



Nuts & Bolts on Guardianship as Last Resort: Basics on When to File & How to Maximize Autonomy

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Hearing VOICE of Individuals with Diminished Capacity: *Not About Me Without Me*

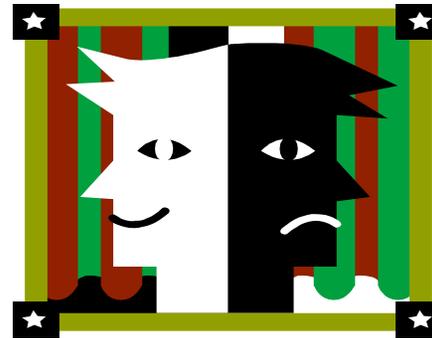
- Why is guardianship last resort?
- What is triggering issue; will guardianship help?
- Is there really lack of capacity?
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- Use person's values in decision-making?
- Consider restoration?
- Routinely screen for these questions?



Guardianship – A “Last Resort”

Why is Guardianship 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



Guardianship – “*Part ogre and part Santa Claus*”



Removes Fundamental Rights

- Loss of basic rights
- Restricts self-determination
- Restricts freedom to choose, freedom to risk
- 1987 *Associated Press* – “unpersons”
- “Living the life of another”

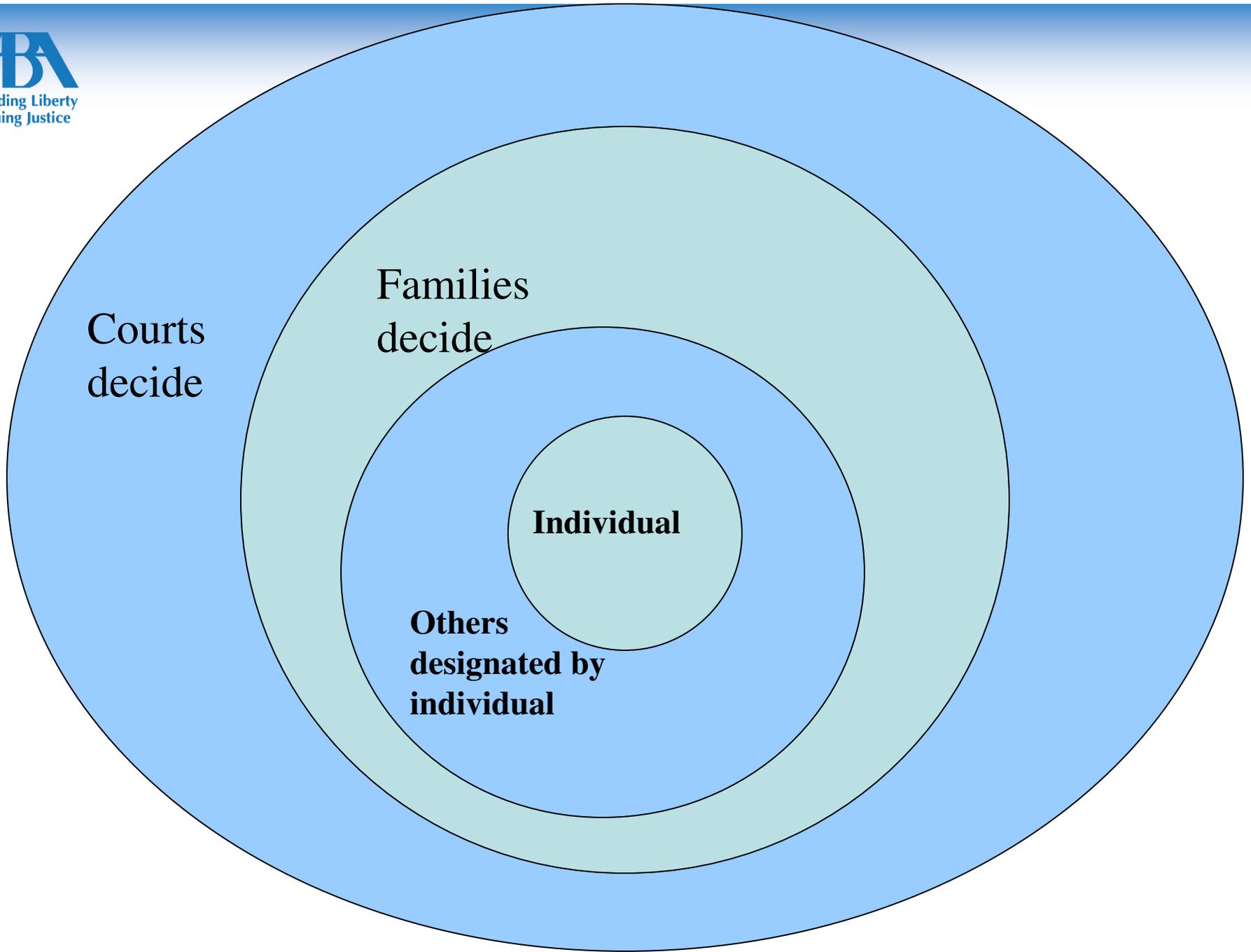
Why Else Avoid Guardianship

- Expense; use up estate
- Cumbersome; time consuming
- Stigmatizing
- Intimidating; confusing
- Families in court maze
- Benefit of third parties over individual
- Blunt tool

Least Restrictive Alternative

- Constitutional principle – *Shelton v. Tucker*, 364 U.S. 479 (1960)
 - “Even though the government purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.”
- Application in mental health context – *Lake v. Cameron*, 364 F.2d 657 (D.C. Cir. 1966)
- Application to guardianship – example is *In Re Mollie Orshansky*, 804 A.2d 1077 (D.C. App.2002)
 - Trial Court “abused its discretion in appointing a guardian and conservator by not giving the wishes of Mollie Orshansky the consideration to which they were entitled by law.”





