

Guardianship and Conservatorship

Presentation By:
Guardianship Association of Iowa Network
(GAIN)

Deanna Clingan-Fischer, JD



AGENDA

1. Overview of Substitute Decision Making and the Need for Guardianship and Conservatorship?
2. Decision Making Capacity
3. Personal Care
4. Financial Management



Substitute Decision Making

When someone needs assistance making
financial or personal care decisions



Substitute Decision Making

Guardian—limited and plenary

Conservator—limited and plenary

Representative Payee/Federal Fiduciary

Attorney-in-Fact or Agent

Trustee



Decision-Making Capacity



Capacity is Different from Competence

Capacity refers to the ability to use certain cognitive processes to make decisions

- Capacity is specific – you can have capacity to make some decisions but not others
- Capacity is variable – you can have capacity sometimes but not others

Competence refers to recognition of having the rights, responsibilities, and legal status to make decisions about one's own life

If someone's capacity is sufficiently impaired across a broad enough range of decisions, the court could find that they meet the definition of incompetent in Iowa Code 633.3(25)



What is Decision-Making Capacity?

Decision-making capacity has four key elements

- **Understanding** – learning, remembering, and using information
- **Appreciation** – applying information to one's own personal situation
- **Reasoning** – weighing risks and benefits of options in light of one's goals and values
- **Expression** – making and communicating a choice



Important Considerations About Capacity

- **Making “bad” decisions does not necessarily mean capacity is impaired**
- **Having a specific diagnosis does not necessarily mean capacity is impaired**
- **Capacity can be temporarily impaired by stress, illness, injury, medications, drug or alcohol use, poor nutrition, etc.**
- **Competent adults can be pressured, cajoled, manipulated, or coerced into making decisions that go against their goals, values, and wishes**
- **Competent adults may make decisions based on factors that others are unaware of or don’t fully understand or appreciate**



Guardianship

Court authorized relationship whereby one person assumes the responsibility for the physical custody of another.



Conservatorship

Court authorized relationship whereby one person assumes the responsibility for the property and finances of another.



The need for Guardianship or Conservatorship

Impaired Decision-Making Capacity – this is required to meet the legal standard to have a guardian or conservator appointed

Functional Limitations- behavior or conditions

Availability of Less-Restrictive Alternatives – ways to meet the person’s needs that are less restrictive of their rights.

- Required by Iowa law – 633.551(4)
- Third-party assistance

guardianship – Matter of Guardianship of Hedin, 528 N.W.2d 567 (Iowa 1995)



Guardianship

Criteria for appointment: (impaired decision-making capacity)

Is a person whose decision-making capacity is so impaired that the person is unable to care for the person's personal safety or to attend to or provide for necessities for the person, such as food, shelter, clothing, or medical care without which physical injury or illness might occur OR

Is a minor



Conservatorship

Criteria for appointment: (impaired decision-making capacity)

Is a person whose decision-making capacity is so impaired that the person is unable to make, communicate, or carry out important decisions concerning the person's financial affairs OR

Is a minor



Functional Limitations

Functional limitations – the behavior or condition of a person which impairs the person's ability to care for the person's personal safety or to attend to or provide for necessities for the person Iowa Code 633.3(21)

- Goes beyond diagnosis, test scores, etc.
- Looks at actual ability to function in their day-to-day life
- Important to parse out physical capacity and external factors (money, time, availability of services) from decision-making capacity



Guardianship/Conservatorship--Types

General/plenary-Full authority

Limited—limited to powers set out in court order

Temporary-to time or place (could be emergency)

Standby-upon the occurrence of an event

Know what power exists



Guardianship/Conservatorship Process

1. File petitions
2. Service-notice
3. Hearing—attorney for the protected person; attorney for the petitioner and a court visitor
4. Appointment—LOA and order ; Conservatorship-may be bond
5. Reports
 - a. Initial -60 days; 90 days with inventory
 - b. Annual
 - c. Final



Guardianship Process

Petition

1. Name, address of the proposed protected person
2. That the proposed protected person meets the decision-making capacity test or is a minor
3. Name, address of proposed guardian
4. Proposed protected person is a resident and best interests require this
5. Name, address or institution having care, custody



