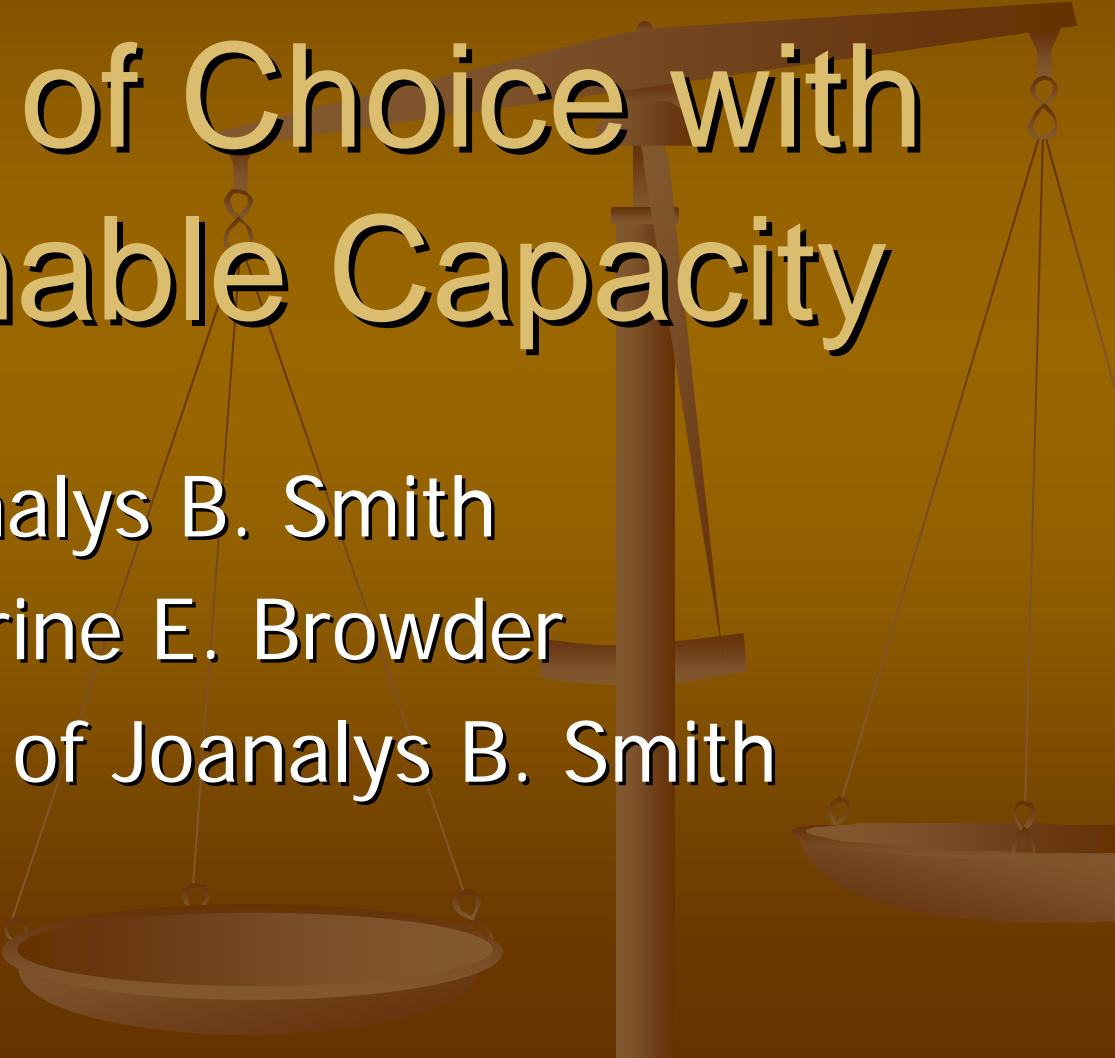


Freedom of Choice with Questionable Capacity



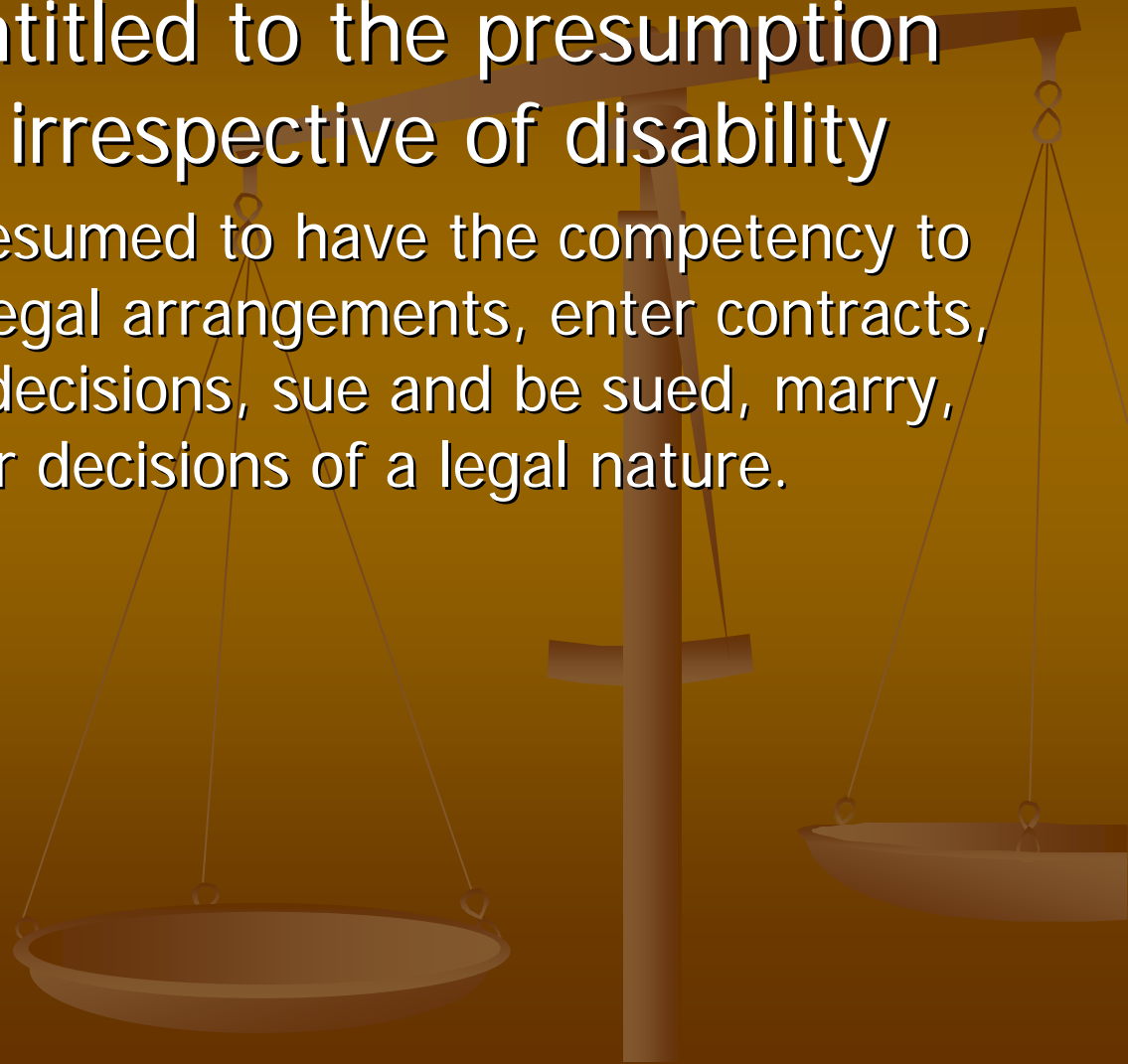
Joanalys B. Smith

Katherine E. Browder

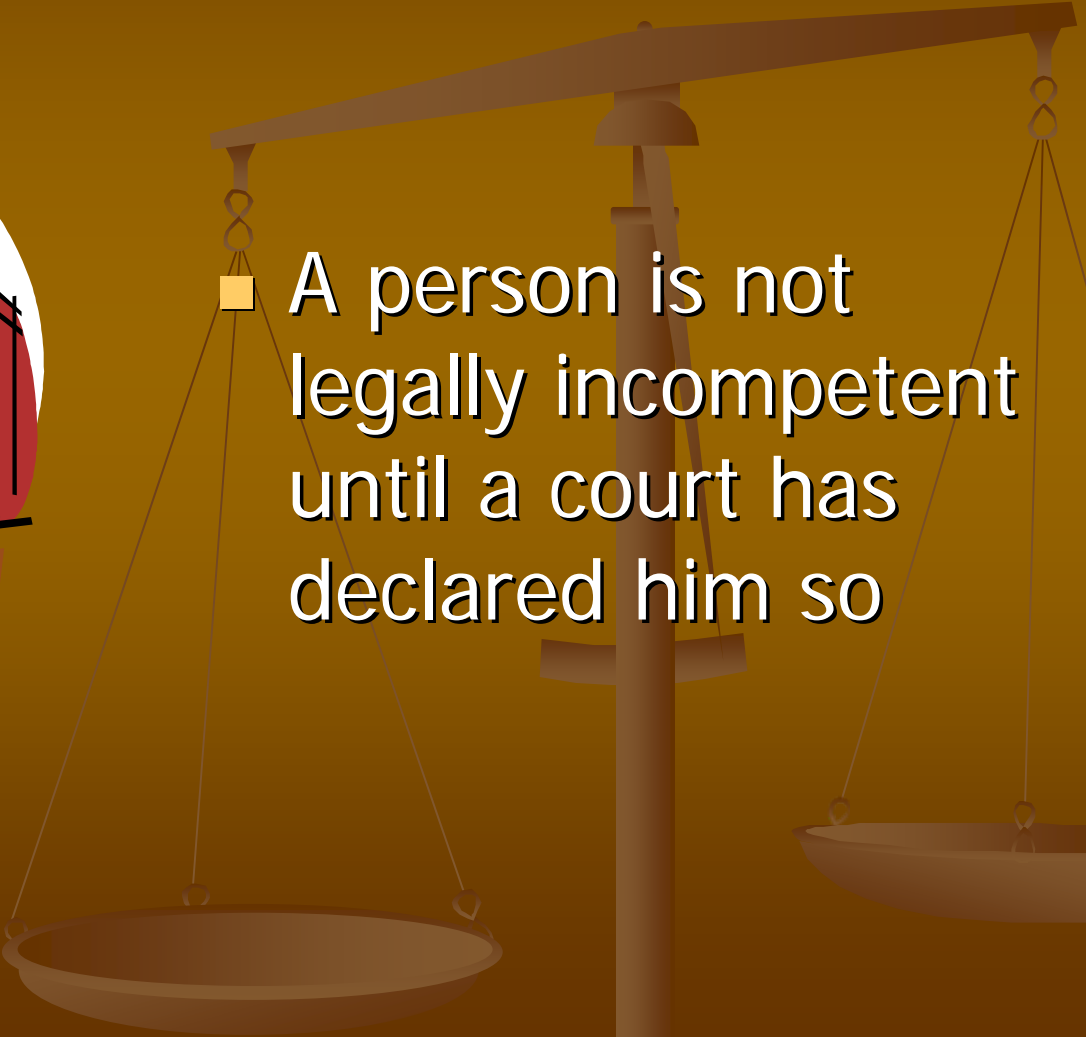
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Presumption of Competency

- All adults are entitled to the presumption of competency, irrespective of disability
 - Persons are presumed to have the competency to make binding legal arrangements, enter contracts, make medical decisions, sue and be sued, marry, and make other decisions of a legal nature.



Determinations of Incompetency



A person is not legally incompetent until a court has declared him so

