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Helping America's most vulnerable™

GUARDIANSHIP, CONSERVATORSHIP, & LESS RESTRICTIVE ALTERNATIVES

CommUNITY Adult Mental Health Initiative
August 7, 2018

Anita L. Raymond, LISW, CMC

Objectives

Define guardianship and conservatorship

Describe the process for appointment of a guardian/conservator

Understand statutory and practical aspects: when guardianship/conservatorship may be an effective option.

Understand why guardianship / conservatorship is often not the best intervention

List at least 5 alternatives to guardianship / conservatorship

Center for Excellence in Supported Decision Making

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



Lutheran
Social Service
of Minnesota



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mn DEPARTMENT OF
HUMAN SERVICES



WINGS
Working Interdisciplinary Networks
of Guardianship Stakeholders
MINNESOTA

MINNESOTA
ELDER JUSTICE
CENTER



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 community member!

cesdm@voamn.org
www.wingsmn.org



Framing the Issue

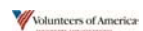
"Darcy" is a 43 year old woman living in her own apartment, receiving SSD for her bipolar disability, which she has historically had difficulty managing due to medication noncompliance. She was recently committed following a manic episode, during which she had engaged in a fistfight with her sister who was trying to "talk sense into her" during extensive shopping sprees and failure to pay her rent/utilities.

Now, her family has been advised to obtain Guardianship and Conservatorship due to the cyclical nature of her illness.

Guardianship & Conservatorship:

What is This?

- Court appointed substitute or surrogate decision-maker
- Voluntary or involuntary (most common)
- Guardianship/Guardian/Ward = Personal and Care Decisions
- Conservatorship/Conservator/Protected Person = Money and Assets



GUARDIANSHIP IS:

- an excellent tool...when it's necessary
- sometimes the only way to protect a person living with vulnerabilities
- sometimes the only way to meet the person's own goals
- to be utilized only in extreme circumstances when there is no other way to protect person/meet goals: last resort



Is Guardianship/Conservatorship the Best Solution?

- An ethical issue: removing constitutional right to self-determination / autonomy: Human Rights
- Time Consuming: due process protections to ensure justifiable intrusion by government in lives of citizens
- May not even solve identified problem

Is Guardianship/Conservatorship the Best Solution? (cont'd)

- Potentially emotionally devastating to person and family
- The problem of scarce resources
- Expensive



G/C Costs

- From estate of proposed ward/pp
- If indigent, from county budget = taxpayers (court or social services budget)
- Minimal payment, complex cases = difficulty finding nominee to serve (when no family to serve)
- Emotional, relationship costs



Can Guardianship Make Things Worse?

Risk of "mission creep"

- Well-intended, worried guardian
- Fears of liability
- Power and control
- Providers (and person) turn to guardian for *all* decisions



Can Guardianship Make Things Worse?

Dignity of Risk / Choice vs. Safety



To deny the right to make choices in an effort to protect the person with disabilities from risk is to diminish their human dignity.

~ Robert Perske

Can Guardianship Make Things Worse?

Medical Orders vs. Quality of Life
(medications, special diets, smoking, sweets, etc.)



Can Guardianship Make Things Worse?

Loss of sense of power/self-determination = potential for

- increased resistance
- reduced cooperation
- decreased sense of self-worth

Research: Guardianship, Self-Determination & Maltreatment

- "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

The Paradox of Guardianship

Valuable tool to protect Vulnerable Adult?

Or

Heavy-handed tool which strips constitutional right to self-determination?



