CAPACITY IN THE PROBATE CONTEXT
Pertinent Points of Law

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PART I

Can be found in the 2018 Winter publication of Council Notes which identified and attended to those particular dilemmas resulting from our law governing mental capacity in the prominent civil contexts of estate planning, representation by counsel, guardianship and conservatorship, where a call for improved guidance has become evident and warranted.

PART II

Necessary Distinctions Among Evaluations

In this probate litigation setting, it is absolutely critical to recognize the differences between various types of clinical/medical examinations and assessments including those that incorporate, first, psychological and/or neuropsychological evaluations and reports by health care and treatment providers and, second, forensic psychological evaluations which include competency evaluations. These two categories are inherently different and require different procedures:

a. The first category is in the clinical realm and includes examinations, assessments, and reports written by health care and treatment providers that are based on data collected in clinical settings. This category also includes psychological and neuropsychological evaluations.

b. The second category is in the realm of forensic psychological and competency evaluations, which focus on specific legal questions, specific competencies, or specific capacities.

In the first category, various types of health care specialists and providers obtain information directly from the patient and conduct medical examinations and assessments that are designed to identify the patient's reported problems and symptoms. Hopefully, the specialist or provider findings will result in diagnoses that contribute to, if not determine, the care and treatment provided to the patient. Most often, in this first category, it is the client or patient who has initiated the contact with one or more health care providers based on medical complaints or questions regarding symptoms or problems experienced. The health care provider relies heavily on the patient's self-reports about their symptoms.

In neuropsychological evaluations, the psychological tests utilized are designed to assess the individual's intellectual and neuro-cognitive abilities and how these abilities impact the patient's functioning. If a neuropsychological or a psychological evaluation is utilized as part of a forensic psychological and competency evaluation, that evaluation must hit the target of the issue addressed in the referral.

The second category, which is a forensic psychological and competency evaluation, utilizes specific forensic principles and strategies in the assessment of a client for the purpose of drawing conclusions about the individual's fitness or abilities to meet specific legal standards in the criminal, civil, or probate justice system. In these types of evaluations, the hierarchy of relevance and value of the information obtained is very different than in the first category described above.

At the top of the hierarchy in forensic psychological and competency evaluations are: verifiable facts of the case; information obtained from credible collateral sources; results from specific forensic psychological test instruments; information obtained from direct observation of the client in structured interviews; assessment for evidence of malingering, feigning, fabricating, or exaggerating symptoms; and consideration of alternative hypotheses. At the bottom of the hierarchy is what the client self-reports.

Some forensic psychological and competency evaluations are designed to assess an individual's ability to understand and explain the concepts that pertain to the specific legal capacities in question. The forensic practitioner must assess the client's adaptive and functional abilities by observing their ability to successfully demonstrate the necessary and required skills that define those specific legal capacities. The purpose of a competency evaluation is to evaluate those functional abilities and skills, draw conclusions about the individual's abilities, and often make recommendations about what the individual needs that are based on the specific legal capacities that are being evaluated.

In competency evaluations, it is typically not the patient or client that initiates the referral; most often the referral is instigated by an attorney, a treatment provider, a family member, a court appointee or the court itself, to address questions about a client's specific legal capacities. In competency evaluations, the scope and purpose and exclusive focus of the evaluation should be defined in the initial section called "Reason for Referral."

Legal capacities identified in the Reason for Referral include questions regarding the client's Contractual Capacity, Testamentary Capacity, Decisional Capacity, Capacity for Informed Consent, and his or her Functional/Adaptive Capacities that pertain to the client's ability to live independently, manage safety and health needs, and manage financial responsibilities. In criminal cases, the most common referral questions might comprise: Competence to Stand Trial, Competence to Assist Counsel, Competence to Waive 5th or 6th Amendment Rights, questions

regarding Impaired Mental Condition and/or Pleading Insanity as a Defense, and Competence to be Executed.

In competency evaluations regarding an individual's Functional and Adaptive Capacities that pertain to the individual's ability to satisfy essential requirements for physical health, safety, self-care, and to live independently and effectively manage financial responsibilities, the evaluator must assess the individual in terms of the legal standard specified at C.R.S. § 15-14-102(5) or § 15-14-401. In this type of competency evaluation, the various definitions of incapacity guide the evaluator and the court regarding whether the individual needs guardianship and/or conservatorship. The Colorado Uniform Guardian and Protective Proceedings Act (CUGPPA) statutory scheme requires evaluation of specific functional aspects of capacity and provides for the court-ordered evaluation of mental and physical conditions, educational potential, adaptive behavior, prognosis for improvement, and recommendations for rehabilitation.

