



Adult Guardianship in Colorado

Christi Romero-Roseth

Director of Community Relations

Colorado Fund for People with Disabilities

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Today's Presentation

CFPD Services

Exploring Less-Restrictive Measures

Medical Proxy Decision Making, Power of Attorney,
Medical Durable Power of Attorney

Adults who need Guardians

What type of person is likely to need a guardian?
How can we tell when an individual needs help?

Defining Guardianship

Just what is guardianship? What are the legal responsibilities of a guardian?

Real-Life Scenarios

Cases posed hypothetically to discuss and process solutions

Questions and Answers

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Colorado Fund for People with Disabilities

The Colorado Fund for People with Disabilities (CFPD) was established by a volunteer Board of Directors in 1994 to develop a **supplemental needs trust or SNT**. The purpose of the trust is to protect a person's Supplemental Security Income (SSI) and Medicaid from being impacted should they receive funds that would make them ineligible for these or other public benefits.

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Our Services

- Pooled Supplemental Needs Trust (SNT)
- Private Trust Group
- Private Case Management
- Conservatorships
- Trust Advisory Services
- Representative Payee
- Mission Supports

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Colorado Fund for People with Disabilities

The special needs of the person with a disability must be planned for with extra care...

- Guardian and/or Conservator (may be appropriate)
- Financial Plan (saving for the future; preserving benefits)
- Estate Plan (what happens when I die?)
- Residential (home ownership, renting, group home living)
- Vocational (full employment, self-employment)
- Family/Social (letter of intent, life insurance)
- Trust (pooled or individual SNT)

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Who needs an SNT?

- People with disabilities who are preparing to go on benefits (SSI/Medicaid)
- People on benefits who need to leave funds to a disabled child
- People unable to personally handle any sums of money or may be vulnerable to exploitation
- People who may receive benefits in the future

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Who needs an SNT?

People on benefits who receive funds exceeding \$2,000

- Inheritance
- Back-payment of Social Security
- Personal Injury Settlement
- Car Accident
- Gift from Family/friends
- Worker's Compensation
- Medical Malpractice
- Liquidation of Personal Assets
 - Sale of Home
 - Excess resource each month

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Guardianship as Last Resort

*Guardianship is the most restrictive challenge
to the rights of an adult.*

**We are obliged by law to explore all less restrictive measures
before petitioning for guardianship.**

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Less Restrictive Measures

Medical Proxy — A process in which an individual designates another person to make health care decisions if he or she is rendered incapable of making their wishes known. The health care proxy has, in essence, the same rights to request or refuse treatment that the individual would have if capable of making and communicating decisions.

Power of Attorney — A document in which a person (the Principal) grants another person (an Agent or Attorney-in-Fact) the legal authority or permission to make and execute decisions, as if it were the principal making those decisions. It is up to the principal to decide how extensive or limited those powers should be.

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Medical Proxy

- A relationship to the patient as an "interested person" is all that's required for one to be considered a candidate for proxy. The key is to have that person be the one who best knows the wishes of the incapacitated patient, and to have consensus among all interested persons (the doctor, perhaps a spouse, adult children or parents of the patient) about WHO should be proxy. As long as none of those other IPs object to the person chosen as proxy, you may accept that responsibility.
- There is no legal requirement that a family member act as the patient's proxy, and no legal hierarchy of relatives that says as daughter, for example, one is more liable than an aunt or uncle. The law suggests that the Medical Proxy be the person who best knows the patient's wishes.
- Consensus is not required for the medical decision; it's required to choose the proxy. Consensus may be defined as a simple majority – does not have to be unanimous
- A Medical Proxy has NO financial obligation - if one makes a medical decision on a patient's behalf as proxy, one would be committing only the patient's assets to his care, not one's own.

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Medical Proxy

- Liability to perform due diligence (locate all possible interested parties; search for any advance directives, powers of attorney, etc.) rests with the practitioner. As long as they have performed this “reasonable search,” they may have confidence in the consensus-approved proxy has decision-making authority.
- If a doctor determines the need for a proxy decision-maker (due to his/her evaluation of the patient’s capacity), the patient **MUST** be informed of the decision and of the candidate for proxy.
- The patient has a right to object to the person chosen as proxy, or to that person’s decisions
- For withdrawal of artificial nourishment/hydration, at least two physicians must agree that it would only prolong dying; one of those physicians must be in neurology or neurosurgery
- Proxy decision-makers are relieved of responsibility if the patient regains capacity to make decisions.

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Medical Durable Power of Attorney

A person of sound capacity can grant another person power as an Agent to make medical decisions on their behalf, and with their consent

This Agent is a stand-in for the patient in medical decision-making, including the right to review the patient's medical records

Express wishes may be written into an MDPOA; we encourage this just in case the Agent must make a decision without any input from the patient

MDPOA's can take effect immediately, or only in the instance of the patient's inability to make decisions (springing)

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Medical Durable Power of Attorney

Anyone over 21 of sound mind can be an Agent, even if they live some distance from the patient.

