

Decision-making Options

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PRESENTED BY:

Meredith Greene, Esq.

Special Needs and Elder Law Practice Group

“A commitment that lasts a lifetime.”

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Agenda

- **Overview**
- **Guardianship**
 - Powers and Duties of Guardian
 - Procedure
 - Substituted Judgment
- **Supported Decision Making**

Basic Concepts

- Legal Emancipation
- Presumption of Competence
- Least Restrictive Alternative
- Prioritization of the areas requiring decision-making.

Range of Legal Options

- Guardianship (full or limited)
 - Intellectual Disability
 - Mental Illness
 - Disability
- Conservatorship
- Roger's Guardian
- Trustee
- Durable Power of Attorney
- Health Care Proxy
- Appointment of Advocate
- Representative Payee

Guardianships Should be Narrowly Tailored

- Least restrictive alternative
- Individual functional assessment: **inability to receive and evaluate information or make and communicate decisions essential for physical health, safety and self-care**
- Medical Certificate (30 days) Developmental Delay, Mental Health, Dementia
- Clinical Team Report (180 days) Intellectual Disability
 - Licensed psychologist
 - Licensed social worker
 - Registered physician

Nature of Clinical Evaluation

- Individualized and Comprehensive
- Identify Strengths and Impairments
- Recommendation as to the need for Guardianship or Conservatorship
- Determination of capacity to create legal instruments as alternatives to Guardianship or Conservatorship

Powers of Guardian

- Make personal decisions regarding support, care, education, health and welfare
- Immunity from personal liability for Protected Person's expenses and acts
- All powers and responsibilities of a Guardian of a minor – make typical every day decisions
- Continues until terminated without regard to location of guardian

Duties of Guardian

- Exercise only amount of authority necessary
- Encourage the Protected Person to participate in decisions, act on own behalf, work to regain capacity
- To consider expressed desires and preferences of Protected Person
- Act in Protected Person's best interest when expressed preferences aren't clear

Who May Be Guardian

- Any qualified person over age 18 years
- Court to follow priority list if person is appropriate:
 - Protected Person's nomination in durable power of attorney
 - Spouse of Protected Person or person nominated in spouse's will
 - Parent of Protected Person or person nominated in parent's will

Petition for Guardianship Notice of Guardianship

- Anyone can petition for guardianship
- Persons notified greatly expanded:
 - Parents and siblings
 - Current Guardian and/or Conservator
 - Representative Payee
 - Persons living with Protected Person
 - Any person nominated as Guardian by Protected Person
 - Protected Person's agent under a Power of Attorney
 - Department of Developmental Services (DDS) if ID/ASD

Protections

- Protected Person has rights during proceedings:
 - Right to counsel
 - Right to be present at hearing
 - Right to have the Guardianship limited

Reporting Duties of Guardian

- Notify court when Protected Person's condition has changed
- Report to the court
 - 60 days from appointment
 - Annually

Reporting Requirement

60 Days After Appointment and Annually

- Mental, physical and social condition
- Living arrangements
- Services
- Visits/contact by the Guardian
- Whether institutionalization should continue
- Plans for future care
- Recommendations on need for Guardianship

Limitation of the Guardian

- A Guardian **cannot**:
 - Admit or commit to a mental health facility
 - Admit to nursing facility
 - Consent to extraordinary treatment decisions requiring a substituted judgment determination

Procedures Requiring Substituted Judgment Determination

- Administration of antipsychotic medication (Rogers Orders)
- Provision/withdrawal of life-prolonging treatment
- Psychosurgery
- Electroshock therapy
- Sterilization
- Abortion
- Level III behavior modification plans

Questions about whether a specific procedure requires a substituted judgment determination should be directed to the court, attorney, or state agency

Factors of Substituted Judgment

- Protected Person's expressed preference
- Protected Person's religious beliefs
- Probability of and extent of side effects
- Prognosis with proposed action
- Prognosis without proposed action
- Impact on Protected Person's family

Statutory Alternatives to Guardianship in Massachusetts

- Durable Power of Attorney
- Health Care Proxy
- Advocate Appointment
- HIPAA Release

Durable Power of Attorney and Appointment of Advocate

- Principal authorizes Agent or Advocate to perform acts on behalf of the Principal
- “Durable” means that the power remains valid despite the subsequent incapacity of the Principal
- Can take effect immediately or upon occurrence of a specific event

Authority of Agent/Advocate

- Deal with assets of the principal, e.g. buy, sell, borrow, gift, create trusts, etc.
- Personal decision-making, e.g. maintain standard of living, advocate, hire others to help, make funeral plans
- Advocacy in special education, D.D.S., D.M.H., health care and/or provider agency settings

Health Care Proxy

- Principal designates a Health Care Agent
- Authority of Health Care Agent takes effect by written determination by physician that principal has lack of capacity to make or communicate health care decisions
- If incapacity due to mental health or developmental disability, physician must have or consult with a health care professional who has specialized training or experience in diagnosing or treating mental illness or developmental disabilities

Health Care Agent Authority

- Provide consent or refusal for health care treatment
- Access to medical records
- Employ and discharge health care providers
- Provide consent for admission, transfer and discharge to hospitals
- Authorize relief from pain

GUARDIANSHIP QUESTIONS?

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Thank you



Meredith Greene, Esq.

(508) 532-3515

mgreene@fletchertilton.com

Fletcher Tilton^{PC}
Attorneys at law

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