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CLEAR TODAY, UNCERTAIN TOMORROW:
COMPETENCY AND LEGAL GUARDIANSHIP,
AND THE ROLE OF THE LAWYER IN SERVING THE NEEDS
OF COGNITIVELY IMPAIRED CLIENTS

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I. INTRODUCTION

Americans today live in one of the oldest societies in the world.¹ In 1995, people sixty-five and older made up 12.8% of the population of the United States.² This figure will increase to twenty percent by the year 2030.³ In 2030, demographers estimate that almost seventy-nine million people will be aged sixty-five or over, which is a 135% increase over 1995.⁴ This increase in the proportion and number of older people will mean that professional services and service providers will have to adapt to the needs of this group.⁵ Attorneys, for example, will probably see more older clients and these clients will present attorneys with new challenges.

Furthermore, an older population will mean a greater number of individuals with cognitive impairments.⁶ Currently, it is estimated that ten percent of individuals over sixty-five suffer from Alzheimer's

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** B.A., University of Manitoba, 1995; J.D., University of North Dakota School of Law, 1998. I would like to express my appreciation to my family and friends for their support and encouragement along the way. I would also like to thank the North Dakota Law Review for giving me an opportunity to work with my father, a scholar whom I hold in high regard.

1. See U.S. Bureau of the Census, *1995 Population Profile of the United States* 1, 5 (stating that the average age of the American population is at a record level high) (visited March 15, 1998) <<http://www.census.gov>> [hereinafter *Census I*].

2. U.S. Bureau of the Census], *1990 Census Results* (visited March 15, 1998) <<http://www.census.gov>> [hereinafter *Census II*].

3. *Id.*

4. *Id.*

5. *Census I*, *supra* note 1, at 5 (stating that as they age, elderly people need more help with daily activities).

6. See Colleen C. Manning, *The Medicare Alzheimer's Demonstration*, 1 ELDER L. J. 113, 113 (1993); see also James L. McGaugh, *Enhancing Cognitive Performance*, 65 S. CAL. L. REV. 383, 393 (1991) (citing studies estimating that 35% of persons over age 85 suffer from Alzheimer's disease). In addition to Alzheimer's disease, other disorders such as brain injury, strokes, malnutrition, and the cumulative effects of environmental toxins are significant causes of cognitive impairment. *Id.* at 394.

disease or a related disorder.⁷ This comes to roughly one and one-half million Americans today with a disorder causing serious dementia, and between one and five million people with milder stages of related diseases.⁸ When the Baby Boomers reach old age in the year 2040, as many as five million people will have severe dementia.⁹ These people will place more demands on the health care and other social systems.¹⁰

Additionally, an aging population will even affect states with relatively small populations. These states will also notice increases in the demand for services for the elderly. North Dakota, for example, has a small population, but it can expect to see an increase of eighty percent in its elderly population by the year 2025.¹¹ While the number of elderly individuals in North Dakota is low compared to other states, the proportionate increase in the number of elderly people will create new and unexpected challenges for those who deal with the elderly on a regular basis. For example, one expert reports that people seventy or over make up seventy-five percent of all assessments for mental capacity.¹² Therefore, a larger elderly population will need more services and different kinds of assistance from health care and legal professionals.

Cognitive impairment will be a growing issue for attorneys. It affects the attorney, the client, the family, and medical science.¹³ Each of these stakeholders has an interest in the decision-making ability of the client, but the stakeholders may differ in their view of the client's capacity (mental functioning) and competency (ability to make informed judgments about their own interests).

7. Manning, *supra* note 6, at 113; see also Lori A. Nicholson, *Hedonic Damages in Wrongful Death and Survival Actions: The Impact of Alzheimer's Disease*, 2 ELDER L.J. 249, 250 (1994) (stating that Alzheimer's disease accounts for 66% of all cases of dementia among elderly persons).

8. Manning, *supra* note 6, at 113.

9. *Id.* at 114.

10. See McGaugh, *supra* note 6, at 393. It is recognized that managing Alzheimer's patients is a costly and difficult task that requires extensive resources from a care provider. *Id.*

11. See *Census I*, *supra* note 1. As of 1990, there were approximately 91,055 people over age 65 living in North Dakota. See *id.* That number comprised 14% of the population of the state. *Id.* By the year 2025, there will be 729,000 people living in the state of North Dakota. *Id.* At that time, approximately 166,000 people over age 65 will then be living in the state comprising 23% of the population. *Id.* As these people age they will need increasing help in everyday activities. See *Census*, *supra* note 1, at 5.

12. Michel M. Silberfeld, *Ethical Issues of Competence in the Older patient*, 86 MEDICINE NORTH AMERICA 92, 92 (1989).

13. See, e.g., Manning, *supra* note 6, at 113 (stating that lawyers have traditionally prepared wills and estate planning for elderly clients, but now elderly clients and their children are seeking consultation about planning for possible future incompetence); Warren F. Gorman, *Testamentary Capacity in Alzheimer's Disease*, 4 ELDER L.J. 225, 227 (1996) (discussing common problems encountered by physicians in dealing with competency questions involving patients); Daniel C. Marson, et al., *Assessing the Competency of Patients with Alzheimer's Disease Under Different Legal Standards*, 52 ARCH. NEURO. 949, 950 (1995) (stating competency assessments must be comprehensible for patients, family, healthcare professionals, and legal professionals).