Legal Areas of Capacity Testing

■ Wills

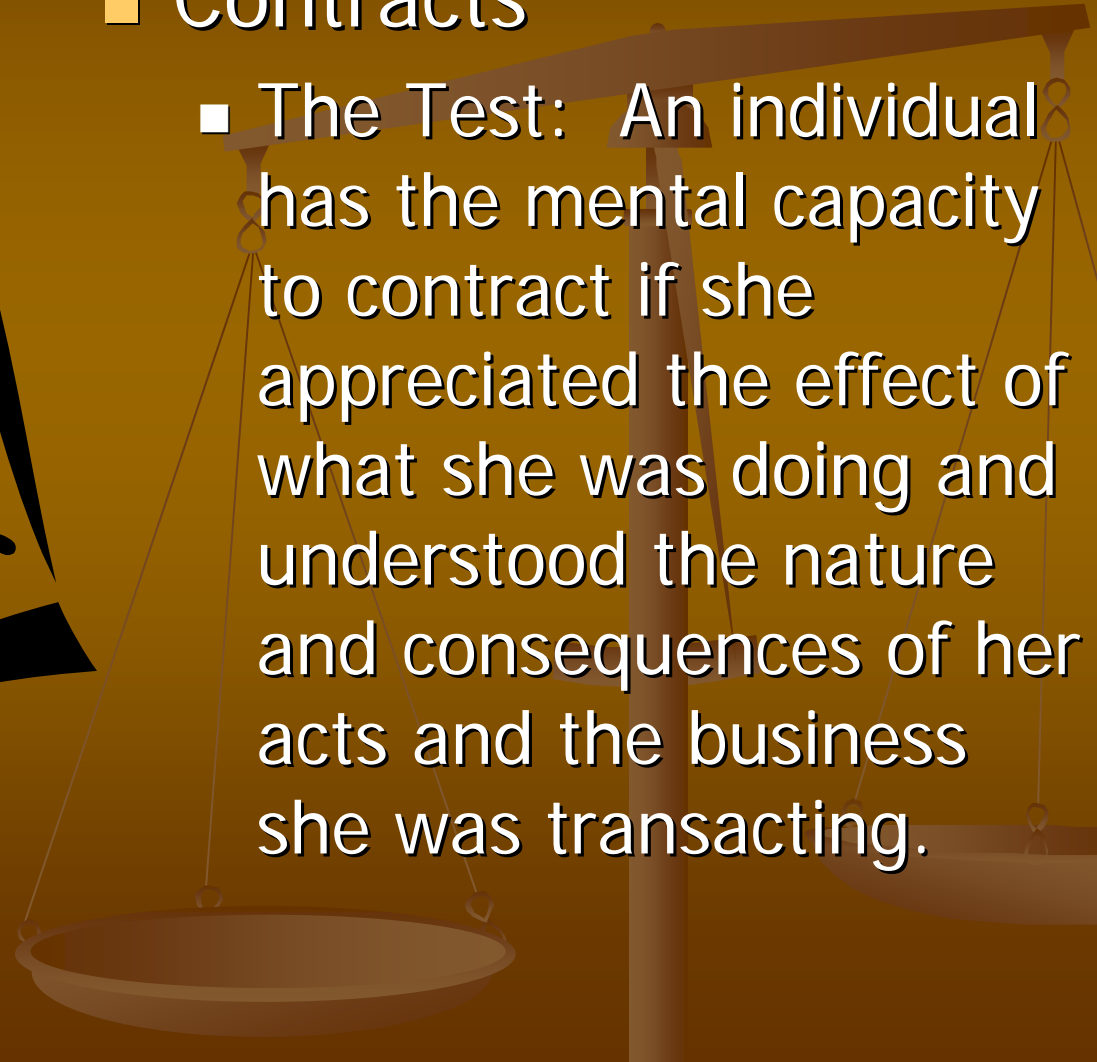
- Thus, to form a valid will an individual must have had "testamentary capacity" when the will was signed by her.
- The Test: An individual has testamentary capacity when she has sufficient mental ability to understand she is making a will, the effect of making a will. She must also have sufficient mental faculties to understand the general nature and extent of her property and the natural objects of her bounty, and she must possess the ability to consider the business to be transacted and to form a reasonable judgment about it.



