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**Least Restrictive Alternative, Limited Guardianship &
A Person's Autonomy: Trends in the US
In the 21st Century**

"Statute De Praerogativa Regis"

- The King shall provide, when any, that beforetime hath had his wit and memory happen to fail of his wit, as there are many, that their lands and tenements shall be safely kept without waste and destruction and that they and their households shall live and be maintained competently with the profits of the same. And the residue besides their sustenance shall be kept to their use, to be delivered unto them when they come to right mind, so that such lands and tenements shall in wise be alienated; and the king shall take nothing to his own use.
- Origins of modern guardianship - "Parens Patriae"

Introduction

- Late 1980s in U.S.--shift in thinking about guardianship; focus on functional capacity.
- Two concepts emerged—least restrictive alternative & limited guardianship.

Introduction

- Once court determines person needs assistance, use limited guardianship & plenary guardianship as last resort when limited guardianship not sufficient to meet person's needs.
- 1997-UGPPA adopted; provides for less restrictive alternatives & limited guardianships.

Introduction

- To determine no least restrictive alternatives to meet person's needs or create limited guardianship, court needs evidence about person's abilities, needs, physical health & cognitive abilities.
- 10+ years since Uniform Guardianship and Protective Proceedings Act.

UGPPA

- Catalyst for 1997 Act--movement in the U.S. to “modernize” guardianship law as a result of developments:
 - Press reported on stories of abuses of guardianship system,
 - State reforms, and
 - 2 year study-ABA Senior Lawyers Division Task Force on guardianship reform.

UGPPA

- Significant policy reasons for using least restrictive alternatives & limited guardianships:
 - limiting intrusion into autonomy, tailoring help to the individual's needs, & preserving as much of the individual's autonomy as possible.
- Guardianships can and do have drastic, negative impact on person while intending to provide help to meet person's needs.

UGPPA

- UGPPA Functional approach definition of incapacitated person:
 - someone who is unable to receive & evaluate information or make or communicate decisions to such extent individual lacks ability to meet essential requirements for physical health, safety, or self-care, even with appropriate technological assistance
- Definition
 - emphasizes importance of functional assessment & recognizes more appropriate measure is abilities.
 - works with least restrictive alternative & limited guardianship.

UGPPA

- Limited guardianship emphasized.
 - Courts tailor guardianship to fit needs of person &
 - Only remove those rights person no longer exercise or manage.
 - If unlimited guardianship requested, explain why no limited guardianship.
- When appointing guardian, court find by clear & convincing evidence, person incapacitated and needs not met by least restrictive alternative including technological assistance

UGPPA

- 6 states + U.S. Virgin Islands adopted.
- Other states have own provisions.
- These 2 provisions protect autonomy & individual rights.
- The goal of guardianship: to protect person and provide assistance; reality loss of many rights.
- Balance help with autonomy & dignity.

Currently in US

- Ongoing state statutory reform--to provide or improve due process protections or respond to developing issues
 - Example-UGPPJA (jurisdiction)
- How well do statutes achieve intended policies & purposes?
- Is there disconnect between Act & implementation?

Currently in US

- Consider change in definition-focus on person's abilities as opposed to some prior criteria.
- Some may argue vs. use of limited guardianship but any objections can be overcome.
- Importance of impact on person—limited guardianship can preserve some autonomy, dignity, self-worth and have less negative impact on person.

Currently in US

- Although many use functional approach, other ways of assessing capacity
- Typically combination of 3 components
 - Causal – diagnostic
 - Cognitive
 - Functional
- All require connection - risk of harm
- Increasing tension between family members with disputes over who should be guardian, etc.

Current Time

- Case Studies
- Small study shows correlation between reform and better practices, including use of least restrictive alternatives.
- Linkage of quality to oversight.
- Advance planning documents may be least restrictive alternative but may not always prevent finding of incapacity or guardianship

Efforts to Improve

- Oversight, such as monitoring guardianships
- Mediation for disputes
- Emphasis on planning for incapacity
- However, alternatives/planning devices may carry own risks or disadvantages

Issues for Future

- U.S. “baby boomers” turning 65 starting 2011.
- 65 significant number as far as age in U.S., viewed by some as threshold for “old age”.
- Baby boomers--extremely large segment of U.S. population:
 - size alone caused researchers & policymakers to question ability of government and providers to provide services & supports traditionally provided to America’s elders.
 - Important to think about impact boomers will have on court system & particularly, guardianship system in U.S.

Issues for Future

- Consider the impact of dementia on this group.
- Some studies--prediction-significant percentage of individuals age 85--some symptoms of dementia.
- In next 20 years, prediction of 50% increase in Americans 65 & over with Alzheimer's disease from today.
- Number of baby boomers + increase in longevity & increase risk of developing dementia.
- That leads to potential for increasing number of U.S. elders with diminished capacity.

Issues for Future

- For those who have not done advance planning &/or have no family caregivers, will that mean an increasing need for guardianships?
- What about impact on courts and legal system?
 - Court budgets?
 - Need for more personnel or resources.
- More education for judges on least restrictive alternative, limited guardianship and oversight.
- If it takes more time and resources for this, it is no less important—deprivation of rights and liberties is profound.

Issues for Future

- Consider any correlation between elder abuse and guardianship.
- Elder abuse cases on increase?
 - Statistics appear to support increase.
- Need data on whether elder abuse is the catalyst for guardianships.
 - Limited research but there appears to be correlation.
 - Studying this may allow for creation of new interventions within and outside of the courts.

Issues for Future

- Need more study, especially more empirical work & increased oversight of existing cases, through guardianship monitoring & other devices.
- Study whether there is a need further reform to UGPPA or individual state statutes on least restrictive alternative and limited guardianship.
- More education on importance of implementation of least restrictive alternative & limited guardianship.

Issues for Future

- Consideration and/or study correlation between elder abuse & initiation of incapacity/guardianship process.
 - Data crucial, since both are likely to grow &
 - We need to be more informed in order to craft better responses.

Conclusion

- Least restrictive alternative and limited guardianship are key to preserving autonomy, independence and dignity while providing needed assistance.
- Changes to statutes, UGPPJA, monitoring, etc. are helpful.
- Further research, study and data collection are critical.

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