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Standards and Basic Principles of Examining and Evaluating Capacity in Guardianship Proceedings

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STANDARDS AND BASIC PRINCIPLES OF EXAMINING AND EVALUATING CAPACITY IN GUARDIANSHIP PROCEEDINGS

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I. INTRODUCTION

In the realm of guardianship law, an elder law attorney is well aware that a declaration of incapacity may strip an individual of more rights than that of a convicted felon.[1] The concept of whether capacity is a matter of fact or law is often debated. The framework for establishing standards governing which rights warrant removal is tenuous and complex. A factual determination of incapacity requires a finding, by clear and convincing evidence, that the Respondent, or alleged incapacitated person, is both functionally unable, either wholly or partially, to care for their person (self) and/or property.[2] This determination culminates in a finding by the court that the impaired person lacked the ability to make or communicate certain decisions as the result of some proven disorder or disability.[3]

The intent of the Florida legislature is to make available the least restrictive alternative to guardianship and seek to permit "incapacitated persons to participate as fully as possible in all decisions affecting them . . .

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1. *See* Vitek v. Jones, 445 U.S. 480, 492 (1980) (stating the greater degree of protection afforded to a convict when compared to that afforded to persons adjudicated incapacitated).

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

3. *Id.*

in protecting their rights, in managing their financial resources, and in developing or regaining their abilities to the maximum extent possible . . . ."[4] Essentially, the state seeks to provide assistance to the public in a form that least interferes with the legal capacity of a person to act on their own behalf. Florida law presumes capacity and supports the least restrictive alternative consistent with the limitations of a person presumed to lack capacity, in the event that a limitation must be placed on their personal autonomy.[5] This article will explore the shortcomings in the current state of the law, when a court has to decide whether fundamental civil rights warrant removal due to an individual's lack of capacity to exercise those rights.

II. FUNDAMENTALS OF CAPACITY AS A LEGAL DETERMINATION

There are basic principles when determining incapacity in guardianship proceedings. The first, and often most misguided, is the notion that incapacity is a medical and not a legal decision. To that end, it correctly follows that the question of capacity is to "be presented to the court as a triable issue of fact."[6] Although the court should weigh testimony from health professionals, there are some states that make an incapacity determination based upon non-medical evidence.[7] This is a material deficiency in the judicial process of determining incapacity due to the lack of expert medical testimony presented for the court to weigh. A person is or is not incapacitated simply because of the ability or inability to complete a specific task.

The same issues stem from whether a person lacks capacity with respect to exercise certain rights while retaining capacity to exercise others. To further complicate the matter, an individual may be able to perform certain tasks proficiently on their own while having an incomplete ability to perform other tasks with or without assistance.[8] Notwithstanding, under Florida law capacity is presumed.[9]

Under Florida law, six rights may be removed which cannot be delegated to a guardian: (1) the right to marry; (2) the right to vote; (3) the right to personally apply for government benefits; (4) the right to have a

4. FLA. STAT. § 744.1012 (2013).
5. *In re* Guardianship of Monty v. Fuqua, 646 So. 2d 795, 796 (Fla. Dist. Ct. App. 1994).
6. Anderer, *supra* note 2, at 108.
7. *See id.*
8. *Id.*
9. Travis v. Travis, 87 So. 762, 765 (Fla. 1921).

driver's license; (5) the right to travel; and (6) the right to seek or retain employment.[10] Seven rights that may be removed and delegated to a guardian: (1) the right to contract; (2) the right to sue and defend lawsuits; (3) the right to apply for government benefits; (4) the right to manage property (or make gifts or disposition of property); (5) the right to determine residence; (6) the right to consent to medical and mental health treatment; and (7) the right to make decisions about one's social environment or other social aspects of one's life.[11] These rights are specific transactions that require distinct cognitive abilities necessary to appreciate the consequences of making any of the decisions. The law, although enacted with good-natured intentions, lacks appreciation that there is not a global diagnosis for determining whether an individual has capacity. A definitive analysis should be engaged in when assessing the degree of a person's abilities and finding the specific limitations of capacity with regard to any right that may be removed.[12]