Attorneys can be an important resource for individuals in need of information and advice. An attorney can play the role of mediator, counselor, advisor, and confidant to a client.¹⁴ In order to perform these roles, an attorney must understand the concepts of capacity and competency for elderly clients as they are now being developed by medical and social science. This paper will examine the current understanding of competency and how it can broaden the attorney's options in seeking to serve older, cognitively impaired clients.

II. THE COGNITIVELY IMPAIRED CLIENT AND LEGAL GUARDIANSHIP

Old age alone does not affect competence.¹⁵ However, as a person ages, he or she can become more susceptible to various mental disorders.¹⁶ Disorders such as Alzheimer's disease lead to dementia and affect a person's ability to function.¹⁷

Dementia in the early and middle stages can show up as forgetfulness, inability to understand instructions, and behavior like wandering.¹⁸ It causes distress for family members to see their loved ones deteriorate both physically and mentally.¹⁹ Alzheimer's disease generally progresses to the point where the person needs care in a nursing home or hospital,²⁰ but before this occurs the person may spend years in the community living with their declining abilities.

Life in the community includes benefits and risks for the person. As the disease progresses, simple tasks such as cooking can pose dangers. Some people, for example, will forget to turn off the stove after cooking, which can pose a fire hazard. Likewise, a person may make

14. Manning, *supra* note 6, at 113 (stating that persons with cognitive disorders present a challenge for lawyers seeking to offer practical assistance).

15. See Runge v. Moore, 196 N.W.2d 87, 102-03 (N.D. 1972) (stating that the advanced age of a person does not necessarily mean that a person is incompetent to engage in business affairs). Even though a person's mind may be weak and impaired compared to what it had been, that does not mean that a person is incompetent. *Id.*

16. See McGaugh, *supra* note 6, at 390 (citing studies that show an age-related decline in memory). Alzheimer's disease is a neurodegenerative disease that is age-related, and progressively degenerates the brain ultimately resulting in death. *Id.* at 393. Therefore, as a person ages dementia can become significantly more severe. See *id.*

17. Nicholson, *supra* note 7, at 250. With Alzheimer's disease, increasing dementia leads to forgetfulness and lapses in judgment and concentration. *Id.* Additionally, various other cognitive disorders lead to a gradual decline in cognitive ability. See McGaugh, *supra* note 6, at 394.

18. See, e.g., Nicholson, *supra* note 7, at 250. Dementia from Alzheimer's disease leads to increasing forgetfulness, a decline in the ability to comprehend language, the loss of verbal communication, and loss of voluntary movement. *Id.*

19. See Mary E. Sharp, *Care and Protection of Indigent and Elderly Patients*, 12 GA. ST. U. L. REV. 234, 235 (1995) (stating that family members may feel great sadness and grief at having to accept the inevitable decline of a family member with Alzheimer's disease).

20. See Nicholson, *supra* note 7, at 251 (stating that Alzheimer's disease progresses to the point where individual self-care is impossible).

foolish financial decisions. In a case from our own research, a man in the early stages of Alzheimer's disease bought a new Lincoln Continental off the showroom floor. When he arrived home with the car his wife was horrified. They had no money to pay for a new car. She finally succeeded in returning the car to the dealership, but only after a long argument with the salesman and an appeal to the dealership's owner. Soon after this, she got power of attorney over her husband in order to prevent a future financial disaster.

In this paper we explore a case where the older person with Alzheimer's disease or another cognitive impairment is the attorney's client. This type of client can pose a challenge to attorneys as they attempt to serve the client's best interests.²¹ The older client and one or more family members will probably seek advice from the attorney on the issue of guardianship.²² They will often ask for this advice while the older person can still understand his or her actions.²³ At this point, the client functions independently to some degree and wants to retain as much control over their own life as possible.

The question posed is how an attorney can protect a client's rights, allowing them to maintain control, and also protect the client and the family in the face of future cognitive decline. Clients with Alzheimer's disease and related disorders "present the strongest need for a dramatically more expansive type of counseling and planning by lawyers. Meeting the needs of the client with Alzheimer's requires that the attorney provide practical assistance, not simply traditional legal advice."²⁴

A. BASIC FORMAL LEGAL COMPETENCY ISSUES

One of the first questions a lawyer must ask before beginning estate planning for a client, or handling a client's personal affairs, is whether the client is legally competent to deal with these issues.²⁵ This is important because competency is not a medical diagnosis, but rather is solely a legal determination.²⁶ Therefore, a lawyer needs to be able to assess a client's competency in order to serve the client's best interests.²⁷ Lawyers

21. Manning, *supra* note 6, at 113.

22. *Id.*

23. Susan M. McCurry & Linda Teri, *Advance Planning for Dementia Caregivers*, 45 J. AM. GER. SOC. 1102, 1102 (1997).

24. Manning, *supra* note 6, at 114.

25. Holten D. Summers, *Competency and Undue Influence: Issues for Elder Estate Planning*, 84 ILL. B.J. 18, 19 (1996).

26. Gorman, *supra* note 13, at 227.

27. See Mark Falk, *Ethical Considerations in Representing the Elderly*, 36 S.D. L. REV. 54, 67-68 (1991). Attorneys must consider a client's competency to make decisions, and be able to document the client competency. *Id.*

must also bear in mind that they may owe a duty not just to their client, but to intended beneficiaries of the client as well.²⁸

Assigning guardianship is desirable, and even essential, when a person is aware of declining competency. Taking steps in advance avoids future court intervention.²⁹ Additionally, appointing a guardian while an individual is still competent can avoid possible inter-family conflicts that might arise.³⁰

The courts often take a simple view of the attorney's role in the process of assigning guardianship. As with the signing of most legal documents, a person must have the appropriate mental capacity at the time he or she signs the papers.³¹ Therefore, the attorney present must ensure that the person understands their actions and is aware of the effect of those actions.³² An attorney cannot use past conduct or later conduct to judge competency, and the courts will not use past or future conduct to invalidate an individual's decision.³³ This means that someone with Alzheimer's disease can agree to guardianship as long as they are lucid at the time they sign any legal documents.