Legal Areas of Capacity Testing

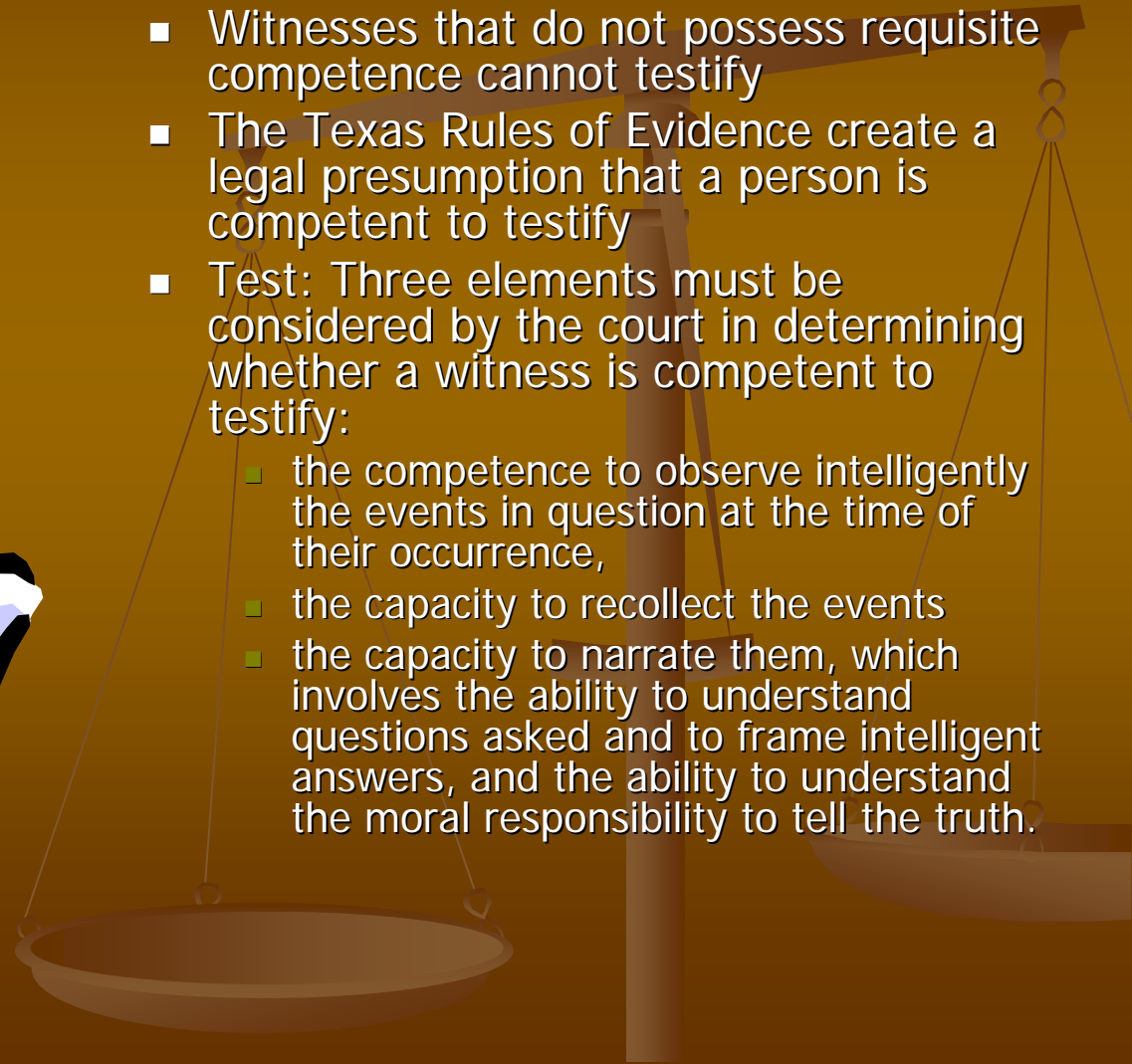
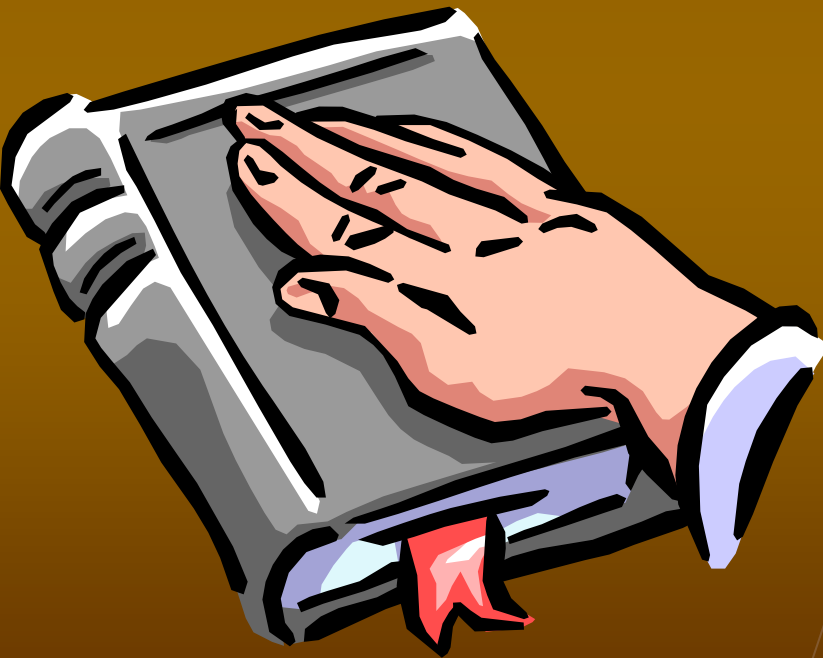
- Contracts

- The Test: An individual has the mental capacity to contract if she appreciated the effect of what she was doing and understood the nature and consequences of her acts and the business she was transacting.



Legal Areas of Capacity Testing

- Testimony
 - Witnesses that do not possess requisite competence cannot testify
 - The Texas Rules of Evidence create a legal presumption that a person is competent to testify
 - Test: Three elements must be considered by the court in determining whether a witness is competent to testify:
 - the competence to observe intelligently the events in question at the time of their occurrence,
 - the capacity to recollect the events
 - the capacity to narrate them, which involves the ability to understand questions asked and to frame intelligent answers, and the ability to understand the moral responsibility to tell the truth.

