

# Healthcare Decision Making and Guardians: The Physician's Role

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**CLINE WILLIAMS**





# Presentation Overview

- Introduction
- Guardianships and the Physician's Role
- How physicians can help
  - In the process
  - In preventing guardianships – Advance Care Planning
- FAQs and Your Questions

# Introduction





# Duties of the Nebraska Office of Public Guardian

- ✓ Guardians/conservators of last resort
- ✓ Safeguard individual rights by supporting least restrictive manner
- ✓ Model the highest standard of practice for guardians/conservators
- ✓ Develop a uniform reporting and data collection

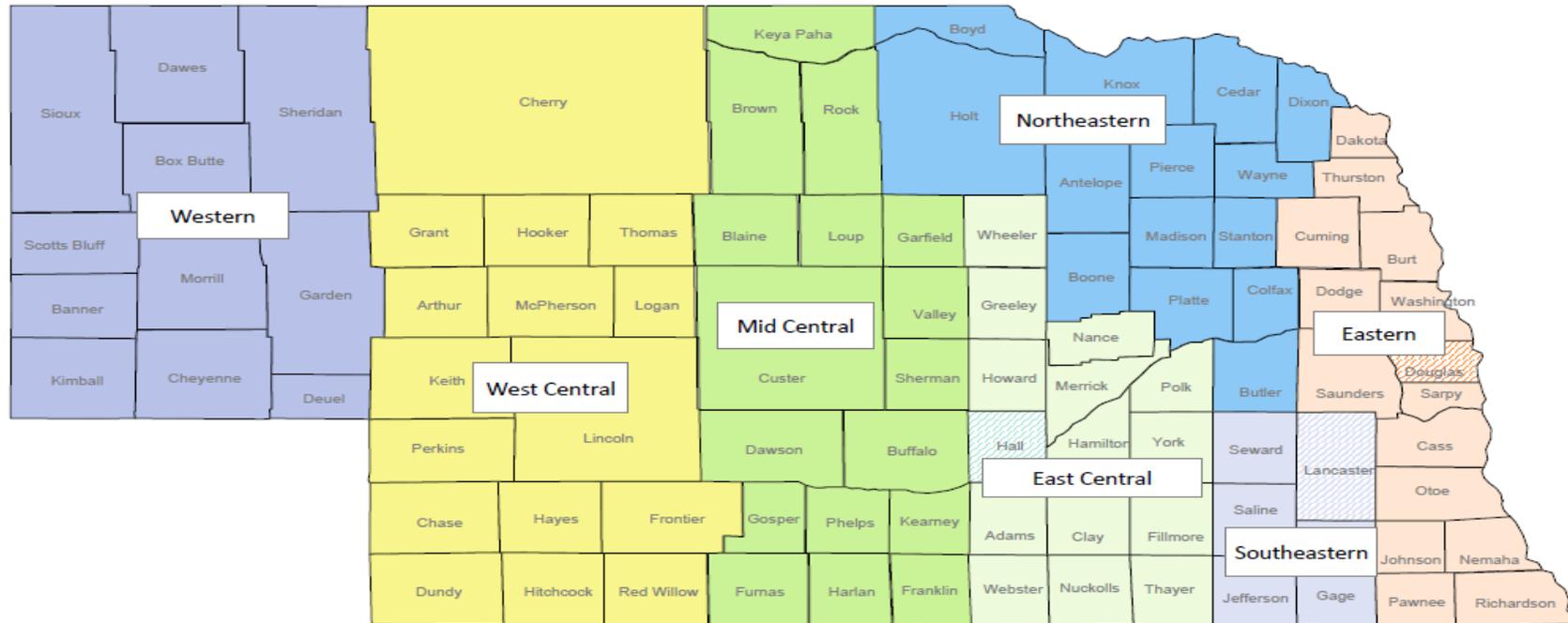


# Duties of the Nebraska Office of Public Guardian

- ✓ A public resource
- ✓ Maintain training programs statewide
- ✓ Recruit members of public and family to serve
- ✓ Locate successor guardians/conservators

Office of Public Guardian  
Administrative Office of the Courts  
1445 K Street/P.O. Box 98910  
Lincoln, NE 68509  
(402) 471-2862

## Office of Public Guardian Service Areas



The counties of Hall, Lancaster and Douglas are shared between multiple Associate Public Guardians as a part of their Service Areas.

