to a judicial determination of incompetency. Legal incompetency may be operationally defined as clear and convincing findings of specific functional deficits such that the alleged incompetent is unable to provide for her safety or manage her property. While this definition may seem unsatisfactory to those who seek a psychological basis for legal incompetency, it is important to remember that the law must be responsive to what people do, not to the processes underlying those actions.

83. *Id.* at 8; *see generally* Stephen J. Anderer, *A Model for Determining Competency in Guardianship Proceedings*, 14 MENTAL & PHYSICAL DISABILITY L. REP. 107, 108 (1990).

84. Finding a defendant incompetent to stand trial, for instance, may prompt the court to hospitalize the defendant not for the purpose of helping the defendant to adjust to the demands of life but "to bring the defendant to competency to stand trial." GRISSO, *supra* note 25, at 9. Thus, competency experts need to distinguish the needs of the court from the needs of the patient when they evaluate defendants. *Id.*

85. *Id.* at 8–9.

86. *See, e.g.*, Cornia v. Cornia, 546 P.2d 890, 893 (Utah 1976) (the only expert testimony presented was a physician's opinion that "Mrs. Cornia was senile to a greater degree than is normal for a person her age."); Interdiction of Denham, 554 So.2d 836, 837 (La. App. 1987) (convenience is not an appropriate basis for guardianship, despite a physician's opinion that the defendant's physical condition creates hardships); *In re* Estate of McPeak, 368 N.E.2d 957 (Ill. App. Ct. 1977) (error in finding of incompetency based on physician's testimony that

actual limitations, and even less about the legal meaning of incompetency.[87] Healthcare professionals are generally not trained to conduct examinations or prepare reports for forensic purposes.[88] Hence, reports from physicians and psychiatrists often contain diagnostic information and conclusory statements[89] that fit within a therapeutic but not a legal framework.[90]

Courts often presume that the evidence offered by a competency expert satisfies the vague statutory criteria.[91] Even though medical reports prepared by physicians might not offer enough probative evidence to satisfy a court's fact-finding function,[92] these reports may be the only evidence available to the court.[93] In addition, the pressures of an overburdened judiciary may discourage judges from launching a more comprehensive investigation into a defendant's functional limitations.[94] For the sake of judicial efficiency, then, a court might overlook the significant loss of liberty at stake for the proposed ward.

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elderly defendant's heart ailment rendered her incompetent).

87. *See* GRISSO, *supra* note 25, at 8.

88. *See* Goodenough, *supra* note 50, at 58.

89. The evidence they offer typically includes a diagnostic label "followed by a conclusion (without further explanation) that the individual cannot care for self and/or property." GRISSO, *supra* note 25, at 273.

90. "What the psychiatrists have apparently never been able to understand is that conclusory labels and opinions are no substitute for facts derived from disciplined investigation." The Honorable David L. Bazelon, *A Jurist's View Of Psychiatry*, 3 J. PSYCHIATRY & L. 175, 181 (1975).

91. *See, e.g., In re* Boyer, 636 P.2d 1085 (Utah 1981) (overturning the lower court's approval of a plenary guardianship based on finding the prospective ward unable to make "responsible decisions").

> The use of the word "responsible" focuses the committing authority's attention on the content of the decision rather than on the ability of the individual to engage in a rational decision-making process. The word "responsible," being given no further content, lends itself to a completely subjective and, therefore, potentially arbitrary and nonuniform, evaluation of what is decided rather than an objective evaluation of the method by which the decision is reached.

Id. at 1088.

92. *See* GRISSO, *supra* note 25, at 8–12. Grisso criticizes the use of mental health professionals as competency experts because the evidence they offer manifests "(1) *ignorance and irrelevance* in courtroom testimony; (2) psychiatric or psychological *intrusion* into essentially legal matters; and (3) *insufficiency and incredibility* of information provided to the courts." *Id.* at 8 (emphasis in original). Clinical observations are not necessarily linked with legal standards of incompetency, and psychiatric experts often fail to connect diagnostic labels with the needs of the law. *Id.* at 8.

Examiners often are said to provide testimony that is not relevant to the law's concerns in legal competency cases. "When unrecognized, the legally irrelevant testimony of mental health professionals displaces proper, legal criteria in the courtroom and poorly serves the process of law, the public, and individuals whose futures are influenced by the outcome." *Id.*

See also Goodenough, *supra* note 51. Four problematic areas for physicians are inherent in physician reports to the court: physician bias can arise from the doctor's familiarity with the family, the patient, and the age of the patient; the physician could be called upon by the family to treat what may be a transient condition (such as a stroke, a cardiac condition, medication interactions or prolonged use of a medication); elderly patients may have communication problems due to physical conditions, rather than mental conditions (for example, a chronic dry mouth affects the lability of the tongue); and the physician may use an evaluation that relates to diagnostic categories rather than to specific activities. *Id.* The author recommends that where guardianship issues are raised, physicians can help their patients better if they learn to use standardized functional assessments, *see infra* Section IV, to improve their objectivity when they are asked to report a patient's condition to a court.

93. *See generally supra* notes 58–63.

94. It has been reported that judges are distressed by the large number of cases waiting to be heard in their courts. Pleak & Appelbaum, *supra* note 58, at 78.

Statutes that guide the court with clear criteria for incapacity will only partially rectify the problems addressed in this section. Courts may not always adhere to the precise standards because the necessary evidence may be unavailable. As long as courts fail to reject statutorily insufficient evidence, competency experts will continue to express clinical opinions about a defendant's capacities in a manner that poorly serves the guardianship process. Correcting for this inadvertent laxity in the judicial process[95] entails strong measures to ensure that the court will have the evidence necessary for a fair and legally sufficient determination. The next section offers such a solution.

