GUARDIANSHIP, CONSERVATORSHIP, & LESS RESTRICTIVE ALTERNATIVES

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Objectives

- Define guardianship and conservatorship
- List at least 5 alternatives to guardianship / conservatorship
- Describe the process for appointment of a guardian/conservator
- Understand why guardianship / conservatorship is often not the best intervention
The Paradox of Guardianship

Valuable tool to protect Vulnerable Adult?

Or

Heavy-handed tool which strips constitutional right to self-determination?
Is Guardianship/Conservatorship the Best Solution?

- An ethical issue: removing constitutional right to self-determination / autonomy
- Time Consuming: due process protections to ensure justifiable intrusion by government in lives of citizens.
- Expensive: to incapacitated person, family, society
Is Guardianship/Conservatorship the Best Solution? (cont’d)

- Potentially emotionally devastating to incapacitated person and family
- May not even solve identified problem
- The problem of scarce resources
NAPSA (or APS) Code of Ethics

Adult Protective Services...promote safety, independence, & quality-of-life for older persons & persons w/ disabilities...being mistreated or in danger of being mistreated, and who are unable to protect themselves.

Guiding Value: Every [APS] action ...must balance duty to protect the safety of the VA with the adult’s right to self-determination.
Principles

- Adults have the right to be safe...
- Adults retain all their civil and constitutional rights...unless a court adjudicates otherwise.
- Adults have the right to make decisions that do not conform with societal norms as long as these decisions do not harm others.
- Adults have the right to accept or refuse services.
Practice Guidelines: APS

Responsibilities

- Recognize interests of the adult are first concern of any intervention.
- Avoid imposing personal values on others...
- Recognize individual differences such as cultural, historical and personal values.
- Honor right of adults to receive information about choices & options in form or manner that they can understand...
Practice Guidelines: APS
Responsibilities

• Focus on case planning that maximizes the vulnerable adult’s independence and choice to the extent possible based on the adult’s capacity.

• Use the least restrictive services first whenever possible—community-based services rather than institutionally-based services.
Practice Guidelines: APS
Responsibilities

● Use family and informal support systems first as long as this is in the best interest of the adult...

● In the absence of an adult’s expressed wishes, support casework actions that are in the adult’s best interest.
Practice Guidelines: APS
Responsibilities

- Use *substituted judgment* in case planning when historical knowledge of the adult’s values is available.
- *Do no harm*. Inadequate or inappropriate intervention may be worse than no intervention.
Guardianship & Conservatorship: What is This?

- Court appointed substitute or surrogate decision-maker
- Process for appointment is identical
- Voluntary or involuntary (most common)
- MN: Guardianship /Guardian/ Ward = Personal and Care Decisions
- MN: Conservatorship /Conservator/ Protected Person = Money and Assets
Who is Appropriate for Guardianship? Incapacitated Person

- Lacks sufficient understanding/capacity to make/communicate responsible personal decisions and
- Behavioral deficits which evidence inability to meet personal needs for medical care, nutrition, clothing, shelter or safety needs, and
- No less restrictive alternatives will meet needs
- (Guardianship will address identified problem)
Who Is Appropriate for Conservatorship?

● Unable to manage property & business affairs b/c of inability to receive & evaluate information or make decisions

● Has property that will be wasted or dissipated unless management is provided or

● Money needed for support, care, education, health & welfare of person or individuals entitled to person's support and

● Needs cannot be met by any Less Restrictive Alternative
Pondering The Three-Legged Stool of Guardianship/Conservatorship

Incapacity

+ Behavioral Evidence

+ No Viable Less Restrictive Alternative

This is why we do what we do.™
Competence vs. Capacity (A Minnesota Perspective)

- Competency: Determined by a court (e.g., incompetent to stand trial in criminal matters); typically = global determination of functioning

- Capacity: Ability to make particular decision
  - Guardianship = Legal Determination
  - Everything else = Functional, Medical, Practical Determination
Right to Make a Decision

None of these alone preclude an individual’s legal ability to make a decision:

● Impaired memory
● Diagnosis relating to cognitive incapacity
● Meeting criteria/definition of Vulnerable Adult
● SW, Nursing, Speech or OT evaluation / cognitive score
● Psychiatrist/Psychologist/Physician determination of incompetence/incapacity