The MDPOA is only effective when everyone who needs to know it exists does:

Individual, Agent, Primary Care Physician, other regularly-seen practitioners, the local ER, residential providers, other family members, etc.

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Advanced Directives

When a person completes an advance directive (CPR directive, DNR, COR-status, MOST Form) PRIOR to his/her incapacity, that directive STANDS through a guardianship or conservatorship

Durable Powers of Attorney, too, survive incapacity, even if guardianship is awarded

(...unless good reason to revoke)

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Advanced Directives

If you are 18 years or older and don't have Advance Directives and/or a Medical Durable Power of Attorney in place RIGHT NOW, you are at risk of someone else making these decisions for you.

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When is it time to talk guardianship?

POA vs. Guardianship

The issue is CAPACITY.

If I have capacity, I can name an agent.

If I don't meet a legal standard of capacity,
I am unable to have an Agent.

C.R.S. 15-14-102 (5) "Incapacitated person" means an individual other than a minor, who is unable to effectively receive or evaluate information or both or make or communicate decisions to such an extent that the individual lacks the ability to satisfy essential requirements for physical health, safety, or self-care, even with appropriate and reasonably available technological assistance.

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How can we tell who needs a guardian?

- Your experience with the person needing protection
- Exploration of real decision-making abilities (e.g., taking the bus, planning with service providers)
- Support from the person's primary physician (or sometimes neurologist, psychologist, psychiatrist)
- Ability of yourself (or other individual(s)) who can effectively become guardians

- Capacity evaluation by an informed evaluator -

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Capacity isn't all or none

You must also consider whether or not limited guardianship may be more appropriate, where guardians are only responsible for specific matters which with the ward may need assistance.

Consider ability for Situational Capacity

Some Barriers To Successfully Determining Capacity:

- Measured IQ
- Capacity for language
- Physical challenges
- Sensory impairments
- Family's wish to control environment

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Limited or Situational Capacity

A person with a developmental disability may learn at a slower rate, and may be able to make good decisions given more time to process the information

The person who learns more slowly or communicates differently may need more time to make a decision about a non-emergency medical situation.

A person with cognitive impairment may have “good days” or think more clearly during a certain part of the day.

That same person may require assistance to make an informed decision in an emergency.

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How is capacity determined?

Before considering guardianship for an adult, there must be an assessment of the person's functional capacity.

This may include a recent psychological or psychiatric evaluation and a medical examination which, together, clearly describe the history, nature and degree of the disability.

<http://www.apa.org/pi/aging/programs/assessment/index.aspx>

ABA/APA Assessment of Capacity in Older Adults

For Psychologists



[Assessment of Older Adults with Diminished Capacity: A Handbook for Psychologists](#) (PDF, 1.3MB)

This publication is designed to give psychologists and other health care providers important information to help guide their work with older adults.

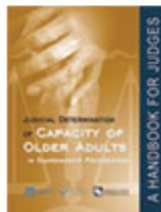
For Lawyers



[Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers](#) (PDF, 434KB)

This handbook offers a conceptual framework and practice tips for addressing problems of client capacity, in some cases with help from a clinician.

For Judges



[Judicial Determination of Capacity of Older Adults: A Handbook for Judges](#) (PDF, 889KB)

This handbook overviews capacity determination, examines the role of judges, provides judges with a summary of the kinds of functioning assessed, and suggests a five-step model for assessment.

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What if we don't agree?

- It's not uncommon for persons within a family to disagree about next steps, especially for the person in need of protection
- Before taking a contested case to court (with multiple attorneys and professionals), consider mediation.
- Co-guardianship can sometimes balance family member concerns; it can also create hassles

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What if there's no one to serve as Guardian?

- If there are no friends or family members who are willing to be guardians, APS would be your first resource.
- SOME Colorado counties can take on guardianships.
- If County Adult Protective Services is unable to help, a Volunteer Guardian through Guardianship Alliance of Colorado may be the last resort.
- There is ALWAYS a waiting list for Volunteer Guardians.

