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JUSTICE FOR ALL: PROTECTING OUR VULNERABLE ADULTS

MILWAUKEE, WISCONSIN AUGUST 30, 2017

GUARDIANSHIP - SUPPORTIVE DECISION MAKING
PART 9

WHAT WILL HAPPEN TODAY DURING PART 1

- UNDERSTAND WHAT A GUARDIAN IS
- UNDERSTAND WHAT SUPPORTIVE DECISION MAKING IS
- HOW A GUARDIANSHIP IS PROCESSED
- STEPS TO SUPPORTIVE DECISION MAKING
- WHO CAN BE A GUARDIAN
- WHO CAN BE A SUPPORTIVE DECISION MAKER







WHAT IS ADULT GUARDIAN?





WHAT IS ADULT GUARDIANSHIP?

- RELATIONSHIP
 - CREATED BY THE COURT OF JURISDICTION
- GIVES AN INDIVIDUAL OR ENTITY SPECIFIC POWER
 - OF A PERSON
 - OF A ESTATE CONSERVATOR
- PROCESS WHEN AN ADULT IS DETERMINED BY THE COURT TO LACK CAPACITY
- RESTRICTION OR LOSS OF RIGHTS FOR THE ADULT

WHAT IS A SUPPORTIVE DECISION MAKER?





SUPPORTIVE DECISION MAKER

- ALTERNATIVE TO GUARDIANSHIP
- A PERSON IS CHOSEN BY THE ADULT TO HELP WITH DECISIONS
- A TRUSTED RELATIONSHIP
- DOES NOT REQUIRE AN ATTORNEY
- SUPPORTER DOES NOT ACT IN PLACE OF THE INDIVIDUAL
- ADULT DOES NOT LOSE ANY RIGHTS
- CAN BE CREATED OR TERMINATED AT ANY TIME

WHAT ARE ALTERNATIVES TO GUARDIANSHIPS?





ALTERNATIVES TO GUARDIANSHIPS

- REPRESENTATIVE PAYEE
- POWER OF ATTORNEY FOR MEDICAL
- POWER OF ATTORNEY FOR FINANCIAL MATTERS
- TRUST AND SAVINGS ACCOUNTS
- PERSON CENTERED PLANNING
- SUPPORTIVE DECISION MAKER



WHO IS UNDER GUARDIANSHIP

- ELDERLY WITH DEMENTIA, OR OTHER COGNITIVE IMPAIRMENTS
- ADULTS WITH DEBILITATING MENTAL ILLNESS
- ADULTS WITH PHYSICAL/MEDICAL DISABILITIES
- ADULTS WITH INTELLECTUAL DISABILITIES
- ADULTS WITH TRAUMATIC BRAIN INJURY
- ADULTS WHO ARE SUBSTANCE ABUSERS
- ADULTS WHO......



DEMOGRAPHICS ARE CHANGING

- GUARDIANSHIP IS NOT JUST FOR THE POOR;
- MANY ARE WEALTHY
- MANY HAVE FAMILY MEMBERS
- SOME ARE IN HOSPITALS
- SOME ARE IN NURSING HOMES/ ASSISTED LIVING FACILITIES
- THEY ARE AGE 18 100+
- ALL GENDERS
- LGBT OLDER ADULTS



WHO ARE THE GUARDIANS

- FAMILY MEMBERS
- FAMILY FRIENDS
- PROFESSIONALS
- PRIVATE FOR PROFIT PROGRAMS
- PRIVATE NON-PROFIT PROGRAMS
- PUBLIC PROGRAMS (STATE)
- VOLUNTEERS



FAMILY

- MORE FAMILIAR WITH THE WARD (ADULT)
- UNDERSTANDS THE WARDS CULTURE, BEHAVIORS, VALUES, NEEDS
- GENERALLY HAVE NO CLUE OR EXPERIENCE WITH THEIR ROLE AS GUARDIAN
- LACK UNDERSTANDING OF LEGAL REQUIREMENTS

PROFESSIONAL

- LESS FAMILIAR WITH WARD (ADULT)
- LESS UNDERSTANDING OF WARDS CULTURE, BEHAVIORS, VALUES, NEEDS
- MORE FAMILIAR WITH LAWS, COMMUNITY RESOURCES
- HAVE MORE WARDS ON CASE LOAD