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Deciding to Seek Guardianship / Conservatorship

- ✓ A Practical Decision
- ✓ An Ethical Decision

A Legal Decision

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Criteria for Guardianship

- When a person is incapacitated: impaired & lacks sufficient understanding/capacity to make or communicate responsible personal decisions, (MN Stat. 525.5-102 Subd. 6) *and*
- Has behavioral deficits which evidence inability to meet personal needs for medical care, nutrition, clothing, shelter, safety even with use of appropriate technological assistance *and*
- No less restrictive means will meet their needs, including use of appropriate technological assistance (MN Stat. 524.4-310 (a)(2))

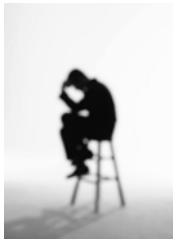
(AND Guardianship appointment will actually address the identified problem)

Criteria for Conservatorship

(MN Stat. 524.5-409 Subd. 1(1)(2)#3)

- 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 means, including use of technological assistance

Pondering The Three-Legged Stool of Guardianship/Conservatorship



Incapacity
+
Behavioral Evidence
+
No Viable Less Restrictive Alternative

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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

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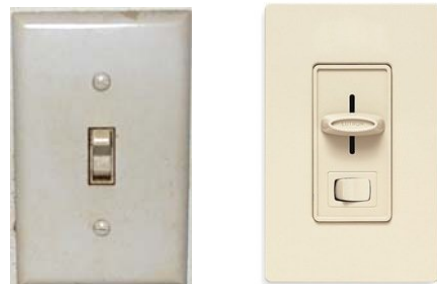
An Individual's Capacity May Vary:

- 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?

Capacity



Right to Make a Decision

- Impaired memory or intellectual or psychiatric disability
- 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.



Rethinking “incapacity” and independence



Independence & Decision Making

- How do you make decisions?
❖ Housing? Navigating new locations?
- Do you ever need help with your ADLs & IADLs?
❖ Taxes? Complex medical diagnosis?
- Does needing help = needing a substitute decision maker?
- What about our societal and professional obligation to support people living with disabilities and to assist them in maximizing independence?

Behavioral Evidence

Bills not paid
 Moldy food
 D/C notice
 Giving \$\$ away
 Inapprop. attire
 Loss of insurance
 Unkempt
 Leave AMA
 Hospital admits
 Loss of utilities
 Getting lost
 Forgets Rx



Challenge to Providers

Inability to
independently
meet needs
(existence of
“behavioral
evidence”)

≠

Need for
Guardian /
Conservator



Less Restrictive Alternatives to Guardianship

- Supported Decision Making / Cooperation with Others' Ideas/Input
- Family Involvement
- Ethics Committees
- Health Care Directive
- Authorized Rep. for Economic Assistance
- County/Private Case Management
- Commitment
- Financial Management

Supported Decision Making: What is This??

A person-centered intervention where a person is empowered to make decisions *with* the support of trusted family / friends / professionals, rather than others making decisions *for* the person

"A way people can make their own decisions, stay in charge of their lives while receiving help they need to do so." ~ Jonathan Martinis, Esq.

Supported Decision Making

A legal tool in Texas, Delaware, Wisconsin, D.C., British Columbia, Australia, other jurisdictions... (coming soon: Alaska, Tennessee)

A philosophical approach: a paradigm, not just a process: person-centered approach to assisting person with decision making



Supported Decision Making: Definition

"a recognized alternative to guardianship where people with disabilities use trusted friends, family members, and professionals to help them understand the situations and choices they face, so they may make their own decisions without the 'need' for a guardian"

(Blanck & Martinis, 2015)

Guardianship & SDM Position or Supporting Statements



NATIONAL ADULT PROTECTIVE
SERVICES ASSOCIATION



AMERICAN BAR ASSOCIATION
Defending Liberty Pursuing Justice



Real Possibilities



NATIONAL GUARDIANSHIP ASSOCIATION



American Association
on Intellectual and
Developmental Disabilities



How Can I Use SDM?

- Confront own assumptions about:
 - Capacity & Diagnosis
 - Need for legal decision maker
 - Ability of family (however imperfect) to play significant and positive role
- Recognize risk factors re: family, but sort out reality vs. perception
- Confront own and other professionals' lack of comfort with ambiguity

SW Advocacy for Person and SDM

- Confront your own risk tolerance
- Build trust; joining
- Advocate for decisions person can make
- Accommodate for disabilities
- Give information about rights
- Help patient identify needs
- Facilitate realistic goal setting (Insight Proxy)
- Identify and link to formal and informal resources
- May need to confront other professionals

How Does Supported Decision Making Work?

