

# Closing the Justice Gap for Older Adults Part 4: You Can Make a Difference – Defending Against or Terminating Guardianship

- Introduction:
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# Housekeeping

- All on mute. Use Questions function for substantive questions and for technical concerns.
- Problems getting on the webinar? Send an e-mail to [NCLER@acl.hhs.gov](mailto:NCLER@acl.hhs.gov).
- Written materials and a link to the recording will be emailed to attendees and posted on our website: [NCLER.acl.gov](http://NCLER.acl.gov). Links to materials will be available in the chat box.

# About NCLER

The National Center on Law and Elder Rights (NCLER) provides the legal services and aging and disability communities with the tools and resources they need to serve older adults with the greatest economic and social needs. A centralized, one-stop shop for legal assistance, NCLER provides Legal Training, Case Consultations, and Technical Assistance on Legal Systems Development. Justice in Aging administers the NCLER through a contract with the Administration for Community Living's Administration on Aging.

# About Justice in Aging

Justice in Aging is a national organization that uses the power of law to fight senior poverty by securing access to affordable health care, economic security, and the courts for older adults with limited resources.

Since 1972 we've focused our efforts primarily on populations that have traditionally lacked legal protection such as women, people of color, LGBT individuals, and people with limited English proficiency.

# About Texas RioGrande Legal Aid

Founded in 1970 to represent Texas farmworkers, TRLA has grown into the nation's second largest legal aid provider and the largest in Texas.

TRLA provides free civil legal services to residents in 68 Southwest Texas counties and represents migrant and seasonal farm workers throughout the state and in six other southern states.

TRLA also operates public defender programs that serve at least 10 Texas counties, representing low-income and indigent people accused of felonies, misdemeanors, and juvenile crimes.

# Introductions

- Francis Nugent, Legal Services Corporation
- Hilary Dalin, Office of Elder Justice and Adult Protective Services at the Administration for Community Living

# What We'll Cover

- Initial Considerations when defending a guardianship case
- Preparing the case
- Defense strategies
- Modification and termination
- Building systems and partnerships

# Part 1: Initial Considerations When Defending a Guardianship Case





# Initial Considerations

- This training will cover:
  - The “Why?”
  - How guardianship defense cases present themselves
  - Decisional capability
  - The attorney’s role
  - Reframing the conversation away from guardianship to supports and alternatives

# The “Why?”

- Guardianship is a serious deprivation of fundamental rights – “civil death,” stripping away “personhood.”
- There are few case types where more is at stake or where a client needs help more.
- One of the best ways to prevent abuse in the guardianship system is the involvement of a skilled, committed attorney to advocate zealously.
- Our goal: Encourage legal aid attorneys and programs to take on this important work.

# How Cases Present Themselves

- Statutory appointment
  - Nearly every state has a statute addressing appointment of counsel or right to counsel.
    - Mandatory appointment
    - Discretionary appointment
    - When requested
    - General right to an attorney
- Direct contact by the older adult or by family, friends, or other third parties
  - Clarify the current status of representation.
  - Watch Part 2: “Representing Clients with a Range of Decisional Capabilities.”
    - Working with older adults with cognitive impairment, third-parties, and fiduciaries; ethical rules and solicitation rules

# Decisional Capability

- “Decisional capability” is the ability to make an informed decision or choice about a particular matter.
  - It is a spectrum, not static, and domain/context specific: “The capability to decide WHAT?”
  - Not synonymous or proven by diagnosis, bad decisions, fiduciary appointment, tests or checklists, or old age.
- The model rules require only that a lawyer is able to communicate sufficiently with the client to allow client to understand to the degree needed for the client to give informed consent regarding the course of conduct and goal of representation (Rules 1.0, 1.2, 1.4).

# The Attorney's Role

- Model Rule 1.14
  - “When a client’s capacity to make adequately considered decisions . . . is diminished, . . . the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.”
- A defense attorney retained or appointed to represent the older adult facing or under guardianship is a zealous advocate –
  - For the wishes of the client,
  - For the protection of the client’s statutory rights, and
  - For the protection of the client’s due process rights.
- Even when the older adult’s wishes cannot be ascertained, the attorney still plays a vital role.
  - Advocate for the result that is least restrictive in type, duration, and scope; protect due process and other rights and interests.

# Reframing the Conversation

- A quick and early resolution – one that avoids guardianship – benefits everyone.
- What is driving the push for guardianship?
  - Family dynamics, power plays, frustration
  - Incorrect or insufficient information
  - A trusted individual or institution saying, “You need to file for guardianship.”
  - Hospital to guardianship pipeline, guardianship as collection mechanism
- What is the *specific* problem (real or perceived) that needs to be addressed?
- Be creative and explore alternatives.