Updated 11/22/2016



# For more information

<https://supremecourt.nebraska.gov/programs-services/office-public-guardian>

# What is a guardian?

- A court-appointed helper of another individual
  - Minor
  - Adult





# Guardian Responsibilities (Neb.Rev.Stat. §30-2620)

- Selecting residence
- Arranging for medical care
- Protecting personal effects
- Giving necessary consents, approvals, or releases
- Arranging for training, education, or other appropriate services

# Guardian Responsibilities, continued

- Applying for private or governmental benefits
- Ensuring that persons required to help support the Ward do so
- Entering into contracts if no conservator
- Receiving money and any other items of value and applying funds to housing, medical care, personal effects, training, education, and other services
- Any other responsibility ordered by the court

# Why talk about Guardianships?



# FUTURE DEMOGRAPHICS

- Growing number of vulnerable adults
- Fewer persons to care for them
- The need to help people plan ahead is imperative



# The Senior “Tsunami”

- Americans aged 65+ will double
  - 46 million to 98 million by 2060
- Boomers: 78% increase in age 65+ nursing home care need
  - 1.3 million in 2010 to 2.3 million in 2013.
- Alzheimer elder care needs will triple
  - 5 million in 2013 to 14 million by 2050



# Nebraska's Senior Tsunami

- Nebraskans 65+ projected to increase from 15 % in 2010 to 24% of population by 2030
- Seniors proportionately experience more disability than younger population
  - 35% compared to almost 11% of the younger population



# Aging Alone

- More older women living alone (2014):
  - 27% of women age 65-74;
  - 42% of aged 75-84 and 56% of those age 85+



# Nebraska's Oldest-Old – Age 85+

- In 2009, estimated 39,544 residents - 2.2% of state population were 85 or older
  - 8th highest in the nation
- Compare nationally, only 1.8% of the national population in 2009



# We are

- Living much longer
- Living lonelier
- More likely to experience disability
- More likely to vulnerable as we age



# What Does This Mean to Physicians?

- Sicker patients with multiple chronic conditions
- Difficult communications – hearing, speaking, understanding
- Memory/Dementia
- Mental Health
- Mobility issues
- Technological barriers
- Social issues

# Practical Effect on Physicians

- Appointments made – but not kept – “no shows”
- Did the patient understand my advice?
- I've prescribed medication. Will the patient take it as prescribed?
- What support does the patient have at home?



# How Can Nebraska Physicians Help?

- Understand physician's role
  - In the guardianship process
  - In working with a guardian
  - Helping patients plan ahead

# Legal Background



# Basic Principles

- Human dignity –
  - Life, Liberty, the Pursuit of happiness
- Minors
  - Parents/Guardians
- Adult patients

IN CONGRESS, JULY 4, 1776.  
A DECLARATION  
BY THE REPRESENTATIVES OF THE  
UNITED STATES OF AMERICA,  
IN GENERAL CONGRESS ASSEMBLED.

WHEN in the Course of human Events, it becomes necessary for one People "to dissolve the Political Bands which have connected them with another," and to assume among the Powers of the Earth, the separate and equal Station "to which the Laws of Nature and of Nature's God entitle them," a decent Respect to the Opinions of Mankind requires "that they should declare the causes which impel them to the Separation.

We hold these Truths to be self-evident, "that all Men are created equal," "that they are endowed by their Creator with certain unalienable Rights," that among these are Life, Liberty, and the Pursuit of Happiness—That to secure these Rights, Governments are instituted among Men, "deriving their just Powers from the Consent of the Governed," that whenever any Form of Government becomes destructive of these Ends, "it is the Right of the People to alter or to abolish it, and to institute a new Government, laying its Foundation on such Principles, and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness." Prudence, indeed, will dictate that Governments long established should not be changed for light and transient Causes; and accordingly all Experience hath shewn, that Mankind are more disposed to suffer, while Evils are sufferable, than to right themselves by abolishing the Forms to which they are accustomed. But when a long Train of Abuses and Usurpations, pursuing their ordinary Course, evinces a Design to reduce them under absolute Despotism, it is their Right, it is their Duty, to throw off such Government, and to institute new Guards of their Liberties and Phisical Security.



