

# Using Alternatives to Guardianship to Defend Against or Terminate Guardianship

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# Housekeeping

- All on mute. Use Questions function for substantive questions and for technical concerns.
- Problems getting on the webinar? Send an e-mail to [NCLER@acl.hhs.gov](mailto:NCLER@acl.hhs.gov).
- Written materials and a recording will be available at [NCLER.acl.gov](http://NCLER.acl.gov). See also the chat box for this web address.

# About NCLER

The National Center on Law and Elder Rights (NCLER) provides the legal services and aging and disability communities with the tools and resources they need to serve older adults with the greatest economic and social needs. A centralized, one-stop shop for legal assistance, NCLER provides Legal Training, Case Consultations, and Technical Assistance on Legal Systems Development. Justice in Aging administers the NCLER through a contract with the Administration for Community Living's Administration on Aging.

# About ABA COLA

The ABA Commission on Law and Aging is a collaborative and interdisciplinary leader of the Association's work to strengthen and secure the legal rights, dignity, autonomy, quality of life, and quality of care of aging persons.

The Commission accomplishes its work through research, policy development, advocacy, education, training, and through assistance to lawyers, bar associations, and other groups working on issues of aging.

# Key Lessons

- Defending a guardianship is being an advocate for the wishes of the person, and protecting the persons civil, legal, human, and constitutional rights.
- If the person can make informed choices, guardianship should never be necessary.
- Even if the person is comatose, guardianship is unnecessary if less restrictive alternatives meet the needs of the person.
- Defense should always include developing and presenting evidence of alternatives to guardianship.

# Terminology

- Traditionally a **Guardian** was a court appointed fiduciary for a person
- A **Conservator** was a court appointed fiduciary for real and personal property (money)
- Some states, and the [Uniform Act](#) maintain those distinctions
- Some states use different terms, or use these terms interchangeably
- For simplicity I will use guardian/guardianship for any court appointment for person or property

# Poll #1

- Laney-Lawyer has been appointed by the Court in a case seeking the appointment of a guardian for Renee-Respondent. What roles might Laney-Lawyer play in the case?
  - A. Defense Attorney
  - B. Attorney Ad Litem
  - C. Guardian Ad Litem
  - D. Court Visitor
  - E. All of the above

# A Vigorous Defense

- A defense attorney is retained, or appointed to represent the defendant, or respondent, or the person who has had a guardian appointed
- A defense attorney is a zealous advocate for:
  - The wishes of the client
  - For protecting the rights of the client
  - Protecting the due process rights of the client
- Guardianship is a major restriction on the rights of the client



# Always the Starting Point

- Is the person able to make and communicate informed choices?
- Start by spending time getting to know the client
- Are there communications accommodations that will help?
- Is language or culture being misinterpreted?
- Ask the person, ask others who know the person

# Two Strategies

- Cross examine evaluations/evaluators
  - How was the evaluation done?
  - What test or questions were asked?
  - How much time?
  - Were reasonable accommodations provided?
  - What was the experience and training of the evaluator?
- Ask for an additional evaluation
  - Two challenges
    - Cost
    - May confirm finding of first evaluation

# Evaluating Evaluations

- Evaluator spent little time with the alleged incapacitated person
- Overreliance on screening tools (ex. Mini Mental Status Exam)
- Focused on cognitive impairment vs. measuring capacity
- Based on diagnosis, not actual abilities
- Based on paternalistic fears and stereotypes
- No significant right-by-right analysis
- Too short, not enough information
- Equating needing help with incapacity
- Holds people with disabilities to a higher standard

Adapted from Disability Rights Florida and Georgia P&A

# Clariss-Client

- Clariss was recently taken to the emergency room of her local hospital and diagnosed with a stroke and urinary tract infection (UTI.) She was extremely confused and non-responsive in the emergency room. Hospital staff were unable to contact her family. A transfer to a skilled nursing facility was planned as soon as the UTI was under control. The hospital asked for a guardian to be appointed to consent to the transfer and admission and included statements and evaluations from the emergency room staff to justify the need for a guardian.

# Poll #2 Claris

- You are defending Claris. What are the weaknesses in the facts?
  - A. The evaluations were done during a major health emergency
  - B. Emergency room personnel may lack expertise in capacity evaluations
  - C. A UTI can temporarily impact capacity
  - D. All of the above

# Defending on Alternatives

- Virtually all state guardianship laws:
  - Least restrictive alternative
  - Only to the extent necessary
  - Less restrictive alternative
  - Only as required
- States are starting to require evidence that alternatives have been tried, and why they will not meet the need
- [Least Restrictive Alternative References in State Guardianship Statutes](#)

# Health Care Decisions

- All states allow an adult to name a health care agent (decision-maker, surrogate, proxy)
  - Most require in writing
  - Some allow verbal appointments
  - Capacity standard can be low
    - “Please ask X.”
- 45 states have default health care decision-making statutes
  - Family
  - Increasingly close friends
  - Social services and medical ethics consultants

# Research Shows

- That even in states that do not have default health care decision-making laws:
  - Most health care providers will accept consent from family or close friends
  - Unless there is a concern about liability



# Defense on Health Care

- Ask about existing advance directives
  - Ask the person, family, friends, health care providers and past lawyers about advance directives of any kind
  - Request for production of documents
  - Subpoena
- Look for statutory defaults
- Talk to the Client about naming a health care agent
- Ask what questions need consent
- A conflict between family members should not be a reason for a guardian.
  - Limited protective arrangement
- Prepare and present the evidence

