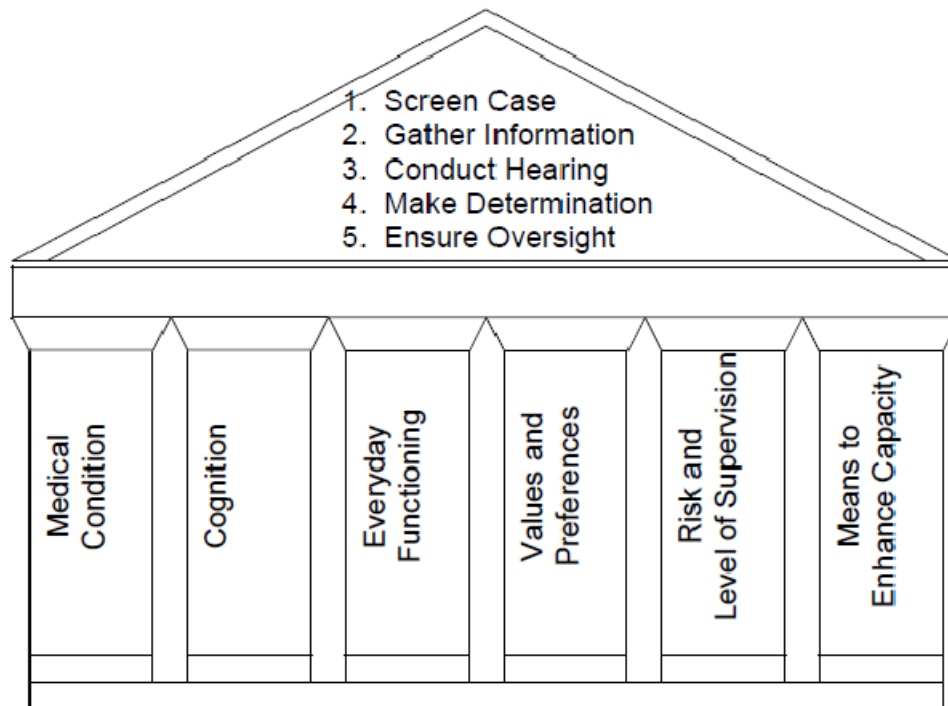


Excerpts From
**Judicial Determination of
Capacity of Older Adults
in Guardianship Proceedings**

*American Bar Association/American Psychological Association
Assessment of Capacity in Older Adults Project Working Group
National College of Probate Judges*
[Full Guidebook - 2006](#)



Judges Balance Multiple Goals

- Decide capacity in a manner that balances well-being and rights.
- Promote self-determination.
- Identify less restrictive alternatives to guardianship.
- Provide guidance to guardians.
- Make determinations of restoration.
- Craft limited guardianship when appropriate.

What Is Limited Guardianship?