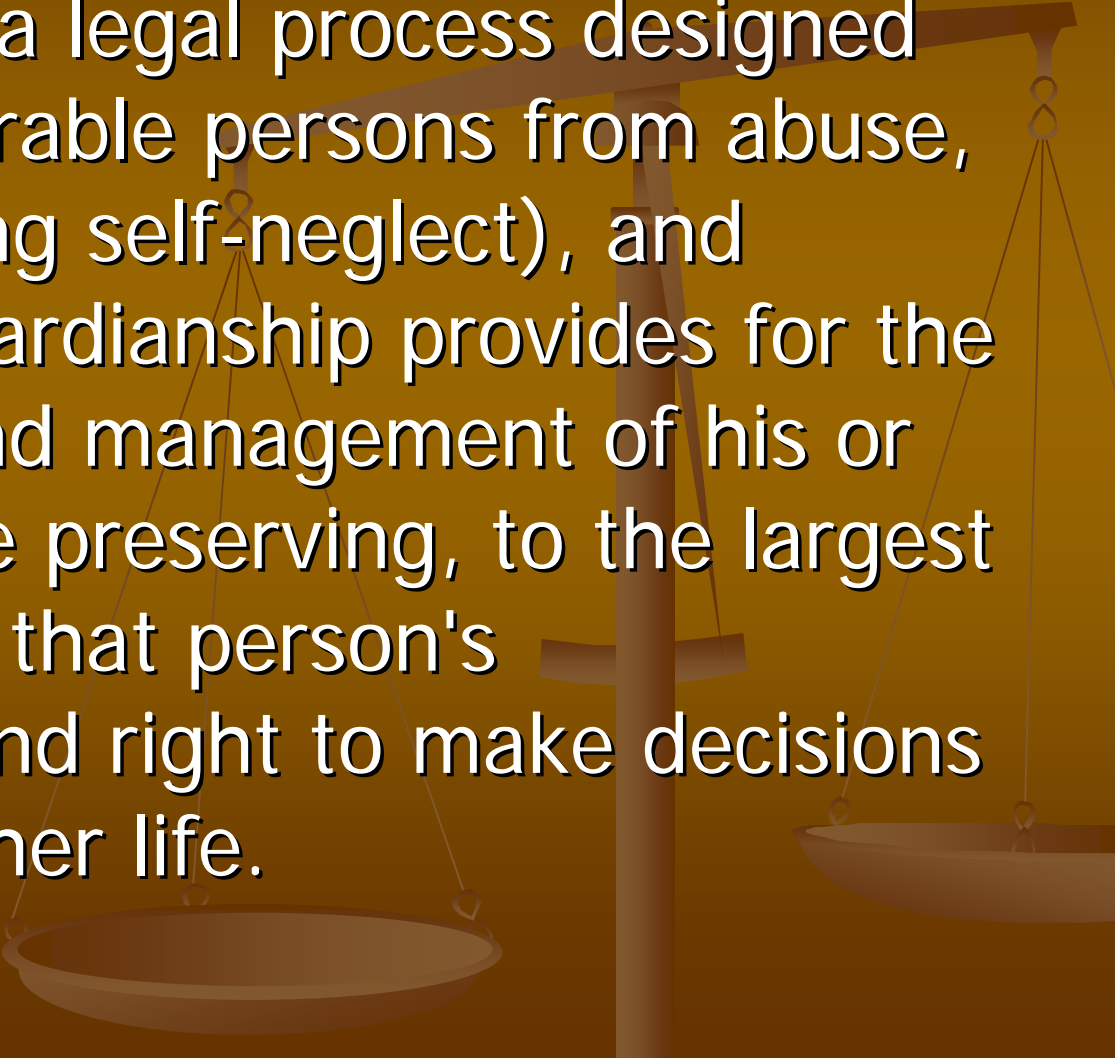


Legal Areas of Capacity Testing



- Standing Trial
 - Defendants that do not possess sufficient "competence" are usually excluded from criminal prosecution
 - The specific test, as determined in *Dusky v. United States*, is whether the accused "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him."
 - Being determined incompetent is substantially different from undertaking an insanity defense; competence regards the defendant's state of mind at the time of the trial, while insanity regards his state of mind at the time of the crime.

Determinations of Incompetency

- Guardianship is a legal process designed to protect vulnerable persons from abuse, neglect (including self-neglect), and exploitation. Guardianship provides for the person's care and management of his or her money while preserving, to the largest extent possible, that person's independence and right to make decisions affecting his or her life.
- 

Determinations of Incomptency

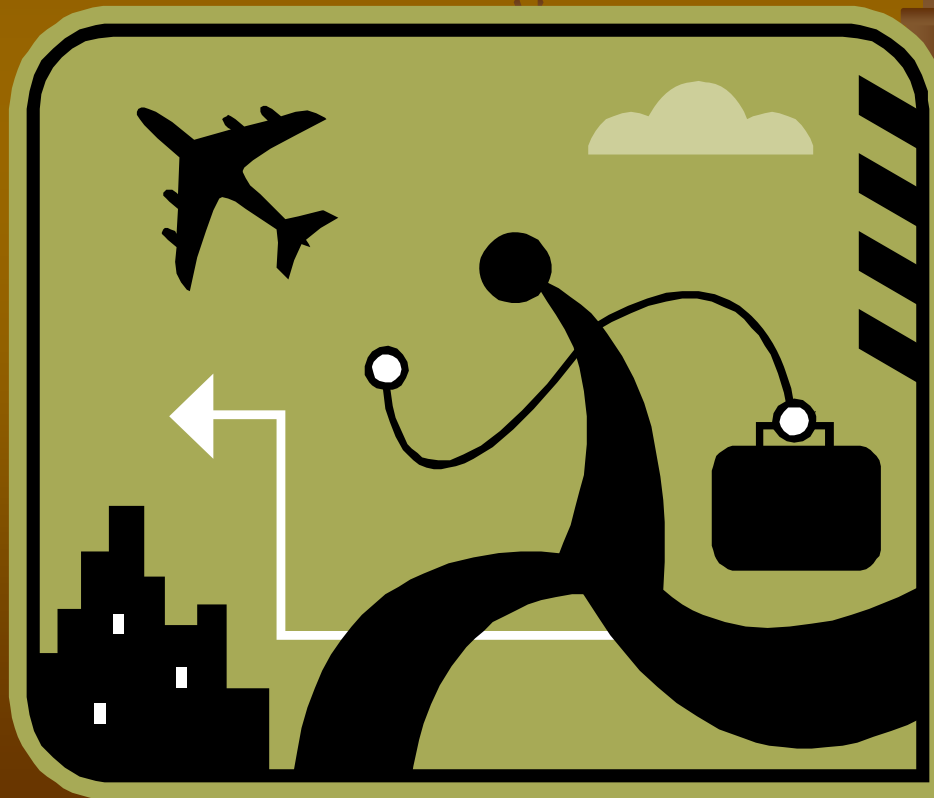


■ Guardianship Requisites

- The guardianship statute defines an incapacitated adult as a person who, because of physical or mental condition, is substantially unable to
 - provide food, clothing or shelter for himself or herself;
 - care for the individual's own physical health; or
 - manage the individual's own financial affairs.

