

# Decision-Making Capacity And Older Adults

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**GEROPARTNERS**

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# Learning Goals

- Become familiar with decision-making capacity as a construct
- Learn the legal implications of decision-making capacity
- Understand the standards against which capacity is compared
- Appreciate the steps involved in conducting a decision-making capacity evaluation
- Realize the ethical implications of decision-making evaluations
- Learn about issues unique to financial decision-making in particular

# Organization of Presentation

- Section I: Issues relevant to all types of decision-making capacities
- Section II: Issues specific to financial decision-making capacity

# Autonomy and Freedom

- Western culture places great importance on issues of freedom and self-direction
  - Declaration of Independence
  - Bill of Rights
  - Constitutional guarantee of Freedom of Speech
- Society values an individual's right to make his or her own decisions
- Revoking someone's autonomy requires careful thought and consideration

# Exceptions

- Under certain circumstances, it is necessary to disallow a person to make autonomous decisions
  - Unable to provide for his or her own health, care, safety, or therapeutic needs without help
  - Unable to manage property or financial affairs

# Tough Questions

- When does a person reach the point where they cannot make decisions or act for themselves?
- Who makes that determination?
- How is that conclusion reached?

# Myths

1. Doctors decide whether a person is competent or incompetent
2. “Competency” and “Capacity” are just different words for the same idea
3. A person is always either completely competent or incompetent—no in-between
4. There is one universal test for capacity
5. A 5-minute interview is enough to determine if a person has capacity or not

# Myths cont.

5. A diagnosis of mental illness automatically means a person is incompetent
6. Competency evaluations should be conducted the same way with everyone in all circumstances
7. If a person is found incapable once, they will always be incapable

# Competency vs. Capacity

- “Competency” is a legal term
  - Involves a moral and social judgment that a person cannot handle their own affairs
  - Can only be determined by a judge
  - Judge usually takes recommendations from evaluators but is not required to

# Competency vs. Capacity cont.

- “Capacity” is a clinical term
  - Refers to a person’s particular abilities in a specific area
  - Example: A person has the capacity to construct a will (i.e., testamentary capacity)
  - Determination made by healthcare professionals

# Fundamental Tenets of Capacity

- Individuals are presumed capable of managing their own affairs until proven otherwise
- Burden of proof is on the legal and healthcare systems

# Current Legal Trend

- State legal definitions of competency:
  - Moving away from generalized concept of incompetence
    - Analogy: One circuit breaker for entire fuse box
  - Moving toward more specific construct of individuals' ability to perform certain tasks
    - Several individual breakers in fuse box
    - Each has different threshold

# Virginia Law

- § 37.1-134.6 of the Virginia Code
- “Incapacitated person” means an adult who has been found by a court to be incapable of receiving and evaluating information effectively or responding to people, events, or environments to such an extent that the individual lacks the capacity to (i) meet the essential requirements for his health, care, safety, or therapeutic needs without the assistance or protection of a guardian or (ii) manage property or financial affairs or provide for his or her support or for the support of his legal dependents without the assistance or protection of a conservator... A finding that a person is incapacitated shall be construed as a finding that the person is “mentally incompetent...” [emphasis added]

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# Virginia Law cont.

- This definition of incompetence is not domain-specific
- One may lose their overall “competence” by meeting any single criterion

# Types of Capacities (Civil)

- Medical decision-making
  - Capacity to consent to treatment
  - Capacity to refuse treatment
  - Capacity to release medical information
- Other decision-making
  - Capacity to manage finances (at different levels)
  - Capacity to enter into contracts (e.g., mortgage, marriage)
  - Capacity to execute a will
  - Capacity to select surrogate decision-maker

# Types of Competencies (Criminal)

- Competency to testify
- Competency to stand trial
- Competency to be executed

# Virginia Law cont.

- Illness does not imply incapacity by itself
  - Major mental illness
  - Traumatic Brain Injury
  - Dementia

# The Construct of Capacity cont.

- “Capacity” is a combination of the following:
  1. **Cognition**
  2. **Task-specific skills**
  3. **Contextual factors**
    - Environmental demands
    - Risk/benefit ratio

