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Medical and Legal Implications of Impaired Financial Capacity in Aging and Dementia

Edmund W. Granski, Jr.* & Milap A. Nowrangi**

I. INTRODUCTION

American society is experiencing a significant demographic shift as individuals are living significantly longer lives than in previous generations. Today, there are an estimated 73 million baby boomers in the United States.¹ Each day, more than 10,000 attain the age of 65.² By 2034, older adults will outnumber children for the first time in US history.³ By 2050, the number of those older than 65 years is expected to grow more rapidly than any other age group.⁴ Since increasing age is the single most important risk factor for dementia (Alzheimer's Disease ("AD") in particular), the prevalence of AD and other dementias will also increase. The latest figures from the Alzheimer's Association indicate that there are an estimated 5.8 million Americans living with AD and that by 2050 an estimated 11-16 million Americans are expected to be diagnosed with AD.⁵

* Attorney at Law, Glen Rock, New Jersey.

** M.D., M.Be. Assistant Professor of Psychiatry and Behavioral Sciences, Johns Hopkins Medicine. The authors are grateful to Maya Taliaferro, a rising senior at Hamilton College, Clinton, New York, for her research assistance.

¹ Am. Counts Staff, *By 2030, All Baby Boomers Will Be Age 65 Or Older*, U.S. CENSUS BUREAU (Dec. 10, 2019), <https://www.census.gov/library/stories/2019/12/by-2030-all-baby-boomers-will-be-age-65-or-older.html> [<https://perma.cc/SAK2-9BLQ>].

² Russell Heimlich, *Baby Boomers Retire*, PEW RSCH. CTR. (Dec. 29, 2010), <https://www.pewresearch.org/fact-tank/2010/12/29/baby-boomers-retire> [<https://perma.cc/6AWA-S7LY>].

³ JONATHAN VESPA ET AL., U.S. CENSUS BUREAU, DEMOGRAPHIC TURNING POINTS FOR THE UNITED STATES: POPULATION PROJECTIONS FOR 2020 TO 2060 1 (rev. 2020), <https://www.census.gov/content/dam/Census/library/publications/2020/demo/p25-1144.pdf>.

⁴ U.N. DEP'T OF ECON. & SOC. AFFAIRS, WORLD POPULATION AGEING 2007, at 13-14, U.N. Doc. ST/ESA/SER.A/260, U.N. Sales No. E.07.XIII.5 (2007), <https://www.un.org/en/development/desa/population/publications/pdf/ageing/WorldPopulationAgeingReport2007.pdf>.

⁵ ALZHEIMER'S ASS'N, 2019 ALZHEIMER'S DISEASE FACTS AND FIGURES 17 (2019), <https://www.alz.org/media/documents/alzheimers-facts-and-figures-2019-r.pdf>; INT'L ASS'N CHIEFS OF POLICE, IACP'S ALZHEIMER'S INITIATIVES: SAFEGUARDING THE MATURING POPULATION, <https://www.theiacp.org/sites/default/files/all/i-j/IACP-Alzh-Brochure42514.pdf>.

II. COGNITIVE IMPAIRMENT AND AGING

AD and related dementias lay on a continuum of impairment defined by severity of cognitive symptoms and its effect on daily functional abilities. On one end, most older individuals experience the effects of “normal cognitive aging” characterized by mild cognitive changes to “fluid intelligence” (recall, learning, reasoning) and relatively preserved “crystallized intelligence” (knowledge from prior learning and past experiences) that increases with age.⁶

These changes do not affect an individual’s general ability to live independently and carry out daily activities. A transitional zone called Mild Cognitive Impairment (MCI) includes individuals with cognitive impairment that is apparent to the individual as well as others and may be detectable on cognitive testing.⁷ Such individuals are still able to carry out the majority of daily activities independently. Finally, individuals with dementia have severe cognitive impairment easily detectable on neuropsychological examination and to such an extent that independent living is difficult if at all possible.⁸ Likelihood of progression from normal to MCI to dementia is dependent on a myriad of factors that include non-modifiable risk factors such as family history, baseline intelligence, sex, and education, and modifiable risk factors such as cardiovascular lifestyle, smoking, and head injury.⁹ Diagnosis is based on the cumulative assessment of the history of cognitive decline, physical and cognitive examination (often including comprehensive neuropsychological testing), and laboratory and neuroimaging tests that are primarily used to rule out reversible causes. Early detection can often lead to reversal (where a specific cause is identified) or delay of progression which generally leads to more positive outcomes.¹⁰