GUARDIANSHIP TERMINOLOGY

NATIONAL GUARDIANSHIP ASSOCIATION

- ADJUDICATION: THE LEGAL PROCESS OF RESOLVING A DISPUTE; THE PROCESS OF JUDICIALLY DECIDING A CASE. (BLACK'S)
- ADVANCE DIRECTIVE: A WRITTEN INSTRUCTION, SUCH AS A LIVING WILL OR DURABLE POWER
 OF ATTORNEY FOR HEALTH CARE, WHICH GUIDES CARE WHEN ADULT UNABLE TO
 COMMUNICATE
- ADVOCATE: A PERSON WHO ASSISTS, DEFENDS, OR PLEADS, OR PROSECUTES FOR ANOTHER.
 (BLACK'S)
- BEST INTEREST: THAT COURSE OF ACTION THAT MAXIMIZES WHAT IS BEST FOR A WARD AND THAT INCLUDES CONSIDERATION OF THE LEAST INTRUSIVE, MOST NORMALIZING, AND LEAST RESTRICTIVE COURSE OF ACTION POSSIBLE GIVEN THE NEEDS OF THE WARD. (E & S)

- CAPACITY: LEGAL QUALIFICATION, COMPETENCY, POWER, OR FITNESS. ABILITY TO UNDERSTAND THE NATURE OF THE EFFECTS OF ONE'S ACTS. (BLACK'S 5TH EDITION)
- DECISIONAL CAPACITY: THE ABILITY TO UNDERSTAND AND APPRECIATE THE NATURE AND CONSEQUENCES OF A DECISION AND TO REACH AND COMMUNICATE AN INFORMED DECISION IN THE MATTER. (BLACK'S)
- COMPETENCY: THE MENTAL ABILITY TO UNDERSTAND PROBLEMS AND MAKE DECISIONS.
 (BLACK'S)
- COURT REQUIRED REPORT: A REPORT WHICH THE GUARDIAN IS REQUIRED BY STATUTE OR COURT ORDER TO SUBMIT TO THE COURT RELATIVE TO THE GUARDIANSHIP. (E & S)
- COURT VISITOR, MONITOR, INVESTIGATOR: A PERSON APPOINTED BY THE COURT TO PROVIDE THE COURT WITH INFORMATION CONCERNING A WARD OR A GUARDIAN.

- DIRECT SERVICES: INCLUDES MEDICAL AND NURSING CARE, CARE/CASE MANAGEMENT AND
 CASE COORDINATION, SPEECH THERAPY, OCCUPATIONAL THERAPY, PHYSICAL THERAPY,
 PSYCHOLOGICAL THERAPY, COUNSELING, RESIDENTIAL SERVICES, LEGAL REPRESENTATION,
 JOB TRAINING AND OTHER SIMILAR SERVICES. (E & S)
- ESTATE: BOTH REAL AND PERSONAL, TANGIBLE AND INTANGIBLE, AND INCLUDES ANYTHING THAT MAY BE THE SUBJECT OF OWNERSHIP. (E & S)
- FIDUCIARY: AN INDIVIDUAL, AGENCY OR ORGANIZATION THAT HAS AGREED TO UNDERTAKE FOR ANOTHER A SPECIAL OBLIGATION OF TRUST AND CONFIDENCE, HAVING THE DUTY TO ACT PRIMARILY FOR ANOTHER'S BENEFIT AND SUBJECT TO THE STANDARD OF CARE IMPOSED BY LAW OR CONTRACT. (SELECT)
- GUARDIAN: AN INDIVIDUAL OR ORGANIZATION NAMED BY ORDER OF THE COURT TO EXERCISE ANY OR ALL POWERS AND RIGHTS OVER THE PERSON AND/OR THE ESTATE OF AN INDIVIDUAL. THE TERM INCLUDES CONSERVATORS AND CERTIFIED PRIVATE OR PUBLIC FIDUCIARIES. ALL GUARDIANS ARE ACCOUNTABLE TO THE COURT. (E & S)

WHAT IS SUPPORTIVE DECISION MAKING?