One's surroundings can also affect the demands on an individual's ability to exercise certain skills, such as activities of daily living or the management of finances. The presence of family and friends also determines whether the individual will receive support and assistance in managing their own affairs.[13] This gives rise to the separation that many states use in organizing whether an individual requires assistance with personal matters (i.e., making medical decisions) or financial matters (i.e., gifting property).[14] The gray area widens when certain matters overlap into both categories. For example, the ability to determine your residence requires both the necessities of having to determine your social environment (e.g., the ability to assess your needs in terms of accommodating your everyday living requirements) and the cost of the same.

III. THE ROLE OF THE JUDICIARY

It is important to note that all too often, the trial court affords the greatest weight to the expert testimony and recommendations of the

10. FLA. STAT. § 744.3215(2) (2013).

11. FLA. STAT. § 744.3215(3) (2013).

12. *See* FLA. STAT. § 393.062 (2013); *see also* FLA. STAT. § 393.066 (2013) (mandating that the goal of specialized programs is to allow a person to live as independently as possible). The Florida Statutes expresses a preference for a limited guardianship for persons with developmental disabilities as well. FLA. STAT. § 393.062 (2013).

13. Anderer, *supra* note 2, at 108.

14. *See* Norman Fell, *Guardianship and the Elderly: Oversight Not Overlooked*, 25 U. TOL. L. REV. 189, 203–04 (1994).

physicians or psychologists appointed to evaluate the alleged incapacitated person.[15] These court-appointed "experts" employ methods of evaluating an individual to determine whether there is an issue regarding capacity. The experts perform a battery of tests to determine whether the individual has a mental disorder. In their analysis, all of these doctors should seek to obtain information relevant to the individual's diagnosis and functional capacity. They must also conduct a mental examination that is coupled with a detailed review of the individual's psychiatric history.[16] The examination touches upon a series of categories such as motor activity, speech, mood, belief, perception, and cognition.[17]

One can easily conclude that because a physician or psychiatrist is presumed to be highly skilled in diagnosing mental capacity, the court may adopt their recommendation and impose a guardianship without questioning the methods the physician or expert applied while examining and diagnosing the individual.[18] This calls into question whether the courts are properly weighing evidence and protecting the rights of an individual where capacity is a legal conclusion and not a medical determination. The court must reconcile the intent of the legislature and the criteria used by the court-appointed experts to make a decision. Many times, a doctor's report contains diagnostic information and conclusory statements obtained from a person's past medical history.[19] However, the opinion of the expert examiner as to the issues of capacity is effective only as to the date of the examination. This is because capacity can fluctuate where it is probable that an individual experiences lucid intervals; or the degree of incapacity does not warrant removal of a right.

In Florida, the petitioner's burden of proof requires presenting "clear and convincing" evidence to support a judicial determination of incapacity.[20] The "clear and convincing" standard has been defined to require the proffer of evidence to "be of a quality and character so as to

15. *See* Anderer, *supra* note 2, at 108.

16. *See* Robert P. Roca, *Proceeding of the Conference on Ethical Issues in Representing Older Clients: Determining Decisional Capacity: A Medical Perspective*, 62 FORDHAM L. REV. 1177, 1178 (1994).

17. *Id.* at 1178–80.

18. *See* Smeed v. Brechtel, 567 P. 2d 588, 589 (Or. Ct. App. 1977) (finding the psychiatrist's report and testimony to be persuasive despite what the court characterized as conflicting, confusing, and unpersuasive testimony given by the protected person's relatives).

19. *See* Shen v. Parkes, 100 So. 3d 1189, 1190–92 (Fla. Dist. Ct. App. 2012) (ruling for the appellant who alleged that the admission of the examining committee reports was hearsay, and determining that the written reports were insufficient wherein the reports included diagnosis, prognosis, and treatment recommendations, while no live testimony was offered by the doctors).