IV. FIXING THE PROBLEMS: MANDATING STANDARDIZED ASSESSMENTS

Although a statute may guide the court by outlining the forms of evidence it should consider, this does not go far enough to protect the liberty interests and due process rights of individuals who are at risk. Very few jurisdictions delineate how to gather evidence of incapacity.[96] To correct this, an impartial evaluation of a defendant's ability to function should be required before a court makes a decision whether or not to interfere with that person's autonomy.[97] This is accomplished by mandating valid and reliable standardized functional assessments[98] of proposed wards before the guardianship hearing takes place.

The prospect of requiring examinations for guardianship defendants raises several questions such as how the assessment instruments work, what they measure, and who should conduct the evaluations.[99] In addition, should statutes

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95. Arnold J. Rosoff & Gary L. Gottlieb, *Preserving Personal Autonomy for the Elderly: Competency, Guardianship, and Alzheimer's Disease*, 8 J. LEGAL MED. 1, 16 (1987) ("[W]hile statutes require documentation of functional disability, courts rarely insist upon such evidence. Far too often they are satisfied with only perfunctory assessment of the alleged incompetent's mental capacity.").

96. For example, Florida has been progressive in its statutory revisions. Before an adjudicatory hearing is held, an examining committee is appointed to make findings of fact from a comprehensive examination, which includes a physical, mental health, and functional examination. FLA. STAT. ANN. § 744.331(3)(c) (West Supp. 1993). Which professions are represented on the examining committee are determined by statute. FLA. STAT. ANN. § 744.331(3)(a) (West Supp. 1993). Fees to the members of the examination committee, as well as fees to an appointed attorney, are to be paid from the county general fund, §744.331(7)(a), unless the petition is filed in bad faith. FLA. STAT. ANN. § 744.331(7)(c) (West Supp. 1993). The Florida Code also limits how the court uses the evidence to determine incapacity. For example, the court is required to make findings concerning: "(1) The exact nature and scope of the person's incapacity; (2) The exact areas in which the person lacks capacity to make informed decisions about care and treatment services ... ; (3) The specific legal disabilities to which the person is subject; and (4) the specific rights that the person is incapable of exercising." FLA. STAT. ANN. § 744.331(6)(a) (West Supp. 1993).

97. The Florida Legislature, for example, has responded to the publicized abuses of its former guardianship system by enacting a comprehensive statute that requires a pre-hearing evaluation. *See supra* note 96.

98. Recommendations for comprehensive evaluation requirements have been suggested for some time to stem the over-utilization of plenary guardianship arrangements. AXILBUND, *supra* note 17, at 19. Also, standardized assessments have been encouraged because they give precision to evaluations, Winsor C. Schmidt, Jr., *The Evolution of a Public Guardianship Program*, 12 J. PSYCHIATRY & L. 349, 356 (1984); Forrest Scoggin & James Perry, *Guardianship Proceedings With Older Adults: The Role of Functional Assessment and Gerontologists*, 10 L. & PSYCHOL. REV. 123 (1986).

99. *See* Nolan, *supra* note 27, at 211, 212, 214.

mandate examinations, or should the court be given the discretion to order them on a case-by-case basis? Finally, who should pay for the evaluations? This section will examine these issues.

A. Employing Standardized Assessments in Guardianship

When evidence of functional deficits[100] is required, the court will be compelled to look for "inventories of daily activities that can provide the court with objective information about the respondent's ability to manage independently or with voluntary assistance."[101] Functional evaluations may also include data on reasoning abilities, perceptual skills, sensory responses, and memory.[102] The structure of these assessment tools, their implementation, their benefits and limitations are considered next.

1. Features of standardized competency assessments

Assessment instruments[103] were developed primarily for research and diagnostic purposes.[104] In response to new statutory demands for evidence of functional deficits, some instruments were designed to evaluate legal competency.[105] These instruments provide information about specific cognitive and physical abilities, including the ability to take account of income, manage spending and provide adequate care for basic needs of proper nutrition, clean clothing, and health.[106] Relevant social, environmental, and emotional factors such as access to family, friends, and emergency resources, and the respondent's satisfaction with life may also be assessed.[107]

Instruments that serve the needs of guardianship laws already exist. Some instruments use a survey method in which respondents answer a series of

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100. GRISSO, *supra* note 25, refers to functional abilities as a focal point for constructs of legal competency. "[T]he term *functional abilities* refers to that which an individual can do or accomplish, as well as to the specific knowledge, understanding, or beliefs that may be necessary for the accomplishment." *Id.* at 15. Accomplishments may include caring for oneself and managing one's assets. *Id.*

101. Barnes, *supra* note 13, at 955.

102. Several assessment instruments have been developed for use in court-ordered evaluations of elderly prospective wards. *See* GRISSO, *supra* note 25, at 283–303; Jill J. Schwartz & David F. Barone, *Assessing Civil Competence in the Elderly*, 37 J. FORENSIC SCI. 938 (1992); Scoggin & Perry, *supra* note 98.

103. "Instruments" refer to standardized tests that are used to measure particular psychological qualities. These tests can consist of questions or nonverbal stimuli which elicit responses that are recorded, statistically summarized, and statistically compared with group norms. *See* GRISSO, *supra* note 25, for a survey and analysis of forensic assessment instruments. Intelligence tests, such as the Wechsler Adult Intelligence Scale, are examples of standardized assessment instruments. They measure an individual's intellectual responses for comparison with a known age-matched group. *See infra* note 115.

104 GRISSO, *supra* note 25, at 283.

105. *E.g.*, Schwartz & Barone, *supra* note 102, at 938. Of these instruments, a few were designed to measure functional deficits in the elderly. *See, e.g.*, Scoggin & Perry, *supra* note 98. *See* Nolan, *supra* note 27, at 213 n.19, regarding several assessment frameworks that are available.

106. Nolan, *supra* note 27, at 211, includes:

> [I]ncome adequacy and spending patterns (physical ability to manage currency and check writing, whether pension checks arrive consistently); adequacy of food, clothing and shelter (ability to buy, transport, store and prepare food); ability to eat; choice of diet; ability to dress and undress; adequacy of laundry facilities and their use....

