

Elder Law and Serving Clients With Diminished Capacity

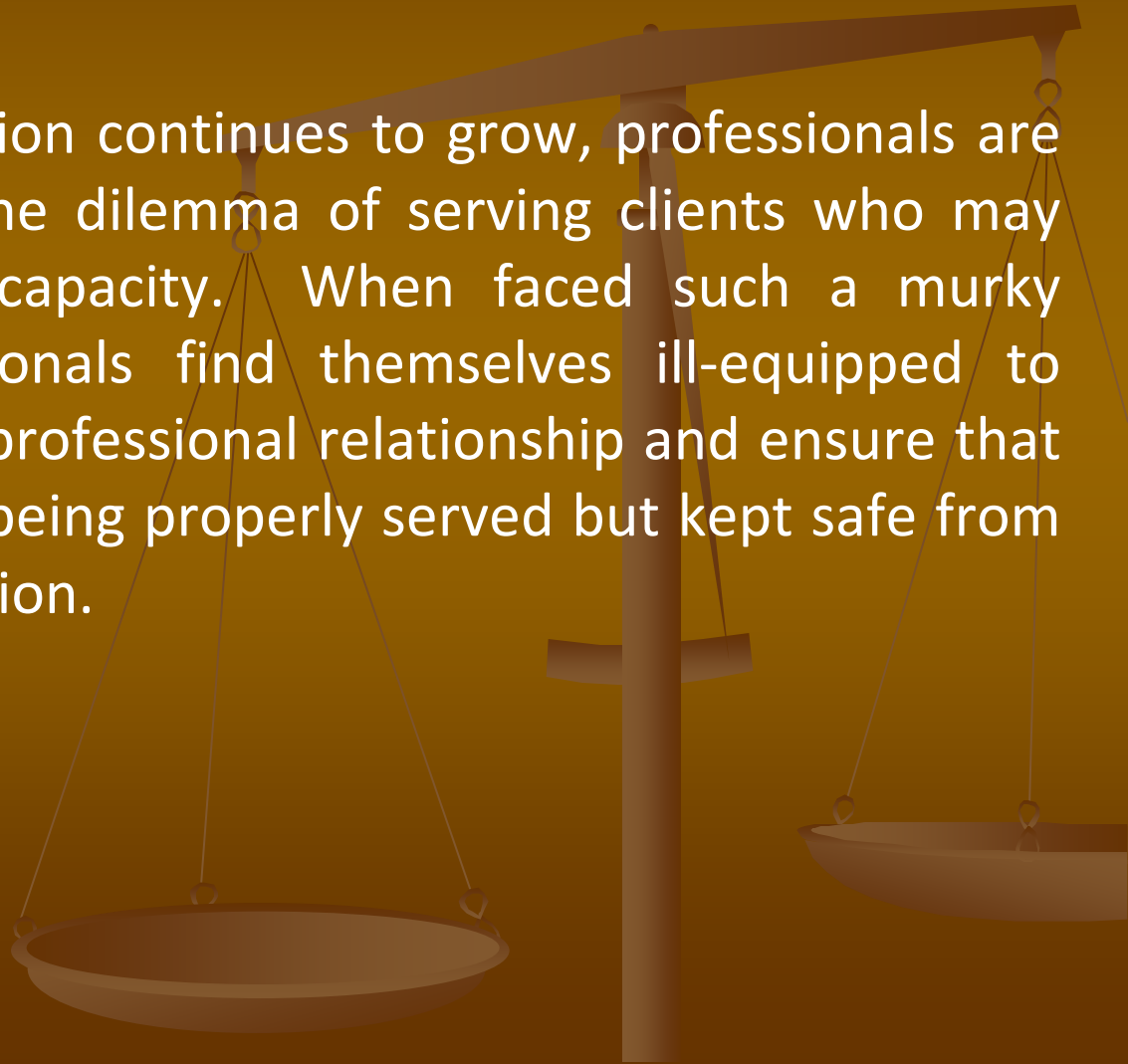


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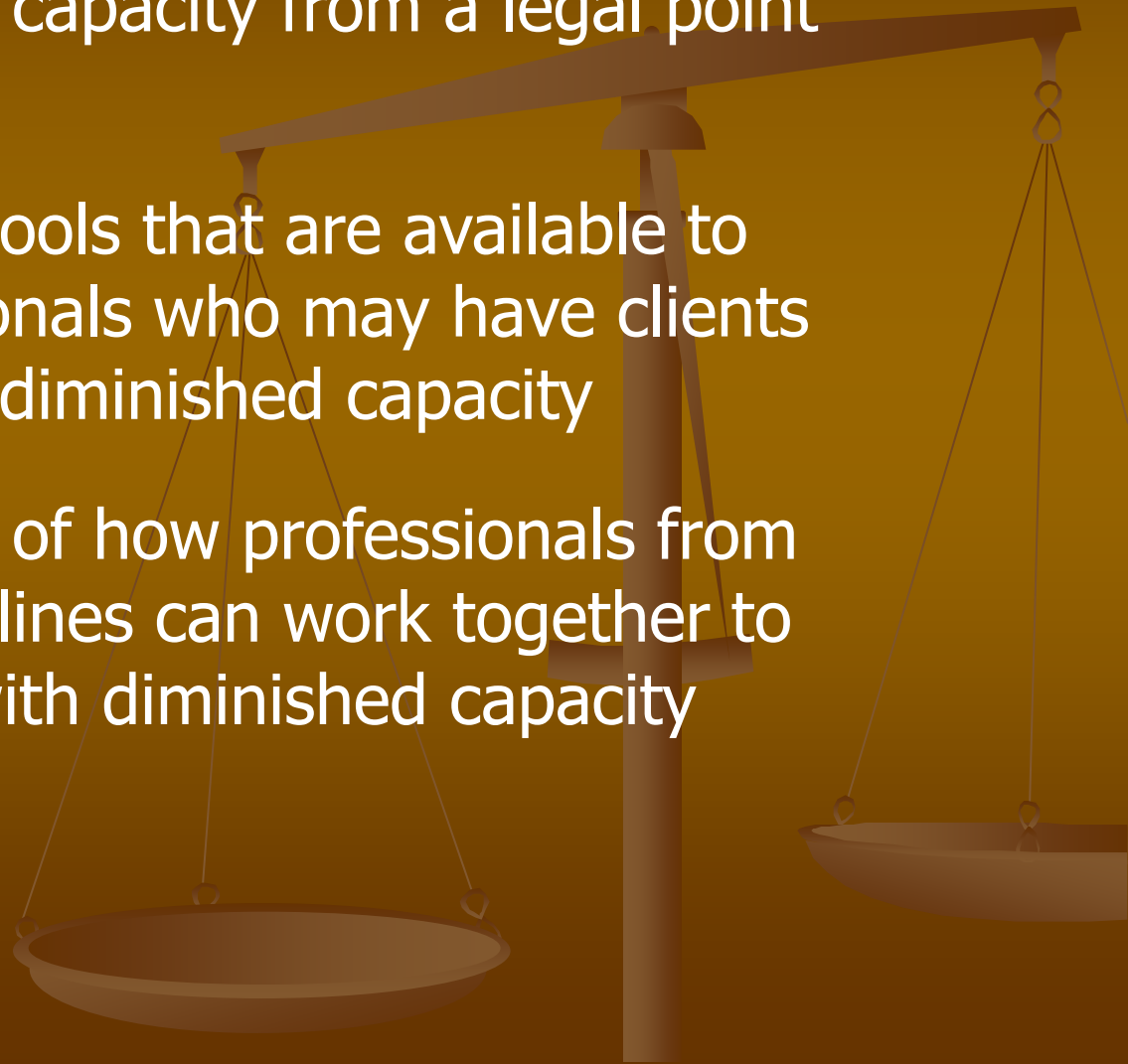
Overview

As society's aging population continues to grow, professionals are increasingly faced with the dilemma of serving clients who may suffer from diminished capacity. When faced such a murky situation, many professionals find themselves ill-equipped to maintain a normal client-professional relationship and ensure that their clients are not only being properly served but kept safe from possible harm or exploitation.



Course Learning Objectives

- Understanding capacity from a legal point of view
- Awareness of tools that are available to assist professionals who may have clients suffering from diminished capacity
- Understanding of how professionals from different disciplines can work together to assist clients with diminished capacity

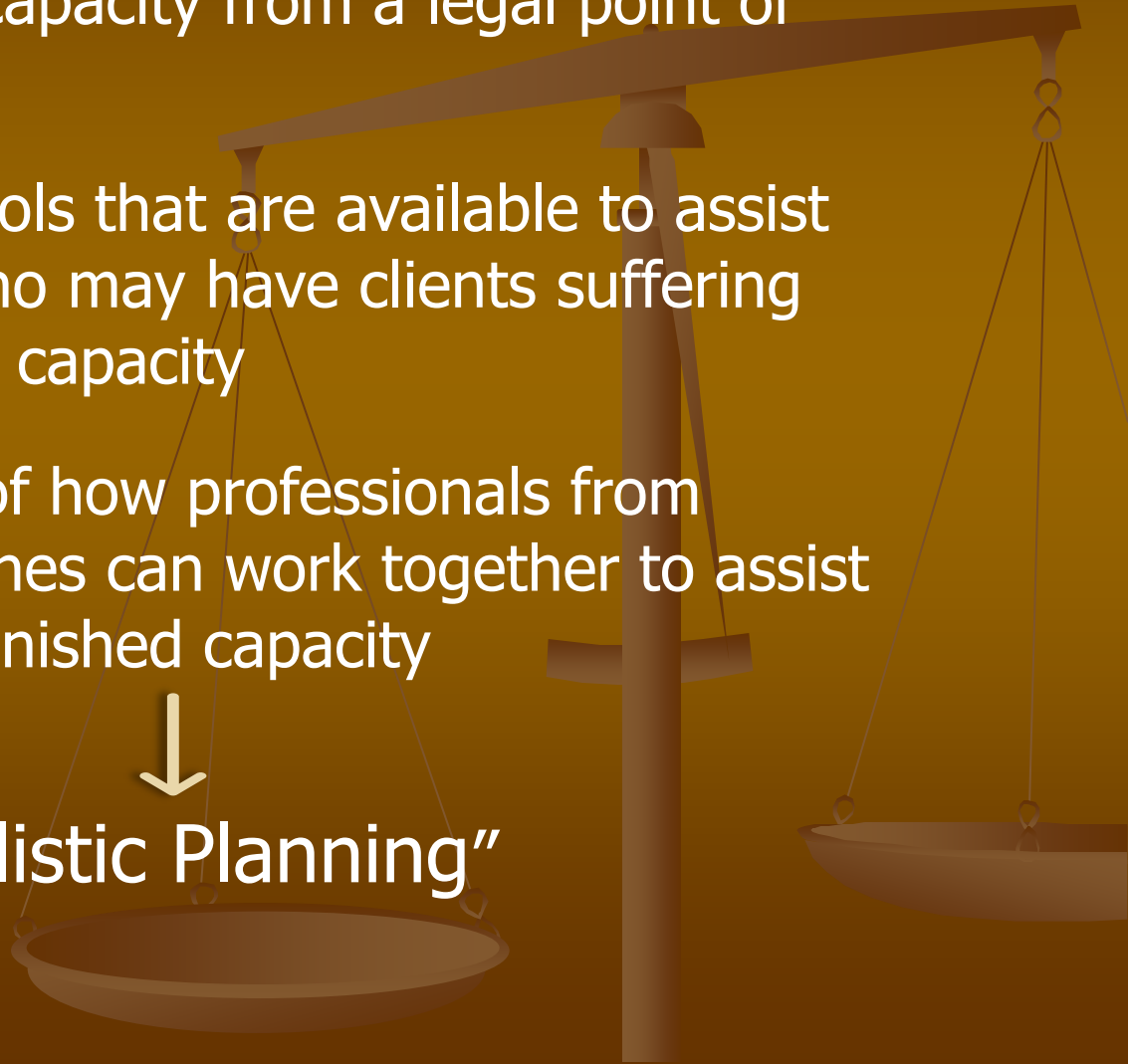


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“Holistic Planning”



National Academy of Elder Law Attorney's Vision Statement

“We envision a day when all older adults, people with disabilities, and their families have the legal, health, social, and financial care they need to live their best lives.”

(Source: <https://www.naela.org/Web/Web/Who-We-Are-Template.aspx?hkey=feb0efd3-bd62-4508-9ca4-20de373d4784>)



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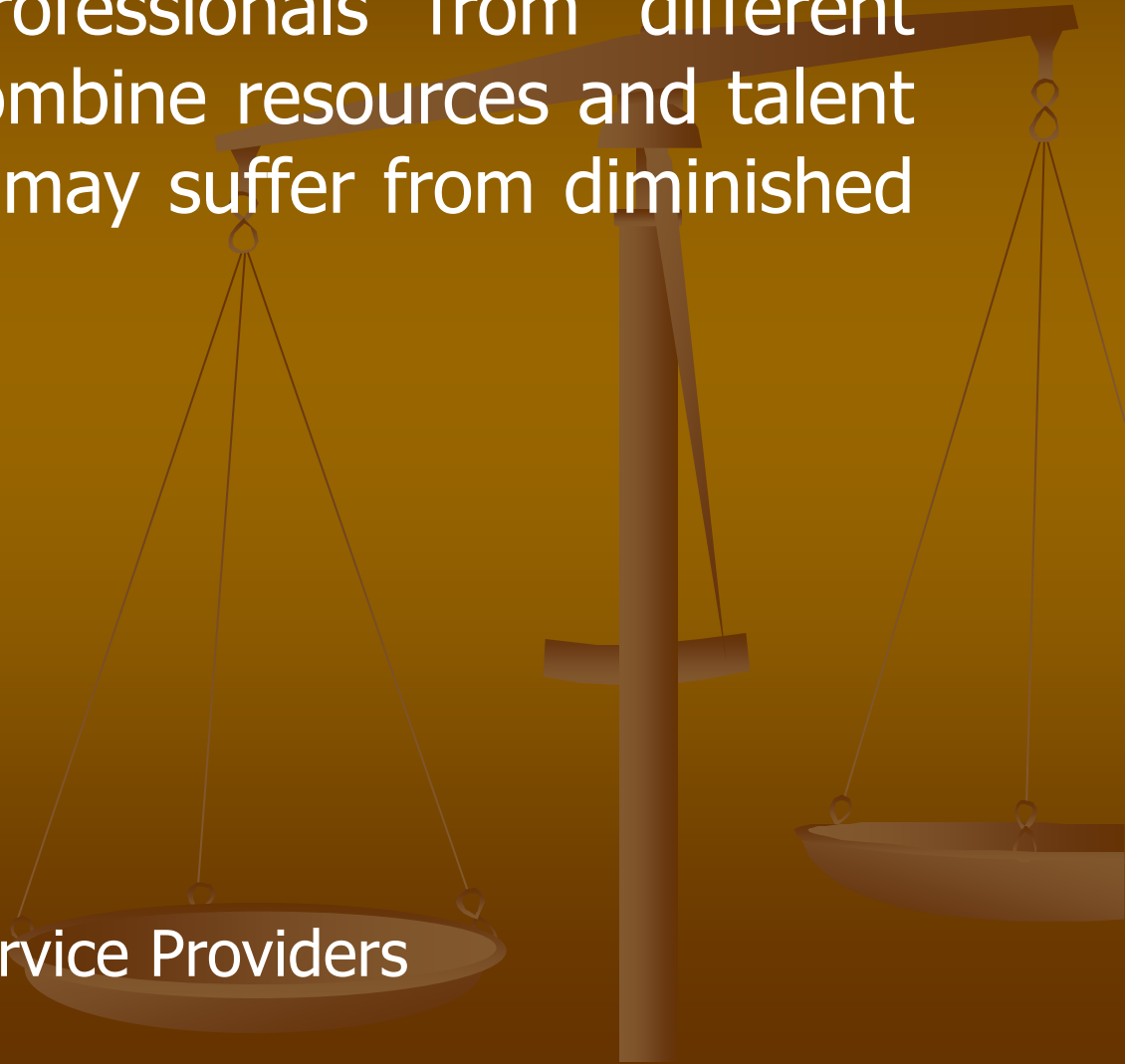


Holistic service to clients and families

“Holistic Service Framework”

A look at how professionals from different service areas can combine resources and talent to assist those who may suffer from diminished capacity.

