



Coming of Age, So What Now?

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Agenda

- Implications of Emancipation at Age 18
- Decision making after legal emancipation
- Guardianship and alternatives Government Benefits *Overview*
- Basic Government Benefits
- Special needs trusts – core considerations beyond the “cookie cutter
- Questions & Answers

Decision-Making Analysis

- Legal Emancipation
- Clinical Assessment of Capacity
- What is the Clinical Diagnosis, if any?
- Least Restrictive Alternative Approach;
- Prioritization of the areas requiring decision-making.

Range of Personal Decision-Making Options

- Guardianship (full or limited)
 - Intellectual Disability
 - Mental Illness
 - Disability
- Conservatorship
- Roger's Guardian
- Trustee
- Durable Power of Attorney
- Health Care Proxy
- Appointment of Advocate
- Representative Payee

Nature of Clinical Evaluation

- Individualized and Comprehensive
- Identify Strengths and Impairments
- Recommendation as to the need for Guardianship or Conservatorship
- Determination of capacity to create legal instruments as alternatives to Guardianship or Conservatorship

Guardianships Should Be Narrowly Tailored

- Least restrictive alternative;
- Individual functional assessment;
- Medical certificate;
- Clinical team report;
- Identify areas of decision-making
(Exhibit A – Limitations of
Guardian)

Duties of Guardian

- Exercise only amount of authority necessary
- Encourage the Protected Person to participate in decisions, act on own behalf, work to regain capacity
- To consider expressed desires and preferences of Protected Person
- Act in Protected Person's best interest when expressed preferences aren't clear

Reporting Duties of Guardian

- Notify court when Protected Person's condition has changed
- Report to the court
 - 60 days from appointment
 - Annually

Who May Be Guardian

- Any qualified person over age 18 years
- Court to follow priority list if person is appropriate:
 - Protected Person's nomination in durable power of attorney
 - Spouse of Protected Person or person nominated in spouse's will
 - Parent of Protected Person or person nominated in parent's will

Petition for Guardianship Notice of Guardianship

- Anyone can petition for guardianship
- Persons notified greatly expanded:
 - Spouse and children or parents and siblings
 - Current Guardian and/or Conservator
 - Representative Payee
 - Persons living with Protected Person
 - Any person nominated as Guardian by Protected Person
 - Protected Person's agent under a Power of Attorney

Protections

Protected Person has rights during proceedings:

- Right to counsel
- Right to be present at hearing
- Right to have the Guardianship limited

Reporting Requirement

60 Days After Appointment and Annually

- Mental, physical and social condition
- Living arrangements
- Services
- Visits/contact by the Guardian
- Whether institutionalization should continue
- Plans for future care
- Recommendations on need for Guardianship

Procedures Requiring Substituted Judgment Determination

Administration of antipsychotic medication; (Rogers Orders)*

- Provision/withdrawal of life-prolonging treatment
- Psychosurgery
- Electroshock therapy
- Sterilization
- Abortion
- Level III behavior modification plans

Questions about whether a specific procedure requires a substituted judgment determination should be directed to the court, attorney, or state agency

Limitation of the Guardian

A Guardian cannot:

- Admit or commit to a DMH or DDS institution
- Admit to nursing facility for an admission estimated to be over 60 days
- Consent to extraordinary treatment decisions requiring a substituted judgment determination

Factors of Substituted Judgment

- Protected Person's expressed preference
- Protected Person's religious beliefs
- Probability of and extent of side effects
- Prognosis with proposed action
- Prognosis without proposed action
- Impact on Protected Person's family

Why Avoid Guardianship and/or Conservatorship?

- Public
- Legal determination of incapacity eviscerates self-determination option
- Inconvenient
- Can be expensive
- Other alternatives exist

When Guardianship Shouldn't or Can't Be Avoided

- Protection is needed by court intervention and/or oversight
- No capacity to validly execute a durable power of attorney or health care proxy
- Court appointed fiduciary is needed because there is no interested party available to serve as agent in either durable power of attorney or health care proxy

Statutory Alternatives to Guardianship in Massachusetts

- Durable Power of Attorney
- Health Care Proxy
- Advocate Appointment

Durable Power of Attorney and Appointment of Advocate

- Principal authorizes Agent or Advocate to perform acts on behalf of the Principal
- “Durable” means that the power remains valid despite the subsequent incapacity of the Principal

Authority of Agent/Advocate

- Deal with assets of the principal, e.g. buy, sell, borrow, gift, create trusts, etc.
- Personal decision-making, e.g. maintain standard of living, advocate, hire others to help, make funeral plans
- Advocacy in special education, D.D.S., D.M.H., health care and/or provider agency settings

Health Care Proxy

- Principal designates a Health Care Agent;
- Authority of Health Care Agent takes effect by written determination by physician that principal has lack of capacity to make or communicate health care decisions
- If incapacity due to mental health or developmental disability, physician must have or consult with a health care professional who has specialized training or experience in diagnosing or treating mental illness or developmental disabilities

Health Care Agent Authority

- Provide consent or refusal for health care treatment
- Access to medical records
- Employ and discharge health care providers
- Provide consent for admission, transfer and discharge
- Authorize relief from pain

Questions & Answers

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