107. *Id.*

questions during a structured interview.[108] Others require the examiner to observe the degree of difficulty respondents have with specific tasks.[109] Some instruments combine measurements of sensory and perceptual responses with other tests of reasoning and functioning abilities.[110] At least one scale has been empirically developed for ascertaining functional limitations that affect one's capacity to communicate and to manage money independently.[111]

Most inventories or assessment instruments consist of subsets of questions that index the subject's physical health, intellectual functioning, self-maintenance, time activities,[112] social interaction, and perceived environment[113] to known standards. The results from these standardized tests are summarized according to the several indexes.[114] Performance levels on the various indexes provide the examiner with descriptive information about the respondent.[115] Depending on a respondent's scores, a determination about the respondent's level of functioning in the different assessment areas can be made.[116] By looking at specific areas of performance, the examiner can make recommendations about the specific needs of the respondent.

2. Who should conduct standardized evaluations?

Some experts advocate using interdisciplinary teams of professionals for evaluating subjects of incompetency hearings.[117] By employing experts from the fields of medicine, psychology, and gerontology to evaluate the respondent, a more complete picture of the respondent's incapacities and needs can be developed.[118] Sources of behavioral disabilities can be pinpointed, and alternatives for dealing with an incapacitated individual can be proposed. However, using interdisciplinary teams could be costly and possibly unwieldy, and it is unlikely that a petitioner seeking a guardianship for a family member would want to incur the time and expense of a multi-discipline examination if less

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108. *See* Schwartz & Barone, *supra* note 102.

109. Filling out blank checks, addressing envelopes, and using a telephone may be some of the activities tested. P. Loeb, *Validity of the Community Competence Scale with the Elderly* (Unpublished Doctoral Dissertation, St. Louis University 1983), *in* GRISSO, *supra* note 25, at 295–303.

110. *See* Altman & Parmelee, *supra* note 70, at 408.

111. P. Anderton, *The Elderly, Incompetency, and Guardianship* (Unpublished Master's Thesis, St. Louis University 1979), *in* GRISSO, *supra* note 25, at 276–278.

112. Indexed time activities include durations and frequencies of various leisure and social activities. *Id.* at 290–291.

113. *Id.*

114. *See id.* at 283–303, for a review of selected forensic assessment instruments. Actuarial predictions can be based on the respondent's demographic profile, personal characteristics, and test scores.

115. Objective testing provides a way to sample a subject's behavioral repertoire and to make comparisons with groups with known characteristics. DANIEL SHUMAN, PSYCHIATRIC AND PSYCHIATRICAL EVIDENCE § 2.15, at 47 (1986). The kinds of tests and testing procedures discussed in the text are similar to those used for obtaining intelligence quotients (IQs), personality profiles, and evidence of neuropsychological dysfunctions. *See id.* at 47–61.

116. *Id.*

117. Thomas L. Hafmeister & Bruce Sales, *Interdisciplinary Evaluations for Guardianship and Conservatorship*, 8 L. & HUM. BEHAV. 335 (1984). Florida's guardianship laws require that the court appoint a three-member examining committee composed of at least one physician or psychiatrist and one psychologist, gerontologist, nurse, or licensed social worker. FLA. STAT. ANN. § 744.331(3)(a) (West Supp. 1993).

118. See Hafmeister & Sales, *supra* note 117, at 338–39, for an enumeration of the benefits from interdisciplinary evaluations of guardianship defendants.

expensive evaluation options are available.[119]

Standardized assessment instruments could alleviate the need for and expense of multi-discipline exams. Costs would be reduced by eliminating the need for expensive medical or mental health specialists. Apart from its development, a standardized instrument does not require a highly trained professional to implement it.[120] Nursing, counseling, psychology, and social work students are often trained to carry out evaluations that aid physicians and psychologists in treating patients.[121] However, the clinical training and experience possessed by psychiatrists or physicians may be essential in the interpretation of the data.

An important concern is the qualifications of the person who interprets the data and submits a report of the evaluation to the court.[122] Clinical experience may be important for detecting revealing subtleties in the subject's behaviors that a test may not pick up. Finding that an individual needs assistance in only a few areas rather than in all areas, or foreseeing that the individual will need greater assistance at some future time may depend on the skill of the examination expert.[123]

Standardized assessments can provide information that is vitally relevant to the court's need for objective evidence about the proposed ward's incapacities. The purpose of an assessment tool is to measure a respondent's abilities in various functions of daily life. The respondent's raw scores will not be meaningful to the court, but when translated into probabilities, the scores reveal a profile of the respondent's functional abilities across important areas of daily activity.[124] The expert can explain the expected chance that a defendant will succeed without assistance at various tasks. Statements of probability can then be used by the court to determine whether or not the defendant needs the assistance of a guardian, and if so, to tailor the guardianship plan to the needs of the defendant.

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119. Even if costs are paid from public funds, tight budgets force local governments to either find a less expensive solution or cut the program from their budgets. *See* cost allocation discussion, *infra* Part IV(C).

120. By its very nature, a standardized test requires little more than an ability to faithfully follow a routine procedure. Unlike clinical judgments, asking a series of questions or marking boxes on a data sheet after making observations is a relatively straightforward task that does not usually involve complex decisions. Conducting functional assessments is not new to workers in geriatrics, medicine, and mental health. Assessments have been used in these professions for clinical evaluations, patient care and maintenance, and therapeutic or rehabilitation planning. Nolan, *supra* note 27, at 211.

121. *Id.*

122. One of the recommendations from *Wingspread* was that courts should allow expert testimony from any professional whose training and experience would aid in the assessment of functional impairment. Parry, *supra* note 14, at 404.

123. Those who should not conduct assessments as part of the guardianship adjudication process include parties to the action, such as the petitioning family members or guardians ad litem, and persons not trained in using functional evaluations for forensic purposes. Bias and interest would eclipse the probative value of a family member's testimony. If the petitioner conducts an evaluation of the proposed ward, the evidence will be tainted by conflicts of interest, especially where control of financial assets are concerned. Nolan, *supra* note 27, at 215. The lack of qualification and experience of guardians ad litem might foreclose on their credibility. *But see id.* at 215 (arguing that guardians ad litem tend to be neutral, and that it would not be inappropriate for the court to call upon a guardian ad litem to conduct a functional evaluation if she should possess the appropriate expertise).