Determinations of Incompetency

- Out of State Enforcement of Guardianships

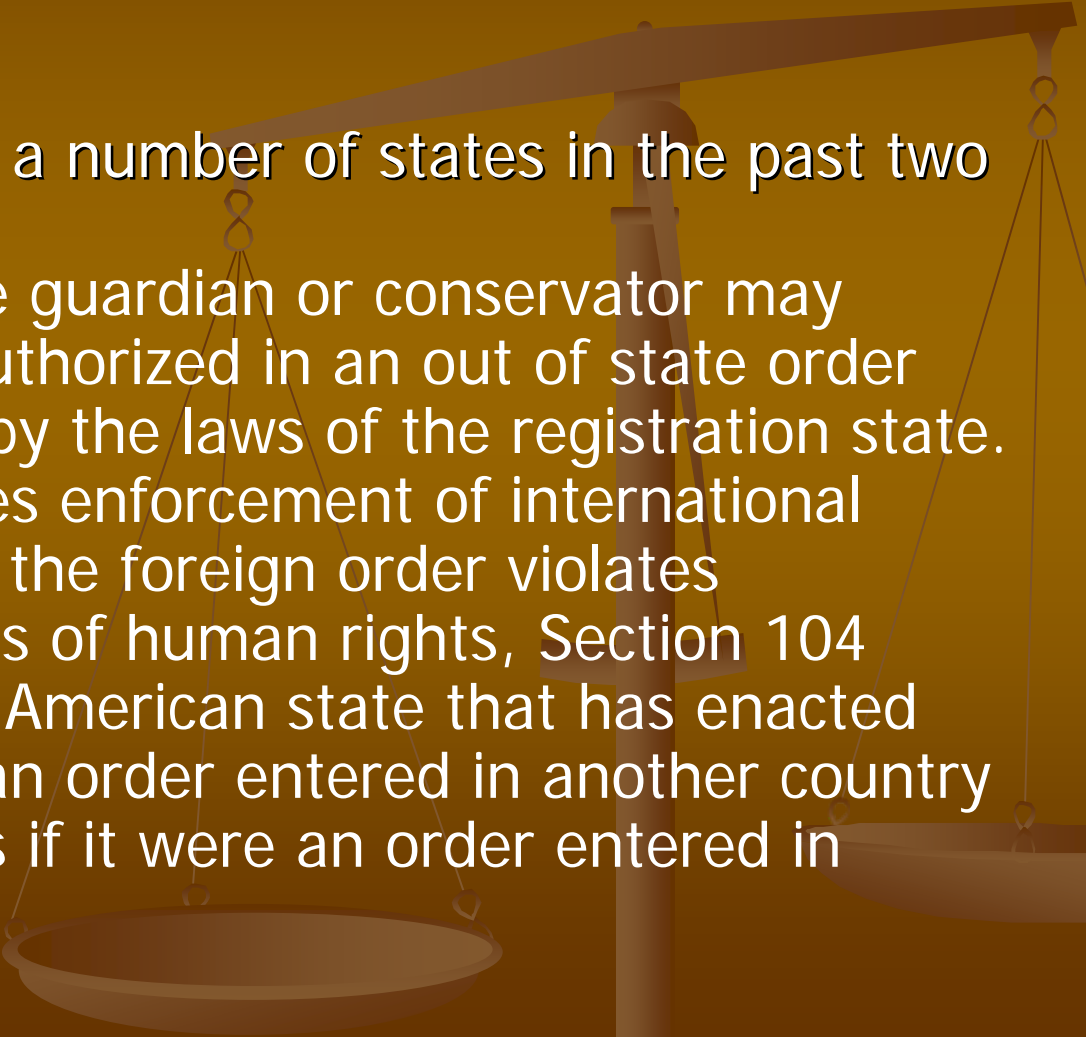


Full Faith and Credit

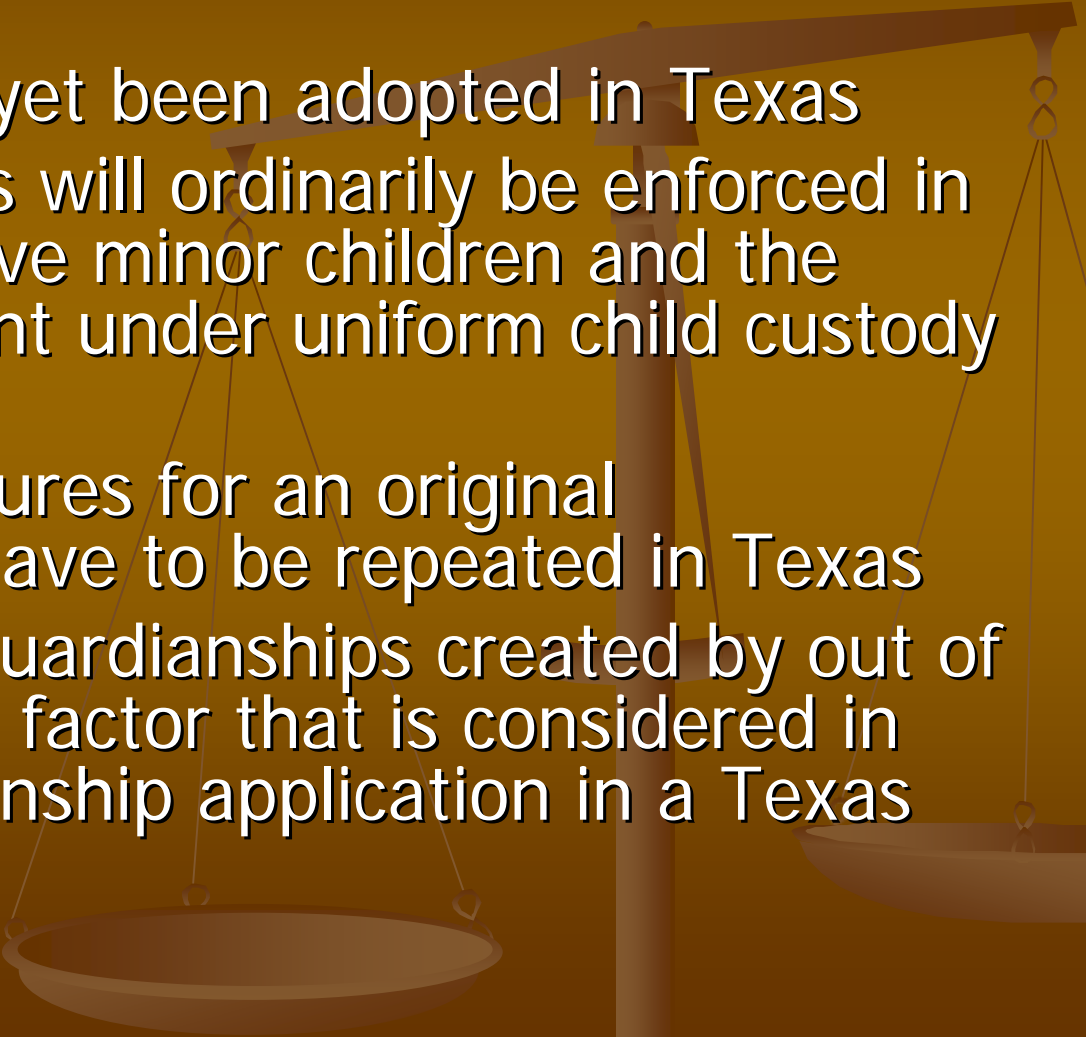


- Generally, the U.S. Constitution requires that court orders in one state be honored by the courts of another state
- Guardianships, however, are sometimes an exception to the full faith and credit doctrine. Sometimes, guardianship proceedings must be initiated in a second state because of the refusal of financial institutions, care facilities, and the courts to recognize a guardianship issued in another state.
- Under current law, courts in more than one state often have jurisdiction to appoint a guardian for a particular individual, some states have procedures for transferring an already existing guardianship from one state to another, and the authority of a guardian to act outside the state of appointment may be limited.
- An important issue because of increased mobility of families, support systems, caregivers, and assets

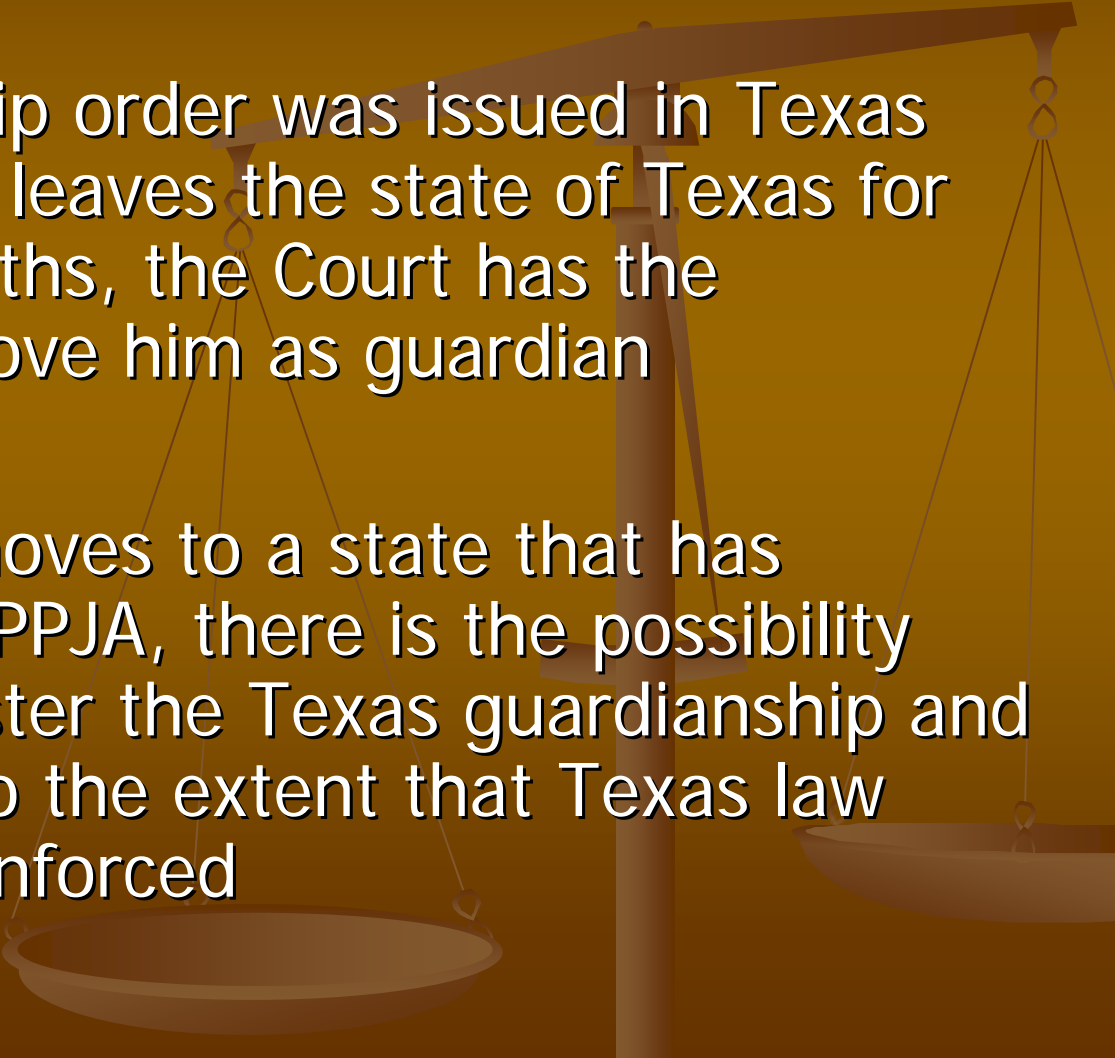
Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA)