- CPA's
- Attorneys
- Medical Professionals
- Financial Advisors
- Community-Based Service Providers



How CPA's may be impacted by clients suffering from diminished capacity...

- Purchase of complicated financial products
- Misuse of 401k's, IRA's and other retirement accounts
- Reverse Mortgages
- *Gifts to Third Parties



Definition of Diminished Capacity

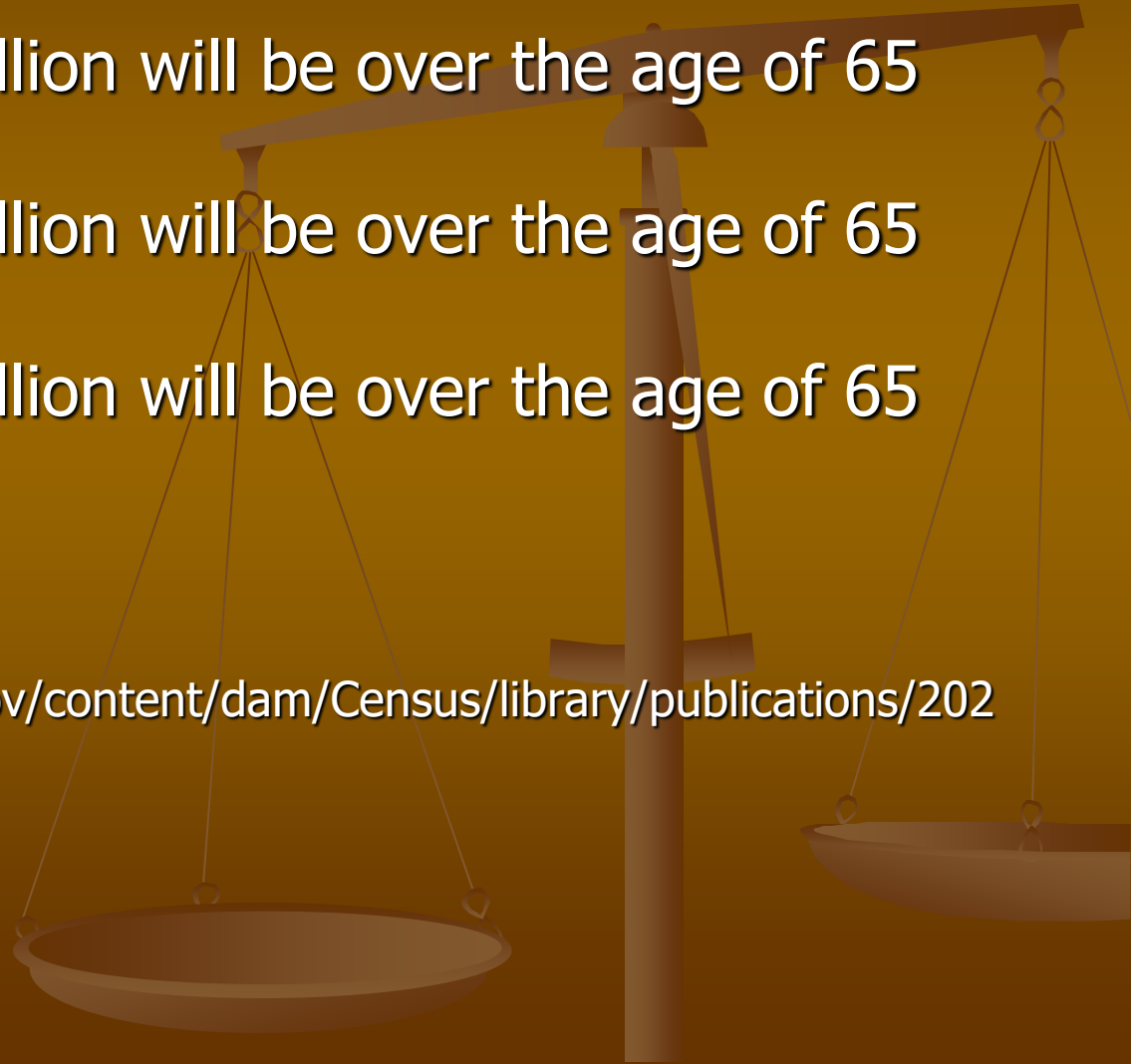
“Diminished financial capacity” is a term used to describe a decline in a person’s ability to manage money and financial assets to serve his or her best interests, including the inability to understand the consequences of investment decisions.


(Source: <https://www.consumerfinance.gov/consumer-tools/educator-tools/resources-for-older-adults/financial-security-as-you-age/planning-for-diminished-capacity-and-illness/>)

America is an aging society...

- By 2030 → 73.1 million will be over the age of 65
- By 2040 → 80.8 million will be over the age of 65
- By 2050 → 85.7 million will be over the age of 65

(Source:<https://www.census.gov/content/dam/Census/library/publications/2020/demo/p25-1144.pdf>)





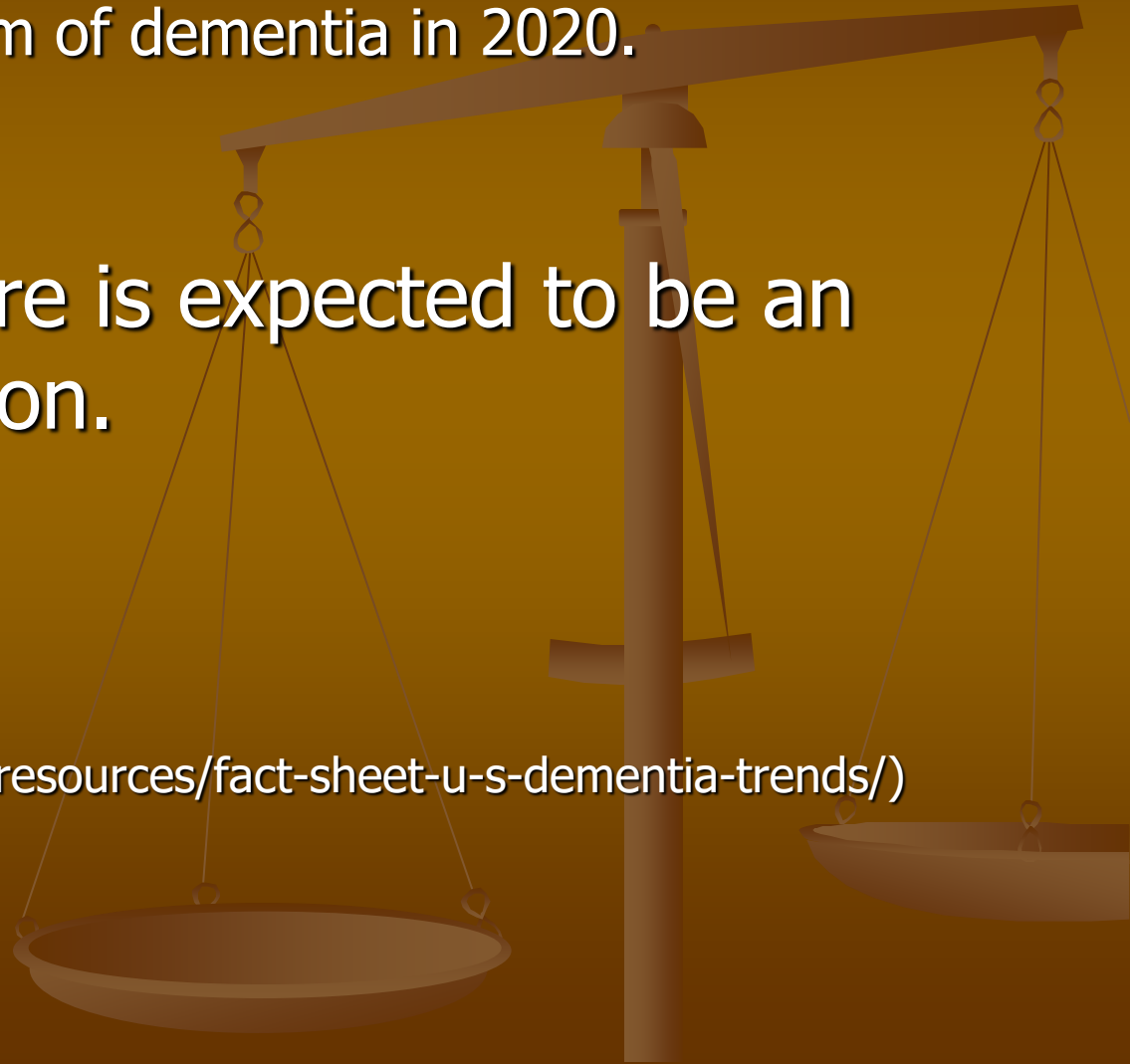
An estimated 7 million Americans, age 65 and older, suffered from some form of dementia in 2020.

(Source: <https://www.prb.org/resources/fact-sheet-u-s-dementia-trends//>)

An estimated 7 million Americans, age 65 and older, suffered from some form of dementia in 2020.

By 2040, this figure is expected to be an estimated 12 million.

(Source: <https://www.prb.org/resources/fact-sheet-u-s-dementia-trends/>)



Causes of Diminished Capacity

From a legal perspective, diminished capacity requires that some type of medical condition exists impacting a person's ability to make reasonable and sound decisions.

Types of Medical Conditions:

- "Dementia" → Alzheimer's, Memory Loss, UTI's
- Mental Illness
- Alcoholism and Illicit Drug Use

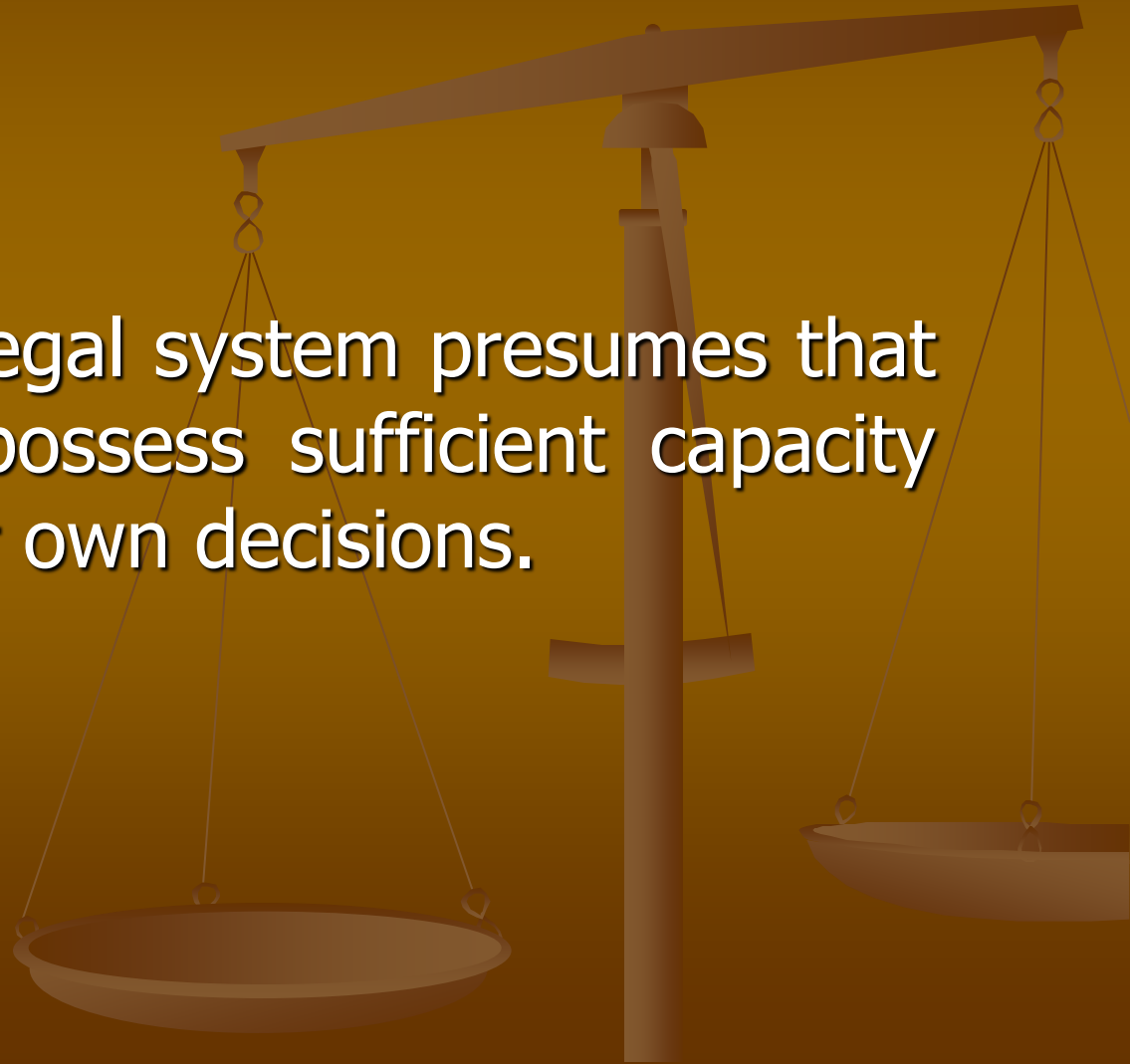
Warning Signs of Diminished Capacity

- Clients not showing up for appointments
- Clients exhibiting signs of confusion or difficulty communicating wishes
- Clients making bad financial/investment decisions
- Clients with “new friends”



