



When All You Have Is A Hammer:

**National Guardianship Association
October 24, 2022**

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Objectives

- Participants will have awareness of multiple alternatives to guardianship and frameworks for identifying which options are most appropriate in a given situation
- Participants will recognize situations where guardianship is often used inappropriately because of gaps in other services and systems
- Participants will understand the impact that other laws and policies have on the use of guardianship and alternatives to guardianship

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Defendants In Criminal Cases Who Are Found Incompetent to Stand Trial

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When is incompetence not incompetence?

- The law uses the words “incapacity,” “incapacitated,” and “incompetent” in various different contexts, sometimes interchangeably, other times with very specific definitions – and it’s confusing as heck!

Capacity to contract

Capacity to vote

Incompetent to stand trial

Testamentary capacity

Capacity to consent

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Same words, different meanings

Incompetent to stand trial – “the defendant is suffering from a mental disorder which prevents the defendant from appreciating the charge, understanding the proceedings, or assisting effectively in the defense” (Iowa Code 812.3)

Incompetent – “the condition of any person who has been adjudicated by a court to meet at least one of the following conditions:

- a. To have a decision-making capacity which 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 may occur.
- b. To have a decision-making capacity which is so impaired that the person is unable to make, communicate, or carry out important decisions concerning the person’s financial affairs.” (Iowa Code 633.3(25))

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So what’s the problem?

Paolo sustained a brain injury as a teenager. When he was in his 20s, he was charged with vehicular homicide, voluntary manslaughter, and OWI after he and his brother were involved in a hit-and-run accident. The court found Paolo not competent to stand trial on those charges, and after almost 18 months of treatment and evaluation at an Iowa Department of Corrections facility, the court concluded that there was no reasonable likelihood that Paolo would be restored to competency.

Under Iowa law, that meant that he had to be released from custody/placement, and the criminal prosecution was suspended indefinitely.

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Could guardianship solve this problem?



- A guardian was appointed for Paolo, and he was placed in a brain injury rehabilitation facility.
- OPG was appointed as successor guardian about 4 years later and assisted Paolo in transitioning to progressively lower levels of supportive services.
- It became increasingly clear that Paolo had the ability to make and communicate decisions about his personal safety and basic needs. He also repeatedly expressed a desire to terminate the guardianship. OPG petitioned the court to terminate it.

Guardianship is not a substitute for criminal proceedings

- The initial guardianship case was filed by the county attorney's office – the same office that was prosecuting Paolo for the criminal case.
- When the initial guardian sought to resign, the county attorney resisted having Paolo's mother or brother-in-law appointed as successor and asked to have OPG appointed instead.
- Family members of the person killed in the car accident were allowed to intervene in the guardianship. When OPG sought to terminate the guardianship, the family members argued against the termination.



Guardianship is not a criminal matter

Guardianship is:

- A civil matter
- A mechanism for protecting the rights and interests of people who lack the decision-making capacity to provide for their own safety or basic needs
- Focused on enhancing the protected person's independence and self-reliance

Guardianship is not:

- A criminal matter
- Punishment for criminal conduct
- A form of incarceration
- A method to control the behavior of the protected person
- A mechanism for protecting society from dangerous people

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Other Tools for These Situations

- Timely access to appropriate treatment and services for restoration of competence to stand trial
- Reasonable accommodations in the judicial system for criminal defendants with disabilities
- Civil commitment processes for people whose competence to stand trial cannot be restored and who are a danger to self or others
- Appropriate community-based services for people whose competence to stand trial cannot be restored and who are not a danger to self or others

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Disabled Youth Aging Out of Foster Care or the Juvenile Justice System

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But I Never Even Got A Chance to Use My Rights!

- Parents and families are often encouraged to pursue guardianship of their disabled children when those children turn 18.
- The pressures are similar – and sometimes even greater – for disabled youth aging out of foster care or the juvenile court system, as these teens and young adults often lack a natural support network of family and friends to help them navigate the transition to adulthood.