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# The Continuum of Decision Making Authority: Infancy Through Adulthood



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# Fundamental Rights

## ➤ Examples:

- Religion
- Speech
- Press
- Association
- Due process



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# Self-determination & Informed Consent

- ▶ Consent based on information which
  - ▶ Ordinarily provided to the patient
  - ▶ Under like circumstances by health care providers
    - ▶ in a similar practice
    - ▶ in the locality or in similar localities

# Failure of Informed Consent

- Not obtaining consent
- Where a reasonably prudent health care provider in the community or similar communities would have done so





# Informed Consent

- What's my situation now?
- What care do I need?
  - What's the proposed plan of care?
- How will it help me? (the benefits)
- What are the risks --
  - If I do accept the plan?
  - If I don't accept the plan?
- What can I expect?

# Informed Consent and Capacity

- ▶ Infants
- ▶ Children
- ▶ Unmarried,
- ▶ Unemancipated
- ▶ Under 19





# Key Principle at Work

- Adults are *presumed* under the law to be capable of making their own decisions
  - Healthcare
  - Financial
  - Other



# Legal aspects of Adulthood

- Accountable
  - Enter into contracts
  - Criminal liability
- Responsible
  - Financially self-supporting
- Autonomous
  - Personal decision making



# So, what does this have to do with Guardianships?

- Adults are legally presumed to have capacity to make their own decisions
- Unless legally determined otherwise



# Self-Determination: Capacity vs. No Capacity

- To understand potential consequences
- To express preferences
- To see dangers
- A person can
  - Express his or her preferences but can't "connect the dots."
  - Be very verbal and charming but not able to understand dangers.

# Medical Condition vs. Function

- ▶ How well a person functions is the key to determining whether a guardianship is needed
- ▶ Too often, the rationale stated in the petition is simply a **medical condition**, rather than the functional limitations caused by the condition.

# Medical Condition vs. Function

## ► Guardianship

- not necessarily needed because of an intellectual disability (**a condition**)
- may be needed if person cannot make decisions about self-care or property (**limited function**).
- **The key is how well a person functions.**



- 
- ➔ **Physicians are key** to helping the courts **evaluate individual capacity**



# Guardianship and Functional Evaluation

- Clinical evaluations are increasingly
  - **Complex**; and
  - **Crucial to preserve autonomy** and rights of vulnerable adults



# Clinical examinations are important evidence for judicial determinations of legal capacity

- ✓ **Should not be based on** individual's **diagnostic label**, but individual's strengths
- ✓ Specific to decision making and protection needs.

# Clinical Assessments in Guardianships

## Worst

- Sketchy
- Incomplete
- Conclusory
- Limited functional data

## Much Better

- Diagnosis + effect on function
- Prognosis - Temporary or permanent
- Effect of medications
- Effect of other conditions
- Psycho/Social Factors

# Compare and Contrast

- Average length of written clinical reports for guardianship of older adults
  - Between 83 words in MA (2/3 illegible)
  - 781 words in CO (1-3 pages)
  - 24 pages for the average length of child custody evaluations

# The Result

- Many Guardianship Orders are for full guardianships due to incomplete information
- Neb.Rev.Stat. §30-2601.02 – State law encourages “the **least restrictive alternative** possible on the impaired person's exercise of personal and civil rights consistent with . . . need for services . . . .”
- **Limited guardianships** should be used if appropriate

# Guardianship: Full or Limited

- ▶ Limited Guardianship ideally the norm
- ▶ To match functional strengths of the individual:
  - ▶ Preserving autonomy where capacities retained;
  - ▶ Delegate to limited guardian where capacity lost.