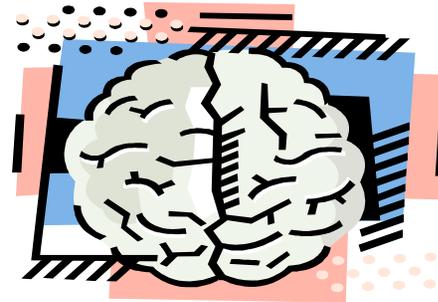
Triggering Issue

- Protection of person vs needs of third party –
 - Hospital
 - nursing home
 - family member
 - case worker
- Will a guardian help to solve the problem?

Capacity

Is There Lack of Capacity?

- Changing definition of “incapacity” in state guardianship law
- Four elements; states mix & match
 - Medical condition
 - Cognitive element
 - Functional element
 - Risk of harm
- State-by-state chart (“Initiation of Guardianship Proceedings, 2008) at <http://new.abanet.org/aging/Pages/GuardianshipLawandPractice.aspx>



Incapacity: What is it Not?

- **Incapacity \neq**
 - Cognitive impairment alone
 - Medical diagnosis alone
 - Advanced age
 - Eccentricity
 - Refusal of care
 - Disagreement in high risk situations
 - Poverty

Incapacity Definition in Uniform Guardianship & Protective Proceedings Act

- [Cognitive] “unable to receive and evaluate information or make or communicate decisions to such an extent that. . .”
- [Functional] “. . . the individual lacks the ability to meet essential requirements of physical health, safety, or self-care, even with appropriate technological assistance.”

Definition of Protected Person Under Uniform Guardianship and Protective Proceedings Act

- [functional] “Individual unable to manage property and business affairs because of [cognitive] an impairment in ability to receive and evaluate information or make decisions, even with use of appropriate technological assistance. . . .”
- And [risk of harm] “has property that will be wasted or dissipated unless management provided or money needed for support, care. . . .”

