

# Guardianship

&

# Alternatives



# Hello!



## **Speakers**

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## **Guests**

Who are you?

Why are you here?

What do you hope to learn?

## Why are we here? What do we value?

**Education & Support.** This training will provide a basic overview of guardianship and its alternatives. We will also address challenges for involved parties and possible solutions to said challenges.

**Guiding Principles.** *We serve* people with IDD; therefore, we promote self-determination, person-centeredness, the dignity of risk, the safeguarding of human rights, least restrictive interventions, objectivity of interested persons, and education to those who support people with IDD. We use the National Guardianship Association's Standards of Practice and Model of Ethics as guiding principles for the implementation of guardianship support.

***Not all adults with IDD require a guardian.***

# Training Outline

## Guardianship

- When might Guardianship be Needed?
- Petitioning the court
- Individual Rights
- Standards of Practice

## Alternatives to Guardianship

- Power of Attorney
- Medical Proxy
- Advanced Directives
- Conservatorship

## Resources

# Defining Terms



**Guard·i·an** A person who guards, protects, or preserves. A person/entity who is entrusted by law with the care of the person or property, or both, of another, as a minor or someone legally incapable of managing his or her own affairs.

**Ward** A person for whom a guardian has been appointed. Synonyms: conservatee, disabled person, protected person, incapacitated person (*National Guardianship Association - NGA*). (*Individuals will not be referred to as "Ward" throughout the course of this training*)

**Ca·pac·i·ty** Ability to understand the nature and effects of one's acts (*NGA*).

**In·ca·pac·i·tat·ed person** Any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, or other cause to the extent that the person lacks sufficient understanding or capacity to make or communicate responsible decisions (*NGA*).

# When is Guardianship Appropriate?

## At Risk Adult

“An individual 18 years of age or older who is susceptible to mistreatment, self neglect, or exploitation because the individual is unable to perform or obtain services necessary for his/her health, safety, or welfare or lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his/her person or affairs”  
(CRS §26-3.1-101)

*\* Persons are not considered “at-risk” solely because of age and/or disability.*

# When is Guardianship Appropriate?

## Questions to Ask in Considering Decision-Making Support

- \*What kind of decision is being made?
- \*Has the person made a decision like this before?
- \*Has the person been assisted to understand the risks and benefits?
- \*How big is the impact of this decision in the person's life
- \*How long would the person live with the decision?
- \*How hard would it be to undo?
- \*Most important: What is the least restrictive level of support that might work?

# When is Guardianship Appropriate?

## Self-Neglect

“an act or failure to act whereby an at-risk adult substantially endangers his/her health, safety, welfare, or life by not seeking or obtaining services necessary to meet the adult’s essential human needs.” (CRS §26-3.1-101).

*\*Choice of lifestyle or living arrangements shall not, by itself, be evidence of self neglect*



# When is Guardianship Appropriate?

## **Clear & Imminent Danger: Indicators/Level of risk**

- A change or decline in physical status
- Environmental status, including
  - safety issues within the person's residence
  - access to food and drinking water
  - functional heating, plumbing, and electrical systems
- Financial exploitation
- High medical needs or a change/decline in medical needs
- If a person is suspected to lack capacity to make and/or communicate decisions
- MANE (mistreatment, abuse, neglect, exploitation)



Parents, physicians, professionals, or other interested parties involved with the individual's care, collectively determine if the individual is unable to make informed decisions with appropriate support and whether guardianship is needed.

# What is the role of a guardian?

**Principle of Best Interest** - requires the guardian to consider the least intrusive, most normalizing, and least restrictive course of action possible to provide for the needs of the individual

**Principle of Self-determination** - the right to decide for one's self; the ability or right to make one's own decisions without interference from others

**Principle of Diversity & Personal Preference** - the guardian shall advocate for the person's preferences in ethnic, religious, and cultural identification and promote the engagement in such activities. The guardian shall acknowledge and protect the person's right to interpersonal relationships and sexual expression



# What is the role of a guardian?

## **The guardian shall:**

- provide the person with every opportunity to exercise those individual rights that he/she might be capable of exercising as they relate to his/her own care
- attempt to maximize the self-reliance and independence of the person
- understand and advocate for person-centered planning and the least restrictive alternative on behalf of the person
- encourage the person to participate, to the maximum extent of his/her abilities, in all decisions that affect him/her, to act on his/her own behalf in all matters in which he/she is able to do so, and to develop or regain his/her own capacity to the maximum extent

# What is the role of a guardian?

## ***You have authority over:***

- where a person should live
- what care and supports are needed
- medical treatments
- financial decisions

## ***You do not have authority over:***

- if a person is capable of balancing his/her checkbook
- choosing friends
- dating
- having sex
- getting a tattoo

# Petitioning for Guardianship

- Petition cannot be filed until the person is 18 (age of majority)
- Prior to petition, investigate and document why guardianship is needed
  - Evaluation of the person's decision making capacity from a qualified professional indicating the degree of incapacity and level of risk to the person's health, safety, and well being. Request letter from doctor(s) stating why the person is unable to make informed decisions.
  - Consideration of other (least restrictive) methods of intervention (other than guardianship) that will meet the person's needs.