The role of the attorney seems clear. He or she must ensure proof of competency in a legal capacity at the time documents are signed.³⁴ Competency may be defined as the mental capacity to make informed decisions concerning one's own mental and physical welfare.³⁵ A general rule is that the law presumes competency except in cases where a

28. See, e.g., *In re Estate of Washburn*, 690 A.2d 1024, 1029 (N.H. 1997) (stating that the state of New Hampshire recognizes that lawyers owe a duty of care to their clients, and the intended beneficiaries of the client's will).

29. See, e.g., *In re Conservatorship of Lundgaard*, 453 N.W.2d 58, 61-62 (Minn. Ct. App. 1990) (involving proceedings to create a guardianship for an elderly woman). When called upon to appoint a guardian, if no guardian has been nominated, a court may have broad discretion and may appoint any qualified person it chooses. See, e.g., *id.* at 63 (citing MINN. STAT. ANN. § 525.44 subd.2 (West 1988)). See also *In re Dahmen's Guardianship*, 256 N.W. 891, 893 (Minn. 1934) (involving the court's determination whether a woman's daughter was a suitable guardian).

30. See, e.g., *In re Dahmen's Guardianship*, 256 N.W. at 892-93 (involving a brother opposing the appointment of his sister as guardian of their mother).

31. See, e.g., *Bender v. Bender*, 72 N.W.2d 220, 223 (N.D. 1955) (stating that in order to have testamentary capacity the testator must be able to understand the documents being signed at the time of signing).

32. See, e.g., *Gorman*, *supra* note 13, at 232-33; *Feiden v. Feiden*, 542 N.Y.S.2d 860, 862 (N.Y. App. Div. 1989); *Bender*, 72 N.W.2d at 223.

33. *Summers*, *supra* note 25, at 19 (stating that the fact that a client suffers from mental problems before or after signing documents does not establish that the person lacked competency to understand the documents at the time they were signed).

34. *Id.* at 20.

35. See *Marson et al.*, *supra* note 13, at 949 (stating that many Alzheimer's patients may be incompetent to make treatment decisions, especially where a court applies a more stringent competency standard).

need exists for the protection of the individual or others.³⁶ Therefore, even someone with Alzheimer's disease may have "lucid intervals" when they understand their actions and can make informed decisions.³⁷ The attorney only needs to ensure that the person's decision making ability meets a legal threshold of understanding needed to sign a document like a guardianship agreement.³⁸

Since a client "is only required to have the ability to comprehend"³⁹ at the time they sign a legal document, a number of methods have been suggested that an attorney can use to support the claim of competency at the time of signing.⁴⁰ For example, the attorney can meet the client in the morning which is generally a time of greater lucidity, can check with a doctor about the effects of medication, can have witnesses present and have them write notes afterwards, and can video or audio tape the proceedings.⁴¹ All of these methods help to ensure the validity of the client's decision.

B. BEYOND ESTABLISHING FORMAL COMPETENCY

Practical steps can serve the client and family in case of future challenges to a client's decision by showing that the client met a basic threshold of competency.⁴² However, while these suggestions are useful, they will not always fully address a lawyer's role in serving a client with impaired cognitive abilities. A lawyer is not always called upon to merely create documents for signature. A lawyer may also be called upon to play the role of the consultant in helping a family decide when to execute a guardianship decision.⁴³

Often the client and the client's family turn to the attorney as one of a number of professionals including physicians, nurses, and insurance

36. See, e.g., *In re Lien*, 892 P.2d 530, 532 (Mont. 1995) (stating that petitioner has the burden of proving that the person lacks testamentary capacity); *Feiden*, 542 N.Y.S.2d at 862 (stating that a party's competence is presumed, and the party asserting incapacity bears the burden of proving incompetence). See also MINN. STAT. ANN. § 525.54 (West 1988 & Supp. 1998) (stating that there is a legal presumption of capacity, and the burden of proof is on the petitioner to prove incapacity).

37. See Gorman, *supra* note 13, at 235.

38. See David Checkland & Michel Silberfeld, *Reflections on Segregating and Assessing Areas of Competence*, 16 THEORETICAL MEDICINE 375, 379 (1995) (discussing criteria for measuring competency for legal purposes).

39. Summers, *supra* note 25, at 19.

40. See *id.* at 20.

41. *Id.*

42. See, e.g., *In re Dahmen's Guardianship* 256 N.W. 891, 893 (Minn. 1934) (involving a challenge to an elderly woman's decision to have her daughter appointed as her guardian); *In re Strom's Guardianship*, 286 N.W. 245, 248 (Minn. 1939) (involving a challenge to an elderly person's decision of a guardian).