- Understand we all have the right to make choices.
- Needing help ≠ needing guardianship
- Work with person to identify team of “supporters” for current or future



How Does Supported Decision Making Work? (cont'd)

- Consider developing a written plan (often as part of HCD or POA):

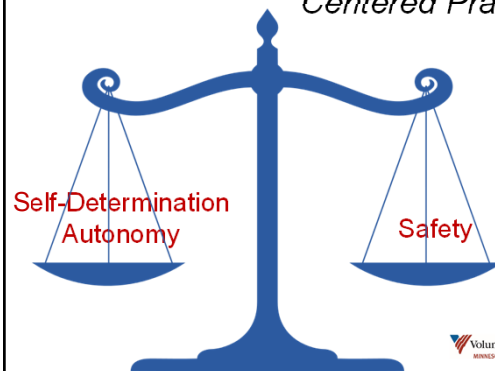
Who will provide support, when they will provide it, and how they will provide it

- Share plan with providers, so they know that person(s) identified are part of the “team”

How Can I Use SDM?

- Changing our approach and assumptions about vulnerability and disability
- From “telling” to “coaching”
- Is neither abandoning person to their choices nor is it complete focus on total risk elimination.
- In other words:

Finding the Balance: Person Centered Practices



What Does SDM Look Like?

Example: managing money

~ no one talks about money with the person, & person does whatever wants: not SDM

~ someone manages all the person's money, gives no choices about how it's spent: not SDM

~ anything else - opening joint bank account, making a budget together, having a fiduciary who discusses how to spend money: is SDM

(National Resource Center on SDM Brainstorming Guide)

What Does SDM Look Like?

Example: making health care decisions

- person makes own decisions without talking to anyone else: not SDM
- someone else makes all medical decisions for person without discussing preferences/opinions: not SDM
- anything else - attending medical appts. together, explains healthcare choices in plain language, shares access to medical records: is SDM

(National Resource Center on SDM Brainstorming Guide)

What Does SDM Look Like?

Example: deciding where to live

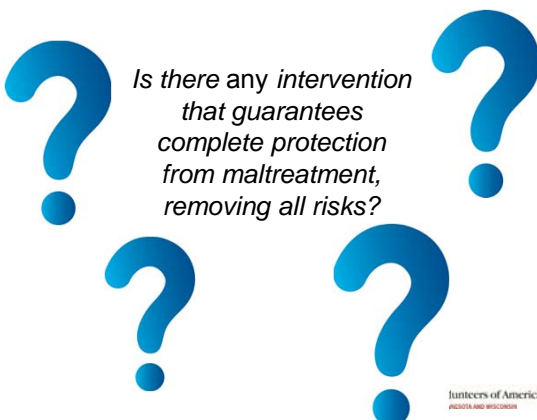
- person makes own decisions without consulting friends, family, professionals: not SDM
- someone else makes all living decisions for person without considering preferences / opinions: not SDM
- anything else – visiting possible residences together, making pro/con lists; discussing direct service needs: is SDM

(National Resource Center on SDM Brainstorming Guide)

But there's not court monitoring!

Can SDM protect individual rights while addressing vulnerabilities and preventing maltreatment?

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INDEPENDENCE AND WELLNESS



Is Person a Candidate for SDM?

Maybe

- Recognizes needs help
- Has trusted others to form team
- Cooperative and/or open to trusted others' ideas
- Ideally, able to also complete HCD/POA

Is Person a Candidate for SDM?

