


**PRACTICAL:  
A New Tool to Determine Need for  
Guardianship**

Honoring Choices Annual Conference  
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*Objectives*


1. Understand the tension  
Guardianship/Conservatorship presents between helpful tool and infringement on civil rights.
2. Understand how PRACTICAL can aid in identifying and facilitating less restrictive alternatives to guardianship.
3. List PRACTICAL's 9 critical steps in determining the need for guardianship/conservatorship.

*PRACTICAL Tool*

Developed by *American Bar Association* with assistance from *National Resource Center for Supported Decision Making*


Field tested with, and designed for, attorneys

Applicable to anyone contemplating need for guardianship of (patient / client / resident / tenant / consumer) person served



*PRACTICAL Tool*

**P**resume  
**R**eason  
**A**sk  
**C**ommunity  
**T**eam  
**I**dentify  
**C**hallenges  
**A**ppoint  
**L**imit



*Presume guardianship is not needed*




**Guardianship**



*Guardianship/Conservatorship:  
Often Not the Best Solution*

- An ethical issue: removing constitutional right to self-determination / autonomy
- Time Consuming: due process protections to ensure justifiable intrusion by government in lives of citizens
- Expensive: to incapacitated person, family, society



*Guardianship/Conservatorship: Often Not the Best Solution (cont'd)*

- Potentially emotionally devastating to person and family
- May not even solve identified problem
- The problem of scarce resources
- Potential losses: dignity of risk, self-advocacy skills/motivation

People under guardianship can experience a **significant negative impact** on their physical and mental health, longevity, ability to function, and reports of subjective well-being.

~Jennifer Wright



**Self-Determination**

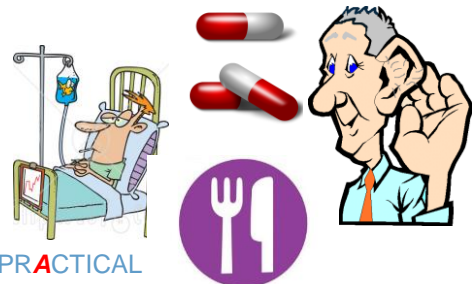
- “Older adults with more self-determination have improved psychological health including better adjustment to increased care needs.” O’Conner & Vallerand, Canadian Journal on Aging, 1994
- “Women with intellectual disabilities exercising more self-determination are less likely to be abused.” Khemka, Hickson, and Reynolds, 2005

**Reason:**  
clearly identify the reasons for concern



**PRACTICAL**

**Ask** if triggering concern may due to temporary or reversible conditions



**PRACTICAL**

**Community:** can concerns be addressed by connecting to family or community resources / making accommodations for deficits?



**PRACTICAL**

**Family**

Community standard to allow family to act as surrogate when:

- Available
- Acting in best interest
- Client not objecting

May need permission, advocacy and assistance from professional to step in to meet client needs



**Myth Busters:**

- Guardianship is NOT required by MN law:
  - to receive County Services
  - to sign IEP when person turns 18
- Care Facilities cannot mandate appointment of Guardian as condition of admission

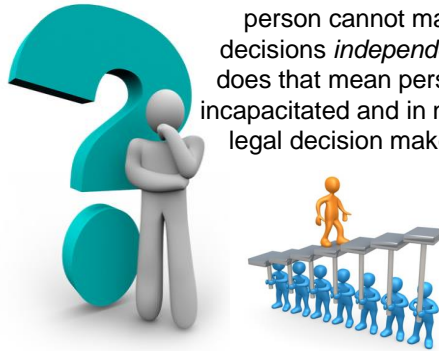


**Team:** Develop a team to help make decisions



PRAC**T**ICAL

Just because a person cannot make decisions *independently*, does that mean person is incapacitated and in need of legal decision maker??



**SUPPORTED DECISION MAKING**  
An Emerging Model

- “A way people can make own decisions, stay in charge of their lives while receiving help they need to do so.”
- Person making decisions *with* support of others vs. others making decisions *for* the person: “...cutting through the jargon to understand what’s going on and what you need to do...”

