



GUARDIANSHIP AND ITS IMPACT ON A LIFE CARE PLAN

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Life care plans are essential tools that provide roadmaps for individuals facing challenges due to injuries or enduring conditions that impact their capacity to thrive (Weed & Berens, 2009). The foremost component of these complex plans is individualization designed to meet the person's needs in accordance with their abilities. Injuries and conditions come in a wide variety of presentations with no two situations alike. Many of the circumstances are catastrophic in nature and it is not uncommon for the issue of mental capacity to come into play. Traumatic brain injuries, developmental disabilities, and anoxic events are just a few conditions that can impact cognitive functioning and processing skills. Those affected by cognitive dysfunction may need lifelong assistance with decision-making to protect them, guide and help them through life events, and allow them live to their fullest potential.

The life care planner must have a working knowledge of guardianship

to appropriately identify clients who may need decisional capacity support. Additionally, the life care planner must understand the qualifications, responsibilities, and duties of the guardian(s); such as case coordinators and financial managers; to integrate the economic factors and avoid duplication of those services within the plan. Therefore, the aim of this article is for the life care planner to become familiar with various aspects of guardianship including: criteria for guardianship, types of guardianships, standards of practice and ethical considerations, and the costs associated with guardianship.

What is Guardianship and When is it Needed?

Freedom of choice and personal rights are a foundation of this country. In the United States, the question of competency is a legal one, and *all* adults are considered competent until adjudicated otherwise (Leo, 1999). For example, even children born with profound mental disabilities must go

through the guardianship process when they become of legal age to have an alternate decision-maker. In the United States, removing the rights of an individual is done with due process, as guardianship limits a person's rights to make choices for one's self. The National Guardianship Association (NGA) describes guardianship succinctly in the following passage:

"Guardianship, also, referred to as conservatorship, is a legal process, utilized when a person can no longer make or communicate safe or sound decisions about his/her person and/or property or has become susceptible to fraud or undue influence. Because establishing a guardianship may remove considerable rights from an individual, it should only be considered after alternatives to guardianship have proven ineffective or are unavailable" (NGA, n.d., para. 1).

A guardian is appointed and supervised by the court. The court must be provided evidence and find

that the person or proposed ward is not competent. The evidence usually consists of a medical doctor's report that indicates an exam took place and determined the person is no longer able to understand options and make decisions. The capacity to manage one's affairs can be influenced by mental deterioration, illness, physical incapacity, developmental disability, chronic intoxication, or addictions such as gambling (Jacobson, 2013). Alternatives to guardianship such as case management, powers of attorney, and representative payee should be considered first as they do not result in the same rights restrictions as guardianship (NGA, 2013). For instance, a person under guardianship may not enter into contracts such as leases, credit cards, consent for medical procedures, or marriage.

People are individuals and courts are respectful of this. Guardianships are viewed on a sliding scale or spectrum, rather than seeing the persons in a clear-cut, black and white context. The cognitive skill set for managing functions of the person's life can be different from person to person. For instance, a ward may have the ability to make medical and social decisions, but the same person may be unable to manage the complexities of a \$15,000,000 settlement. Therefore, guardianships are always divided into two parts: guardian of the person and guardian of the estate.

Additionally, there are many types of guardianships. It is up to the courts to determine which are most appropriate for the person after reviewing the evidence. Types of guardianships include:

- Temporary: used in emergency situations and lasting no more than 60 days;
- Plenary of the person: the guardian has broad ability to make decisions concerning the person; and
- Plenary of the estate: the guardian has broad ability concerning property and financial matters (Jacobson, 2013).

The court also has the role of overseeing the guardianship. Therefore, the court requires plans and reports from both the guardian of the person and guardian of estate. The guardian is always accountable to the court and must seek guidance when the circumstances require oversight. For instance, the guardian of the person needs court approval for electroshock therapy or sterilization. Additionally, the guardian of the estate is not allowed to invest nor disperse the assets without presenting a plan to the court (NGA, 2013, p. 18).

