

ADULT GUARDIANSHIP AND OTHER DECISION-MAKING OPTIONS

SARAH HESS, JD

LEGAL COUNCIL
FOR HEALTH JUSTICE

Agenda

- Basic concepts for people over 18 with disabilities
- Options that are simpler than guardianship
- Guardianship process
- This presentation is informational only
 - it is not legal advice and does not outline every detail of the process;
 - I am not a guardianship expert
 - Cook County-based
- Resources to assist you

Legal Mechanisms

- Why these laws exist
- MLPs – Train, Treat, Transform, Upstream
- Legal Aid bandwidth = 5,000+ : 1
 - Low-income Illinoisans with legal problems : every legal aid attorney
- Health law and civil rights, adhere to least restrictive environment philosophy

Decision-Making Options

Permission, release of information forms (school, medical)

Health Care Surrogate Act

Powers of Attorney

Supported Decision Making

Adult Guardianship – the most restrictive result, the highest bar to meet

Successor Guardianship v. Standby v. Short-term



Developmental Disability

"Developmental disability" means a severe, chronic disability, other than mental illness, found to be closely related to an intellectual disability AND

(1) before the individual is 22;

(2) is likely to continue indefinitely;

(3) results in limitations in three or more of the following: self-care, receptive and expressive language, learning, mobility, self-direction, capacity for independent living, or economic self-sufficiency; and

(4) reflects need for special services or assistance that are lifelong

405 ILCS 5/1-106

Intellectual Disability

"Intellectual disability"

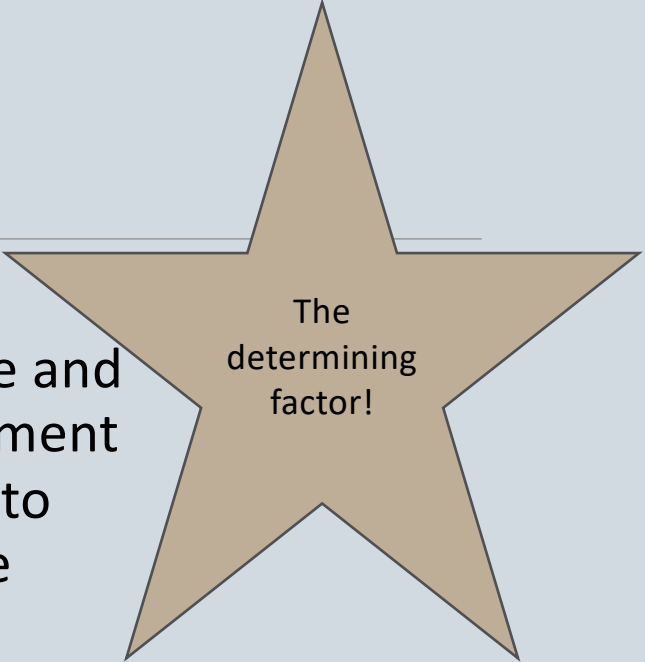
The following 3 criteria must be met:

- (1) deficits in reasoning, problem solving, planning by clinical assessment and IQ score of 70 or below,
- (2) deficits in activities of daily life, such as communication, social participation, and independent living
- (3) onset before age 22

Does the adult patient have Decisional Capacity?

“the ability to understand and appreciate the nature and consequences of a decision regarding medical treatment or forgoing life-sustaining treatment and the ability to reach and communicate an informed decision in the matter as determined by the attending physician.”

- From the Health Care Surrogate Act




The
determining
factor!

Scenario 1

Adult patient can't make any decisions, can't understand the question being asked

Physician determines they have no decisional capacity:

- Doesn't have enough understanding to assign their rights to someone else
- Needs a guardian to make all personal and financial decisions




Clear Adult
Guardianship

Scenario 2

18 year old patient understands her basic condition, engages in self-harm, needs help managing her appointments and bank account

Can patient get all needs met with:

- Power of Attorney for Healthcare
- SSI “Rep Payee” – anyone can act as Representative Payee and have permission to conduct all SSI requirements
- Delegation of Educational Rights – student turning 18 can allow parents to continue to hold their education rights
- Power of Attorney – Health care
- Medicaid/SNAP: Approved Representative Form
- Mental Health Declaration



No obvious
need for adult
guardianship

Health Care Surrogate Act



In an emergency, without POA and no capacity, then Health Care Surrogate Act should provide for patient's care

- Surrogate decision makers
- Physician determines patient is lacking decisional capacity to make medical treatment decisions or to terminate life-sustaining treatment
- Purpose: so that decisions may be made without judicial involvement of any kind