20. FLA. STAT. § 744.331(5)(c) (2013).

produce in the mind of the [court] a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established."[21] The Florida courts have also required "clear and convincing" evidence with regard to: coherency in testimony; orientation as to person, place, and time; but not sworn affidavits from psychiatrists indicating improvement or sufficiency of capacity in making financial, medical, and testamentary provisions.[22] The "clear and convincing" standard is an intermediary standard between the "preponderance of the evidence" standard applied in most civil cases and the proof beyond a reasonable doubt charged to the state in criminal matters.[23] Conversely, a ward petitioning for restoration bears the "preponderance of the evidence" burden of proof.[24]

IV. THE EXAMINERS

In Florida, a three-member committee is appointed by the court to determine whether an individual lacks capacity. One of those members must be a psychiatrist or other physician and the remaining two must be qualified as per the statutory requirements.[25] At least one of the three members are required to "have knowledge of the type of incapacity alleged in the petition."[26] Because the petitioner's due diligence may include attaching to the Petition to Determine Incapacity a letter from the respondent's physician, the attending or family physician may not be appointed to the examining committee, unless good cause is shown; but attending or family physician must be consulted, if available, by the appointed committee members on the matter at hand.[27] Each member of the examining committee must complete a minimum of four hours of initial training.[28] Thereafter, every two years the committee members are required to complete two hours of continuing education.[29] "The initial training and

21. McKesson Drug Co. v. Williams, 706 So. 2d 352, 353 (Fla. Dist. Ct. App. 1998) (citing Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. Dis. Ct. App. 1983)).

22. *See* Losh v. McKinley, 86 So. 3d 1150, 1153–54 (Fla. Dist. Ct. App. 2012); *see also* Graham v. Florida Dep't. of Children & Families, 970 So. 2d 438, 444 (Fla. Dist. Ct. App. 2007).

23. Allstate Ins. Co. v. Vanater, 297 So. 2d 293, 295 (Fla. 1974).

24. *In re* Guardianship of Branch, 10 Fla. L. Weekly Supp. 23a (Fla. Cir. Ct. 2002).

25. *See* FLA. STAT. § 744.331(3)(a) (2013) ("The remaining two examiners must be either a psychologist, gerontologist, another psychiatrist, or other physician, a registered nurse, nurse practitioner, licensed social worker, a person with an advanced degree in gerontology from an accredited institution of higher education, or other person who by knowledge, skill, experience, training, or education may, in the court's discretion, advise the court in the form of an expert opinion.").

26. *Id.*

27. *See id.*

28. FLA. STAT. § 744.331(3)(d) (2013).

29. *Id.*

continuing education program [is] developed under the supervision of the Statewide Public Guardianship Office in consultation with [various official related offices, conferences, and sections of the Florida Bar]."[30]

Unfortunately, the statutes permit a court to "waive the initial training requirement for a person who has served for not less than 5 years on examining committees."[31] One can presume that if one of the three members is required to have knowledge of the alleged incapacity, and said "expert" has not received training apart from past service, the committee member's qualifications to opine on the issues of capacity is questionable.

The committee members are charged with the duty to assess whether the alleged incapacitated person has capacity to exercise the enumerated rights specified by the legislature.[32] In determining the alleged incapacitated person's capability of exercising these rights, the committee is permitted but not required to review previous examinations that may include "habilitation plans, school records, psychological, and psychosocial reports [that are] *voluntarily* offered . . . by the alleged incapacitated person."[33] The actual evaluation conducted by the examining committee members must include a physical examination, a mental health examination, and a functional assessment.[34] Although this evaluation is deemed to be an "essential element," by statute, it is "not necessarily the only element to be considered by the judge in making a capacity and guardianship decision."[35] Nevertheless, "[i]f a majority of the examining committee members conclude that the alleged incapacitated person is not incapacitated in any respect, the court shall dismiss the petition."[36] These two statutory subsections appear to contradict each other. On the one hand, the committee members' reports are essential but not exclusive and on the other hand, if two members recommend that no guardianship is required, the court may look no further and must dismiss the petitioner.[37]