Probably Not

- Does not recognize need for help/refuses
- Resistiveness cannot be overcome
- Person sabotages others' efforts
- No trusted supporters
- Supporters not able to act per wishes/best interests (even with support)

Less Restrictive Alternatives to Guardianship

- | | |
|--|---|
| • Supported Decision Making / Cooperation with Others' Ideas/Input | • Authorized Rep. for Economic Assistance |
| • Family Involvement | • County/Private Case Management |
| • Ethics Committees | • Commitment |
| • Health Care Directive | • Financial Management |

Family

May be best influencer of person

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

Legal vs. Informal Decision Makers

American Medical Association Code of Ethics:

www.ama-assn.org/delivering-care/decisions-adult-patients-who-lack-capacity

MN Medical Association Code of Ethics

www.mnmed.org/getmedia/d922e045-c6a4-43af-8d0d-f212a11bd059/2017-Policy-Compendium.aspx

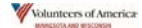


Less Restrictive Alternatives to Guardianship

- Supported Decision Making / Cooperation with Others' Ideas/Input
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- **Ethics Committees**
- Health Care Directive
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Ethics Committee / Institutional Policy

- May be capacitated, incapacitated or questionably capacitated client
- Convenes when there is Ethical Conflict
 - e.g. autonomy vs. protection; benefit vs. harm
- Not decisional body, but does facilitate decision-making
- AMA Policy E-2.20 & E-8.081: recommends using when no surrogate, to facilitate sound decision making, when question re: surrogate acting in best interest



Less Restrictive Alternatives to Guardianship

- Supported Decision Making / Cooperation with Others' Ideas/Input
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- **Health Care Directive**
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Health Care Directive

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

Less Restrictive Alternatives to Guardianship

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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



Less Restrictive Alternatives to Guardianship

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Case Management

- Assessment of needs
- Trusting relationship (?) / insight proxy
- Connect to necessary services
- Gatekeeper to services
- Especially effective if someone controls \$\$

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Commitment vs. Guardianship

Guardianship Commitment

Permanent:

Time-limited:

Ends only on successful petition for termination

Automatically expires



Commitment vs. Guardianship

Guardianship	Commitment
Broad Powers	Placement and/or Treatment Only (& “forced” treatment if Jarvis / Price)

*Commitment vs. Guardianship*

Guardianship	Commitment
Process: 2 - 4+ months (Emergency g'ship?) No screening	Process: 2 - 4 weeks Pre-Petition Screening

Commitment vs. Guardianship

Guardianship	Commitment
Cost born by respondent	Cost born by system (RTC)

*Case Study: Tim*

Tim is a 83 year old man with life-long hx. of untreated schizophrenia. He was recently found wandering in a park; he had been evicted recently and had not established housing. EMTs transported him to the hospital, and he was admitted to the geri-psych unit. Psychiatry states his condition is not amenable to treatment. He is demanding to be allowed to return “home” with no insight to his deficits, inability to meet his basic needs, etc.

Guardianship or Commitment???

Commitment vs. Guardianship

Guardianship to Avoid Commitment rationales:

- Place of abode power: keeps person in stable environment = no need for future commitment
- Medical treatment power: keeps person stable = no need for future commitment (complication: consenting to psychotropic medications when person refusing)

Case Study: Eva

Eva is an 68 year old woman who has bipolar dx. and has had multiple commitments in her lifetime. She has little savings or income, so she lives with her daughter and family. She typically does well under commitment, and is then discharged home. Ultimately, she stops taking her medications and the cycle continues; she is again in the hospital, demanding to go home. She is now frail, needs a wheelchair and significant supervision for her progressing dementia, but her daughter's home is split-level and no one is home during the day.

Commitment vs. Guardianship

Commitment to Avoid Guardianship rationales:

- Person gets placed via Commitment, settles in, finances managed, commitment expires = no need for guardianship (is LRA)
- Person gets committed, psychiatrically stabilized, commitment expires, person signs psychiatric Health Care Directive = no need for guardianship or future commitment



Less Restrictive Alternatives to Guardianship

- Supported Decision Making / Cooperation with Others' Ideas/Input
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- County/Private Case Management
- Commitment
- **Financial Management**

Financial Management

Bank Account Authorized Signer / Rep Payee / Trustee / Attorney in Fact / Conservator