- INCORPORATES A RANGE OF LEGAL MODELS
- ALLOW THE INDIVIDUAL TO RETAIN FINAL SAY IN HER OR HIS LIFE.
- MOST OF US FEEL FREE TO RELY ON THE ADVICE, EXPERTISE AND KNOWLEDGE OF SOMEONE ELSE
 WHEN WE ENCOUNTER ISSUES WITH WHICH WE ARE UNFAMILIAR. WE CONSULT OUR ATTORNEY,
 OUR ACCOUNTANT, FINANCIAL ADVISORS, AUTO MECHANIC OR DOCTOR WHEN WE NEED TO
 MAKE INFORMED DECISIONS, OR WHEN WE ARE UNSURE AS TO HOW TO PROCEED. IF WE KNOW
 ANY OF THESE "EXPERTS" WELL ENOUGH, THEY HELP US UNDERSTAND WHICH DECISION SERVES
 OUR LONG-TERM INTEREST BEST. THIS IS, ESSENTIALLY, SUPPORTED DECISION-MAKING.
- AUTHENTIC PERSON-CENTERED PLANNING IS A PROVEN AND EFFECTIVE WAY TO PROVIDE SUPPORTS



SUPPORTIVE DECISION MAKING

- NEED TO UNDERSTAND WHAT THE ISSUES ARE
- BELIEVE A GUARDIANSHIP IS NOT NEEDED
- CLARIFY REASON FOR CONCERNS
- IS THE ISSUE TEMPORARY OR REVERSIBLE CONDITIONS.
- WHAT RESOURCES ARE AVAILABLE IN THE COMMUNITY
- WHAT ARE THE STRENGTHS OF THE ADULTS
- IDENTIFY THE LIMITATIONS OR BARRIERS FOR THE ADULT



SUPPORTIVE DECISION MAKING

- SUPPORTING DECISION MAKING REFERS TO WHEN ADULTS,
 PARTICULARLY THOSE WITH COMPLEX NEEDS, COGNITIVE AND/OR
 COMMUNICATION REQUIREMENTS ARE ASSISTED TO UNDERSTAND,
 CONSIDER AND COMMUNICATE THEIR CHOICES.
- WITH SUPPORTING DECISION MAKING THE CHOICE ULTIMATELY REMAINS THE DECISION OF THE ADULT.

WHO CAN BE A SUPPORTIVE DECISION MAKER?

- FAMILY MEMBERS
- FAMILY FRIENDS
- PROFESSIONALS
- PRIVATE FOR PROFIT PROGRAMS
- PRIVATE NON-PROFIT PROGRAMS
- VOLUNTEERS

PRACTICAL TOOL FOR LAWYERS: STEPS IN SUPPORTING DECISION –MAKING 2016

GUIDE AT WWW.AMBAR.ORG/PRACTICALTOOL

- PRESUME GUARDIANSHIP IS NOT NEEDED
- REASON CLEARLY IDENTIFY THE REASON FOR CONCERNS
- ASK IF A TRIGGERING CONCERN MAY BE CAUSED BY TEMPORARY OR REVERSIBLE CONDITIONS.
- COMMUNITY DETERMINE IF CONCERNS CAN BE ADDRESSED BY CONNECTING THE INDIVIDUAL
 - TO FAMILY OR COMMUNITY RESOURCES AND MAKING ACCOMMODATIONS.
- TEAM ASK THE PERSON WHETHER HE OR SHE ALREADY HAS DEVELOPED A TEAM TO HELP MAKE DECISIONS.
- IDENTIFY IDENTIFY AREAS OF STRENGTHS AND LIMITATIONS IN DECISION-MAKING
- CHALLENGES SCREEN FOR AND ADDRESS ANY POTENTIAL CHALLENGES PRESENTED
- APPOINT LEGAL SUPPORTER OR SURROGATE CONSISTENT WITH PERSON'S VALUES AND PREFERENCES.
- LIMIT ANY NECESSARY GUARDIANSHIP PETITION AND ORDER.