Diminished Capacity and Decision-Making

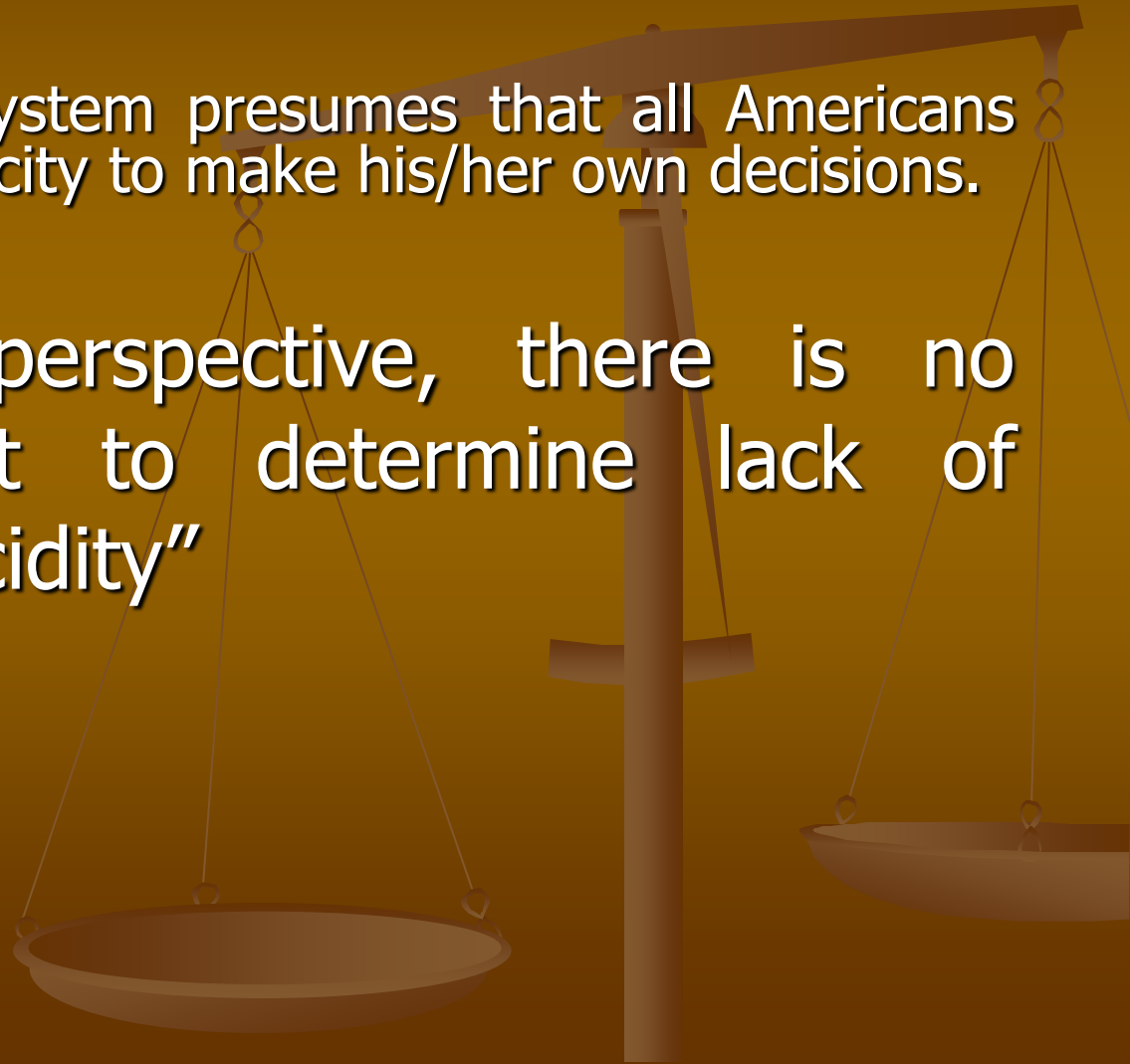
The American legal system presumes that all Americans possess sufficient capacity to make his/her own decisions.



Diminished Capacity and Decision-Making

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From a legal perspective, there is no “bright-line” test to determine lack of capacity. → “Lucidity”

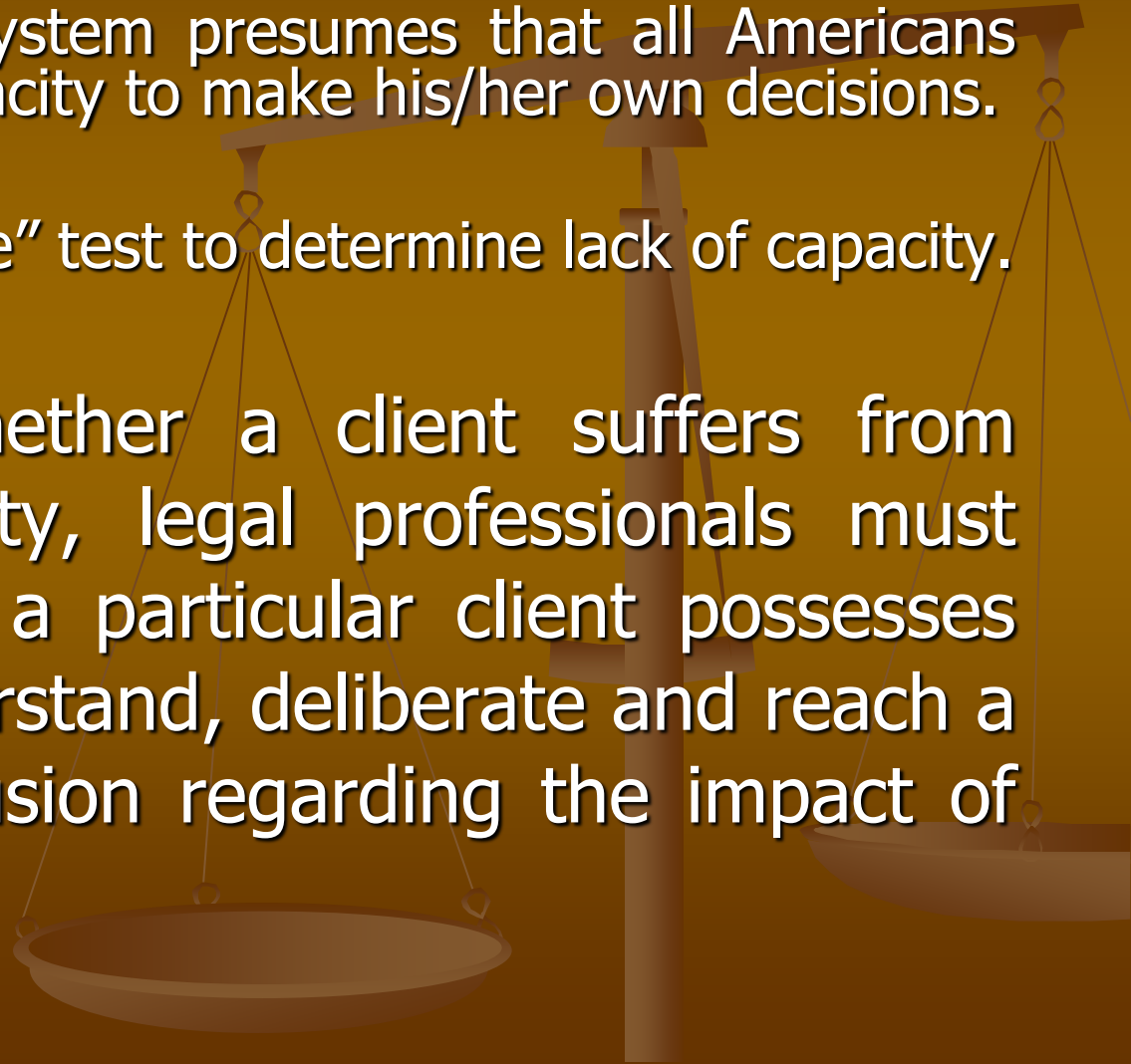


Diminished Capacity and Decision-Making

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To determine whether a client suffers from diminished capacity, legal professionals must examine whether a particular client possesses the ability to understand, deliberate and reach a satisfactory conclusion regarding the impact of his/her decisions.



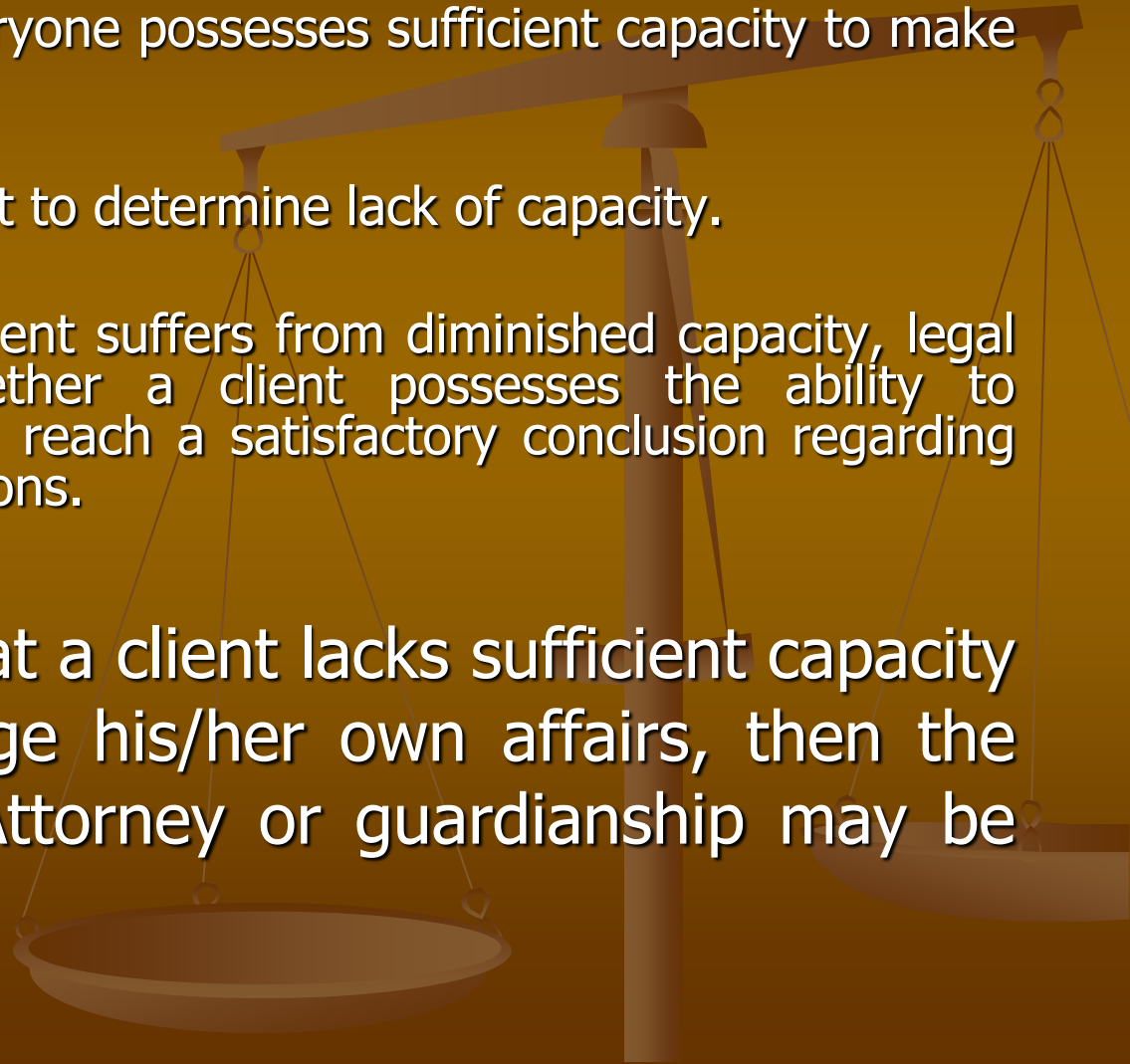
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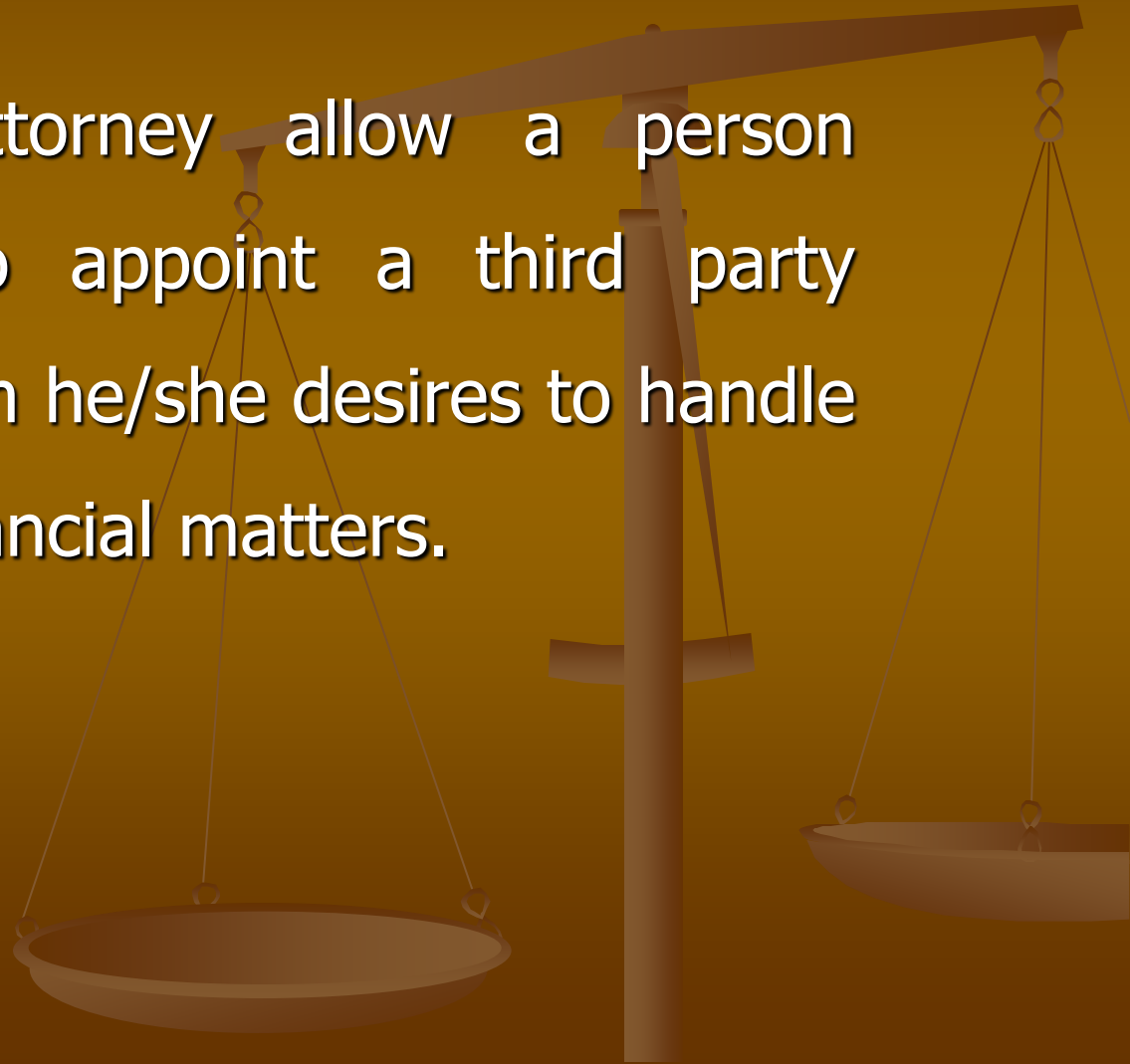
To determine whether a client suffers from diminished capacity, legal professionals examine whether a client possesses the ability to understand, deliberate and reach a satisfactory conclusion regarding the impact of his/her decisions.

