

Guardianships and Decision- Making Supports

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Objectives

- ▶ Know the components of decision-making capacity and ways to maximize decision-making capacity
- ▶ Understand different types of decision-making supports and situations when each might be most appropriate
- ▶ List the responsibilities of guardians, conservators, and representative payees

Decision-Making Capacity

Decision-Making Capacity

- ▶ Understand
- ▶ Appreciate
- ▶ Reason
- ▶ Express a choice
- ▶ Ability to learn information about a topic
- ▶ Ability to apply information to their situation
- ▶ Ability to weigh the pros and cons of different options
- ▶ Ability to make and communicate a choice based on this process

Ways to Maximize Decision-Making Capacity

- ▶ Explain things in plain language
 - Avoid jargon, use common words, explain technical terms
- ▶ Ask questions to ensure understanding
 - Open-ended versus yes/no questions
 - Have them explain back in their own words
- ▶ Use needed communication supports
 - Glasses, hearing aids, communication devices
 - Alternate formats (large print, Braille, audio, video)
 - Interpreters and translators

Ways to Maximize Decision-Making Capacity

- ▶ Identify and reduce temporary impairments
 - Medication effects, time of day, illness or infection, alcohol/drug use
- ▶ Recognize the effects of stress
 - Grief, family conflict, trauma (recent or past), natural disaster, life changes
- ▶ Establish rapport and relationship
 - Personal decisions
 - Sensitive topics
 - Fear of being judged
 - Fear of unwanted consequences

Decision-Making is a Learned Skill

- ▶ Use social stories and personal examples
 - Provide concrete examples of similar decisions
 - Learn to apply information
 - Learn to weigh pros & cons
- ▶ Break big decisions into smaller steps
 - Helps avoid overwhelm
 - Helps refocus on goals and priorities at each step
- ▶ Model the decision-making process
 - Provide real life examples and experience
 - Learn to follow the whole process
 - Great for guardians and conservators

Capacity vs. Competence

Capacity

- ▶ Clinical/functional term
- ▶ Reflects the ability to perform a certain task or make a certain type of decision
- ▶ Context-specific
- ▶ Variable

Competence

- ▶ Legal term
- ▶ Refers to the status of having the legal rights and responsibilities of an adult
- ▶ Generally seen as binary



The Right to Make Decisions

- ▶ A basic legal right
- ▶ All adults are presumed to be capable of making their own decisions
- ▶ Adults have the right to make bad decisions
- ▶ Having a disability doesn't automatically mean a person needs a guardian

Decision Making Supports

Autonomy and Self-Determination

Dependence and Loss of Rights



**Supported
Decision Making**

**Powers of
Attorney**

**Limited
Guardianship**

**Full
Guardianship**

Decision-Making Supports

Ways to support a person in making decisions about their life

▶ Supported Decision Making

- People chosen by the person to help them understand information, make decisions, and communicate those decisions to others

▶ Release of Information

- A person can give permission to have information released to people who are supporting them

▶ “Appointed Representative”

- Many government agencies let an applicant or beneficiary name someone to help them with the process. (Social Security, Medicaid, IRS and Iowa Dept. of Revenue, unemployment insurance, etc.)

Tools to help people with medical decisions

▶ Supported Decision Making

- People chosen by the patient to help them understand information, communicate with their providers, and make treatment decisions

▶ Release of Information

- Gives medical providers permission to share information and medical records with people or organizations

▶ Durable Healthcare Power of Attorney

- Names a person who the patient wants to make medical decisions for them if they are unable

▶ Declaration Regarding Life-Sustaining Procedures (“Living Will”)

- Expresses the patient’s wishes regarding life-sustaining procedures if they have a terminal condition or are in a persistent vegetative state

Tools to help people manage their finances

▶ Money Management Tools

- Bill payer services
- Debit cards (pre-paid, spending controls)
- Joint bank accounts – proceed with caution!
- Representative payee
- Power of attorney

▶ Financial Planning Tools

- PASS Plan
- ABLE Act accounts
- Special Needs Trusts
- Miller Trusts



Powers of Attorney

Power of Attorney

- ▶ A written legal document in which one person gives another person authority to act on their behalf
- ▶ Sharing of decision-making authority
- ▶ The person who signs the document and gives someone else the authority to act for them is called the principal
- ▶ The person who is given the authority to act for the principal is called the agent or the attorney-in-fact

Durable Power of Attorney for Healthcare

▶ Healthcare decisions

- ▶ Takes effect only when the attending physician certifies the patient's inability to make their own decisions
- ▶ Can include instructions about the principal's wishes and preferences

Things to Know About HCPOAs

- ▶ Must be “activated” before the agent/attorney-in-fact has authority to make decisions
- ▶ Capacity is not the same as competence
- ▶ Principal retains the right to make other decisions
- ▶ Revocable
- ▶ No reporting requirements

General Power of Attorney

▶ **Financial Decisions**

- ▶ Can be broad or specific
- ▶ Can take effect upon signing or in the future
- ▶ Agent has a fiduciary duty to the principal
- ▶ Agent cannot use the principal's money or property for their own benefit