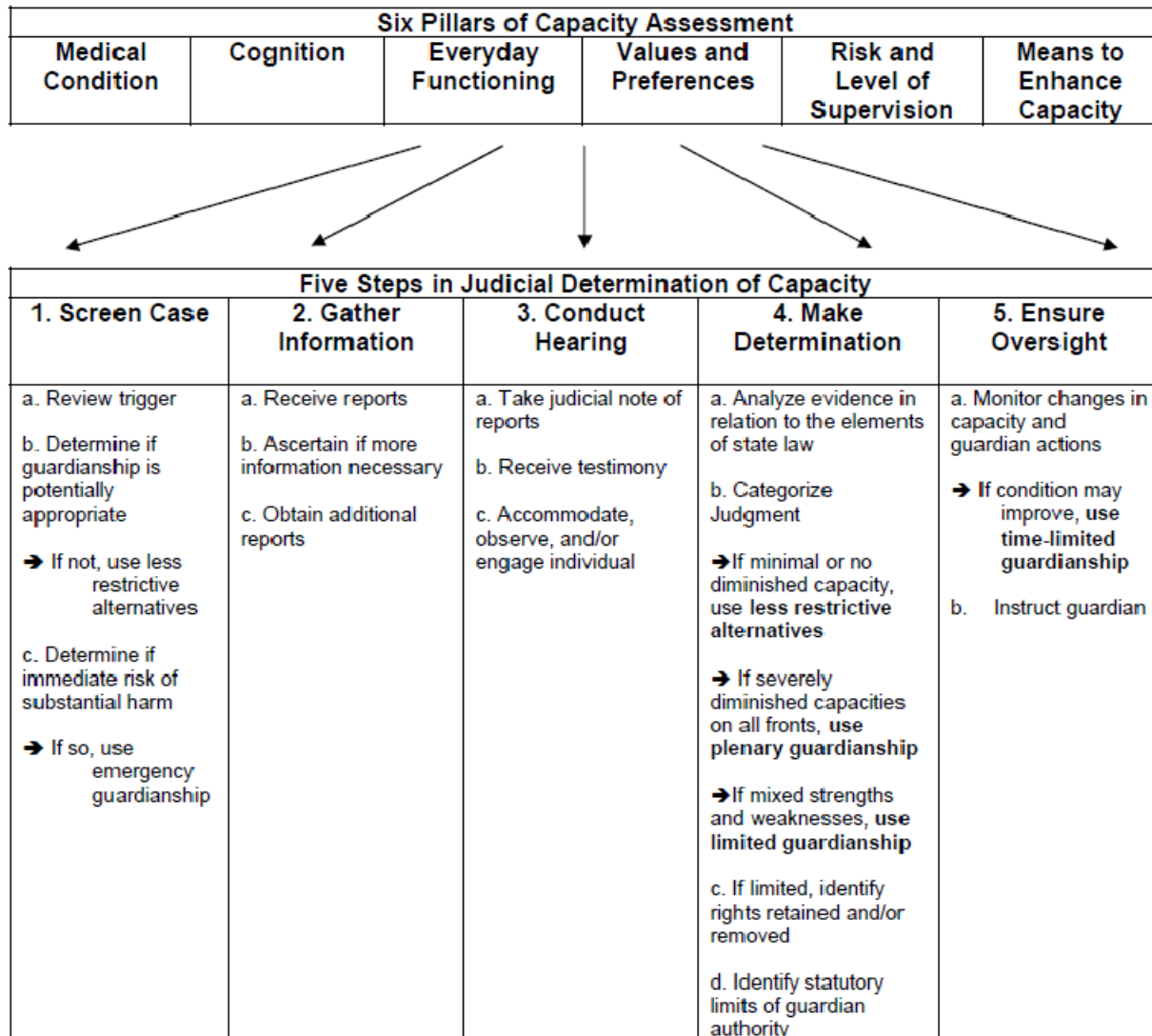
- A limited guardianship is a relationship in which the guardian “is assigned only those duties and powers that the individual is incapable of exercising.”
- The concept of limited guardianship is promoted in the UGPPA4 and the *National Probate Court Standards*, which directs probate judges to “detail the duties and powers of the guardian, including limitations to the duties and powers, and the rights retained by the individual.”
- In some cases, such as coma or advanced dementia, individuals are totally impaired by their medical condition. In other cases, a fine tuned assessment may help to identify specific areas— **even if relatively small in scope**—in which the individual may retain rights.
- Examples of limitations to guardianship include rights retained by an individual to:
 - Determine living arrangements.
 - Spend small amounts of money.
 - Make and communicate choices about roommates.
 - Initiate and follow a schedule of daily and leisure activities.
 - Establish/maintain personal relationships with friends and relatives.
 - Determine degree of participation in religious activities.

Benefits of Limited Guardianship

- Maximizes the autonomy of the person with diminished capacity.
- Is directly responsive to the concept of the least restrictive alternative.
- Supports an individual’s mental health.
- Encourages the guardian to take into account the wishes of the individual, moving the relationship more toward collaboration and compromise.

Overview of Capacity Assessment

A comprehensive assessment of capacity for guardianship proceedings requires collecting information on six factors. In this book, these factors will be referred to as the “Six Pillars of Capacity Assessment.” Information about these factors may be obtained from healthcare professionals, court investigators, guardians ad litem, family members, adult protective service workers, and other involved parties.



Capacity

Presumption of Capacity

While legal definitions of capacity vary by jurisdiction and by circumstances in which the question of capacity is raised, one stable cornerstone of the law has been the principle that all adults are presumed competent until proven otherwise.²² Adults have the right—even when frail, vulnerable, or eccentric—to make their own decisions and to govern their own affairs, even if their decisions are unwise and their methods objectionable to the reasonable observer. The burden rests on the party questioning the capacity of an individual to establish the lack of capacity, and the nature and extent of harm resulting from the lack of capacity.

