

## Guardianship and Adult Protective Services in NC

### Guardianship overview:

#### **1) Statutory Authority, Types of Guardianship, & Responsibilities:**

- Incompetency and Guardianship is mandated by N.C. General Statute 35A.
- The purpose of Guardianship is to help an individual exercise his or her rights and is not an appropriate avenue to attempt to control a person's behavior.
- The initiation of guardianship proceedings should be considered only after all other possible alternatives have been explored.
- There are 3 kinds of Guardianship:
  - Guardian of the Person
  - Guardian of the Estate
  - General Guardian (both person/estate)
- Responsibilities of the guardian include (can be limited or full):
  - Making decisions about where the individual will live (cannot force them to go anywhere)
  - Authorizing medical treatment
  - Consenting to recreational activities
  - Managing the individual's finances/estate/asset related issues
  - Filing status reports and accountings with the court
- A guardian is not:
  - required to contribute his/her own resources to the ward
  - liable for the ward's debts
  - able to gift whatever he/she wants to themselves (must be reasonable expenses incurred in carrying out his duties as guardian). The clerk can set a commission for the guardian by the clerk from the ward's estate for serving.

#### **2) The process**

- Any person with good intentions who feels that a person would benefit from having an appointed guardian may file a guardianship (incompetency) petition. It could be a family member, representative from a department of social services, mental health center or other person who knows the individual, may file a petition with the Clerk of Superior Court (Clerk). If appointed, the guardian is authorized by the clerk of superior court to be substitute decision maker for an incompetent adult (the ward).
- Every Clerk's office has forms that may be completed and filed as a petition which must include a sworn statement that the information in the petition is true. A fee for filing the petition may be required and may be reimbursed later by the court unless the court determines the petitioner did not have good reason to start the guardianship proceeding.
- When a petition is filed, the Clerk sets a date and time for the guardianship hearing. The Sheriff serves copies of the petition and notice of the hearing on the respondent and on his attorney or other representative. The petitioner must mail copies of the petition and notice of the hearing to the respondent's spouse and relatives.
- Medical evidence is normally sought to support a finding of incapacity, but it is important to remember that *incapacity* is a legal term, not a medical definition and the threshold issue is whether or not the alleged incapacitated person is capable of exercising certain legal rights, such as the right to manage money or to consent to medical treatment. Before the hearing, the clerk may order medical, psychological, social work and other evaluations of the respondent.

- The respondent may arrange for an attorney of his choice to represent him in the proceeding. If he doesn't have an attorney, the clerk of superior court appoints one, called a guardian ad litem, to represent him. The respondent is responsible for his attorney's fee. If the respondent is not financially able to pay the fee, the court will pay it.
- At the hearing, the clerk serves as judge unless a jury is requested. Then they will consider the results of the requested evaluations and other evidence that relates to whether the respondent is incompetent. The petitioner is responsible for presenting sufficient evidence to convince the clerk or jury that the respondent is incompetent. If the evidence does not convince the clerk or jury that the respondent is incompetent, the clerk dismisses the petition. If the clerk or jury decides that the respondent is incompetent, the clerk hears additional evidence about who should be appointed the guardian for the adult.
- Once the adult has been determined to be incompetent and a guardian is appointed, the guardian will receive a written order of appointment from the clerk. This order explains the guardian's powers and duties. If the guardian has questions about his powers and duties, he/she may direct them to the clerk or to an attorney.
- While there is no fee charged to the guardian of the person, a bond is fixed in cases in which a general guardian or guardian of the estate is appointed. (e.g., in estates in which the guardian will be responsible for managing large amounts of money or other property belonging to the incompetent individual.) The amount of the bond is set according to the value of the estate, and it is generally purchased like an insurance policy.
- A nonresident of the State of North Carolina, to be appointed as general guardian, guardian of the person, or guardian of the estate of a North Carolina resident, must indicate in writing his willingness to submit to the jurisdiction of the North Carolina courts in matters relating to the guardianship and must appoint a resident agent to accept service of process for the guardian in all actions or proceedings with respect to the guardianship. Such appointment must be approved by and filed with the clerk, and any agent so appointed must notify the clerk of any change in the agent's address or legal residence. The clerk shall require a nonresident guardian of the estate or a nonresident general guardian to post a bond or other security for the faithful performance of the guardian's duties. The clerk may require a nonresident guardian of the person to post a bond or other security for the faithful performance of the guardian's duties.

