

Making Guardianship Work for Vulnerable Elders

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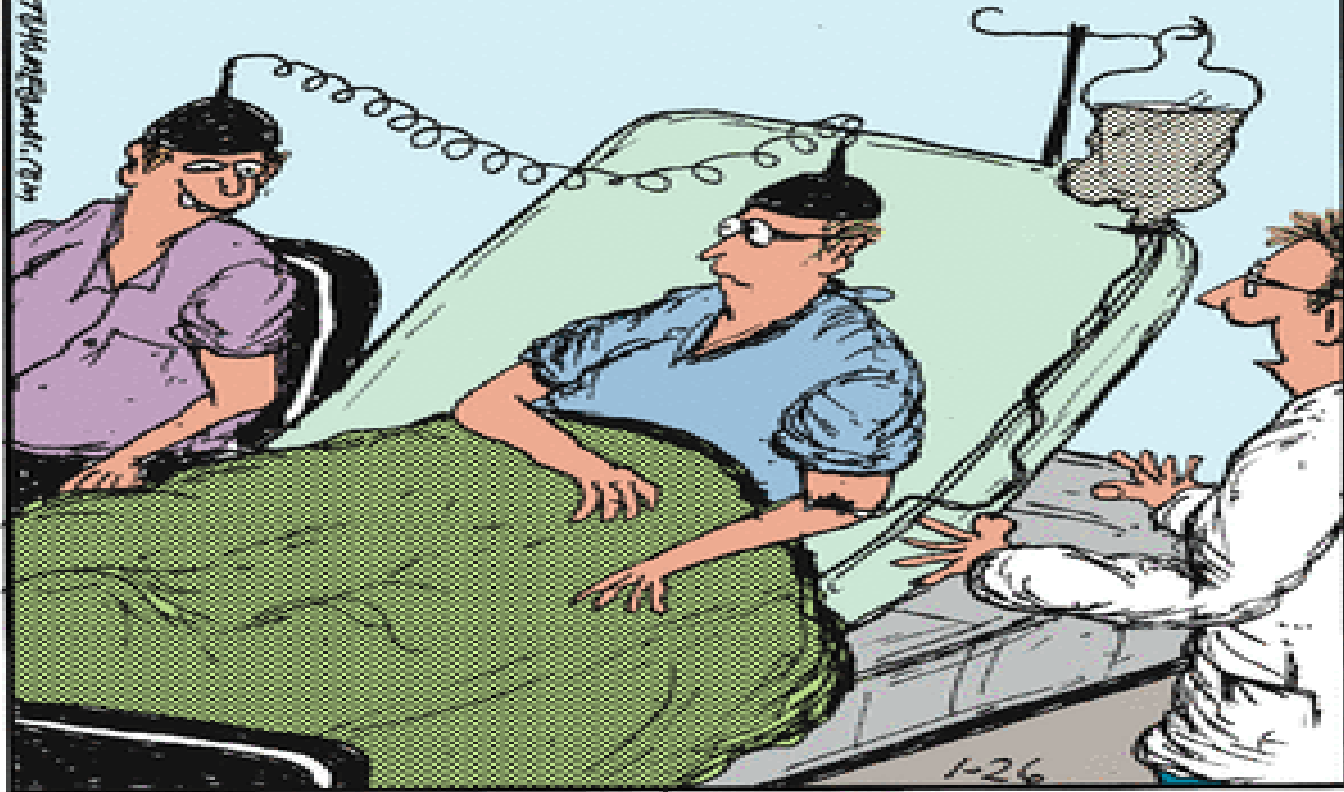
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“Mr. Calton here will handle your thinking until your brain has healed enough from your surgery to think for itself.”

What IS adult guardianship?

- Relationship
- Created by state law
- In which court gives
- One person or entity (guardian)
- Duty and power
- To make personal and/or property decisions
- For another (incapacitated person)
- Upon finding that adult lacks capacity to make decisions.



Do you speak “guardianship”?