Capacity Is Task-Specific, Not Global

The definition of “diminished capacity” in everyday legal practice depends largely on the type of transaction or decision under consideration.²³ The law recognizes that capacity is not an all-or-nothing phenomenon. One may lack the capacity to handle one’s financial affairs, for example, but still retain the capacity to make health care decisions or to vote in elections. The application of limited guardianship is tied directly to this recognition of the task-specific reality of capacity.

Capacity Can Fluctuate

Capacity status can fluctuate over time. Capacities that were initially lost (e.g., as a result of a head injury, transient acute psychosis, severe depression that later remits) may be recovered over time. Dementias such as Alzheimer’s disease will result in fluctuating levels of capacity through the early and mid-stages of the disease. Also, cognitive deficiencies that suggest incapacity are often caused by treatable and reversible physical causes, such as overmedication, toxic combinations of medications, poor diet, vitamin deficiencies, infectious diseases, poor eyesight, or other conditions. By discovering and addressing medically treatable conditions first, capacity issues may be rendered moot or at least decreased.

Capacity Is Situational

Appropriate capacity assessment never happens in a vacuum. It occurs in the context of the resources and support available to the individual. The supports may be social, such as a caregiver who can monitor the individual’s medication regimen; legal, such as a trust or durable power of attorney that enables appropriate management of one’s affairs; technological, such as an emergency help alert transmitter; or any other support.

Capacity Is Contextual

The contextual element of capacity goes a step beyond the question of resources available to the individual and considers how the individuals interact with those resources and with their social and physical environment. Issues of undue influence, exploitation, or threat can directly affect the autonomy, functioning, and well being of the person with diminished capacity. Likewise, a home environment that is familiar and comfortable for the individual may enhance capacity, while a new and unfamiliar setting may undermine functional capacity.

Clinical Professionals

A clinician is a general term for a healthcare professional who works with patients. A wide range of clinicians may bring expertise to the capacity evaluation process. *The information provided on this page is meant to highlight some of the strengths that varied professionals may bring to the capacity evaluation practice.*

Geriatricians, Geriatric Psychiatrists, or Geropsychologists, practitioners with specialized training in aging, are experienced in considering the multiple medical, social, and psychological factors that may impact an older adult's functioning. A geriatric assessment team is comprised of multiple disciplines, each with advanced training in syndromes of aging.

Neurologists, M.D.'s with specialized training in brain function, may address how specific neurological conditions (e.g., dementia) are affecting the individual and his/her capacity.

Neuropsychologists, psychologists with specialized training in cognitive testing, may address relationships between neurological conditions, cognitive tests results, and an individual's functional abilities.

Nurses have medical expertise and some, such as visiting nurses in Area Agencies on Aging, may have in-depth information on how a person's medical condition is impacting functioning in the home. Geriatric nurse practitioners are advanced practice nurses with additional credentials to assess and treat the medical problems of aging.

Occupational Therapists are professionals with advanced degrees specializing in the assessment of an individual's functioning on everyday tasks, such as eating, meal preparation, bill paying, cleaning, and shopping.

Physicians can provide a summary of the individual's major medical conditions. In some cases, the physician may have provided care to the individual over many years and can provide a historical perspective on the individual's functioning (although this cannot be assumed).

Psychiatrists, M.D.'s with specialized training in mental health, may address how specific psychiatric conditions (e.g., schizophrenia) and related emotional/mental systems may be affecting the individual and his/her capacity. Geropsychiatrists receive additional training in problems of aging; forensic psychiatrists receive additional training in mental health and the law.

Psychologists, clinicians with advanced training in behavioral health, may utilize standardized testing and in-depth assessment, useful when the judge wants detailed information about areas of cognitive or behavioral strengths or weaknesses. Geropsychologists receive additional training in problems of aging; forensic psychologists receive additional training in mental health and the law.

Social workers, are trained to consider the multiple determinants on an individual's social functioning, and are often knowledgeable about a wide range of social and community services that may assist the individual.

Everyday Functioning and Functional Assessment

What Is “Function”? How do Judges and Clinicians Think Differently?

A comprehensive assessment of capacity should include a “functional assessment.” **Of note:** when the law refers to “function” it often means someone’s thinking and decision-making, as well as everyday behavior where the person lives. When clinicians refer to “function” they usually mean only the everyday behavior, where as thinking and decision making is assessed separately as “cognition.”