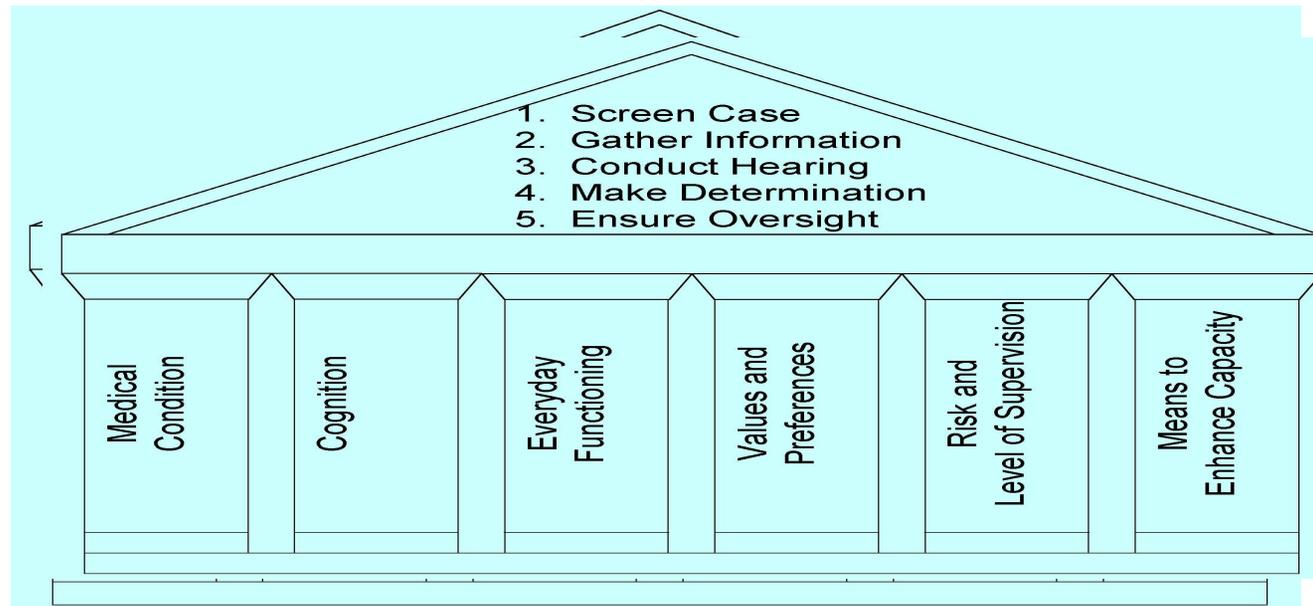
Rule Out Reversible/Mitigating Conditions

- Medical Causes
 - Delirium in acute care setting
 - Medications
 - Polypharmacy
 - Drug to drug, drug to disease
 - Drugs & aging
 - Urinary track infection
 - Malnutrition; dehydration
- Psychological Causes
 - Grief
 - Transfer trauma
 - Depression
- Communication Problems
 - Hearing loss
 - Language & literacy problems
 - Cultural differences



Capacity Assessment Model – ABA/APA Handbook for Judges

<http://new.abanet.org/aging/Pages/Onlinepublicationsprofessionals.aspx>



- Get thorough assessment; show strengths & weaknesses
- Identify assessment professional
- Relate assessment to elements of state law

[Poll on Capacity Assessment]

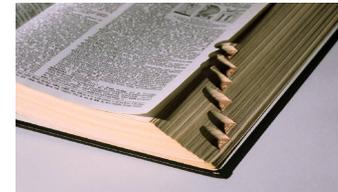
Less Restrictive Alternatives

Less Restrictive Options

- Financial Alternatives
 - Financial power of attorney
 - Representative payee
 - Joint accounts
 - Trust
 - [Money management]
- Health Care/Personal Care Alternatives
 - Health care power of attorney
 - Health care “living will” instructional directive
 - Advance directive
 - Health care default surrogate law
 - For guide for proxy decision-making, see *Making Medical Decisions for Someone Else: A How-To Guide*, <http://new.abanet.org/aging/Pages/HealthDecisions.aspx>
- May not need guardian *unless*
 - Decision outside scope of document
 - Possible abuse by agent