As both cognitively normal older individuals and those with dementia continue to age they will not only experience diminished cognitive

⁶ CAROLINE N. HARADA ET AL., NORMAL COGNITIVE AGING, NAT’L INST. OF HEALTH PUB. ACCESS 2-3 (Nov. 1, 2014) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4015335/pdf/nihms569964.pdf>.

⁷ *Mild Cognitive Impairment*, MAYO CLINIC, <https://www.mayoclinic.org/diseases-conditions/mild-cognitive-impairment/symptoms-causes/syc-20354578> [<https://perma.cc/H8PY-FB24>].

⁸ Katya Rascovsky, *A Primer in Neuropsychological Assessment for Dementia*, PRAC. NEUROLOGY, July-Aug. 2016, at 20, 20-21, <https://practicalneurology.com/articles/2016-july-aug/a-primer-in-neuropsychological-assessment-for-dementia/pdf>; *Staying Independent with Dementia*, NAT’L HEALTH SERV., <https://www.nhs.uk/conditions/dementia/staying-independent-with-dementia> [<https://perma.cc/V2LN-LH6N>].

⁹ ALZHEIMER SOC’Y OF CAN., RISK FACTORS (2018), <https://alzheimermontreal.ca/wp-content/uploads/2018/12/Risk-factors.pdf>.

¹⁰ NINA SILVERBERG ET AL., ASSESSMENT OF COGNITION IN EARLY DEMENTIA, NAT’L INST. OF HEALTH PUB. ACCESS 2 (Apr. 2, 2013), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3613863/pdf/nihms294637.pdf>.

functions but also impairment in daily functional abilities that ultimately lead to loss of independence. One function that often becomes impaired early is financial capacity (FC). FC is defined as an “ability to independently manage one’s financial affairs in a manner consistent with personal self-interest.”¹¹ FC encompasses conceptual, pragmatic, and judgment abilities ranging from *basic skills* such as counting coins and prioritizing bills to more *complex skills* such as exercising financial conceptual knowledge and investment decision-making. FC diminishes during the course of normal cognitive aging and more precipitously during the development of progressive neurodegenerative conditions such as AD.¹² Individuals with milder forms of cognitive impairment such as MCI may have limitations in either complex or basic skills. As a complex neurocognitive function, FC has been related to brain regions (angular gyrus, temporal fusiform cortex) specific to numerical calculation, learning and memory, and visuoperception using resting-state functional connectivity analysis.¹³

III. FINANCIAL CAPACITY AND THE LEGAL PROTECTION OF OLDER ADULTS

Older individuals become at risk for financial exploitation (scams, theft, abuse of trust, etc.), loss of autonomy, dignity, and other negative physical and mental outcomes as their cognitive and functional capacities decline.¹⁴ As such, individuals with diminished FC account for an estimated 30% of all elder abuse reports.¹⁵ In 2010, victims of financial

¹¹ Daniel C. Marson & Katina R. Hebert, *Financial Capacity*, in *ENCYCLOPEDIA OF PSYCHOLOGY & THE LAW* 313-16 (Brian L. Cutler ed., 2008).

¹² See Eric Widera et al., *Finances in the Older Patient with Cognitive Impairment: “He Didn’t Want Me to Take Over”*, 305 *JAMA*, Feb. 16, 2011, at 698, 699-700.

¹³ Milap Nowrangi et al., *Poster - Resting State Functional Connectivity Associated with Financial Capacity in Mild Cognitive Impairment*, *ALZHEIMER’S ASS’N INT’L CONF.*, <https://alz.confex.com/alz/20amsterdam/meetingapp.cgi/Paper/45635> [<https://perma.cc/3WYP-CRYF>].