# Filing w/ Probate Court

File the following forms with Probate Court (district is based on county of residence):

- Petition for Appointment of Guardian for Adult
- Acceptance of Office
- Order Appointing Guardian for Adult
- Letters of Guardianship – Adult, Notice to Set Hearing, Criminal Background Check and Credit Report (if applicable)
- Motion to File Without Payment of Filing Fee
- Notice of Hearing to Respondent
- Notice of Hearing to Interested Persons
- Personal Service Affidavit
- Acknowledgement of Responsibilities

Obtain forms at [www.courts.state.co.us](http://www.courts.state.co.us) or purchase a guardianship packet from The Arc.

# Petitioning for Guardianship (cont.)

- A Court Visitor and/or a Guardian ad Litem is assigned to interview all interested parties
- A hearing is held in front of the Magistrate
- An initial Care Plan/Court Report is filed within the first 60 to 90 days (determined by the court)
- Petitions for people with mental health needs are made through the County Attorney's Office (Adult Protection Intake Line, 719-444-5755)

**Questions?**

# The Big Question



Does a person with a I/DD who has been deemed incapacitated by the court still have legal rights, human choice, and free will when a legal guardian has been appointed by the court or when other interested persons serve as an informal “guardian” to protect said person?



## **Rights of the Developmentally Disabled: Colorado Revised Statutes (C.S.R.) 27- 10.5-112**

Unless a person's rights are modified by court order, a person with a developmental disability shall have the same legal rights and responsibilities guaranteed to all other individuals under the federal and state constitutions and laws. No otherwise qualified person, by reason of having a developmental disability, shall be excluded from participation in, denied benefits, or subjected to discrimination under any program or activity which receives public funds.

What are the legal rights of persons with a I/DD?

# The Right To...



- Individualized Plan (CRS 27-10.5-113)
- Medical Care & Treatment (CRS 27-10.5-114)
- Humane Care & Treatment (CRS 27-10.5-115)
- Religious Belief, Practice, & Worship (CRS 27-10.5-116)
- Communication & Visits (CRS 27-10.5-117)
- Fair Employment Practices (CRS 27-10.5-118)
- Vote (CRS 27-10.5-119)
- Records & Confidentiality of information pertaining to eligible persons or their families (CRS 27-10.5-120)
- Personal Property (CRS 27-10.5-121)
- Influence Policy (CRS 27-10.5-122)
- Notification (CRS 27-10.5-123)
- Protection from Discrimination (CRS 27.10.5-124)
- Sterilization Rights (CRS 27-10.5-128 - >132)

# Acknowledging Vulnerabilities of Caring Professionals & Family Members

Let's be honest ...



In our attempt to protect people with IDD, we are vulnerable to err by neglecting or removing a person's ability to self determine and take risk. We informally remove rights of the people with good intention but without due process.

# Safeguarding of Rights

- **Legal Accountability**
  - Guardianship Laws of Accountability
  - Colorado Revised Statutes (CRS)
  - Division of Developmental Disabilities Rules & Regulations (DDD R&R) 16.3
- **Adult Protective Services / Law Enforcement**
- **Interdisciplinary Teams (IDT)**
  - An individual's rights may be suspended by a DD professional only to protect the individual from endangering self, others, or property and in a manner that is least restrictive to the person's rights in accordance with rules & regulations established by the DDD or by court order (DDD R&R 16.312)
  - Individual and guardian shall be notified (DDD R&R 16.312)
  - A proposed Rights Suspension shall be reviewed by the IDT and the HRC and revisited not less than every 6 months to consider the restoration of rights suspended (DDD R&R 16.312)

# Safeguarding of Rights (cont.)

- **Human Rights Committee (HRC)**

- HRC is required by Colorado Revised Statute (CRS 27-10.5-105) and Division for Developmental Disabilities Rules (DDD 16.550).
- A volunteer third-party advisory and review body established with the intent to monitor situations which may infringe upon an individual's legal rights
- Participates in the granting of informed consent, and monitors the suspension of rights, behavioral development programs, use of psychotropic medications, investigations and allegations of MANE

- **Standards of Practice-**

- National Guardianship Association (NGA)



# Legal Accountability

## Guardianship Laws of Accountability

- A Guardian shall file a report with the court, not less often than annually, as required by state statute, regulations, court rule, or particular court pursuant to whose authority the guardian was appointed (NGA)- Colorado Uniform Guardianship and Protective Proceedings 15-14-101 through 433 of CRS.
- A guardian shall not act beyond the powers ordered by the court (AGA).
- A guardian shall make decisions on behalf of the person based on the principle of Informed Consent (a person's agreement to a particular course of action based on a full disclosure of facts needed to make the decision intelligently).