124. As with IQ tests, a score is meaningful only when compared to the group norm. *See*

3. Benefits of functional evaluations

The foremost benefit of a functional evaluation is that it particularizes the defendant's condition and allows the court to objectively determine competency.[125] The court can more accurately determine if the defendant meets the statutory criteria and the evidentiary standard—usually clear and convincing evidence[126]—for incapacity.

Evidence of the defendant's functional limitations diminishes the evils arising from the court's reliance on undocumented medical reports or subjective clinical judgments. Inconsistent determinations among courts and within the same court can be corrected. All judges applying a functional statute will have the same objective criteria to apply at guardianship hearings.

Data from a functional examination is essential for the court to carry out its statutory duty to appoint a limited guardian when it can or to provide the least restrictive alternative[127] where the resources are available. A functional examination can also specify the areas in which the defendant needs assistance, as well as areas in which she can continue to operate autonomously. Most jurisdictions allow and prefer limited guardianship when the proposed ward has some functional capacity.[128] A number of states limit the court's intervention in a guardianship case to the least restrictive form of assistance.[129] The proposed ward is then protected from the excesses of a plenary, or total, guardianship in a case of limited need.[130]

With evidence culled from a comprehensive evaluation, the court is in a

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supra note 115.

125. *E.g.*, *In re* Conservatorship of Lundgaard, 453 N.W.2d 58 (Minn. 1990) (requiring specific findings of present incapacities to support the appointment of a guardian); *In re* Guardianship of Reyes, 152 Ariz. 235, 731 P.2d 130 (1986) (requiring further evidence of an adult's inability to care for her safety, attend to necessities of food, shelter, clothing, and medical care to support a finding of incompetent decision making process); *see also* Parry, *supra* note 14, at 404.

126. Many jurisdictions require clear and convincing evidence of incapacity or incompetency before a guardianship is ordered. *E.g.*, ARK. CODE ANN. § 28-65-213(B) (Michie 1987); ARIZ. REV. STAT. ANN. § 14-5304(A) (Supp 1992); COLO. REV. STAT. ANN. § 15-14-102(3) (West Supp. 1992); N.Y. MENTAL HYGIENE LAW § 81.02(b) (McKinney Supp. 1993). For case law, *see* for example, *In re* Nelson, 408 A.2d 1233 (D. C. 1979); *In re* Bryan, 550 So.2d 447 (Fla. 1989); *In re* Corless, 440 N.E.2d 1203 (Ohio Ct. App. 1981); Sabrosky v. Denver Dep't of Social Services, 781 P.2d 106 (Colo. 1989); *In re* Boyer, 636 P.2d 1085 (Utah 1981); *In re* Galvin, 445 N.E.2d 1223 (Ill. App. Ct. 1983); *In re* Richard, 655 S.W.2d 110 (Mo. 1983); Cummings v. Stanford, 388 S.E.2d 729 (Ga. Ct. App. 1989); *In re* Guardianship of Reyes, 152 Ariz. 235, 731 P.2d 130 (Ariz. Ct. App. 1986). *But see In re* B., 620 P.2d 1228 (Mont. 1980) (requiring a reasonable medical certainty of incapacity or incompetency before a guardianship is ordered); *In re* Guardianship of Roe, 421 N.E.2d 40 (Mass. 1981) (requiring incompetency or incapacity to be established beyond a reasonable doubt before finding a likelihood of serious harm to others).

127. *See, e.g.*, N.H. REV. STAT. ANN. § 464-A:9 (1992).

128. *E.g.*, "After considering all evidence presented as a result of such investigation, the court shall impose, by order, only such specific limitations and restrictions on an incapacitated person to be placed under a limited guardianship as the court finds necessary for such person's protection and assistance." WASH. REV. CODE ANN. § 11.88.010(2) (West Supp. 1993).

129. *See supra* note 74.

130. In spite of a mandate to refrain from appointing a plenary guardian where there is not total incapacity, AXILBUND, *supra* note 17, reported that limited guardianship was not fully utilized. *Id.* at 19. Axilbund's report was prepared in 1979 and pertained to the practices when guardianship statutes did not define incompetence as functional deficits. The standards for incompetency were much less objective than the standards for incapacity promulgated by many current statutes.

better position to consider the need for a temporary guardian. The evaluation report may include information about the proposed ward's degree of incapacity, the prognosis, and a recommended course of treatment or care. This information gives the court a better picture of the defendant's condition and chances for recovery. If the evaluation indicates that the debilitating condition is treatable or transitory, the court can schedule another hearing to consider the restoration of rights to the individual upon improvement or recovery.

A standardized assessment also benefits the defendant who is unable to attend the hearing. In many cases the prospective ward is too debilitated or ill to attend the guardianship hearing.[131] In this case, the examination report may be the only objective evidence before the court. If the proposed ward opposes the guardianship, absence from the hearing is likely to be adverse to the proposed ward's case.[132] In her absence, the facts concerning the proposed ward's functional incapacities are thus essential for an accurate and fair hearing.

A functional evaluation also aids the court in deciding on a guardianship plan for the ward. A standardized assessment instrument generates a statistical profile of the respondent that is helpful to the court for predicting the defendant's chances of recovery.[133] An expert may report how well the defendant's level of functioning on specific kinds of ecologically relevant tasks[134] compares to average levels.[135] This actuarial evidence of the

131. For instance, the Associated Press investigation, *supra* note 6, showed that only eight percent of the wards had attended their hearings. Some jurisdictions allow the hearing to proceed even in the absence of the proposed ward. *See* McCue, *supra* note 14, at 35 n.4.

