



## **Petitioning for Guardianship**

**Tuesday Transition Talks at Twelve  
Northern Lights Interagency Council  
March 2, 2021**

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## **Roadmap**

- A. Introduction
- B. Define & Contrast
  - A. Health Care Directives & Powers of Attorney.
  - B. Guardianship & Conservatorship.
- C. What is the problem?
- D. Petitioning for Guardianship
- E. Resources
- F. Question & Answer

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## Estate & Elder Law Services



**Estate & Elder Law Services**

### WHAT



- ▶ Non-profit law firm
- ▶ Offer both full-pay and sliding-fee legal services
- ▶ Full-pay clients subsidize low-income clients
- ▶ Legal services limited to **estate planning, probate, and incapacity** (supported decision making, guardianship, conservatorship).

### WHO



Work with clients of any age to meet legal needs.

### WHERE



Represent clients in **metro area**

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## University of St. Thomas School of Law

- ◆ Elder Law & Guardianship Alternatives Clinic (ELGA)
  - Four students per semester
  - Avoid, modify, or terminate guardianships
    - Power of Attorney, Health Care Directives
    - Modify existing guardianship to be less burdensome
    - Represent PSG in guardianship termination cases
  - 16 guardianship terminations over 7 semesters
    - Partnership with Anoka County
  - ELGA clients continue as E&ELS clients after casework ends

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## Why do people seek guardianship?



[www.voamnwi.org/cesdm](http://www.voamnwi.org/cesdm)

### SUPPORTING AT-RISK ADULTS & CAREGIVERS

- ◆ People seek guardianship or conservatorship because they are **concerned**
- ◆ Families may not know their **options**
- ◆ Petitioners and their attorneys have **little incentive or guidance** to thoroughly evaluate less restrictive interventions – **even though it's the law**

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## Guardianship is overused, expensive and growing



[www.voamnwi.org/cesdm](http://www.voamnwi.org/cesdm)

### AN EMERGING ISSUE

- ◆ **26,203** Minnesota adults live under guardianship (8/2020)
- ◆ **1,734** new guardianship petitions filed in 2018
- ◆ **\$4,000 to \$6,000** the estimated cost to establish a guardianship
- ◆ **20%** the percent of people age 65 by 2030, which represents a **doubling of the population**

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**Define & Contrast**

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## Incapacity Timeline

	<u>BEFORE</u> <u>Incapacity</u>	<u>AFTER</u> <u>Incapacity</u>
<u>FINANCI</u> <u>AL</u>	<b>Power of Attorney:</b> appoints "attorney-in-fact" to make financial decisions.	<b>Conservatorship:</b> Judge appoints "conservator" to manage finances under Court supervision.
<u>MEDICAL</u>	<b>Health Care Directive:</b> appoints "health care agent" to make medical decisions	<b>Guardianship:</b> Judge declares incompetence and appoints "guardian" to manage health under Court supervision

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## Incapacity Timeline

	<u>BEFORE</u> <u>Incapacity</u>	<u>AFTER</u> <u>Incapacity</u>
<u>FINANCI</u> <u>AL</u>	<b>Power of Attorney:</b>  <u>DUPLICATION</u> OF RIGHTS	<b>Conservatorship:</b>  <u>REMOVAL</u> AND <u>REASSIGNMENT</u> OF RIGHTS
<u>MEDICAL</u>	<b>Health Care Directive:</b>  <u>DUPLICATION</u> OF RIGHTS	<b>Guardianship:</b>  <u>REMOVAL</u> AND <u>REASSIGNMENT</u> OF RIGHTS

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## Incapacity Timeline

	<u>BEFORE</u> <u>Incapacity</u>	<u>Questionable</u> <u>Decision-Making</u>	<u>AFTER</u> <u>Incapacity</u>
<u>FINANCIAL</u>	<b>Power of Attorney:</b> Both principal and agent have authority to act.	<b>Power of Attorney:</b> No ability to stop or undo actions of principal.	<b>Conservatorship:</b> Conservator has sole authority to act in financial best interest of principal.
<u>MEDICAL</u>	<b>Health Care Directive:</b> Principal retains decision making authority.	<b>Health Care Directive:</b> No ability to "fix" uncooperative principal.	<b>Guardianship:</b> Sole authority with no ability to "fix" uncooperative principal.

