Guardianship and Advance Directives
THE LAW OF SURROGATE DECISION MAKING IN ILLINOIS

Presenter:
Amy E. McCarty

2010 NASW Illinois Virtual Symposium on Ethics
September 14, 2010
Patient Self-Determination Act of 1990

Effective December 1, 1991, every adult patient admitted to a hospital must be asked whether they have signed an advance directive under the federal Patient Self-Determination Act of 1990 (Public Law 101-508).

State must promulgate description

The Act requires that each state develop a written description of the law in that state concerning advance directives.
Patient Self-Determination Act of 1990 (CON’T)

- Information must be provided to every patient admitted.
  - Every health care provider is required to give that information to each patient admitted to the facility, in addition to any written hospital policies concerning patients' rights to formulate advance directives.

- Documentation
  - Every provider must document whether or not a patient has signed an advance directive.
Durable Powers of Attorney

General

- Definitions
  - Agent
  - Principal

- Who can execute?
  - Must have legal capacity
  - Must have clinical capacity

- When effective

- Revocation
Powers of Attorney for Health Care
- Scope of powers
- Medical wishes checklist

Powers of Attorney for Property
- Scope of powers
- Must be notarized
Durable Powers of Attorney (con’t)

<table>
<thead>
<tr>
<th>Advantages of Powers of Attorney as a Decision-Making Tool</th>
<th>Disadvantages of Powers of Attorney as a Decision-Making Tool</th>
</tr>
</thead>
<tbody>
<tr>
<td>Easy to execute</td>
<td>Easy to execute</td>
</tr>
<tr>
<td>Quick</td>
<td>Quick</td>
</tr>
<tr>
<td>Powerful</td>
<td>Powerful</td>
</tr>
<tr>
<td>Inexpensive</td>
<td>Easily revoked</td>
</tr>
<tr>
<td>&quot;Durable&quot;</td>
<td>Easy to take advantage of &quot;disabled&quot; or clinically incompetent person</td>
</tr>
</tbody>
</table>
Durable Powers of Attorney (con’t)

Checklist for Durable Powers of Attorney

- Properly executed?
  - Signed
  - Dated
  - Witnessed (health care POA only)
  - Notarized (property POA only)

- Effective, unrevoked?
- Any limits on power, authority?

Powers of Attorneys from Other States
Mental Health Treatment Preference Declaration Act 755 ILCS 43 et. seq.

Definitions

- “Attorney-in-fact”
- “Incapable”
  - two physicians or the court
  - ability to receive and evaluate information
- Mental health treatment
  - ECT
  - treatment with psychotropic medication
  - admission and retention to mental health facility not to exceed seventeen (17) days

Declaration

- adult; sound mind
- may be invoked for up to three (3) years
- continues in effect as long as in effect or until the attorney-in-fact has withdrawn
- can remain in effect until the principal is no longer incapable
Agent makes decision only when the principal is incapable

Signature of principal
And two (2) competent adult witnesses

Operation of Declaration

- Delivered to principals’ attending M.D.
- Valid until revoked or expired
Mental Health Treatment Preference Declaration
Act 755 ILCS 43 et. seq. (CON’T)

Authority of attorney-in-fact
- principal has to be incapable
- not guarantor of payment
- right to receive, review, and consent to disclosure of medical records
- act using "substituted judgment" or, if not known, "best interest"

Declaration should become part of the medical record

Principal’s wishes must be followed unless
- Court order
- Emergency endangering life or health
Mental Health Treatment Preference Declaration
Act 755 ILCS 43 et. seq. (CON’T)

**Revocation**
- May be revoked at anytime by the Principal
  IF PRINCIPAL IS NOT INCAPABLE

**Physicians can rely on declaration**

**Restrictions on who may serve**
- attending physician
- mental health service provider
- employee of the physician or provider (if unrelated to patient)
- owner, operator, or employee of a health care facility
GUARDIANSHIP FOR DISABLED ADULTS

Disabled Person Defined (Illinois Probate Act, § 11a-2)

- Not fully able to manage person or estate
- Spends or wastes his or her estate to expose family to want or suffering

Power To Appoint Guardian (Illinois Probate Act, § 11a-3)

- Lacks understanding or capacity to make or communicate responsible decisions
- Unable to manage estate or financial affairs
- Only as necessary
- Requires Petitioner (person seeking the appointment) to make reasonable steps to notify all close relatives and any AGENTS under Powers of Attorney
GUARDIANSHIP FOR DISABLED ADULTS (CON’T)

The Physician's Report
- The form
- Using the "magic language"
- The role of the social services provider -- Requires a functional assessment to be included in the doctor’s report. Guardian or proposed Guardian does not need explicit court permission to have access to CCP.211 doctors report

Types Of Guardianships
- Temporary (Illinois Probate Act, § 11a-4)
- Guardian of Person (Illinois Probate Act, § 11a-12(b))
- Guardian of Estate (Illinois Probate Act, § 11a-12(b))
- Guardian of Person and Estate (Illinois Probate Act, § 11a-12(b))
- Limited Guardian (Illinois Probate Act, § 11a-12(c))
Who May Act As Guardian  (Illinois Probate Act, par. 11a-5(a))

- 18 years of age, resident of U.S.
- Is of sound mind
- Has not been adjudicated a disabled person by a court
- Is capable of providing an active and suitable program of guardianship for the disabled person and has not been convicted of a felony.
  - In some cases, the court may still appoint a convicted felon as the guardian if it determines it is in the best interest of the patient, unless the felony involved harm or threat to a child, an elderly person or a disabled person, including a felony sexual offense. If the person has been convicted of a felony, s/he will have to disclose certain information about the felony record to the court.

