

# Guardianships in Colorado

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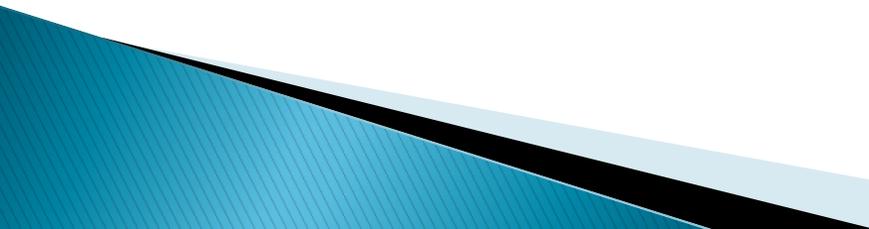
# Guardianship vs Conservatorship

- ▶ Guardianship: Fiduciary makes personal decisions about an incapacitated person, including where the person will live, medical treatment, care person will receive, education, welfare, some finances, and supervision
  - ▶ Conservatorship: Fiduciary makes financial decisions for person who is unable to manage property & business affairs because he or she is incapacitated, missing/detained, and the person has property that will be wasted unless management is provided
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# When is a Guardianship Necessary?

- ▶ At age 18, an individual is considered an adult and presumed to have legal capacity
- ▶ “Incapacitated adult”:
  - Colorado Probate Code: an adult who is “unable to effectively receive or evaluate information or both or make or communicate decisions to such an extent that the individual lacks the ability to satisfy essential requirements for physical health, safety, or self-care, even with appropriate and reasonably available technological assistance.”

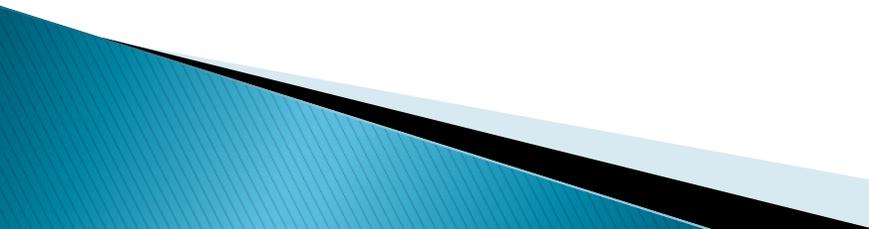
# Who May Serve as Guardian?

- ▶ Any person age 21 or older
  - ▶ Family members, professional fiduciaries, volunteers, public administrator, Dept. of Human Services (some counties)...anyone the court finds fit
  - ▶ Nominated Guardian must submit to the court's review/oversight
  - ▶ Unless related by blood, marriage, or adoption, an owner, operator, or employee of a long-term care facility may not be appointed Guardian
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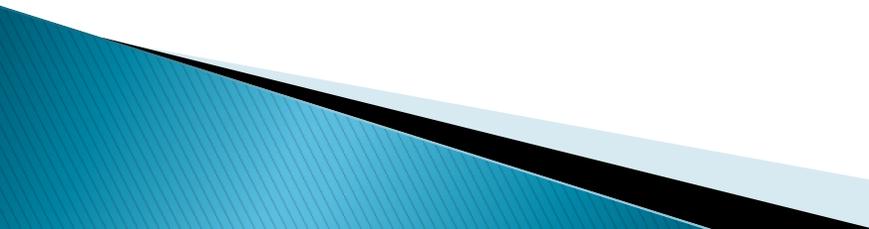
# Types of Guardianships

- ▶ Limited
  - Restricts Guardian's authority to certain specified matters (medical, education, activities, etc.)
- ▶ Unlimited
  - Covers all matters; Petitioner will have to explain to the court why an unlimited guardianship is necessary
- ▶ Emergency
  - Guardian will be appointed if there is an "imminent threat" to the Respondent's health, safety, or welfare unless a Guardian is appointed; temporary

# Maximizing Personal Autonomy

- ▶ Numerous provisions throughout Colorado's statutes require the court, Court Visitor, Petitioner, and Guardian to consider the **least restrictive means** available to protect the individual while considering the use of reasonably available technology
  - ▶ The court, whenever feasible, shall grant to Guardian only those powers necessitated by the Ward's limitations and demonstrated needs
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# Decision-making