# Supports and Alternatives

- Informal and personal supports
  - Family, friends, neighbors
  - Community organizations
  - Religious organizations
- Social supports
  - Congregate and home-delivered meals
  - Home health care
  - Housekeeping services
  - Day programs
  - Paratransit and other transportation services – rideshare
  - Delivery services – auto refill
- Financial supports
  - Automated finances
  - Direct deposit
  - Account with read only access, shared statements/notices
  - Shared notice of late payment
  - Debit/credit cards with agreed limits
- Financial supports (cont.)
  - Joint accounts
  - Trusted person designations
  - Representative payees
  - Financial management services, bill pay services, certified daily money managers, senior money management programs
  - SDM agreements
  - POA for finances
  - Trusts
- Health care supports
  - Health alerts (falls, emergencies)
  - GPS monitoring
  - Virtual medicine
  - Electronic medication management
  - SDM agreement
  - Health care proxy
  - POA for healthcare
  - Care managers and coordinators

# Part 2: Preparing the Case





# Preparing the Case

- We'll cover
  - Gathering information and documentation and evaluating the case
  - Burden and Standards
  - Procedural and evidentiary rules
  - Medical evaluations
  - Witnesses
  - Ensuring accessibility and the right to participation

# Gathering and Evaluating

- Meet with your client
- Review the court file
- What do you need to look for?
  - Who is seeking guardianship?
  - What is client's relationship with the proposed guardian?
  - What are the issues the proposed guardian is alleging to be the basis of the guardianship request?
    - Can these be solved with guardianship alternatives?
  - Who are the medical authorities in the client's life?
    - What does the medical report say, if required?
      - Was the physician court ordered, your client's PCP, or a third party?
- Know your judge
- Prepare and research

# Burden and Standards (new application)

- Burden: The burden is on the proposed guardian/movant/person applying to be guardian.
- Standard: Know Your State.
  - Clear and convincing?
  - Preponderance of the evidence?
  - Something else?

Findings, Standard by State from ABA:

[https://www.americanbar.org/content/dam/aba/administrative/law\\_aging/chartconduct.pdf](https://www.americanbar.org/content/dam/aba/administrative/law_aging/chartconduct.pdf)

# Procedure and Evidence Rules

- This is your Rules of Evidence, your Estate/Probate codes.
- Each state is different, but each state is specific.
  - READ THE RULES
- Why know the rules? Why know how your court works?
  - It's the best way you can be ready to contest the guardianship.
    - You only know if your opponent is doing it wrong if you know the procedure and the law.
  - It helps things to run smoothly for your client.

# Medical Evaluations

- Physician's Certificate of Medical Evaluation
- Independent Mental Examination
- Examining Committee
- Etc.
  
- The states vary: some require examinations by those appointed by the Court, some don't specify what must be in the written report, and some states don't require an exam or a report – KNOW YOUR STATE'S RULES
  
- Things to Consider: What does the report say? Is the opponent's report by a qualified person (think *Daubert*)? Do qualified minds differ? Does the initial report help or hurt your client? If there's a disagreement, will the Court order an independent examination? Should the exam be completed by a doctor in a different discipline?

# Witnesses

- Check your evidence rules to ensure witnesses are subpoenaed timely.
- Who is going to help your position, even if they are a hostile witness?
- Who can help show decisional capability? Who can help disqualify the proposed guardian (show abuse, neglect, fraud, notoriously bad conduct)? Who can contest the medical report?
  - Doctor/psychiatrist
  - family members
  - law enforcement
  - Adult Protective Services
  - Etc.

# Accessibility and Participation

- Goal: Denial of Guardianship
  - On the basis of your client's decisional capability. Makes sense the judge would want to see and hear from your client.
- Goal: Preserve your client's autonomy
  - Treat the older adult as your ethics code requires you to treat all clients.
    - Communicate with client.
    - Let client make the decisions that affect their lives.
    - Ensure the client's active presence at each hearing.
      - Interpreter needed?
      - Elevator access?
      - No elevator? Does hearing need to be moved to bottom floor?

# Part 3: Defense Strategies





# Defense Strategies

- We'll cover
  - Statutory/due process violations
  - Guardian not needed
  - Guardian not qualified or preferred
  - Support and alternatives available
  - Limited guardianship orders and protective procedures

# Statutory and Due Process Violations

- Guardianship statutes as written can be very different than guardianship statutes in practice.
- Safeguard due process even where there might not be a substantive defense.
  - Right to notice
  - Right to counsel
  - Right to be present
  - Right to be heard, present evidence, jury trial
  - Right to confront witnesses
  - Rules of evidence and procedure
- Know your state statutes.
  - Pleading requirements
  - Physician's certificate or other medical evidence
  - Notice and service to all required and interested parties
  - Other requirements