Things to Know About General POAs

- ▶ Principal retains the right to make their own decisions
- ▶ Agent cannot overrule a decision by the principal
- ▶ Revocable
- ▶ No reporting requirements
- ▶ Co-agents
- ▶ Nomination of a conservator or guardian
- ▶ Agent's authority terminates if founded DAA report or conviction for DAA against the principal

Executing the Document

- ▶ Principal must be an **adult**, have **capacity** and it must be **voluntary**
- ▶ Document must be in **writing** (handwritten, typed, form)
- ▶ Name of the attorney-in-fact or agent
- ▶ Responsibilities and authorities being granted
- ▶ Signed and dated by the principal
- ▶ Notarized or signed by two witnesses (healthcare POA only)

If You Have Concerns About an Agent or Attorney-in-Fact

- ▶ Discuss your concerns directly with the agent.
- ▶ Iowa Department of Health and Human Services – Dependent Adult Protective Services: 1-800-362-2178
- ▶ Help the principal get legal advice about their rights
 - Iowa State Bar Association “Find-a-Lawyer” website: www.iowafindalawyer.com
 - Iowa Legal Aid: 1-800-532-1275
 - Legal Hotline for Older Iowans: 1-800-992-8161
 - Disability Rights Iowa: 800-779-2502

Representative Payees

Representative Payee

- ▶ An individual or organization appointed by the Social Security Administration to manage Social Security benefits on behalf of a beneficiary who is incapable of managing or directing the management of their own benefits
- ▶ Similar programs in other federal agencies which pay benefits (e.g. VA fiduciary)

Who Needs a Representative Payee?

- ▶ Social Security beneficiaries who are incapable of managing or directing the management of their Social Security benefits
 - What indicators or evidence show that the beneficiary is incapable of managing or directing someone else to manage their benefits?
 - Has a court found the beneficiary to be legally incompetent?
 - Is there lay evidence and/or medical evidence that the person is incapable?

Who Can Be a Representative Payee

1. Spouse or other relative or legal guardian or conservator who demonstrates strong concern for beneficiary's wellbeing
2. Friend who demonstrates strong concern for beneficiary's wellbeing
3. Public institution or non-profit agency having custody of beneficiary
4. Private facility, operated for profit and licensed under state law which has custody of the beneficiary (e.g. private nursing homes, assisted living facilities)
5. Any other person or organization who shows strong concern for the beneficiary, is suitable, able, and willing to act as payee
6. Organization that charges a fee for providing payee services

What Does a Representative Payee Do?

- ▶ Meet with the beneficiary on a regular basis to ascertain their needs
- ▶ Use funds in the beneficiary's best interest
- ▶ Conserve benefits not needed for the beneficiary's current needs
- ▶ Keep detailed and accurate records of how the payee uses benefits and complete the accounting form each year
- ▶ Report events that may affect the beneficiary's entitlement or amount of payment
- ▶ Return any benefits to which the beneficiary is not entitled

Other Ways a Payee Can Help Beneficiaries

- ▶ Establish a budget and involve the beneficiary as much as possible in financial decisions
- ▶ Explain benefit payments and the beneficiary's expenses to the beneficiary
- ▶ Ensure the beneficiary is aware of current and large retroactive payments
- ▶ Help the beneficiary find other services (e.g. food assistance, housing subsidies, medical treatment)
- ▶ Negotiate with the beneficiary's landlords and creditors to get favorable terms or change when bills are due to align with availability of funds
- ▶ Recommend an alternate person or agency if the payee can no longer serve in that role

Things a Representative Payee Can and Cannot Do

A representative payee CAN:

- ▶ Establish and manage an ABLE Act account on behalf of the beneficiary if no one with higher priority is able to do so
- ▶ Complete a Medicaid application or renewal on behalf of a beneficiary

A representative payee CANNOT:

- ▶ Make decisions about the beneficiary's medical or personal care unless they have separate authority to do so
- ▶ Manage any other income or property of the beneficiary unless they have separate authority to do so

If You Have Concerns About a Representative Payee

- ▶ Discuss your concerns directly with the payee. For example, request an accounting of funds spent or a copy of their budget for the beneficiary.
- ▶ Social Security Administration: 1-800-772-1213 or contact your local Social Security office
- ▶ Disability Rights Iowa: 800-779-2502 (partners with SSA to oversee representative payees and educate them on their responsibilities)
- ▶ Iowa Department of Health and Human Services – Dependent Adult Protective Services: 1-800-362-2178

Guardianship and Conservatorship Basics

Guardianship and Conservatorship

- ▶ Guardians and conservators are appointed by the court to make decisions for someone else
- ▶ A guardian or conservator is only appointed for a person who is unable to make or communicate their own decisions
- ▶ A person who has a guardian or conservator appointed for them is called a “protected person”

Guardians & Conservators

Guardian

- ▶ Someone appointed by the court to make decisions about the protected person's **physical care**

Conservator

- ▶ Someone appointed by the court to make decisions about the protected person's **property and finances**

Legal Standard for Guardianship

A person whose **decision-making capacity is so impaired** that they are unable to care for their personal safety or to provide for their basic necessities, such as food, shelter, clothing or medical care, without which physical injury or illness might occur.