### **3) Terminating Guardianship**

- A guardian's powers and duties end when any of the following occurs:
  - The guardian resigns
  - The ward's competence is restored
  - The Clerk removes the guardian from his/her position
  - The ward dies

## **Key issues with Guardianship (as it relates to individuals with dementia):**

### **1) Appointment Issues**

- In order for many clerks to make a decision to appoint a guardian, they may require an MDE, but this may be cost prohibitive. Therefore, many rely on family or social services to provide as much medical information as possible. Without a multi-disciplinary evaluation (MDE), we cannot really make an informed decision. We don't know what we don't know.
- Educating Clerks that there is not always medical information for individuals who have not been to doctor in years and waiting for MDEs can place individuals at risk in emergency situations. The Clerk cannot require a

medical provider to determine competency, but it is legal conclusion of law for the Clerk to draw a conclusion based on evidence presented.

- Some suggest relaxing the rules of evidence to allow reliable hearsay at protective services hearing and incompetency hearings.

## **2) Limited Family Involvement**

- Family members can at times be reluctant to serve and can refuse to assume the responsibility of serving as Guardian. Some possible reasons are: status reports and annual accountings are not easy for a layman to complete; families are fearful of facilities discharging wards immediately and having to come pick them up; navigating the “system” is cumbersome, lack of transportation and other resources to assist the adult, etc.
- Public Social Services should be the Guardian of last resort by design, but can be the default. If the Social Services is appointed, the adult’s wishes are unknown due to limited family involvement and the disease (living preferences, advanced directives, etc...).
- There are likely many persons in institutional living who cannot make decisions on their own and need an appointed guardian.

## **3) Geography/Distance**

- County jurisdiction issues: who should serve as Guardian when an adult has lived in multiple counties? The county of Medicaid may be counties away and may not be the county that has history or knows this adult?
- At times, wards are placed outside their community as there are no appropriate or available placements. This causes many issues, such as loss of family and friends as travel is can be a major issue; little rapport with social workers due to distance/frequency of being able to visit; loss of familiar surroundings, etc.

## **4) Indigent Issues**

- Often wards have little or no funds for funeral expenses and it is unknown what their wishes were for their funeral. Also Counties have to incur burial expenses which is an unfunded mandate.
- Guardian of the Estate requires a bond. Some estates have little value and it can be difficult getting an attorney to serve and family members may not have a high enough credit score.

## **5) Funding & Numbers Served**

- Local Social Services received wards (who have a primary mental illness diagnosis) from the LME/MCO as part of continued mental health reform.
- Funding comes out of the regular Social Services Block Grant (SSBG) Allocation that has to be used to fund ALL aging services, but also competes against other HHS programs for funding (child welfare, child care subsidy, TANF programs, etc..).
- Total Expenditures for SFY 2014 \$17,956,187 (includes County DSS and Corporations Corporation Expenditures = \$3,188,861).
- Number of wards served by a DSS Director as Guardian during SFY 2014= 4,328.
- Number of wards served by a corporation under contract with Division of Aging and Adult Services during SFY 2014= 1,365.