43. See Sharp, *supra* note 19, at 236 (discussing the fact that people at times make decisions regarding care under stressful conditions, and those people need detailed information in order to optimize their decision making).

company representatives who can help the family cope in a time of stress. The attorney in this case needs to look beyond the client's ability to understand a document. The attorney must consider the effects of guardianship on the client's life and the client's ability to make choices for himself or herself. "We have long held," a Supreme Court of New Hampshire commentary says, "attorneys owe a duty of reasonable care to their clients . . ."44 In the case of the older client, the attorney must balance the client's right to freedom of action with the need for the protection, the safety, and the concern of others.⁴⁵

The attorney must also take into account potential conflicts involved with appointing one family member instead of another, and resulting conflicts of interest that may arise.⁴⁶ The question of an older person's competency may come from a relative or other person who wants control of the older person's resources.⁴⁷ Some experts say that "[U]ndue influence may be present in an attempt to seize control of the person or their resources. Relatives may be dissatisfied with the protection that is offered by the state. Relatives may wish themselves to be empowered contrary to the previous preference of the person."⁴⁸ An attorney may decide, or be obligated by rules of professional conduct,⁴⁹ to advise a client against signing a guardianship document if the result might harm the interest of the client.⁵⁰

As a result, it is difficult for an attorney to help the client and the family come to an optimum decision on this difficult issue. The question remains, what does an attorney need to know about cognitive impairment and competency to help a client and a family make a decision about guardianship. A look at the concept of competency can help shed some light on this complicated area.

44. *In re Estate of Washburn*, 690 A.2d 1024, 1029 (N.H. 1997).

45. *See, e.g., In re Conservatorship of Lundgaard*, 453 N.W.2d 58, 62 (Minn. Ct. App. 1990) (discussing the fact that although Mrs. Lundgaard did not want a guardian, the fact that she could not fully appreciate her physical limitations made it necessary to appoint a guardian in addition to a guardianship of the estate).

46. *See In re Dahmen's Guardianship*, 256 N.W. at 893 (involving a dispute between a brother and sister over guardianship of their mother).

47. *See id.*

48. Michel Silberfeld et al., *Capacity Assessments for Requests to Restore Legal Competence*, 10 INT'L J. OF GER. PSYCH. 191, 196 (1995).

49. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3. The comments attached to Rule 1.3 state that a lawyer should act with commitment and dedication to the interests of the client. *Id.*

50. *See* Michel Silberfeld et al., *Acknowledgment of Limitations and Understanding of Their Consequences in Mental Capacity Assessments*, 13 BEHAV. SCI. & THE LAW 381, 385 (1995) (stating that it is appropriate to refuse to perform a competency assessment, unless required by the court, if the elderly person's interests would not be served by an assessment, and the person is not personally at risk).

III. THE CONCEPT OF COMPETENCY

The concept of competency is no longer viewed as an all encompassing term.⁵¹ The concept of a global competency has been replaced with a more decision-specific approach to competency.⁵² Decision-specific capacity looks at a person's ability to understand pertinent information and to make well-reasoned choices concerning a decision.⁵³ This view is compatible with the common legal approach that recognizes that a person may not be capable of managing finances, but may be able to make other decisions.⁵⁴ An illustration of this can be seen in states that distinguish between guardianship of the estate and guardianship of the person.⁵⁵

Due to the complexities involved in assessing competency, an attorney should be aware of certain important considerations prior to referring a client for an outside competency assessment. Commonly, researchers assess competency using a sliding scale, using a multi-level scale, and in terms of a client's current capacity to act autonomously.

A. ASSESSING A CLIENT BASED ON A SLIDING SCALE

Most professionals who work with older people place capacity on a sliding scale.⁵⁶ For example, capacity can vary by activity. A person may have the capacity to decide issues concerning medical treatment, but not financial issues.⁵⁷ The Supreme Court of Illinois has held that a person may have the competence needed to make decisions about a small estate, although that person may lack the competence to make decisions

51. See D. William Molloy et al., *Measuring Capacity to Complete an Advance Directive*, 44 J. AM. GER. SOC. 660, 662 (1996).

52. *Id.*

53. *Id.*

54. *Id.*; see *In re Conservatorship of Gessler*, 419 N.W.2d 541, 544 (N.D. 1988) (stating that even though a person may lack competency to manage personal affairs, the person can still have testamentary capacity); see also N.D. CENT. CODE § 30.1-29-08(e) (1996) (stating that the fact that a person has a guardian appointed over the estate has no effect on the determination of capacity of the person).

55. See *In re Conservatorship of Lundgaard*, 453 N.W.2d 58, 61-62 (Minn. Ct. App. 1990) (discussing the viability of appointing a guardian of the person, after determining that a guardianship of the estate was appropriate).

56. D.M. High, *Research With Alzheimer's Disease Subjects: Informed Consent and Proxy Decision Making*, 40 J. AM. GER. SOC. 950, 957 (1992).

57. See Checkland & Silberfeld, *supra* note 38, at 378 (discussing the various aspects of competency).

about a complex estate.⁵⁸ Many state statutes and court decisions have recognized degrees of competency and incompetency.⁵⁹

Courts, for example, often apply different standards for determining competency depending on the type of action involved.⁶⁰ Actions that lead to the appointment of a guardianship may require a different demonstration of competency than actions that lead to writing a will.⁶¹ Courts often use a lower threshold test of competency in cases where a person makes out a will, and use a higher threshold when it comes to determining whether a person is capable of managing an estate, or assessing their financial capacity.⁶² A study of California judges found that they accepted a low level of competency sufficient for a person to give a durable power of attorney, lower than that required to make a will or manage finances.⁶³ These studies illustrate that at present no single definition or agreed upon threshold of competency exists. However, it is important for an attorney to keep in mind that although a client may be unable to perform certain tasks, a guardianship may not be necessary.

