

Understanding Guardianship and SSI





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Presentation for:
Minnesota Independence
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- Guardianship is an odd concept to most families.
- At age 18, an individual is considered an emancipated adult.
- Parents no longer have the legal authority to make decisions on behalf of their child regarding health care, education, or government benefits.
- Many children with ASD or other developmental/mental health limitations continue to need assistance.

Guardianship can give you the legal authority to continue making decisions.

ALTERNATIVES TO GUARDIANSHIP

- 2020 Amendments to Guardianship Statute require that Court's make specific findings regarding consideration and attempts at alternatives prior to pursuit of guardianship.
- Alternatives:
 - Power of Attorney
 - Health Care Directive (AKA Medical Power of Attorney)
 - Supported Decision Making Arrangement (formal/informal)
- Power of Attorney/Health Care Directive requires capacity to understand and sign those documents at age 18.
- Supported Decision Making arrangement can be difficult if there are any communication/processing speed limitations and/or significant anxiety mental health difficulties with decision making.

WHO NEEDS A GUARDIAN?

- Minnesota law says that the Court can appoint a guardian for an “incapacitated” person.
- An “incapacitated person” is someone who:
 - lacks sufficient understanding or capacity to make or communicate responsible personal decisions, and
 - has demonstrated deficits in behavior which evidence an inability to meet personal needs for:
 - Medical care,
 - Nutrition,
 - Clothing,
 - Shelter, or
 - Safety.

WHAT POWERS CAN A GUARDIAN HAVE?

- A guardian can have any or all of the following nine powers:
 1. To have custody and determine place of abode of the person under guardianship
 2. To provide for the care, comfort and maintenance needs of the person under guardianship
 3. To take reasonable care of the personal property of the person under guardianship**
 4. To give or withhold consent for necessary medical care and treatment for the person under guardianship
 5. To make or withhold approval of contracts for the person under guardianship
 6. To exercise supervisory authority over the person under guardianship
 7. To apply for government benefits on behalf of the person under guardianship
 8. To open an ABLE account for the person under guardianship
 9. To institute and represent the person under guardianship in civil litigation

LIMITS ON POWERS OF GUARDIANS

- The guardianship is only as restrictive as necessary to meet the demonstrated needs of the person under guardianship
- The Guardian's powers are limited to those in the guardianship order and letters
- Automatic limits imposed by law:
 - Court order required prior to psychosurgery, electroshock, sterilization, or experimental treatment
 - May not consent to medical care that violates the religious or moral beliefs of the person under guardianship
 - Guardian must use powers in manner that minimizes limits on personal freedoms and civil rights of person under guardianship

THE RIGHT TO VOTE

- Does the person under guardianship have the sufficient capacity and understanding to exercise his or her right to vote?
- Is the person under guardianship able to understand the nature and effect of voting?
- Should the person under guardianship affirmatively retain their right to vote?

Extremely Low Burden

GUARDIANSHIP BILL OF RIGHTS

- Receive timely and appropriate health care and medical treatment
- Exercise control of all aspects of life not delegated specifically by court order to the guardian
- Petition the court to modify or terminate guardianship or if disagree with a decision (e.g. to prevent or initiate a change in abode)
- Personal privacy
- Communication and visitation with persons of their choice
- Marry and procreate
- Be represented by an attorney in any proceeding
- Vote, unless restricted by the court

WHAT ARE A GUARDIAN'S DUTIES?

- Duty to ensure that the needs of the person under guardianship are met (not required to use personal funds)
- Duty to use government benefits to meet the needs of the person under guardianship, rather than their estate
- Duty to take reasonable care of the personal property of the person under guardianship and seek the appointment of a conservator if they have other property
- Annual Filing Duties:
 - Personal Well-Being Report
 - Annual Notice of Right to Petition for Restoration to Capacity
 - Affidavit of Service

ANNUAL REPORT

- Due 30 days after the anniversary of the guardianship
 - Personal Well-Being Report
 - Current mental, physical, social condition
 - Living arrangements
 - Any restrictions on the person under guardianship's right to visit or communicate with persons of their choice
 - Medical, educational, and vocational services provided
 - Whether guardianship is still needed
 - Annual Notice of Right
 - Provide notice to the person under guardianship of the right to request termination or modification of the guardianship
 - Serve all interested parties and complete an Affidavit of Service
 - (Sample form available on state court's website)

WHO CAN BE GUARDIAN?

Statutory priority for certain people:

- Current guardian
- Agent appointed by the individual's health care directive
- Spouse or someone nominated by a deceased spouse (HCD)
- Adult child
- Parents
- Adult with whom the person has resided for more than six months
- Adult related by blood, marriage, or adoption
- Any other adult OR a professional guardian

WHO CANNOT BE A GUARDIAN?

- Paid caregivers (individual or agency) UNLESS they are related by blood, marriage, or adoption
- Parents who use parental pay can still be guardians!
- All proposed guardians must consent to a background study UNLESS:
 - They are parents with whom the person under guardianship has always lived.