- ▶ In making decisions, a Guardian shall consider the expressed desires & personal values of the Ward to the extent known to the Guardian, regardless of the limited or unlimited nature of the guardianship.
  - ▶ At all times, a Guardian shall act in the Ward's best interest and exercise reasonable care, diligence, and prudence
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# Duties

## A Guardian has the following duties:

- ▶ Make decisions regarding the Ward's support, care, education, health, & welfare
- ▶ Exercise authority only as necessitated by the Ward's limitations & to encourage the Ward to participate in decisions
- ▶ Become/remain personally acquainted with the Ward. Maintain sufficient contact to know of the Ward's capacities, limitations, needs, opportunities, & physical/mental health.
- ▶ Make arrangements for, keep informed about, and maintain documentation of the Ward's current situation regarding finances, living arrangements and care givers, health and medical care, education and training, personal needs, preferences and desires, employment, recreation, and leisure time
- ▶ Become acquainted with the significant persons in the Ward's life: family, doctors, nurses, case workers, employers, therapists, friends, and neighbors.
- ▶ Take reasonable care of the Ward's personal effects and bring protective proceedings, if necessary, to protect the property of the Ward (conservator).
- ▶ Appropriately spend the Ward's money that is in the guardian's control for the Ward's current support, care, education, health, and welfare needs (if there is no conservator).
- ▶ Save the Ward's excess money for the Ward's future needs. If the Ward has substantial assets, it is necessary that a conservator be appointed.
- ▶ Inform Court of any change in the Ward's residence.
- ▶ File an annual guardian's report with the Court
- ▶ Notify Court if the Ward's condition changes to the degree that guardianship may no longer be necessary.
- ▶ Notify the court of the Ward's death.

# Powers and Rights

## A Guardian has the following powers:

- ▶ Consent to medical and/or other care, treatment, or services for the Ward.
- ▶ Apply for and receive money payable to the Ward (if a conservator has not been appointed).
- ▶ Take custody of the Ward or to establish the Ward's custodial dwelling within Colorado.
- ▶ Commence a proceeding to compel a person to support the Ward or pay money for the benefit of a Ward (if a conservator has not been appointed).
- ▶ If reasonable under the circumstances, delegate to the Ward certain responsibilities for the Ward's well-being
- ▶ Consent to adoption or marriage of the Ward.
- ▶ May petition the court for authority to pursue a dissolution of marriage or legal separation on behalf of the Ward.

## A Guardian has the following rights:

- ▶ Receive reasonable compensation for services as Guardian, but only as approved by the court (unless a conservator who is not the Guardian has been appointed)
- ▶ Reimbursement for room & board provided to the Ward by the Guardian or by one who is affiliated with the Guardian, but only as approved by the court
- ▶ Guardian need not use own personal funds for the Ward's expenses
- ▶ Guardian is not liable to a third person for acts of the Ward solely by reason of the relationship
- ▶ Guardian who exercises reasonable care in choosing a medical provider for the Ward is not liable for injury to the Ward resulting from negligent or wrongful conduct of the medical provider

# Limitations

**A Guardian has the following limitations and restrictions:**

- ▶ The court shall consider less restrictive means of providing the necessary protective services for the Ward.
- ▶ The court shall consider the wishes of the alleged incapacitated person concerning her care, treatment, counsel, and supervision. The court shall consider the person's views concerning selection of the Guardian, Guardian's duties, scope of guardianship, & any limitations imposed on the powers of the Guardian
- ▶ The court may set limitations of the Guardian's powers & duties (limited guardianship) including extent to which a Guardian shall be permitted to give any consents or approvals that may be necessary to enable the Ward to receive medical or other professional care.
- ▶ Without authorization of the court, a Guardian may not revoke the Ward's medical POA. If the medical POA is in effect, and absent a court order to the contrary, a health-care decision of the agent takes precedence over that of a Guardian.
- ▶ A Guardian may not initiate commitment of a Ward to a mental health-care institution for involuntary civil commitment, may not seek hospital or institutional care and treatment for mental illness, may not obtain care and treatment from an approved service agency for a Ward with developmental disabilities, and may not obtain care and treatment for alcoholism or substance abuse using the guardianship. In these circumstances, the Guardian must comply with the Colorado law which governs these medical conditions.