B. ASSESSING A CLIENT BASED ON A MULTI-LEVEL SCALE

Next, experts say that a person can have general and specific competencies.⁶⁴ Some experts say that a person may have a limited capacity that would allow them to achieve some of their goals.⁶⁵ In determining if a client can achieve certain desired goals, an attorney must ask "whether the client, under his unique circumstances, has the capacity to execute the specific document in question."⁶⁶

To illustrate the current open-ended analysis used, one study gives the example of Mrs. L., who has an advanced cognitive impairment.⁶⁷

58. John B. Huffaker & Michael B. Novakovic, *How to Determine if a Client Has Testamentary Capacity*, 21 ESTATE PLANNING 323, 326 (1994) (citing *Healea v. Keenan*, 91 N.E. 646 (Ill. 1910)).

59. High, *supra* note 56, at 952; See D.M. High, *Planning For Decisional Incapacity: A Neglected Area in Ethics and Aging*, 35 J. AM. GER. SOC. 814, 820 (1988); Huffaker & Novakovic, *supra* note 58, at 327 (stating that no exact line exists determining where competency begins or ends, and various factors influence a court analysis of whether a person is competent).

60. Summers, *supra* note 25, at 19. It is noted that there are subtle differences in the criteria used by courts in determining competency to sign a will, deed, or gift. *Id.*

61. See, e.g., *In re Guardianship of Larson*, 530 N.W.2d 348, 351-52 (N.D. 1997) (stating that a guardianship for an elderly person was necessary after evidence established that the person was confused and suffered from dementia); *In re Estate of Mickelson*, 477 N.W.2d 247, 250 (N.D. 1991) (stating that in order to invalidate a will it must be shown that the testator lacked capacity to make the will at the time the will was signed.)

62. Michel Silberfeld & Wendy Corber, *Permissible Errors in Managing Property: An Approach to the Threshold of Capacity*, 41 CAN. J. OF PSCH., 513, 514 (1996).

63. J.E. Spar et al., *Assessing Mental Capacity and Susceptibility to Undue Influence*, 13 BEHAV. SCI. & THE LAW 391, 401 (1995).

64. See Marson, et al., *supra* note 13, at 949.

65. Huffaker & Novakovic, *supra* note 58, at 330.

66. *Id.*

67. Robert Pepper-Smith, et al., *Competency and Practical Judgment*, 17 THEORETICAL MED. 135,

Mrs. L contacts her lawyer and asks to change her will. The lawyer notes her wishes and then asks for an assessment of her capacity. Mrs. L. shows the greatest lucidity in the evening. So, the assessment takes place at night. The assessors find that she cannot recall what her will says, but she understands her will when she reads it and makes sensible comments on its contents. The assessors present the will to her on successive days and find consistent responses. The assessors conclude that she can make competent decisions at certain times of day and with the right cues, such as having her will in front of her.⁶⁸ In this situation, an attorney armed with this knowledge can help individuals like Mrs. L. to make competent decisions and to maintain control over their own affairs even with some cognitive impairment.

Experts in the assessment of cognitive capacity also understand it as multi-dimensional.⁶⁹ "This means that a person may be simultaneously capable and incapable with respect to different decisional areas."⁷⁰ A person with Alzheimer's disease, for example, may be able to drive a car, but not know their name or where they live. They may have moments of lucidity where they recognize family members clearly and at other moments they may stare blankly at a spouse or child. The ability to act on one's own behalf may come and go. A person may face great risk in terms of finances or health care decisions, but may face limited risk in other dimensions including living alone in an apartment.⁷¹

These facts have led many state statutes and courts to offer the option of limited guardianships and limited conservatorships.⁷² These options, where they exist, give an attorney more choices to offer a family. Therefore, an attorney can best help the client and the client's family by understanding the client's unique capacity in a particular decision making area.⁷³ Only then can the attorney offer legal options that work in the client's best interest.

C. ASSESSING A CLIENT BASED ON AUTONOMY

Third, the client's degree of autonomy can be a useful assessment tool. Autonomy refers to a person's ability to make informed decisions about personal and financial affairs.⁷⁴ In using autonomy to assess

144-45 (1996).

68. *Id.*

69. See Silberfeld et al., *supra* note 50, at 381 (acknowledging that a person may be simultaneously competent and incompetent with regard to different decisional areas).

70. *Id.*; see Checkland & Silberfeld, *supra* note 38, at 376.

71. See Marson et al., *supra* note 13, at 949.

72. See Silberfeld et al., *supra* note 48, at 191 (discussing the option of a limited guardianship).

73. See Checkland & Silberfeld, *supra* note 38, at 386 (advocating an understanding of client limitations and intervening accordingly in the least restrictive manner possible).

74. See Rebecca Dresser, *Missing Persons: Legal Perceptions of Incompetent Patients*, 49 *RUTGERS L. REV.* 609, 611 (1994).

competency, assessors often attempt to determine what the person would decide if the person were completely healthy and then look at actual decisions made, taking into account present and future impairment.⁷⁵

The belief with autonomy is that any clear instructions or decisions made by an individual should be followed.⁷⁶ Any autonomy detected should be preserved because it is deemed desirable to give people freedom to decide their lives as individuals, regardless of particular idiosyncrasies that they might possess.⁷⁷ Therefore, recognition of the presence of autonomy weighs heavily as an assessment factor because individuals understand better than anyone else how to advance their own well-being, and the desire is to preserve as much of this autonomy as possible.⁷⁸

Some believe that autonomy is the single most important value to consider in assessing a person.⁷⁹ However, in examining the issues surrounding autonomy, it is important to remember that there are distinctions between a person operating within a normal range of cognitive ability, and a person operating with impaired cognitive abilities.⁸⁰ Individuals suffering from dementia can have altered consciousness causing them to make choices they might not normally have made.⁸¹ Therefore, while many researchers favor using a measurement of autonomy as a guideline for assessing competency, it should be remembered that those experiencing cognitive impairment are not always acting consistently with past behavior. This makes autonomy inadequate as the sole measure of competency.⁸² Bearing in mind the potential altered consciousness of the client, the presence of any degree of autonomy is still an important consideration in a competency assessment.