The law mandates qualifications for such an evaluator pursuant to C.R.S. §§ 15-14-306 and 15-14-406.5, which require that a physician, psychologist, or other provider must be qualified to evaluate the individual's impairment specific to the legal capacity in question. Those statutory sections specify four elements that a professional report must contain. The CUGPPA effectively declares that the global opinions of health care providers are inadequate for its objectives. For example, a doctor's summary report, or brief note on a prescription pad stating that an individual is not competent and needs a guardian will be sufficient no longer.

In order for the court to render its findings of fact in a competency case, the report of the forensic psychological evaluation must provide the court with scientific and technical information from the results of the assessment. Such result must pertain to the client's functioning in relation to the questions of the specific capacities that concern the court. However, none of the statutory provisions mandate the specific procedures and/or evaluation tools or instruments to be used in reaching the conclusions that must be verified by the findings in the evaluation.

In a competency evaluation, the qualified forensic evaluator does not rely on the client's self-reports but places the most significance on direct observations of characteristics and abilities that relate to the capacities being evaluated. Other sources of data that are crucial in a forensic evaluation are: (1) the individual's personal circumstances; (2) reports of credible collateral sources that are pertinent to the capacity or capacities in question; and (3) information about the individual that would be considered "facts of the case."

Another distinction between clinical practice evaluations and forensic psychological evaluations is that in the former, the standards for rendering diagnoses, particularly those found in the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition-TR (DSM-IV™), the ICD-9-CM, the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5™) and in the ICD-10-CM classification systems, do not specify or require that credible verification must be obtained. In forensic psychological evaluations, however, the standard of outside credible

verification must be applied before a diagnosis in either of those classification systems can be stated.

In many competency evaluations, neuropsychological evaluations, information from medical examinations, and provider reports are relevant to the questions regarding an individual's competence; however, this information itself does not answer the direct questions about the individual's legal competencies and capacities that are specified in the referral questions for a competency evaluation. When a competency evaluation is sought to answer questions about an individual's competence relative to a specific legal capacity, a medical examination, a neuropsychological evaluation, or a physician's summary of treatment and opinions about legal competencies cannot be used on a stand-alone basis to answer such legal queries of capacity.

Although certain information contained in a medical examination or in a clinical practice neuropsychological evaluation might be relevant to a capacity evaluation, that information by itself is far from sufficient to provide reliable assistance to the court in determining an individual's specific legal capacity or competence. Medical examinations, physicians' reports on their patients, and psychological or neuropsychological evaluations all generally lack the requisite forensic/psychological principles applied to the functional and adaptive assessment that comprises the essence of a competency evaluation.

In the absence of a forensic psychological assessment of the client's functional and adaptive skills and abilities that pertain to the legal competencies and capacities in question, it would be wholly inappropriate to make any assumptions or to draw conclusions regarding whether a person could or could not demonstrate a specific legal capacity. As a specific focus of a competency evaluation, determination of the post-adjudication right to counsel of a respondent plainly triggers the most profound due process considerations, warranting – even amid an incapacity determination for guardianship – the closest court and evidentiary scrutiny.[1] The Court of Appeals in 2014 fostered a scenario where a similar extent of litigation could occur over the issue of respondent's capacity to nominate, and thereby confer priority for appointment upon, a person to serve as respondent's guardian or conservator and possibly, depending on scope of appointive authority, to serve as a decision-maker for the fate of the respondent's personal health and financial life savings. In *Estate of Runyon*,[2] the Court relied upon various authorities, including *Estate of Romero*, to conclude:

> As noted, a respondent's nomination creates priority for the nominee only if, at the time of the nomination, "the respondent had sufficient capacity to express a preference." §§ 15-14-310(2), -413(2). But a finding that the respondent is an "incapacitated person" within the terms of the statute does not necessarily mean that the respondent lacks sufficient capacity to express a preference as to a guardian or conservator. Neither the definition of incapacitated person nor the criteria for appointment of a conservator automatically exclude the ability to make a rational choice as to the selection of a guardian or conservator. *See* §§ 15-14-102(5), -401(1)(b). Therefore, an incapacitated person may "still be able to express an

intelligent view as to his choice of guardian, which view is entitled to consideration by the court."[3]