30. *See id.*

31. *Id.*

32. FLA. STAT. § 744.3215(2)–(3) (2013).

33. FLA. STAT. § 744.331(3)(e) (2013); *see* Manassa v. Manassa, 738 So. 2d 997, 998 (Fla. Dist. Ct. App. 1999) (holding that evidence apart from the examining committee reports, which included medical reports and testimony concerning competence showing the long-term existence of diminishing mental capacity, supported conclusions that the alleged incapacitated person was incapacitated in conformity with the reports).

34. FLA. STAT. § 744.331(3)(f) (2013).

35. *Id.*

36. FLA. STAT. § 744.331(4) (2013).

37. *See* Rothman v. Rothman, 93 So. 3d 1052 (Fla. Dist. Ct. App. 2012).

V. THE WEIGHT OF EXPERT TESTIMONY AND THE TRIER OF FACT

Statutorily mandating the dismissal of the petition on the recommendation of two committee members' reports that no guardianship is required usurps the judicial discretion of the court. Section 90.703 of the Florida Evidence Code, "Opinion on [U]ltimate [I]ssue," provides that "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it includes an ultimate issue to be decided by the trier of fact."[38] However, section 90.703 is not interpreted to mean that all expert opinion testimony is admissible. An expert witness's conclusion that tells the trier of fact how to decide the case, and does not assist the court in determining what has occurred, is inadmissible.[39] Thus, by statutorily requiring dismissal of a Petition to Determine Incapacity on the recommendation of two committee members' reports, the statute restricts the evidence the court may consider. Moreover, if the judge, as the trier of fact charged with weighing the evidence and applying the law, does not agree with the two committee members' recommendations of "no guardianship", the judge is unable to act.

The purpose of having expert witness testimony is to aid the trier of fact in seeking information that is not common knowledge. Taking into account that this type of testimony (opinion or inference) is admissible but not objectionable, this does not mean that all expert testimony is admissible–it becomes inadmissible only after the expert witness's conclusions dictate the ultimate decision that should be left to the tier of fact. This calls into question the weight that should be afforded to the opinion of an examining committee member in their determination of whether an individual is incapacitated. Furthermore when there are limited or no means for an individual to present evidence of equal quality to contradict the examining committee's opinions, almost any other form of evidence indicating capacity are presumed to fail in comparison.

Generally, statutes governing guardianship or incapacity "have two common elements: (1) the existence of a mental or physical condition, and (2) an inability to make or communicate decisions . . . ."[40] This is a modern approach distinguishable from the traditional schemes that associated the

38. FLA. STAT. § 90.703 (2013).

39. Town of Palm Beach v. Palm Beach Cnty., 460 So. 2d 879, 882 (Fla. 1984).

40. JOHN PARRY & ERIC Y. DROGIN, MENTAL DISABILITY LAW, EVIDENCE AND TESTIMONY: A COMPREHENSIVE REFERENCE FOR LAWYERS, JUDGES AND MENTAL DISABILITY PROFESSIONALS 140–41 (2007).

presence of a mental condition, mental illness, addiction or senility with the need for a guardianship.[41] Obviously, a court will inquire as to whether the alleged incapacitated person has any present disability or disorder that leads to the conclusion that they suffer from an impairment of their capacity to make decisions about their person or property. This involves the court looking not only at the present condition but how it was diagnosed. This process may involve evaluating whether the diagnosis was based upon a comprehensive exam versus a summary exam. Issues may arise when certain disorders, such as Alzheimer's, are still in its early stages and a fixed standard is not adequate to diagnose an illness. The court may also consider the recurrence of the person's impairment. The disability may allow for moments of lucidity in which the person regains capacity and is able to resume making meaningful decisions. If the condition lends itself to improving in a brief time, a determination of incapacity may be unnecessary.