How Do Clinicians Divide Everyday Functioning? ADLs and IADLs

Clinicians often divide everyday function into the “Activities of Daily Living” (ADL) and the “Instrumental Activities of Daily Living” (IADL). There is fairly good agreement on the ADLs as comprising dressing, eating, toileting, transferring or moving from one sitting position to another, walking or mobility, and bathing. There is less agreement on what are the main categories of IADLs and how to divide them. For the purpose of this book, we have described several broad categories commonly encountered in guardianship proceedings, namely financial, medical, and home/community.

How Is Functioning Assessed by Clinicians? Informal and Formal Assessment

Functioning can be assessed through **informal** means, such as observing the individual, and asking the individual, family, and staff questions, or through **formal testing**, such as that performed by an occupational therapist. Nurses, social workers, and psychologists are often prepared to assess everyday functioning.

What Tests Are Used to Assess Everyday Functioning? ADL Rating Scales and Capacity Tools

There are two main ways that functioning is formally assessed. One way is through ADL and IADL rating scales. These are often used by nurses and social workers and are usually brief check lists for categorizing everyday functioning. Similar and more sophisticated tools are used by occupational therapists who tend to directly assess and observe ADL/IADL performance in their evaluations.

Hearing: Maximizing Participation

Can any of these strategies be implemented to increase the participation of the individual?

Ensure Access to the Courthouse and Courtroom

Do accessibility check of your courthouse and courtroom.

Get a local disability group to visit the court and make recommendations for removing accessibility barriers.

Consider Alternative Locations for Hearing

Move the hearing site (e.g., to a nursing home) to understand in greater depth individual's circumstances.

Reduce Intimidation; Respect Privacy

Conduct hearings at the bench or in private chambers.

Address Hearing Loss

Minimize background noise and use auditory amplifiers when available.

Look at the individual when speaking so individuals can read lips.

Speak slowly and distinctly, but do not over-articulate or shout as this can distort speech and facial gestures.

Use a lower pitch of voice for common problems with high frequency tone hearing loss.

Address Vision Loss

Increase lighting.

Format documents in large print, if possible (e.g., 14- or 16-point font) and double-spaced.

Give individual additional time to read documents.

Allow extra time to refocus when shifting between reading and viewing objects at a distance.

Address Cognitive Impairments

Begin with simple questions requiring brief responses.

Use a slower pace to allow the individual to process and digest information.

Allow extra time for responses to questions, as "word-finding" can decline with age.

Break information into smaller, manageable segments, focusing on one issue at a time.

Provide cues (lists, reminders) to assist recall.

Repeat, paraphrase, and summarize periodically, as well as check for accuracy comprehension.

Jury Instructions

1. In the petitioner's claim that Mrs. X is an incapacitated person and needs a guardian, the petitioner has the burden of proving by clear and convincing evidence that:

- i. She lacks the ability to receive and evaluate information.
- ii. She lacks the ability to make or communicate decisions.
- iii. She lacks the ability to meet essential requirements for her physical health, safety, or self-care.
- iv. There is no technical assistance or accommodation that can make up for the lack of these abilities.
- v. There is no less restrictive alternative to guardianship that would suffice to meet her needs. For example, advance directives for health care and Social Security representative payees are considered less restrictive alternatives to guardianship.
- vi. She would be harmed without the protection of a guardian.

2. Capacity is task-specific. If you think she lacks some, but not all, abilities, you must specify the kinds of actions or decisions for which she has capacity and the kinds of actions or decisions for which she does not have capacity. This may make it possible to limit any guardianship order, removing only some of her rights and autonomy, but not all. Think about her specific abilities in the following areas:

- i. Financial
- ii. Health care
- iii. Personal safety and hygiene
- iv. Living arrangements; using community resources

3. Sickness, eccentricity, and old age do not, of themselves, amount to incapacity.

4. People have the right to make foolish or eccentric decisions and to govern their own affairs, unless they lack decision-making capacity and cannot understand the consequences of their decisions.

Less Restrictive Alternatives to Guardianship

The expeditious management of a guardianship case begins soon after the petition has been presented. While some courts have formal *diversion programs* by which the problems leading to the guardianship petition may be successfully addressed, in most courts the responsibility falls on the shoulders of the judge to ensure that only cases with genuine issues of capacity and probable need for guardianship proceed. The court should have investigatory and expert services to assist in exploring viable alternatives to guardianship. A finely tuned evaluation is a key tool.