The goal of the court is to protect an individual and the person's estate while maximizing the ward's ability driven participation. Hence, the court is also responsible for evaluating changing circumstances. For example, has the ward improved to the point that the guardianship needs to be adjusted to restore some or all the rights of the individual?

Standards of Practice and Ethical Considerations

Types of Guardians

Family and friends frequently choose to petition to be the guardian for their loved one. These types of guardians are considered non-professional and usually do not charge for their services because the services are commonly viewed as a component of the personal relationship with the ward. Professional guardians are third-party entities or persons that are not related to the individual, such as a corporate, not-for-profit, or state entity. They charge fees to the estate, which must be an economic consideration in the life care plan.

The court will appoint the best guardian to act in the ward's interest, regardless of any familial relationship. Guardianship petitions are state specific, and contain questions related to age, legal status, felony convictions and other items concerning competence of the petitioner to act in the role as guardian. Illinois, as an example, outlines that a guardian must be at least 18 years old, mentally sound,

a legal resident of the United States, and must disclose felony convictions (Illinois Legal Aid Online, 2018).

Laws and the standards of practice apply to both professional and non-professional guardians. The guardian performs duties and fulfills obligations in accordance with current state and federal law governing guardianships.

"The National Guardianship Association (NGA) supports and encourages the adoption and/or use of the NGA Standards of Practice (Practice Standards) and Standards of Practice for Agency and Programs Providing Guardianship Services (Agency Standards) by professional organizations, guardianship agencies and programs, guardianship associations, legislatures, courts or any other entity desirous of bringing excellence to the practice of guardianship" (NGA, 2016, p. 1).

To provide uniformity in executing duties as a guardian, there is a nationwide push for all guardians – professional and non-professional – to be certified (Center for Guardianship Certification [CGC], n.d.). There are two levels of certification: National Certified Guardian and National Master Guardian (CGC, n.d.). These certifications are knowledge and experience-driven processes that requires the person to pass a test for initial certification and continuing education for certification renewal.

Plan of Care Development

The guardian of the person is entrusted to treat each person as an individual and create a person-centered plan of care. The guardian of the person serves as the plan developer and coordinator, which encompasses the duty to consult with appropriate professionals to develop a comprehensive plan. If the case warrants, the guardian may consult with the treating physicians, therapists, educators, nurse case managers, and nutritionists to name a few. The NGA standards do not specifically address consulting with case management services but do encourage medical second opinions (NGA, 2013, p. 4-33).

Professional guardians of the person are compensated for their services and as a general practice do not request the additional expense of external case managers for more than consultation. NGA standard 22 specifically states, "The guardian shall bear in mind at all times the responsibility to conserve the person's estate when making decisions regarding providing guardianship services and charging fees for those services" (NGA, 2013, p. 23).

There are exceptions to this. The court must assess the level of care the individual needs and the guardian's ability to manage that care. The professional and non-professional guardians have the same responsibility of justifying all expenditures in behalf of the ward. The court ultimately oversees all expenditures and is diligent in preserving the assets for future needs and avoids replication of service.

For example, in a case where the mother was the non-professional guardian of her daughter and had some developmental challenges of her own, the court approved a case manager to assist in coordinating the health care of her daughter.

Another example was the case of a 50-year-old male with a traumatic brain injury from a bicycle accident whose wife was appointed as guardian of the person. The entire family was from Mexico with Spanish as their only language and an unretractable fear of any health care system. The judge approved a case manager to assist the wife with coordination of care, attending doctor's appointments, and managing durable medical equipment.

The guardian of the person charges the estate fees for developing and coordinating the plan of care and must justify all expenditures. The judge—as an agent of the court—has the role of approving the guardian of the person, the fee schedule, and their proposed plan of care. The cause for the adjudication of disability is considered when a guardian is chosen. The judge appoints the guardian who is qualified as having the proper skill set to manage the wellbeing of the ward in a fiduciarily

responsible manner.

For instance, if the ward has a severe mental health challenge, the judge will encourage the parties to petition for a mental health professional as guardian. If there are medical complexities, the judge will gravitate toward a nurse, physician, rehabilitation specialist, or clinical social worker to act as guardian. If the judge feels a guardian is not performing in the role of developing a person-centered care plan for a specific individual, the judge—as an agent of the court—may direct that a substitute guardian is found.