Unfortunately, when the dispute arose over who should be appointed, the *Runyon* trial court did not hold an evidentiary hearing on the respondent's capacity to nominate or "express a preference." The Court of Appeals, therefore, remanded the matter back for just such a proceeding. What this ruling implies, for good or ill, is that persons with legal standing in guardianship and conservatorship matters may set an evidentiary hearing, post-adjudication, of a person's incapacity, on virtually any issue of the respondent's "expression of preference."

Why? The appointed guardian is duty-bound by statute to "exercise authority only as necessitated by the ward's limitations and, to the extent possible, shall encourage the ward to participate in decisions, act on the ward's own behalf, and develop or regain the capacity to manage the ward's personal affairs. A guardian, in making decisions, shall consider the expressed desires and personal values of the ward to the extent known to the guardian."[4] Further, limited guardianship is favored, narrowly tailored to the particular impairments and needs of the respondent.[5]

For conservators, the court similarly is admonished to "make the least restrictive order consistent with its findings. The court shall make orders necessitated by the protected person's limitations and demonstrated needs . . . ."[6] In such contexts, where a plenary appointment of a guardian or conservator is now disfavored except in the most extreme circumstances of total incapacity, the current increased complexity of controversies over cognitive capacity pose daunting, and in some cases disturbing, challenges to the conscientious legal and medical practitioner.

Conclusion – Mindfulness of the New Environment

Notwithstanding the potential for court evidentiary determinations in an expanded host of scenarios described above, it is apparent – upon application the respective, situational definitions of incapacity and the concomitant requisites of proof before appointment of a guardian or conservator[7] – that an appointed guardian's or conservator's robotic adherence to whatever the incapacitated or cognitively compromised respondent merely says he or she wants does not constitute a prudent or even responsible discharge of fiduciary duty. If anything, the line of cases referenced – from the early 20th and even early 17th century precedents for *Hanks*, through *Breeden*, *Romero* and *Runyon* – stand for the principle that the myriad functional capacities and incapacities of cognitively compromised persons, and their "expressions of preference" amid such impairments, are subject to evidentiary determination as a matter of due process in these proceedings.

Today's Colorado probate practitioners have witnessed or heard about the advent of "person-centered decision-making" and the intricately specific or complex determination of capacity for autonomous decision-making such as in *Runyon* for nominative conferral of priority or such as informed consent to counsel per §§ 15-14-319 and 15-14-434. These tendencies and

practices notwithstanding, it is an abdication of fiduciary responsibility warranting removal, as well as a welcome mat for sophisticated undue influencers, if either a court or an appointed guardian or conservator capitulates to absolutist advocacy for, and reflexively slavish genuflecting to, an adjudicated respondent's expressions of preference, absent informed, qualified, and professionally credible input on those decisions of a respondent

In another case along the foregoing lines, *Neher v. Neher*,[8] the capacity pendulum seemed to swing abruptly in the opposite direction. Beyond the issues of settlement and admission of evidence, the factual essence of *Neher* is that a vulnerable respondent lost, or wasted, $500,000 in various offshore investment scams. Upon the district court's grant of respondent's son's petition for appointment of permanent conservator, the Court of Appeals affirmed, stating:

> "To be sure, section 15-14-401 precludes imposing a conservatorship on the sole basis of imprudent investments. But the court could have concluded that Father had fallen prey to obvious fraud. And from Father's repeated participation in similarly suspicious transactions, the court could have reasonably inferred that Father was "unable to manage property and business affairs because [he] [wa]s unable to effectively receive or evaluate information or both." § 15-14-401(1)(b)(I).
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> . . . Father's letter to the court strengthens this inference because he did not explain why he continued taking out loans and wiring money to bank accounts that Taylor described as "nameless" and "faceless," based on unsolicited proposals from sources that he had done nothing to verify by determining the transferee's identity, finding out exactly how the money would be used, or otherwise evaluating the validity of the proposed transaction."[9]

There is no suggestion here that this ruling of *Neher* was incorrect, especially in view of the horrendous social problem of online and telecommunications exploitation of vulnerable persons, including senior citizens extraordinarily exposed to such graft by cognitive impairment. *Neher* is simply expeditiously direct, in contrast to the far more measured determinations as to incapacity found in the other cases presented in this article.