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## Capacity

- ◆ Capacity to do what?
  - Capacity is not all or nothing.
  - Categories of capacity.
  - Possible to have capacity in one area and not in another area.
- ◆ Defined by state statutes and/or case law.
- ◆ Capacity assessment is a factual determination.
- ◆ Attorneys make their own assessment of client capacity (not limited by medical diagnoses).

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**What is the Problem?**

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## **Substituted Decision Making: When Guardianship Makes Things Worse: Robert A. McLeod**

◆ Ineffective:

- Principal suffers from severe alcoholism
- Principal suffers from mental illness
- Principal is in early stages of Alzheimer's or Dementia
- Principal can physically refuse to cooperate with agent's decisions
- Principal can mentally refuse to cooperate with agent's decisions

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## **Substituted Decision Making:**

**When Guardianship Makes Things Worse: Robert A. McLeod**

- ◆ Health Care Directive/Guardianship cannot:
  - Make disability or illness go away
  - Force a Principal to take medications
  - Force a Principal to behave in a manner you believe is appropriate
  - Force a Principal to live where you have made arrangements for them to live
  - Force a Principal to follow the decisions and recommendations you have made
  - Force a Principal to receive and cooperate with medical treatment

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## **Substituted Decision Making:**

**When Guardianship Makes Things Worse: Robert A. McLeod**

- ◆ Guardianship:
  - Takes independence from the Ward
  - Obligates Guardian to court procedures
  - Forces Guardian to address issues Guardian may have had no legal duty to address before with no real power to solve the issues

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## **Substituted Decision Making:**

- ◆ Guardianship:
  - Drastic: rights are taken away instead of duplicated
  - Permanent: only a judge can terminate
  - Expensive: Must be established by the Court and remains under Court supervision for life. Will cost thousands of dollars to establish and maintain.

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## **Substituted Decision Making: When Guardianship Makes Things Worse: Robert A. McLeod**

- ◆ Guardianship can:
  - Allow you to speak to medical professionals about the Ward's care
  - Give you some legal authority to try to prevent bad actors from harming the ward

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## **Petitioning for Guardianship**

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## **Petitioning for Guardianship**

- ◆ 1. Information Gathering
- ◆ 2. Filing the Petition and Going to Court
- ◆ 3. Ongoing management of Guardianship

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## Petitioning for Guardianship

### ◆ 1. Information Gathering

#### – Language:

- Petitioner files the Petition for Guardianship
- Respondent is the person who may be in need of a guardian
- Person Subject to Guardianship has a guardian (formerly ward)
- Guardian is appointed by the court and subject to court supervision
- Interested parties – party to the legal matter
- Interested persons – related or connected to the PSG

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## Petitioning for Guardianship

### ◆ 1. Information Gathering

#### – Who is my client?

- My client will be the petitioner

#### – Who is the proposed guardian?

- Can be the same or different than petitioner

#### – Who will pay for the guardianship

- Comes from assets of Respondent
  - Unless we lose
- Possible to ask County to pay if Respondent is indigent.