~ Jonathan Martinis, Esq.

**SUPPORTED DECISION MAKING**

“[J]ust a fancy way of describing how we all make choices. We all need help making decisions, every single day.”

~ Jonathan Martinis, Esq.


“I don’t need a guardian. I just need a little help!”

~ Jenny Hatch

*Texas*

“A process of supporting and accommodating an adult with a disability to enable the adult to make life decisions, including decisions related to where the adult wants to live, the services, supports, and medical care the adult wants to receive, whom the adult wants to live with, and where the adult wants to work, without impeding the self-determination of the adult.”

*Tex. Est. Code § 1357.002(3)*



**Identify abilities & limitations**




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**An Individual’s Capacity May Vary:**


- Throughout a time period (course of illness, hospitalization, time of day, etc.)
- May deteriorate or improve (the healing nature of time)
- Capacity is not global: Depends on decision or issue

*Q: Who decides?*  
*A: Who needs the decision?*



**Competence vs. Capacity**


- **Competency:** Determined by a court (e.g., incompetent to stand trial in criminal matters); typically = *global* determination of functioning
- **Capacity:** Ability to make particular decision
  - Guardianship = *Legal* Determination
  - Everything else = *Functional, Medical, Practical* Determination



**Note to Professionals:**

Just because my patient is “incapacitated”, does not automatically mean G/C needed


- Informal decision maker may be sufficient
- May not need any decision maker
- May instead need good advocacy, strong social work/case work
- If seek official, tidy, legal guardian for every incapacitated person, there will be lines years long to get to court; insufficient guardians to serve all these people



**Right to Make a Decision**

- Impaired memory
- Diagnosis relating to cognitive incapacity
- Meeting criteria/definition of Vulnerable Adult
- SW, Nursing, Speech or OT evaluation / cognitive score
- Psychiatrist/Psychologist/Physician determination of incompetence/incapacity (Exception: HCD)

None of these alone preclude an individual’s *legal* ability to make a decision.



### Determining Incapacity/Inability

- Medical Diagnosis
- Testing
- Inability to give Informed Consent
- Behaviors demonstrate understanding/lack of understanding

*Presumption is Competence/Capacity*



### Medical Decisional Capacity Requirements

- Patient communicates a choice  
*clearly indicates chosen tx. option*
- Understands the relevant information  
*grasps meaning of info. given by MD*
- Appreciates situation and consequences  
*acknowledges condition, consequences*
- Reasons about treatment options  
*engages in rational process of manipulating relevant info.*

### Financial Decisional Capacity Requirements

- Declarative Knowledge
  - *Ability to describe facts, concepts, events related to financial activities*
- Procedural Knowledge
  - *Ability to carry out motor-based financial skills: e.g., making change, writing check*
- Judgement
  - *Ability to make financial decisions consistent with self-interest*

(Moye & Marson, 2007)



### Challenges

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### Assessing Challenges

#### Possible challenges to identified supports:

- Eligibility
- Cost
- Timing
- Location
- Risk to public benefits




### Assessing Challenges

#### Possible concerns about supporters:


- Risk of undue influence
- Risk of abuse, neglect, exploitation (report suspected abuse to MAARC)
- Lack of understanding of person's medical/mental health needs
- Lack of stability, or cognitive limitations of supporters
- Disputes with family members



**Appoint a legal supporter or surrogate**




**PRACTICAL**



**Health Care Directive**


- If present: Presume capacity at time of completion
- Capacity to name agent vs. capacity to make medical decision
- Nomination for guardian
- Placement decisions
- Trigger for implementation: usually attending MD
- Protections: limits, easily revoked, provider oversight

*Goal: every person?*



**Authorized Rep for Economic Assistance**



- Do not need “legal” decision making authority to assist w/ MA application
- Counties/facilities cannot mandate guardianship as condition of admission/service provision
- X sufficient for signature



**Representative Payee**


- Does not need client cooperation or capacity
- VA, Social Security, Railroad Retirement
- Can be family or professional
- Perfect tool if only asset is monthly income