Thus, the analysis of *Neher* arguably mandates conservatorship protection, pursuant to the proof standards of C.R.S. § 15-14-401(1), where a provably vulnerable person succumbs, to the extent of significant monetary loss, to what the court would deem "an obvious fraud." This might be the probate arena protective-proceedings analogy to the civil court's *res ipsa loquitur (that the occurrence of an accident implies negligence)*. Yet the analysis of *Runyon* arguably mandates that even in the case of a person adjudicated incapacitated by clear and convincing evidence pursuant to the extraordinarily high standards of C.R.S. § 15-14-102(5), an evidentiary hearing still may be required to determine whether the respondent retains residual capacity to confer appointive priority upon his or her nominee, pursuant to C.R.S. §§ 15-14-310(1)(b) (nominee priority for appointment of guardian) and 15-14-413(1)(b) (nominee priority for appointment of conservator).[10]

Again, such a proceeding conceivably, and expensively, could entail highly specific, specialized professional evaluations[11] and conflicting expert testimony. Ironically, amid the intricacy/specificity of functional capacity determination as indicated in *Runyon*, and the arguably greater need for it, the *Neher* court ruled that medical opinion was not required to adjudicate capacity for purposes of conservatorship and, likely, guardianship.[12] Perhaps that ruling also was correct, but that notwithstanding, it is absurd for an appointee then to follow the expressed wishes of the incapacitated respondent like a glove puppet without any qualified professional-evaluation guidance on functional capacity.

At this juncture, and with all due respect, one plausibly may ask, is this state of affairs disturbing? Is it coherent? It could well be that the plausible answer to both questions is yes, in view of the due-process rationale behind the evolution of guardianship and conservatorship proceedings to limited authority warranted by proven cognitive impairments. Holding interlocutory evidentiary proceedings á la *Runyon*, despite an adjudication of such severe cognitive incapacity as to result in a guardianship, might well be necessary to assure no further intrusion upon the respondent's personal autonomy than provably warranted, by clear and convincing evidence of the respondent's cognitive impairments. On the whole, it would be prudent to think that more focused and credible functional evaluation, and more sophisticated rather than more contentious lawyering, will be imperative to achieve just and reasoned results. Furthermore, and more now than ever, the better forum for solving these complexities might be mediation.

In any event, as we cross the threshold into the new environment of complex considerations concerning capacity, we will be well advised to heed the warning-sign admonition of London's famed Underground: Mind the Gap.

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[1] *See*, *e.g.*, rationales enunciated for rulings in *Milstein v. Ayers*, 955 P.2d 78 (Colo.App. 1998) and *Sabrosky v. Denver Dept. of Soc. Servs.*, 781 P.2d 106 (Colo.App. 1989), as well as considerations underlying the Colorado Uniform Guardianship and Protective Proceedings Act, particularly at C.R.S. § 15-14-311(1)(a)(II) (appointment of guardian by clear and convincing evidence only where incapacity found and "if respondent's identified needs cannot be met by less restrictive means . . . ."). (Emphasis added).

[2] *In re Estate of Runyon*, 2014 COA 181, 343 P.3d 1072.

[3] *Runyon*, supra, note 56, 2014 COA 181, ¶26, 343 P.3d 1072, 1077.

[4] C.R.S. § 15-14-314.

[5] *See*, note 55.

[6] C.R.S. § 15-14-409(2).

[7] Respectively, C.R.S. §§ 15-14-102(5), 15-14-311(1)(a) and 15-14-401(1).

[8] 2015 COA 103, 402 P.3d 1030.

[9] *Neher*, *supra*, note 62, at ¶¶ 63-64, 402 P.3d at 1039.

[10] Both sections annotate to *Runyon*.

[11] *See*, note 50.

[12] "Although the General Assembly knew how to require such evidence, its failure to do so in the conservatorship statute indicates purposeful omission." *See*, *Neher*, *supra*, note 62, at ¶23, 402 P.3d at 1034.

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