- Has been adopted by a number of states in the past two years
 - Upon registration, the guardian or conservator may exercise all powers authorized in an out of state order except as prohibited by the laws of the registration state. The Act also addresses enforcement of international orders. To the extent the foreign order violates fundamental principles of human rights, Section 104 permits a court of an American state that has enacted the Act to recognize an order entered in another country to the same extent as if it were an order entered in another US state.
- 

So, what about Texas?

- UAGPPJA has not yet been adopted in Texas
 - Out of state orders will ordinarily be enforced in Texas if they involve minor children and the guardian is a parent under uniform child custody laws
 - Otherwise, procedures for an original appointment will have to be repeated in Texas
 - The existence of guardianships created by out of state courts is one factor that is considered in granting a guardianship application in a Texas court.
- 

What if a guardian leaves Texas?

- If the guardianship order was issued in Texas and the guardian leaves the state of Texas for more than 6 months, the Court has the discretion to remove him as guardian
 - If the guardian moves to a state that has adopted the UAGPPJA, there is the possibility that he may register the Texas guardianship and enforce it there to the extent that Texas law permits it to be enforced
- 

Determinations of Incompetency— Power of the Order

- A court may appoint a guardian with full authority over an incapacitated person or may grant a guardian limited authority over an incapacitated person as indicated by the incapacitated person's actual mental or physical limitations and only as necessary to promote and protect the well-being of the person.
- In creating a guardianship that gives a guardian limited power or authority over an incapacitated person, the court designs the guardianship to encourage the development or maintenance of maximum self-reliance and independence in the incapacitated person.

The Guardianship Order



- The guardianship order specifies powers and duties granted to the guardian and any limitations of those powers
 - A Guardian of the Person is appointed by the court to take care of the physical well-being of a ward
 - A Guardian of Estate is appointed to care for a ward's property.
 - Often both a guardian of person and a guardian of estate are appointed and this can be the same person.

Reasons We Question Capacity

- Paternalism
- Protection
- Accuracy



Protecting Capacity



■ Surrogates

- People with intellectual disabilities should be supported to make their choices and decisions, to communicate them and to have them respected.
- Goals:
 - Preservation of rights
 - Use of least restrictive method