# The Construct of Capacity cont.

- Capacity is always considered in the context of:
  - A particular decision
  - At a particular time
  - Under particular circumstances

# The Construct of Capacity cont.

- Central to the notion of capacity: Person-Environment (P-E) Fit
- All capabilities are a function of the demands of the environment versus the resources of the individual

# The Construct of Capacity cont.

- “Capacity” is a combination of the following:

1. **Cognition**

2. **Task-specific skills**



**Person**

3. **Contextual factors**

- Environmental demands
- Risk/benefit ratio



**Environment**

# Ethical Issues

- We have a responsibility to prevent two types of mistakes:
  1. *Mistakenly preventing* capacitated patients from directing the course of their treatment
  2. *Failing to protect* incapacitated patients from the harmful effects of their decisions

# Ethical Issues cont.

- When considering whether or not an individual possesses capacity to perform a certain task, we must strive to do the following:
  - Rehabilitate (to the extent possible) any skills that affect capacity
  - Revoke a person's independence only to the degree necessary (least restrictive alternative)
  - Maximize the individual's level of control over their own decisions

# Ability vs. Support

Patient  
capacity

Assistance  
needed

# Ethical Issues cont.

## PHYSICIAN DETERMINATION OF INCAPABILITY

I certify that this patient is incapable of informed consent for:

- Psychoactive Medications
- Other Proposed Treatment \_\_\_\_\_
- Withholding or Withdrawing of Treatment (additional form required)
- Releasing of Information (additional form required)

Physician.: \_\_\_\_\_ Date: \_\_\_\_\_  
Concurring Physician: \_\_\_\_\_ Date: \_\_\_\_\_

# Assessing Capacity

- Components:
  - Cognitive evaluation
  - Specific capacity evaluation
  - Clinical interview
- Serial evaluations are preferable to single evaluations when the person's capacity is presumed or found to fluctuate

# Assessing Capacity cont.

- Cognitive testing
  - Considerations for older adults (normal aging)
    - Decreased processing speed
    - Diminished ability to attend to simultaneous stimuli
    - Sensitive to ceiling and floor effects dep. on population
    - Myriad individual differences (cultural, cohort, language, education, etc.)
  - Need tests specifically normed for older adults