In *LeWinter v. Guardianship of LeWinter,*[42] the appellate court reversed the trial court's finding of incapacity where the report of the examining committee was filed over six weeks before the hearing occurred, and had been rendered valueless by the admission that the ward's condition had markedly improved.[43] The trial court concluded that the ward was incapacitated due, in part, to lapses of attention, while the appellate court found such an opinion was "a mere non-expert conclusion entitled to no evidentiary weight."[44] In *Losh v. McKinley*[45] the court concluded that the three examining committee members appointed by the court examined Losh and found that she "was oriented as to person, place and time . . . , [was] able to name three major current event issues, and reported" that she was capable of managing her own finances.[46] However, she was unable to "name her medications or reasons for taking them," and she could not recall "the names of her banking institutions."[47] While testifying at her capacity hearing, Losh "testified in detail about her family, finances, health, and prescribed medications."[48] Her testimony included statements as to the reason why some of her properties were not insured and she explained her reasoning for investing her funds in money market accounts

41. *Id.* at 141.
42. LeWinter v. Guardianship of LeWinter, 606 So. 2d 387 (Fla. Dist. Ct. App. 1992).
43. *Id.* at 388.
44. *Id.*
45. Losh v. McKinley, 86 So. 3d 1150 (Fla. Dist. Ct. App. 2012).
46. *Id.* at 1152.
47. *Id.*
48. *Id.*

rather than certificates of deposit.[49] The court found that the most convincing evidence was Losh's testimony wherein she was able to reveal that she was "coherent and fully aware of her circumstances, both financially and medically."[50]

As *Losh* demonstrates, Florida takes an objective approach when examining a person's ability to make a decision and adequately act in their own interest.[51] A number of other states employ non-objective factors where the statutes use terms such as "responsible" or "effective" to the point where the decision-maker is not being assessed for his ability to make a decision but rather whether his final decision is socially-acceptable and analogous to the "reasonable person" standard.[52]

VI. THE REQUIREMENTS OF EXAMINING COMMITTEE REPORTS

Florida Law details what is required in the written reports from examining committee members:

> (g) Each committee member's written report must include:
>
> 1. To the extent possible, a diagnosis, prognosis, and recommended course of treatment.
>
> 2. An evaluation of the alleged incapacitated person's ability to retain her or his rights, including, without limitation, the rights to marry; vote; contract; manage or dispose of property; have a driver's license; determine her or his residence; consent to medical treatment; and make decisions affecting her or his social environment.
>
> 3. The results of the comprehensive examination and the committee member's assessment of information provided by the attending or family physician, if any.
>
> 4. A description of any matters with respect to which the person lacks the capacity to exercise rights, the extent of that incapacity, and the factual basis for the determination that the person lacks that

49. *Id.* The trial court found that she had diminished ability to manage her finances and assets, explaining:

> [O]n more than one occasion, she has been late in paying her credit card bill; she has intentionally not carried liability insurance on improved, unencumbered real estate; she keeps money in lower interest rate money market accounts rather than seeking the higher interest rate of a certificate of deposit and other people sometimes write checks for [her] to sign . . . .

Id. at 1153.

50. *Id.* at 1153.

51. *Cf.* PARRY & DROGIN, *supra* note 40, at 142.

52. *Id.; see also* UNIF. PROB. CODE § 5-103(7) (2010) (defining an incapacitated person as one "who is impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or other cause (except minority) to the extent of lacking sufficient understanding or capacity to make or communicate responsible decisions").

capacity.

5. The names of all persons present during the time the committee member conducted his or her examination. If a person other than the person who is the subject of the examination supplies answers posed to the alleged incapacitated person, the report must include the response and the name of the person supplying the answer.