¹⁴ Ron Acierno et al., *The National Elder Mistreatment Study: An 8-year Longitudinal Study of Outcomes*, 29 *J. ELDER ABUSE & NEGLECT* 254, 254-55 (2017); JACLYN S. WONG & LINDA J. WAITE, *ELDER MISTREATMENT PREDICTS LATER PHYSICAL AND PSYCHOLOGICAL HEALTH: RESULTS FROM A NATIONAL LONGITUDINAL STUDY, HEALTH AND HUMAN SERVS. PUB. ACCESS* 4 (Feb. 23, 2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5322798/pdf/nihms847130.pdf>.

¹⁵ NAT’L CTR. ON ELDER ABUSE & WESTAT INC., *THE NATIONAL ELDER ABUSE INCIDENCE STUDY* p. 4-15 tbl.4-7 (Sept. 1998), https://acl.gov/sites/default/files/programs/2016-09/ABuseReport_Full.pdf; Alzheimer’s Ass’n, *2012 Alzheimer’s Disease Facts and Figures*, 8 *J. ALZHEIMER’S ASS’N* 131 (2012); Josep Garre-Olmo et al., *Prevalence and Risk Factors of Suspected Elder Abuse Subtypes in People Aged 75 and Older*, 57 *J. AM. GERIATRICS SOC’Y* 815 (2009); Mark S. Lacks et al., *Risk Factors for Reported Elder Abuse And Neglect: A Nine-Year Observational Cohort Study*, 37 *GERONTOLOGIST* 469 (1997).

elder abuse lost an estimated \$2.9 billion, including claimed loss of money and goods to legitimate businesses, scams, and family and friends, and indirect losses through medical insurance fraud.¹⁶ Moreover, the inability to manage finances is one of the strongest predictors of caregiver burden.¹⁷

There is a dynamic relationship between medical and legal practice in relation to financial capacity and cognitive impairment. In typical situations, attorneys are asked to intervene in problematic situations where an individual's capacity to handle their finances is called into question such as financial victimization, family conflict, certification of incapacity, or other specific legal capacities. On the other hand, evaluations of cognitive function using neuropsychological testing allow medical professionals (physicians, psychologists, social workers, etc.) the ability to detect and characterize suspected cognitive impairment before related legal issues arise if, in fact, they arise at all. Additionally, there are several instruments available that can directly assess impaired FC and the best known and validated is the Financial Capacity Instrument (FCI).¹⁸ Such clinical resources enable families and clinicians to objectively characterize current cognitive functions and predict future decline and is an integral part of establishing a diagnosis of dementia.

For families that have effective fiduciary, company, and related governance and decision-making systems, these tools can help family members make informed decisions about the roles elder members of a family can assume within the family system so that the family, as a whole, remains highly functional in terms of day-to-day as well as more complex decision-making.

Attorneys regularly turn to powers of attorney and other voluntary agency relationships to respond to the potential that an individual may develop some form of diminished capacity. Attorneys are well-versed in the issue of capacity as it relates to an individual's ability to execute a will, enter into a contract, or make a gift. They also are well-versed in the emotionally difficult process of having a family member become subject to a guardianship or conservatorship proceeding. Thus, for attor-

¹⁶ NAT'L COMM. FOR THE PREVENTION OF ELDER ABUSE ET AL., *THE METLIFE STUDY OF ELDER FINANCIAL ABUSE: CRIMES OF OCCASION, DESPERATION, AND PREDATION AGAINST AMERICA'S ELDERS*, METLIFE MATURE MKT. INST. 7-8 (2011), <https://ltcombudsman.org/uploads/files/issues/mmi-elder-financial-abuse.pdf>.

¹⁷ JILL RAZANI ET AL., *PREDICTING CAREGIVER BURDEN FROM DAILY FUNCTIONAL ABILITIES OF PATIENTS WITH MILD DEMENTIA*, NAT'L INST. OF HEALTH PUB. ACCESS 6-7 (Apr. 4, 2008), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2288619/pdf/nihms42435.pdf>.