Health Care Surrogate Act



Order of Hierarchy:

- Patient's guardian of the person
- Patient's spouse
- Any adult son or daughter of the patient
- Either parent of the patient
- Any adult brother or sister of the patient
- Any adult grandchild of the patient
- A close friend
- Patient's guardian of the estate
- Juvenile Court ordered temporary custodian

Illinois Powers of Attorney

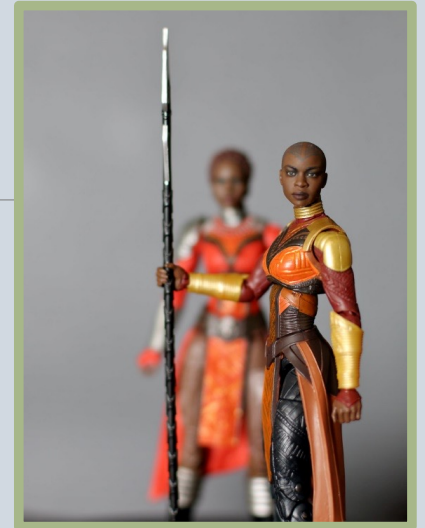
You must have power to give power

We'll ask, "Does person have capacity to sign?"

Principal: person who signs a power of attorney or other instrument granting powers to agent

Agent: person designated to act by principal

Designates same powers to agent that principal would have to consent to or refuse, including after death of principal



Supported Decision Making

- The Principal can fill out form for someone to help them with all the in between items not covered by the previous mechanisms
- The Principal retains decision-making power
 - Obtaining food, clothing, and shelter.
 - Applying for public benefits.
 - Helping me find work.
 - Assisting with residential services.
 - Helping me with school.
 - Helping me advocate for myself
- The Supporter would still need explicit permission and releases for medical and school

<https://gac.illinois.gov/content/dam/soi/en/web/gac/documents/supported-decision-making/supported-decision-making-agreement-rev-jul-2022.pdf>

Adult Guardianship

A legal relationship between a Guardian, who is appointed by the court, and a person over 18 with a disability who cannot manage personal or financial decisions

Always aim for the least restrictive circumstances for people with disabilities to live full, autonomous lives

Guardianship only when absolutely necessary because person will no longer be able to make decisions, consent to procedures, etc.

Not for mental health: Guardian cannot involuntarily commit or force medications



Report of Physician



Physician's Report

Physician fills out form with details about impairment, level of needed support

Establishes the need for guardianship

Must use the court's form

Must be completed by:

- A. **A licensed doctor**; exam must be *within three months* of filing OR
- B. **A clinical psychologist** in the case of intellectual disability; must complete a psychological evaluation of the respondent *within one year* of the date of the filing

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, PROBATE DIVISION

File No. _____

Estate of _____

Alleged Person with a Disability

REPORT OF PHYSICIAN

_____, a licensed physician, submits the following Report on
[printed name of the physician]_____, an alleged person with a disability (the "Respondent"), based
[printed name of the alleged person with a disability]

upon evaluations of the Respondent performed on _____

NOTE: The evaluations upon which this Report is based must have been performed within three (3) months of the date the Petition for guardianship is filed.

1. The following is a description of the nature and type of the Respondent's disability and an assessment of how the disability impacts on the ability of the Respondent to make decisions or to function independently, including an underlying diagnosis and a description of the manifestations of the disability:

| |
|--|
| |
| |
| |
| |

2. The following is an analysis and the results of evaluations of the Respondent's mental and physical condition, and (if appropriate) a description of the Respondent's educational condition, adaptive behavior and social skills:

| |
|--|
| |
| |
| |
| |

3. The following is my opinion as to whether guardianship is needed, the type and scope of the guardianship needed, and the reasons for my opinion, including whether the Respondent is **totally** or only **partially** incapable of making **personal** and **financial** decisions and if only **partially**, the kinds of decisions which the Respondent can and cannot make:

| |
|--|
| |
| |
| |
| |

4. The following is my recommendation as to the most suitable living arrangement for the Respondent and (if appropriate) the treatment or habilitation plan for the Respondent, and the reasons for my recommendation:

| |
|--|
| |
| |
| |
| |

Next Page

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

If the description of the Respondent's mental, physical and educational condition, adaptive behavior or social skills is based upon evaluations by other professionals, all professionals preparing evaluations must also sign this Report.