# Income

- For about 20% of Social Security beneficiaries, Social Security is the person's only source of income
  - Nearly all for SSI
- For about half of Social Security beneficiaries, Social Security is the majority of income
- Guardianship has no legal effect on Social Security Benefits
- Representative Payee is required – Guardians must also become payees
- Not all are familiar with this

# Other Income Management Tools

- Direct Deposit
- All SSA benefits, government benefits, pensions
- Can be arranged on defined contribution plans (401K, IRA)
- Can be arranged on rents, royalties, business income
- Gather evidence that income is received and deposited
- Arrange read-only access for oversight

# Payment of Expenses

- Automatic Payment assures timely payment as long as funds are available.
- Set up Read-Only Access and shared email accounts to provide oversight
- With “plastic money” virtually all expenses can be paid with accounts that are tied to automatic payment.

# Defending on Finances

- Setting up direct deposit and automatic payment are evidence that the person was making plans to assure that income is received and expenses paid, even if they are unable to oversee the day-today details
- Ask for bank records
- Look at how income is received and bills are paid
- Oversight can easily be provided by read-only access to statements or copies of electronic invoices
- Document, prepare, and present this as evidence of advance planning using alternatives

# Clancy-Client

- Clancy is living with dementia that progressed to the point that Clancy often forgets to accomplish routine acts, such as checking the incoming mail, writing checks, or operating the ATM to get spending cash. His Social Security and Pension are on direct deposit. He has all of his bills on automatic payment. He has set his bank account so if his checking account drops below \$1,000, money is automatically transferred from his savings account. If his savings account drops below \$10,000, an advance is taken on a home equity line of credit and the money is added to his account. He named his long-time companion, Ben, in writing to make health care decisions.

# Poll #3 Defending Clancy

- Clancy's son has filed to be appointed as his guardian, citing Clancy's dementia and the fact that a "non-family" member is making health care choices. You are asked to defend Clancy. What evidence do you have that a guardian is not needed?
  - A. Clancy arranged all income to direct deposited
  - B. There is no evidence of unpaid bills
  - C. Clancy has named the person of his choice to make health care decisions
  - D. All of the above

# Power of Attorney

- A Power of Attorney (POA) is a document naming an agent to transact business on behalf of the grantor, the person appointing the agent
- A Person needs to be able to understand a few things to create a Power of Attorney
  - That the person being named can make decisions for them
  - The agent's decisions are binding
  - The general nature of the authority being granted
  - That they can revoke or change the appointment



# Strong Evidence of Intent

- About 1/3<sup>rd</sup> of adults are believed to have signed a POA
  - Often with the express intent of avoiding guardianship
- A Person who needs help with day-to-day business, may still have capacity to execute a valid POA

# Finding POAs

- Ask:
  - The client
  - Family – family who didn't file
  - Friends and neighbors
  - Banks
  - Health care providers
  - Other businesses
  - Previous lawyers (often done with wills and estate plans)
  - Review of the client's files
- Civil Procedure
- Request for production of documents
- Request for admissions
- Subpoena
- Witnesses
- Ask on cross examination

# Preparing and Presenting Evidence on POA

- Talk with the agent named in the document
  - Are they willing and able?
  - Have they encountered any obstacles?
- Call them as a witness
- Prepare for admission of the document into evidence (rules of evidence)

# Trusts

- Less common, but very strong evidence of advance planning
- More common in states with complex probate
- Trust provisions and state law control successor trustees
- Look for assets in the name of the trust – trust bank accounts, brokerage accounts
- Bank should have a copy on file
- Drafting attorney

# Decision Supports

- The person makes choices, with advice and assistance from supporters or advisors that the person has selected
- Supporters help the person understand options, risks and benefits, consequences, make recommendations, but allow the person to make the choice, then support the person in carrying out the decision as needed
- We all do it

# The Majority

- 6.1 million older adults with Alzheimer's
- 38 million adults in the United States with severe disabilities
- 13.1 million Americans live with serious mental illness
- 1.3 million persons subject to guardianship
- Clearly the majority of persons who might be subjected to guardianship manage perfectly fine with decision supports – they may not call it that

# Supported Decision-Making Laws

- Increasingly states are passing laws specifically recognizing SDM
- Written agreements between the Person and the Supporters specifying who helps, what they help with, what is not wanted
- Support is commonly more informal
- Gather and present evidence that the person's needs are being met by formal or informal supports
- Bring in witnesses, lay and professional

# Termination

- A guardian may have been needed at one time, but is no longer needed
- Capacity can increase
- Alternatives can be developed, implemented, changed
- Supports can develop to annul the reasons for the appointment
- Look to experiences in the disabilities community on restoration based on alternatives and supports



# Advocacy in Restoration Cases

- Develop and present evidence that alternatives provide the supports needed to help the person without the need for guardianship
- Testimony of the person is critical
- Evidence from independent professionals about the sufficiency of the alternatives and supports
- Testimony from supporters and advisors
- If there is an explanation of why this was not possible earlier, present it
- Avoid suggesting that the Court made a mistake (that was an issue for an appeal that has passed)
- Testimony of the persons supporting the person

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# Technical Assistance

Technical assistance is available for attorneys and professionals seeking more information to help older adults. Contact NCLER at [ConsultNCLER@acl.hhs.gov](mailto:ConsultNCLER@acl.hhs.gov).