# A Guardian Is Not Needed

- The evidence does not meet the standard of proof because contrary evidence shows that a guardian is not needed.
- Find the statutory hooks in your state statutes.
  - Nev. Rev. Stat. § 159.019 – “A person is ‘incapacitated’ if he or she ... is unable to receive and evaluate information or make or communicate decisions to such an extent that the person ***lacks the ability to meet essential requirements for physical health, safety or self-care ....***”
  - Conn. Gen. Stat. § 45a-650(f) – “If the court finds by ***clear and convincing evidence*** that the respondent is ***incapable*** of caring for himself or herself, ... ***cannot*** be cared for adequately without the appointment of a conservator and the appointment of a conservator is the ***least restrictive means of intervention*** ....”
  - Minn. Rev. Stat. § 524.5-310(a) – “The court may appoint a guardian ... ***only if*** it finds by ***clear and convincing evidence*** that (1) the respondent is an ***incapacitated person***; and (2) ... needs ***cannot be met by less restrictive means*** ....”
  - Ind. Code Ann. § 29-3-5-3 – Court must find “(1) the individual ... is an ***incapacitated person*** ... and (2) the appointment of a guardian is ***necessary*** ....”

# A Guardian Is Not Needed (cont.)

- UGCOPAA

- § 301(a)(1)(A) – “[T]he court may appoint a guardian for an adult if the court finds by ***clear-and-convincing evidence*** that the respondent ***lacks the ability to meet essential requirements for physical health, safety, or self-care*** because the respondent is unable to receive and evaluate information or make or communicate decisions, even with appropriate supportive services, technological assistance, or supported decision making . . . .”

- Present evidence of client’s functional capability via
  - Client’s testimony
  - Testimony of other witnesses and supporters (friends, neighbors, service providers)

# An Alternative Is Available (1 of 3)

- Statutes increasingly requiring the consideration and elimination of other alternatives.
  - UGCOPAA § 301(a)(1)(B) – “**and** the respondent’s identified needs cannot be met by a protective arrangement instead of guardianship **or other less restrictive alternative . . .**”
  - UGCOPAA § 302(b)(4)(B)-(D) – “A petition ... **must state ... any ... other less restrictive alternatives** for meeting the respondent’s alleged need which have been **considered or implemented**; if no . . . other less restrictive alternative have been considered or implemented, **the reason they have not been considered or implemented**; and **the reason a ... less restrictive alternative is insufficient** to meet the respondent’s alleged need ...”
- Even if not specified in statute, if there’s an available alternative, then guardianship isn’t “necessary” or “needed” or “required,” etc.

# An Alternative Is Available (2 of 3)

- Present evidence that the alternative is meeting (or will meet) the older adult's needs and provide the sought-after protection.
  - Evaluations and reports by professionals
  - Client's testimony
  - Testimony of other witnesses and supporters (friends, neighbors, service providers)
- Don't forget about already existing alternative (POAs, advance directives, named agents).
  - Ask the client, family, friends, banks, health care providers, previous lawyers.

# An Alternative Is Available (3 of 3)

- Informal and personal supports
  - Family, friends, neighbors
  - Community organizations
  - Religious organizations
- Social supports
  - Congregate and home-delivered meals
  - Home health care
  - Housekeeping services
  - Day programs
  - Paratransit and other transportation services – rideshare
  - Delivery services – auto refill
- Financial supports
  - Automated finances
  - Direct deposit
  - Account with read only access, shared statements/notices
  - Shared notice of late payment
  - Debit/credit cards with agreed limits
- Financial supports (cont.)
  - Joint accounts
  - Trusted person designations
  - Representative payees
  - Financial management services, bill pay services, certified daily money managers, senior money management programs
  - SDM agreements
  - POA for finances
  - Trusts
- Health care supports
  - Health alerts (falls, emergencies)
  - GPS monitoring
  - Virtual medicine
  - Electronic medication management
  - SDM agreement
  - Health care proxy
  - POA for healthcare
  - Care managers and coordinators

# Guardian Is Not Qualified or Preferred

- Certain factors might render a proposed guardian unsuitable or unqualified under state law.
  - Criminal history (felonies, abuse, abandonment, etc.)
  - License suspension or disbarment
  - Abuse of drugs or alcohol
  - Past bankruptcy
  - Incapacity
- Most states have priority statutes, hopefully with a preference for your client's wishes.
  - UGCOPAA § 309(a)(2) gives preference to “a person nominated as guardian by the respondent” (including an oral nomination at the hearing or nomination communicated to the visitor).
  - Select someone who shares the goal of future modification/termination.