SUCCESSOR GUARDIANS

- Guardianship is limited to 72-month term for people under the age of 30. Term of guardianship is indefinite for people over the age of 30.
- Any change in guardianship has to be approved by the probate court
- No provision for appointing a “back up” or “contingent” guardian
- If the guardian is unable or unwilling to continue serving, someone needs to file a petition for appointment of a successor guardian
- Good idea to talk to friends and family now about who you want as the successor guardian for your child!
 - Nominate successor guardian in your will. It is not binding on the Court, but you cannot give a judge stronger evidence about your wishes.

LEGAL PROCESS – START TO FINISH!

- File Petition for Guardianship
- Provide notice to all interested persons
- Request statements in support of guardianship from service providers
- Court visitor – meet with child
- Court-appointed attorney – meet with child
- Attend court hearing
- Testimony
- Ask the Judicial Officer to take notice of:
 - Statements in Support of Guardianship
 - Visitor's Report
- Proposed person under guardianship must be present unless appearance is waived by the Court
- Court will issue the Order and the Letters of Guardianship

LETTERS OF GUARDIANSHIP

- Proves to the world that you are the Guardian!
- Provide to:
 - School
 - Medical Providers
 - County
 - Social Worker
 - SSI – requires certified copy
- Keep a copy with you! In your car, smartphome, mobile device, flash drive
- Most providers accept a non-certified copy

WHO IS PAYING FOR ALL OF THIS?

We can generally assist families with establishing guardianship at
NO COST!

- Most parents petition to proceed *In Forma Pauperis*.
- IFP status is based on Respondent's income and assets. In most cases, the Respondent has little or no income or assets.
- If granted, the Court will waive filing fees, court visitor fees, copy fees, and order payment of Respondent's attorneys fees.
- In most counties, the Court will also order the county to pay for the Petitioner's (YOUR!) attorneys fees.
- Certified copy of letters – no cost.

- Social Security Benefits
 - Multiple types
 - Social Security Disability Insurance (SSDI)
 - Supplemental Security Income (SSI)
 - Survivor's Benefits
 - Retirement
 - All of the benefit types are funded by Social Security taxes, except for SSI, which is funded separately.
 - Focus on SSDI and SSI.

SOCIAL SECURITY DISABILITY INSURANCE (SSDI)

- SSDI is a Social Security benefit that people can receive based off of their past work history and payment into the insurance program.
- People need a certain number of “work credits” to qualify for SSDI:
 - People who have never worked do not qualify for SSDI based on their own work history, but may qualify based on a parent’s or other family member’s work history if that family member is receiving disability or retirement.
- Work Credits:
 - Earn up to 4 work credits per year.
 - Generally, need 40 credits, with 20 in the past 10 years.
 - Younger workers may qualify with fewer credits.
 - Disabled before age 24: may qualify with 6 credits in 3-year period ending when disability began.
 - Disabled between ages 24 and 31: may qualify if you have credits for working half the time between age 21 and age disability began.
 - Disabled between ages 31 and 42: 20 work credits.

SOCIAL SECURITY DISABILITY INSURANCE (SSDI) CONTINUED.

- No resource/asset limitation (different from SSI).
- No unearned income limit.
- Earned income limit: Achievement of Substantial Gainful Activity (SGA) generally results in denial of benefits.
 - Exception for trial work periods.
- Five month waiting period after onset date of disability for receipt of benefits.
- Spouses of individuals receiving SSDI payments can sometime receive payments along with disabled spouse if a child under the spouse's care is under 16 or is disabled.

SUPPLEMENTAL SECURITY INCOME (SSI)

- No past earnings/work credit requirements. Generally paid to individuals with low income and limited resources.
- Asset limits:
 - \$2,000 asset limit for an individual receiving SSI.
 - \$3,000 asset limit for a couple receiving SSI.
- Unearned income: small amount is disregarded and remainder deducted from SSI benefit.
 - E.g. child support, other Social Security benefits, state cash assistance.
- Earned income limit: after individual is receiving SSI benefits, Social Security encourages work by reducing SSI benefits by about half of earned income.
- Waiting period: None; individual is eligible for payment of benefits from the date of their application.

DEFINITION OF DISABILITY

- Definition of Disability: Inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.
- Disability, for purposes of Social Security benefits, is based on the inability to work.
- An individual is disabled if, due to an established medical condition, they:
 - 1) meet or equal a medical listing;
 - 2) cannot perform any of the work they have performed before (if any);
 - 3) cannot make an adjustment to other work.
- Social Security will not pay benefits for temporary or partial disability lasting less than 12 months (unless resulting in death).
- Social Security maintains state offices called Disability Determination Services (DDS) to make medical disability determinations.