The constitutional principle of the least restrictive alternative was first articulated by the U.S. Supreme Court and was applied to mental health in a case in which the court said that a person could not be subjected to a mental health commitment of unspecified time without an exploration of all alternatives.

If the person needs medical treatment, but is not able to consent:

Health Care Advance Directive

Any written statement a competent individual has made concerning future health care decisions. The two typical forms of advance directive are the *living will* and the *health care power of attorney*.

Surrogate decision making by an authorized legal representative, a relative, or a close friend

In many states, the next of kin are authorized to make some or all medical treatment decisions in the absence of a health care advance directive or appointed guardian.

If the problem involves litigation against or by the disabled person:

Appointment of Guardian ad litem

The court in which litigation is proceeding has authority to appoint a guardian ad litem solely for the purpose of representing the best interests of the individual in the litigation.

If the problem involves a family dispute:

Mediation

Referring a case to mediation before a hearing offers a personal, confidential, and less intimidating setting than the courtroom, as well as an opportunity for exploring underlying issues privately.

If the person needs help with financial issues:

Bill paying services

Also called *money management services*, these assist persons with diminished capacity through check depositing, check writing, checkbook balancing, bill paying, insurance claim preparation and filing, tax and public benefit preparation, and counseling.

Utility company third party notification

Most utility companies permit customers to designate a third party to be notified by the utility company if bills are not paid on time.

Shared bank accounts (with family member)

The use of joint bank accounts is a common strategy for providing assistance with financial management needs. However, if the joint ownership arrangement reaches most of the individual's income or assets, it also poses risk in its potential for theft, self-dealing, unintended survivorship, and exposure to the joint owner's creditors. A more secure arrangement is a multiple-party account with the family member or friend designated as agent for purposes of access to the account.

Durable Power of Attorney for finances

This legal tool enables a principal to give legal authority, as broadly or as narrowly as desired, to an agent or attorney in fact to act on behalf of the principal, commencing either upon incapacity or commencing immediately and continuing in the event of incapacity. Its creation requires sufficient capacity to understand and establish such an arrangement.

Trusts

Trusts can be established to serve many purposes, but an important one is the lifetime management of property of one who is or who may become incapacitated. They are especially useful where there is a substantial amount of property at stake and professional management is desired. Special or supplemental needs trusts and pooled income trusts are recognized under federal Medicaid and Social Security laws as permissible vehicles for managing the funds of persons with disability who depend on government programs for their care needs.

Representative Payee

A person or organization authorized to receive and manage public benefits on behalf of an individual. Social Security, Supplemental Security Income (SSI), veterans' benefits, civil service and railroad pensions, and some state programs provide for appointment of a "rep payee." Each program has its own statutory authorization and rules for eligibility, implementation, and monitoring.

Adult protective services

The term protective services encompasses a broad range of services. It includes various social

services voluntarily received by seniors in need of support (e.g., homemaker or chore services, nutrition programs). It also includes interventions for persons who may be abused, neglected, or exploited, and which may lead to some form of guardianship.

If the person is living in an unsafe environment:

Senior shared housing programs

In shared housing programs, several people live together in a *group home* or apartment with shared common areas. *Congregate housing* refers to complexes with separate apartments (including kitchen), some housekeeping services, and some shared meals. Many congregate care facilities are subsidized under federal housing programs. Personal care and health oversight are usually not part of the facility's services, but they may be provided through other community social services.

Adult foster care

Adult foster care is a social service that places an older person, who is in need of a modest amount of daily assistance, into a family home. The program is similar to foster care programs for children. The cost varies and may be covered in part by the state social services program.

Community residential care

These are small supportive housing facilities that provide a room, meals, help with activities of daily living, and protective supervision to individuals who cannot live independently, but who do not need institutional care.

Assisted living

Assisted living facilities provide an apartment, meals, help with activities of daily living, and supervision to individuals who cannot live independently, but who do not need institutional care.

Nursing home

Nursing homes provide skilled nursing care and services for residents who require medical or nursing care; or rehabilitation services for injured, disabled, or sick persons.

Continuing Care Retirement Communities (CCRCs)

CCRCs, also called life care communities, usually require the payment of a large entry fee, plus monthly fees thereafter. The facility may be a single building or a campus with separate independent living, assisted living, and nursing care. Residents move from one housing choice to another as their needs change. While usually very expensive, many guarantee lifetime care with long-term contracts that detail the housing and care obligations, as well as its costs.