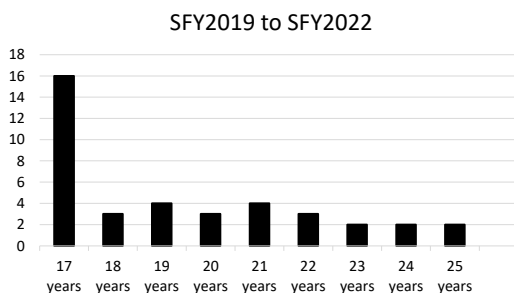
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Who does this affect?

- Youths primarily age 17-18
- May have been in foster care, youth shelters, or psychiatric facilities for children
- Lack family and other natural support networks
 - Parental rights terminated
 - Family unable to provide the support their child needs
 - Family actively harmful to the child's wellbeing
- Often combinations of disabilities – mild or moderate intellectual disability or autism, ADHD, mental illness, behavior/conduct disorders
- May be complex issues – sex offenders, serious behavioral issues, physical aggression and/or self-harm

Could guardianship solve this problem?

- Between July 1, 2018 and June 30, 2022 OPG received
 - 343 total applications for services
 - 39 applications (11.4%) for people between 17 and 25 years old
 - Nearly HALF were for 17 year olds!



Gaps in Services



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- Abrupt transition with minimal overlap between youth and adult service systems
- Youth are left without familiar and trusted sources of support to help them exercise their rights as adults
- For youth in foster care or juvenile justice system, this is compounded by a lack of healthy natural supports
- Misunderstanding the differences between minor guardianship and adult guardianship

Other Tools for These Situations

- Increase the overlap between youth and adult services
- Begin transition planning earlier and focus more on the youth's emotional and social readiness for adulthood than on eligibility for services
- Prepare youth with disabilities to make decisions for themselves – with supports as needed – when they turn 18
- Begin using supported decision-making processes a few years before age 18 and help youth develop a support system that can transition to adulthood with them

Victims of Abuse Who Are Older Adults Or Have Disabilities

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Is it incapacity or is it abuse?

Charlise has a mild intellectual disability and multiple mental health diagnoses. She is married and lived with her husband until a recent psychiatric hospitalization. Her husband controlled her access to medical care. He would take her to the doctor or the ER, and when the doctor asked why she was there, she would say she didn't know. Her treatment team recommended she move into a residential facility where she could get additional help and mental health treatment.

Charlise's husband came to the facility and began packing her things to take her home, even though Charlise said she did not want to leave. Charlise told her mental health case manager that she wanted to stay at the facility because her husband touched her sexually even when she said no. Her husband told her he would divorce her if she didn't come home, so she decided to move back home with him. Charlise's case manager applied to OPG because she thought Charlise needed a guardian to protect her from her husband.

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Is it incapacity or is it abuse?

Monty is 76 years old and has diabetes. He is hospitalized with very high blood sugar. His doctor ask if he has been using his insulin regularly, and he says he can't remember. The doctor is worried Monty is showing signs of cognitive impairment. She requests a neuropsych consult to determine if Monty has the capacity to make medical decisions.

Before the consult can take place, one of the nurses is chatting with Monty. Monty mentions that his son moved in with him last year after his wife died. Monty's son doesn't have a job, and times have been pretty tight. Monty says he can't always afford his prescriptions. When Monty asked his son to start helping with the bills, he got very angry and yelled at Monty, threw things around, and accused Monty of being ungrateful for his help around the house. Monty is afraid to bring it up again because his son has always had "a temper" and because he does help with the yard work and repairs and runs errands for Monty, who can't drive anymore.

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So what's the problem?

- Assuming incapacity because of age or disability
- Assuming incapacity because the victim was abused (e.g. the victim couldn't self-protect/lacked the ability to stop the abuse)

Taking away a person's right to self-determination is not an appropriate response to abuse.

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Guardianship is not the answer!



