



“Protecting and Enhancing the Rights of Vulnerable Adults”

Note from the authors . . .

We devote this edition of *The Navigator* to the important and ever increasing concerns surrounding guardianship and its proper place in the lives of those with diminished mental capacity. Rooted in the *parens patriae* jurisdiction of our courts (protection of those who cannot protect themselves), the fundamental purpose of guardianship is to provide assistance to those in need. At the same time, however, regardless of how well intentioned the process may be, the key is to strike the proper balance between providing assistance on the one hand and minimizing the abridgment of one’s right of autonomy and self-governance on the other. Philosophically, a guardianship should be a force of empowerment rather than a tool of suppression. U.S. Supreme Court Justice Brandeis articulated the need for balance in this area when he warned against the dangers of an overly paternalistic approach: *“Experience should teach us to be most on our guard to protect liberty when Government’s purposes are beneficent. . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.”* *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Justice Brandeis, dissenting). We should all be “on guard” to protect our liberties, especially at times when others profess to be acting in our best interest.

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Special points of interest:

- When dealing with a person with diminished mental capacity, all reasonable attempts should be made to accommodate in the least restrictive manner possible under the circumstances.
- Guardianship is not appropriate when there are less restrictive ways of meeting the needs of a person with diminished mental capacity.
- Guardianship can represent a significant deprivation of civil rights and liberties and as such is viewed as a measure of last resort.

THE NAVIGATOR

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“Protecting and Enhancing the Rights of Vulnerable Adults”

Guardianship: Will It Ever Be Necessary?

When is Guardianship Appropriate?

In her book *Another Country: Navigating the Emotional Terrain of our Elders*, Mary Pipher talks about the “young” old versus the “old” old and how we all aspire to live out our final years enjoying life, in good health, financially secure and surrounded by family and friends who care and want to spend time with us. That, of course, is our dream and if we could control the outcome of things, we would have it no other way; that is remaining “young” while

gracefully growing “old.” Unfortunately, life isn’t all that predictable and it certainly isn’t all that kind. The reality is, as we age, we do not remain “young” and our bodies reflect the aging process not only in terms of our physical appearance and ability (or inabilities), but also in terms of our mental agility and stamina. Some of this curtailment in our physical and mental abilities is quite normal and indeed part of the aging process. Sometimes, however, it is not part of the “normal

aging process” but rather may be a sign of something more serious and complex which needs to be addressed from a variety of view points, including medical, social, legal and financial.

When an individual who has been fully “competent” his entire life begins to lose mental capacity (for instance starts to lose short term memory or forgets a routine he has known for years), the initial question that ought to come to mind

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When is Guardianship Not Appropriate?

Simply stated, guardianship is not appropriate when there are other, less restrictive, ways of accommodating and meeting the needs of a person with diminished mental capacity. Other less restrictive approaches to surrogate decision making include the use of a Durable Power of Attorney, Advance Direc-

tive for Health Care (Living Will), a trust arrangement, joint ownership of assets and Conservatorship. The notion of addressing a person’s needs in the least restrictive manner possible is not a new concept and it is certainly not exclusive to this area of law. Indeed, we see a similar principle

of law applied in the area of Special Education in our public schools where the legal requirement is to provide all classified students with a “free and appropriate education” in the “least restrictive environment” possible. This means that every reasonable attempt should be

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made to accommodate the student in the regular classroom by incorporating into the classroom the services and support the student requires.



Similarly, when dealing with a person with diminished mental capacity, all reasonable attempts should be made to accommodate that person in the least restrictive manner possible under the circumstances. Such an approach, when applied honestly and in good faith, is intended to ensure a proper balance between protection of the individual on the one hand and respect for the person's right of auton-

omy and self-determination on the other. Lopsided results in which a person with early or moderate stage dementia, who needs only a limited amount of assistance, and is saddled with a full, plenary guardian are miscarriages of justice that should not be tolerated.

Caution should also be taken when the medical condition causing the diminished capacity is either unknown or a temporary situation. Someone who is experiencing a level of confusion or disorientation due, for instance, to an imbalance in their medications or as a manifestation of a urinary tract infection, is not necessarily a candidate for a guardianship. It is essential that the underlying

medical condition be treated first to see whether that has a positive effect on the person's mental state and acuity. Guardianship is not a quick fix and it is typically not an appropriate remedy for a temporary condition, unless, of course, there is a compelling need to act

“Vulnerability, however, is not synonymous with needing a guardian....”

before effective treatment can be administered.