Protecting Capacity

- Appropriate Language



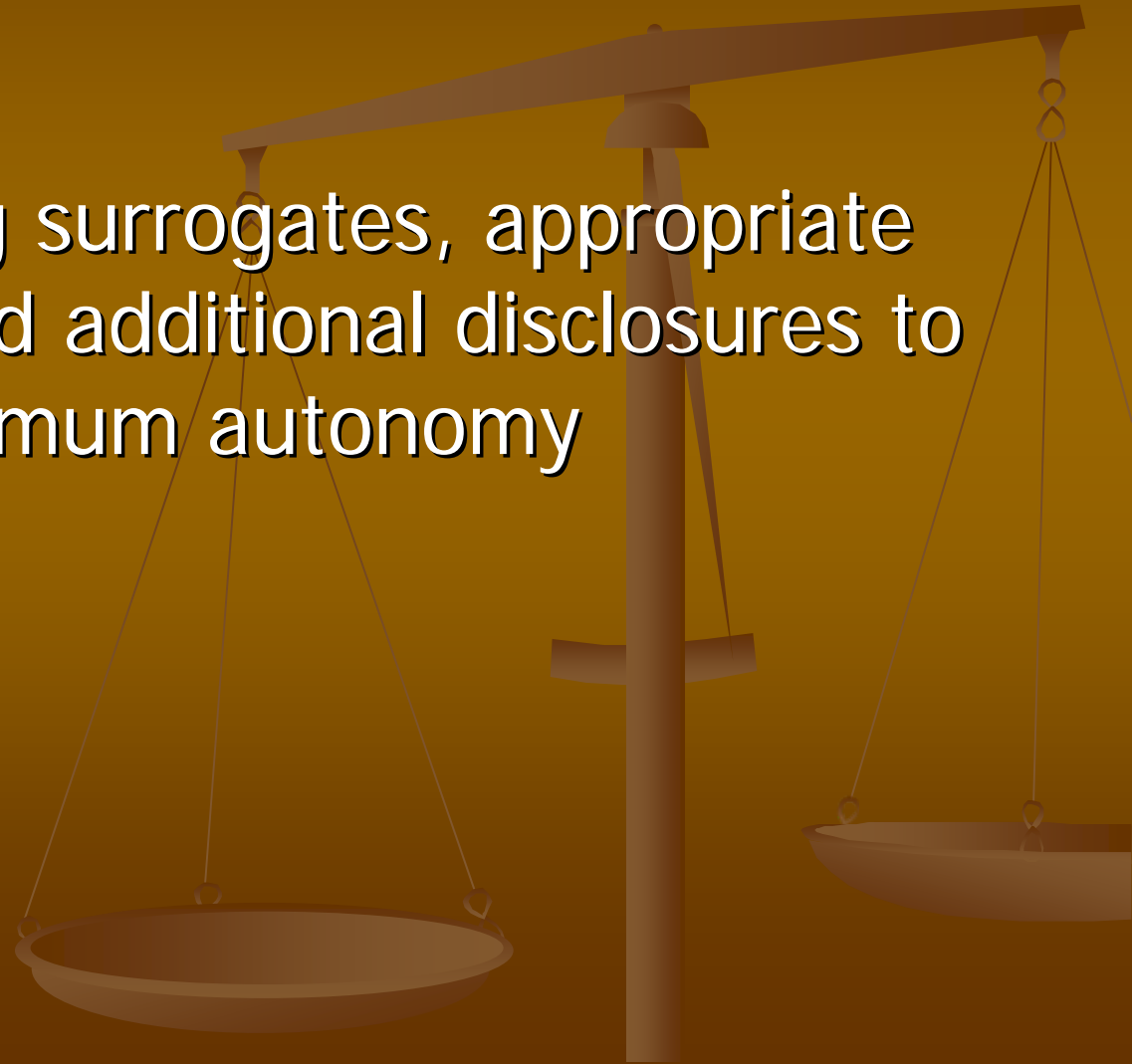
Protecting Capacity

- Additional Disclosures



Protecting Capacity

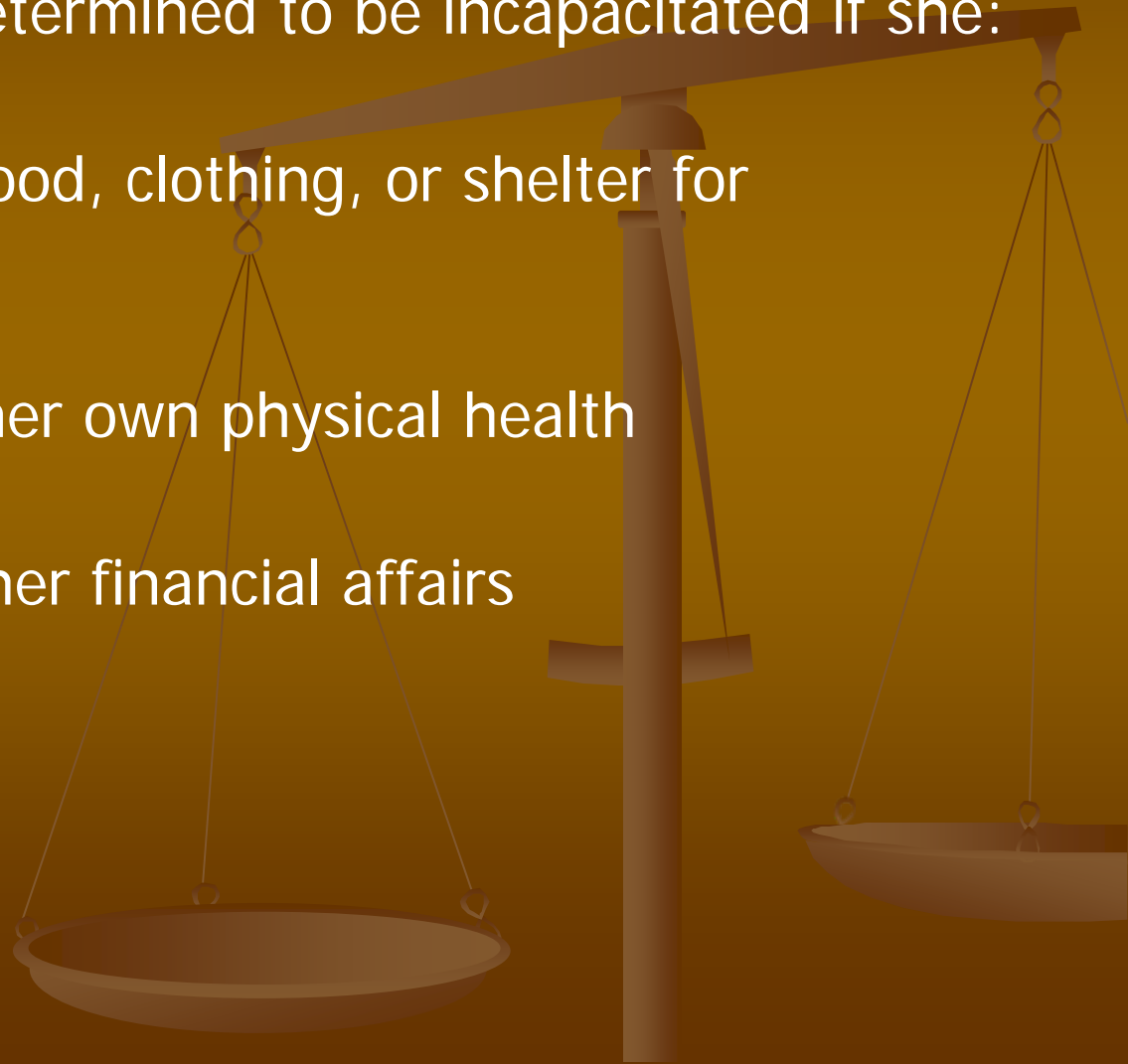
- Incorporating surrogates, appropriate language, and additional disclosures to achieve maximum autonomy



Question 1

An individual may be determined to be incapacitated if she:

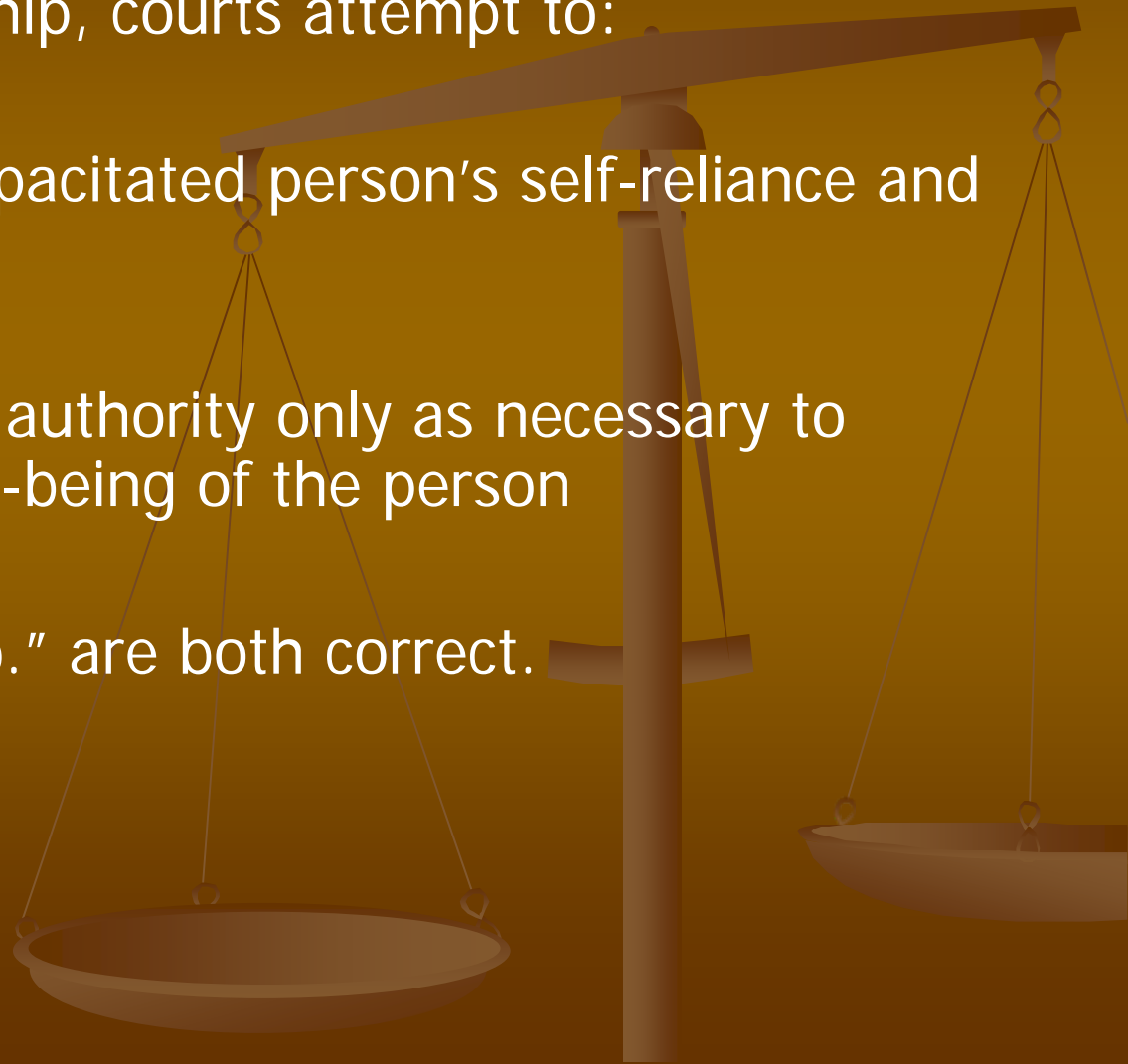
- a. cannot provide food, clothing, or shelter for herself
- b. cannot care for her own physical health
- c. cannot manage her financial affairs
- d. All of the Above



Question 2

In creating a guardianship, courts attempt to:

