

# AN INTRODUCTION TO GUARDIANSHIP ALTERNATIVES IN TERMINATION CASES

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Prepared by Center for Public Representation

# What to expect from training

- We will focus on alternatives to guardianship in the context of petitions to terminate.
- We will review:
  - The relevant law
  - The possible alternatives when guardianship is no longer necessary
    - On a spectrum from some decision-making authority residing with a third party
    - To decision-making independence
- We will review the supports that are available to persons whose decision-making capacity is being restored
- We will provide information about how to access the supports and services that will help make guardianship less necessary.

# A few words about guardianship termination and restoration of rights

- Generally, courts may terminate a guardianship if the individual regains capacity or develops decision-making supports that make the guardianship unnecessary.
- Although many people will achieve or regain mental capacity, or will get supports in place that provide sufficient protection, the majority will not have their rights restored after a guardianship is put into place.
- Due to a lack of adult guardianship data nationally, little is known about the practice of restoration.
- But, despite the lack of data, after an in-depth study, the ABA has concluded that restoration of rights once the guardianship is in place is under-utilized and under-litigated.

Source: Erica Wood et al., Restoration of Rights in Adult Guardianship: Research and Recommendations (ABA 2017) available at [https://www.americanbar.org/content/dam/aba/administrative/law\\_aging/restoration%20report.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/law_aging/restoration%20report.authcheckdam.pdf).

# Termination/Restoration

- We know that for the vast majority of people under guardianship, their capacity and abilities are not static things.
- Over time the need for even limited forms of guardianship may disappear
  - Particularly true between ages 18 and 26 due to brain development, among other things
- Courts and parties should regularly and periodically consider limiting the guardian's authority or terminating the guardianship entirely

# MUPC termination provisions

Section 5–310. [Termination of Guardianship for Incapacitated Person.]

- The authority and responsibility of a guardian of an incapacitated person terminates upon the death of the guardian or incapacitated person, the determination of incapacity of the guardian, the determination that the person is no longer incapacitated, or upon removal or resignation as provided in section 5–311. ... Termination shall not affect a guardian's liability for prior acts or the obligation to report or account for funds and assets of the incapacitated person.

# MUPC termination provisions

Section 5–311. [Removal or Resignation of Guardian; Termination of Incapacity.]

- (a) On petition of the incapacitated person or any person interested in the incapacitated person's welfare, the court, after notice and hearing, may remove a guardian if the person under guardianship is no longer incapacitated or for other good cause. On petition of the guardian, the court, after hearing, may accept a resignation.
- (b) The incapacitated person or any person interested in the welfare of the incapacitated person may petition for an order that the person is no longer incapacitated and for termination of the guardianship. A request for an order may also be made informally to the court.

# Burden of proof

Who carries the burden of proof in a termination case?

Massachusetts law is unsettled. The Appeals Court noted this in In re Guardianship of Forman, 86 Mass. App. Ct. 1119 (2014) at footnote 6:

“Thus, whether the Legislature intended to reallocate the burden of proof when it enacted the Massachusetts Uniform Probate Code, G.L. c. 190B, is not before us. Compare *Guardianship of Lander*, 697 A.2d 1298, 1300 (Me.1997) (holding that under the Maine guardianship statute, whose language is similar to the Massachusetts statute, the party seeking termination of guardianship bears the burden of proof throughout the termination proceeding), with *Matter of Rosenberg*, 211 Md.App. 305, 319–320 (2013) (concluding that the invasion of liberty occasioned by a guardianship requires a burden-shifting approach; after petitioner files a valid medical certificate, the burden of proof shifts to and remains with the party opposing termination).”

The Uniform Guardianship, Conservatorship and Other Protective Arrangement Act (UGCOPAA)(2020) at Sec. 319(4)(a) requires termination upon “prima facie evidence for termination” unless it is proven that a basis for appointment exists. This implies burden shifting.

# The person under guardianship has the burden to prove she can retain her own attorney

“Consistently with [*Guardianship of*] *Hocker*, [439 Mass 709 (2003)] we hold that the integrity of the statutory process for protecting a ward's rights in a guardianship requires that a nonindigent ward who has been adjudged incompetent to make her own medical decisions be given the opportunity to demonstrate that she is competent to select and retain counsel of her own choosing to challenge her guardianship when there is evidence that the interests of the guardian and ward are adverse and that the ward may have recovered her competency.