## **Adult Protective Services Overview:**

## 1) *Statutory Authority, Types of Maltreatment, & Response*

- County Social Services protect adults by:
  - Receiving reports and evaluating the need for protective service;
  - Planning with the disabled adult, family or caregiver to identify and prevent abuse, neglect or exploitation;
  - Reporting evidence of mistreatment to the District Attorney and various regulatory agencies;
  - Initiating court action as necessary to protect the adult; &
  - Mobilizing essential services on behalf of the disabled adult.
- There is a difference in what the community perceives that Social Services should do and what the law will allow. The main issue being that self-determination is respected if the adult has the capacity to make what others might deem as bad decisions.
- Adult Protective Services (APS) is mandated by N.C. General Statute 108A for Social Services in each County to evaluate reports of abuse, caretaker neglect, self-neglect and/or exploitation of a citizen. Types include:
  - Abuse – Willful infliction of physical pain, injury, mental anguish, unreasonable confinement or willful deprivation by caretaker of services that are necessary to maintain mental/physical health.
  - Caretaker Neglect – Failure of the caregiver to provide services to maintain the physical/mental health of the disabled adult.
  - Self-Neglect – Disabled adult who lives alone or has no caregiver and is not able to provide necessary services to maintain her mental/physical health.
  - Exploitation – Illegal or improper use of the disabled adult or his/her resources for another's profit or advantage.
- When a report is made, we must know that alleged victim adult is:
  - disabled-incapacitated by a physical or mental impairment, meaning the consumer cannot complete daily activities or handle his/her affairs or protect interests (Mental retardation, cerebral palsy, epilepsy or autism, organic brain damage caused by advanced age or other physical degeneration in connection therewith; or conditions incurred which are the result of accident, mental or physical illness, or continued consumption or absorption of substances);
  - abused, neglected and/or exploited (already occurred);
  - unable and unwilling to obtain essential services him or herself **OR** in a situation where no one willing, able and responsible to obtain essential services on their behalf;
- If an APS report meets **ALL** of the criteria above, the County can accept the report for evaluation/investigation. Responses/initiation times can range from immediate up to 72 hours depending on the urgency of the consumer's situation. The social worker must complete a thorough evaluation of abuse/neglect within 30 days and before 45 days for exploitation cases. If the criteria is not met, if APS criteria are not met some counties will provide information regarding community resources.
- For Social Services to “take action”, they must substantiate that the adult meets **ALL** of the criteria below. The adult is:
  - truly a disabled adult (incapacitated);
  - has been abused, neglected and/or exploited;
  - in need of protective services (needs services to alleviate substantiation like in home care, needs an appointed guardian, assist with long term care placement, or provide case management);
  - willing to accept services (and has the mental capacity to do so).

## 2) *Data:*

- APS reports are increasing at a rapid rate. In State Fiscal Year 2009, 17,043 reports were received, of which 9,252 were evaluated. In State Fiscal Year 2014, 22,824 reports were received, of which 11,311 were evaluated. Based on this data, the number of reports received between 2009-2014 has increased by 34 percent. Of those evaluated 44% found abuse, neglect or exploitation.
- Total APS Expenditures for SFY 2014=\$18,579,807
- NC is ranked 9<sup>th</sup> among states who have the highest population of over age 60. By 2018, NC will have more people 60+ than ages 0-17. In 2013, 60 NC counties had more 60+ population than 0-17. In 2025, that number is projected to be 90 Counties.
- Approximately 25% of North Carolina's 1.4 million older adults over the age of 65 have two or more physical or mental conditions that make it difficult to do activities required to remain independent.

### **Key issues with APS:**

#### **1) Strengthen APS statutes in NC**

- there are no penalties for failing to report abuse, neglect, or exploitation of vulnerable adults (unlike child protective services).
- allow prosecution of a financial power of attorney for financial exploitation when this power has been abused
- jurisdictional issues regarding which county "owns" the case
- develop and require "pre service" training for APS like we have for child protective services to ensure a minimum level of competency (which should include how to identify and serve dementia)
- address payee issues as APS does not cover administering financial affairs for individuals (conflict). Social Services can get the assets frozen, but not able to pay necessary bills. Also, it is too easy for SSA disability payments to be changed. One must be appointed as interim guardian of estate.
- Adopt a *Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act* in NC
- Ensure timely multi-disciplinary evaluations which should be required for all incompetency hearings and a means to pay for them.
- More education is needed about what APS can and cannot do, as self-determination is currently respected in statute if the adult has the capacity to make what we might deem as bad decisions.

#### **2) Financial Exploitation & Prosecution**

- Can be difficult to obtain bank records when we have exploitation issues (or is not willing).
- Prosecution of abuse, neglect and exploitation. At times, an adult cannot testify to the abuse, neglect or exploitation as he/she is incapacitated.
- A financial power of attorney can be a beneficial tool if used appropriately, however, if abused there are no consequences criminally for the exploiter. There is no restitution and it ends up costing taxpayers as the person may have had funds to pay for care, but will have to depend on Medicaid much sooner.

#### **3) Geography**

- There is no integrated statewide system to connect Counties and their APS/Guardianship cases for which data can be shared to best insure the protection of vulnerable adults in NC.
- APS jurisdiction on reports when an adult is in a hospital in another county. This is being discussed now as counties do this differently- lack of consistency.
- Accessing resources for mental health interventions.
- There is currently a *Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act* adopted by 40 states, the District of Columbia and Puerto Rico. Elements of the Act establish ways to resolve multi-state adult

guardianship jurisdictional issues. It is a simple, jurisdictional fix that requires no additional funds. Currently North Carolina law includes only incomplete provisions on transfer of a case across state lines. There is no procedure to transfer a case *out of North Carolina* into another state – only provisions to move the person’s personal property to a new state if the person lives there. While North Carolina law does have a procedure for transferring a guardianship *into the state*, it is at the clerk’s discretion, and in practice a full hearing re-litigating the case may be required. The current North Carolina law has no provision for registration. However, it does allow for appointment of an “ancillary guardian” in North Carolina when a person is under guardianship of another state but authority is needed to address real or personal property located in North Carolina. This does not address authority for health care/personal decisions. The underlying idea of the Act is that the jurisdictional procedures would be the same in all states, allowing for an efficient flow of cases not impeded by state differences. Therefore, it would be best to adopt the Act’s procedures for transfer and recognition, and enact the initial jurisdiction procedures as well.