Prior to an outside assessment, an attorney should be aware of the sliding scale of competency, the multi-level view, and the basic autonomy of a client. Keeping these factors in mind can help prevent an unnecessary declaration of incompetency where an outside assessment of capacity, which is the clinical term for a person's mental ability, would

75. See *id.* at 626 (citing Superintendent of Belcher Town State Sch. v. Saikewicz, 370 N.E.2d 417, 431 (Mass. 1977) (stating that courts often compare past decisions made by a person with present decisions in an attempt to determine if the person has remained consistent in decision-making despite the onset of cognitive impairment)).

76. See *id.* (stating that instructions left by an incompetent patient prior to illness should be followed).

77. *Id.* at 622.

78. See *id.*

79. See Alexander McCall Smith, *Beyond Autonomy*, 14 J. OF CONTEMP. HEALTH L. & POL'Y 23, 23 (1997) (discussing whether autonomy is the only factor to be considered in determining the capacity of a patient).

80. See *id.*

81. *Id.*

82. *Id.*

help the attorney decide on the client's ability. Experts say that "a practitioner who has any doubt about the client's capacity should seek a 'second opinion' from other professionals, particularly the client's personal physician."⁸³

IV. MENTAL CAPACITY ASSESSMENT

A clinical assessment can provide the basis for deciding the scope of guardianship that would best serve the client's interests. The legal literature supports the usefulness of expert assessment in helping to support a claim of legal competence or incompetence. However, an assessment of mental capacity can also help the attorney to advise a client and the client's family on a best course of action. An increasing number of attorneys today request mental capacity assessments for their clients.⁸⁴

No standardized assessment of capacity exists. However, some general guidelines can be of use if attorneys wish to put together their own capacity assessment.⁸⁵ We recommend that a capacity assessment usually involve a physician skilled in geropsychiatry. An assessment should also include: (1) an evaluation of mental and physical capacity; (2) a mental and cognitive state exam; and (3) a test of judgment using hypothetical examples. The physician, or other expert, would examine the data from these sources and then judge the capacity of the person.

An assessment attempts to answer the question of whether a person can make decisions for themselves and whether any of a person's rights need to be taken away.⁸⁶ However, attorneys should make sure that they get the kind of assessment they need. Often, assessments take place in a clinical vacuum.⁸⁷

Attorneys should also be wary of the fact that sometimes assessments can be less effective when they lack a context for judging a person's competency.⁸⁸ Since an assessment of incompetence may lead to the loss of a person's rights, experts on this topic urge caution in making

83. Huffaker & Novakovic, *supra* note 58, at 330.

84. See Silberfeld et al., *supra* note 48, at 191.

85. See, e.g., Gorman, *supra* note 13, at 228 (discussing suggested criteria for performing assessments that appeared in a position paper released by the American College of Physicians). Examples of criteria deemed important to examine in an assessment were whether subjects could understand pertinent facts relating to their situations, whether the subjects could choose from available options, and whether the subjects could communicate their choices. See *id.*

86. MARK NOVAK, AGING IN SOCIETY: A CANADIAN PERSPECTIVE 1, 113 (3d ed. 1997) (citing A. Morantz, *The Right to Decide*, TODAY'S HEALTH, GLOBE & MAIL, Sept. 1990, at 39-44).

87. See Michel Silberfeld, *The Use of "Risk" in Decision-Making*, 11 CAN. J. ON AGING 124, 124-36 (1992) (discussing various problems with clinical tests developed to assess capacity).

88. See Silberfeld et al., *supra* note 48, at 195-96. It is recommended that every attempt be made to consider the competency of a person in relation to that person's context. *Id.* A person's context often will help an assessor determine if the person can manage without outside help, or are able to direct others to assist them in overcoming problems. *Id.*

this judgment.⁸⁹ A capacity assessment should take place more than once to assess a person's present and future ability to make decisions.⁹⁰ An assessment should also consider a person's ability to function within their own daily routine.⁹¹

The decision to seek guardianship may hinge on a person's ability to live safely on their own or to care for themselves.⁹² In this case, a clinical exam may fail to answer the question. A person may be unable to make choices concerning how to manage personal affairs, but they may still live at home without serious risk. In these cases, a physician could arrange for observation of the person in their home. This field-based assessment gives a better reading of the person's abilities. It may also postpone the need for a guardianship decision or a move to a more restricted living arrangement.