Ability to pay for services, person doesn't / can't sabotage services = getting needs met without guardianship



Less Restrictive Alternatives: Conservatorship

- Family, trusted friend
- Bank Plans: auto pay, direct deposit, co-signers
- Authorized Representative
- Representative Payee
- Power of Attorney
- Trust



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



Success of LRA

- Individual cooperates / doesn't sabotage
- Available family/friend/professional to serve
- Abuse or neglect by surrogate not at issue
- Skill & willingness of professionals to respect & work with conflict or difficult clients/families as well as tolerance for some ambiguity
- When professionals' liability is low



Challenge

Just because a person *might* revoke a less restrictive tool, does that mean we shouldn't try it?



Petitioning for Guardianship

Person has irreversible condition that causes their inability to make responsible personal decisions

and

Person's behaviors (actions or lack of actions) demonstrate that basic needs are unmet

and

There are no less restrictive options to be tried to accommodate the cognitive/psychiatric/intellectual disability by meeting personal needs

Maybe we need Guardianship

Petitioning for Conservatorship

Person has condition that causes their inability to manage finances

and

Assets will be eliminated w/o management or need to access assets for own or dependents' support

and

There are no less restrictive options to be tried to adequately protect or manage income/assets

We may need Conservatorship

Court Process and Procedures

- Petitioner/Petitioner's Attorney
- Physician's Statement in Support
- Proposed Guardian/Conservator (priority appts)
- Petition Filed/Notice Requirements
- Court Date Scheduled



Court Process and Procedures

- Court Visitor
- Court Appointed Attorney
- Hearing
- Bond
- Oath & Acceptance
- Court Order



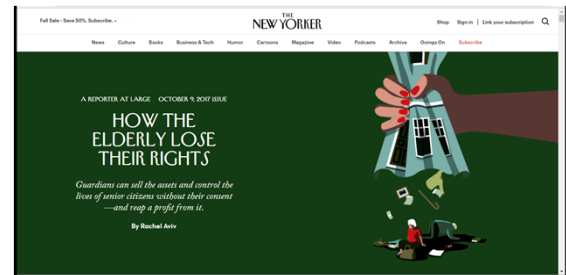
Court Process and Procedures

That's a lot of due process!

Why is it important???



Potential for Abuse



The Times They Are A Changin'

- Human Rights
- ADA
- Olmstead & 245D
- Person Centered Interventions



Note to Professionals:

Just because my client/patient is "incapacitated", does not automatically mean G/C needed

- Informal decision maker or decision making supporter 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

When Might a G/C Be Needed?

- Individual lacks capacity/competence to give informed consent *and* no less restrictive approach to address deficits
- Decision requires "legal decision-maker" by statute
- Irresolvable conflict or controversy about decision
- Person unable to receive necessary services without surrogate



Avoid Using G/C

- when person is "incapacitated", but all needs being (or can be) met
- to manage problem behaviors
- for ease of providers/system (including fears of liability)
- to manage chemical dependency
- to obtain treatment for mental illness
- to manage eccentric behaviors
- appointment of G/C would not address issues



Darcy

"Darcy" is a 43 year old woman living in her own apartment, receiving SSD for her bipolar disability, which she has historically had difficulty managing due to medication noncompliance. She was recently committed following a manic episode, during which she had engaged in a fistfight with her sister who was trying to "talk sense into her" during extensive shopping sprees and failure to pay her rent/utilities.

Now, her family has been advised to obtain Guardianship and Conservatorship due to the cyclical nature of her illness.

Does Darcy need a Guardian/Conservator?

- Are there other things we could try first?
 - Stabilization w/ Commitment?
 - Community support:
 - Case management
 - ARMHS services
 - Completion of HCD with psychiatric directive?
 - Rep Payee?
 - Other?
- Does Darcy meet criteria for G/C?