Powers of Guardian-without court order

Look to the Order

1. Making decisions regarding care, maintenance, health, education, welfare and safety
2. Establish permanent resident
3. Taking reasonable care of clothing furniture, vehicle, other personal effects, and companion/service animals
4. Assist in maximizing self-reliance and independence
5. Consent to and arrange for medical, dental, and other health care treatment and services
6. Consent to and arrange for appropriate training, educational and vocational services



Powers of Guardian-without court order

Look to the Order

7. Maintaining contact-regular visitation

8. Making reasonable efforts to identify and facilitate supportive relationships and interactions with family members and significant others. (Can place reasonable restrictions)

9. Any other powers or duties the court may specify



Powers of Guardian-court order

Look to the Order

1. Changing, at the guardian's request, the permanent residence to a nursing home, other secure facility or secure portion of a facility that restricts the ability to leave or have visitors unless advance notice of the change was included in the initial care plan and approved by the court.
2. Consenting to:
 - a. Withholding or withdrawal of life-sustaining procedures
 - b. The performance of an abortion on the protected person
 - c. The sterilization of the protected person



Powers of Guardian-court order

Look to the Order

3. Denying all communication, visitation or interaction with a person whom the protected person has expressed a desire to communicate, visit or interact. (Can deny if good cause shown)

4. Court will see if third-party assistance will meet the needs and may direct that the guardian have only a specially limited responsibility for the protected person. In that event, the court shall state those areas of responsibility which shall be supervised by the guardian and all others retained by the protected person. The court may find that the protected person lacks the capacity to contract a valid marriage or to vote



Rights Maintained

The right to communication, visitation or interaction with persons upon the consent of the protected person

The appointment of a guardian or conservator shall not constitute an adjudication that the protected person is of unsound mind. (sign a will) Cannot sign a power of attorney

In some cases: voting and marriage

To representation

To be present at all hearings

To request termination



Terminates

1. If a minor, when reaches the age of majority
2. The death of the protected person
3. A determination by the court that the guardianship is no longer needed and/or that the decision-making capacity is no longer impaired



Guardianship and Law Changes



What Changed?

- **Terminology** – “ward” is now “protected person” and “proposed ward” is now “respondent”
- **Due process protections** – many changes clarified or increased procedural steps to protect the rights of respondents
- **Court oversight** – changes to the annual reports, new initial care plans, and new background check requirements
- **Powers and responsibilities** – some of the changes affect things the guardian or conservator can or cannot do



What Didn't Change?

- Legal standards for guardianship and conservatorship
- Less restrictive alternatives
 - Limited guardianship
 - Third-party assistance
- General court process to establish a guardianship or conservatorship
 - Some *parts* of the process have changed



Establishing Guardianship or Conservatorship

Required

File petition

Professional Evaluation

Notice to respondent

Attorney for respondent

Background check

Hearing

Optional

Court Visitor

Mediation



Procedural Changes

- No more “voluntary” petitions
- Respondent has the same procedural rights regardless of who files the petition
- More information required in the petition, especially about family members and caregivers
- More people entitled to notice of the case
- Petition for adult guardianship can be filed at age 17 1/2



Petition & Notice-633.556 and 633.558

Name and address of:

- Petitioner
- Respondent
- Proposed guardian/conservator
- Respondent's spouse
- Respondent's adult children
- Respondent's parents



Petition & Notice-633.556 and 633.558

Name and address of:

- Any adult who has had primary care of respondent for at least 6 months prior to filing
- Any adult with whom respondent has lived for at least 6 months prior to filing
- Any institution or facility where the respondent has resided for at least 6 months prior to filing of the petition



Petition & Notice-633.556 and 633.558

Name and address of:

- Respondent's legal representative or rep payee
- Any person designated as respondent's agent or attorney-in-fact under a power of attorney
- Any additional persons who may have an interest in the proceeding



Petition -633.556

- A concise statement of the factual basis for the petition
- A concise statement of why there is no less restrictive alternative to the appointment of a guardian or a conservator
- In a petition for conservatorship, the estimated value of real estate, persona property, and estimated gross annual income of respondent
- A brief description of the respondent's alleged functional limitations that make the respondent unable to communicate or carry out important decisions concerning the respondent's financial affairs
 - Should be parallel language for guardianships as well