5. The following are the names, addresses, certifications, licenses or other credentials, and signatures of each other person who performed an evaluation upon which this Report is based:

- a. Name _____
Address _____
License (state and number) _____
Certification _____
Other credentials _____
Signature _____
- b. Name _____
Address _____
License (state and number) _____
Certification _____
Other credentials _____
Signature _____

* _____
[signature of the physician preparing this Report]

[license (state and number)]

[address of the physician]

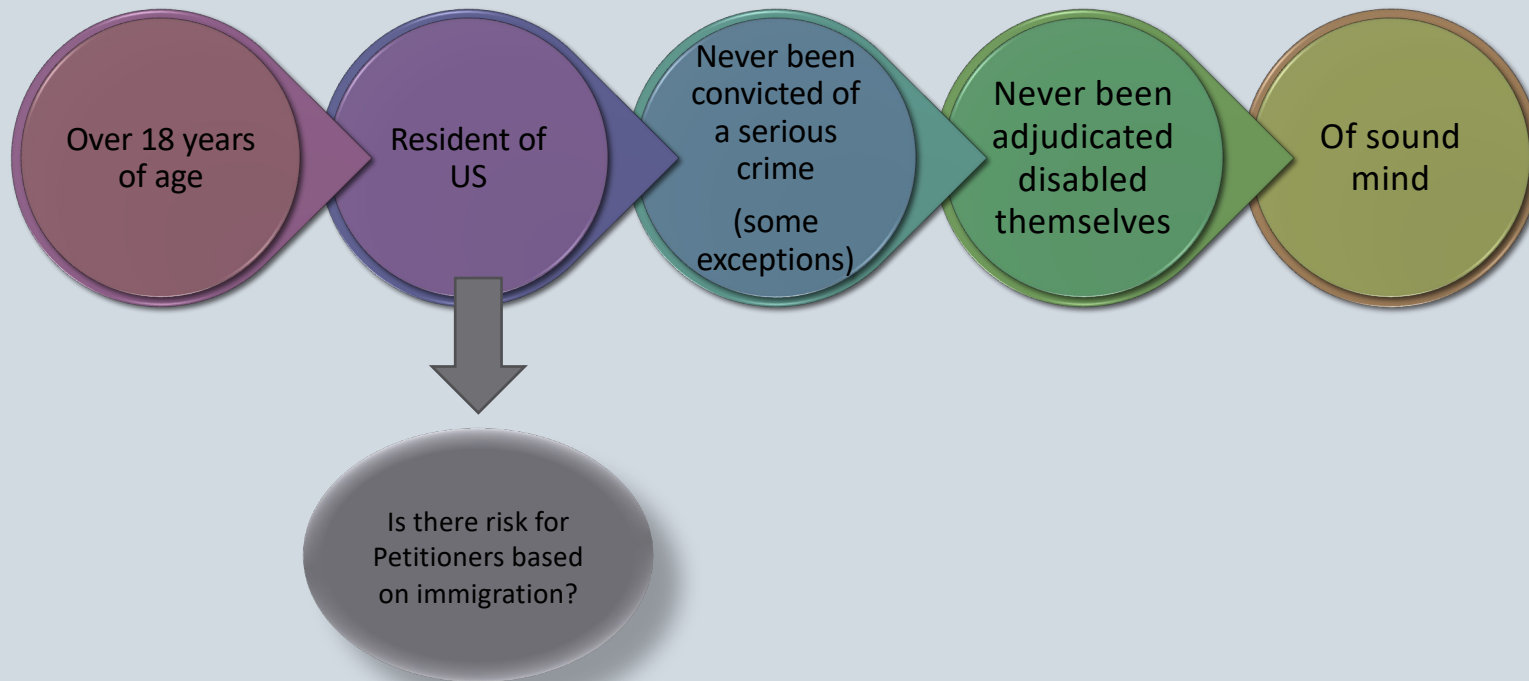
[city/state/zip]

[physician's telephone]

Certification _____
Other credentials _____

*This Report must be signed by a licensed physician.

Who can be a Guardian?