(Exception: HCD)
Determining Incapacity/Inability

- Medical Diagnosis
- Testing
- Inability to give Informed Consent
- Behavioral Evidence

*Presumption is Competence/Capacity*
An Individual’s Capacity May Vary:

● Throughout a time period (course of illness, hospitalization, time of day, etc.)
● May deteriorate or improve (the healing nature of time)
● Capacity is not global: Depends on decision or issue

Q: Who decides?
A: Who needs the decision?
Informed Consent: 
A Capacity Assessment Tool

Capacitated Decisions When Individual:

- Knows the issue – can give and receive relevant information
- Knows available options
- Understands risks and benefits of options
- Makes a decision.
  - Decision not based on delusion
  - Decision not coerced
The Capacitated Person

Has a right to:

- Be in denial (at least for awhile)
- Make poor decisions (as long as these don’t harm others)
- Choose to do nothing
- Place themselves at risk (if understand the risk)
- Own unique values, lifestyle and beliefs
- Change one’s mind
Pondering The Three-Legged Stool of Guardianship/Conservatorship

Incapacity + Behavioral Evidence + No Viable Less Restrictive Alternative
Behavioral Evidence

Bills not paid
Moldy food
D/C notice
Giving $$ away
Leave AMA
Inapprop. attire
Loss of insurance
Unkempt
Forgets Rx
Hospital admits
Loss of utilities
Getting lost

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Pondering The Three-Legged Stool of Guardianship/Conservatorship

Incapacity

+ Behavioral Evidence

+ No Viable Less Restrictive Alternative
Less Restrictive Alternatives: Guardianship

- Own Plan, Cooperation with Others’ Plans
- Family Involvement
- Health Care Directive
- Ethics Committees

- Authorized Rep. for Economic Assistance
- County/Private Case Management
- Protective Order
Own Plan: INVOLVE THE CLIENT!

- Minimal Risk Decision/Outcome – If the person cooperates and accepts assistance, then does not require capacity
- Higher Risk Decision/Outcome - Person has the right to attempt and fail (if able to make informed decision)
Family

Community standard to allow family to act as surrogate when:

- Available
- Acting in best interest
- Client not objecting

May need permission, advocacy and assistance from professional to step in to meet client needs
Health Care Directive (Minnesota)

- Presume capacity at time of completion
- Can name an agent or state wishes or both
- Trigger for implementation: usually attending MD
- Protections: limits, easily revoked, provider oversight

- **Capacity to name agent vs. Capacity to make medical decisions**
Case Management: Client Advocacy

- Build trust – listen, respect, reflect
- Inform client of rights - advocate for rights
- Help client identify needs
- Facilitate realistic goal setting (Insight Proxy)
- Advocate for decisions client can make
- Accommodate for disabilities – repeat, write, re-approach
- Enlist and support informal decision-makers
- Identify/link to formal/informal resources
Ethics Committee

● May be capacitated, incapacitated or questionably capacitated client

● Convenes when there is Ethical Conflict
  ○ e.g. autonomy vs. protection; benefit vs. harm

● Not decisional body, but does facilitate decision-making

● AMA Policy E-2.20 & E-8.081: recommends when no surrogate, to facilitate sound decision making, when question re: surrogate acting in best interest
**Less Restrictive Alternatives: Conservatorship**

- Family, trusted friend
- Bank Plans: auto pay, direct deposit, co-signers
- Authorized Representative
- Representative Payee
- Power of Attorney
- Trust
- Protective Arrangement / Single Transaction
Representative Payee

- *Does not need client cooperation or capacity*
- VA, Social Security, Railroad Retirement
- Can be family or professional
- Perfect tool if only asset is monthly income

*Never underestimate the power of the purse strings!*
Power of Attorney

- Statutory Definition of Powers
- Legal Document: legal counsel recommended for completion!!
- Principal delegates powers to attorney(s) - in fact, does not legally “give up” power / rights (though maybe practically does)
- May or may not be durable into principal’s incapacity (but should be as planning tool)
- Protections for principal can be used (accounting, bonding of professional AIF)
- Considered a nomination for conservator

This is why we do what we do.™
Protective Arrangement

- Court action (typically identical to conservatorship petitioning process)
- May or may not lose rights
- To authorize, direct or ratify any transaction to meet the needs of the protected person
- Can set up a trust, settle a claim, direct income, contract for care
Success of LRA

