

Legal Capacity for All: Including Older Persons in the Shift from Adult Guardianship to Supported Decision-Making

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Key Points

- Guardianship abuse in context of older persons has spurred reform, including SDM
- But, SDM appears to be relatively underutilized by older persons
- Need to address needs of older persons at risk of guardianship if supported decision-making is to truly take hold as alternative

Who is under guardianship in the U.S.?

- Lack of data. Best guess is 1.5 million people under guardianship but could be between 1 - 3 million.
- Case file reviews have suggested that a majority of persons under guardianship are over 65
- *But* data from recent Texas case review showed half of new filings involved person turning 18.

Older persons at risk for guardianship

- Rates of disability increase with age.
 - 35 percent of persons age 65 and over report some type of disability (including hearing, vision, cognition, ambulation, self-care, or independent living difficulty)
 - Rates of Alzheimer's dementia
 - 10 percent of persons age 65 and older have Alzheimer's dementia.
 - Prevalence increases with age
 - 3 percent of people age 65-74,
 - 17 percent of people age 75-84
 - 32 percent of people age 85
- But ... negative stereotypes often presume more severe impairments than older persons actually experience.

Pathways to guardianship for older persons

- Dealing with third parties: Health care, social services or financial institution determines person lacks capacity and requires guardianship in order to provide a service or benefit that the person is otherwise entitled to
 - Sometimes a family member files the petition because it is the only way to help the individual
 - Home being foreclosed upon and older person deemed unable to renegotiate mortgage
 - Sometimes the institutional actor files the petition
 - Nursing home, hospital petitions

Pathways to guardianship

- Person making decisions thought to be harmful and /or irrational
 - Adult protective services/hoarding/eviction
 - Intra-family disputes
 - Adult custody battles
 - Inheritance
 - Hospital discharge planning
 - Elder abuse
 - Under undue influence of another
 - Older person subjected to financial exploitation

Once under
guardianship, little
chance of getting out

...ORDERED
AND
ADJUDGED,
that the
Guardian shall
serve for an
indefinite period
of time



"I'm Petitioning for the Return of My Life

When Phyllis Funke hit bottom, the court appointed a guardian to prop her up. The remedy is like prison, she said. But 'at least in prison you have rights.'"

New York Times, Dec. 7, 2018



Prevalence of guardianship abuse viewed as an elder justice issue, spurring reform



**Guardians of the Elderly: An Ailing System Part I:
Declared 'Legally Dead' by a Troubled System**

FRED BAYLES September 19, 1987

HOW THE ELDERLY LOSE THEIR RIGHTS

*Guardians can sell the assets and control the
lives of senior citizens without their consent
—and reap a profit from it.*

By Rachel Aviv

SDM statutory reform framed as applying to older persons



- Texas SDM statute passed in wake of guardianship scandal
- Pitched to courts as way of avoiding burden of “Silver Tsunami”

How is SDM faring as alternative to guardianship for older persons?

- How much has SDM been used by older persons in the jurisdictions in which it has been formally recognized?
- To the extent that SDM has been relatively underutilized by older persons, why is that the case?
- What advantages would the availability of SDM offer older persons?
- What to do about the really hard cases such as those involving persons with advanced dementia?
- What are the concerns about abuse?

How much has SDM been used by older persons in the jurisdictions in which it has been recognized by statute?

- Little data but mixed reports.
- General perception is that British Columbia representation agreements not used much by older adults.
 - But study of 989 representation agreements over 3 ½ year period shows 40 percent executed by persons aged 70-99
 - Canadian Centre for Study of Elder Law qualitative report on SDM in BC and four other provinces says experts report limited use by older persons. When used, primarily used as stopgap measure until substitute decision-making put in place.
- Implementation of Texas SDM law aimed at younger population transitioning out of special ed.
- Pilots: Have included older persons but have not focused on older population

What accounts for relative underutilization?

Roots of SDM in independent living movement

Messaging has been more aimed at promoting newfound independence for younger persons with intellectual and developmental disabilities.

Also aimed at building decision-making skills over time.

These are not really resonant for older adults.

What accounts for relative underutilization?

Possible reasons

- Older adults more isolated
- Difference in who might otherwise petition for guardianship (adult children vs. parents) and their interest in promoting independence
- Decisions involve higher financial stakes

BUT....

- Younger persons who were previously institutionalized have developed circles of support, used SDM.
- Question of preserving independence rather than promoting it
- Many older persons under guardianship have low income, assets

What accounts for relative underutilization?

Possible reasons

- Powers of attorney quicker, more efficient for managing affairs.
- Lack of movement embracing ideas of personhood and autonomy.

BUT....

- Just as true for younger adults.
- Widespread concern among older persons about preserving their independence.

Potential Benefits to Older Adults

- Preserving autonomy
- Changing and reducing incapacity determinations
 - ABA Resolution, model guardianship statute call on states to consider SDM as an alternative before imposing guardianship
- Giving third-party gatekeepers a legally enforceable decision without need to resort to guardianship
- Restoration of rights when supports put in place

Looming Questions - Abuse and Undue Influence

Compared to what? Important to recognize that abuse and financial exploitation exist both within guardianship and outside of it.

- Guardianship itself can be abusive
 - Even when not abusive, can deplete person's assets
- Inadequate monitoring of guardianships by courts in many states. Almost no monitoring of personal needs.
- Once under guardianship, very hard to dispute actions taken by guardian

Looming Questions – Guarding Against Abuse and Undue Influence

Measures built in to various SDM statutes and pilots

- Voluntariness
- Eliminating Conflicts of Interest
- Accountability
 - More than one supporter
 - Monitors
 - Facilitators
- Education and Training of SDM Participants
- Responsibilities and Fiduciary Duties of the Supporter
- Recordkeeping
- Reporting and administrative oversight

Finding alternative means for preventing and redressing abuse

- Common law remedies
- Consumer protection statutes
- Elder abuse statutes
- Preventative measures put in place by financial institutions
 - Alerts
 - Extra eyes on accounts
 - Immunization from liability for reporting suspicious transactions

Looming Questions - Hardest Cases

- What happens when a person can no longer communicate their will and preferences?
- Could SDM work for persons with moderate to advanced dementia?

Looking Ahead

- Pilots focused on older persons
 - Including “unbefriended elderly”
- Guardianship diversion
 - Distinguishing casework needs from decision-making challenges
 - ABA’s PRACTICAL tool
- Education aimed at older population and service providers
- Taking aim at indefinite duration
- More restoration cases