In re Guardianship of Zaltman, 65 Mass. App. Ct. 678, 692 (2006)

UGCOPAA Sec. 319(g): Contrary to Massachusetts law, the model law provide that all person seeking to terminate have the right to choose their own attorney.



# MUPCA provisions about decision-making assistance

- The concept of incapacity specifically excludes a person who can make decisions with assistance.
  - G.L. c. 190B sec. 5-101.
- Therefore, before appointing a guardian a court must find that “the person's needs cannot be met by less restrictive means, including use of appropriate technological assistance.”
  - G.L. c. 190B § 5-306(b)(8).

# Where one can start to think about whether the guardianship should be terminated.

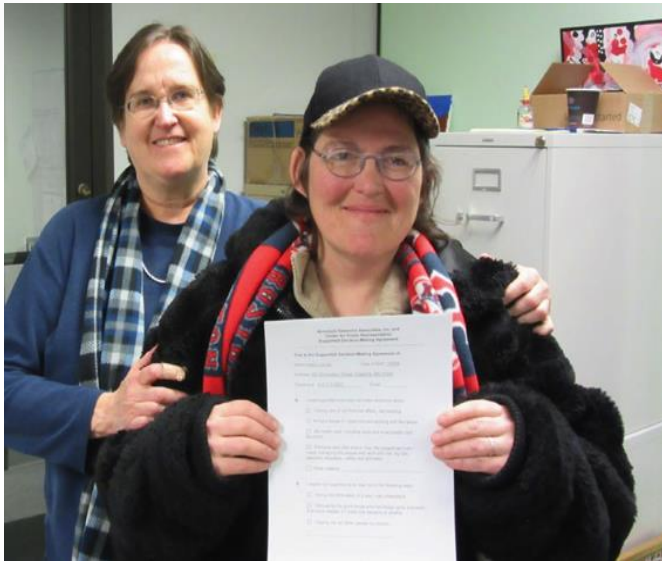
First inquiry: Is person still incapacitated?

- If not, with or without assistance, the guardianship should be terminated.
- Is there “good cause” for termination, including the existence of alternatives.

Inquiry into alternatives could ask:

- Why does the petitioner think guardianship is still needed?
- What is the petitioner concerned about (or is afraid will happen) if the person is not still under guardianship?
- Is there an individualized community-based service or procedure that can address that concern?
- Does the person have natural support systems that provide sufficient protection.
- Can that service or procedure be combined with other processes or procedures to meet individual needs or the person?

# What people who have avoided guardianship or had their decision making rights restored have to say



It helps people with disabilities have their independence even though they have support through it all.

It feels so much better because my parents aren't so in charge of me anymore. I have some independence now.