# Evaluating Capacity: A Conceptual Model

- **Six key domains** of capacity assessment consistent in legal and clinical sources
  - Medical condition and functional disability
  - Cognition
  - Everyday function
  - Values and preferences
  - Level of risk and supervision needed, and
  - Means to enhance capacity



# Medical Condition and Functional Disability

- Key element in capacity determination:
  - Documentation of relevant medical diagnoses; **AND**
  - Prognosis.



# Considerations

- Have temporary causes of mental impairment been ruled out?
- Describe key causes explaining any functional disability
  - Dementia “causing” medication management problem
  - Medications “causing” functional issues
  - Other factors
    - Stress from a recent move
    - Death of spouse



# **Cognition: Cognitive Functioning**

# Cognitive Assessment Components

- Sensory acuity
- Motor skills
- Attention
- Working memory
- Short-term memory
- Long-term memory
- Understanding
- Communication
- Arithmetic
- Verbal reasoning
- Visual-spatial reasoning
- Executive function

# Cognitive Assessment Components

- ▶ **Psychiatric and emotional disturbance not necessarily a cause of capacity impairment, but critical to know about:**
  - ▶ Disorganized thinking
  - ▶ Hallucinations
  - ▶ Delusions
  - ▶ Anxiety
  - ▶ Mania
  - ▶ Depressed mood
  - ▶ Lack of insight
  - ▶ Impulsivity
  - ▶ Noncompliance

# Everyday Functioning

- Activities of daily living, or ADLs:
  - Self care
  - Grooming
  - Toileting
  - Eating
  - Transferring, and
  - Dressing



# Everyday Functioning

- Instrumental activities of daily living, or IADLs:
- Abilities to manage
  - Finances
  - Health
  - Civil or legal issues, and
  - Functioning in the home and community



# Individual Values, Preferences, and Patterns

# Individual Values, Preferences, and Patterns

- ▶ 1982 President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research:
  - ▶ Capacity includes “the possession of a set of values and goals,” which is foundational to comparing alternatives in decision making.



# Risk of Harm and Level of Supervision Needed

- ➔ The least restrictive alternative for addressing the proven substantial risk of harm to the individual



# Least Restrictive Alternative (LRA)

- LRA includes considering alternative interventions for problems identified in the guardianship petition:
  - Clinical interventions -- elder services, technological assistance, or case management.
  - Legal mechanisms -- durable powers of attorney or health care, the condition and its effects.

# Nebraska Law: Guardianship Should be the Least Restrictive Alternative

## ► Neb.Rev.Stat. §30-2620(a)

- The court may appoint a guardian if it is satisfied by clear and convincing evidence that the person for whom a guardian is sought is incapacitated and that the appointment is necessary or desirable as the **least restrictive alternative available** for providing continuing care or supervision of the person of the person alleged to be incapacitated.
- If the court finds that a guardianship should be created, **the guardianship shall be a limited guardianship unless the court finds by clear and convincing evidence that a full guardianship is necessary.**



# Risk; Level of Supervision Needed; LRA

- Risk analysis also considers environmental supports and demands of the individual
  - Strong social and environmental supports may decrease a person's risk
  - Lack of supports may increase risk
  - For example, it may make a real difference whether the person has a caring family, is in a supervised setting, or is surrounded by a familiar community network.

# Means to Enhance Capacity

- ▶ Are there ways to make capacity better to eliminate the need for or limit the scope of the guardianship?
- ▶ What practical accommodations could help?
  - ▶ Vision aids
  - ▶ Medication reminders
  - ▶ Medical, psychosocial, or educational interventions (such as physical or occupational therapy, counseling, medications, or training).



## Means to Enhance Capacity

- Clinical recommendations for intervention may affect the guardianship process if improvement is possible with treatment
- Clinical recommendations may guide the judge in deciding when to hear the case again

# Can Capacity Improve?

- ▶ Postoperative delirium but decisions must be made about care - judge may want to review the need for the guardianship after the delirium clears.
- ▶ If a guardianship is sought involving treatment for an acute psychotic disorder, a judge may want to review the need for guardianship after treatment.

