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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

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The Paradox of Guardianship

Valuable tool to
protect Vulnerable
Adult?

Or

Heavy-handed tool
which strips
constitutional right to
self-determination?



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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

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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

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www.napsa-now.org/about-napsa/code-of-ethics

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.

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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.

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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.

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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*.

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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.

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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

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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***)

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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

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Pondering The Three-Legged Stool of Guardianship/Conservatorship

Incapacity

+

Behavioral Evidence

+

No Viable Less
Restrictive Alternative



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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

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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)



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Determining Incapacity/Inability

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

Presumption is Competence/Capacity

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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?

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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

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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

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+

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Behavioral Evidence

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

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Pondering The Three-Legged Stool of Guardianship/Conservatorship



Incapacity
+
Behavioral Evidence
+

***No Viable Less
Restrictive
Alternative***



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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

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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)

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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

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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***

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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

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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

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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

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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!*

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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

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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

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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

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Deciding to Petition: Assessment

- Person meets criteria
- Determine areas of responsibility needed to meet person's needs
- Nominate most appropriate guardian / conservator

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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)

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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!

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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)

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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)

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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

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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

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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



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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

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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

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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

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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

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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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