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Understanding Adult Guardianship in the Nursing Home Setting: How Social Workers Can Help

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She has participated in national studies on public guardianship and guardianship monitoring; and played a role in convening national consensus conferences on guardianship.

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Today's Webinar

- ✓ Basics; Overview
- ✓ **Pre-appointment – “front end”**
 - ❑ Understand court proceeding; capacity determination
 - ❑ Recognize effect on rights; less restrictive alternatives
 - ❑ Role of social worker
- ✓ **Post-appointment – “back end”**
 - ❑ Understand role of guardian
 - ❑ What if guardianship “goes bad”?
 - ❑ Role of social worker

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Basics: Overview

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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 self.



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Not One Guardianship System But 51 Different Systems

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Do you speak “guardianship”?

- *Guardian*
- *Guardian of person*
- *Guardian of property*
- *Conservator*
- *Plenary guardian; limited guardian*
- *Emergency guardian*
- *Incapacitated person*
- *Incompetent*
- *Ward*
- *Guardian Ad Litem; court visitor*
- *Termination; restoration*

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Who Is Under Guardianship?

- Elders with dementia, chronic cognitive impairments
- Adults with
 - intellectual disabilities
 - mental illness
 - head injuries
 - substance abuse
 - dual or multiple conditions
- Changing demographics
- Lack of data

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But Who Are They?

- High profile wealthy –
Brooke Astor, Joan Kennedy
- People with pensions, assets – Transfer of assets to Boomers; retirees
- Individuals with federal/state benefits
- “Unbefriended” individuals with no money and no one at all

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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

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Family vs “Stranger” Guardians

- Family or “lay” guardians
 - More familiar with person’s values, preferences, needs, history
 - Unfamiliar with role, expectations, court process
 - Need support in role
 - May be beset by family conflict, stress, overload
- Professional guardians
 - Less knowledgeable about person/values/background
 - More familiar with community resources, courts, guardianship process, forms, expectations
 - May have high caseload
 - May have more liability concerns

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What if There is No One to Serve as Guardian?

- After search, relative or friend
- Public guardianship
- Volunteer guardians
- Court appoints attorney
- Court makes decision

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Poll #1

I encounter problems with guardianship

- Routinely
- Frequently
- Sometimes
- Rarely

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Pre-Appointment – “Front End”

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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



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What Is An “Incapacitated Person”?

- Judge’s determination = society’s trigger
- State statutory definitions
- Four elements
 - Medical condition
 - Functional element
 - Cognitive element
 - Harm; necessity
- What does your state definition include?



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No “Capaci-meter” to Measure



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More Than Just Short Term Memory Loss!

THE BABY BORN WITH A MIDDLE-AGED BRAIN

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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 eccentricity

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Scenario

Bob 79 years old, functions poorly, falls, has congestive heart failure, incontinence, hearing loss and diabetes.

Had several hospital admissions for delirium; estranged from family & friends, attached to cat. Tends to refuse care. Scored 23 on Mini-Mental screening test. What questions?

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The D's to Watch For: Causes of Temporary Confusion

- ❖ **D**agnosis
- ❖ **D**rugs
- ❖ **D**ehydration
- ❖ **D**iet
- ❖ **D**epression
- ❖ **D**isorientation
- ❖ **D**elirium
- ❖ **D**ementia
- ❖ **D**ig

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How Does Guardianship Affect Individual's Rights?

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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

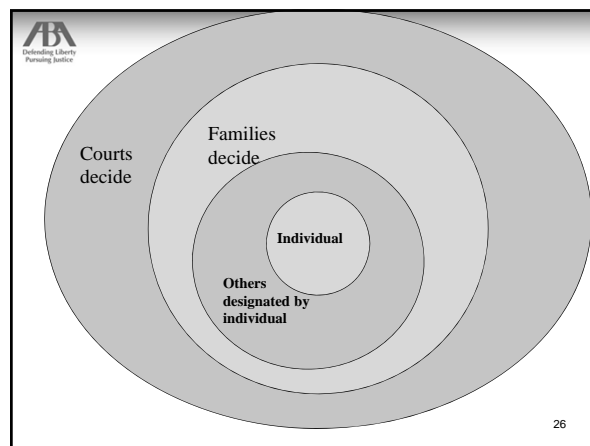
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Guardianship should always be the last resort!

- 1** – An adult lacks capacity to make informed decisions;
– and
- 2** – Alternatives have been exhausted and either don't work or have failed;
– and
- 3** – Decisions must be made to protect the person or property

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Why Plan Ahead?

- ✓ Call the shots
- ✓ Empowerment
- ✓ You decide who decides
- ✓ Like insurance policy
- ✓ Avoid guardianship

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Least Restrictive Alternative Doctrine

- **Constitutional principle** – *Shelton v. Tucker*, 364 U.S. 479 (1960)
- 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)

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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

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Check for Options Beyond Full Guardianship

- ✓ Can the guardianship be limited in scope?
- ✓ Can the guardianship plan be modified?
- ✓ Can the person execute a durable power of attorney?
- ✓ Can the person execute a health care advance directive?
- ✓ Scenario: Mrs. M admitted, now confused; administrator worried she cannot make health or financial decisions; wants to seek guardianship. What questions; what options?

