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Understanding Guardianship for Older Adults

By Elaine Floyd, CFP®

One day you may find yourself involved in guardianship proceedings for an elderly parent or relative. Here's an overview of what guardianship means today, how the court evaluates the adult, and what you need to know.

Guardianship promises to be a huge issue facing baby boomers in the years ahead as they watch over elderly parents—often from a distance—and wonder if the time has come to take control of mom or dad's affairs before something bad happens. In years past, the effort to obtain guardianship of an incapacitated adult was often an ugly, acrimonious process that stripped elderly people of virtually all of their rights. If a court determined that an older person was confused and couldn't pay his or her bills or make independent decisions, a guardian was appointed to handle all of that person's affairs and make decisions for him or her.

Guardianship of the person gives the guardian the right to make decisions concerning living arrangements and health care. Guardianship of the estate, also called conservatorship, gives the guardian, or conservator, the right to manage the person's property. The all-or-nothing nature of guardianship has often led to fierce fights among family members and caregivers, to say nothing of the indignities suffered by elderly people who want to retain some semblance of autonomy.

So the American Bar Association, the Commission on Law and Aging, the American Psychological Association, and the National College of Probate Judges have collaborated to produce a handbook, *Judicial Determination of Capacity of Older Adults*, which lends nuance to the definition of capacity.

For one thing, capacity may be task-specific, not global. A person who can't remember to pay his bills may still be able to make other key decisions. Also, capacity may fluctuate. A person in a coma or other temporary condition may need a guardian for a while and then be able to resume full functioning when she recovers. Capacity may also be situational and contextual. A home environment that is familiar and comfortable may enhance someone's capacity, while a new and unfamiliar setting may undermine functional capacity.

In the handbook, they balance the benefits of guardianship with the rights and well-being of the person in question, crafting limited guardianship when appropriate, and identifying less restrictive alternatives to guardianship. If you are considering guardianship of an adult relative, you should educate yourself about these guidelines and think about the extent of the guardianship necessary.

6 AREAS OF CAPACITY

Courts that follow the guidelines will be gathering information in six areas.

- 1) **Medical condition.** What is the cause of the person's diminished capacity and is it likely to improve, stay the same, or get worse?
- 2) **Cognition.** In what areas is the individual's decision-making and thinking impaired and to what extent? Can the person understand, communicate, and remember?
- 3) **Everyday functioning.** What can the person do in the way of everyday activities? These include:
 - **Care of self.** Bathing, dressing, and meal preparation
 - **Financial.** Cash management, bill paying, and investment decisions
 - **Medical.** Healthcare decisions, medication management, and ability to get help in an emergency

- **Home and community life.** Ability to maintain a clean and safe home, be left alone, drive or use public transportation, use the telephone, and avoid environmental dangers, such as the stove and poisons
- **Civil or legal.** Retain legal counsel, vote, and make decisions about legal documents

- 4) **Values and preferences.** Are the person's choices consistent with long-held patterns, or has there been a sudden, unexplained shift? The guidelines note that eccentricity does not necessarily indicate diminished capacity.
- 5) **Risk of harm and level of supervision.** What level of supervision is needed? How severe is the risk of harm to the individual?
- 6) **Means to enhance functioning.** What treatments might improve the individual's level of functioning? Consider whether education, training, rehabilitation, occupational therapy, or assistive devices might help.

CLINICAL ASSESSMENTS

Courts are encouraged to order assessments by various clinicians, including doctors, psychologists, and social workers for the purpose of determining if guardianship is necessary. Page 25 of the handbook provides a form clinicians may use to evaluate a person's need for guardianship. For each area of capacity the clinician checks one of four boxes:

- ☐ Independent
- ☐ Needs support
- ☐ Needs assistance
- ☐ Total care

Financial advisors are not included among these clinicians, but if the elderly adult has a financial advisor, they can offer information arising from their longstanding relationship. They can also convey their concerns to you and other family members, or health care professionals who can incorporate them into their assessments. Because financial issues are so important and so vulnerable to slips in cognition, the handbook includes a number of questions that help determine whether or not a person can still manage his financial affairs.

The items to be evaluated in the financial area are:

- Protect and spend small amounts of cash
- Manage and use checks
- Give gifts and donations
- Make or modify a will
- Buy or sell real property
- Deposit, withdraw, dispose, or invest monetary assets
- Establish and use credit
- Pay, settle, prosecute, or contest any claim
- Enter into a contract, financial commitment, or lease arrangement
- Continue or participate in the operation of a business
- Resist exploitation, coercion, undue influence

After gathering information in all of the areas of capacity, the court fills out a guardianship order stating that the person is either incapacitated, not incapacitated, or partially incapacitated. If partially incapacitated, the court lists the retained capacities in the following five areas: care of self, financial decisions, health care decisions, living in the home and community, and other civil matters.

Again focusing on the financial area, it may be noted that a person is independent when it comes to handling small amounts of cash, but requires total care when buying or selling property. The guardianship plan would reflect these distinctions and give the guardian or conservator the appropriate powers.

CRAFTING THE GUARDIANSHIP PLAN: VALUES AND FINANCIAL DECISIONS

When it comes to crafting a guardianship plan, an elderly person's relationship with her financial advisor does come into play. The new model gives the person—called a *ward* in legal terms—an opportunity to say that she would like to work with a particular advisor and to state certain preferences about how her money should be managed. The guardian can use the guidelines to accommodate the ward's wishes when making decisions on his or her behalf.

Among the questions the ward might be asked about financial decisions are the following:

- What is your financial history?
- Are you in any debt?
- Are you able to plan ahead and save for the future?

- Do you have enough money to provide for yourself in your retirement?
- Have you made a will?
- How knowledgeable are you about financial investments?
- What, if any, types of investments do you currently have?
- What are the things you like to spend money on?
- In spending money, what are your highest priorities?
- Are there people or organizations to which you generally make gifts or contributions?
- How would you like to invest and manage your money in the future?
- Do you want to stick with what you know or are you open to new investment options?
- Do you prefer higher-risk investments with a possibility of higher return or lower-risk investments with a smaller, guaranteed return?
- If you needed help with your finances, who would you like to help you?
- Who can you trust to ensure your best interests?
- How well does this person handle his or her own finances?
- Is he or she in debt? Does he or she have a good credit record?
- Is he or she knowledgeable about financial investments?
- Do you currently have or would you like to obtain a financial advisor?
- Would this person be a more objective spokesperson than a relative or close friend?
- Are there certain people with whom you would like your spokesperson to discuss financial decisions on your behalf (family, financial advisors, other)?
- Is there anyone you specifically would not want to be involved in helping to make financial decisions on your behalf?
- How closely would you want your spokesperson to follow your instructions about financial decisions vs. what he or she thinks is best for you at the time decisions are made?
- Are there other things you would like your spokesperson to know about you, if he or she were ever in a decision to make financial decisions on your behalf?

While there is no assurance that all courts will follow the guidelines, the handbook appears to be a good start in recognizing that elderly people should be entitled to retain some rights despite diminished capacity. By taking the time to explore the cause and nature of the incapacity, and by incorporating the person's values and preferences into the guardianship plan, we can help ensure that people will not be stripped of their dignity due to illness or aging.

RESOURCES

National Guardianship Association
(www.guardianship.org)

Uniform Guardianship and Protective Proceedings Act (1997).

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