Levels of Adult Guardianship

Plenary Guardianship of the Person: Guardian has all authority to make all decisions over person

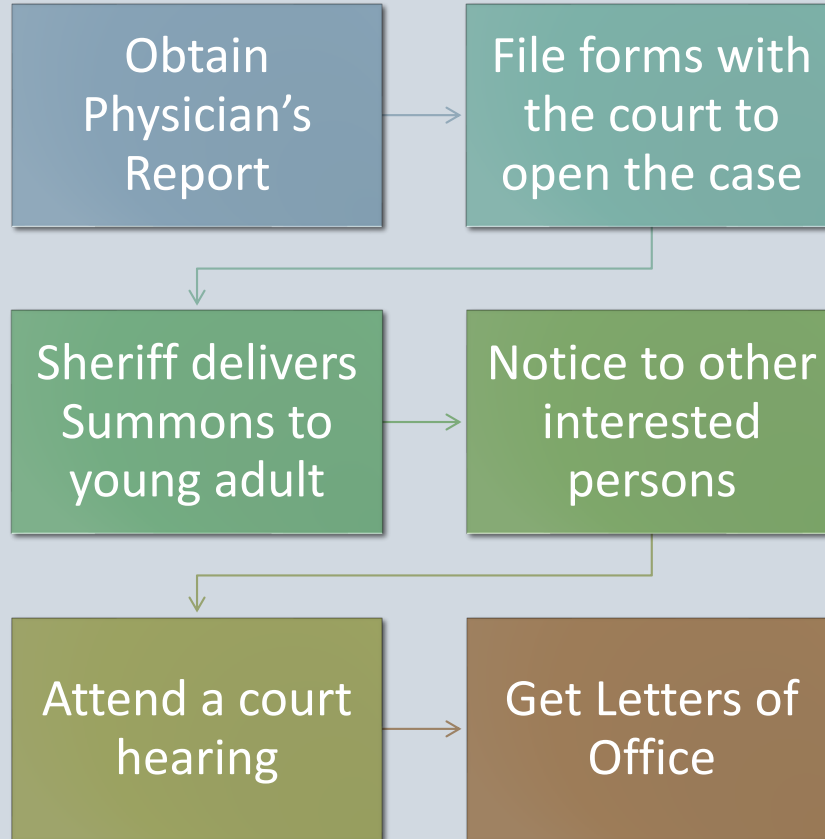
Limited Guardianship: Physician feels Adult can make some decisions

Temporary Guardianship: for emergency use, Petitioners can go into court quickly, must also file for permanent guardianship proceedings

- Court can approve guardian for 30-60 days for specific powers and specific purpose related to welfare. Then hearing held.

What is the Guardianship Process?

No Physician's Report?
Do not pass go

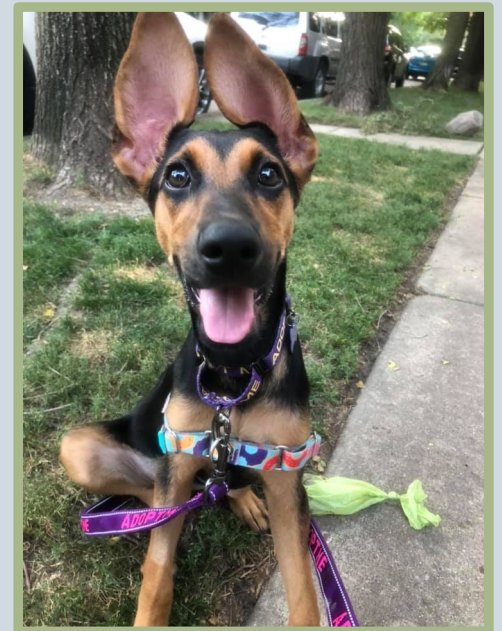


Guardian ad litem

“GAL”

- Court appointed attorney
- Acts as court’s “eyes and ears”
- "Best Interests" of the Respondent, but NOT the Respondent’s attorney or representative

Can sometimes avoid this by Respondent coming to court hearing – judge will question them for understanding



Guardianship Hearing

5

Will anyone disagree with Petitioner becoming guardian?

Judge will decide two things:

- Does the person have a disability and lack all decisional capacity (based on Physician's Report)?
- Who should be the guardian?

Will ask for proof of **Training and Annual Report** every year forever

Issue Letters of Office following hearing



After Guardianship

Short-term Guardianship: allows parent/guardian to delegate decision-making to someone else

- Form signed in front of 2 witnesses
- SW can witness
- Does not change parent/guardian's rights – they can always end it
- [Adults](#): cumulative total up to 60 days across a year
- [Minors](#): up to 365 days total

Standby: in any writing, including a will, names a person to act as back-up if current guardian is incapacitated

- Must bring Standby form into court and ask for Standby Person to be appointed Guardian within 60 days of transition

Successor: Person judge names when guardian is incapacitated

Referrals and Resources

Illinois Guardianship and Advocacy Commission

CVLS

Greenlight

Legal Aid Society at Metropolitan Family Services

Prairie State Legal Services (outside Chicago)

CDEL for seniors