Guardianship Statutory Provisions on Alternatives

- Petition requirements
- Court selection of guardian
- Direction to court to consider
- Health care directive v guardianship: Which trumps?
Decision by agent in:
 - At least 29 states; see chart at <http://new.abanet.org/aging/Pages/GuardianshipLawandPractice.aspx>
 - Uniform Health Care Decisions Act
 - Uniform Guardianship and Protective Proceedings Act



Capacity to Execute Planning Documents

- Standard of capacity for durable power of attorney – traditionally based on capacity to contract; some courts held similar to testamentary capacity
- Standard of capacity for advance directive
 - similar to capacity to contract
- Little adjudication

Health Care Default Surrogates

- Most health care decisions in event of incapacity made by family
- 44 states have health care default surrogate consent laws
- <http://new.abanet.org/aging/Pages/HealthDecisions.aspx>
- Varying scope
- Hierarchy of priority
- 23 include “close friend”
- Approx 10 have provisions for “unbefriended”

Guardianship/Caregiver Mediation

- Not “alternative” to guardianship
- No mediation of “incapacity” determination
- Neutral facilitator may address family disputes
- May help in identifying care plan; selection of guardian or other surrogate
- Pre-filing strategy; or judge may direct
- See “Elder Mediation” on AoA NLRC Web site at:
http://nlrc.aoa.gov/nlrc/Methods/Best_Practices/Elder_Mediation.aspx
- ACR new section on Elder Decision-Making and Conflict Resolution --
<http://www.acrnet.org/sections/Elder%20Section/index.htm>

Questions So Far?

Limited Guardianship Orders

Concept of Limited Order

- Limited v plenary order
- Guardian assigned only those duties & powers person is incapable of exercising
- Highlighted in UGPPA
- National Probate Court Standards – directs judge to detail powers & duties & rights retained
- Language included in virtually every state statute – 2008 chart by AARP Public Policy Institute at <http://new.abanet.org/aging/Pages/GuardianshipLawandPractice.aspx>

Guardian Powers & Duties: Two Types of Statutes

- Type One = Guardianship removes all rights except those
 - Set out in statute. Some states list retained rights (FL)
 - Set out in court order
- Type Two = Guardianship removes and transfers ONLY those powers specifically set out in order. (All orders = limited orders.)

Rationales for Limited Orders

- Maximize autonomy
- Support principle of least restrictive alternative
- Support mental health in preserving choice & control
- Encourage guardian to consult/communicate more with individual
- Disability community – means to normalize life

Examples of Limited Orders

Mr. X retains the right to have and spend \$20 of cash per week.

Ms. X retains the rights to manage and use her checkbook (with monthly limit).

Mr. X retains the right to make donations to organizations of his choosing (with limit).

Ms. Y retains the right to choose a health or long-term care facility.

Ms. Z retains the right to manage her medications (with assistance).

Ms. A retains the right to smoke at a time and place of her determination, within the law.

Ms. Z retains the right to travel.

Mr. M retains the right to vote.

Crafting Limited Orders



“Judges are not like baseball umpires, calling strikes and balls or merely labeling someone competent or incompetent. Rather, the better analogy is that of a craftsman who carves staffs from tree branches.