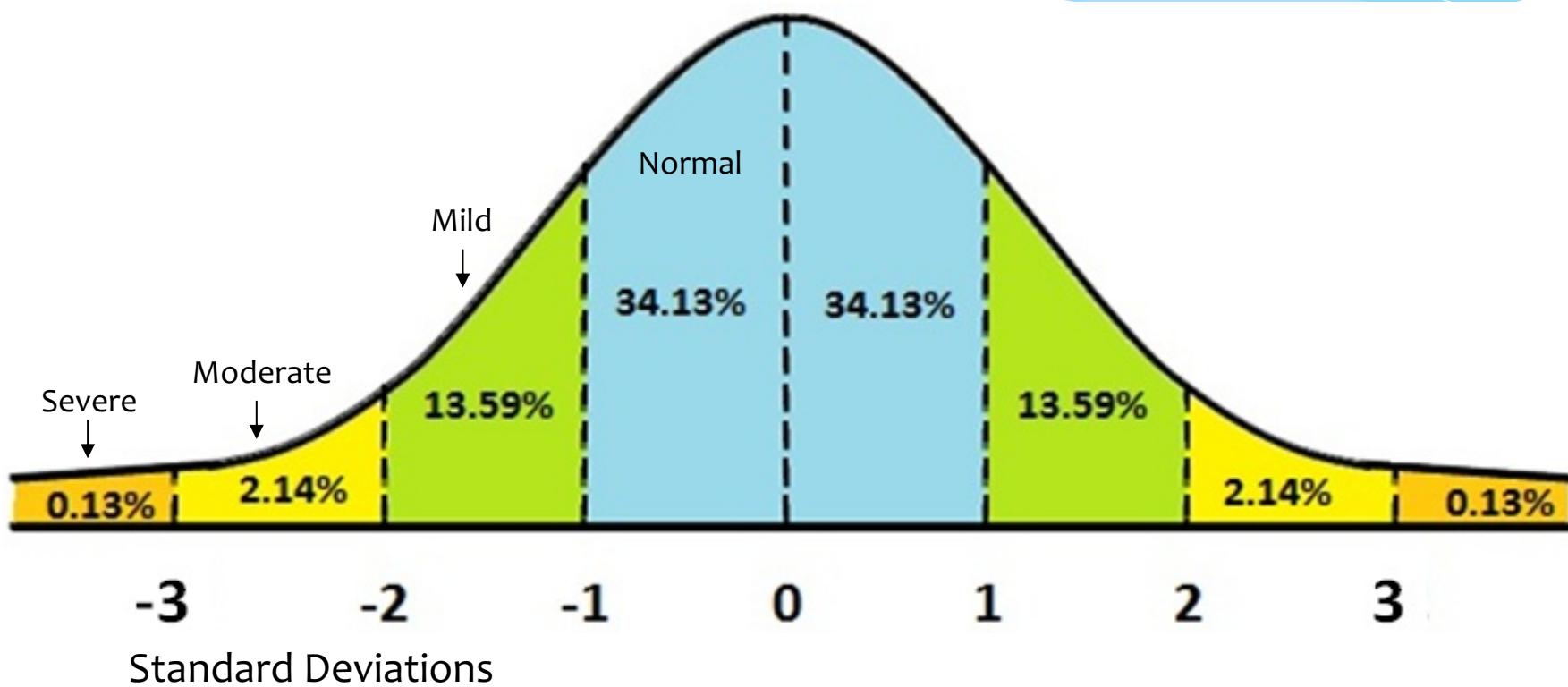
# Assessing Capacity cont.

- Cognitive testing cont.
  - Typical areas to be assessed:
    - Attention/registration
    - Memory (working, short-term, long-term)
    - Language (expressive and receptive)
    - Visuoconstructional praxis
    - Executive functioning
  - Each has relevance to most capacities
  - Differential diagnosis of cognitive impairment can shed light on *anticipated stability or reversibility* of decline

# Assessing Capacity cont.

- Cognitive testing cont.
  - What is considered “impaired?”
  - Standards differ, but it is most often considered to be between 1 and 2 SD below the mean ( $z = -1.0$  to  $-2.0$ )

# The Normal Curve and Impairment



# Assessing Capacity cont.

- Specific capacity evaluation
  - Determined by performance on instruments that realistically simulate “real life” scenarios
  - i.e., instruments that are high in “ecological validity”

# Assessing Capacity cont.

- Specific capacity evaluation cont.
  - Instruments will differ across capacities to be tested
    - Most frequent: Medical decision-making capacity
    - Some other types:
      - \* Capacity to give informed consent
      - \* Testamentary capacity (make a will)
      - \* Donative capacity (give a gift)
      - \* Capacity to manage finances

# Assessing Capacity cont.

- Specific capacity evaluation cont.
- Common instruments:
  - MacCAT-T (Grisso & Appelbaum, 1998): Medical decision-making
  - Aid to Capacity Evaluation Etchells et al. (1990): Medical decision-making
  - Hopkins Competency Assessment Test (Janofsky et al., 1992): informed consent, advanced directives