*(Psst! - Keep an eye on Colorado Courts –
new initiative for Office of Public Guardian!)*

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APS Involvement

- Clear cases of neglect or abuse must be investigated
- Determining factor is often whether there's a roof
- Some counties dedicate a great deal of resource to handling issues of guardianship
- Other counties dedicate none at all; entirely at the discretion of the county policy
- Some will respond to medical emergencies only; others only when there is no medical emergency
- Counties can help a family petition for guardianship or conservatorship, and can additionally help assure the person is engaged in benefit services

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Responding to APS Intervention

- Many people feel a stigma about any intervention from outside the family
- People frightened of losing their home life or quality of life might mitigate circumstances
- Adults dependent on other adults may accept abusive/overly controlling treatment in order to maintain style of living
- Some are more worried about family unity than their own safety
- Virtually all people worry about retaining independence

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When Guardianship Is Deemed Appropriate

- The person in need of protection should be notified of this process as soon as possible, and given opportunity to nominate someone
- The person who would be under the protection of a guardianship has a right to object; they will be appointed counsel
- Any “Interested Person” as defined by statute may also object and appear at hearing
- A court visitor will interview the person; the person will also be required to come to court
- Legal expenses incurred “in the best interest” of persons needing guardianship may ALL be charged to the estate of the protected person

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One way in, one way out

- Unless otherwise written, a guardianship is assumed to be for the life of the protected person
- If anyone, including the Ward, wishes to change or modify the guardianship, they must return to the same Probate Court or Probate Division in District Court where the original ruling was made *and provide new evidence*
- By statute, if any ward gains or regains capacity, the guardian has an obligation to report this to the court

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Defining Guardianship

Except as otherwise limited by the court, a Guardian shall:

- Make decisions about a Ward's support, care, education and welfare
- Exercise authority *only as necessary* based on a Ward's limitations
- Become or remain personally acquainted with the Ward
- Maintain sufficient contact with the ward to know his or her capacities, limitations, needs, opportunities and physical and mental health
- Expend the Ward's money for his or her current needs
- Conserve excess money for the Ward's future needs
- Immediately notify the court if the Ward's needs change
- Inform the court of a change in dwelling or address

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Defining Guardianship

- **To the extent possible, a Guardian will encourage his or her Ward**
 - To participate in making decisions
 - To act on his or her own behalf
 - To develop or regain capacity to manage his or her own personal affairs
- **In making decisions, a Guardian shall**
 - Consider the desires and personal values of the Ward, if known
 - Act in the Ward's best interest and exercise reasonable care, diligence and prudence

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General Responsibilities of a Guardian

- Apply for and receive money payable to the ward, guardian or custodian for support of the Ward
- Establish the place of residency for the Ward
- If no conservator, take action to compel a person to support the ward or pay money for the benefit of the Ward
- Delegate to Ward certain responsibilities affecting the Ward's well-being
- (With court authorization) Consent to adoption or marriage of Ward
- Arrange for divorce or legal separation, if it is in the Ward's best interests based on circumstances AND Ward has consented

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Immunities of a Guardian

Guardians will NOT:

- Be required to use personal funds for the Ward's expense
- Be liable for acts of the Ward
- Be liable for an injury to a ward resulting from wrongful conduct of a care provider chosen by the Guardian

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Limitations of a Guardian's Authority

- **Guardians may NOT consent to involuntary treatment or institutionalization for**
 - Mental Illness
 - Alcoholism
 - Drug Abuse
 - Developmental Disabilities
- **Guardians must always proceed under appropriate statutes**
- **They may not revoke a Medical Durable Power of Attorney made by the Ward, unless as ordered by the court**
- **They must abide by any limitations listed in the court's order**

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Conservatorship

Conservatorship (in addition to guardianship) is necessary for incapacitated individuals with roughly \$10k in cash and/or a home, investments other non-liquid assets.

Conservatorship ALONE can be court ordered; the court asserts that the person is unable to handle finances in a way that safeguards their welfare.

**CONSERVATORSHIP ALONE
DOES NOT EQUAL INCAPACITY**

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Guardianships Gone Bad

- Guardianship is NOT parenting, and it may or may not include care giving
- Issues of control, unresolved feelings, grudges may affect how a family guardian may behave
- On the “front lines” care givers may find themselves between the wishes and welfare of their patients and the guardian’s instructions
- Unless a party is ready to pursue it in court, we’re left with basic conflict-resolution skills to assist with problems.
- A residential provider IS considered an Interested Person by statute

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Finding Help and Information

Guardianship Alliance of Colorado

www.guardianshipallianceofcolorado.org

Senior Law Handbook

<http://www.cobar.org/index.cfm/ID/726/DPWFP/Senior-Law-Handbook/>

Total Community Options Foundation

<http://www.tcofdn.org/>

DRCOG Area Agency on Aging

<http://www.drcog.org/index.cfm?page=agingservices>

Colorado Bar Association, Elder Law Section

<http://www.cobar.org/index.cfm/ID/20104/CLPE/Elder/>

Disability Law Colorado

<https://disabilitylawco.org/>

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Your Scenarios

Remember to stay HIPAA-safe

Pose hypothetical questions

**We may have to take more
complex conversations off-line**

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Questions?

Christi Romero-Roseth

Director of Community Relations

Colorado Fund for People with Disabilities

cromero-roseth@cfpdtrust.org

(303) 476-6322

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