If it is determined that a client lacks sufficient capacity to adequately manage his/her own affairs, then the use of a Power of Attorney or guardianship may be required.



Powers of Attorney versus Guardianship

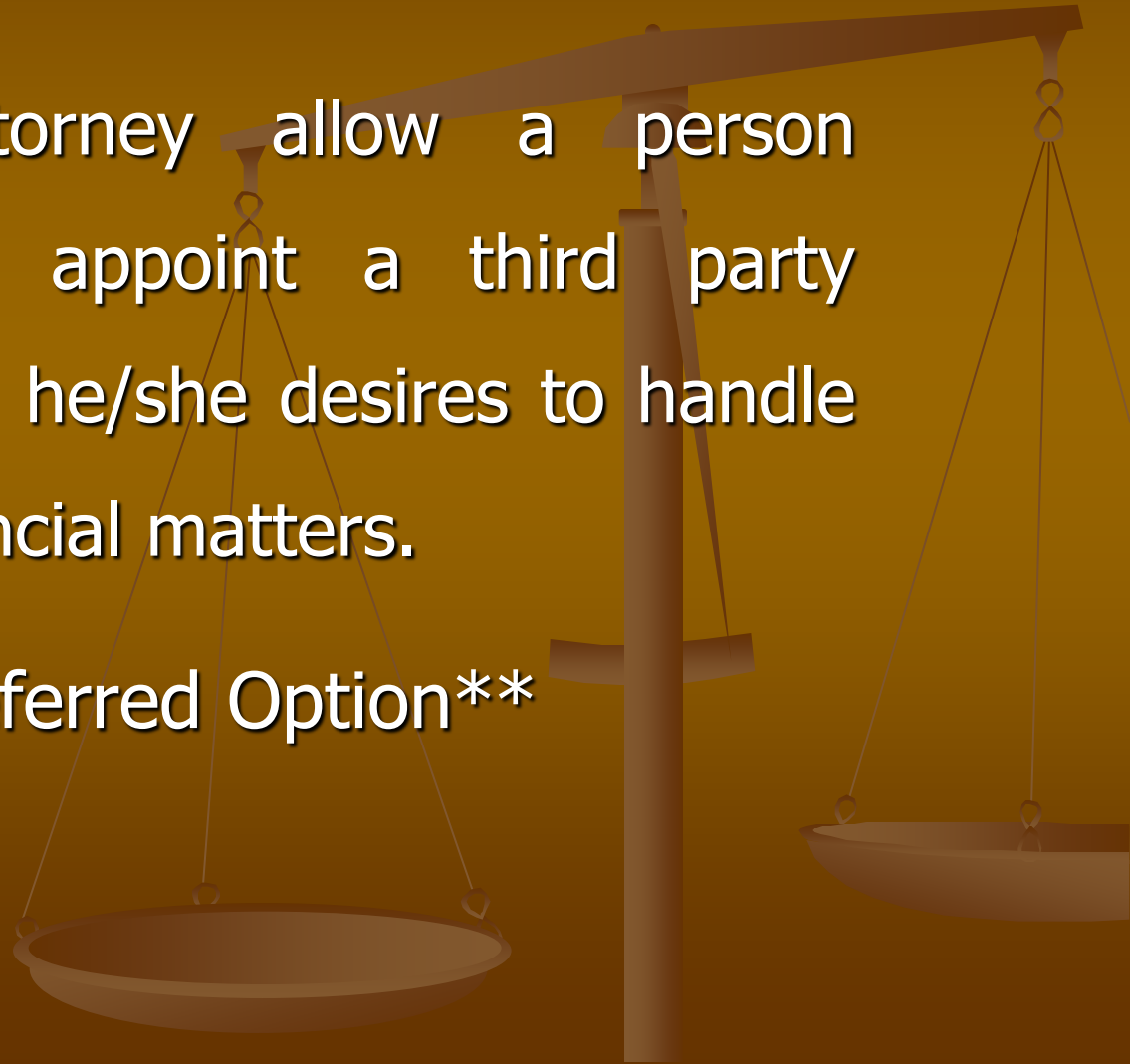
Powers of Attorney allow a person ("principal") to appoint a third party ("agent") whom he/she desires to handle personal or financial matters.



Powers of Attorney versus Guardianship

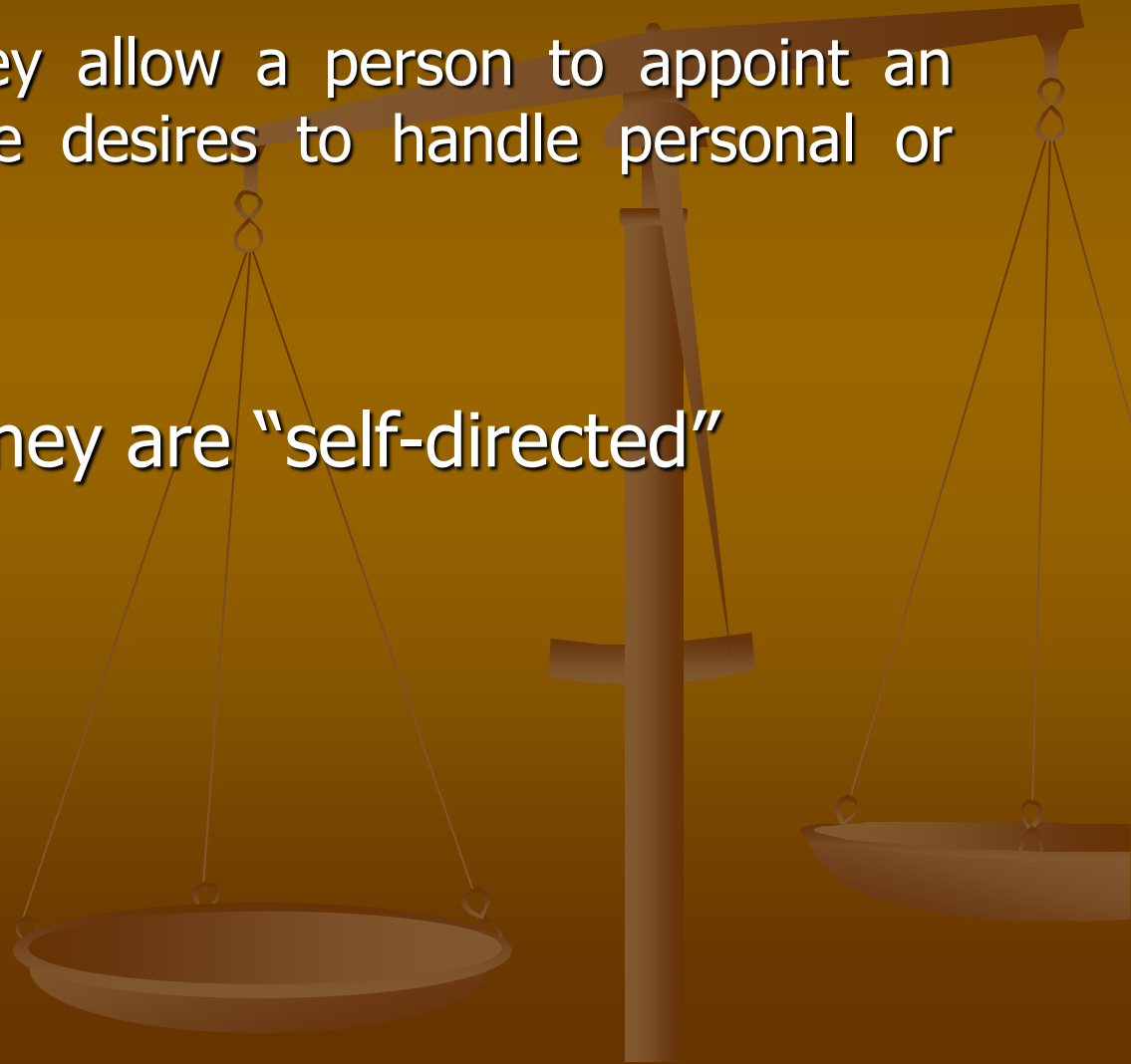
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****Preferred Option****



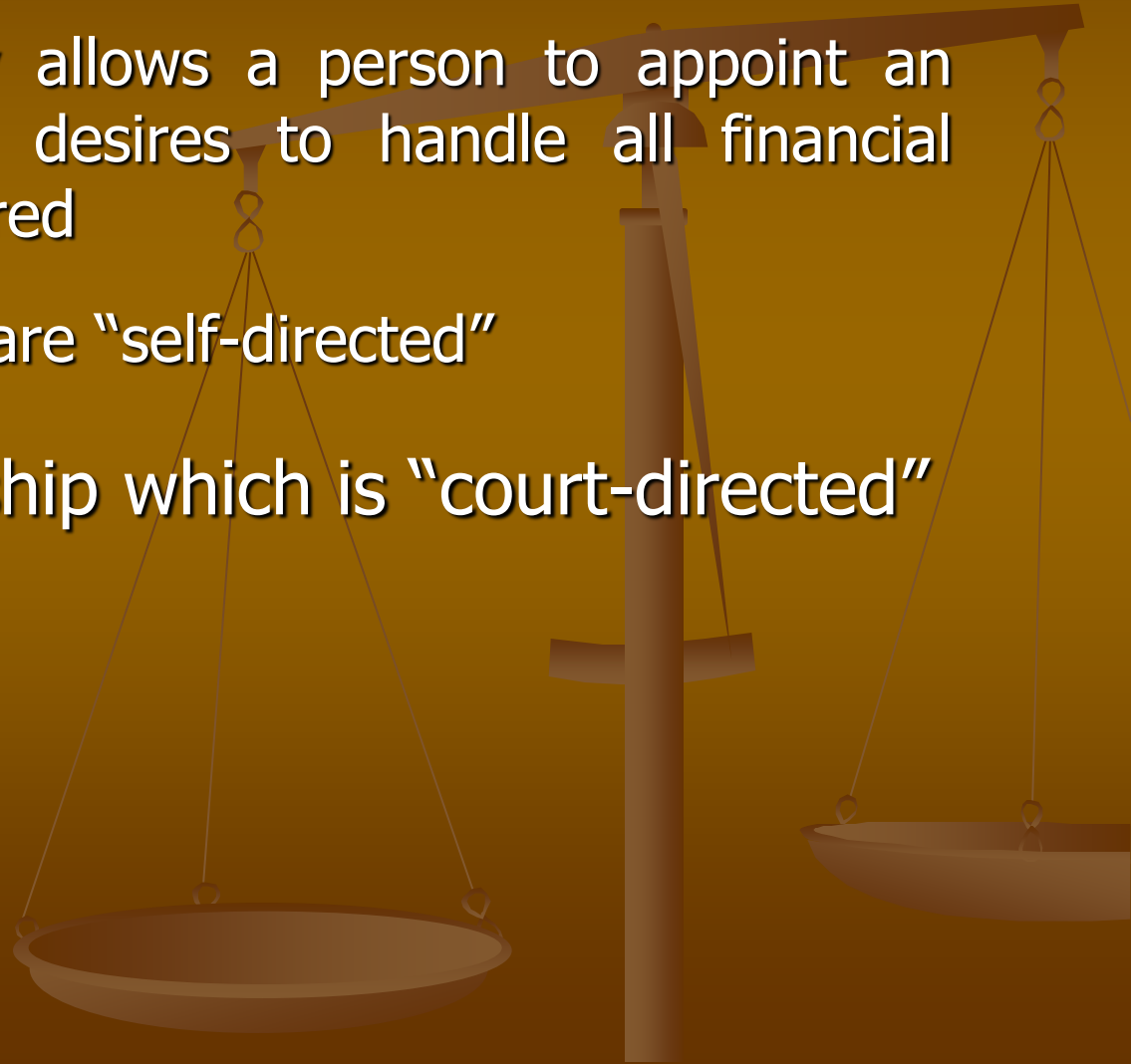
Powers of Attorney versus Guardianship

- Powers of Attorney allow a person to appoint an agent who he/she desires to handle personal or financial matters.
- Powers of Attorney are “self-directed”