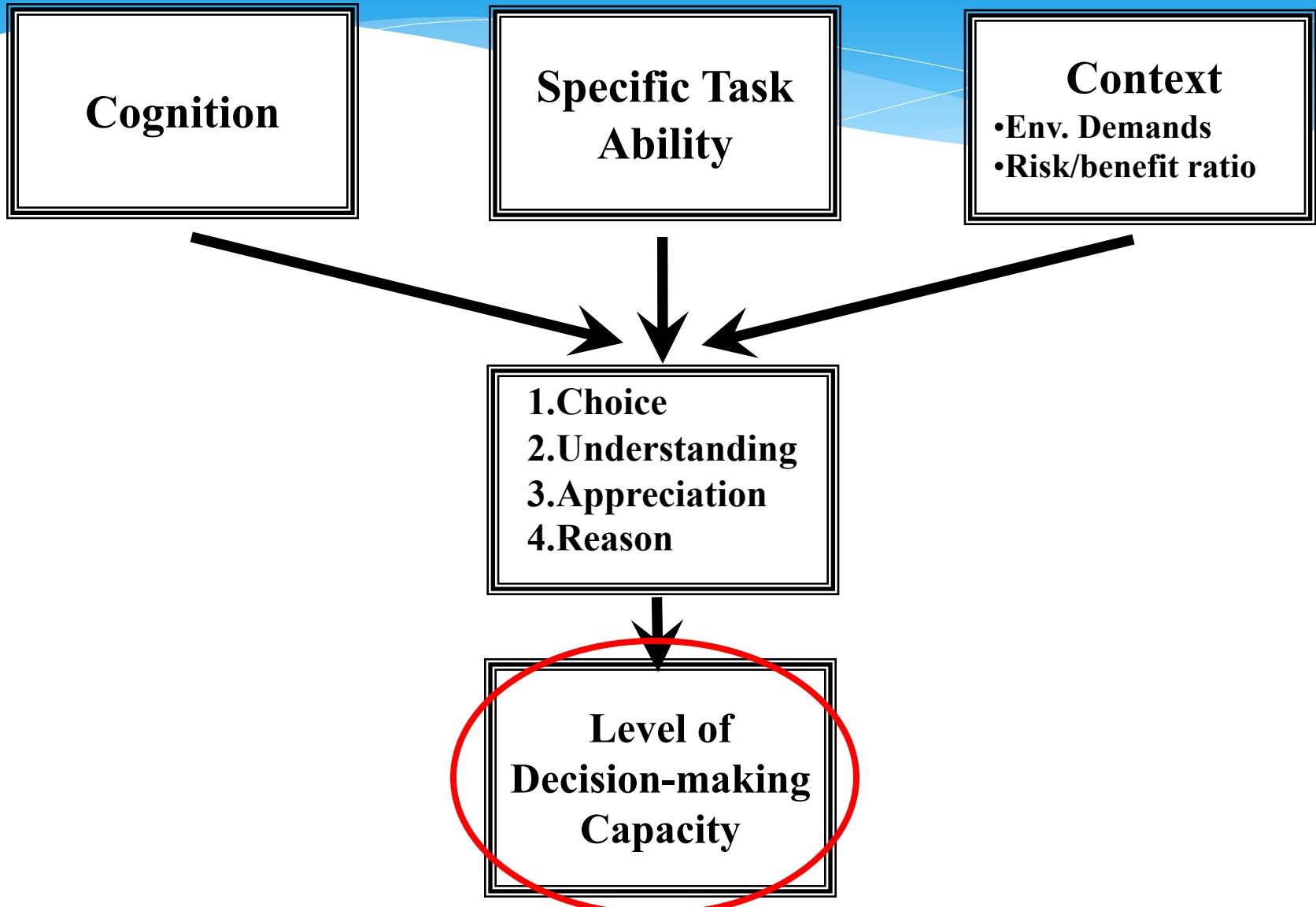
# Assessing Capacity cont.

- Content of instruments
  - Direct questions about condition/situation
    - “What problems are you having now?”
    - “What is the treatment for \_\_\_\_\_?”
  - Hypothetical problem-solving situations
    - “Suppose you were experiencing \_\_\_\_\_, what would you do next?”