*Never underestimate the power of the purse strings!*

**Power of Attorney**

- Principal appoints attorney-in-fact/AIF
- Even if check “all powers”, \$\$\$ only
- Nomination for Conservator
- Power of the purse-strings
- Role of attorney



**Limit any necessary guardianship petition and order**



**PRACTICAL**

### Criteria for Legal Intervention: Guardianship

- When a person is incapacitated: lacks sufficient understanding/capacity to make or communicate responsible personal decisions, even with use of appropriate technological assistance *and*
- Has behavioral deficits which evidence inability to meet personal needs for medical care, nutrition, clothing, shelter, safety *and*
- No less restrictive alternatives will meet their needs



### Legal Intervention: Conservatorship

- Person is unable to manage property & business affairs b/c of inability to receive and evaluate information or make decisions, even with use of appropriate technological assistance;
- Has property which will be wasted or dissipated unless management is provided *or*
- Money is needed for support, care, education, health, and welfare of the person or individuals entitled to the person's support *and*
- Needs cannot be met by less restrictive alternatives

### When Might a G/C Be Needed?

- Decision requires "legal decision-maker" by statute or professional practice
- Irresolvable conflict or controversy about decision
- Required by policy – no other options
- Person unable to receive necessary services without surrogate
- Individual lacks capacity to give informed consent/make a decision *and* no less restrictive alternative



### RESOURCES

**VOA MN** [www.voamnwi.org](http://www.voamnwi.org)

- Legal Services: HCD forms and more
- CESDM & Protective Services: links to articles, G&C FAQ and more

•**National Resource Center on Supported Decision Making**  
[www.supporteddecisionmaking.org](http://www.supporteddecisionmaking.org)

**American Bar Association: PRACTICAL**  
[www.americanbar.org](http://www.americanbar.org)

### RESOURCES

- **American Association on Intellectual and Developmental Disabilities and The Arc Joint Position Statement**  
[http://aaid.org/news-policy/policy/position-statements/autonomy-decision-making-supports-and-guardianship#.WH\\_huOKiy70](http://aaid.org/news-policy/policy/position-statements/autonomy-decision-making-supports-and-guardianship#.WH_huOKiy70)
- **National Guardianship Association SDM Position Statement**  
[http://guardianship.org/documents/NGA\\_Policy\\_Statement\\_052016.pdf](http://guardianship.org/documents/NGA_Policy_Statement_052016.pdf)



### RESOURCES

The screenshot shows a YouTube playlist page with the following video titles:

- 1. What's Your Favorite Right?
- 2. Understanding the History of Guardianship
- 3. Understanding the Benefits of Self-Determination
- 4. Meet Jerry Hatch
- 5. Justice for Jerry
- 6. Capacity to Make Decisions
- 7. From Theory Into Practice: Special Education
- 8. From Theory Into Practice: Medical and Financial Decisions

A large blue URL is overlaid on the right side of the screenshot: <https://www.youtube.com/playlist?list=PLKdIRbjdmxgeDSVBZhEFyrzIli9zjO3Mc>



**WINGS**  
Working Interdisciplinary Networks  
of Guardianship Stakeholders  
MINNESOTA

Join our efforts to promote alternatives to guardianship and expand networks of people addressing maltreatment of vulnerable adults:








Become a WINGS MN member!

cesdm@voamn.org



**Center for Excellence in Supported Decision Making**

A Program of VOA MN, funded by  
DHHS Administration for Community Living

**Center for Excellence in Supported Decision Making**




**Volunteers of America**  
MINNESOTA

- Phone Consultation, Advice, I&R
- Assessments
- Surrogate Decision Maker Support & TA
- Facilitation of Supported Decision Making & Surrogate Decision Making Legal Tools
- Petitioning for G/C


**Center for Excellence in Supported Decision Making**

**GUARDIANSHIP INFORMATION LINE**



952-945-4174  
1-844-333-1748

CESDM@voamn.org




**CESDM Team**



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