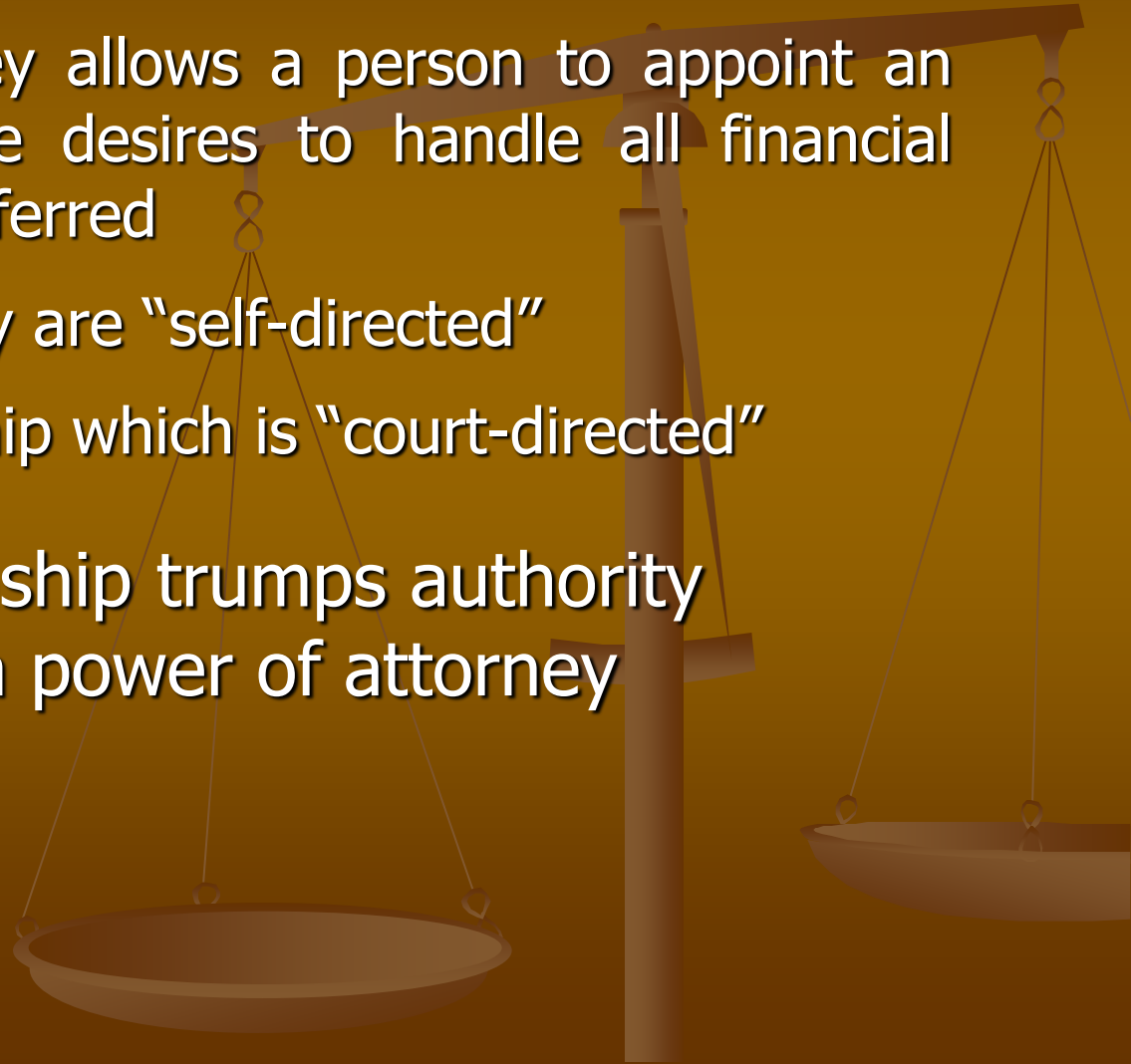
Powers of Attorney versus Guardianship

- Powers of Attorney allows a person to appoint an agent who he/she desires to handle all financial matters → **Preferred
- Powers of Attorney are "self-directed"
- Versus Guardianship which is "court-directed"



Powers of Attorney versus Guardianship

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- Powers of Attorney are "self-directed"
- Versus Guardianship which is "court-directed"
- Note: Guardianship trumps authority granted under a power of attorney



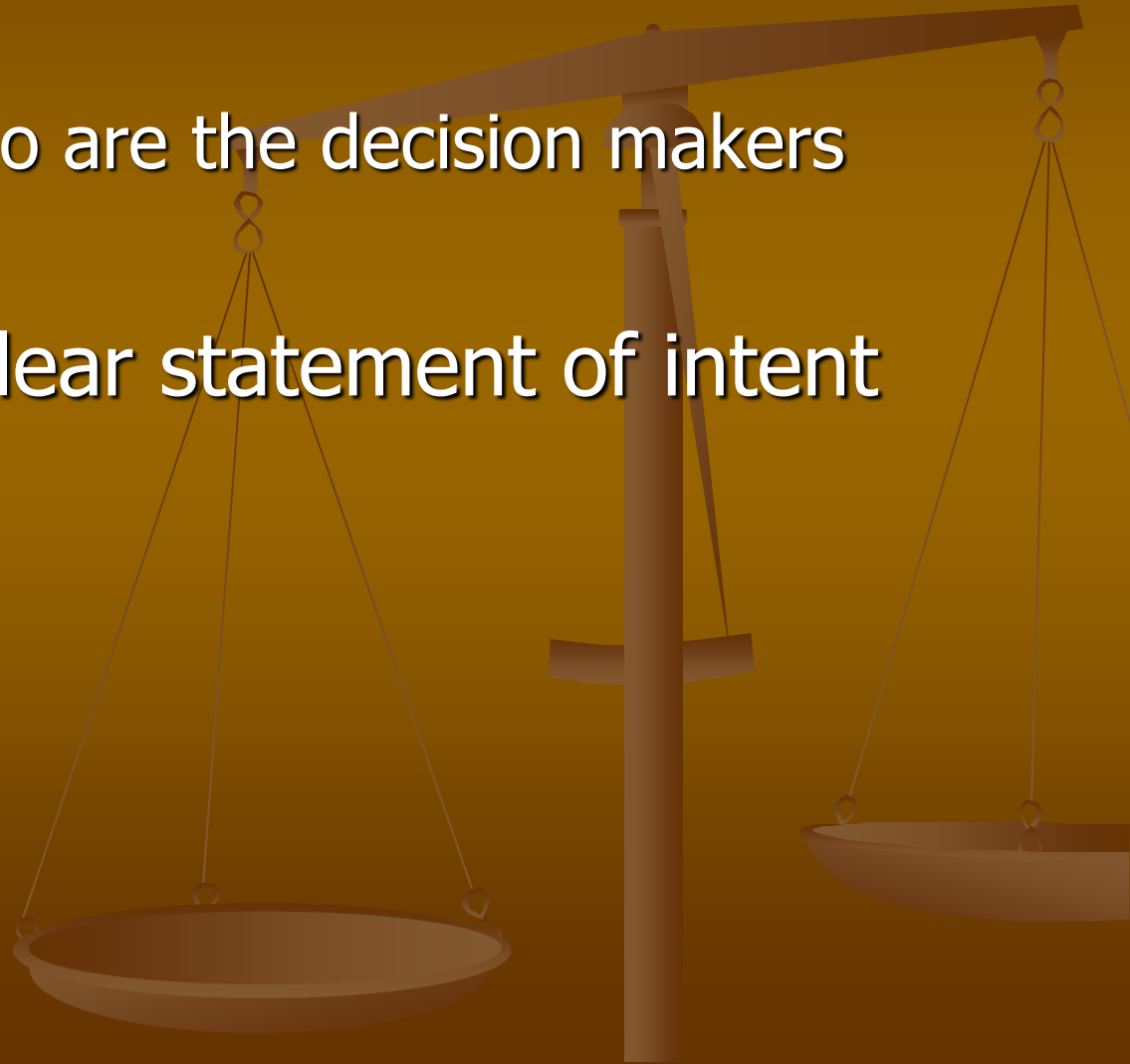
Purpose of Powers of Attorney

- Identifies who are the decision makers



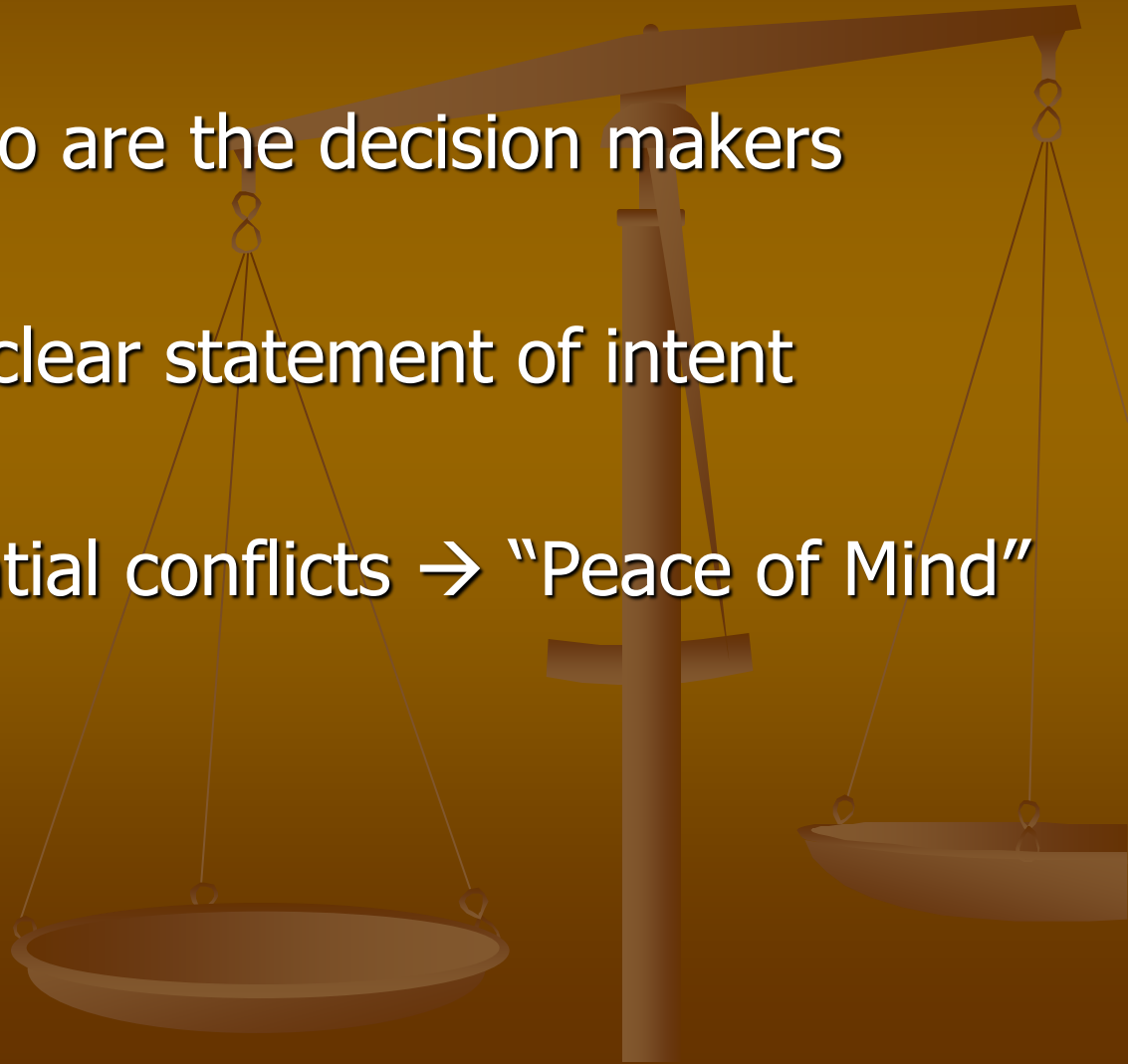
Purpose of Powers of Attorney

- Identifies who are the decision makers
- Provides a clear statement of intent



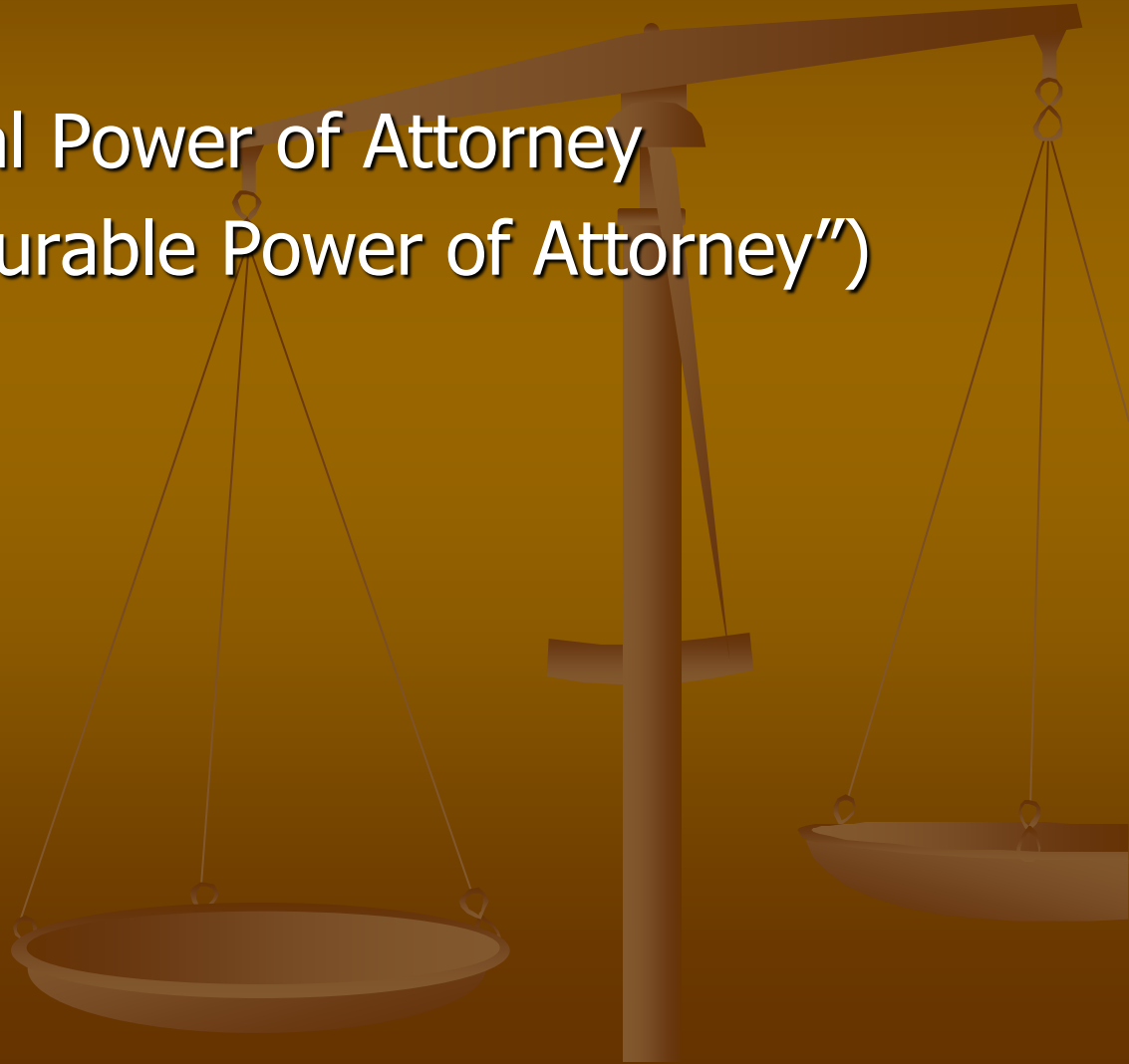
Purpose of Powers of Attorney

- Identifies who are the decision makers
- Provides a clear statement of intent
- May prevent potential conflicts → "Peace of Mind"