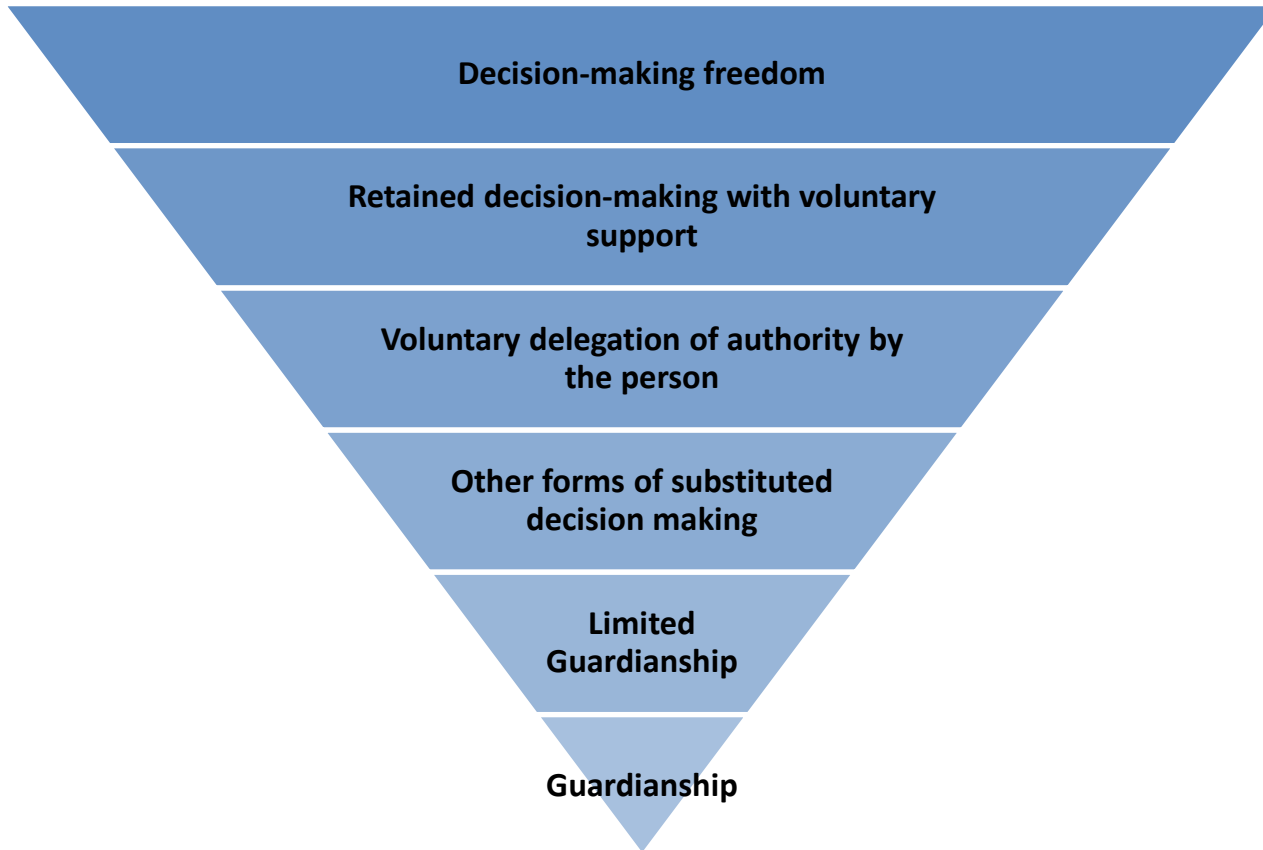
Feel good. Life is better. Explain to me. Have people I trust and like.

I have a new leaf on family tree.

Helping people with their problems. I help my co-workers. I feel more confidence and stronger.



# Liberty Retained by Type of Arrangement





## ALTERNATIVES IN WHICH THE INDIVIDUAL REGAINS DECISION-MAKING AUTHORITY

# Alternatives in Which the Individual Retains Decision-making Authority: Supported Decision-Making

- Individuals with disabilities make choices about their own lives with support from a team of people they choose.
- Individuals identify areas where they need decision-making assistance — health care, employment, relationships, finances, etc. — and the type of support they need.
- Supporters commit to providing information, advice and support to the individuals so that they can make their own decisions.
- Supporters commit to honoring the individual’s decisions. The individual and supporters execute a supported decision-making agreement. The agreement may be modified or revoked at any time.

SDM is widely recognized, including by UGCOPAA and by statute in more than a dozen states,

# Alternatives in Which the Individual Retains Decision-making Authority

## **Wellness Recovery Action Plan (WRAP)**

- It is not a legally enforceable document, but can be helpful for individuals to prepare for crisis and also inform family and friends about their wishes.

## **ABLE Savings Plans**

- Tax-advantaged savings accounts for the health and personal expenses of persons with disabilities.
- ABLE accounts allow persons with disabilities to save money without jeopardizing their access to public benefits.
- Anyone may contribute to the person's account. Distributions are tax-free and within limits do not count for determining eligibility for Medicaid and SSI.

# Alternatives in Which the Individual Retains Decision-making Authority...

## **Real Lives Law – Participant Directed Program**

- Real Lives Law created participant directed programs in the Department of Developmental Services (DDS). DDS recognized that people with IDD are capable of making their own decisions in a Real Lives arrangement.
- Individuals determine how their DDS funding is spent for services, supports and goods.
- Individuals and their families locate and direct services with the assistance of support brokers and fiscal intermediaries.



# Alternatives in Which the Individual Retains Decision-making Authority...

## **Shared (or Delegated) Educational Decision-making Authority (18-21 year olds)**

- When students turn 18, they attain the right to make their own educational decisions. The student may elect to share educational decision making with parents or other adults. (Or, the student may delegate decision making to parents or another adult.) The election is revocable.