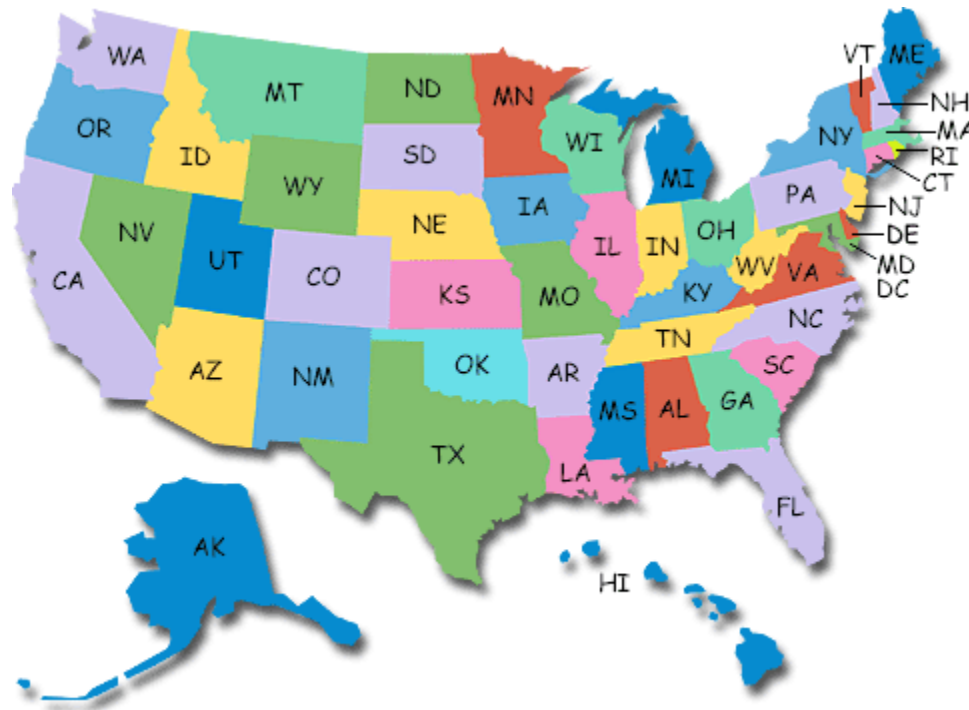
- ***Guardian***
- ***Guardian of person***
- ***Guardian of property***
- ***Conservator***
- ***Guardian ad litem***
- ***Court visitor***
- ***Plenary guardian***
- ***Limited guardian***
- ***Emergency guardian***
- ***Incapacitated person***

Out

- ***Incompetent***
- ***Ward***



Not one guardianship system but 51 different “systems”



How is a guardian appointed?

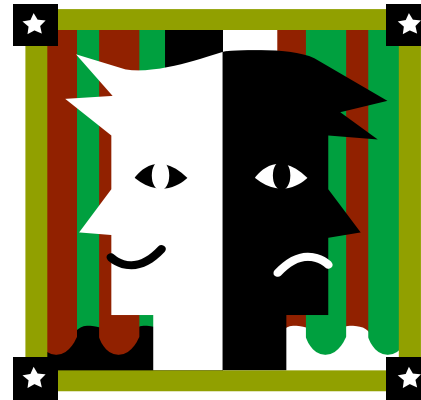
- “Any person” file petition
- Notice
- Possible appointment of counsel, sometimes court visitors, investigators, guardians ad litem
- Hearing
- Judicial order; appointment of guardian
- Bond
- Annual reports and accountings

Who are the guardians?

