

Is Guardianship the Only Option?

A Discussion about Guardianship and the Many Alternatives

Hillary Dunn Stanisz, Esq.

Laura Sousa Wagner, Esq.

Disability Law Center

Learning Objectives

○ Compare Alternatives to Guardianship

- Learners will be able to describe at least three alternatives to guardianship (such as supported decision-making, powers of attorney, or health care proxies) and explain how each option allows different levels of independence for the student

○ Explain Key Concepts of Guardianship

- Learners will be able to explain what guardianship is, what responsibilities a guardian has, and what limits guardianship places on an adult's decision-making, and understand how to share this information with families during transition discussions

○ Apply Supported Decision-Making Principles

- Learners will be able to identify ways to encourage students to participate in their own decision-making, help students recognize barriers to independence, and to assist students in identifying strategies that promote the least restrictive, most independence-focused approach during transition planning

Agenda

- Age 18
- Decision-Making Issues
- Alternatives to Guardianship
- Guardianship
- Q&A

18 years of age...

- Presumption of competence
- Decision-Making: Independent? With supports?
By parents or others?

Major Life Decisions

- Education
- Health Care/Medical
- Legal
- Financial
- Employment
- Housing
- Adult Services and Providers

When Assistance with Decision-Making is Necessary

- Supported Decision Making
- Delegation of Ed. Decision-Making Authority
- Representative Payee
- Power of Attorney
- Health Care Proxy
- Limited Guardianship
- Conservatorship
- Guardianship

The “Negatives” of Guardianship

- Impact on self-determination
- Court
- Responsibilities placed on guardian
- MA law: less restrictive alternatives; limited guardianship

Delegation of Educational Decision-Making Authority

- Student retains
- Shared decision-making authority
- Delegate decision-making authority

Supported Decision-Making

- Supported vs. Substituted
- Remain the decision-maker
- Choose supporters to provide decision-making help when needed
- Promotes self-advocacy, self-determination, independence

Supported Decision-Making: What's happening in the U.S.?

○ Cases

- **NY case (2012)** - court recognized the use of SDM rather than guardian's substituted decision making. Terminated guardianship in favor of SDM model
- **Jenny Hatch (2013)** – first US case to order the use of SDM as an alternative to plenary guardianship

○ Legislation

- At least 20 states have laws providing legal authority for Supported Decision-Making agreements

○ National Support

- National Guardianship Association
- The Arc of the US
- American Bar Association

Supported Decision-Making: What's happening in Massachusetts?

- 2014 Pilot
- MASDMC
- MA legislation
 - 2025 – bills reintroduced into MA legislature to establish legal framework for SDM
 - Allow individuals to enter into SDM agreements with trusted person while providing safeguards against abuse
 - Require courts consider SDM before establishing guardianship
 - Require all individuals who are turning 18 and at risk of being placed under guardianship be made aware of SDM as an option at IEP meetings

Supported Decision-Making: Resources

- National Resource Center for SDM:
<https://supporteddecisionmaking.org/>
- CPR resources: <https://supporteddecisions.org>
- MA Advocates Standing Strong:
<https://wearemass.org/supported-decision-making>

Representative Payee

- Appointed through SSA when the beneficiary is unable to manage their benefit checks (SSI, SSDI)
- Does not manage all of the beneficiary's finances

Health Care Proxy

- Adult appoints a trusted person
- Appointed person has authority to make medical decisions *if the adult becomes incapacitated*
- Can be completed without involving the Court
- Capacity

Durable Power of Attorney

- Adult appoints a trusted person
- Appointed person manages and protects money, property, business affairs
- Can be completed without involving the Court
- Capacity

What is the Guardianship Appointment Standard?

- Person has a **clinically diagnosed** condition that results in an **inability to receive and evaluate information or make or communicate decisions** to such an extent that the individual **lacks the ability to meet essential requirements for physical health, safety, or self-care**, even with appropriate technological assistance.
- Less restrictive alternatives are not enough

MA Law: Guardianships Should Be Narrowly Tailored

- Individual should keep as many rights/responsibilities as possible
- Assessment of functional abilities/limitations
- Medical Certificate or Clinical Team Report

Clinical Team Report

- Intellectual Disability
- Must be completed by a physician, a licensed psychologist, and a social worker
- Must be dated within 180 days of filing the guardianship petition

Medical Certificate

- Must be dated within 30 days of filing the petition
- Must be dated and examination must occur within 30 days prior to the hearing.
- Must be completed by a physician, a licensed psychologist, a certified psychiatric nurse clinical specialist, or a nurse practitioner

Role of the Guardian

- Make decisions pertaining to support, education, health and safety
- Encourage the individual to participate in decisions
- Consider the individual's expressed preferences/desires
- Act in the individual's best interest
- Exercise only the necessary amount of control/authority

Reporting Responsibilities

- 60 days from the appointment of the guardian
- Annually
- When the individual's condition has changed

Protections for the Individual Subject to Guardianship

- Least restrictive – limited
- Right to an attorney
- Right to be present at the hearing

Important Limitations of the Guardian's Authority

- “Extraordinary” medical treatment**
- Mental health facility

Extraordinary Treatment

- Examples:
 - Treatment with antipsychotic medication (Rogers)**
 - Sterilization
 - Abortion

Substituted Judgment

Judge considers the following factors:

- Individual's expressed preference regarding the treatment/action
- Individual's religious beliefs
- Side effects
- Prognosis with and without the proposed action
- Impact on the individual's family

Common Issues

- Guardianship/Alternatives Timeline
- PCA and AFC

Resources

- DLC handout: <https://www.dlc-ma.org/wp-content/uploads/2023/11/Alternatives-to-Guardianship-and-Guardianship.pdf>
- MA Probate Court forms: <https://www.mass.gov/lists/probate-family-court-forms-for-guardianship-and-conservatorship>
- List of Possible Limitations to guardianship: <https://www.mass.gov/info-details/limitations-to-guardianship-and-conservatorship-for-clinicians-mpc-903a>

Questions & Answers

THANK YOU!

Hillary Dunn Stanisz, Esq.
Disability Law Center
(617) 723-8455

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www.dlc-ma.org