6. The signature of the committee member and the date and time the member conducted his or her examination.[53]

The Rules of Evidence are applicable because judges are statutorily required to consider the committee reports when making a final determination. Florida courts have interpreted this to mean that the evidence code applies to the guardianship statutes.[54] Florida recently questioned the longstanding practice of judges relying entirely on reports of an examining committee member, whether or not the committee member were present to testify or authenticate their report. In *Shen v. Parkes*,[55] a petition to determine incapacity was filed seeking plenary guardianship.[56] An examining committee was appointed, examined Shen, and filed reports.[57] Shen denied the "allegations of the petition . . . . [and] [a]n adjudicatory hearing was held, during which the written reports of the examining committee members were accepted into evidence by the court over Shen's hearsay objection."[58] None of the committee members were present at the hearing to testify. Those witnesses who were present were unable to testify as to the alleged incapacity.[59] The appellate court held that the trial court's admission into evidence of the committee members' reports', culminating in a determination of incapacity was based on inadmissible hearsay.[60]

The *Shen* Court's holding prompts the analysis of whether the appellate court rightfully deemed relevant evidence inadmissible because its probative value substantially outweighed the danger of unfair prejudice and confusion of the issues, absent the direct testimony of a witness with

53. FLA. STAT. § 744.331(3)(g) (2013).

54. FLA. PROB. R. 5.170 (2013).

55. Shen v. Parkes, 100 So. 3d 1189 (2012).

56. *Id.* at 1190. The general magistrate at the incapacity hearing issued "a report which stated that clear and convincing evidence established Shen's incapacity and need for a limited guardianship. However, the general magistrate made only the following finding: 'K. Parkes-hosp. asked to be petitioner for possible guardian no attempted [ineligible] guardian asked her to file.'" *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *See id.* at 1191.

personal knowledge of the facts.[61] To reiterate, Florida law requires that the examining committee reports are a necessary, but not exclusive, element in making a determination of capacity. However, under the aforementioned case law, by requiring dismissal of the opinion of two committee members' votes for "no to guardianship," the reports are given greater weight than any other relevant evidence.[62] Of even greater concern, is whether procedural due process is compromised where cross-examination of an adverse witness, here an examining committee member, is not available to a party. The court should be knowledgeable as to the particular committee member's assessment, what their exact methods are in factoring out or determining the capability of the alleged incapacitated person to make decisions about each and every enumerated right as delegated by statute. These reports, unlike treating physician's reports, are compulsory from non-treating experts prepared in anticipation of litigation.[63] Hence, without direct testimony from the committee member who conducted the evaluation and prepared the report, the report is inadmissible hearsay. To admit the reports over a hearsay objection is too prejudicial to the respondent/alleged incapacitated person who has a right to viore dire and cross examine the expert in order to test the opinions contained in the report. Otherwise, the court, which may also question the committee members, may be misled by unchallenged opinions of these court appointed "experts."

VII. A CLOSER ANALYSIS OF THE FLUCTUATING NATURE OF CAPACITY

A. THE RIGHT TO VOTE

Nineteen states, including Florida, have specific provisions that persons under guardianship "retain all legal and civil rights not specifically taken away, which at least by implication would include the right to vote."[64] Florida takes it a step further and names the right to vote as a removable right in its guardianship statute, under Chapter 744 and in the Florida Constitution.[65] There are "[o]nly four states [that] give specific statutory direction as to what a judge is to consider when determining

61. *See* FLA. STAT. § 90.403 (2013).

62. *See* FLA. STAT. § 744.331(4)

63. *See* FLA. R. CIV. P. 1.360(b)(1).

64. Sally Balch Hurme & Paul S. Appelbaum, *Defining and Assessing Capacity to Vote: The Effect of Mental Impairment on the Rights of Voters*, 38 MCGEORGE L. REV. 931, 950 (2007).