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Less Restrictive Options

- **Financial Alternatives**
 - Financial power of attorney
 - Representative payee
 - Joint accounts
 - Trust
 - [Money management]
- **Health Care/Personal Care Alternatives**
 - Advance directive; health care power of attorney
 - Health care default surrogate law
- **May not need guardian *unless***
 - Decision outside scope of document
 - Possible abuse by agent

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What Is Limited Guardianship?

- *Limited v plenary* order
- Guardian assigned only those duties & powers person is incapable of exercising
- Language in most state statutes, model laws
- Limited orders
 - Maximize autonomy
 - Support mental health in preserving choice
 - Means to “normalize” life

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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.

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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.

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Pre-Appointment “Front End” – What Can Social Workers Do?

- Ask whether a less restrictive alternative has been tried; will work --
- Does person have advance directive, power of attorney, family to make health care decisions; rep payee?
- Know & document resident’s preferences, values, abilities
- Be ready as witness in court guardianship proceeding if needed

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Poll #2


Of the residents under my care:

- a. Most have advance directives.
- b. Most have advance directives & financial powers of attorney.
- c. Some have such planning documents, some don’t.
- d. Most have not executed such planning documents.
- e. I don’t know whether the residents have such documents or not.

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Questions



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Post Appointment “Back End”

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Understand Role of Guardian

- ❖ Fiduciary duty
- ❖ Agent of court
- ❖ Surrogate, substituted judgment
- ❖ Report to court
- ❖ Promote rights including residents rights
- ❖ Promote meaningful relationships unless harm
- ❖ BUT: **Gap** between best practices, statutory duties, & practice on the ground
- ❖ BUT: Family guardians need training; support




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Surrogate 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”



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What is Surrogate Decision-Making?



What is Supported Decision-Making?



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Difficult Issue: Visitation

Scenario: June 50 year old woman moved to nursing home after traumatic brain injury; paralyzed, confused, limited communication ability. Long-term relationship with Claire, who visited every week. Father appointed guardian. Instructed nursing home that Claire no longer visit Joan; Joan upset.

National Guardianship Association Standards of Practice = “shall promote social interactions & meaningful relationships consistent with preference of person unless substantial harm.”

Steps: Ask resident; seek & document resident preferences

- Examine guardian authority & state law
- Rely on residents rights
- Use care planning discussions
- Complain to court


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Difficult Issue: Residential Decisions & Transitioning to Community

Scenario: Jack is a 45-year-old resident with an intellectual disability. Lived in nursing home for 10 years. When asked as part of a community transition program if would like to live in community, says YES, but guardian says NO.

- Money Follows Person, similar community living programs – role of guardian
- Obstacles to guardian consent
- Getting past no



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Poll #3

When we have care planning meetings, guardian:

- Always come
- Frequently come
- Are more likely to come if family members
- Sometimes come
- Rarely come
- I don't know who has a guardian and who the guardians are.

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Difficult Issue: Guardianship Gone Bad

Scenario: When Mr. J's children feuding, judge appointed private professional guardian who sold his home at below market value to buys that included relative, and appears to be using funds for own use; fails consistently pay nursing home bills; never visits; difficult to reach for decisions.

Red flags

- Bills not paid
- Restricted access; isolation
- Family conflict
- No participation in care planning meetings
- Resident's needs not met
- Court reports & accountings not timely filed




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Guardianship Gone Bad: Options for Social Workers

- Get resident perspective if possible
- Discuss with DoN, administrator
- Discuss with guardian; use NGA standards & state law standards
- Mediation
- Ombudsman
- Legal services
- Adult protective services
- Court complaint
 - Modification
 - Removal
 - Restoration




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

- ✓ What is triggering issue; will guardianship help?
- ✓ Is there really lack of capacity?
- ✓ Are there other options?
- ✓ Can order be limited?
- ✓ Can person be engaged in decision-making?
- ✓ Use person's values in decision-making?
- ✓ Consider modification or restoration?



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Role of Nursing Home Social Workers

- ❖ Don't assume need for guardianship
- ❖ Suggest less restrictive options
- ❖ Track & document values, preferences
- ❖ Explore resident perspective
- ❖ Facilitate communication with individual, guardian, family; use care planning conferences, include guardian
- ❖ Recommend additional, appropriate capacity assessment
- ❖ Understand role of guardian ("culture change" for guardians)
- ❖ Educate guardian about residents' rights
- ❖ Know how to access questions of state law
- ❖ Contact APS if abuse by guardian; work with ombudsman
- ❖ Communicate problems to court

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Questions

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Guardianship Resources

- National Guardianship Network, www.nationalguardianshipnetwork.org
- National Guardianship Association, www.guardianship.org
- ABA Commission on Law and Aging, http://www.americanbar.org/groups/law_aging/resources/
- Center for Elders and the Courts, <http://eldersandcourts.org/>

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