Center for Excellence in Supported Decision Making



- 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: Impacting Individuals

Supporting "family" in need of consultation for support/technical assistance in role of supported or surrogate decision maker



Center for Excellence in Supported Decision Making: Impacting Individuals

Guardianship Complaint Advocacy:
651-440-9300



Center for Excellence in Supported Decision Making

GUARDIANSHIP INFORMATION LINE



952-945-4174

1-844-333-1748

CESDM@voamn.org





CESDM Team

Volunteers of America MINNESOTA

Anita Raymond Program Manager 952-945-4172 araymond @voamn.org	Amanda Hudson 952-945-4177 amanda.hudson @voamn.org	John Kantke 612-676-6301 john.kantke @voamn.org	Kathleen Carlson 952-945-4176 kathleen.carlson @voamn.org
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**CESDM & WINGS MN:
Impacting Communities**

- Supporting individuals, providers, families through education
- Building systems prioritizing supported decision making and alternatives to guardianship
- Sustaining conversations with stakeholders: improve outcomes, increase self-determination

WINGS Working Interdisciplinary Networks of Guardianship Stakeholders MINNESOTA

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CESDM & WINGS MN: Impacting Communities

- Annual Summit
- Quarterly newsletters with local and national news
- Community and Professional Education & Training: Guardianship, SDM, etc.

WINGS Working Interdisciplinary Networks of Guardianship Stakeholders MINNESOTA

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RESOURCES


VOA MN www.voamnwi.org

- Legal Services: HCD forms and more
<https://www.voamnwi.org/estate-and-elder-law>
- CESDM & Protective Services: links to articles, G&C FAQ and more
www.voamnwi.org/protective-services

RESOURCES

**MN Courts:
Guardianship Manual, Forms, Online Training**

<http://www.mncourts.gov/Help-Topics/Guardianship-and-Conservatorship.aspx>



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RESOURCES

State Courts-forms and manuals:
www.mncourts.gov/Help-Topics/Guardianship-and-Conservatorship.aspx

Bill of Rights for Wards & Protected Persons:
www.revisor.mn.gov/statutes/?id=524.5-120

MN DHS Adult Mental Health Programs and Services
<https://mn.gov/dhs/people-we-serve/seniors/health-care/mental-health/programs-services/>

RESOURCES

WINGS MN: www.wingsmn.org and:
www.mncourts.gov/Help-Topics/Guardianship-and-Conservatorship/WINGS.aspx

Article 5 of the Uniform Probate Code,
 Protection of Persons Under Disability and
 Their Property, 524.5-101 – 524.5-903



RESOURCES

<https://www.youtube.com/playlist?list=PLKdIRbjdmxgeDSVBZheFyrzIli9zjO3Mc>



RESOURCES

American Bar Association: The PRACTICAL TOOL
www.americanbar.org/groups/law_aging/resources/guardianship_law_practice/practical_tool.html

National Resource Center on SDM Brainstorming Guide (and SDMA model forms)
<http://www.supporteddecisionmaking.org/sites/default/files/sdm-brainstorming-guide.pdf>



RESOURCES

American Medical Association Code of Ethics:

www.ama-assn.org/delivering-care/decisions-adult-patients-who-lack-capacity

MN Medical Association Code of Ethics

www.mnmed.org/getmedia/d922e045-c6a4-43af-8d0d-f212a11bd059/2017-Policy-Compendium.aspx



RESOURCES

- **American Association on Intellectual and Developmental Disabilities and The Arc Joint Position Statement**
http://aaidd.org/news-policy/policy/position-statements/autonomy-decision-making-supports-and-guardianship#.WH_huOkj70
- **National Guardianship Association SDM Position Statement**
http://guardianship.org/documents/NGA_Policy_Statement_052016.pdf



VIDEO RESOURCES

- **What Guardianship Means to Me**
<https://youtu.be/u6FTL7bYUAW>
- **Michael Latawiec, St. Thomas School of Law Clinic on WCCO**
<https://youtu.be/aclKso0vqIY>
- **Last Week Tonight with John Oliver**
<https://www.youtube.com/watch?v=nG2pEffLEJo>