#### **4) Limited Family Involvement**

- Less informal support available due to many adult children working longer and/or moving to other areas.

#### **5) Funding**

- Federal and State funding available through the Social Services Block Grant, the Home and Community Care Block Grant and through the Medicaid Program all support provision of services and supports needed by Adult Protective Services clients.
- In the SFY 2011-2012 \$2 million in state funding was eliminated from the State Adult Protective Services Fund. While there is a state legislative mandate to provide Adult Protective Services, state funding is no longer earmarked to address this mandate. This service is seriously underfunded relative to increasing need which places many counties in North Carolina in extremely difficult situations in meeting the needs of a very vulnerable and increasingly more complex population.
- Cuts to the Home and Community Care Block Grant-below are only the state dollars in the Home and Community Care Block Grant that the General Assembly allocates:
  - 2009: Decrease of \$500,000 (Non-Recurring) in 09-10 and 10-11.
  - 2011: Decrease of \$200,000 (Recurring).
  - 2014: Decrease of \$969,549 (Recurring=1,500 persons impacted who would not receive needed services.

#### **“Top 10” Recommendations for consideration regarding Guardianship and APS (not ranked):**

- 1) Strengthen NC laws/statutes as it relates to APS/Guardianship based on the recommendations above-including adequate funded and trained workforce NC.
- 2) Emergency placement options and special care units for adults with dementia in crisis-too much “red tape” and untimely processes.
- 3) An integrated case management system for social work services for APS/Guardianship that can cross reference public assistance programs to reduce keying duplications and assist with locating vulnerable adults.
- 4) Better Education for Clerks of Court to press for family members being identified prior to appointing Social Services as guardian.
- 5) Assess national and local processes/models who serve as guardians/caregivers/ surrogate decision makers (bonds, status reports, accountings, transportation, burnout, etc..).
- 6) Provide More Support for Caregivers

- The caregiver support ratio (the number of potential caregivers age 45-64 for each person 80 or older) will decline from 8.0 in 2010 to 3.9 in 2030.
  - More than 60% of all family caregivers work.
  - We should expand Project Care to more Counties than just a handful.
  - Subsidized payments or tax breaks for caregivers who are unable to work as a result of their caregiving responsibilities.
  - Allow caregivers to use existing sick leave benefits for caregiving purposes.
  - Allow caregivers to take short increments of unpaid leave for a family member's illness, injury, or medical appointment.
  - Increase the availability of respite care services, which provide short periods of relief for family members from their on-going caregiving tasks.
  - Continue to stress the importance of advance planning and provide caregiver coping strategies. Hawaii's plan addressed some of these efforts.
- 7) More education is needed about what APS can and cannot do as self-determination is respected if the adult has the capacity to make what we might see as bad decisions.
- 8) Implement Collective Community Impact Models focused on outcomes specific to local issues and needs. A more coordinated response among governmental agencies, medical associations, medical providers, health and community support providers and insurers to identify and/or create improved detection tools for dementia and coordination of medical care and referral for community support and services. Maine's plan spoke about this.
- 9) Adding dementia assessments into part of the annual physical leading to early detection/diagnosis. We would not be re-inventing the wheel or creating something totally new or different that would require extensive funding.
- 10) Assess the availability of Home and Community Care Services in NC (ex: Meals on Wheels, In Home Aide, Transportation, Adult Day Care/Health, Information and Options Counseling, etc.), and strategies to reduce waiting lists. We need more **readily available** community based services to maintain adults in the least restrictive setting whenever possible and delay institutionalization. There are long waiting list for such services statewide. Therefore, most providers jump to institutionalization. Approximately 80% of those currently on the HCCBG wait lists are waiting for In-Home Aide Services or Home Delivered Meals (these are pillars of health outcomes). This assists citizens who cannot afford private pay, but aren't eligible for Medicaid either.