The court has a role of preserving assets for future needs of the ward and is always on the alert for duplication of services. The guardian of the person may request a case manager to be approved by the court. However, since there cannot be two parties charging for coordination of care, the professional guardian accordingly reduces the time and associated costs for this service.

For example, a Public Guardian was named guardian of the estate and person. He was a lawyer with no health care background and his ward had uncontrolled back pain. With court approval, he hired a professional case manager to manage the care plan and did not charge any coordination fees for guardian of the person.

Values and Choices Consideration

It is important for the life care planner to understand that decisions made by the guardian of person or estate are not made on economics and care alone. Inclusion and adherence to incorporating the ward's values and choices are required decision-making standards (NGA, 2013, pp. 7-8).

An example of this is a 99-year-old ward with a \$9,000,000 estate who wanted to live at home regardless of the cost. She emphatically stated to the court that she did not want to preserve the assets for her daughter. Instead, she wanted to utilize all services that would allow her to remain in her home, providing for her comfort and health. The ward also expressed that she did not want her

daughter as her guardian, as she feared her daughter would not follow or carry out her wishes.

The ward's home-based care was complex and expensive, much costlier than a nursing home placement. The daughter's repeated attempts to place her in the nursing home were rejected by the guardian who was supported by the court and the ward's medical team. The guardian was obliged to execute decisions based on the premise of doing what the ward would decide if she was able to do so. It is important to note that the guardian in this case was being true to the ward's wishes that she had expressed throughout her life.

According to the NGA's *Standards of Practice* (2013), substituted judgement is "the principle of decision making that requires implementation of the course of action that comports with the individual person's known wishes expressed before incapacity, provided the individual was once capable of developing views relevant to the matter at issue and reliable evidence of those views remains" (p. 30). The only time the guardian should invoke a different standard is when the ward's personal choice could put the person or the estate at risk.

For instance, in the prior example, if the care provided in the home was not adequate to meet her health needs, the guardian would be faced with a different challenge. The principle of best interest; part IV of the NGA's seventh standard of practice; would then be invoked to override a personal choice by the ward (NGA, 2013, p. 8).

State jurisdictions are very clear that the principle of least restrictive environment or least intrusive measure is followed for all wards (Georgia Council on Developmental Disabilities, n.d.; Missouri Protection & Advocacy Services, 2004; Montana Department of Public Health & Human Services, n.d.; Wisconsin Department of Health Services, 2011; Wyoming Department of Health, 2014). It is the guardian's duty to ensure the ward is residing in the least restrictive environment that meets the person's needs whenever possible.

The issue is not just one of economics, considering only the expenses related to placement; but is also the issue of ensuring the individual's freedoms, a sense of purpose, and quality of life. One must look at each situation to determine what the least restricted environment measure would be for the ward.

For example, a person with developmental disability or traumatic brain injury may have more freedom in a group home than a skilled nursing facility. In such an environment, the person can live more independently in a home-like environment and participate in day training or programming workshops that may not be available in other settings. The least restrictive environment concept is foundational across disciplines and should be taken into consideration when creating or reviewing life care plans (International Association of Rehabilitation Professionals, 2015; Nursing Home Care Act, n.d.).

Guardianship is State Specific

Guardianships are managed by the state courts. If a person is under a guardianship the plan should be congruent with the state specific requirements. For example, states can differ in the requirements and process to deem a person incapacitated that requires a guardian and the process of obtaining guardianship. The National Guardianship Society has always been concerned about the mobility of our society and to not put an undue burden and expense on the wards and their family when they want to change locations, particularly across state lines.

The Adult Guardianship and Protective Proceedings Jurisdiction Act (Uniform Law Commission, 2007) is designed to address "the issue of jurisdiction over adult guardianships, conservatorships and other protective proceedings, providing a mechanism for resolving multi-state jurisdictional disputes. The goal is that only one state will have jurisdiction at any one time" (Uniform Law Commission, 2017, para.