132. Patients who are unable to attend a hearing may nonetheless be capable of making responsible decisions. The defendant's presence at the hearing may be so influential on its outcome that some critics have proposed that the judge bring the hearing to the defendant's bedside if necessary. *See* McCrary & Walman, *supra* note 75. The authors describe a case in which a patient whose decision to refuse brain surgery for a life-threatening illness was overridden by a court's appointment of a physician to act as guardian and make a substituted judgment for the patient. When the anesthesiologist refused to go against the patient's wishes, the case was re-opened, and the judge visited the patient in the hospital. After meeting with the patient, the judge was convinced that she was competent to refuse treatment, and the order for substituted judgment was rescinded. *Id.*

133. Since the instrument has been standardized, the defendant's responses can be indexed to standards arrived at from all respondents who have been tested. *See* Goodenough, *supra* note 50; GRISSO, *supra* note 25; Scoggin & Perry, *supra* note 98; Schwartz & Barone, *supra* note 102; Gerald T. Bennett & Arthur F. Sullwold, *Competence To Proceed: A Functional and Context-Determinative Decision*, 29 J. FORENSIC SCI. 1119, 1123 (1984) (use of a checklist of specific functions recommended for assessing mental competence to stand trial in criminal actions).

134. Ecological relevancy, like ecological validity, refers to the applicability of a test to the abilities and skills an individual requires for successful transactions with the everyday world. In developing cognitive assessments, psychologists attempt to devise tests that are simple to administer. This usually entails the elicitation of uncomplicated responses to simplified stimuli. "Especially problematic is the question of ecological validity: the extent to which cognitive testing mirrors real functional disability and impairment of judgment, particularly among less severely impaired individuals." Altman & Parmelee, *supra* note 70, at 417.

135. That is, levels expected from an average individual of the same age, living in a similar social and physical environment with the same medical condition, and having other similar characteristics. *See* ROSALIE A. KANE & ROBERT L. KANE, ASSESSING THE ELDERLY: A PRACTICAL GUIDE TO MEASUREMENT 57 (1981) ("not all persons are required to manage skills at the same level of complexity. Some have more of the advantages of modern devices and human help than do others."). The performance demands of the environment can be controlled by drawing samples from "discrete types of environmental settings." GRISSO, *supra* note 25, at 307.

defendant's functional limitations can lead to more accurate predictions about how well the defendant can manage without intervention than predictions based on subjective clinical judgments.[136]

Evidence from a functional evaluation is arguably more relevant to determinations of incapacity than from a clinical report. The functional evaluation produces descriptive information which is highly probative of the defendant's capacities.[137] An expert can easily communicate the results of a functional evaluation in lay terms. The expert's testimony may include a description of the behaviors observed, the environment in which the evaluation was conducted,[138] the relevant characteristics of the defendant, and other important factors reflected in the evaluation. The trier of fact can easily comprehend information about how well people perform everyday tasks. The trier can then make its own inferences about the defendant's abilities.

In contrast, clinical judgments are based on a diagnostic framework that is designed to diagnose and treat persons with aberrant behavioral patterns or complaints and to enable the clinician to communicate clinical findings to other specialists.[139] Terms such as "schizoaffective disorder" or "post traumatic stress syndrome"[140] are beyond the knowledge of jurors and perhaps even most judges. These psychiatric categories may have little probative value to a court since they are based on clinical distinctions and not on forensic distinctions.[141] Moreover, the meaning of specialized terms may require elaborate explanations that may not be understood by the trier, although the meaning of the defendant's behavior may be readily grasped. Consequently, diagnostic categories may be considerably less relevant than specific functional deficits at guardianship hearings.

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136. David Faust & Jay Ziskin, *The Expert Witness in Psychology and Psychiatry*, 241 SCI. 31, 33 (1988) (reporting on findings that predictions about defendants' future behavior are more accurate when based on actuarial data than when based on clinical judgments).

137. If the expert is trained in evaluating functional capacities for forensic purposes, then her testimony will be oriented to the facts; she will be less likely to state conclusions of law or to state an opinion on the ultimate issue of competency. Although a state's rules of evidence may not prohibit experts from giving their opinion on a defendant's competency, the resolution of this issue is for the trier of fact. If the expert refrains from stating legal conclusions, the trier will be swayed only by the facts.

138. Social supports such as family and friends may enable one to manage in his environment. If examined outside of this support system, perhaps in a doctor's office, the prospective ward may come across to the doctor as being incompetent. *See* Anderer, *supra* note 73, at 108.

139. *See* Faust & Ziskin, *supra* note 136, at 32.

140. These diagnostic categories are found in THE AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (1987) (DSM – III – R), the authoritative guide to psychiatric diagnoses.

141. "According to the diagnostic manual, individuals with [post traumatic stress] disorder can show either substantial or minimal impairment in judgment. Additionally, most available research addresses clinical distinctions, and there may be little or no research that pertains to forensic distinctions." Faust and Ziskin, *supra* note 136, at 32.

This is not to say that there is no place for psychiatric testimony in court. The Supreme Court avers that psychiatric testimony aids courts in making accurate decisions, Ake v. Oklahoma, 470 U.S. 68 (1985) (arguing that disapproving the "widespread reliance on psychiatrists" in courts would be unfair and would risk the accurate resolution of sanity issues). The Supreme Court's argument seems to be that some help in the area of mental illness is better than no help. *See also* DANIEL W. SHUMAN, PSYCHIATRIC AND PSYCHOLOGICAL EVIDENCE § 7.04, at 178 (1986), for other arguments in favor of psychiatric testimony. One may also argue that it takes someone with specialized knowledge about clinical interventions to offer an opinion

4. Limitations of Standardized Assessments

The court must be careful not to declare a defendant incompetent who is physically but not cognitively impaired.[142] Under some functional statutes, the court may find a physically impaired person legally incapacitated without evidence of cognitive impairment.[143] However, other states require that a person demonstrate both cognitive and behavioral deficits before that person can be found legally incapacitated.[144] In these states, if the court focuses exclusively on deficits exposed by a functional assessment and ignores the person's decisional capacity, a person may be found legally incapacitated without sufficient evidence. This risk can be minimized by examining evidence of cognitive impairment from psychometric tests of memory, reasoning ability, perceptual skills, and sensory functioning, tests that could be included in the functional assessment[145] and which quantify cognitive deficits affecting one's ability to communicate, understand, and make meaningful, if not responsible,[146] decisions.