- Family members; friends
- Professional guardians – “stranger guardians”
- Private non-profit and for-profit agencies
- Lawyers
- Banks
- Public guardian “last resort”
- Volunteers
- Dedicated? Caring? Conflicted? Abusive? Yes; no data on practice

Guardianship as last resort

- *Parens patriae* – paternalistic, protective
- Removes basic rights
- Constant inherent tension
 - Protection v autonomy
 - Rights v needs
- Double edged sword
- Society's most extreme intervention



SCENARIO

- Procedural safeguards

Shaping the Guardianship

- Is a guardianship necessary?
 - What are alternatives?
- How can the guardianship be limited?
 - Most state statutes prefer if not require limited
 - What is the practice in your state?
- Who is the best person to serve?
 - Family versus 3rd party

Role of guardian

What authority can you point to in advocating the proper role of a guardian?

What guardian can do

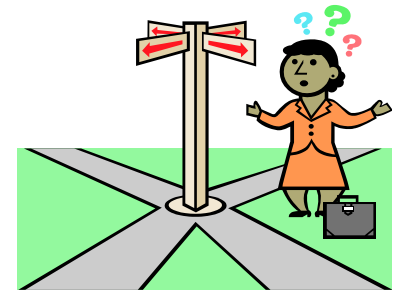
- ✓ State law
- ✓ Court order

How guardian makes decisions

- ✓ National Guardianship Association 2013 *Standards of Practice* – see www.guardianship.org
- ✓ Fiduciary duty (Watch for upcoming CFPB *Fiduciary Guides*) – see <http://www.consumerfinance.gov/>

Two standards for surrogate decision-making

- “**Best interests**” – surrogate makes decisions to best protect health, safety, welfare
- “**Substituted judgment**” – surrogate uses values of individual, determines what person would have wanted
 - Requires evidence of values, preferences
 - “Values history”
- In practice, often a blend



Substituted judgment standard confirmed

- *Resa Raven v Department of Social Services*, Supreme Court of State of Washington, July 2013
 - Guardian kept individual at home with care, on basis that she consistently had refused nursing home placement; but guardian made mis-steps in care that could have been called neglect.
 - Court held that “ a guardian’s good faith determination that her ward opposes nursing home placement cannot be the basis for a finding of neglect in light of the legislature’s clear mandate against placing incapacitated persons against their will.”

New views on decision-making

Surrogate decision-making



Supported decision-making



How Make Decisions



NGA Standard 7

1. The guardian shall ask the person what he or she wants.
2. If the person has difficulty expressing what he or she wants, the guardian shall do everything possible to help the person express his or her goals, needs, and preferences.
3. Only when the person, even with assistance, cannot express his or her goals and preferences, shall the guardian seek input from others familiar with the person to determine what the individual would have wanted.
4. Only when the person's goals and preferences cannot be ascertained, may the guardian make a decision in the person's best interest.

Include in Decisions

NGA Standard 9

- The guardian shall encourage the person to participate, to the maximum extent of the person's abilities, in all decisions that affect him or her, to act on his or her own behalf in all matters in which the person is able to do so, and to develop or regain his or her own capacity to the maximum extent possible.
- The guardian shall make and implement a plan that seeks to fulfill the person's goals, needs, and preferences. The plan shall emphasize the person's strengths, skills, and abilities to the fullest extent in order to favor the least restrictive setting.
- The guardian shall wherever possible, seek to ensure that the person leads the planning process; and at a minimum to ensure that the person participates in the process.

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- Guardian authority
- Preservation of rights

Visitation



NGA Standard 4

The guardian shall promote social interactions and meaningful relationships consistent with the preferences of the person under guardianship.

- A. The guardian shall encourage and support the person in maintaining contact with family and friends, as defined by the person, unless it will substantially harm the person.

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- Values of Individual

Residential Options



NGA Standard 12

See that the person is living in the most appropriate environment that addresses the person's goals, needs, and preferences.

- The guardian shall have a strong priority for home or other community based settings, when not inconsistent with the person's goals and preferences.
- The guardian shall authorize moving a person to a more restrictive environment only after evaluating other medical and health care options and making an independent determination that the move is the least restrictive alternative at the time, fulfills the current needs of the person and serves the overall best interest of the person.
- The guardian shall consider the proximity of the setting to those people and activities that are important to the person when choosing a residential setting.