65. *See* FLA. CONST. art. VI, § 4; FLA. STAT. § 744.3215(2)(b) (2007). Persons adjudicated to be mentally incompetent may not vote. FLA. CONST. art. VI, § 4.

whether a person is ineligible to vote."[66] Some statutes are as elusive and verbose as Washington's statute, which provides that the right to vote will not be lost "unless the court determines that the person is incompetent for purposes of rationally exercising the franchise in that the individual lacks the capacity to understand the nature and effect of voting such that she or he cannot make an individual choice."[67] Other states use a more concise and understandable standard such as the Wisconsin statute requiring courts to find that the person is "incapable of understanding the objective of the elective process."[68]

Although some states have language in their constitution and statutes that define incapacity by status, most jurisdictions employ a functional standard.[69] "Of the four states whose statutes attempt to define a standard, two definitions are essentially circular . . . : Delaware's 'severe cognitive impairment which precludes exercise of basic voting judgment' and Iowa's 'lacks sufficient mental capacity to comprehend and exercise the right to vote.'"[70] Some scholars find that looking to a specific case or statute is pointless and not particularly informative in determining a functional standard for capacity to vote; thus they emphasize two points of preliminary consideration: (1) "the definition of the criteria for capacity is an exercise in policy, not science . . ."; and (2) a person's capacities for most tasks range on a spectrum that requires either more or less proficiency.[71] Of course, much can be said about the value of the ability to vote rather than the effect that one's single ballot has on the election process. This begs the question: what is the substantial harm of removing one's personal inalienable right to vote versus the likelihood of harm that the cast ballot will have on the outcome of the election?[72]

Despite this policy concern, most jurisdictions lack clear standards for capacity to vote.[73] An interesting test employed by the United States Supreme Court is that of *Matthews v. Eldridge*,[74] which closely examines the sufficiency of the procedures employed by a state used to disenfranchise their voters.[75] In using this method, a court weighs the plaintiff's interest in participating in the democratic process through voting,

66. Hurme & Appelbaum, *supra* note 64 at 957.
67. WASH. REV. CODE § 11.88.010(5) (2013).
68. WIS. STAT. § 54.25(2)(c)(1)(g) (2013).
69. Hurme & Appelbaum, *supra* note 64 at 960.
70. *Id.* at 961 (citing 15 DEL. CODE ANN,. § 1701 (2013) and IOWA CODE § 633.556 (2013)).
71. Hurme & Appelbaum, *supra* note 64 at 962.
72. *See id.* at 963–64.
73. *Id.* at 965.
74. Matthews v. Eldridge, 424 U.S. 319 (1976).
75. *Id.* at 321.

the risk of erroneous deprivation of the right to vote, and the state's interest.[76] This test calls for the court to ask what state interest is associated in disenfranchising citizens in a guardianship. *Doe v. Rowe*[77] established that states must grant citizens under guardianship full procedural due process protections before denying them the right to vote.[78]

B. RIGHT TO MARRIAGE

The Florida Statutes give some direction when defining the capacity requisite to enter into a marriage.[79] This includes the requirement that the couple enroll in a "premarital preparation course" or wait three days before the marriage is effective; participants may be instructed in matters that include conflict management and parenting responsibilities.[80] The inclusion of these programs is in line with the state's intent to promote marriage and responsible parenting.

C. RIGHT TO CONTRACT

In most jurisdictions, the capacity to enter into a contract depends on the person's ability to understand the transaction at the time it occurs.[81] Elements surrounding this concept include: ability to understand the nature and consequences of a transaction; inability to act reasonably in relation to the transaction; inability to understand the character of the transaction; and inability to understand or agree to the contract.[82] Factors that may be relevant in determining the ability to contract include the individual's: (1) ability to appreciate the risk and benefits of decision making; (2) ability to reason and consider alternatives; and (3) the ability to predict the significance of a decision.