A. INFLUENCES ON AN ASSESSMENT OF COMPETENCE

The issue of competency often arises around the issue of self care.⁹³ Some states define competency as the ability to care for oneself and to provide for basic needs like food, clothing, and shelter.⁹⁴ Some experts define competency "as the exercise of practical skills that meet and are evaluated according to some norm . . . These skills serve the value of autonomy. Only through the exercise of these skills are individuals able to realize an autonomous life."⁹⁵ For example, an older man may feel that he is able to live on his own. The client's daughter may feel that this puts her father at risk. By assisting the older person in minimizing the risk, it may be possible to maintain that individual's lifestyle. Instead, it is often the caregiver who magnifies the risk because they fear the worst.⁹⁶

This example illustrates how these interests can collide: Mrs. X is an eighty-six year old widow who has lived alone with the help of home

89. Checkland & Silberfeld, *supra* note 38, at 377. Sometimes making a determination about a person's competency involves a judgment call by the assessor, and such a decision should not be made capriciously or in an arbitrary manner. *Id.*

90. Silberfeld et al., *supra* note 48, at 191-97 (stating that periodic reassessments of a previous competency decision should be made).

91. *Id.*

92. See Checkland & Silberfeld, *supra* note 38, at 382 (stating that a person's lack of ability to care for oneself often leads caring family members to conclude that the person is at risk).

93. See MINN. STAT. ANN. § 525.54 subd. 3 (West Supp. 1998) (stating that an inability to meet basic needs concerning nutrition, medical care, clothing, and shelter justifies appointing a guardian over a person).

94. See, e.g., N.D. CENT. CODE § 30.1-28-04(2)(b) (1996) (stating that an emergency guardian can be appointed if a person is demonstrated to be unable to provide self-care); MINN. STAT. ANN. § 525.54 (West 1988 & Supp. 1998) (detailing when appointment of a guardian is appropriate).

95. Pepper-Smith et al., *supra* note 67, at 13.

96. National Advisory Council, *Competency and Risk*, 9 EXPRESSION 1, 3-4 (1993).

support services for the past ten years. She is an insulin dependent diabetic with a sweet tooth. During the past two years, she has become increasingly short of memory and confused. She often forgets to eat or only eats junk food. Efforts to have her live with her only son and daughter-in-law several miles away have failed. Her home care case manager is becoming uncomfortable because, even with the maximum level of home care available, Mrs. X is considered to be at risk. Following a fall, where she fractured her wrist, she was hospitalized. The son, in conjunction with home care, decided to institutionalize his mother. Mrs. X is clearly unhappy in the nursing home, objecting to all aspects of her care and continually asking when she can go home.⁹⁷

The son in this case may consult the family attorney to assume legal guardianship for his mother in order to keep her in the nursing home. However, the attorney may question whether the son is acting in his mother's best interest or his own. In this case, guardianship also creates a "risk" in terms of an unhappy life for the mother in a nursing home.

Likewise, a family may seek a Durable Power of Attorney in order to protect the older person from harm that has not yet occurred. For example, the family may fear that a con artist will dupe the older person.⁹⁸ However, relatives should use caution when intervening. Often relatives, who start with good intentions to keep the older person from harm, risk developing an unconscious rhetoric of controlling the older person.⁹⁹ One expert says that "the pleasure the person derives from continuing to exercise some discretionary choices should be weighed against the cost of the [potential] losses."¹⁰⁰

An assessment of capacity must rest on three things: (1) an ability to make a choice; (2) an ability to give directives; and (3) an ability to care for oneself.¹⁰¹ The presence of the first two items ensures competency.¹⁰² The last item, when the person lacks needed support, may lead to a decision of incompetency and then ultimately to guardianship.¹⁰³ Researchers give the example of Mrs. W.,¹⁰⁴ who suffers from "periodic hallucinations and delusions," and at other times she thinks clearly.¹⁰⁵ Her mental lapses affect her ability to take her medications, but her

97. *Id.* at 2.

98. Silberfeld, *supra* note 12, at 134.

99. *See id.*

100. *Id.* at 128.

101. *Id.* at 129.

102. *Id.*

103. *See id.*

104. Pepper-Smith et al., *supra* note 67, at 143.

105. *Id.*

daughter helps her keep track of her medications and monitors her dosages.¹⁰⁶ As a result, Mrs. W. can live on her own.¹⁰⁷

In another case, Mrs. G. would like to return home after a hospital stay.¹⁰⁸ Her demand seems irrational because a recent assessment of her abilities has shown that she lacks the capacity to bathe herself or cook without risking harm.¹⁰⁹ However, her irrational demands make sense in the context of her value system.¹¹⁰ She prefers to take the physical risks in order to live in her own home.¹¹¹ If she could afford live-in help, the issue of her competency would not arise and she could return home.¹¹² However, her poverty and lack of support play a role in the staff's assessment of her capacity.¹¹³

The example of Mrs. G helps demonstrate that sometimes assessors should not decide that a person lacks the ability to care for themselves just because they lack support.¹¹⁴ An assessor should consider whether the person could care for themselves with a proper support system. With support, a person may be able to live a relatively autonomous life in spite of cognitive decline. An assessment sensitive to this issue could result in a finding that the older person has the support they need to live the life they choose.

The fear of risk often supports the request for assessment and then for guardianship.¹¹⁵ However, assessors should consider the negative effects of this fear on the older person's freedom. For example, a cognitively impaired older person may forget to turn off a gas stove. This and other evidence may be used to persuade the older person to enter a nursing home. Yet, the failure to turn off the stove may have little consequence for the older person if they seldom use the stove, or if they promise they will not use the stove and can keep this promise. Other solutions to this failure to remember may exist, including the decision to switch to an electric stove or to turn off the stove and provide meals-on-wheels instead.

It is maintained that even after an assessment of incompetence, others should intervene as little as possible.¹¹⁶ A person with specific

106. *Id.*

107. *See id.*

108. *See id.* at 147.