SOCIETY -V- INDIVIDUAL RIGHTS

AT THE HEART OF THIS ISSUE ARE ASSUMPTIONS ABOUT INTELLECTUAL DISABILITY. GUARDIANSHIP IS PREDICATED ON THE PREMISE THAT INDIVIDUALS LACK DECISION-MAKING CAPACITY. HOWEVER, DETERMINATIONS OF CAPACITY ARE HIGHLY SUBJECTIVE AND OFTEN CENTER AROUND IDEOLOGICAL STIGMAS ASSOCIATED WITH PEOPLE WITH DISABILITIES. STATE MANDATES AROUND DETERMINATIONS OF GUARDIANSHIP ASSUME THAT PEOPLE IDENTIFIED WITH INTELLECTUAL OR DEVELOPMENTAL DISABILITIES DO NOT HAVE THE CAPACITY TO EXERCISE THEIR RIGHTS AS AN ADULT (LISI, BURNS, & LUSSENDEN, 1994; MILLAR, 2008). THEREFORE, STATES ARE EXERCISING THEIR "AUTHORITY WITH LESS CONCERN ABOUT THE NEEDS OF PERSONS WITH DISABILITIES, FOCUSING INSTEAD ON SOCIETY'S DESIRE TO PROTECT ITSELF FROM THOSE DEEMED 'DANGEROUS' OR MERELY DIFFERENT" (SALZMAN, 2009, P. 164).

RECOMMENDATIONS FROM WORLD CONGRESS ON GUARDIANSHIP

TWO RECOMMENDATIONS:

- 1. STOP PROMOTING GUARDIANSHIP
- 2. ENHANCE RESOURCES TO PROMOTE INDEPENDENCE AND AUTONOMY COUNTRIES AND SYSTEMS SHOULD DEVELOP MATERIALS, RESOURCES AND GUIDANCE FOR SCHOOLS AND OTHER PROFESSIONALS INTERACTING WITH FAMILIES OF CHILDREN WITH DISABILITIES. THESE MATERIALS WOULD INCLUDE, BUT NOT BE LIMITED TO, TOOLS THAT:
- A. EDUCATE AND TRAIN PARENTS, SELF-ADVOCATES AND PROFESSIONALS WITH WHOM STUDENTS WITH DISABILITIES INTERACT PRIOR
 TO AGE 18 ON THE WAYS IN WHICH SUPPORTED DECISION-MAKING CAN ENHANCE A STUDENT'S SAFETY AND GROWTH.
- B. INCORPORATE SUPPORTED DECISION-MAKING APPROACHES TO SCHOOL CURRICULUMS FOR ALL STUDENTS, INCLUDING
 EDUCATION ON FINANCIAL MANAGEMENT, MEDICAL DECISIONS, CAREER DECISIONS, LIVING ARRANGEMENTS, AND ENTERING INTO
 CONTRACTS.
- C. DEVELOP LOCAL RESOURCES SO THAT SCHOOLS AND FAMILIES CAN CONSULT DISABILITY AND LEGAL ORGANIZATIONS THAT
 PROVIDE ADVICE AND GUIDANCE ON SUPPORTED DECISION-MAKING OPTIONS.

END OF PART 1 GUARDIANSHIP & SUPPORTIVE DECISION MAKER



RESOURCES

- PRODUCED BY THE NATIONAL GUARDIANSHIP NETWORK; SUPPORTED BY THE STATE JUSTICE INSTITUTE AND THE BORCHARD FOUNDATION CENTER ON LAW AND AGING
- WINGS WORKING INTERDISCIPLINARY NETWORKS OF GUARDIANSHIP STAKEHOLDERS
- NATIONAL GUARDIANSHIP ASSOCIATION
- WHERE HUMAN RIGHTS BEGIN
- HUMAN RIGHTS AND GUARDIANSHIP FOR INDIVIDUALS WITH DEVELOPMENTAL DISABILITIES IN PLAIN LANGUAGE – WWW.GANJI WWW.ARCESSEX.ORG
- 3RD WORLD CONGRESS ON ADULT GUARDIANSHIP MAY 28-30, 2014
- SUPPORTED DECISION-MAKING TEAMS: SETTING THE WHEELS IN MOTION SUZANNE M.
 FRANCISCO
- ERICA WOOD COMMISSION ON LAW & AGING AMERICAN BAR ASSOCIATION
- ABA TOOL ON SUPPORTED DECISION MAKING

Michael Hagenlock, LCSW, LAC Montana Adult Protective Services Bureau Chief

Justice For All: Protecting Our Vulnerable Adults
Milwaukee, Wisconsin August 30, 2017
Guardianship – Supportive Decision Making Part 2

What to expect from this presentation

- How guardianships happen
- Regulations & reports for guardians
- Pros and Cons of Guardianships
- Supportive Decision making and how to implement
- Pros and Cons of Supportive Decision Making

Before we start; what questions do you have?



