



# What the Hell is Incapacity anyway?

A White Paper by Americans Against Abusive Probate Guardianship

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*“The typical Ward has fewer rights than the typical convicted felon. It is in one short sentence... The most punitive civil penalty that can be levied against an American citizen with the exception of the death penalty.” ~ The late US Representative Claude Pepper*

If you are targeted for guardianship, your civil rights can be taken away long before anyone even bothers to inquire about your mental state in ETG's. You will immediately be an AIP—Allegedly Incapacitated Person.. But when it comes to locking you down permanently in a life sentence of guardianship, the court has to at least go through the motions of proving (if only to itself) that you must have guardianship “protection”—that you are “incapacitated”.

What does that even mean? Incapacity is a term unfamiliar to the general public, but it is the key that unlocks a greed-based system of court sanctioned estate rape in probate courts across the country.

There have been countless books and articles trying to pin down the meaning of that term. Until the last decade or so the term did not exist in guardianship law. Instead the word used by lawyers and judges to determine qualification for guardianship was “incompetent”. But that term required some very specific criteria to be applied. Over time as advocated by the legal profession, the term “incapacitated” replaced incompetency in guardianship statutes.

The American Bar Association in Washington DC has been instrumental in producing information about incapacity.

[Three ABA-APA capacity assessment handbooks are available free online.](#)

These scholarly volumes are intended for Psychologists, Lawyers and Judges working the system.

After carefully studying all three of these volumes, any reasonable person would come to the conclusion that **nobody really knows what incapacity is.**

The legal construct of incapacity is that it is a functional determination. That means it's a highly subjective moving target. It means that a person who is deemed completely normal and capacitated yesterday could be incapacitated tomorrow. It means that what is incapacity to one person or judge might not be incapacity to another. The plasticity of the term is highlighted by its definition-- The Merriam-Webster dictionary defines incapacity as *"a lack or loss of the ability to do something in the usual or desired way."*

But as vague as the definition is, determination of incapacity is an all or none event, no matter the extent of the alleged defect. How much memory loss is considered diagnostic of incapacity? Are you incapacitated if you recurrently lose your keys? If you can't subtract serial sevens do you need Guardian? If you can't remember the location of every single dollar you have invested anywhere are you incapacitated? Amazingly these questions are used routinely by court appointed examining committees to provide a black or white answer to a determination of incapacity request.

Determination of incapacity in many states is placed in the hands of an examining committee. It should be noted that **none** of these committee members are given formal training in the sub-specialty of psychiatry in the elderly. **Frequently members are not physicians.** Almost anyone can serve on this committee and I am aware of cases in the state where a state trooper with no experience whatsoever in medicine was given the opportunity to declare an innocent individual incapacitated. The composition of these examining committees is determined by the chief judge in every circuit. If Miami is any example, these individuals make an excellent living as "court officers" by doing hundreds of these examinations at \$400 an hour. While the examinations themselves are often documented to take less than 30 min., bills for multiple hours are the norm.

Guardianship courts will not accept evidence or testimony that contradicts findings of the examining committee. This entire anti-intellectual pseudo-scientific approach is born of the fact that the **judges appoint and support the examining committee members** and are not inclined question them. Similarly the **members of the examining committee need to make sure their findings increase the number of guardianships that the court supervises or risk losing their lucrative referral business.**

Like so many other aspects of guardianship court proceedings, this is an obvious **conflict of interest.** Furthermore, in Florida, until recently members of the examining committee would only be paid if incapacity was their determination. Worse even yet, if one of the three members should somehow feel that incapacity is not present their opinion is discarded.

Bear in mind that although there are hundreds of sophisticated well documented and proven, validated scientific methods to measure every aspect of dementia or incapacity in an objective way, **none of these are ever undertaken in a guardianship proceeding. Judges will simply not allow that kind of evidence into proceedings for guardianship.** The universal stance of probate court is that the examining committee is and shall be the only opinion a judge is obligated to entertain and any other opinions or evidence are extraneous and irrelevant no matter what their validity or source.

It is increasingly clear that rather than being a meaningful or even relevant clinical term or diagnosis, incapacity is an artifice created by the judicial and legal guardianship system stakeholders to create increased opportunities to subvert and twist the stated intention of State guardianship law from assisting vulnerable elderly into a court sanctioned scheme of asset diversion into a well-oiled efficient machine designed to ruthlessly siphon legal and proper inter-generational transfers of wealth into massive income and wealth for stakeholders in the guardianship industry.

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