VIII. INQUIRY INTO THE "REQUISITE" FUNCTION AND CAPACITY

Functional capabilities are activities that are necessary to demonstrate one's ability to care for their person or property. This assessment assists the court in determining which areas of decision making require assistance. Some commentators have analyzed the assessment of one's capacity

76. *See id.*
77. Doe v. Rowe, 156 F. Supp. 2d 35 (D. Me. 2001).
78. *Id.* at 48.
79. *See* FLA. STAT. § 741.04 (2013).
80. *See* FLA. STAT. § 741.0305 (2013); FLA. STAT. § 741.04(3) (2013).
81. *See* RESTATEMENT (SECOND) OF CONTRACTS § 15 (1981).
82. *See id.* § 15(1).

through three different approaches. The first approach relies on statutory language where incapacity is defined in terms of diagnostic categories of mental disability or illness.[83] The second is based upon the Uniform Probate Code model, which connected a mental (and sometimes physical) condition to cognitive functions wherein the condition renders an individual incapable of making or appreciating certain decisions.[84] The third is the "functional model" which is increasing in popularity among lawmakers as a basis for assessing incapacity.[85]

The functional model is favored for a variety of reasons: (1) its recognition of capacity being fluid (either partial or complete); (2) its application of clinical rather than legal standards; (3) conditions can improve and so capacity is never static; (4) its recognition that functional incapacities are likely to place the person in danger of substantial harm; (5) and its recognition that diagnostic labels (i.e. Alzheimer's or dementia) or stigmatic labels are an insufficient basis for a finding of incapacity.[86]

Despite the majority interest in moving towards this "functional approach," state laws fail to provide the court with sufficient guidance on standards to determine an objection measure for "functionality."[87] Without clear standards, the court must subjectively determine whether an individual lacks abilities to the degree that requires a guardian, or worse, the court must depend on the opinion of an examining committee member's on the same. The American Bar Association and American Psychological Association published a judicial handbook in 2006, which served to provide some guidance on how to evaluate incapacity for purposes of

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83. *See* Phillip Tor, *Finding Incompetency in Guardianship: Standardizing the Process*, 35 ARIZ. L. REV. 739, 743 (1993). The author points towards a 1983 definition of "incompetency" in the Ohio Code which states in part:

> "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 . . . .

Id. at 743 n.29 (quoting OHIO REV. CODE ANN. § 2111.01(D) (West 1989).

84. *See* UNIF. PROB. CODE § 5-103(7) (2012) ("'Incapacitated person'" means any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or other cause (except minority) to the extent of lacking sufficient understanding or capacity to make or communicate responsible decisions."). *Contra* FLA. STAT. § 744.102(12) (2013) ("'incapacitated person' means a person who has been judicially determined to lack the capacity to manage at least some of the property or to meet at least some of the essential health and safety requirements of the person.").

85. Tor, *supra* note 83, at 743–44.

86. *See id.* at 744.

87. *See* Jan Ellen 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, 1878–80 (1992).

guardianship proceedings.[88] The handbook referred to a six-part analysis that included: (1) the individual's medical status/condition; (2) the individual's cognitive function; (3) the individual's everyday functioning; (4) the consistency of the individual's choices with her values; (5) the potential risk of harm and level of supervision required; and (6) availability of means to enhance capacity.[89] The implementation of these principals, namely, through codification, would assist the court or trier of fact in making a determination that encompasses a variety of considerations that may be overlooked for one reason or another by the examining committee members and/or any other witnesses.

IX. CONCLUSION

Although plainly obvious, it is important to emphasize what is at stake during guardianship proceedings. If examined in a broad sense, during a determination of incapacity, individuals experience cursory routine exams and a hearing where a judge makes a determination which can strip an individual of their fundamental civil rights. The court takes the role of deciding not only the personal and fundamental rights of the individual, but the decisions that could potentially be made by individuals designated by that person (i.e. agent of a Power of Attorney, healthcare surrogates, etc.) and families. The courts are tasked with interpreting the policy behind the law, which is to protect vulnerable persons. Current legislation requires further development when measured against the importance of the rights that are at stake in guardianship proceedings.

88. *See* AM. BAR ASS'N JUDICIAL DETERMINATION OF CAPACITY OF OLDER ADULTS IN GUARDIANSHIP PROCEEDINGS: A HANDBOOK FOR JUDGES 1 (2006), http://www.apa.org/pi/aging/resources/guides/judges-diminished.pdf.

89. *Id.* at 4–5.