FIVE (5) STEP DISABILITY DETERMINATION PROCESS FOR SSI AND SSDI

- Step 1: Is the individual engaging in Substantial Gainful Activity (SGA)?
 - SGA for 2021 is \$1,310 per month and \$2,190 for blind individuals.
- Step 2: Is the individual's disability "severe"?
- Step 3: Does the individual's disability meet or equal the severity of a medical listing?
- Step 4: Can the individual do any past relevant work?
- Step 5: Can the individual make an adjustment to other work?

STEP 1: SUBSTANTIAL GAINFUL ACTIVITY

- Is the individual working right now, and if so, how much money are they making on a monthly basis?
- SGA for 2021 is \$1,310 per month and \$2,190 per month for blind individuals.
- If an individual is working and their earnings average more than that year's SGA limit per month, then they will be found to be not disabled.
- If the individual's earnings are less than SGA, or the individual is not working, then the Social Security adjudicator moves onto Step 2.

STEP 2: CONDITION SEVERE?

- Social Security considers the severity of an individual's disability.
- Individuals must have a medically determinable physical or mental impairment (or combination of impairments) that interferes with basic work-related activities that is expected to last twelve (12) months or result in death.
 - Basic work-related activities:
 - Physical: e.g. Lifting, carrying, walking, sitting pushing, pulling, etc.
 - Mental: e.g. communicating with authority figures and the public, maintaining pace, flexibility, maintaining appearance, comprehending, remembering, and carrying out simple instructions, making simple work-related judgments and decisions, etc.
- If the impairment is not severe or does not meet duration requirement, the individual will not be found to be disabled.
- However, if the impairment is severe and meets the duration requirement, the adjudicator will move onto Step 3.

STEP 3: MEDICAL CONDITION MEET/EQUAL LISTING?

- Social Security again considers the severity of an individual's impairment, but with criteria specific to the impairment.
- Social Security maintains a list of medical criteria that are considered sufficiently severe such that an individual is found to be disabled if their impairment matches the list.
- An individual's impairment can be found to meet OR equal the severity of the listed criteria (DDS makes this determination).
- If an individual's impairment meets or equals a listing, then they will be found to be disabled.
- If the individual's impairment does not meet a listing, then the adjudicator will go onto Step 4, after the adjudicator assesses the individual's Residual Functional Capacity (RFC).

RESIDUAL FUNCTIONAL CAPACITY (RFC)

- An accounting of an individual's capacity for full-time work.
- Evaluated with regard to physical and mental demands of work.
- RFC assessments are limited in scope.
 - Does not factor in sex, age, body type, or physical conditioning.
- If not medically determinable impairment, then an individual is considered to be of unlimited physical and mental capacity.

STEP 4: PAST RELEVANT WORK

- Comparison of an individual's RFC and past relevant work.
 - Past relevant work = work done at SGA level that was performed within a 15-year period and performed long enough to reach an average level of performance.
- If an individual has the physical and mental capacity to perform past relevant work as they previously performed it or how it is performed in the national economy, then they will not be found to be disabled.
- Burden of proof is on the individual.
- If the individual has no past relevant work, or no relevant work, then the adjudicator goes onto Step 5.

STEP 5: ADJUSTMENT TO OTHER WORK?

- Burden shifts to Social Security to prove that work, other than the work the individual performed in the past, exists in the national economy that the individual can make an adjustment to given the individual's impairment, age, education, and work experience.
- If Social Security finds that the individual can make the adjustment to other work, then they will not be found to be disabled.
- If the individual cannot make the adjustment, then they will be found to be disabled.

TIMELINE FOR APPLICATION

- File an application.
 - Online, by phone, or in person.
- Generally, 4 – 6 month wait time for an initial decision on the application.
 - If denied at the initial application stage, then you have 60 days to request reconsideration of the application by a different team of people.
- Generally, 2 – 3 months additional wait time for a decision on reconsideration.
 - Can supplement the application with additional information on reconsideration or after initial filing of application.
 - If denied again on reconsideration, then you can request a hearing before an Administrative Law Judge (ALJ).
- Generally, 12 – 18 months wait time for a hearing date depending on whether in person or via teleconference.
 - If denied following hearing, you can either appeal to the Appeals Council or file a new application and start process over.

DO I NEED AN ATTORNEY?

- Legal representation can be very helpful.
 - Initial application:
 - Applications can be complicated, confusing, and cumbersome.
 - Attorneys can assist in organizing and developing the medical documentation needed for an application.
 - Reconsideration:
 - Attorneys can file the request for reconsideration on your behalf if your initial application is denied.
 - ALJ Hearing:
 - Attorney can file the request for hearing. Then attorneys can review the Social Security file, develop arguments, and represent the claimant at the hearing.

CAN I AFFORD AN ATTORNEY?

- Initial consultations with most attorneys will be free.
- Fees for attorney representation on Social Security applications are regulated and set by Social Security.
 - Fees are generally contingent on the claimant being found eligible for benefits.
 - Fees allowed are 25% of any back benefits owed to the claimant, up to the maximum fee of \$6,000.
- In most cases, Social Security can pay the fee directly to your attorney.

THANK YOU!



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