Another problematic issue is the relevance of the tests to everyday functional capacity, that is, their ecological validity.[147] Cognitive measures[148] and related neuropsychological tests[149] are useful as diagnostic instruments. These

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about a defendant's chances for recovery or rehabilitation.

142. "Presumably, a physically impaired but mentally capable individual needs an agent, not a guardian...." Barnes, *supra* note 13, at 958. The constitutionality of state interventions "that override the decisions of those who can make decisions, but are precluded by mere physical incapacity from executing them" has been questioned. Jan E. Rein, *Preserving Dignity and Self-Determination of the Elderly in the Face of Competing Interests and Grim Alternatives: A Proposal For Statutory Refocus and Reform*, 60 GEO. WASH. L. REV. 1818, 1868 (1992).

143. For example, in Connecticut, a person who is "'[i]ncapable of caring for one's self' means [a person who has a] mental, emotional or physical condition *resulting from* mental illness, mental deficiency, or *physical illness or disability, advanced age,* chronic use of drugs or alcohol, or confinement...." CONN. GEN. STAT. ANN. § 45a-644(c) (West Supp. 1993) (emphasis added). Allowing the state to impose a guardianship on an individual who remains capable of making rational decisions but unable to execute them has made some critics uneasy. "Arguably, without evidence of a cognitive impairment leading to functional deficits, guardianship is inappropriate, even if functional impairments are present." Parry, *supra* note 14, at 404. Rein, *supra* note 142, would "categorically forbid the imposition of guardianship or conservatorship when the impairment or dysfunction is purely or primarily physical." *Id.* at 1868.

144. For purposes of guardianship, the Minnesota Code, for example, defines an "incapacitated person" as an adult "who is impaired to the extent of lacking sufficient understanding or capacity to make or communicate responsible personal decisions, *and* who has demonstrated deficits in behavior which evidence an inability to meet personal needs for medical care, nutrition, clothing, shelter, or safety." MINN. STAT. ANN. § 525.54(2) (West Supp. 1992) (emphasis added).

145. Altman & Parmelee, *supra* note 70, at 416.

146. An objectively irrational decision can result from a rational decision making process. *Id.* at 414. The functional inquiry measures "'the ability of the individual to go through the cognitive process.'" *Id.* (*citing* SAMUEL J. BRAKEL ET AL., THE MENTALLY DISABLED AND THE LAW (3d ed. 1985)). "Mental incapacity and mental incompetency are not to be confused with unreasonable, foolish or even 'crazy' behavior, for it is not the wisdom of the decision but rather the quality of the thought process that is at issue." Lawrence A. Frolik, *Plenary Guardianship: An Analysis, A Critique and a Proposal for Reform*, 23 ARIZ. L. REV. 599, 603 (1981).

147. Altman & Parmelee, *supra* note 70, at 417.

148. This includes tests of memory, spatial perception, hearing and vision, and intelligence. *Id.* at 416.

149. These are behavioral tests designed to locate brain dysfunctions. *See* SHUMAN, *supra* note 115, § 2.18, at 56–59.

tests can help locate the source of brain dysfunctions and the degree of impairment.[150] However, the individual's particular needs, living arrangements, environment, age, drug use, drug sensitivity, and emotional status may have a greater bearing on the need for intervention than measured intelligence or reaction time.[151] However, there is no reason to limit functional evaluations to strictly cognitive functions. Indeed, measures of ability to perform ordinary daily tasks should be the centerpiece of functional assessments.

However, potential problems inherent in standardized assessment instruments may arise if they have not been anticipated. Errors may accumulate in the assessment process because of the instrument itself,[152] variability among persons who administer the tests,[153] environmental conditions that can distort the generality of an observed functional deficit,[154] and uncertainty about the direction of the causal connection or source of the impairment.[155] The effects from these sources of error can be reduced by making statistical adjustments, by thoroughly training those who conduct the assessments, and by developing ecologically relevant instruments.[156] An accurate profile of the respondent, within a statistical range of certainty, is thus possible with a developed and well-tested instrument.

In summary, the advantages of using standardized assessments in making determinations of incapacity clearly outweigh the potential shortcomings. These assessments provide the court with objective measurable evidence of capacity, alleviate the need for the court to rely on undocumented clinical judgments, allow the court to make comparisons with normative behavior, reduce the potential for large disparities in judicial outcomes within jurisdictions, and enable the defendant to make specific challenges against the need for intervention. Instruments can be developed to avoid the criticisms discussed here.

B. Mandating Evaluations

Courts in most jurisdictions already have the authority to order functional assessments when a party's mental or physical condition is at issue.[157]

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150. *Id.*

151. *See* Anderer, *supra* note 73, at 108; Nolan, *supra* note 27, at 211.

152. The instrument itself may distort responses by inducing fatigue in elderly respondents, a risk-avoidance style, or rejection of the evaluation procedure. GRISSO, *supra* note 25, at 279.

153. Interexaminer and interrater reliability, a measure of agreement about the same event by different observers, are a distinctive source of error in the administration of assessment instruments. GRISSO, *supra* note 25, at 45. Test developers do not always take this source of error into account. *Id.*

154. For example, self-care skills may appear deficient because of the living situation rather than because of some organic dysfunction. *Id.* at 279–280.

155. "[T]he deficiency might have predated the organic condition." *Id.* at 280; *see infra* note 156.