# Assessing Capacity cont.

- Standard for capacity
  - Based on work of Appelbaum and Grisso (1998)
    1. Ability to communicate a choice
    2. Ability to understand relevant information\*
    3. Ability to appreciate the situation and its consequences
    4. Ability to manipulate information rationally

\*For medical decision-making capacity, the notion of understanding Risks, Benefits, and Alternatives of proposed treatment is considered here



# Assessing Capacity cont.

- Bottom line: Clinicians must always advocate for least restrictive intervention possible
  - E.g., Least restrictive intervention: Power of Attorney for Healthcare Decisions
  - E.g., Most restrictive intervention: Legal Guardianship

# Financial Decision-Making Capacity

- The term encompasses many types of abilities
  - Protect and spend small amounts of cash
  - Manage and use checks
  - Give gifts and donations
  - Make or modify a will
  - Buy or sell real property

# Financial Decision-Making Capacity cont.

- Deposit, withdraw, dispose, invest money
- Establish and use credit
- Pay, settle, prosecute, or contest a claim
- Enter into a contract or financial commitment
- Continue or start operating a business
- Employ others
- Resist exploitation, coercion, undue influence

# Financial Decision-Making Capacity cont.

- Most often, capacity to make financial decisions (AKA “financial capacity”) is considered to be all-encompassing
- Accordingly, most referrals and evaluations often treat it the same way
- Must ask ourselves, “What does financial capacity mean for this person?”

# Evaluating Financial Capacity

- Overall process:
  1. Referral clarification
  2. Planning and conducting the assessment
  3. Synthesis of data
  4. Communication of findings

# Evaluating Financial Capacity cont.

- 1. Referral clarification
  - Encourage referral source to be as specific as possible
  - Which area(s) of financial capacity?
  - Under what circumstances?

# Evaluating Financial Capacity cont.

- 2. Planning and conducting assessment (context, cognition, and specific task ability)
  - (A) Context: interview reveals environmental demands, as well as potential risks and benefits
    - This will vary widely from person to person
    - These results guide selection of capacity instrument

# Evaluating Financial Capacity cont.

- 2. Assessment cont.

(B) Cognition: choice of instrument/battery will depend on context (high/low env. demand, high/low risk)

- E.g., MMSE has a very low ceiling, not ideal for determining whether a person should continue to run a business
- More often will use more specific cognitive screening batteries
  - \* Dementia Rating Scale-2 (DRS-2)
  - \* Repeatable Battery for the Assessment of Neuropsychological Status (RBANS)

# Evaluating Financial Capacity cont.

- 2. Assessment cont.

(C) *Specific Task Ability:* choice of instrument will depend on context and referral question

- Content of items must be similar in type and difficulty to tasks the individual would most likely experience
- Referral questions that are larger in scope will require a more comprehensive instrument
  - \* e.g., Independent Living Scales (ILS)

# Evaluating Financial Capacity cont.

## Example Instrument

- *Independent Living Scales (ILS; Loeb, 1996)*—  
Money Management subtest
  - Brief (approx. 20-25 min.)
  - Covers basic but broad-based categories of financial management
  - Low ceiling
  - Normed for institutional and community elderly, as well as other populations

# Evaluating Financial Capacity cont.

- 3. Synthesis of data
  - Aggregate context (interview), cognition, and specific task findings
  - Compare against decision-making standards
    1. Ability to communicate a choice
    2. Ability to understand relevant information
    3. Ability to appreciate the situation and its consequences
    4. Ability to manipulate information rationally

# Evaluating Financial Capacity cont.

- Alternative standards for possessing financial decision-making capacity:
  1. Knowledge
  2. Skill
  3. Judgment
- Less preferable to Choice, Understanding, Appreciation, Reason

# Evaluating Financial Capacity cont.

- \* Choice
- \* Understanding
- \* Appreciation
- \* Reason

More objective

- \* Knowledge
- \* Skills
- \* Judgment

More subjective

# Evaluating Financial Capacity cont.

- 4. Communication of findings
  - Conclusion of report should address:
    - Do they have capacity to independently manage finances (as you have defined it for this evaluation)? Yes/No
    - If no, what standard(s) was/were not met (1-4) and why?
    - Is this deficiency likely to improve? If yes, what would help?
    - What assistance needs to be offered to the patient?
    - What can the patient still manage him/herself?

