

Surrogate Decision Makers: GUARDIANSHIP & CONSERVATORSHIP:

September 13, 2007

Presentation:

DHS Aging and Adult Services Division



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**

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- **Guardianship/Conservatorship Basics**
- **Less Restrictive Alternatives**
- **Guardianship/Conservatorship Law**
- **Court Process**
- **Miscellaneous**
- **Resources**

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Guardianship & Conservatorship

- **Court appointed substitute or surrogate decision-maker**
- **Process for appointment is identical**
- **Voluntary or involuntary (most common)**
- **Guardianship (of person), Guardian/ Ward = Personal and Care Decisions**
- **Conservatorship (of estate), Conservator/ Protected Person = Money and Assets**

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Who is Appropriate for Guardianship?

Incapacitated Person *meaning*

- **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**

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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, even with the use of appropriate technological assistance;
- Has property that will be wasted or dissipated unless management is provided *or*
- Money is needed for support, care, education, health, and welfare of the person or individuals entitled to the person's support *AND*
- Needs cannot be met by Less Restrictive Alternative

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Less Restrictive Alternatives: Guardianship

- **Own Plan, Cooperation with Others' Plans**
- **Family Involvement**
- **Health Care Directive**
- **Authorized Rep. For Economic Assistance**
- **County/Private Case Management**
- **Ethics Committees**
- **Nomination of Guardian**
- **Protective Order**

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Own Plan

- **Minimal Risk – Cooperates and accepts assistance, does not require capacity**
- **Higher Risk - Has right to attempt and fail, if able to make informed decisions**

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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 SW or Case Manager to meet client needs
- AMA Policy E-2:20 Withholding or Withdrawing Life Sustaining Medical Treatment

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Health Care Directive

- **Presumption of capacity of principal at time of completion**
- **Statutory Definition of Powers, document specific.**
- **Residence, psychotropic medications, anatomical gifts, funeral wishes, nomination of guardian**
- **Can name an “Agent” OR state wishes OR both**
- **Trigger for implementation stated in document**
- **Protections - Limits of Powers, Easily Revoked, Provider Oversight**

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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 and Link to Formal and Informal Resources

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Case Management: Resource Broker

- Community Resources – Identify, refer, link, funding, set-up appointments, ongoing monitor
- Adult Protection
- Legal Opinion – Facility attorney, County Attorney, Private Attorney, ARC
- DHS Guardianship

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Ethics Committee

- May be capacitated, incapacitated or questionably capacitated client
- Basis of intervention – Ethical Conflict
Autonomy vs. Protection; Benefit vs. Harm
- Not Decisional Body
- Facilitate Decision-Making
- AMA Policy E-2.20 & E-8.081 “when no ...surrogate “ ,
“to facilitate sound decision making”, when question if surrogate acting in best interest

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Nomination of Guardian and Protective Orders

- Nominations – HCD or separate form
- Protective Order – Guardianship Process then amended in court to meet need for protective decision

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Less Restrictive Alternatives: Conservatorship

- Family, Trusted Friend Assistance
- Bank Plans: auto pay, direct deposit, co-signers
- Authorized Representative
- Representative Payee
- Power of Attorney
- Trust
- Nomination of Conservator
- Protective Arrangement/ Single Transaction

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Family or Friend

- Frequent source of assistance
- Does not require capacity
- Risk of exploitation

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Bank Plans

- **Autopay, auto deposit, phone or internet banking**
- **Joint or dual signer accounts – Use with Caution!**

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Authorized Representative

- **Ability to apply and complete eligibility applications for Medical Assistance**
- **County ability to do administratively**

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Power of Attorney

- **Statutory Definition of Powers**
- **Legal Document – Legal counsel recommended for completion**
- **Principal delegates powers to attorney-in-fact (s), does not “give up” power/rights**
- **May or may not be durable into principal’s incapacity**
- **Protections for principal can be used (accounting, bonding)**
- **Considered a nomination for conservator**

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Trust

- Grantor may grant specific or broad powers to trustee
- Legal Counsel is needed
- May or may not lose rights to manage finances
- Protections may be written into document (accounting, bonding, court review)

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Protective Arrangement

- Court action
- 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, or Minimum Doesn't Sabotage
- Available Family/ Friend/Professional to Serve
- Abuse or Neglect by SDM Not at Issue
- Skill and Willingness of Professionals to Respect and Work With Conflict or Difficult Clients/Families
- When Liability is Low for Professionals.