Transitioning to the community – role of guardian

- ✓ Transitioning to community
- ✓ Transition team
- ✓ Supports and services
- ✓ Choice of housing
- ✓ House or roommates
- ✓ Employment
- ✓ Medical decisions
- ✓ Perception of risk and ability to address



Obstacles to guardian consent for community placement/MFP

- Guardian unfamiliar with MFP
- Guardian fears liability
- Guardian fears additional burden
- Guardian fears risk to family member
- Guardian fears losing control, not being in loop
- Guardian not used to person-centered planning
- Guardian party to family feuds
- Professional guardian case overload; insufficient funding
- Guardian fears court will disapprove
- Guardian says court approval needed



Tools for “getting past no”

- ✓ **State law**
 - ✓ Most state laws require “substituted judgment” – guardian uses person’s values, steps into shoes
- ✓ ***NGA Standards of Practice (or state standards)***
 - ✓ Require “person-centered plan”
 - ✓ Require guardian preference for community settings if not inconsistent with what person wants
 - ✓ Require assist & encourage person to act in own behalf & participate in decisions
- ✓ **Keep guardians in loop; keep them informed**
- ✓ **Assurances of teamwork & support**



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- Restoration

Restoration of rights; Termination of guardianship

- All states have procedures for restoration to capacity
- Evidentiary standards vary
- Procedural safeguards vary
- Court review of need for modification of order and possible restoration varies
- In real world, it is often “until death do us part” for individual & guardian
- Advocates should consider whether restoration is possible; if not, consider modification of order
- See ABA Commission, *Bifocal*, Vol. 34, No 6 (2013).

When Guardian Goes Wrong



- Court as chief supervisor
- APS/ombudsman & courts
 - Access to court
 - New National Probate Court Standards
- Center for Guardianship Certification
 - File grievance against NCG, NMG
- Mediation

Red Flags

- Bills not being paid
- Restricted access
- No participation in care plan meetings
- What have you seen?



Ombudsman Role re Reporting Abuse

- Ombudsman needs informed consent of resident to report to APS
- Proposed regulations to the Older Americans Act address cases in which:
 - Resident cannot communicate informed consent; and
 - Ombudsman believes guardian is perpetrator of abuse
- Upcoming OAA reauthorization may address issue as well

Systems advocacy- federal & state legislation

- Klobuchar & Cornyn bill, S. 975
- State bills
- Communicate with court
- Education & training of all players
- Find and work with stakeholders in state
 - NGA affiliate, see www.guardianship.org
 - Public guardianship program
 - Elder law & bar
 - AARP; other senior coalitions

Klobuchar & Cornyn bill, S. 975

Guardian Accountability and Senior Protection Act

- Provide funding for State courts to assess and improve the handling of proceedings relating to guardianship and conservatorship of disabled elderly individuals
- Authorize the Attorney General to carry out a pilot program for the conduct of background checks on individuals to be appointed as conservators
- Promote the widespread adoption of information technology to better monitor, report, and audit conservatorships and adult guardianships of protected persons

State WINGS



- **Working Interdisciplinary Networks of Guardianship Stakeholders (WINGS)**
- Steering committee; high-level court backing
- Assess strength, weaknesses, priorities
- Sustainability – remain as consistent forum for collaboration & problem-solving
- Legislation is the beginning, not the end
- “Collective impact”

Launching of State WINGS

- New York
- Oregon
- Texas
- Utah
- Existing groups – Ohio; Missouri
- Liftoff is model for other states; importance of LTC advocate participation



Adult Guardianship Resources

- Center for Elders & Courts, National Center for State Courts, <http://eldersandcourts.org/>
- National Guardianship Association, www.guardianship.org
- National Guardianship Network, www.nationalguardianshipnetwork.org
- ABA Commission on Law and Aging, http://www.americanbar.org/groups/law_aging/resources/guardianship_law_practice.html
- Your state guardianship association, protection & advocacy agency, state unit on aging, elder or disability law bar section