If the person needs help with activities of daily living or supervision:

Care management

This is provided by a social worker or health care professional, who evaluates, plans, locates, coordinates, and monitors services for an older person and the family.

Home health services

If the person needs medical care or professional therapy on a part-time or intermittent basis, a *visiting nurse* or *home health aide* from a *home health agency* may meet that need. Some services may be covered by Medicare or Medicaid, private insurance, or state programs.

Home care services

Homemaker or *chore services* can provide help with housework, laundry, ironing, and cooking. *Personal care attendants* or *personal assistants* may assist an impaired person in performing *activities of daily living*, (i.e., eating, dressing, bathing, toileting, and transferring), or with other activities instrumental to daily functioning.

Adult day care services

These are community-based group programs designed to meet the needs of functionally and/or cognitively impaired adults through an individual plan of care. Health, social, and other related support services are provided in a structured, protective setting, usually during normal business hours. Some programs may offer services in the evenings and on weekends.

Respite care programs

“Respite” refers to short-term, temporary care provided to people with disabilities in order that their families can take a break from the daily routine of caregiving. Services may involve overnight care for some period of time.

Meals on wheels

Volunteers deliver nutritious lunchtime meals to the homes of people who can no longer prepare balanced meals for themselves. The volunteers also provide daily social contact with elders to ensure that everything is okay.

Transportation services

Because many elders cannot afford a special transit service, and are too frail to ride the bus, senior transportation services volunteers drive clients to and from medical, dental, or other necessary appointments, and remain with them throughout the visit.

Food and prescription drug deliveries

Either volunteer-based or commercially-based delivery services for food or prescription drugs, may

assist those who are unable to leave their home regularly.

Medication reminder systems

This may include a weekly pill organizer box, or another pill distribution system, or telephone reminder calls.

Telephone reassurance programs

These services use volunteer to provide a daily telephone call to older persons living alone.

Emergency call system (“lifeline”)

Usually includes equipment added to the telephone line, plus a wireless signal button worn by the older adult. Trained responders provide emergency assistance in the event of a medical emergency in the home, such as a fall.

Home visitors and pets on wheels

Elder service agencies and other volunteer agencies may match elders with home visitors, including visiting pets, which provide social interaction and a form of monitoring.

Daily checks on the person by mail carriers

Many mail carriers, if notified than an elder at risk is living at an address, will monitor the home to insure that mail has been picked up daily, and if not, notify a designated individual.

Role of Judges in Capacity Determinations

Protecting Rights. The aim of guardianship is to protect the well-being of vulnerable individuals. The reality is, however, that the appointment of a guardian results in the partial or complete loss of liberty and a potential litany of legal rights that adults enjoy, including the right to contract, vote, travel at will, and decide where to live. The potential loss of these rights may be further exacerbated by ageist stereotypes. Moreover, losing rights to make choices can be a self-fulfilling prophecy: “taking away people’s rights to make decisions on their own makes them less competent.” Identifying the choices . . . that should remain intact depends directly on the quality of the capacity determination process.

Promoting Self Determination. Along with identifying deficits in functioning, a careful determination of capacity identifies the individual’s strengths and the circumstances . . . that can maximize the individual’s capacities.

Identifying Less Restrictive Alternatives. Closely related to the goal of promoting self-determination is the identification of intervention strategies short of guardianship that protect an individual’s well-being with as little intrusion as possible into legal rights and autonomous functioning.

Providing Guidance to Guardians. The guidance provided by a high-quality capacity determination process assists the guardian after his or her appointment. By articulating the specific areas of functional deficit *and* areas of functional strength, along with the environmental features that may enhance functioning, the guardian can better prepare and implement a guardianship plan that permits and encourages the maximum self-functioning of the individual.

Making Determinations of Restoration. Not all losses of functional capacity are permanent or progressive. A thorough understanding of the individual’s diagnosis, prognosis, and pattern of functional strengths and weaknesses helps identify those who may improve, and suggests a possible timetable for re-determination.

Crafting Limited Guardianships. The ethical and conceptual preference for limited guardianship has been a core element of guardianship reform for a quarter century. Limited guardianship seeks to attain an optimal balance of care and protection with autonomy and dignity. Today, limited guardianship is available in every state. Yet, the reality persists that it is underutilized. The inadequacy of the clinical assessment process and its review in judicial proceedings often contributes to the under-use of limited guardianship. Without a thorough and discriminating mapping of functional strengths and weaknesses, limited guardianship has no feet to stand on.