- Competent adults are victims of domestic abuse and intimate partner violence
- Competent adults are victims of scams and financial exploitation
- Competent adults are victims of other crimes – theft, burglary, harassment, identity theft, assault, sexual assault, homicide, etc.
- Being a victim of abuse or other crimes is not evidence of incapacity

Can guardianship ever be appropriate for a victim of abuse?

Yes.

If the person's decision-making capacity is so impaired that they meet the legal standard for a guardian (or conservator) to be appointed

AND

There are no less-restrictive alternatives that can meet the person's needs for decision-making support.



Other Tools for These Situations

- Civil legal services – civil protective orders, evictions, return of personal property
- Advocacy services – domestic violence and sexual assault advocates, elder rights specialists
- Home and community-based services
- Reversing the effect of isolation
- Adult protective services – depending on their jurisdiction in your state
- Law enforcement/criminal justice system

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The Impact of Laws and Policies

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Medicaid Eligibility & Long-Term Care

- Medicaid is the largest source of payment for long-term care in the United States
- Medicaid eligibility rules – especially financial eligibility – are both complex and strict
 - Limits on monthly income
 - Limits on “resources” – may need to liquidate/sell property and spend down funds to become eligible
- Leads to referrals for guardianship/conservatorship to complete Medicaid application and spend down resources for eligibility

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Medical Informed Consent

- Informed consent is a protection for patients against unwanted medical treatment performed against their wishes by doctors
 - **Informed:** Doctors need to explain the potential risks and benefits of treatment options to their patients in a way the patient can understand
 - **Consent:** Patients who have the capacity to make medical decisions may freely decide whether to consent to or refuse treatment
- Doctors are concerned about legal liability for treating a patient without informed consent
- Leads to referrals for guardianship for patients perceived to lack the capacity to make decisions about treatment, discharge, etc.

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End-of-Life Care

- Advance directives (“living wills”) began to be used in the late 1960s and early 1970s
- Courts recognized rights to appoint a health care proxy and to execute a living will
- Hospitals and nursing facilities are prohibited under federal and state laws from conditioning care on a person having or not having a health care power of attorney or a living will
- Nursing facilities often make referrals to OPG to have a resident’s “code status” changed to DNR (do not resuscitate)

So what’s the problem?

- Increasingly complex public benefit systems are harder for people with intellectual disabilities, brain injuries, mental illness, and cognitive impairments to navigate
- Ageism, ableism, and paternalism among medical providers lead to unnecessary recommendations for guardianship
- Concerns about liability on behalf of medical providers and nursing facilities overshadow concerns for person-centered care





Is guardianship the answer?

- Limited guardianship or conservatorship might be appropriate for some situations
 - Medicaid eligibility might involve a temporary conservatorship to sell property or purchase exempt resources (e.g. prepaid burial plan)
 - A temporary or limited guardianship might be appropriate for a person who lacks capacity to make certain medical decisions and doesn't have a healthcare proxy
 - Guardianship might be appropriate when family or friends need the legal authority to carry out a loved one's wishes regarding end-of-life care

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But there's always a "but"...

- Public guardianship is not an ideal solution to address medical and end-of-life care decisions
 - Medical and end-of-life care decisions are intensely personal
 - Public guardians are strangers with no background knowledge about the person's wishes and preferences regarding medical and end-of-life care
 - Public guardians can, over time, develop that type of knowledge as they get to know their client
 - But that doesn't help with emergent or imminent decisions that are the reason for appointment

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Other Tools for These Situations

- Simplify application processes for Medicaid and other public benefits
- Educate medical professionals about working with patients from diverse backgrounds and about accommodations for patients with intellectual, cognitive, and mental health disabilities
- Educate nursing facility administrators and staff about advance directives and ethical considerations regarding end-of-life decisions
- Encourage nursing facilities to have conversations with residents about their care preferences and develop tools to facilitate and document these conversations
- Improve advance directives and systems in state law for surrogate decision-makers for medical and end-of-life decisions

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