- Statutory Hierarchy (755 ILCS § 5/9-3): spouse; legatees; children; grandchildren; parents; siblings; nearest kin.
- Statutory Hierarchy not rigidly followed
  - *In Re Estate of Johnson*, 303 Ill. App. 3d 696, (1st Dist. 1999)
Who May Act As Guardian (con’t)

Public Agency (Illinois Probate Act, § 11a-5(b))

- Office of State Guardian -- when no other suitable and willing person is available to serve as guardian and less than $25,000
- Office of Public Guardian -- when no other suitable and willing person is available and there is more than $25,000 in assets

Not for Profit (Illinois Probate Act, § 11a-5(b))

Banks and Trust Companies Guardian of the Estate (Illinois Probate Act, § 11a-5(c))
Effect Of The Appointment Of Guardian

"A Disabled Person"

Capacity to Contract, Vote, Drive A Car, Marry, Divorce, Etc....

- Marriage/Divorce
  - *In re Marriage of Drews*, 115 Ill.2d 201 (Ill. 1986)
  - *In re Marriage of Burgess*, 725 N.E.2d 1266 (Ill. 2000)

- Reproductive issues
  - *In re Estate of D.W.*, 134 Ill.App.3d (1st Dist., 1985)
Effect Of The Appointment Of Guardian (con’t)

- Visitation
  - *Struck v. Cook County Public Guardian*, 387 Ill.App.3d 867 (1st Dist., 2008)

- Testifying in court

- Conducting Estate Planning – Will, Trust, etc.
  - Person must know objects of his/her bounty; and
  - able to comprehend the kind and character of his/her property and
  - able to make disposition of his/her property according to some plan formed in his/her mind.

- Motor voter law and registering to vote
Areas Where Guardian **DOES NOT** Have Authority Without Further Court Intervention

**Admission to Mental Health Facilities**


**Right to Refuse Medication** *(S.H.A. 405 ILCS 1992 5/2-107)* also see *(S.H.A. 405 ILCS 1992 5/2-107.1)*

- Note: Guardian may consent to Psychotropic Medication for "non-objecting" ward.
- What does it mean to be “non-objecting”?
Areas Where Guardian DOES NOT Have Authority Without Further Court Intervention (CON’T)

- The provisions of 2-107 with respect to the emergency administration of “authorized involuntary treatment” (psychotropic medication and ECT) DO NOT APPLY to facilities LICENSED under the NURSING HOME CARE ACT. Consequently, there is the option to use psychotropic medications or ECT on an emergency basis in a nursing home. [5/2-107(f)]

Right to Consent to ECT - Unusual, Hazardous, or Experimental Activities (S.H.A. 405 ILCS 1992 5/2 – 110)

- Note: Guardian may consent to the use of ECT for “non-objecting ward”
Areas Where Guardian **DOES NOT** Have Authority Without Further Court Intervention (CON’T)

**Admission to residential facilities** *(S.H.A. 755 ILCS 5/11a-14.1 1997)*

- Note: Public Guardians and Office of the State Guardian no longer need prior court approval.
- *Muellner* issues
- New legislation in Mental Health Code

**Consent to Do Not Resuscitate (DNR) orders**

- Note: Use of Health Care Surrogate Act
## Advantages Of Guardianship

### Person
- Protection for disabled person
- Access to medical records
- Participation in treatment/habilitation planning
- "Perceived power"
- Advocacy
- Planning

### Estate
- Protection from exploitation
- Management of estate assets
- Conserve the estate
<table>
<thead>
<tr>
<th>Person</th>
<th>Estate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Problems with the mentally ill ward, i.e., medication, ECT, admission to mental hospital, residential placement</td>
<td>Expenses associated with guardianship of estate</td>
</tr>
<tr>
<td>Lack of enforcement powers under the Illinois Probate Act</td>
<td>Time commitment of guardian (if individual)</td>
</tr>
<tr>
<td>- nursing home admissions</td>
<td></td>
</tr>
<tr>
<td>- mental health admissions</td>
<td></td>
</tr>
<tr>
<td>- medication over the objection of ward</td>
<td></td>
</tr>
<tr>
<td>- consent to administration of ECT</td>
<td></td>
</tr>
<tr>
<td>- consent to DNR</td>
<td></td>
</tr>
</tbody>
</table>
Practical Considerations

Timing
- Necessary Guardianship Information CCP- 211
- Court Hearings

GAL Appointment
- What is their role?
- What must they do?

Temporary Guardianship
- Order – only that specific authority granted by the court
- Temporary Order cannot last more than 60 days