# When to file for Guardianship?

- ▶ If Guardianship is the correct path for your child with special needs, contact an attorney about 6–8 weeks before his/her 18<sup>th</sup> birthday.
- ▶ Allows time for the attorney and your family to consult, complete the documents, file with the court, & schedule the court hearing just after the Ward turns 18.
  - Each county has different local rules. A few counties in Colorado will not accept the initial guardianship filings until potential Ward has turned 18.

# Appointment Process

- ▶ In the district court of the county in which potential Ward (Respondent) lives, file the following forms:
  - 1. Petition for Appointment
    - Contact info for Petitioner and Respondent, Respondent's potential living arrangements, description of alleged incapacity, authority requested, and description of Respondent's assets/income
    - Physician or other professional evaluation of Respondent's impairment (physician letter)
  - 2. Acceptance of Office
    - Disclose any court involvement (convictions, restraining orders, civil judgments against, etc.)

# Appointment Process cont.,

- Name-based criminal history check
- Current credit report
- Copy of driver's license
- 3. Irrevocable Power of Attorney
  - If nominated Guardian lives out-of-state
- 4. Proposed Order of Appointment
  - Consider appropriate restrictions and authority
- 5. Proposed Letters of Guardianship
  - Indicates appointment has been made and any limitations
  - Serves as proof of legal authority

# Appointment Process cont.,

- ▶ The Court Visitor:
  - Appointed by the court
  - Personally interview the Respondent, Petitioner, and nominated Guardian and provide the court with a report summarizing their recommendations
  - Court Visitor fulfills many requirements during visit and in report—will advise the Respondent of his or her rights and nature of proceedings
  - Petitioner is responsible for paying for the Court Visitor—either hourly or flat fee, varies by county

# Appointment Process cont.,

## ▶ Due Process—Notice:

- Notice of Hearing served on Respondent and Interested Persons
- Notice must include: statement that Respondent must be present unless excused by the court; informs Respondent of his or her rights at the hearing; and description of the nature, purpose, and consequences of an appointment
- Respondent must be personally served the Notice of Hearing and all pertinent documents
- “Interested Persons” must be served (via mail or e-service is fine) the Notice of Hearing and pertinent documents

# “Interested Persons”

- ▶ Individuals “interested in the individual’s welfare” and those required to be named in the Petition:
  - Respondent’s spouse, adult children, and parents (if none, at least one adult nearest in kinship who can be found with reasonable efforts);
  - Caregiver(s) (including treating physician);
  - Legal representative(s);
  - Persons nominated by the respondent (if age twelve (12) or older);
  - Any person alleged to have had primary care and custody of a minor in the sixty (60) days before the filing of the Petition;
  - Each living parent or adult of nearest kinship;
  - Any person appointed by a parent of a minor; and
  - Any currently acting Guardian

# Appointment Process cont.,

- ▶ The Hearing (6–8 weeks after filing Petition):
  - Respondent's Rights
    - Court-appointed counsel
    - Professional evaluation
    - Open or closed proceedings
    - Opportunity to be heard, examine documents, and call witnesses
    - Minor 12+ may consent or object to proposed appointment
  - Opening statement/offer of proof; opportunity to call witnesses
  - Court's guiding principles: least restrictive means and best interests standard

# Appointment Process cont.,

- ▶ The Hearing—the court must find:
  - ▶ Respondent is incapacitated AND Respondent's identified needs cannot be met by a less restrictive means, including the use of appropriate and reasonably available technological assistance