156. However, uncertainty about the causal connection between mental impairment and functional deficits remains: "The mere coexistence of brain dysfunction and functional ability deficits ... does not necessarily establish a relationship between them." GRISSO, *supra* note 25, at 279. Neurological, neuropsychological, and environmental data may also be needed "to establish the logic of causal connections between brain and behavior." *Id.* at 280. Arguably, the source or causality of a functional deficit is no less uncertain if incapacity is clinically assessed, rather than functionally assessed. If designed well, a functional assessment can do no worse at locating the source of a disability than a clinical evaluation.

157. Jurisdictions that follow the Federal Rules of Civil Procedure discovery rules can order a party to submit to a physical or mental examination when competency or mental health is

Thus, how the courts treat proposed wards, even within the same jurisdiction, may vary. Whereas one judge may order that a defendant's condition be objectified by an assessment, another may be satisfied with the subjective opinion testimony of a family physician. Moreover, wealthy defendants may be more susceptible to the vagaries of judicial style[158] since they are the more likely subjects of guardianship or conservatorship proceedings.[159] Assuming that impartial evaluations of proposed wards protect them against unneeded intervention,[160] without mandatory pre-hearing evaluations, inconsistent outcomes can result even when functional standards of incapacity apply.[161]

This problem can be corrected by mandating functional evaluations of all proposed wards. To protect due process interests[162] and to ensure equal treatment of guardianship defendants, some states have enacted laws that encourage or require[163] a full evaluation of and an examination report on all proposed wards.[164] Mandated evaluations may be especially important to

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at issue. "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action ...." FED. R. CIV. P. 26(b)(1) & 35(a).

158. In the absence of a state policy which mandates medical and functional evaluations of all subjects of guardianship or conservatorship proceedings, subjects with sizable assets could be the overall losers, as compared to those of more modest means. The wealthier subjects may be more likely to be petitioned to hearings because they are more likely to have family members, friends, or associates who are interested either in their welfare or their assets. The state can correct this potential source of discrimination by requiring examinations of all proposed wards.

159. *See* GEORGE J. ALEXANDER & TRAVIS H.D. LEWIN, THE AGED AND THE NEED FOR SURROGATE MANAGEMENT (1972). After studying over 400 guardianship cases, the authors found that in the aftermath of court hearings to "protect the debilitated from their own financial foolishness or from the fraud of others who would prey upon their mental weaknesses," only the interests of third parties are protected. *Id.* at 135.

> The state hospital commences incompetency proceedings to facilitate reimbursements for costs incurred. ... Dependents institute proceedings to secure their needs. Co-owners of property find incompetency proceedings convenient ways to secure the sale of realty. Heirs institute actions to preserve their dwindling inheritances. Beneficiaries of trusts or estates seek incompetency as an expedient method of removing as trustee one who is managing the trust or estate in a manner adverse to their interests. All of these motives may be honest and without any intent to cheat the aged, but none of the proceedings are commenced to assist the debilitated.

Id.

160. On the one hand, the petitioner will want expert testimony to prove the defendant legally incompetent. On the other hand, defendant's counsel may want to use an expert "to support the presumption of competency," Nolan, *supra* note 27, at 215, or at least to support only limited guardianship arrangements. However, persons brought into a guardianship hearing on allegations of incompetency seldom proffer a formal challenge.

161. An unintended result of discretionary examinations is that not all members of one group of defendants, those who are more likely to become wards because of their economic status, will receive the benefits of an impartial evaluation.

162. The due process interest referred to here is the right to an impartial determination based on the facts, and not based on opinions by experts who are not required by rules of evidence to state the basis for their opinions. *See* FED. R. EVID. 703. Since a guardianship proceeding is not a criminal action, the Federal Rules of Evidence do not prohibit an expert from stating an opinion or inference during his testimony about the defendant's mental state or condition. FED. R. EVID. 704.

163. For jurisdictions where pre-hearing examinations are at the court's discretion, See KAN. STAT. ANN. § 59-3011(a)(1) (1983); OKLA. STAT. ANN. tit. 30, § 3-108(A) (West 1991); UTAH CODE ANN. § 75-5-303(3) (Michie 1993). For jurisdictions where pre-hearing examinations are mandatory, see ARIZ. REV. STAT. ANN. 14-5303(B) (Supp. 1992); FLA. STAT. ANN. § 744.331(3)(c) (West Supp. 1993); ME. REV. STAT. ANN. tit. 18-A, § 5-303(b) (West Supp. 1992); 20 PA. CONS. STAT. ANN. § 5511(d) (Supp. 1993).

164. While it is expected that the laws have produced the desired result, their effectiveness

protect the rights of prospective wards who would be turned over to a public guardian.[165] As the case of Minni Monhoff shows,[166] where the law does not require an evaluation of the proposed ward's incapacities before the appointment of a public guardian, it cannot be assumed that the court or the public guardian will investigate the proposed ward's actual need for assistance.[167]

However, mandating evaluations raises a privacy issue. Although not violative of one's constitutional right to privacy,[168] mandated functional evaluations could be thought to be especially intrusive when the alleged incompetent challenges the guardianship petition. Forcing a defendant to submit to an unwanted mental health examination prior to a competency hearing may be a degrading experience and could seem unjust in the eyes of the prospective ward. But compared to the other significant rights at stake, the privacy intrusion must be considered the lesser of two evils. In guardianship cases, any assurances the law can provide that only probative evidence will be admissible ultimately serves the interests of the defendant.

Mandatory examinations benefit the proposed ward in several ways.[169] First, any conflict of interest created by the competency expert's dual sense of duty to the petitioner and to the proposed ward is eliminated.[170] Second, standardized procedures and assessment instruments provide consistency in the evaluation and adjudication process. Third, relevant evidence of observable facts are presented. Fourth, the defendant is not disadvantaged if she opposes the guardianship; she will have equal access to the examination report and not be burdened with an implied presumption of incapacity when the hearing

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in bringing about the desired benefits to the guardianship system is yet to be ascertained from research.

165. Public guardianship is placed in the hands of an appointed public official or private corporation who administers a state, county, or municipally operated program. The function of the public guardian is to make decisions for the ward concerning management of assets and institutionalization, and for securing entitlements and other benefits. *See* Schmidt, Jr., *supra* note 98, at 359.