109. *See id.*

110. *See id.* at 148.

111. *Id.*

112. *Id.*

113. *See id.*

114. *See id.* at 149 (stating that if the elderly person had the necessary supports the justification for declaring her incompetent may no longer be present).

115. Silberfeld, et al., *supra* note 48, at 194.

116. *See* Checkland & Silberfeld, *supra* note 38, at 387 (stating that even after a person is found incompetent, the issue of whether to respect the person's wishes may arise).

capacities should keep the right to make decisions where that capacity exists. In addition to a study of what the person cannot do, the assessment of competency should include a study of what the person can do and a study of their mental abilities.¹¹⁷ For example, a person may live on their own, but not have the verbal skills to express how they manage their affairs.¹¹⁸ An assessment may find this person competent in this area. Therefore, an assessment of capacity should take into account a person's past decisions, their values, and their track record or "characteristic way of making decisions."¹¹⁹

Furthermore, "[a] finding of incapacity should state the expected duration for the period of incapacity or at least provide for a reassessment of capacity within a reasonable time."¹²⁰ Some reassessments will result in a return to legal competency. Although restoration of competency would rarely occur in cases of Alzheimer's disease, some illnesses that lead to cognitive impairment, like a stroke, may impair cognition only for a limited time.

B. BEYOND THE LEGAL DEFINITION OF COMPETENCY

The current view on mental capacity looks at a person's ability to make decisions and live on their own. This differs from a more traditional legal view of competency that focuses on the moment of executing a legal document. An attorney can take this broader view of mental capacity in order to help older clients and their families. This view can also guide the attorney in cases where a conflict may arise between the wishes of an older client and a family member.

Attorneys owe allegiance to the older client if this person has retained the attorney's services.¹²¹ This means that the attorney must assist the client and the family member in resolving a conflict using an impartial standard. This kind of conflict points to the importance of careful capacity assessment.¹²²

117. See, e.g., Silberfeld et al., *supra* note 50, at 389 (stating that the fact that subjects had an understanding of their limitations was important as a factor in an overall competency assessment).

118. Marson et al., *Neuropsychologic Predictors of Competency in Alzheimer's Disease Using a Rational Reasons Legal Standard*, 52 ARCH. NEURO. 955, 958 (1995) (stating that Alzheimer's patients sometimes are able to make decisions, but lack the verbal skills necessary to explain how they reached the decisions).

119. NOVAK, *supra* note 86, at 113 (citing Daniel Checkland & Michael Silberfeld, *Competence, and the Three A's: Autonomy, Authenticity, and Aging*, 12 CAN. J. AGING 463, 468 (1993)).

120. Sarita Verma & Michel Silberfeld, *Approaches to Capacity and Competency: The Canadian View*, 20 INT'L. J. L. & PSYCHIATRY 35, 42 (1997).

121. Falk, *supra* note 27, at 54-55 (discussing the fact that it is not always clear who the client is when an elderly person and a relative are both consulting with an attorney).

122. Gary Naglie et al., *Convening Expert Panels to Identify Mental Capacity Assessment Items*, 14 CAN. J. ON AGING 697, 704 (discussing the importance of care in assessing competency).

The label of incompetence removes a person's free choice and attorneys should use caution in applying this label to a client. In the case of *Larson v. Larson*,¹²³ the Supreme Court of North Dakota approved of guardianship, but with "the powers and duties conferred upon the guardian . . . appropriate as the least restrictive form of intervention consistent with the ability of the ward for self-care."¹²⁴ "When we are talking about the precious freedom to be left alone, then we should insist that it cannot be lost unless there are the most exacting criteria and the most scrupulous procedures."¹²⁵

V. CONCLUSION

The research and literature on mental capacity and competency shows that complex issues of assessment, rights and freedoms, safety, community well-being, and family concerns often underlie a request for a guardianship decision. The legal, as well as the medical profession, has come to see capacity and competency as a continuum.¹²⁶ Furthermore, the legal and medical communities recognize that competence and capacity can vary for different decisions, e.g., financial, medical, or legal.

The law prescribes a narrow role for the attorney in using the concept of competency. The attorney serves as guarantor of lucidity at the time the client signs documents. The law, often manifested in the person of the attorney, attempts to fix a threshold of competency. If the person falls below that threshold, then the attorney may support the shift of decisional authority to someone else such as a family member.

However, the wishes of the family and the best interests of the older client may demand a more complex role for the lawyer. An attorney should understand that competency and capacity exist on a continuum, that capacity has many dimensions, and that an assessment can gauge a person's ability to care for themselves. The attorney can then help the family and the older client find the least restrictive solution to the risks that cognitive impairment brings.

More clients in the future will reach old age and more will suffer from cognitive impairments. This will lead to more clients and their families seeking legal advice in deciding how to cope with these changes in mental capacity. Older clients and their families will need the best advice possible in order to manage risk and also to ensure the older per-

123. 530 N.W.2d 348, 348 (N.D. 1995).

124. *Larson v. Larson*, 530 N.W.2d 348, 348 (N.D. 1995) (citing N.D. CENT. CODE § 30.1-28-04(2)(b)(1996)).

125. National Advisory Council, *supra* note 101, at 4.

126. See Checkland & Silberfeld, *supra* note 38, at 376 (stating that courts and statutes are moving away from an "all or nothing" view of competence).

son's ability to manage their own life. An attorney will serve clients best if he or she has an understanding of capacity, its assessment, and the options available to a particular client.