# After Appointment – Guardianship

- ▶ Within 30 days of appointment, Guardian must send Ward and Interested Persons a copy of the Order of Appointment
- ▶ Within 60 days of appointment, initial Guardian's report must be filed with the court and sent to the Ward and those named on Order
  - Condition of the Ward, Guardian's plan for care of Ward, and accounting of Ward's assets and income
- ▶ File annual reports with the court, Ward, and those named on Order
  - Ward's current mental, physical, and social condition; living arrangements; services provided to Ward; Guardian's opinion of adequacy of care; summary of Guardian's visits; the extent of Ward's participation in decision-making; if current care plan is in Ward's best interest; and recommended or requested changes

# What Happens if You Don't File...

- ▶ Your child becomes an adult and has the right to make his or her own decisions
  - ▶ You, as a parent, will no longer have the right to speak on his or her behalf, make his or her decisions, have access to his or her medical/financial records, etc.
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# Risks of Not Obtaining Guardianship

## ▶ Financial Exploitation

- Possible Ward (PW) has a longtime Caregiver (C) & believes C is her friend. C convinces PW to go shopping together as “girlfriends”, where PW buys clothes, flat screen TV, and many other valuable items for C. PW thinks she is just making C happy & being a good friend.
- Bad Actor (BA) meets PW at the mall walking. PW doesn't like current rep payee. Complains to BA. BA says I can help. PW and BA go to Social Security and switch rep payee and tell no one. Two months later, deposits stop to former rep payee.

## ▶ Medical Decisions

- PW has diabetes. She doesn't understand the risks associated with the disease. She doesn't go to the doctor regularly. When she does see the doctor, she doesn't understand the doctor's advice on diet and testing her blood sugar. This results in several trips to the hospital for diabetic emergencies

# Alternatives

## ▶ Power of Attorney

- Adult gives another person the authority to make decisions regarding financial and/or medical issues
- Agent has the authority to do whatever the principal may do except as limited in the POA
- May not override the wishes of the principal
- Principal must have capacity to understand what he/she is signing

## ▶ Supported Decision-Making

- Individuals with disabilities choose people they know and trust to be part of a support network to help with decision-making.
- No legal basis in Colorado law
- Community members may not recognize SDM agreement

# Planning for Disability

Nearly everyone will face some type of disability sometime during their lifetime.

- ▶ One in three Americans will face at least a 90-day disability before reaching age 65.
- ▶ Up to 44% of Americans will face a disability of 2.4 – 4.7 years.
- ▶ 1.3 million+ Americans received long-term home health care services during 2000.  $\frac{3}{4}$  of patients received skilled care. 51% percent needed help with at least one "activity of daily living" (eating, bathing, dressing, or the kind of care needed for a severe cognitive impairment like Alzheimer's disease).
- ▶ The average length of service was 312 days. 70% of in-home patients were 65 years of age or older.
- ▶ The national average length of stay for nursing home residents is 892 days, with over 50% of nursing home residents staying at least one year. Only 18% are discharged in less than three months.

# BEFORE the Onset of Disability or Incompetence...

- ▶ Execute a durable general financial power of attorney.
  - ▶ Execute a durable medical power of attorney.
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# What Happens if You Fail to Execute POAs?

- ▶ Even people who execute POAs end up in situations that require the appointment of a guardian/conservator.
  - If your agent becomes incompetent or disabled
  - If the durable POA or medical POA is not broad enough to handle all situations
  - If the principal becomes incompetent and has been taken advantage of by unscrupulous people. (Common among the developmentally disabled and senior citizens who don't realize that a family member/ friend is taking advantage of them)
- ▶ Not uncommon for a party involved to disagree with the need for a guardian/conservator. Then it becomes an adversarial proceeding which can prolong the matter. The cost of the process then becomes substantial as each party hires attorneys and expert witnesses to present their case.

# Resources

- ▶ **Colorado Revised Statutes – Probate Code**
  - Title 15, Article 14
    - § 15–14–101 through –122: General Provisions
    - § 15–14–301 through –318: Guardianships for Adults
    - § 15–14–401 through –433: Conservatorships for Adults
- ▶ **Colorado Courts Website**
  - Instructions, Forms, and Guardianship Manuals
- ▶ **Colorado Bar Association**

# Thank You!

## ▶ Contact Information

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