# Options in Which the Individual Retains Decision-making Authority...

## **HIPAA, FERPA and Service Providers record access permission**

- Some families seek guardianship because they have difficulty getting information about their adult family member's health care, human services and school records and status.
- Releases allow access to health care information, educational information and records, and information from state agencies and their vendors serving persons with disabilities.

## **Joint bank account**

- A person with a disability may keep a joint bank account with another adult. Such accounts allow for money management learning and oversight.

# Delegation by the person of decision-making authority...

## **Durable power of attorney (DPOA)**

- A legally enforceable document where a trusted person, called an “Attorney-in-Fact,” is appointed by an individual to manage and protect the money, property, and business affairs and make financial decisions.
- A DPOA allows the Attorneys-in Fact to continue acting on behalf of principals even when they become incapacitated.
- A springing DPOA is executed when a person is competent, but does not come into effect until the individual is incapacitated.

# Delegation by the person of decision-making authority...

## Health care proxy (HCP)

- An advance directive in which an individual (called the principal) designates another person (called the agent) to make health care decisions when the principal is not capable to make them.
- A health care agent's decision trumps the decision of a guardian.
- Although a principal may revoke a health care proxy at any time, the agent may petition the Probate Court to “affirm” the proxy upon a showing that the principal lacks the capacity to revoke.

# Options in Which the Individual Retains Decision-making Authority...

## **Order for Life Sustaining Treatment (MOLST) (POLST)--**

- Allows patients with serious advancing illnesses (end-of-life) to express their wishes for treatment in consultation with providers.
- It is a medical order, like any medical order in a patient's records, and providers should follow it.
- Effective immediately upon signing.
- Revocable at any time.
- Person does not have to become incapacitated in order for it to go into effect.

# Substitute decision-makers designated by another --Trusts

## Trusts

- A trust is a legal arrangement, usually in writing, in which a trustee holds assets for the benefit of another person, called the beneficiary.
- Trustee has ownership of the property and/or funds in the trust but is obligated to act in the best interest of the beneficiary in accordance with the term of the trust.
- Federal law allow for the individual and pooled special needs trusts. Discretionary distributions from these kinds of trusts do not count as assets or income for determining Medicaid (“MassHealth”) and SSI eligibility.

# Substituted Decision-makers Appointed by Administrative Agencies

## Representative payee – Social Security Administration (SSA)

- A person (or entity) who receives and controls the use of **Social Security Disability Insurance (SSDI)** or **Supplemental Security Income (SSI)** benefits for a person who is not fully capable to manage the benefits.
- Appointed by the SSA based on medical documentation.
- Expected to assist with money management and to provide protection from financial abuse and victimization.
- Monitored by SSA and the Disability Law Center.

# Substituted Decision-makers Appointed by Administrative Agencies

## Fiduciary – Veterans' Benefits

- DVA may appoint fiduciaries to manage the benefits of eligible veterans who are “unable to manage [their] affairs.”
- Fiduciaries “are also responsible for monitoring the beneficiary's well-being and using available funds to ensure that the beneficiary's needs are met.”



## Limited guardianship as an alternative to general guardianship

- Case law and MUPC have a clear preference for limited guardianship.
- The purpose of limited guardianship is to “maximize the liberty and autonomy of the persons subject to guardianship.” Guardianship of B.V.G., 474 Mass. 315, 323 (2016).

# Other court ordered alternatives to general guardianship

- Conservatorships
  - May be general or limited. c. 190B §§ 5-401, 5-404(c)(3), 5-409.
  - A conservator has a fiduciary duty to manage property and assets in the person's best interest.
- The court may also “direct or ratify” a protective arrangement, or single transaction, and may appoint a special conservator to assist in its arrangement in cases in which appointment of conservator is unnecessary. c. 190B § 5-408.

# The Handbook

- Each of these alternatives is described in the Alternatives Handbook.
- Citations to the law, sources of information, sample forms and contact information for accessing information about the alternative are provided.



**THANK YOU**

**“THE MINUTE THE PERSON  
BECOMES A PERSON  
EVERYTHING CHANGES”**

**JUDGE GAIL PERLMAN (RET.)**