Legal Standard for Conservatorship

A person whose **decision-making capacity is so impaired** that they are unable to make, communicate, or carry out important decisions concerning the person's financial affairs.

Before Considering Guardianship and Conservatorship

Does the person meet the legal standard?

- ▶ Significantly impaired decision-making capacity

Consider any and all less restrictive alternatives.

- ▶ Informal supports
- ▶ Representative payee
- ▶ Supported decision-making
- ▶ Power of attorney
- ▶ Limited guardianship or conservatorship

Is the potential guardian or conservator ready for the responsibility?

- ▶ Long-term responsibility
- ▶ Duties to protected person
- ▶ Duties to the court

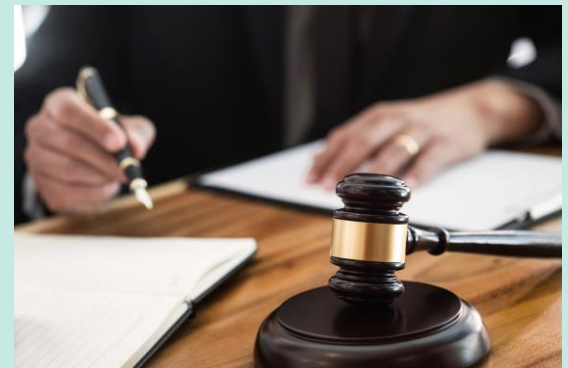
Establishing Guardians or Conservators

Required

- ▶ File petition
- ▶ Notice to respondent
- ▶ Attorney for respondent
- ▶ Background check
- ▶ Hearing

Optional

- ▶ Professional evaluation
- ▶ Court visitor
- ▶ Mediation



What Does a Guardian Do?

- ▶ Helps the protected person develop and maintain self-reliance
- ▶ Makes decisions about the care, maintenance, health, education, welfare, and safety of the protected person
- ▶ Establishes the protected person's permanent residence
- ▶ Takes care of the protected person's personal property
- ▶ Consents to medical and dental care and education, training, vocational and other professional services for the protected person
- ▶ Helps the protected person develop and maintain supportive personal relationships

Powers Requiring Specific Court Approval

- ▶ Changing the protected person's permanent residence to a nursing home, other secure facility, or secure portion of a facility that restricts the person's ability to leave or have visitors
- ▶ Consenting to the withholding or withdrawal of life-sustaining procedures
- ▶ Consenting to the performance of an abortion on the protected person
- ▶ Consenting to the sterilization of the protected person
- ▶ Denying all communication or contact between the protected person and someone else

Things a Guardian Cannot Do

- ▶ Adults have the right to make their own decisions – including bad decisions!
- ▶ A guardian cannot force someone to
 - Eat healthy foods or exercise
 - Take their medications
 - Cooperate with service providers
- ▶ A guardian cannot stop
 - Aggressive, violent, or self-harming behavior
 - Taking things that belong to others
 - Consensual sexual activity
 - Staying up late, sleeping late, skipping work or school, etc.
 - Smoking, alcohol use, drug use

What Does a Conservator Do?

- ▶ Responsible for managing the protected person's money and property
- ▶ Has a fiduciary duty to the protected person
- ▶ Must make prudent decisions about how to save or spend the protected person's money

How Do Guardians and Conservators Make Decisions?

Substituted judgment – attempts to make the decision that the protected person would make if they had the capacity to do so

- ▶ Involve the protected person
- ▶ Consider the protected person's past decisions and known wishes, preferences, values, and goals

Best interests – when the protected person's wishes cannot be known, make decisions based on what would be in the best interests of the protected person

Guardianships can be changed or ended

- ▶ Many people who have guardians can develop or regain the ability to make decisions
- ▶ Guardianships can be limited or expanded as the protected person's needs change
- ▶ Guardians have a responsibility to help the protected person become self-reliant
 - A guardian involves the protected person to the greatest extent possible in all decision-making
 - A guardian maximizes the self-reliance and independence of the protected person

If You Have Concerns About a Guardian or Conservator

- ▶ Discuss your concerns directly with the guardian or conservator.
- ▶ Contact the court in the county where the case is filed. Write a letter to the court explaining your concerns.
- ▶ Iowa Department of Health and Human Services – Dependent Adult Protective Services: 1-800-362-2178
- ▶ Office of Public Guardian: 515-681-8622 or opg@hhs.iowa.gov (cannot investigate concerns but can provide guidance about how to resolve a situation)

Other Resources

Guardianship Association of Iowa Network (GAIN)

- ▶ GAIN is a membership association focused on providing advocacy, education, and resources to members and the community for the purpose of promoting best practices and the provision of ethical substitute decision making services in the least restrictive manner.
- ▶ www.iowaguardianship.org

National Guardianship Association (NGA)

- ▶ National organization dedicated to improving the standard of excellence in guardianship.
- ▶ www.guardianship.org

Questions?

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