About Guardianship



Guardianship

Guardianship, is a legal process, utilized when a person can no longer make or communicate safe or sound decisions about his/her person and/or property or has become susceptible to fraud or undue influence. Because establishing a guardianship may remove considerable rights from an individual, it should only be considered after alternatives to guardianship have proven ineffective or are unavailable.

Guardianship of the Person

When the court appoints a guardian of the person, the guardian may have the following responsibilities:

- Determine and monitor residence.
- Consent to and monitor medical treatment.
- Consent and monitor non-medical services such as education and counseling.
- Consent and release of confidential information.
- Make end-of-life decisions (depends on State Law).
- Act as representative payee.
- Maximize independence in least restrictive manner.
- Report to the court about the guardianship status at least annually.

Guardianship of the Estate or Property May also be referred to as Conservator

Estate" is defined as real and personal property, tangible and intangible, and includes anything that may be the subject of ownership.

When the court appoints a guardian/conservator of the estate, the guardian/conservator is assigned the following responsibilities:

- Marshall and protect assets.
- Obtain appraisals of property.
- Protect property and assets from loss.
- Receive income for the estate.
- Make appropriate disbursements.
- Obtain court approval prior to selling any asset.
- Report to the court or estate status.

How a Guardian is appointed

Erica Wood Commission on Law and Aging American Bar Association July 1, 2014

- A petition is filed
- Notice is sent out to all parties involved
- Court appoints counsel, court visitor, physician,
- Sets date for a hearing
- A hearing is held
- Judicial Order is made for or against
- If for; guardian is appointed
- Maybe individual or entity
- Reports are made, accounting completed; reports made to the court annually

Capacity is determined

- What are your state definitions?
- **■**Four elements
 - Medical condition
 - Functional element
 - Cognitive element
 - Harm, Necessity

Montana

- 72-5-306. Purpose and basis for guardianship. Guardianship for an incapacitated person may be used only as is necessary to promote and protect the well-being of the person. The guardianship must be designed to encourage the development of maximum self-reliance and independence in the person and may be ordered only to the extent that the person's actual mental and physical limitations require it. An incapacitated person for whom a guardian has been appointed is not presumed to be incompetent and retains all legal and civil rights except those that have been expressly limited by court order or have been specifically granted to the guardian by the court.
- Temporary Emergency Guardianship 6 months
- Full Guardian
- Limited Guardian

Capacity Assessment

- Considerations in Capacity Assessment
- Judge will make decision based on evidence
- Need for professional assessment
- Means to enhance capacity
- Values
- Capacity not global but task & situation specific
- Temporary or mitigating factors
- Severity, reversibility of risks
- Not advanced age; not oddness

Things to be cautious of

- Diagnosis
- Drugs
- Dehydration
- Diet
- Depression
- Disorientation
- Delirium
- Dementia

Effects of Guardianship on the adult

- Restricts or removes basic rights
- Constant natural tension between guardian and ward
 - Protection –v- Autonomy
 - Rights Needs
- Most extreme action an adult individual could go through
- Guardianship should always be last resort
 - Adult must lack capacity to make informed decisions
 - All Alternative interventions have been exhausted
 - Must be for protection of the person or their property

Other Reasons to avoid Guardianship

- Expensive for Adult (Ward)
- Time consuming for all involved
- Stigmatizing
- Intimidating
- Confusing
- Family Issues
- Benefits the third party more than the individual

Abuse, Neglect, Exploitation Guardianship

A 2005 AARP Public Policy Institute survey on guardianship monitoring found that over 40 percent of courts and guardianship experts surveyed reported that no one is assigned to visit individuals under guardianship and more than one-third said no one is designated to verify information in reports and accountings And while there are few statistics, evidence of guardianship abuse and lack of effective oversight continues to surface.