Finally, guardianship should never be used as a

way to gain control over the affairs of another person simply because it appears as though the person is not acting in his or her best interest. Many people act in ways that are clearly contrary to their best interest, yet are competent to manage their own affairs. This is generally not an issue for young people; however, as we age, societal attitudes change and we tend to become much more protective and paternalistic of the elderly who appear vulnerable. Vulnerability, however, is not synonymous with needing a guardian and again, there are many other less restrictive ways to minimize the exploitation of those who may be vulnerable than the imposition of a guardian.

these questions, of course, requires the input from those in the medical profession who understand and appreciate this phenomenon and who can skillfully detect and diagnose the person's condition.

If we are dealing with a type of dementia, regardless of its particular etiology, it is essential to begin

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is: What is that all about and what are we dealing with? Are we dealing with a memory slip that we all experience from time to time, like misplacing the car keys (something many of us do all the time) or forgetting whether we locked the



front door when we left in the morning, or is it the early signs of a dementia; a condition that may or may not worsen over time, but a “condition” nonetheless? And if it is a dementia, what is its etiology? That is to say, what is causing the dementia? Is it organic brain syndrome, caused perhaps from years of

alcohol or drug use, or is it the by-product of a series of mini-strokes that have disrupted vital nerve and blood flows in the brain, or is it the unintended side effects of medications, or is it Alzheimer's disease? To understand its etiology is to understand the likely course the condition will take and whether and to what extent it is treatable. And to answer

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planning. It cannot be overstated how critical planning is when we are concerned about a person with early or “mild” stage dementia.

First, planning in the early stages of the disease makes sense for the simple reason that the person about whom we are concerned can participate in the plan. A diagnosis of dementia does not mean, *ipso facto*, that the person can no longer participate in the decisions affecting his life. Quite the contrary, it is during this time that it is critical to begin exploring with the person what it is he wants and desires in the event his condition progresses to the point when he can no longer make decisions for himself.

Second, early planning makes it possible for the person who is experiencing a diminished capacity to select the person or persons he would like to serve as his representative (or surrogate decision maker) in the event he is no longer able to make financial and medical decisions for himself. This is accomplished by executing a Durable Power of Attorney and Advance Medical Directive (or Living Will) and appointing financial and medical fiduciaries called an Attorney-in-Fact and Health Care Proxy, respectively. These fiduciaries have the

legal duty to remain loyal to the person who appointed them and to act in that person's best interest. Finally, from a more holistic perspective, early planning and establishing a plan of care can bring to a family a sense of order and direction to what may otherwise seem like a hopeless and uncertain situation.

Once mental capacity deteriorates to the point where the person is no longer able to make decisions for himself, the person needs a surrogate decision maker in order to promote the well being of the person as well as to ensure that the rights and interests of the person are protected. If the person has planned, as suggested in this article, then in most cases, the Attorney-in-Fact and Health Care Proxy will have sufficient authority to act on behalf of the person in need, regardless of the severity of the dementia. However, if there is no Power of Attorney or Advance Directive in place, or if such documents do exist but there is hostility between the person in need and the designated fiduciaries, then in that case, it may be necessary to consider guardianship. By “hostility,” I am referring to the situation in which there is a disagreement between the fiduciary and the person in need over what is “best”

for the person. In such a scenario, if the person opposes what his Attorney-in-Fact is doing, he will essentially be revoking the authority given under the Power of Attorney document, thereby leaving the designated Attorney-in-Fact powerless.

By its very nature, guardianship is an involuntary process in which a person is declared to be an incapacitated person by a court and a surrogate decision maker (a guardian) is appointed to act on the person's behalf. It is an arrangement that is imposed on a person as opposed to a consensual arrangement. In other words, a person cannot consent to his own adjudication of incapacity. A court makes a finding of incapacity based on the medical testimony of at least two physicians who are able to diagnose the underlying medical condition causing the diminished capacity and who can state that, in their medical opinion, the person is unfit and unable to manage his own affairs. These medical proofs, in conjunction with a showing of why a guardianship is necessary, form the basis for the court's



decision as to whether or not to impose a guardianship.

A guardianship can represent a significant deprivation of civil rights and liberties and as such is viewed in the law as a remedy of last resort. It is always better to at least consider other, less restrictive, approaches to accommodating a person with diminished capacity which is why planning is so essential and critical. Proper and advanced planning, while it cannot eliminate

“...planning in the early stages of the disease makes sense for the simple reason that the person about whom we are concerned can participate in the plan”

completely the need for a guardianship at some point in the future, can minimize significantly the likelihood that such a drastic measure will ever be necessary in the life of a person who develops diminished mental capacity.