- Individual cooperates / doesn’t sabotage
- Available family/friend/professional to serve
- Abuse or neglect by surrogate not at issue
- Skill & willingness of professionals to respect & work with conflict or difficult clients/families as well as tolerance for some ambiguity
- When professionals’ liability is low
Deciding to Petition: Assessment

- Person meets criteria
- Determine areas of responsibility needed to meet person’s needs
- Nominate most appropriate guardian / conservator
Powers & Responsibilities: Guardian (Minnesota)

- Place of Abode
- Care, Comfort, Maintenance Needs
- Personal Property
- Medical Care
- Contracts (if no conservator)
- Supervisory Authority
- Governmental benefits (if no conservator)
Powers & Responsibilities: Conservator (Minnesota)

- Pay reasonable charges
- Pay all lawful debts
- Possess and manage the estate, including real estate
- Sell, mortgage, purchase interest in inherited real estate
- Contracts
- Governmental Benefits
- (Revoke, suspend terminate POA)
- (Estate Planning, on approval of court)
Nominate Guardian/Conservator

● Most suitable, best qualified among those willing and able to serve
● Family
● Friend/someone known to respondent
● Independent Guardian/Conservator (AKA: professional, neutral, disinterested, stranger)

Beware of anti-family or -prof. bias!
Priority Appointment: Guardian (MN)

- Currently acting guardian (not emergency)
- Agent appointed in HCD
- Spouse, or person nominated by spouse
- Adult child
- Parent, or person nominated by parent
- Adult with whom resided for 6+ months (not if paid provider)
Priority Appointment: Conservator (MN)

- Conservator/Guardian previously appointed
- Nominee of individual (if sufficient capacity)
- Agent under POA
- Spouse
- Adult Child
- Parent
- Adult with whom resided for 6+ months (not paid provider)
Court Process and Procedures

- Petitioner/Petitioner’s Attorney
- Physician’s Statement in Support
- Proposed Guardian/Conservator
- Petition Filed/Notice Requirements
- Court Date
- Court Visitor
- Court Appointed Attorney
- Hearing
- Bond
- Oath & Acceptance
- Court Order
**G/C Costs (MN)**

- From estate of proposed ward/pp
- If indigent, from county budget = taxpayers (court or social services budget)
- Minimal payment, complex cases = difficulty finding nominee to serve (when no family to serve)
- Emotional, relationship costs
**Note to Professionals:**

Just because my client/patient is “incapacitated”, does not automatically mean G/C needed

- Informal decision maker may be sufficient
- May not need any decision maker
- May instead need good advocacy, strong social work/case work
- If seek official, tidy, legal guardian for every incapacitated person, there will be lines years long to get to court; insufficient guardians to serve all these people.
Avoid Using G/C

- when person is incapacitated, but all needs currently being met
- to manage problem behaviors
- for ease of providers/system (including fears of liability)
- to manage chemical dependency
- to obtain treatment for mental illness
- to manage eccentric behaviors
- appointment of G/C would not address issues
When Might a G/C Be Needed?

- Individual lacks capacity/competence to give informed consent and no less restrictive alternative
- Decision requires “legal decision-maker” by statute or professional practice
- Irresolvable conflict or controversy about decision
- Required by policy – no other options
- Person unable to receive necessary services without surrogate
Checklist to Support G/C Use

Person lacks capacity and
- Basic needs are unmet, or
- Decision needs to be made, or
- Conflict/Controversy about decision, or
- Required by policy, or
- Person unable to receive necessary services without intervention

This is why we do what we do.™
Checklist to Support G/C Use (cont’d)

- All reasonable alternatives have been tried
- There is no other way to meet the person’s needs
- G/C is likely to be effective to address the problem at hand/will solve the problem
- There is a specific decision to be made
SUMMARY: Appropriate Use of Guardianship & Conservatorship

● Need for decision maker to correct problem: inability to provide for food, clothing, shelter, medical care, safety/supervision, protect/manage assets (purposeful, goal-directed intervention)

● Common uses of guardianship/conservatorship: placement in NH, or other change of residence, manage home care, consent for medical care, sale of real estate, payment of debts and services received, stop financial exploitation.
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