See, for example, the 2010 report by the Government Accountability Office, Guardianships: Cases of Financial Exploitation, Neglect, and Abuse of Seniors, GOA-10-1046,

(http://cc.bingj.com/cache.aspx?q=guardianship+monitoring+a+national+survey+AARP+public+policy+institute&d=5043949600243744&mkt=en-US&setlang=en-US&w=3d29fc4c,ea4d5b11).

http://www.gao.gov/products/GAO-10-1046?source=ra.

What are the alternatives if not a Guardianship?

- Representative Payee
- Power of Attorney for medical
- Power of attorney for financial matters
- Trust and savings accounts
- Person centered planning
- Supportive decision maker

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- LIMIT ANY NECESSARY GUARDIANSHIP PETITION AND ORDER.

Supportive Decision Making

- Incorporates a range of legal models
- allow the individual to retain final say in her or his life.
- Most of us feel free to rely on the advice, expertise and knowledge of someone else when we encounter issues with which we are unfamiliar. We consult our attorney, our accountant, financial advisors, auto mechanic or doctor when we need to make informed decisions, or when we are unsure as to how to proceed. If we know any of these "experts" well enough, they help us understand which decision serves our long-term interest best. This is, essentially, supported decision-making.
- Authentic person-centered planning is a proven and effective way to provide supports

Supportive Decision Making

- supporting decision making refers to when adults, particularly those with complex needs, cognitive and/or communication requirements are assisted to understand, consider and communicate their choices.
- With supporting decision making the choice ultimately remains the decision of the adult.

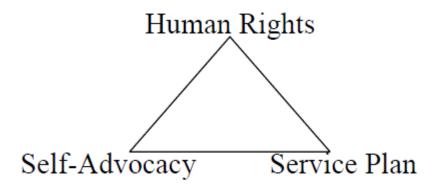
Society –V-Individual Rights

At the heart of this issue are assumptions about intellectual disability. Guardianship is predicated on the premise that individuals lack decision-making capacity. However, determinations of capacity are highly subjective and often center around ideological stigmas associated with people with disabilities. State mandates around determinations of guardianship assume that people identified with intellectual or developmental disabilities do not have the capacity to exercise their rights as an adult (Lisi, Burns, & Lussenden, 1994; Millar, 2008). Therefore, states are exercising their "authority with less concern about the needs of persons with disabilities, focusing instead on society's desire to protect itself from those deemed 'dangerous' or merely different" (Salzman, 2009, p. 164).

From World Congress on guardianship - perspective on supportive decision making 5-13-2014

"Where Human Rights Begin offers a Self-Direction Model of education and habilitation that emphasizes personal purpose and meaning through recognizing an individual's rights, needs, strengths, and

The Self-Direction Model may be conceived as a triangle.



Who Should be on the SDM Team?

- Ask the person
- Ask your self
- Ask who has a connection with the adult
- Community
- Church
- Family
- Friends
- Professionals
- People who have the heart and desire to help the person succeed

A good Supportive Decision Making Team Member

- Someone the person trusts and who is willing to go on the journey implementing SDM.
- 2. Someone who accepts and supports the individual/family.
- 3. Someone who has knowledge in a particular area we are seeking to include in the SDM agreement.
- 4. Someone that can be available long term (although changes to the Team should be anticipated over time).
- 5. Someone who is open to novel ideas, flexible and can make the individual "the agenda".

End of Part 2



Resources

- Produced by the National Guardianship Network; Supported by the State Justice Institute and the Borchard Foundation Center on Law and Aging
- WINGS Working Interdisciplinary Networks of Guardianship Stakeholders
- National Guardianship Association
- Where Human Rights Begin
- Human Rights and Guardianship for Individuals with Developmental Disabilities In Plain Language - www.arcessex.org
- 3rd World Congress on Adult Guardianship May 28-30, 2014
- Supported Decision-Making Teams: Setting the Wheels in Motion Suzanne M. Francisco
- Erica Wood Commission on Law & Aging American Bar Association
- ABA Tool on Supported Decision Making