# Alternatives to guardianship

***Guardianship is not always appropriate for the person...so what other options are available?***

- ***Power of Attorney***
- ***Medical Proxy***
- ***Advanced Directives***
- ***Conservatorship***



# Power of Attorney

Legal authorization granting another person (agent) to make decisions on behalf of another individual (principal) regarding property, financial and/or medical matters. The individual must be with capacity to appoint an agent to make decisions on his/her behalf.

## Responsibilities

- Act in the person's best interest
- Act in "good faith" –be honest
- Act only in the scope of authority
- Avoid conflict of interest
- Keep records
- Communicate needs with other agents

## Limitations

- Cannot take away legal rights
- Only act along with person as authorized
- POA can be revoked at anytime



## Power of Attorney (cont.)

By law, an agent's authority ends if the principal revokes that authority or if the principal dies, and/or if the principal loses decision-making capacity and cannot revoke the agent's authority, so as to protect the incapacitated principal who is no longer able to monitor the agent and take action if authority is being abused. C.R.S. 15-14-500 to ?

- **Durable Power of Attorney (DPA)** - a POA that remains valid even if the principal loses the legal capacity to revoke the agent's authority. Useful for a foreseen loss of capacity which may avoid the need for a conservator or guardian.
- **Springing Power of Attorney** - a DPA that does not become effective when the principal signs it (unlike the POA or DPA, which become effective upon signing). Instead, it springs into effect at a later time or when a certain event specified in the DPA occurs.

# How to obtain POA

- Probate Forms

<http://www.courts.state.co.us>

- Completion by an attorney is preferable
- Notary of signatures needed
- “Colorado Statutory Power of Attorney” in Colorado Revised Statutes 15-14-741



# Medical Proxy

A substitute decision maker who is able to give informed consent or refuse medical treatment when the person lacks decisional capacity.

## Responsibilities

- Comply with the person's medical wishes
- Act in best interest
- Authority is similar to guardian

## Limitations

- Ends when person regains capacity as determined by MD
- Cannot be used if other medical directives/POA/guardianship are in place
- Can be suspended



# How to obtain a Medical Proxy

- In Colorado law, family members and close friends can select a substitute decision maker (proxy) if an advance directive or guardianship is not in place, and if a doctor or judge determines the person is unable to make medical decisions.
- Proxy is obtained through process rather than by a written document granting authority.
- Proxy must be agreed upon by consensus of interested persons if the individual is incapacitated. Documentation of process is recommended.
- Court approval is not required unless proxy is disputed by interested parties.

# Advanced Directives

- **Living Will**
- **CPR Directive**
- **Medical Orders for Scope of Treatment (MOST)**
- **Five Wishes**
- **Do Not Resuscitate (DNR)**

# Conservatorship

A person assigned by the court to make decisions regarding the estate of a protected person

## Responsibilities

- Make financial decisions
- Spend and distribute monies for person and dependents
- Determine what is needed for education, care, etc.
- Give gifts to charity as the person would
- To be reasonably compensated for duties
- Choose beneficiaries

## Limitations

- Cannot use funds for own benefit
- Must act under Prudent Man Rule
- Limited by court



# How to Obtain Conservatorship

- File for petition for appointment
- Hearing and appointment of conservator
- Court visitor and GAL
- A physician's letter is needed to establish incapacity
- Judge to determine, and sets limitations noted as needed
- Documents to include Acceptance of Office and submit financial plan and inventory of income and assets need to be submitted to the court
- File annual report with the court

**Questions?**

# Resources

*The information provided in this training is for informational purposes, only, and should not be construed as legal advice. Please consider the following resources specific to your inquiries and needs.*

- National Guardianship Association: <http://www.guardianship.org>
- The Arc of the Pikes Peak Region: [http://www.thearcppr.org/about\\_us/guardianship.html](http://www.thearcppr.org/about_us/guardianship.html)
- Probate Forms: <http://www.courts.state.co.us>
- Colorado Revised Statute: <http://www.sos.state.co.us/pubs/elections/statutes.html>
- Colorado Department of Human Services, Division for Developmental Disabilities: <http://www.colorado.gov/cs/Satellite/CDHS-VetDis/CBON/1251579253372>
- “Uniform Power of Attorney Act” C.R.S. 7.14.15