166. *See supra* notes 7–11 and accompanying text.

167. Once a guardianship has been ordered, there is little chance that the public guardian will take the initiative to investigate. *See* Goldman v. Krane, 786 P.2d 437 (Colo. Ct. App. 1989) (holding that transporting an elderly woman to a hospital without investigating need, and director's signing blank guardianship petitions constituted an illegal practice by a public guardian); *see also* AXILBUND, *supra* note 17, at 10 (finding that another weakness of the public and corporate guardian is its impersonal nature); Schmidt, Jr., *supra* note 98, at 359 (reporting about public guardians who inappropriately ordered the institutionalization of wards, looted wards' estates, subjected them to experimental medical treatments, and failed to secure entitlements).

168. The discovery rules give courts the authority to order a mental or physical examination when a party's mental status is at issue. *See supra* note 157. In addition, courts may have statutory authority under the guardianship laws of the jurisdiction to order examinations of guardianship defendants. *See supra* note 163. After analyzing the privacy issue, Nolan concludes that "[t]he question is not whether an evaluation should be made, but, rather, whether the evaluation that is made will occur with or without valid and reliable information." Nolan, *supra* note 27, at 214.

169. See FLA. STAT. ANN. § 744.331(3) (West Supp. 1993), for an example of an examination requirement.

170. Money is often at the root of this conflict. The petitioner, who may be the proposed guardian, is often a family member of the proposed ward. The petitioner will summon the family doctor to testify about the proposed ward's condition. The doctor will most likely give a biased and subjective assessment. For other sources of conflict, see Phillip M. Massad & Bruce D. Sales, *Guardianship: An Acceptable Alternative to Institutionalization?*, 24 AM. BEHAVIORAL SCIENTIST 755, 765–66 (1981).

begins.[171] And fifth, the needs of the defendant can be more accurately and specifically addressed. An examination requirement should produce more fair hearings and less abuse in the guardianship system.

C. Paying For The Evaluation

Evaluation costs can fall on either the parties involved or the public. As with the allocation of attorney fees, the cost of the examination could be allocated to either the petitioner or the loser in the action. Alternatively, there may be a good policy reason for using public funds to pay for the examination.

Allocating the costs of a functional evaluation to the petitioner would be counterproductive to all interests. This scheme would reduce the number of private guardianship actions since a potential petitioner may not want to or be able to bear the expenses. Another possible solution is to charge the fees to the losing party (assuming the guardianship is challenged). However, this scheme again places the petitioner at risk and may result in fewer petitions. Assuming that most guardians are needed,[172] the public interest would be poorly served by either of these cost allocation schemes. The risk of under-utilization may be too serious to require pre-adjudicatory examinations without providing for someone other than the petitioner to pay for them.

The law could require payment from the proposed ward's assets, but this solution raises the potential for using the legal system as an instrument of harassment.[173] A partially disabled and vulnerable person with property may be compelled to relinquish her control of it under the threat of a competency adjudication. Whether or not the prospective ward acquiesces, she loses. Indeed, many guardianship proceedings have been motivated by the self-interests of the petitioner.[174]

Alternatively, if a state legislates mandatory competency examinations, the state or county should also pay for them. Allocating the costs to the government may be justified as good public policy.[175] Petitioners are not discouraged from pursuing protective arrangements for disabled persons, and proposed wards are protected from expending their assets to challenge an otherwise biased preparation of facts.

V. CONCLUSION

Unlike other kinds of incompetency,[176] the need for a guardian arises

171. Although a presumption of competency is the law of the land, the lack of specificity in allegations of incompetence may arguably raise a presumption of incompetency in jurisdictions where the definition of incompetency has been vague and overbroad. *See supra* notes 7–11 and accompanying text.

172. Findings of an unmet need for legal guardians support this assumption. *See* Schmidt & Peters, *supra* note 13, at 78. As of 1987, it was estimated that there were over one-half million elderly wards of the state. Barnes, *supra* note 13, at 952.

173. Rule 11 sanctions under the Federal Rules of Civil Procedure are designed to discourage frivolous or meritless actions and may reduce the harassment potential of guardianship petitions. *See* FED. R. CIV. P. 11. But vague standards of incapacity may neutralize the threat of Rule 11 sanctions.

174. *See supra* note 159.

175. Florida is one of the few states that requires a functional examination of proposed wards and also provides for payment of examination committee fees from the county general fund. FLA. STAT. ANN. § 744.331(7)(a) (West Supp. 1993).

176. *See supra* note 12.

from an individual's functional incapacities. Statutes that particularize incapacities offer prospective wards greater protection against unwanted or unneeded guardian appointments than statutes that do not. These statutes alone are not enough to ensure that the court will have clear and objective evidence for determining the need for intervention. Without a statutory requirement for functional evaluations of all guardianship defendants, the court's discretionary use of undocumented expert opinion about the defendant's competency will continue to generate inconsistent and potentially incorrect outcomes. Mandatory use of impartial functional evaluation will assist the court in determining how to best help the proposed ward.

The evaluation procedure for prospective wards can be streamlined by employing standardized assessment instruments. Moreover, requiring jurisdictions to use standardized functional assessments protects vulnerable individuals from baseless threats to their independence and civil liberties. These instruments have already been developed for clinical uses, and some have been refined for forensic purposes. Reliable and valid instruments should be selected as part of the examination regime, perhaps by a "multidisciplinary guardianship committee," as recommended in *Wingspread*.[177]

Legislatures should enact guardianship laws that require standardized assessments of proposed wards and allocate the cost of these examinations to public funds. This system may create a greater burden on public resources,[178] but it is worth pointing out that our judicial system is financed at a great cost to protect our civil liberties.

177. Parry, *supra* note 14, at 280. This committee would be assigned the task of planning and implementing a comprehensive statewide guardianship system.

178. The overall fiscal effects on the county or state treasury for examination costs remain unknown without further study.