# Limited Guardianship Orders and Protective Arrangements

- Every state allows for a limited or tailored order.
  - Yet overwhelmingly most guardianships are plenary.
  - Why?
- If guardianship is to be granted, limit it to the areas of unmet need, retaining all rights possible.
  - Push back against business-as-usual mindset.
  - Overcome “Well, we’ll just be back here anyway” argument.
  - Be creative – Mediation? Diversion? Long-range strategy to educate the judge (bias is real) and obtain future termination/modification.
- Statutory protective arrangements under UGCOPAA
  - §§ 502, 503 “authorize or direct a transaction necessary to meet the respondent’s need for health, safety, or care” or to “protect the financial interests or property.”

# Part 4: Modification and Termination



# Modification and Termination

- We'll cover
  - Burdens and standards
  - Bases for modification and termination
  - Strategies for modification and termination

Restoration case law chart from the ABA:

[https://www.americanbar.org/content/dam/aba/administrative/law\\_aging/2014\\_RestorationCaseLawChartSortedbyState.pdf](https://www.americanbar.org/content/dam/aba/administrative/law_aging/2014_RestorationCaseLawChartSortedbyState.pdf)

# Standards and Burdens

- Burden: The burden is on the movant/older adult subjected to guardianship/petitioner
- Standard: Know your state
  - some require prima facie case and then the burden will shift to the opposing party to prove by clear and convincing evidence (i.e. burden shifting model), some require a preponderance of the evidence, and others require the movant to prove by clear and convincing evidence
    - **Texas rule:** If a court is to determine whether to end a guardianship, “the court must find by a preponderance of evidence that the ward is no longer partially or fully incapacitated.” Tex. Estates Code Ann. § 1202.153 If a court is to limit the power granted to a guardian, “the court must find by a preponderance of evidence that the current nature and degree of the ward’s incapacity . . . warrants a modification of the guardianship and that some of the ward’s rights need to be restored, with or without support and services. *Id.*
    - **Nevada rule:** “The petitioner has the burden of proof to show by clear and convincing evidence that the termination or modification of the guardianship of the person, of the estate, or of the person and estate is in the best interests of the protected person.” Nevada Rev. Stat 159.1905(3)

# Bases

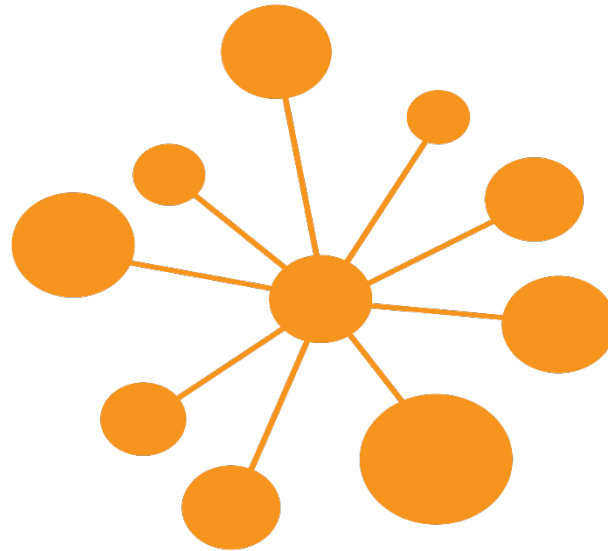
(When is modification or termination proper?)

- When it appears the client has regained decisional capability in the areas for which they were found to not have decisional capability.
- When supports and services, less restrictive alternatives exist.
- When the older adult subject to guardianship wants to challenge the guardianship.
- Does your state have a Bill of Rights for the older adult subject to guardianship?

# Strategies

- Assess for Decisional Capability
  - Has their decisional capability changed since the guardianship was granted?
  - Can they make informed decisions?
  - Work with communication tools that work for the client.
  - Request an independent evaluation.
  - Cross examine witnesses.
- Use Alternatives
  - What is already in place?
  - What can be put into place?
  - What are the state laws?
    - Health care decision making
      - Is there a default health care decision?
      - Does your state allow a health care surrogate?
      - Legislation and Statutory Charts - [Health Care Decision-Making: A Guardian's Authority](#)
    - Finances
      - Will direct deposit, automatic billing solve the problem?
      - Is there a representative payee for SS retirement/disability, SSI?
      - Is there a joint account already? (If no, use caution in creating them, as easy to exploit/abuse.)
- Does the Guardianship Even Work?
  - Think serious mental illnesses (know your state's law)
    - Was the goal institutionalization, to force the person to take medication?

# Part 5: Building Systems and Partnerships



# Building Systems & Partnerships

- Outreach
- Care coordinators, ombudsman, APS, other
- Educating the bench and bar
- Statutory appointment of counsel



# Questions?

# Suggestions for Future Topics

- Please complete the email post-webinar survey and provide us with your suggestions for additional topics in the *Closing the Justice Gap for Older Adults* training series.

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# Case Consultations

Case consultation assistance is available for attorneys and professionals seeking more information to help older adults. Contact NCLER at [ConsultNCLER@acl.hhs.gov](mailto:ConsultNCLER@acl.hhs.gov).