ST. LOUIS METROPOLITAN
MEDICINE
VOLUME 44, NUMBER 4 AUGUST / SEPTEMBER 2022

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Guardianships in the Missouri Court System: A Necessary Part of Medical and Legal Practice

How physicians could be involved in the court process of determining guardianship

By Tina N. Babel, JD

The American Medical Association notes in its Code of Medical Ethics Opinion 2.1.1 that informed consent to medical treatment is "fundamental in both ethics and law." Medical treatment and the legal process often intersect when adult patients[1] in need of medical care are no longer able to make competent, rational decisions on their own. Most medical articles examining capacity and guardianships state that physicians should seek court intervention only as the "last resort;" however, guardianships may be necessary for appropriate patient care. Doctors and hospitals, like most people, prefer to avoid the legal system when at all possible.

The World Health Organization reported in 2017 that mental health conditions and substance use disorders rose 13% in the last decade.[2] Guardianship cases are on the rise in the St. Louis area and nationwide, due in large part to demographics, the rise in substance abuse, as well as the increase in an aging population and the inevitable capacity issues that develop as a result. COVID-19, in turn, triggered a 25% increase in the global prevalence of anxiety and depression worldwide.[3] The Britney Spears saga and recent Netflix movie *I Care a Lot* have done nothing to make doctors, hospitals or the general population more comfortable with the legalities of guardianships. The guardianship process, however, is often necessary and should be utilized when needed for consent and appropriate and proper patient care.

The Difference Between Guardianships and Conservatorships

A guardianship is the legal process of determining individuals' capacity to make decisions for themselves regarding personal affairs. If a full guardianship is awarded, the guardians thereafter have the power to make all decisions for the ward/patient, including who can see them, where they reside, and what medical care they receive. The guardian essentially steps into the shoes of the ward/patient for all "personal" decisions.

Of course, the court could choose to implement a limited guardianship,[4] which would mean the ward/patient maintains full autonomy and capacity, except for whatever delineated rights the guardian has in the ward/patient's stead. For those reasons, when providing care based upon a guardian's decision, it is important to review the letters of guardianship (the legal document that gives the guardian authority), to make sure the guardian has the power to make medical decisions and there is not a limitation on the guardian's ability to act.

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In Missouri, a court can implement a conservatorship, which is like a guardianship but deals only with the financial affairs of the ward/patient. Due to bonding and complicated reporting requirements, most attorneys try to avoid conservatorships whenever possible. In some states, including Illinois, the courts do not have a procedure called "conservatorship," but rather, refer to the differences as guardianship of the person and guardianship of the estate.

The Guardianship and Its Requirements

Often, a Durable Power of Attorney for Health Care (a "POA") will work just as well for the need to consent to patient health care. If the POA provides sufficient delineation of the attorney-in-fact's power to consent to and make health care decisions—as most do—a POA is the less expensive and quicker route. Guardianships are used in lieu of POAs where the POA does not provide sufficient power or direction, the patient/ward has not yet signed one and no longer has the capacity to do so, there is no one to serve, or where there is concern of undue influence

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by the attorney-in-fact or concern that the attorney-in-fact is not working in the ward/patient's best interests. In many courts, upon filing a petition for guardianship, the court will deem the POA no longer valid until the guardianship can be determined.

A guardian will be appointed by the probate court when it is proven to the court that the guardianship is the "least restrictive alternative" and the ward/patient is determined to be "incapacitated." Incapacitation is defined when the patient/ward "by reason of any physical, mental, or cognitive condition" is unable to "receive and evaluate information or to communicate decisions to such an extent that the person, even with appropriate services and assistive technology, lacks capacity to manage the person's essential requirements for food, clothing, shelter, safety or other care such that serious physical injury, illness or disease is likely to occur."[5]

"Any person"[6]—including a physician, nurse and social worker—may file a petition to be appointed as a guardian or petition some other qualified person to be appointed. St. Louis County and St. Louis City have done their best to make the petition for appointment of a guardian as simple as possible, and the forms for both courts are the same. The entirety of the forms that need to be filed can be located online at the court's website under "Forms."[7]

The Need for Physician Interrogatories

As a treating physician, you may be asked to fill out what used to be called "physician interrogatories." In St. Louis County and City courts, this form is now called an "Affidavit in Support of Petition for Appointment of Guardian-Conservator."