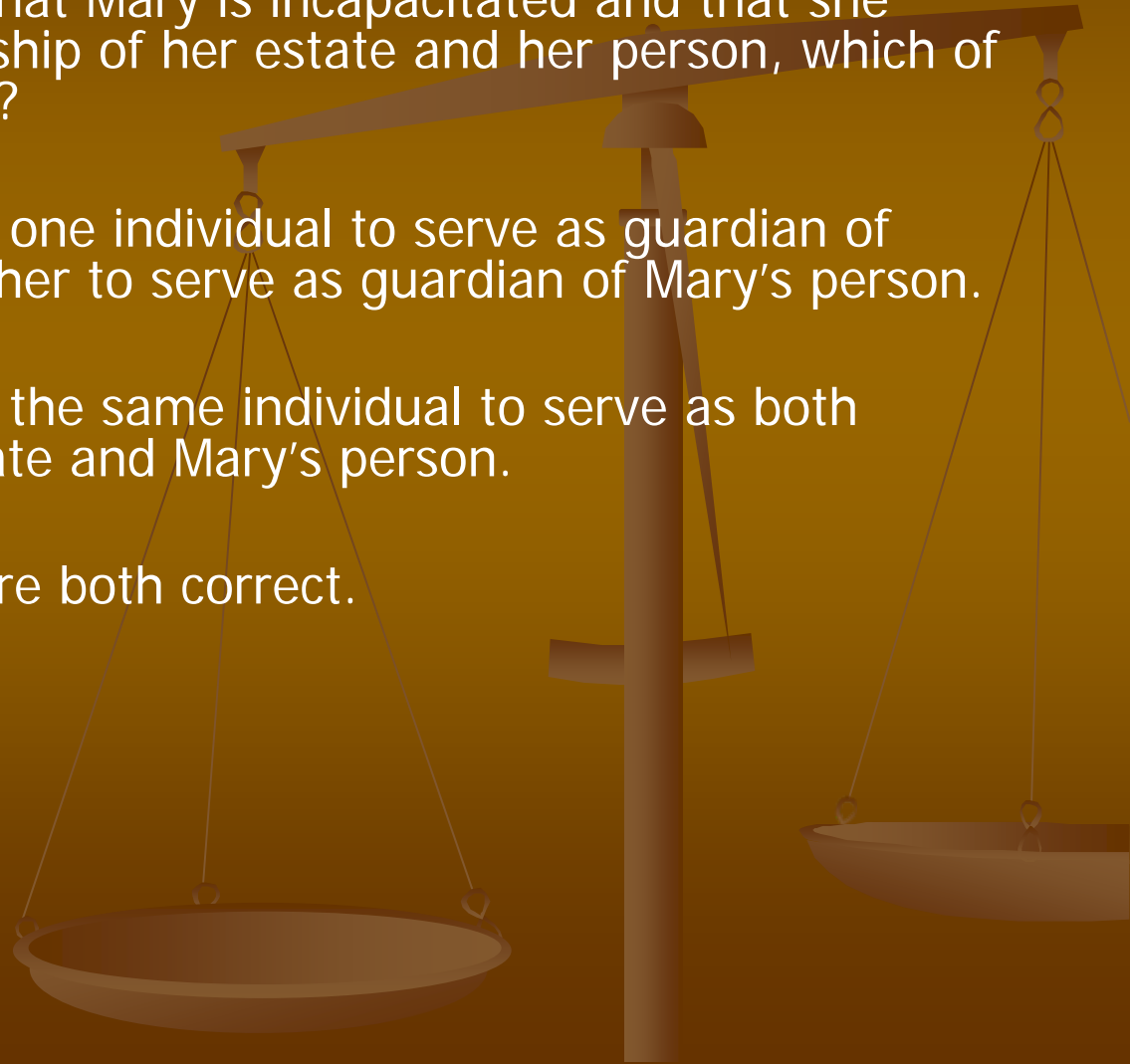
- a. take away the incapacitated person's self-reliance and independence
- b. grant the guardian authority only as necessary to promote the well-being of the person
- c. Options "a." and "b." are both correct.
- d. None of the above.



Question 3

If A court determines that Mary is incapacitated and that she needs both a guardianship of her estate and her person, which of the following is correct?

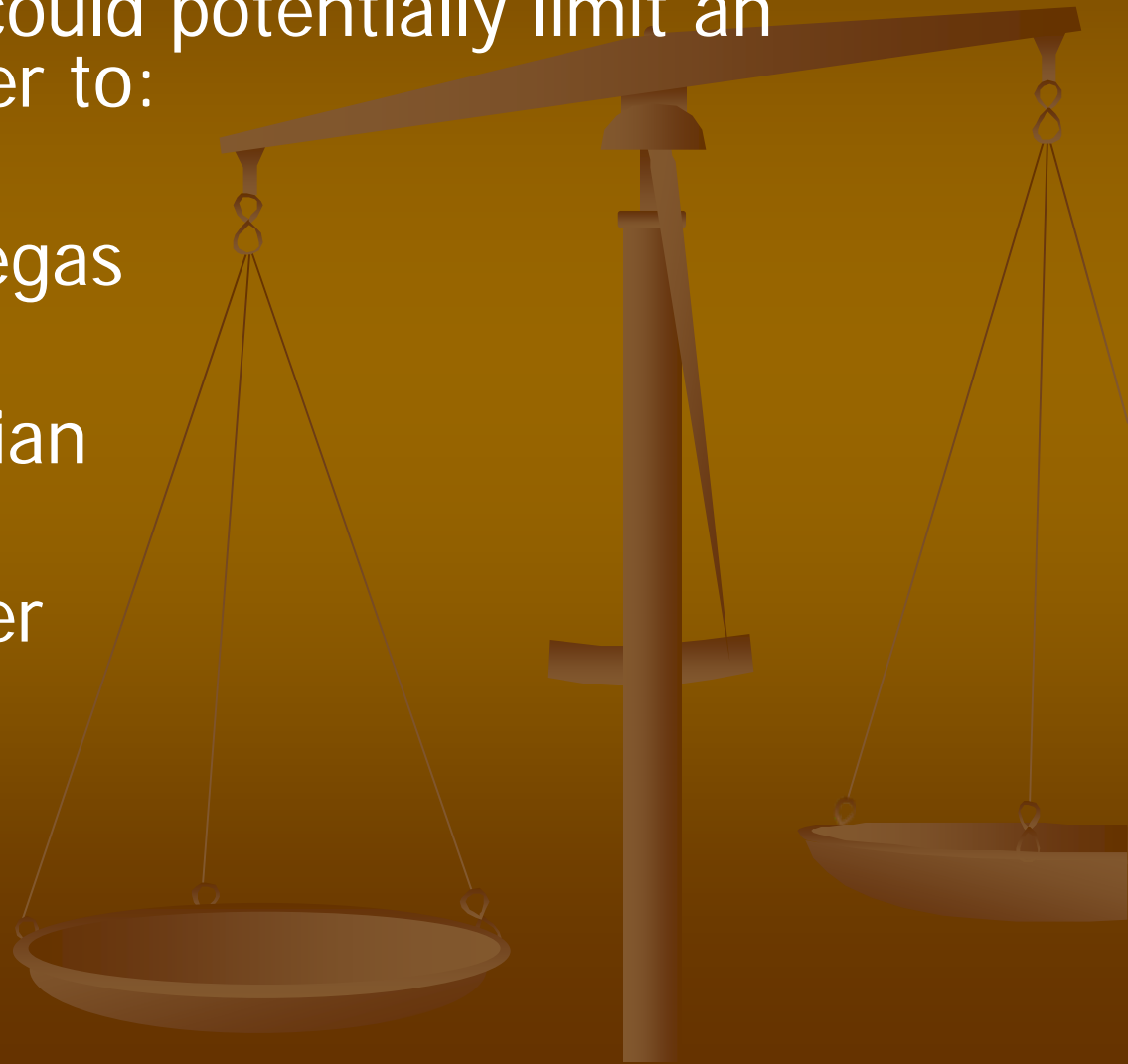
- a. The court may appoint one individual to serve as guardian of Mary's estate and another to serve as guardian of Mary's person.
- b. The court may appoint the same individual to serve as both guardian of Mary's estate and Mary's person.
- c. Options "a." and "b." are both correct.
- d. None of the above.



Question 4

A guardianship could potentially limit an individual's power to:

- a. Take a trip to Vegas
- b. Choose a physician
- c. Accept a job offer
- d. All of the above



Question 5

Let's assume: You are the parent of a son who has a disability, whether from birth or acquired as a result of a brain injury or serious illness. Your son functions at a mental age of approximately 7 years. As his parent you have always made the decisions necessary for him to receive services and treatment. Your son just celebrated his 18th birthday. Can you continue to make decisions regarding the services and treatment he receives?

- a. Yes, because the law automatically presumes that your son is incapacitated.
- b. Yes, if a court determines that your son is incapacitated.
- c. Yes, if a court determines that your son is incapacitated and appoints you to serve as his guardian with the power to make decisions regarding his medical care and residence.
- d. None of the above.