Safeguards for Capacity Assessments:
Valid Results Depend on Reliable Procedures

By Cheryl C. Mitchell, M.P.A., J.D.

Having read some of the materials under consideration by the Capacity Assessment Workgroup of Spectrum Institute, I would like to make some foundational observations and recommendations.

Based on my thirty-five years experience in dealing with persons who have various degrees of disability, most of the articles regarding assessments of capacity that I have read are written from academic and scholarly perspectives. They seem to lack the day-to-day practical analysis that I believe is required to adequately and reliably assess capacity.

I have an undergraduate degree in psychology and I took several classes on tests and measurements so I have some understanding of capacity beyond the purely legal dimension.

In my opinion, far too many of the tests that are administered to assess capacity are based on a one-size-fits-all model and fail to take into account the individual's particular circumstances and abilities. I believe it is important to establish parameters before attempting to develop any test that purports to assess capacity. Further, I do not believe it is possible to develop a single test that can be administered in every situation to assess capacity.

Before getting into the educational and academic debates involving test administration to determine capacity, I am making these suggestions:

My experience indicates there are basically three groups of individuals who may be subject to capacity assessments for purposes of determining if a guardian or conservator is necessary. They are:

1. The first group consists of *people with dementia or memory loss*;

2. The second group is comprised of *people with other disabilities*. These include individuals who have experienced traumatic brain injuries (TBI) and persons who have medical conditions such as Down Syndrome, cerebral palsy, autism, multiple sclerosis, deafness, blindness, etc. Some people who have physical disabilities will also experience some degree of interference with their ability to communicate. For example, girls and women who have Rett Syndrom cannot speak, but may be able to communicate through the use of a computer board that is adapted to their special needs; and

3. The third group is comprised of *people diagnosed with a mentally illness*. This is an entirely different group from those who experience dementia or memory loss, and is also different from people with other cognitive or communication disabilities. These individuals have specialized needs for an accurate assessment by someone who is trained in pharmacology and medicine.

It should be noted that some individuals with disabilities may have only *physical* disabilities, but the person's physical disability may impair his or her communication skills, thus making it more likely that he or she will be diagnosed as being mentally impaired.

For example, a recent study from the University of Washington showed that individuals who had a hearing impairment that was not diagnosed prior to a capacity evaluation were far more likely to fail tests designed to determine their mental status because those individuals were unable to hear the questions and respond appropriately. The same is

true for persons who have sight impairments.

I spoke with one woman who had a court-appointed guardian. She had visual problems and before the guardian was appointed, the guardian ad litem sent her to a psychologist who administered a set of written questions to her. She was placed in a room where she was given a written test to complete. There was a high school student who watched her to make sure she didn't "cheat" on the test. No one read the questions to her and the high school student was not allowed to clarify the test questions or read the questions to her.

The woman had a great deal of difficultly reading the questions due to visual problems, and therefore, she was unable to accurately select the correct response. As a result, the psychologist assessed her as having significant memory loss and a guardian was appointed for her.

From a practical perspective, I believe that in any capacity examination, the first thing that must be done is a physical examination that will rule out physical problems. These would include: a complete physical examination, which should include blood work and urinalysis at a minimum. A medical professional would then need to actually review the test results and order further testing if indicated.

Next, the individual should undergo a hearing test and a visual test that include an examination for visual perception problems. This must entail an examination by an ophthalmologist or an optometrist. Such an examination should rule out visual problems that could interfere with an accurate assessment of mental capacity. If the person examined has visual problems, then the person should be provided with any aids that might assist the individual (such as glasses). This should be required as a necessary accommodation under the Americans with Disabilities Act (ADA).

Any mental capacity examination should be carefully tailored to the specific needs of the individual. If the person being examined cannot hear, then hearing aids or some sort of a device must be provided before any capacity examination is conducted. Again, this would be an ADA requirement.
I spoke with a blind woman who has a guardian. A psychologist who did an assessment of her mental capacity required her to draw figures, which she could not do because she is blind. She told me that she thought she failed the exam because she could not draw the figures he demanded she draw.

This may seem like a basic common sense approach, but as someone recently said to me, "Common sense is no longer common" and it's true.

For persons who have physical disabilities that may impact their mental functioning, it is important to determine what these individuals are able to do, and where their limitations lie. It is well established that some persons with Down Syndrome are able to make decisions regarding their lives (the Jenny Hatch case is one example) but may need some assistance in making some decisions.