# What Can Physicians do to Help Improve the Process?

- Use the framework
- Use available model clinical evaluation forms



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# Model Clinical Evaluation Report Form

- **available online**

[https://www.americanbar.org/groups/law\\_aging/resources/capacity\\_assessment.html](https://www.americanbar.org/groups/law_aging/resources/capacity_assessment.html);

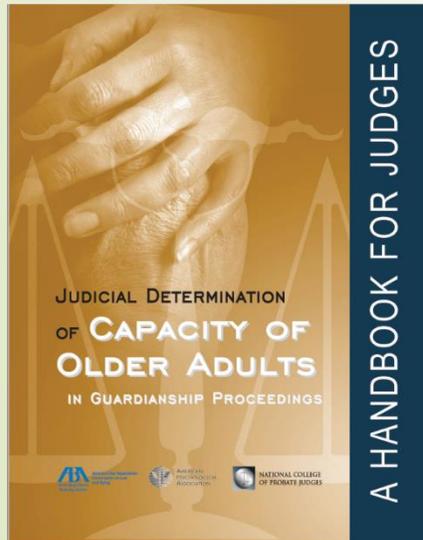
- Form:

<http://ddsd.vermont.gov/sites/ddsd/files/documents/Model-Guardianship-Eval-Form.pdf>

- <http://www.apa.org/pi/aging>

# Model Clinical Evaluation Report

➔ <http://ddsd.vermont.gov/sites/ddsd/files/documents/Model-Guardianship-Eval-Form.pdf>



Adapted from *Judicial Determination of Capacity of Older Adults in Guardianship Proceedings* developed by the American Bar Association (ABA)/American Psychological Association (APA) Assessment of Capacity in Older Adults Work Project Working Group, copyright 2006, ABA and APA.

## Model Clinical Evaluation Report

State of	In the	Court of Justice
County of		Division
In the Matter of:	File No.	
Definition of Incapacity in the State of:		

### 1. PHYSICAL AND MENTAL CONDITIONS

#### A. List Physical Diagnoses:

Overall Physical Health:  Excellent  Good  Fair  Poor  
 Individual's Rating of Health  Excellent  Good  Fair  Poor  
 Physical Health will likely  Improve  Be stable  Decline  Uncertain

#### B. List Mental (DSM) Diagnoses:

Overall Mental Health:  Excellent  Good  Fair  Poor  
 Individual's Rating of Health  Excellent  Good  Fair  Poor  
 Overall Mental Health will likely  Improve  Be stable  Decline  Uncertain

**If improvement is possible, and improvement will likely improve functioning, recommend**

[https://www.americanbar.org/groups/law\\_aging/resources/capacity\\_assessment.html](https://www.americanbar.org/groups/law_aging/resources/capacity_assessment.html)

# What else can physicians do to help?

- Know what advance planning tools a patient has
- Understand a guardianship's scope
- Communicate with guardian



# Guardians and “Informed Medical Consent” for Ward

In evaluating each requested decision, the guardian must

- ▶ Have a clear understanding
  - ▶ of the issue for which informed consent sought
  - ▶ of the options, expected outcomes, risks, and benefits of each alternative,
- ▶ Determine the conditions that require treatment or action,
- ▶ Encourage and support the Ward in understanding the facts and directing a decision
- ▶ Maximize the Ward’s participation in making the decision



## Also, determine

- Whether Ward has previously stated preferences about decision
- Why decision needs to be made now vs. later
- What will happen if decision is made to take no action
- What the least restrictive alternative is for the situation



# And, obtain

- ▶ A second medical or professional opinion, if necessary
- ▶ Information or input from family or from other professionals, and
- ▶ Written documentation of all reports relevant to each decision.

# What Else Can Physicians Do to Help?

# Assist with Advance Care Planning

## ADVANCE CARE PLANNING



**Target Audience:** Medicare Fee-For-Service Providers

The Hyperlink Table, at the end of this document, provides the complete URL for each hyperlink.