¹⁸ Daniel C. Marson et al., *Assessing Financial Capacity in Patients with Alzheimer Disease: A Conceptual Model and Prototype Instrument*, 57 ARCH. NEUROL. 877, 878 (2000).

neys, the issue of diminished capacity often arises in the context of a specific transaction, solving a situation where an individual is subject to actual or potential financial harm, planning to avoid such a situation, or where an actual conflict arises.¹⁹ Attorneys tend to take a binary approach in assessing transactions, focusing on whether an individual has or doesn't have capacity in a given situation. Clinicians, on the other hand, strive to parse medical, psychological, social, personal, and family variables in order to appreciate the nuances and scope of lost FC and other abilities. Often, there is no bright line, allowing for situations in which an elderly individual may lack elements of financial capacity yet determine that the individual is sufficiently functioning well enough not to be considered demented. Other times, the clinician may judge an individual's abilities to be impaired to such an extent that additional guidance is offered or in cases of abuse or neglect that referral to social services agencies are made.

Current medical practice can allow families to use assessment tools outside of situations where there is financial risk or a conflict to positively enhance family decision-making capability. Often, individuals become concerned about their cognitive capacities even when they are functioning well and seek an evaluation to establish a baseline. Due to the array of functions within the definition of financial capacity, with appropriate advance detection and assessment, as family members age, they can continue to play important, dynamic roles in the decision-making and governance of their family's business, charitable, and trustee and related fiduciary activities while compensating for financial incapacities that develop over time.

IV. THE ROLE OF THE ELDER IN FAMILY FINANCIAL DECISION-MAKING

Not all cognitive functions deteriorate with age. In fact, certain functions may increase. In addition to preserved "crystallized intelligence," several lines of research have shown that an individual's wisdom may increase and play an important role in compensating for other di-

¹⁹ The American Bar Association's Model Rules of Professional Conduct (MRPC), suggests that a lawyer has a duty to make informal capacity judgments in certain situations. Paragraph (b) of MRPC 1.14 provides as follows:

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

MODEL RULES OF PRO. CONDUCT r. 1.14(b) (AM. BAR ASS'N 2020).

minished cognitive abilities.²⁰ Wisdom has been defined as the holistic integration of certain cognitive and psychological components: knowledge of life, prosocial values, self-understanding and acknowledgement of uncertainty.²¹ While the weighting of these subcomponents varies by individual, it appears that they remain essential to effectively finding pragmatic, creative, appropriate and emotionally satisfying solutions to complicated human problems.²² Despite the general pattern of cognitive decline in older adults, some studies indicate that wisdom (or its components) has a neurobiological basis and tends to increase with aging.²³ Reshaping of neural network architecture underlying complex cognition during the aging process may be a mechanism responsible for the expression of wisdom as an individual ages.²⁴ Wisdom from older family members may then play a key role in family dynamics, allowing the elder to assume a dignified role as advisor and sage as is understood in many cultures. Having a basis for understanding the contributions older family members may provide, even those with forms and degrees of financial incapacity, can help families and their advisors define roles elders play in financial decision-making and, more generally, in family governance.

V. CONCLUSION

Families and their advisors are encouraged to take advantage of current medical science pertaining to the ways an elder individual's financial capacity can change over time as well as the role of medical professionals and the tools that are available for detection and diagnosis of related cognitive decline. Opportunities are available to educate families and provide them with alternatives to appropriately define an elder family member's role instead of waiting until issues of financial incapacity disrupt the family's decision-making system, create conflict within the family, and possibly require legal intervention of some kind. Effective advice should attempt to preserve the integrity of the family's collective decision-making while recognizing the importance of honoring the dignity of the elder's role and continued contributions to the family and the greater community of which he or she is an integral part.

²⁰ Dilip V. Jeste & Ellen E. Lee, *The Emerging Empirical Science of Wisdom: Definition, Measurement, Neurobiology, Longevity, And Interventions*, 27 HARV. REV. PSYCHIATRY 127, 133 (2019), https://journals.lww.com/hrpjournal/fulltext/2019/05000/The_Emerging_Empirical_Science_of_Wisdom_1.aspx [<https://perma.cc/JC7S-KSKB>].

²¹ *Id.* at 129-30.

²² MARC PRENSKY, BRAIN GAIN: TECHNOLOGY AND THE QUEST FOR DIGITAL WISDOM 46 (2013), https://marcprensky.com/wp-content/uploads/2013/04/Prensky-BRAIN_GAIN-Chapter2.pdf.

²³ Jeste & Lee, *supra* note 20, at 132.

²⁴ *Id.* at 135-36.