Other persons, such as those who have cerebral palsy, may not have any intellectual deficits, but may be perceived as being unable to make decisions due to their physical limitations.

One major problem is that psychologists and others who are performing examinations to complete reports to the court may not customize their testing. In my opinion, counting backward from 100 by 3 is not a valid test of mental ability. Asking a person what season it is, when the person resides in a nursing home 24 hours a day, 7 days a week, in a room without windows, may not be a valid question. In my experience, performing a five minute mini mental status exam is not adequate to determine capacity.

Screening for physical aliments that are treatable is essential. I know of a case in which an elderly woman had been taken off her thyroid medication. This caused her to develop dementia-like symptoms and paranoia. The discontinuation of her thyroid medication was not discovered for months and in the meantime, a guardianship petition for her was commenced and a guardian was appointed.

Some authors refer to physical problems that can cause a diagnosis of dementia as delirium, while other authors refer to it as reversible dementia. Regardless of what it is called, current estimates are that between 4% to 10% of all elderly persons who have been placed under guardianship have a form of

dementia that is (or was) potentially reversible. But it is also important to note that in many cases, a lack of prompt treatment for conditions that mimic dementia can result in permanent memory loss.

In another case, a woman had a severe bladder infection and it appeared that she had developed dementia. As soon as her bladder infection was diagnosed and treated, she immediately regained her mental acuity.

I had a client who I saw on a regular basis when he would stop by my office to visit. He was a wonderful man who was very sharp. One day I received a call from his daughter who told me that he was in the hospital and he had been diagnosed as having Alzheimer's Disease. I knew this was not true, since I had seen him about a week previously and there was nothing wrong with him.

I asked the daughter what medications her father was being given. She didn't know but she went to the nurses' station to get a list of the drugs. She called to read the list to me and when I checked the Physician's Desk Reference, at least one drug contained a warning that it could cause confusion and agitation and it should not be given to elderly persons. After the daughter talked to the doctor the medication was discontinued and he returned to his former witty self.

For persons who have been diagnosed as being mentally ill, it is critical to have a person who is knowledgeable in pharmaceutical medications and for that person to review all of the various prescriptions the alleged incapacitated person is taking. There many drug interactions that can cause very serious physical problems. Some drugs that are given to the mentally ill can cause Parkinson's-like symptoms and can cause permanent brain damage. Psychotropic medications are powerful and can have incredibly serious side effects.

Under federal law, people with mental illnesses have a right to treatment but in far too many cases they are medicated in an effort to make them easier to care for. Treating such individuals in this manner may raise ADA issues.

A final point I have is that the time of day can significantly impact the outcome of any mental status exam. Persons who experience some degree of memory loss generally do better when tested earlier in the day, while persons who have congestive heart failure generally do better on cognitive tests in the afternoon. Mental status examinations should not be performed for the convenience of the person doing the test, but should be based on the time of day when the person to be assessed will be at his or her best. A person who is not adequately rested will also be unlikely to be able to perform at his or her best.

Test anxiety is well known to college students and the same can be said for persons who know that a capacity exam this will be a pass or fail test and if they fail they will lose control over their entire life and their finances. Therefore, any examiner should be sensitive to the stress that can be induced by testing and attempt to minimize it.

I hope that what I have stated here will be useful to the Capacity Assessment Workgroup as it seeks to formulate guidelines and standards that will promote the use of more reliable ways of evaluating the capacities of individuals who are alleged to require the appointment of a conservator or guardian.

About Cheryl C. Mitchell

Cheryl Mitchell is an elder law attorney in Spokane, Washington. She has been practicing law for thirty-five years. Cheryl and her husband are authors of seven volumes of *Washington Practice*, which is a series of books on Washington State law for attorneys. They are authors of four volumes of *Methods of Practice,* two volumes on elder law and one volume on Washington probate and practice. These books are published by Thomson Reuters WestLaw, the largest publisher of legal books in the nation.

Cheryl has participated in approximately 100 adult guardianship proceedings. She has served as a guardian for approximately eight individuals in Spokane County. Cheryl has represented petitioners in guardianship cases, has been a guardian ad litem, and has represented alleged incapacitated persons who opposed having a guardian. Cheryl has lectured on guardianship laws at various continuing legal education programs over the years.

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