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## Petitioning for Guardianship

- ◆ 1. Information Gathering
  - We control the timeline
  - Do we need guardianship?
  - Gather information in support of the Guardianship
    - Physician's Statement
    - Medical Records
    - Statements/Affidavits in Support of Guardianship
    - Talk to interested persons to determine whether they support/object to petition

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## Petitioning for Guardianship

- ◆ 1. Gathering Information, cont'd
  - Draft:
    - Petition for Guardianship
    - Bill of Particulars
    - Acceptance of Appointment
      - Watch the Court Video
    - Background study consent form
  - Physician's Statement
  - Notice of Hearing
  - Proposed Order
  - Proposed Letters
- File documents with the Court

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## Petitioning for Guardianship

- ◆ 2. Filing the Petition and Going to Court
  - Once the petition is filed the Court controls the timeline
    - Court hearing is scheduled
    - Notice must be sent at least 14 days in advance of hearing
    - Court-appointed attorney is assigned to Respondent
    - Court-visitor will meet with Respondent and send report to Court
  - The Court process is adversarial
    - Attorneys represent only their own client, cannot communicate with opposing parties
    - Objections can be made

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## Petitioning for Guardianship

- ◆ 2. Filing the Petition and Going to Court
  - Hearing
    - Testimony must be taken in support of the petition
    - Petitioner has the burden of proof to show Guardianship is necessary
    - Must portray Respondent in the negative (focus on what she or he cannot do)
    - Can be very emotional/traumatic for family members
    - If no objections, will be finished in 15 minutes
    - If contested, a new court date will be scheduled in the future

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## Petitioning for Guardianship

- ◆ 3. Ongoing management of Guardianship (Guardianship Granted)
  - Court issues Order Appointing Guardian
    - Order shows more detail
  - Court issues Letters of Guardianship
    - Letters only shows:
      - Who the Guardian is
      - What powers the Guardian has
      - How long the Guardianship lasts

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## Petitioning for Guardianship

- ◆ 3. Ongoing management of Guardianship (Guardianship granted)
  - Must file annual personal well-being report with the court
  - Must file regularly background study consent form
  - Must keep court updated of current address for Guardian and PSG
  - Must return to court for approval of certain actions
    - Disposition of personal property, etc.
  - Cannot resign as Guardian unless new Guardian is appointed
  - Must to back to Court for Modification or Termination of Guardianship (unless guardianship is limited in duration)

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## Petitioning for Guardianship

- ◆ 1. Information Gathering
- ◆ 2. Filing the Petition and Going to Court
- ◆ 3. Ongoing management of Guardianship

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**Resources**

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## Collaboration: Attorneys and Social Workers



Amanda Hudson, LSW



Anita Raymond, LISW



John Kantke, JD



Lucas Spaeth, JD



Kathleen Carlson, LSW

[www.voamnwi.org/estate-and-elder-law](http://www.voamnwi.org/estate-and-elder-law)

[www.voamnwi.org/cesdm](http://www.voamnwi.org/cesdm)



Mai Young, JD

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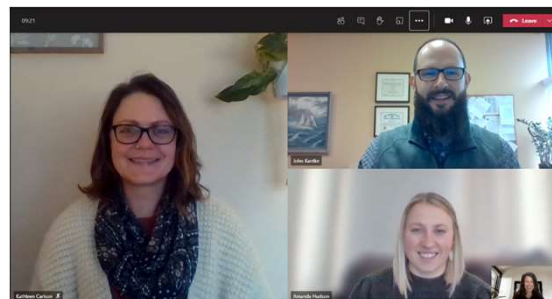
## New! Guardianship Information Clinic

### 1<sup>ST</sup> WEDNESDAY GUARDIANSHIP INFORMATION CLINIC

#### Free Monthly Drop-in Virtual Clinic

Families with questions related to a person's decision-making ability, use of supported decision making, need for guardianship, availability of alternatives, or related concerns are encouraged to drop in during clinic hours to meet with our social workers or attorney for educational information and to get their questions answered in real time: *no appointments, no voice mail, no phone tag, just direct access to our social work and legal team members!*

Contact: [cesdm@voamn.org](mailto:cesdm@voamn.org)



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MINNESOTA AND WISCONSIN



## GUARDIANSHIP INFORMATION LINE

952-945-4174

1-844-333-1748

[cesdm@voamn.org](mailto:cesdm@voamn.org)

*No cost, in-depth consultation for individuals, families  
and professionals; technical assistance/mentoring for  
professionals*

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