Filling out the physician interrogatories is an exception to the Health Insurance Portability and Accountability Act of 1996 (HIPAA) because the information used in the interrogatories is to be used "solely in the course of a judicial proceeding."[8] In the Physician Interrogatories, you will be asked to answer questions (and to notarize your answer) regarding the last time you examined the ward/patient, your diagnoses of the ward/patient, what the diagnoses are based upon, what medications have been prescribed, and whether—based upon a reasonable degree of medical certainty—you believe a guardianship is necessary.

It is highly suggested that you provide enough information from a medical perspective for the court to evaluate the necessity of the guardianship for your patient/ward.

The Guardianship Hearing

In a large majority of cases, filling out the physician interrogatories should be the end of your involvement as a treating physician. Though you will be identified as a potential witness, the *guardian ad litem* appointed by the court to represent the ward, will stipulate to the introduction of your physician interrogatories without needing to call you as a witness; it is assumed the answers you filled out are accurate and complete, and you will not change your opinion if you are called as a witness. However, if you are subpoenaed to testify, you will often need to appear. That said, with the recent improvements in technology in our courts, a health care provider's request to appear virtually for a guardianship hearing would likely be granted.

If you appear in person, the questions will likely involve the necessity of the guardianship, whether the ward/patient is incapacitated, chance of improvement, whether there should be limits on the guardianship, and the depth of care you have provided.

What Happens Next

When important decisions of patient care are before you, and the patient lacks the capacity to consent to the care needed, it is incumbent upon you to make sure the person consenting for your patient has the authority to do so. In many situations, the patient will have already executed a POA that would allow an attorney-in-fact to speak for your patient. But when there is not a POA, the patient revokes it, or you have concerns regarding the attorney-in-fact's decision-making, a guardianship proceeding may become necessary.

Emergency guardianships—to be used only in emergency situations as the court is required to immediately act upon their filing—are always an option and can happen very quickly. A regular guardianship may take up to one to three months to be determined (more, if it is adversarial), depending upon the circumstances of the case.

Despite the time, potential cost, and adversarial nature of the guardianship proceedings, they remain a necessity in our legal system and provision of health care to ensure our disabled and incapacitated adults are being properly cared for, despite what TV shows and pop star dramas may show otherwise.

This article is for informational purposes only. Nothing herein should be treated as legal advice or as creating an attorney-client relationship. The choice of a lawyer is an important decision and should not be based solely on advertisements.

References

1. This article only reviews the requirements of guardianship of adults. The guardianship procedure for minors is different, as the parents of a minor patient are considered the "natural" guardians of the minor under the law.
2. https://www.who.int/health-topics/mental-health#tab=tab_2
3. https://www.who.int/news/item/02-03-2022-covid-19-pandemic-triggers-25-increase-in-prevalence-of-anxiety-and-depression-worldwide
4. R.S.Mo. 475.080 ("If the Court, after hearing, finds that a person is partially incapacitated and that the respondent's identified needs cannot be met by a less restrictive alternative, the court shall appoint a limited guardian of the person of the ward. The order of appointment shall specify the powers and duties of the limited guardian so as to permit the partially incapacitated ward to provide for self-care commensurate with the ward's ability to do so and shall specify the legal disabilities to which the ward is subject.")
5. R.S.Mo. §475.010(11)
6. R.S.Mo. §475.060(2)
7. https://stlcountycourts.com/forms/probate-forms/guardianshipconservatorship-petition-adult/
8. 45 CFR 164.51