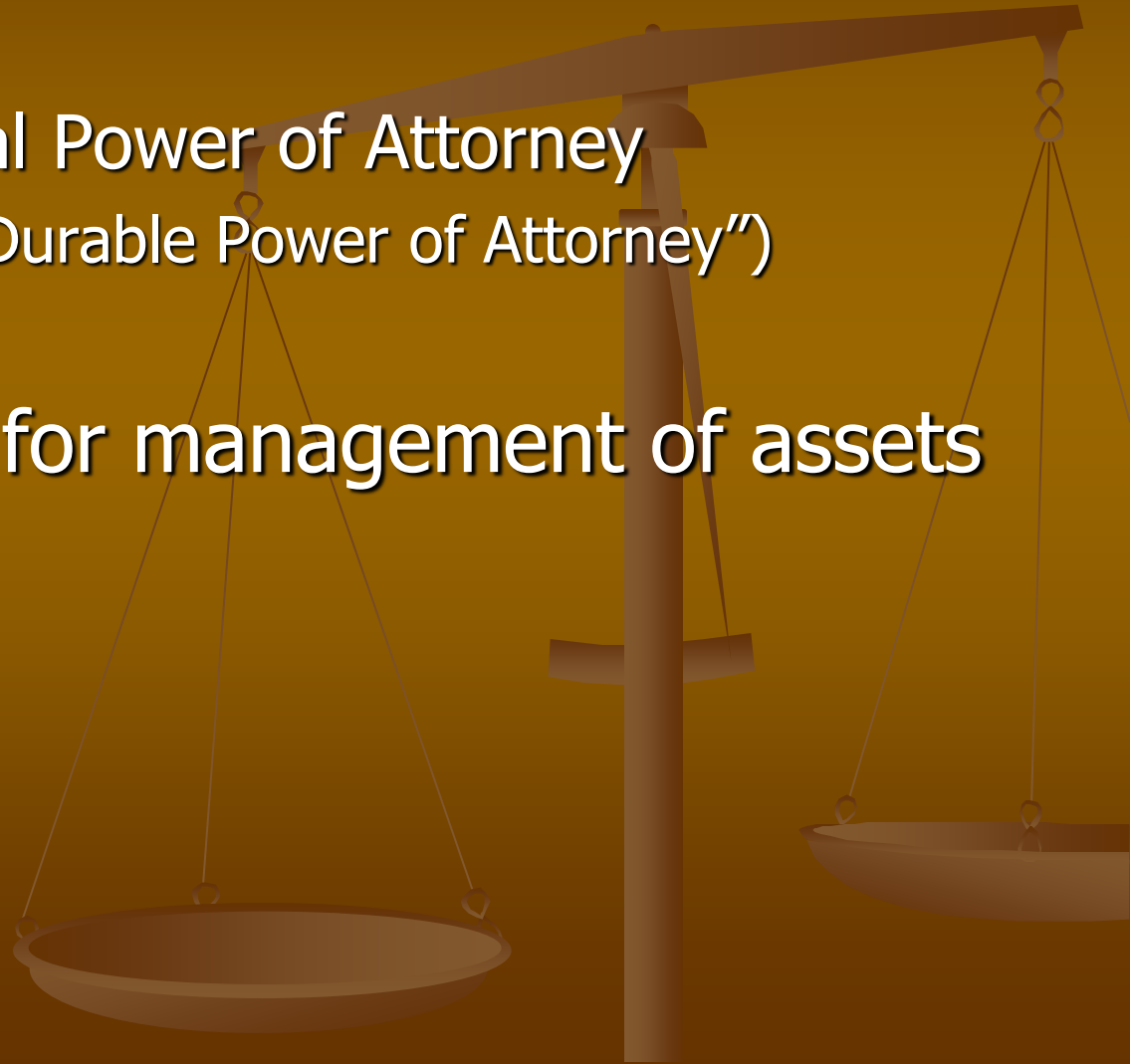
Primary Forms

- General Power of Attorney
(*Also called "Durable Power of Attorney")



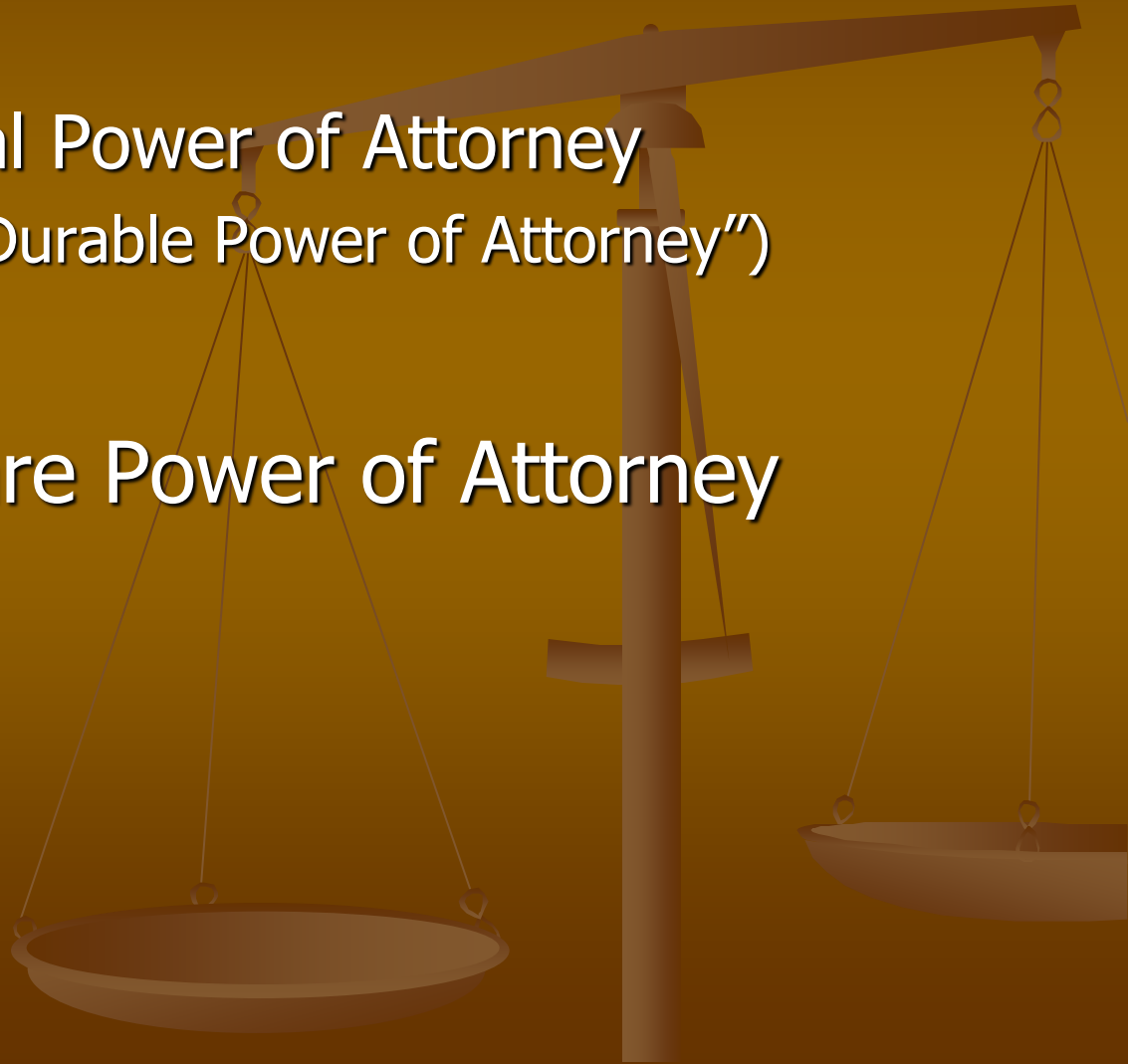
Primary Forms

- General Power of Attorney
(*Also called "Durable Power of Attorney")
- Used primarily for management of assets



Primary Forms

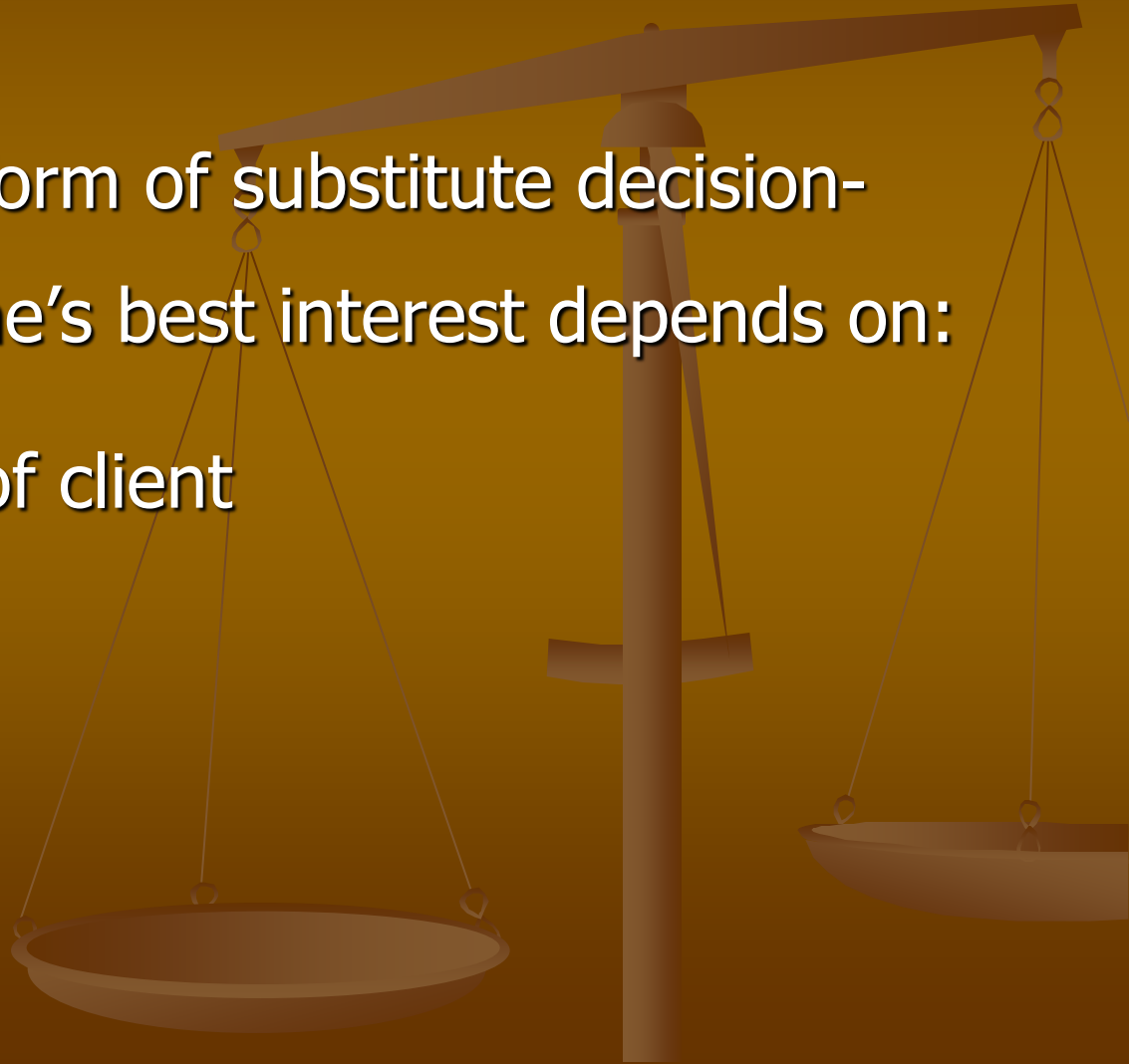
- General Power of Attorney
(*Also called "Durable Power of Attorney")
- Health Care Power of Attorney



Power of Attorney vs. Guardianship

Determining which form of substitute decision-making is in someone's best interest depends on:

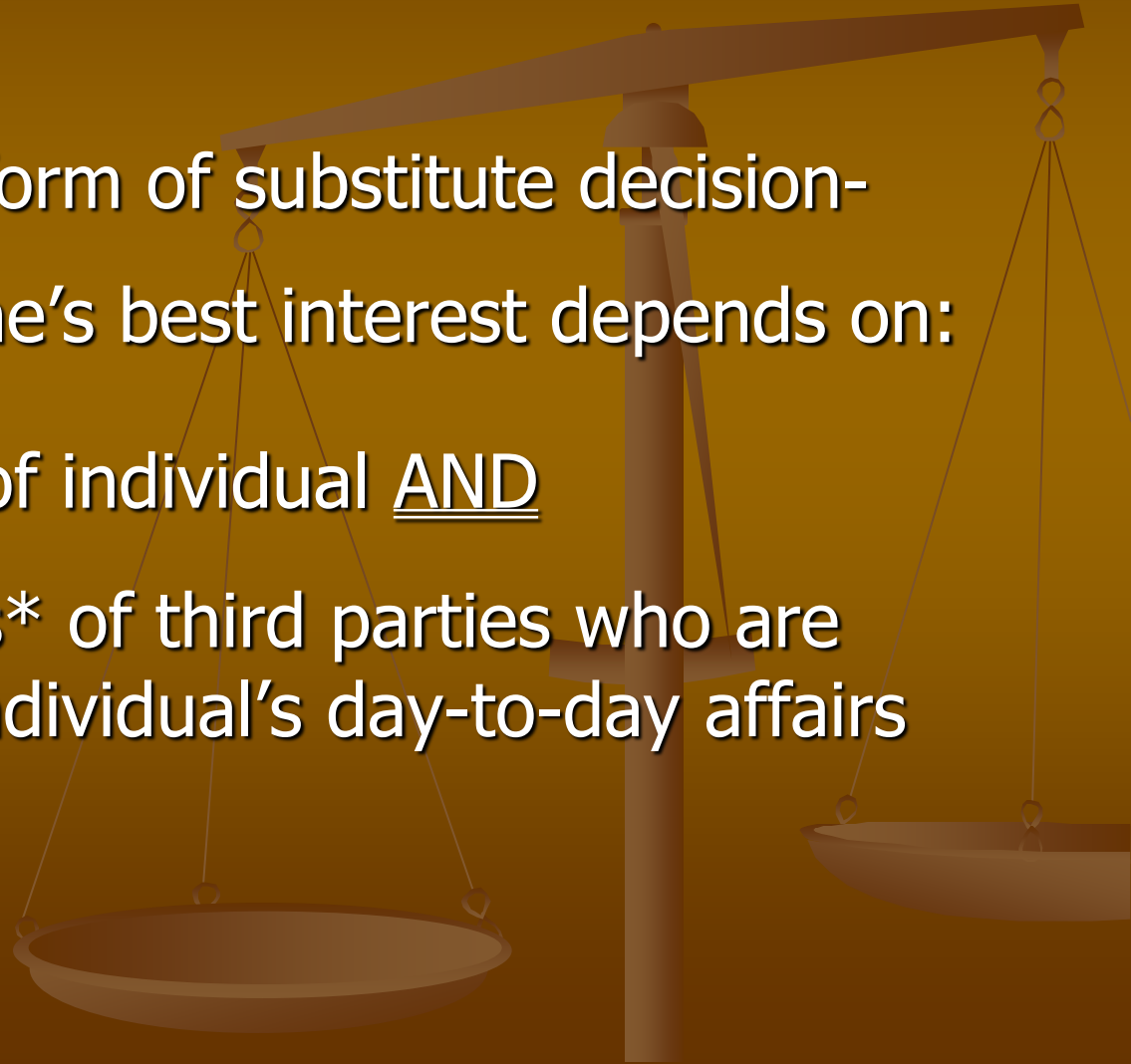
- 1) Mental capacity of client



Power of Attorney vs. Guardianship

Determining which form of substitute decision-making is in someone's best interest depends on:

- 1) Mental capacity of individual AND
- 2) *Trustworthiness* of third parties who are involved in the individual's day-to-day affairs



Types of Guardianship

➤ Guardianship of the Person



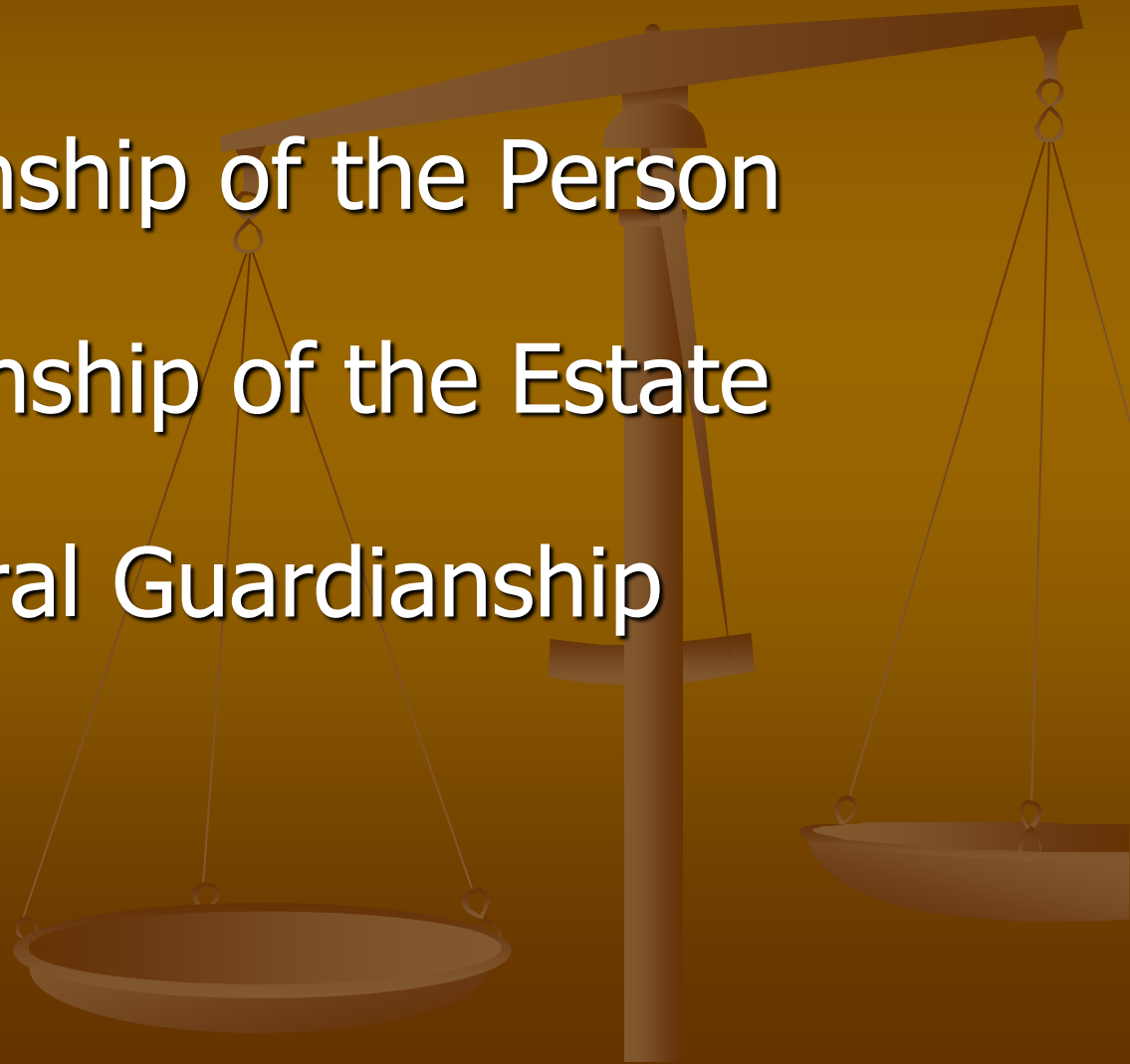
Types of Guardianship

- Guardianship of the Person
- Guardianship of the Estate



Types of Guardianship

- Guardianship of the Person
- Guardianship of the Estate
 - General Guardianship



Long-Term Care Planning Considerations

With proper planning, families can help protect assets while obtaining assistance from the government to help defray the exorbitant cost of long-term care.

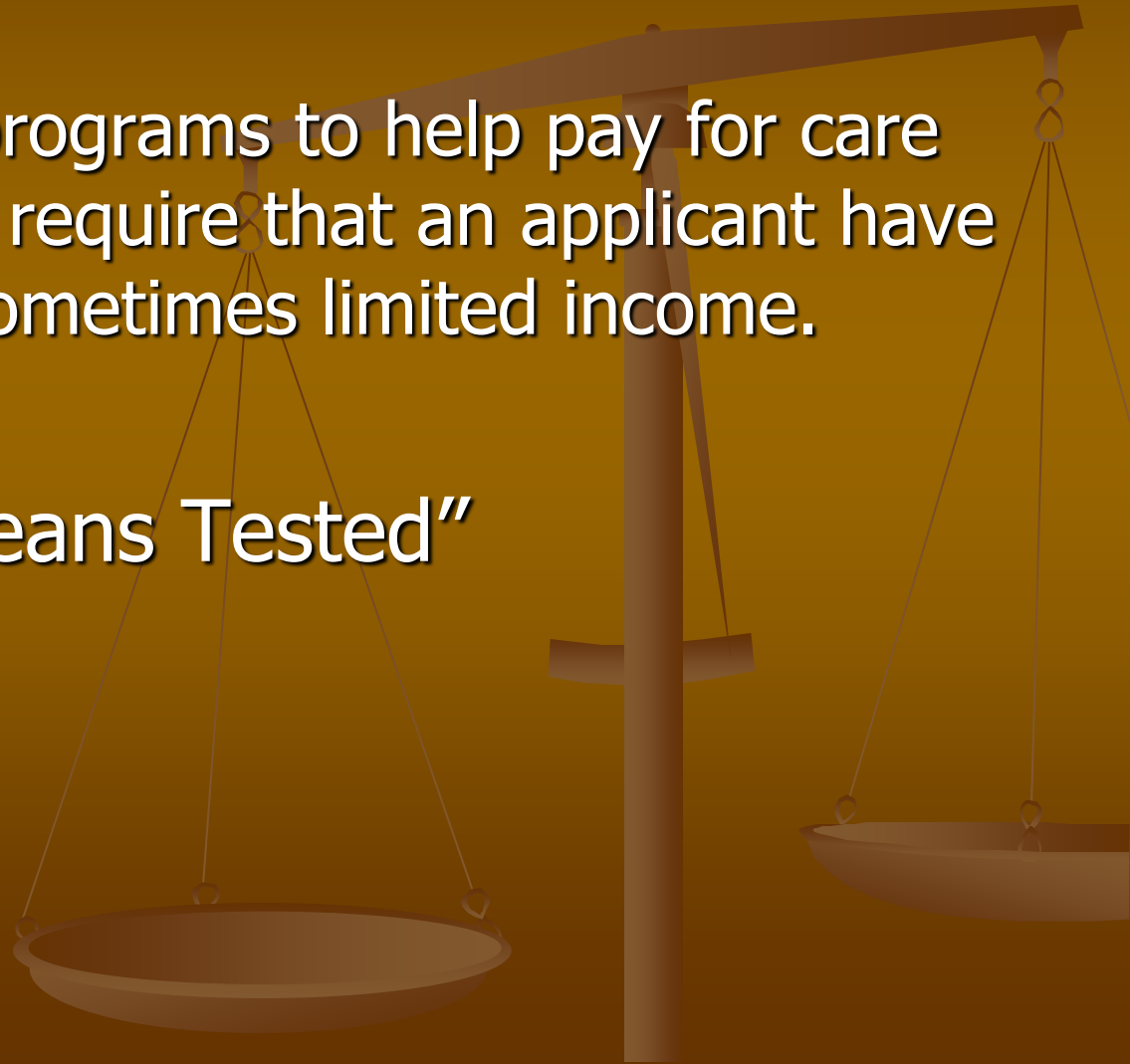
Federal and State programs exist to help seniors and their families pay for long term care, especially when a senior's assets run out.

All of the available programs to help pay for care are "need based" and require that an applicant have limited assets and sometimes income.

Long-Term Care Planning

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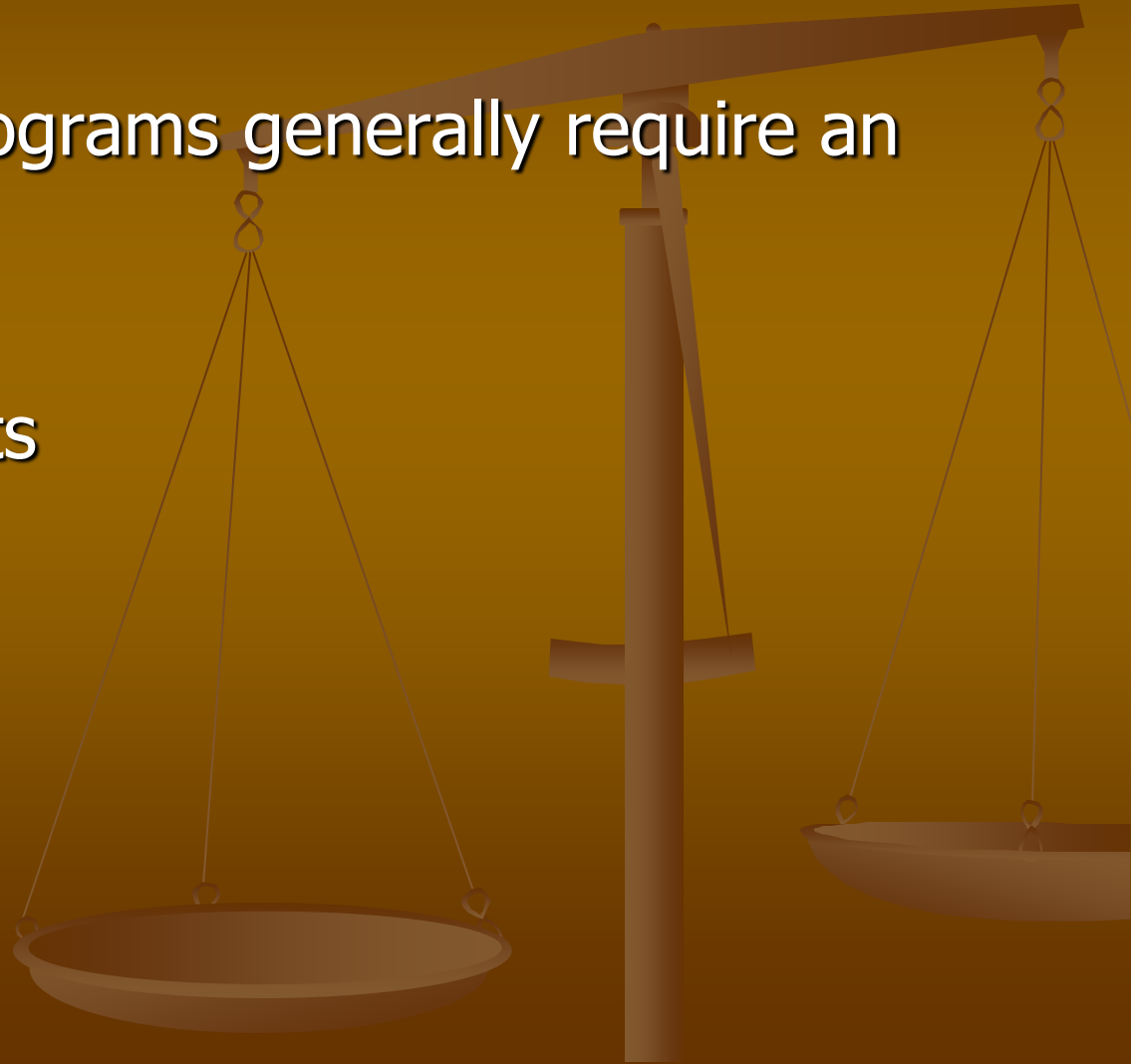
“Means Tested”



Long Term Care Planning

Means Tested programs generally require an examination of:

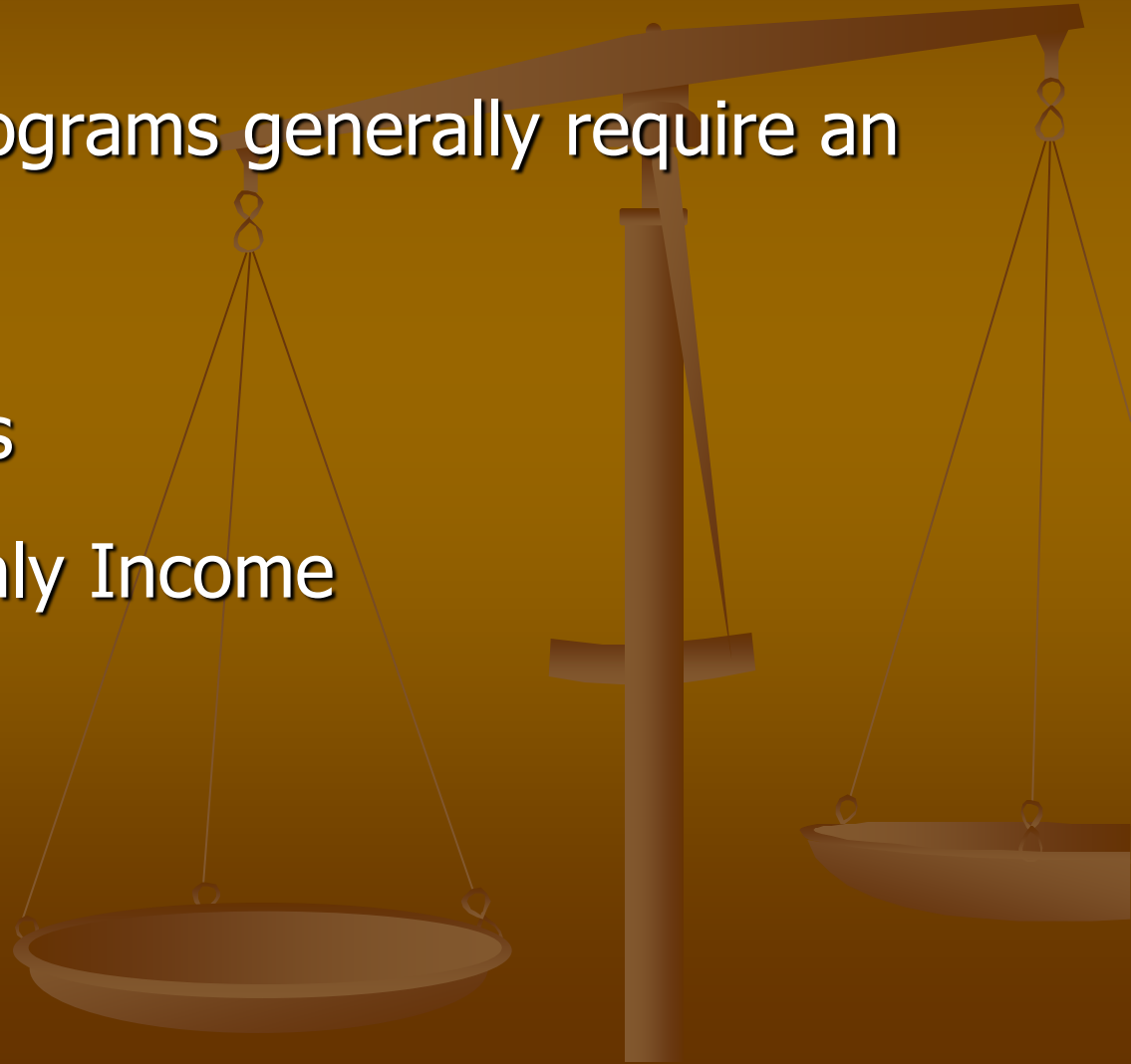
1: Assets



Long Term Care Planning

Means Tested programs generally require an examination of:

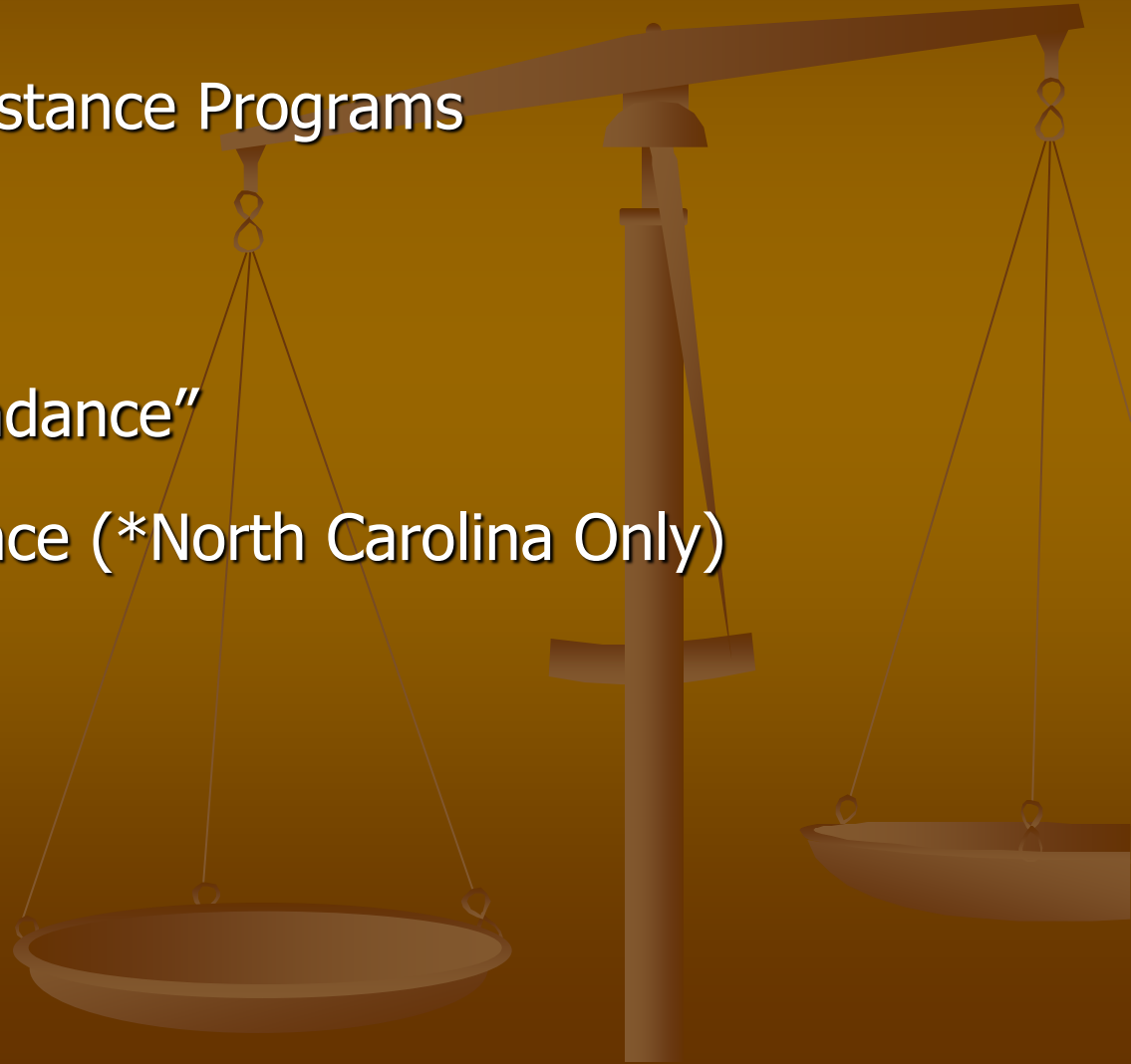
- 1: Assets
- 2: Monthly Income



Long Term Care Planning

Assistance Programs

- Medicaid
- VA "Aid & Attendance"
- Special Assistance (*North Carolina Only)



Long Term Care Planning

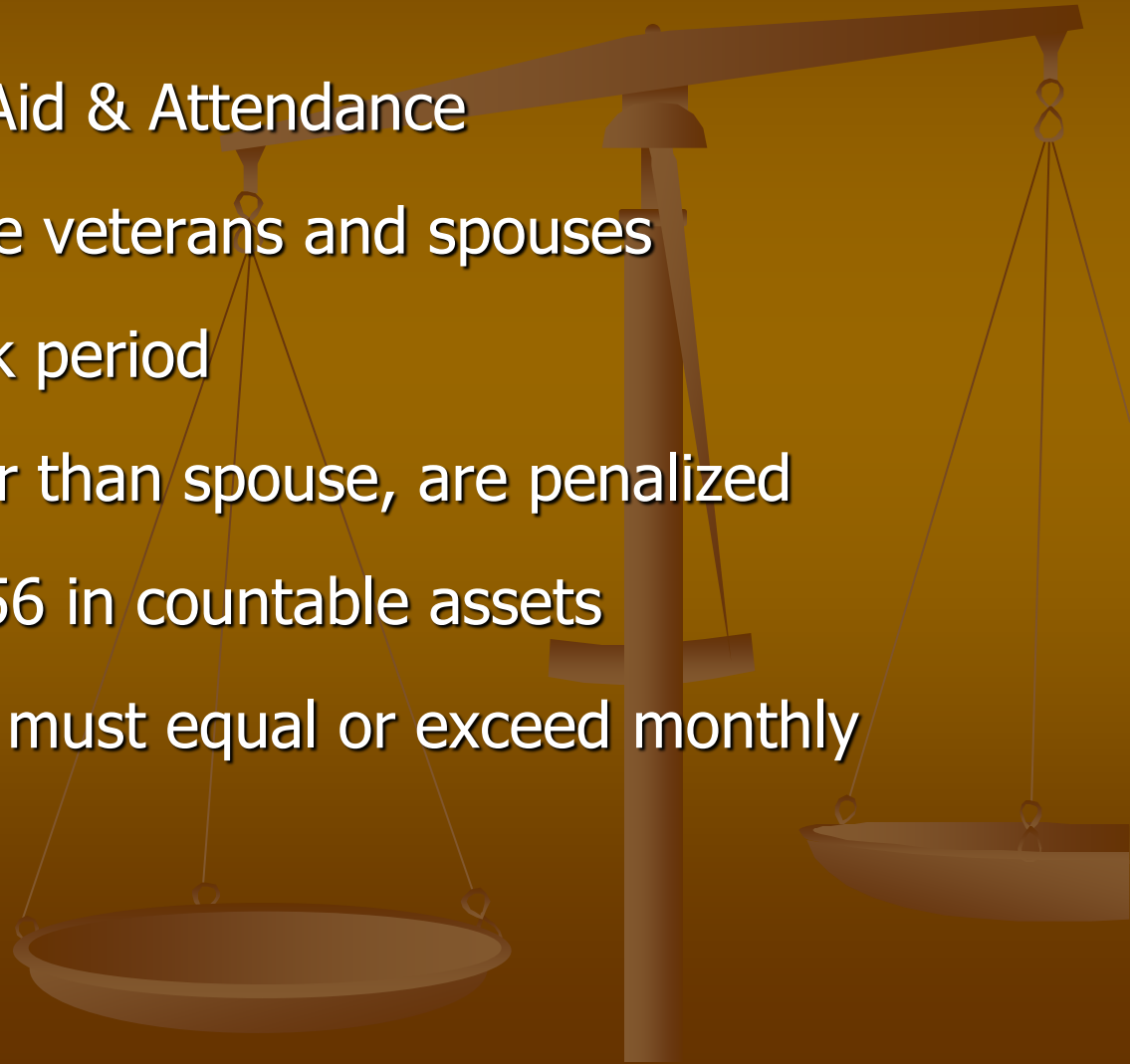
Medicaid

- **Five-year Look-back Period
- Gifts to third parties, other than a spouse, are penalized
 - ** Exceptions for disabled adult children and minors
 - ** IRS gifting exception does not apply
- Maximum of \$2,000 in countable assets
 - ** Does not include primary residence, one vehicle and personal property

Long Term Care Planning

VA Aid & Attendance

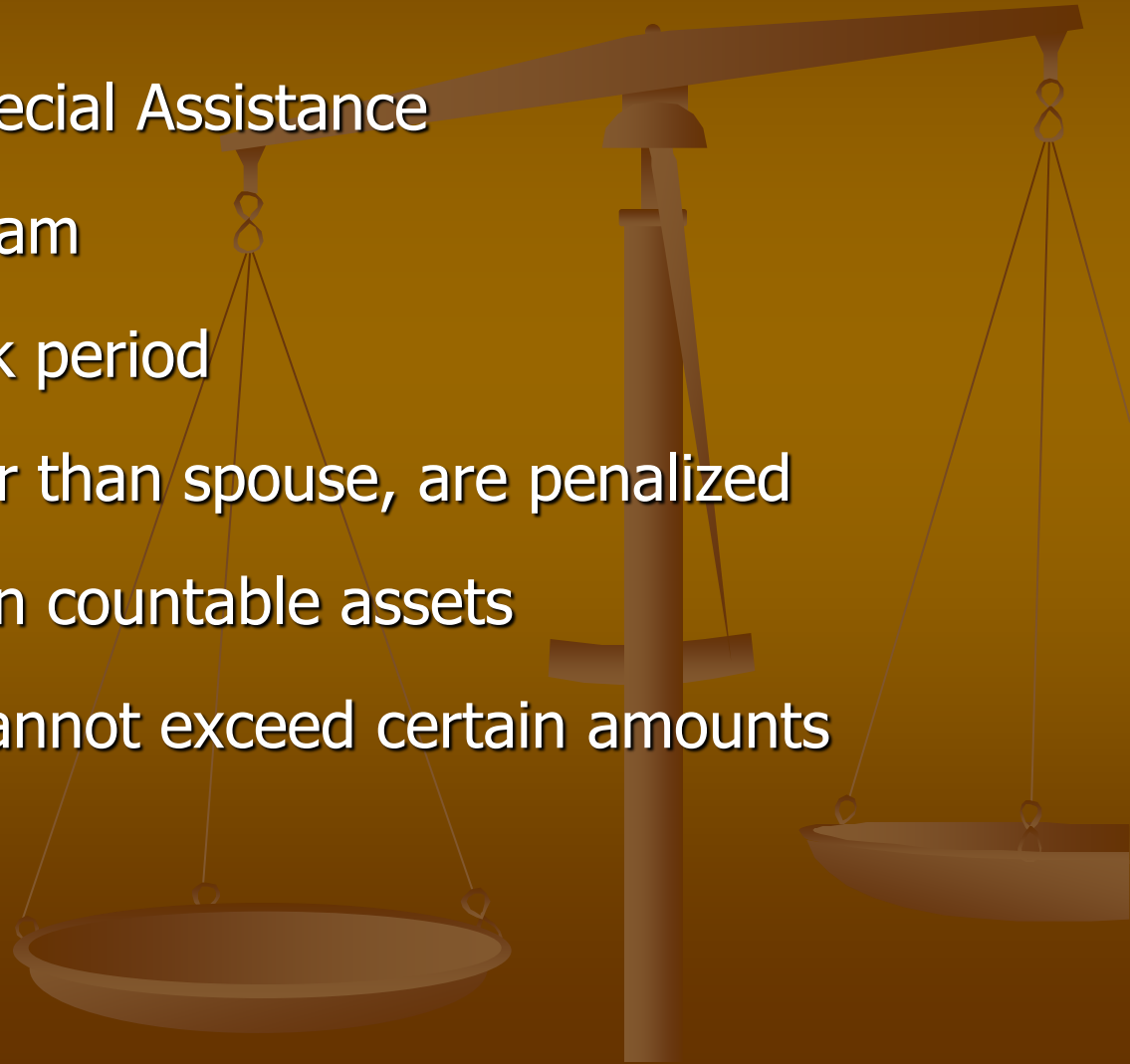
- Program for war-time veterans and spouses
- Three-year look-back period
- Gifts to parties, other than spouse, are penalized
- Maximum of \$155,356 in countable assets
- Monthly cost of care must equal or exceed monthly gross income



Long Term Care Planning

Special Assistance

- North Carolina program
- Three-year look-back period
- Gifts to parties, other than spouse, are penalized
- Maximum of \$2000 in countable assets
- **Monthly income cannot exceed certain amounts



RESOURCES

- AARP
- National Academy of Elder Law Attorneys
- Investor Protection Trust
- Local Elder Law Attorneys



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