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Less Restrictive Alternatives

- | Pros | Cons |
|--|--|
| <ul style="list-style-type: none">▪ Capacity Required for Some Options▪ Fast and Simple to Enact▪ Dignity/Rights of Client▪ Respects Societal Values of Family▪ Government Not Involved (Except Rep. Payee/other statutory requirements)▪ Can Be Easily Revoked | <ul style="list-style-type: none">▪ Capacity Required for Some Options (POA, Trust, Adv. Directives, Nominations)▪ Lack of Accountability/Rights Protection▪ Exploitation Risk▪ Can have Concurrent Multiple Surrogates▪ Can be Easily Revoked |

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When Might a “Legal” Decision Maker (Guardian/Conservator) 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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Supporting Families: Delegation of Powers

- **Guardianship: by properly executed POA, may delegate for less than one year, any powers regarding care, custody, personal property**
- **Conservatorship: may not delegate entire administration of estate, but may delegate performance of functions**

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Supporting Families: Appointment by Will / Other Writing

- Spouse caring for “incapacitated” spouse
- Parent caring for adult “incapacitated” child
- May specify limitations on powers
- May amend prior to appointment by court
- Appointment effective on death or incapacity of spouse/caregiver
- Requires confirmation of appointment by court
- Objections by interested parties would require regular process

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Powers & Responsibilities: Guardian

- **Place of Abode**
- **Care, Comfort, Maintenance Needs**
- **Personal Property**
- **Medical Care: Exceptions, HCD**
- **Contracts (if no conservator)**
- **Supervisory Authority**
- **Governmental benefits (if no conservator)**

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Powers & Responsibilities:

Conservator

- 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)

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Priority Appointment: Guardian

- 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

- Conservator/Guardian of estate 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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Venue

- Court making appointment may transfer proceedings to another county if in ward or protected person's best interest
- Guardian, conservator or fiduciary appointed in another state may petition MN for appointment in this state with notice if court determines it is in best interest of ward or protected person.

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Court Process and Procedures: Judicial Appointment

- Petitioner/Petitioner's Attorney
- Physician's Statement in Support
- Proposed Guardian/Conservator

- Petition Filed/Notice Requirements
- Court Date

- Court Visitor

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Court Process and Procedures (cont'd)

- Court Appointed Attorney

- Hearing
- Bond
- Oath & Acceptance
- Court Order

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Court Process and Procedures (cont'd)

- **Initial Inventory (Conservator)**

- **Annual Filing Requirements**
 - Annual Account (Conservator)
 - Guardian's Report (Guardian)
 - Annual Notice of Right to Petition (Both)

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Miscellaneous Issues

- Emergency Guardianship/Conservatorship

- Commitment

- Cost
 - Financial
 - Emotional/Practical

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Appropriate Use of Guardianship & Conservatorship

- Need for decision maker to correct problem: inability to provide for/obtain food, clothing, shelter, medical care, safety/supervision, protect/manage assets (purposeful, goal-directed)
- 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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Appropriate & Effective Use of Guardianship/Conservatorship

- **Identified goal requiring the appointment**
- **Goal has realistic chance of being met**
- **Will not change client/other behavior.**
- **Not solely to meet provider needs**
- **Cost of services vs. benefit to client.**

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Resources

- VOA MN Protective Services
- MN Association for Guardianship and Conservatorship (MAGiC)
www.minnesotaguardianship.org
 - Standards of Practice
 - MAGiC Educational Materials

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