# Evaluating Financial Capacity cont.

- 4. Communication of findings (cont.)
  - Keep in mind that stating a patient is not capable of participating in any aspect of financial decision-making can lead to guardianship proceedings
  - Finding even small ways a person can be involved in financial decision-making is important
    - Helps feelings of self-efficacy
    - Helps preserve person's legal autonomy

# Guardianship

- The most restrictive intervention for an incapacitated individual
- Usually reserved for the most impaired and vulnerable individuals
- Requires that a person be declared legally incompetent

# Guardianship cont.

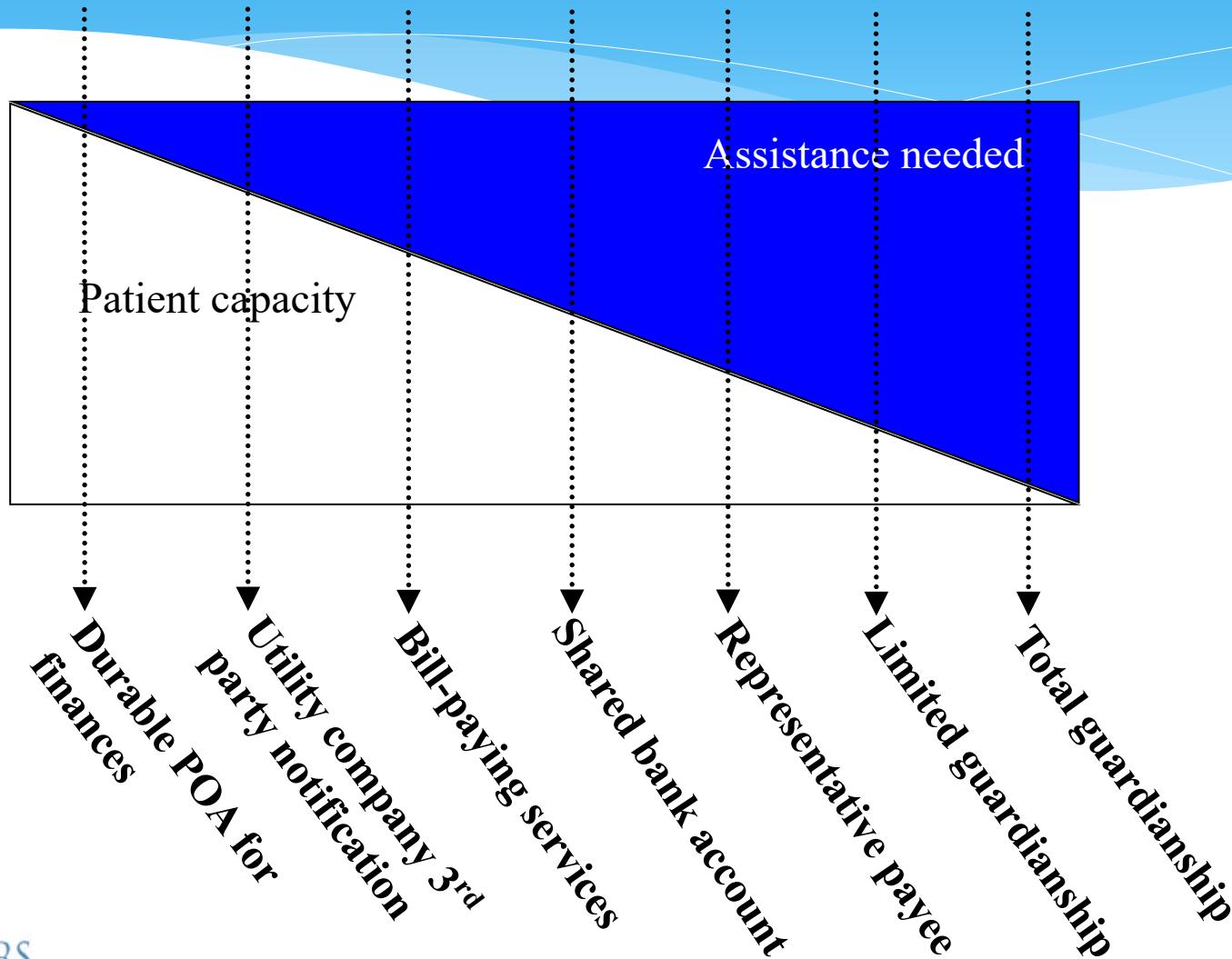
- If an individual is appointed a guardian simply because they cannot manage their finances, all other facets of his or her life are affected by being deemed legally incompetent
- Difficult to legally vacate or terminate a need for guardianship

