Healthcare Decision Making and Guardians: The Physician’s Role

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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
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
The Continuum of Decision Making Authority: Infancy Through Adulthood
Fundamental Rights

Examples:
- Religion
- Speech
- Press
- Association
- Due process
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
Model Clinical Evaluation Report Form

- available online
  https://www.americanbar.org/groups/law_aging/resources/capacity_assessment.html;
- Form:
- http://www.apa.org/pi/aging
### Model Clinical Evaluation Report

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.

<table>
<thead>
<tr>
<th>State of</th>
<th>In the Court of Justice</th>
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<tr>
<td>County of</td>
<td>Division</td>
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<tr>
<td>In the Matter of:</td>
<td>File No.</td>
</tr>
<tr>
<td>Definition of incapacity in the State of</td>
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1. **PHYSICAL AND MENTAL CONDITIONS**

   A. **List Physical Diagnoses**

<table>
<thead>
<tr>
<th>Overall Physical Health:</th>
<th>Excellent</th>
<th>Good</th>
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<th>Poor</th>
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   B. **List Mental (DSM) Diagnoses**

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

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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
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 - Legal Aid 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 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.

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...
Resources
http://dhhs.ne.gov/medicaid/Aging/Pages/HelpfulDocsVids.aspx
FAQs and Your Questions
Thank you!