Role of Respondent's Attorney-633.561

- Respondent has a right to be represented by an attorney
- If the respondent's wishes cannot be ascertained, the attorney shall advocate for the least restrictive alternative consistent with the respondent's best interests
- Rule 32:1.14 – “When a client's capacity to make adequately considered decisions in connection with a representation is diminished...a lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client”



Role of Court Visitor-633.562

- Appointed if court determines it is in the best interest of respondent
- Same person cannot be both respondent's attorney and court visitor
- “Eyes and ears of the court” outside the courtroom
- Not necessarily an attorney – other professionals with relevant experience
- Investigates and makes recommendations to the court



Hearings-633.560

- Court **must** hold a hearing
- Respondent has a right to attend the hearing
- Court shall make reasonable accommodations to enable the respondent to attend
- Court may waive respondent's attendance for good cause and shall make a record of the reason for the respondent's nonattendance
- A complete record of the hearing shall be made



Background Checks-633.564

- Applies to new guardians and conservators
- Court must run a SING background check on all proposed guardians and conservators
 - Iowa criminal records check
 - Iowa child and dependent adult abuse registry
 - Iowa sex offender registry
- Fee is \$15
- Can get repetitive for professional guardians



Professional Evaluation-633.563

- Court must order a professional evaluation unless
- The court has enough information to determine whether the criteria for guardianship or conservatorship are met, or One of the parties has already filed a professional evaluation of the respondent
- Conducted by a licensed physician, psychologist, social worker, or other qualified individual



Professional Evaluation-633.563

Includes:

- Description of the nature, type, and extent of the respondent's cognitive and functional abilities and limitations
- Evaluation of the respondent's mental and physical condition and, if appropriate, educational potential, adaptive behavior, and social skills
- Prognosis for improvement and recommendation for the appropriate treatment, support, or habilitation plan
- Statement of evaluator's qualifications and lack of conflict of interest



Initial Care Plan-633.669(1)(a)

- Looks to the future
- Tells the court what the protected person's needs are
- Tells the court what the guardian will do to make sure those needs are met
- Can affect what powers and authorities the court gives to the guardian



Initial Financial Plan & Inventory- 633.670(1)(a) and 633.670(2)

- Looks to the future
- Conservator's powers are limited until this is filed
- Tells the court what income, property, expenses, and debts the protected person has
- Tells the court what the conservator plans to do to manage the income and property and pay the expenses and debts
- Affects what powers and authorities the court gives the conservator



Annual Report & Annual Accounting - 633.669(1)(b) and 633.670(3)

- Look to the past
- Tell the court what has happened in the past year
- Tell the court whether the guardian/conservator followed their plan
- If not, may need to explain why or make changes to the plan going forward
- **Late, missing, or incomplete annual reports are often the first sign the court has of problems with a guardianship or conservatorship**



About the Office of Public Guardian



Eligibility for Public Guardianship

- Iowa resident
- Age 18 or older
- Meets the legal standard for appointment of a guardian or conservator
- Has needs that can be served by a guardian or conservator and that cannot be met with less restrictive alternatives
- Does not have an appropriate or responsible person available to serve as guardian or conservator, and
- Does not have resources to compensate a private guardian or conservator



Applying for Public Guardianship Services

Required

- Application Form
 - Anyone can complete
- Report of Decision-Making Capacities
 - Must be completed and signed by a physician (M.D. or D.O.), licensed psychologist, or ARNP

Optional

- Any other supporting documentation



Application Process

- Incomplete application – notify and give 14 days to correct, otherwise denied
- Complete application – review for eligibility
 - Accepted – send straight to local office of public guardian to begin the petition/appointment process
 - Denied – not eligible for public guardianship services
 - Waiting list – have been operating at capacity since October 2018, so most new applications are placed on a waiting list



Contact Us

Guardianship Association of Iowa Network (GAIN)

Deanna Clingan-Fischer, JD, Executive Director

515-412-4969

iowaguardsians@gmail.com

www.iowaguardsianship.org