Although the end result – a wood staff – is similar, the process of creation is distinct to each staff. Just as the good wood-carver knows that within each tree branch there is a unique staff that can be ‘released’ by the acts of the carver, so too a good judge understands that, within the facts surrounding each guardianship petition, there is an outcome that will best serve the needs of the incapacitated person, if only the judge and the litigants can find it.” Larry Frolik, *Stetson L. Rev.* Spring 2002

Barriers to Limited Orders

- Require fine-tuned capacity assessment
- Older people with dementia – declining
- Expensive to return to court
- Compromise judicial economy
- Hard for third parties
- Attorneys frequently don't request

Limited Orders – Barriers & Responses

- Judicial efficiency – But preserving rights should not be compromised.
- Would require multiple modifications – But many conditions progress slowly & some reversible.
- Third party ambiguity – Need clarity in order and plan.
- Lack of judicial knowledge – Need for good clinical evaluation.
- Judges do not have time – Use of semi-standard orders or templates.

Use of Guardianship Plan

- Forward looking document; blueprint for guardian actions
- Required by National Probate Court Standards; UGPPA
- Approx 10 states require plan
 - With petition
 - Following appointment
 - With annual report
- Crafting of plan form to include goals of shared decision-making; areas of limitation
- Barriers
 - Court approval
 - Court review
 - Changing circumstances

[Poll on Limited Guardianship]

Engagement in Decision-Making

Ways to Promote Participation – *Not About Me Without Me*

- Frequency of visits
 - State provisions
 - NGA Standards require monthly
- NGA Standards
 - *“Guardian shall encourage the ward to participate, to the maximum extent of the ward’s abilities, in all decisions that affect him or her. . .”*
- Communication tips – for example, Alzheimer’s Association:
 - Use short, simple words & sentences
 - Give one step directions
 - Repeat or paraphrase
 - Give visual clues
- “Gradual Counseling” – Smith, L., *Journal of Contemporary Law* (1988)
- U.N. Convention on Rights of People with Disabilities – “supported decision-making”
- Need for guardian training

Questions So Far?

Voice, Values & Standards of Decision-Making

Decision-Making Standards

- 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”
- NGA Standards: use substituted judgment except when “following the ward’s wishes would cause substantial harm” to the person

Substituted Judgment: Stepping into Shoes of Another



Person-Centered Planning & Thinking

- Puts person, not agency, system or program, at center
- “Structured methods for people who are paid to provide support to *think about quality of life* from perspective of the person they support” (Michael Smull, Support Development Associates 2010).
- Key is person’s own definition of quality of life – people to relate to, things to do, routines, more
- “Important to” and “Important for” (Smull)
 - Important to = things that help us to be satisfied, happy, comforted
 - Important for = health and safety issues
- NGA Standards – “Guardian shall understand and advocate for person-centered planning.”

Restoration

- Guardianship = until death do us part?
- When possible
 - Temporary or reversible condition changes
 - Medication and treatment stabilize condition
 - Substance abuse stops
 - Person with traumatic head injury regains significant functioning
 - Less restrictive alternative exists
- Every state has restoration provisions
 - Procedural due process
 - Evidentiary standard
- UGPPA (Sec. 318)
 - “If the ward no longer needs the assistance or protection of a guardian.”
 - Same procedures as appointment
 - Prima facie case rather than clear and convincing evidence

Screening Panel

- Local pre-guardianship screening committees
- Guardianship program intake/screening panels
- Court staff screening
- Offers structured way to review steps, options, search for less restrictive approaches

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Addendum to Presentation: Status of Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act

- Objectives
 - Recognition of guardianship orders in another state
 - Efficient transfer of guardianship from one state to another
 - Initial jurisdiction to appoint a guardian fixed in one and only one state
- Why every state should enact UAGPPJA
 - Jurisdiction-based statutes only work if all states enact and no state offers a place to forum shop
 - Uniformity decreases costs for individuals and families
 - Predictability of outcome
 - Helps prevent or address elder abuse
- Uniform Law Commission www.nccusl.org; ABA Commission, www.abanet.org/aging/guardianshipjurisdiction/home.html; National Guardianship Association www.guardianship.org