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AgingHome

dhhs.ne.gov/medicaid/Aging/Pages/AgingHome.aspx

Official Nebraska Government Website

NEBRASKA DEPARTMENT OF HEALTH & HUMAN SERVICES

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Useful Links

Helpful Videos & Documents

Grantee Resources

Aging & Disability Resource Center

Alzheimer's & Dementia

**State Unit on Aging - Homepage**  
"To promote the Dignity, Independence, and Freedom of Choice for Older Nebraskans"

🔔 **Subscribe to this site**

- [Aging and Disability Resource Center Website](#)  
(Network of Care site)
  - For more information, see the [ADRC Program Page](#)
- [Automated Online Power of Attorney and Living Will Forms Added - LegalAid of Nebraska News Release](#)
- [Aging and Disability Business Institute](#)
- [TIM TALKS: Business Acumen Webinar Series](#)

The Aging Network in Nebraska is made up of individuals and organizations in the public and private sectors. Funded by the Older Americans Act, the Nebraska Community

The Aging Network in Nebraska is made up of individuals and organizations in the public and private sectors. Funded by the Older Americans Act, the Nebraska Community Aging Services Act and the Nebraska Department of Health & Human Services, the State Unit on Aging has broad responsibilities for addressing the concerns of older Nebraskans.

Protecting Senior and Vulnerable Nebraskans from Fraud, Abuse and Exploitation

Protecting Senior and Vulnerable Nebraskans from Fraud, Abuse and Exploitation

The State Unit on Aging grants state and federal funds to the eight Area Agencies on Aging in Nebraska to support local programs and services. With the assistance of local individuals and advisory groups, each Area Agency on Aging determines needs and develops a plan to provide an appropriate array of services for its aging population.

In addition to its planning responsibilities, each Area Agency on Aging is a key source for information on available local resources and services. The Area Agencies have banded together as the Nebraska Association of Area Agencies

<http://dhhs.ne.gov/medicaid/Aging/Pages/AgingHome.aspx>

# Resources

<http://dhhs.ne.gov/medicaid/Aging/Pages/HelpfulDocsVids.aspx>

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### State Unit on Aging

"To promote the Dignity, Independence, and  
Freedom of Choice for Older Nebraskans"

#### Helpful Videos & Documents

This page provides helpful documents and videos for Older Nebraskans. If you have any questions, contact your closest Area Agency on Aging (AAA). If you are unsure of your AAA, the first file below provides Nebraska's service area layout.

#### Useful Documents

-  [Area Agency on Aging \(AAA\) Service Area Map](#)
-  [Ombudsman Service Area Map](#)
-  [Ombudsman Program Acronym Resource Sheet](#)
-  [Know the Facts - Assisted Living Facilities](#)
-  [Benefits and Resource Guide for Older Nebraskans](#)
-  [Nebraska Senior Centers \(FY19\)](#)
-  [Nebraska Senior Centers \(FY19\)](#)
-  [Nebraska Legal Services Capacity Assessment](#)
-  [Adyngatė Dėrsiavė Mėklėg \(English\)](#)
-  [La Toma de Decisiones Substitutas \(Español\)](#)
-  [Senior Exploitation by Strangers Placemat](#)
-  [Senior Exploitation by Family Placemat](#)
-  [Senior Exploitation by Strangers and Family Placemat](#)
-  [Family Caregiver Support Program Brochure \(English\)](#)
-  [Programa de Apoyo por un Cuidador Familiar \(Español\)](#)
-  [Servicios de Coordinación de Cuidados \(Español\)](#)

#### State Plans

# Surrogate Decision Making in Nebraska

➔ <https://www.creighton.edu/fileadmin/user/CHPE/files/Conversation/Surrogate.pdf>

**Surrogate Decision Making In Nebraska**



**State Unit on Aging**  
Nebraska Department of Health and Human Services  
PO Box 95026 Lincoln, Nebraska 68509-5026  
(800) 942-7830 / Nebraska (402) 471-2309  
[www.dhhs.ne.gov/medicaid/Aging/Pages/AgingHome.aspx](http://www.dhhs.ne.gov/medicaid/Aging/Pages/AgingHome.aspx)



# FAQs and Your Questions



# Thank you!

CLINE WILLIAMS