# Least to Most Restrictive Options

Patient  
capacity

Assistance  
needed

# Least to Most Restrictive Options



# Limitations on Guardianship

- A judge can impose any limitations on a guardianship as s/he sees fit
- This is referred to as a Limited Guardianship
- Helps to preserve some of the autonomy of an individual and avoids a finding of legal incompetence
- Judges will often include these limitations on the recommendation of the evaluator

# Limitations on Guardianship cont.

- Common limitations:
  - Have and spend certain \$ per time period
  - Manage and use checkbook
  - Plan a budget and direct guardian in expenditures
  - Purchase and give gifts to others (not to exceed \$\$ per month)
  - Make gifts or donations to organizations of his choosing (not to exceed \$\$ per month)
  - Make or modify a will

# Limitations on Guardianship cont.

- Make decisions concerning a particular purchase  
Deposit, withdraw, dispose, or invest monetary assets
- Establish and use credit
- Pay, settle, prosecute, or contest a claim
- Enter into a contract, financial commitment, or lease agreement
- Continue or participate in operation of a business
- Manage property and investments

# From A Caregiver Perspective

- When does a person reach the point where they cannot make decisions or act for themselves?
- Caregivers should be alert to changes in thinking or behavior of their loved one
  - Trouble balancing checkbook
  - Difficulty remembering to turn off stove
  - Expressing bizarre or unusual beliefs

# From A Caregiver Perspective cont.

- When to intervene:
  - When dangerous behavior or self-neglect emerges
  - When the potential for danger or self-neglect becomes evident
  - Consequences of poor decision-making could be large (e.g., major medical problems because of refusing necessary care) or small (e.g., poor credit rating because of late bills)
  - Intervention should be only as “large” as the problem is

# From A Caregiver Perspective cont.

- Who to call:
  - For smaller day-to-day problems (e.g., trouble performing activities of daily living, remembering to do important things), caregivers should consult directly with a mental health professional (e.g., a psychologist or psychiatrist)
    - Evaluate the problem
    - Suggest strategies for coping

# From A Caregiver Perspective cont.

- Who to call:
  - For larger issues (e.g., damaging financial behavior, refusal of medical care), an elderlaw attorney should be consulted
    - Lawyer will review legal options, which could include limited guardianship or conservatorship (for specific issues)
    - An evaluation will probably be recommended and the results taken before a judge to determine whether the person qualifies

# From A Caregiver Perspective cont.

- Who to call:
  - In cases of serious and global incapacity (e.g., dementia that impacts all decision-making, major mental illness), an elderlaw attorney should be consulted to pursue a finding of incompetency
    - Evaluation will be performed
    - Results will be placed before a judge, who will make the determination of competence
    - Assignment of a guardian or other arrangements will be considered at this time

# Summary

- Evaluating decision-making capacity can (and should) be complex
- A person's capacity to make any given decision depends upon their cognition, their ability to execute relevant tasks, and contextual factors.
- Individuals should retain as much control over their own decisions as reasonably possible

# Recommended Resources

- American Bar Association Commission on Law and Aging & American Psychological Association. (2005). *Assessment of older adults with diminished capacity: A handbook for lawyers*. Washington, DC: American Bar Association and American Psychological Association.
- American Bar Association Commission on Law and Aging & American Psychological Association. (2006). *Judicial determination of capacity of older adults in guardianship proceedings*. Washington, DC: American Bar Association and American Psychological Association.
- Baker, R.R., Lichtenberg, P.A., & Moye, J. (1998). A practice guideline for assessment of competency and capacity of the older adult. *Professional Psychology: Research and Practice*, 29, 149-154
- National Center for Cost Containment (1997). *Assessment of competency and capacity of the older adult: a practice guideline for psychologists*. U.S. Department of Veterans Affairs.

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