1). Although it is recommended that all 50 states adopt this legislation, the five states that have not yet enacted the Act are: Wisconsin, Texas, Florida, Kansas, and Michigan (Uniform Law Commission, 2017). The life care planner should use diligence when researching the state-specific rules in these states.

Guardianship Costs in a Life Care Plan

Guardianship adds additional costs for professional time to manage and care for a person with disabilities. Since it is the life care planner's responsibility to incorporate and factor the costs of services over a lifetime, when applicable, the costs of guardianship also need to be included in the plan. It is important to consider all aspects of a guardianship including initial and ongoing court costs, attorney fees, and the guardian fees.

Legal Representation Fees

Guardians, both non-professional and professional, have the right to legal representation paid for by the estate. If the guardian of the person and the guardian of the estate are separate entities, they have the right to have separate representation. However, they will use the same counsel if there are no conflicts to preserve costs. The life care planner should examine local costs for attorneys and professional guardianship fees. Since fees vary from county to county, it is prudent to research costs in the county where the individual resides.

Guardian of the Estate

Fee Structure Options

The guardian of the estate is responsible for mapping out the resources and structuring expenditures to last the lifetime for the ward. The guardian of the estate is also responsible for property/asset management and for paying bills. A family member may be appointed in this capacity, but the court usually insists on the family member hiring a financial planner to assist in managing the estate and to provide professional reporting. This could be a financial

planning organization or a bank trust department.

The costs of hiring such experts to assist the appointed family member do not vary significantly from directly appointing these entities to be the guardian of the estate. If a professional service is appointed in the guardian of the estate role, it is critical to avoid duplication of services. The planner should be aware of the qualifications of the guardian of the estate to evaluate if a professional financial planner is needed as an additional cost item.

For instance, the guardian of the estate could be an attorney who performs legal work and manages the funds and usually engages a financial planner for investment advice at an additional cost to the estate. Alternatively, banks that serve as guardian of the estate usually have a package price that includes both the financial advising and fund management but hires attorneys for the court costs and filings at an additional cost. Regardless of whether the guardian of the estate is an attorney or a bank, the sum of legal and financial management fees should be similar.

Managing the estate is much more straightforward than managing the person. Whether the family member assumes the role and hires a professional case manager or if the professional manager is directly appointed by the court, the case management costs should be comparable.

Guardian of the Person

Family Member Considerations

The guardian of the person is a role that family members frequently assume. The life care planner should discuss with the family if they want to maintain their role in the personal aspects of their loved one's life. Turning this responsibility over to a professional is not common unless the family is ill-equipped to manage the ward's personal life. The life care planner should ask the family questions that focus on challenges

Nursing Diagnoses To Consider

Ineffective health management (Domain 1, Health promotion, Class 2, Health management)

Deficient knowledge (Domain 5, Perception/cognition, Class 4, Cognition)

Interrupted family processes (Domain 7, Role relationship, Class 2, Family relationships)

Ineffective role performance (Domain 7, Role relationship, Class 3, Role performance)

Powerlessness (Domain 9, Coping/stress tolerance, Class 2, Coping responses)

they may have that prevent them from accepting the role. A few examples that may impair the person's ability to meet the challenges of the role include:

- The family unit includes another child or spouse with disabilities and the person cannot devote the time.
- The person has been estranged for years, and the ward is not comfortable with the family member in charge.
- The ward's mental state has resulted in family violence.
- The family member has been convicted of a felony, which may disqualify them.
- The family member has a drug addiction.
- The family member has a progressive disease such as multiple sclerosis.

Typically, a family member assumes this role without monetary compensation. The family member managing this role can be time-limited if the ward is younger than the guardian. Social Security projections should be used to estimate the retirement age for the chosen guardian (Social Security

Administration, 2017). If another family member is not able to assume the role at the projected retirement age of the appointed family member, the life care planner may consider including conversion to a professional guardian of the person.

Care Coordination

The guardian of person performs the role of decision-maker and coordinator of care to ensure the health and well-being of the ward. Since these functions are similar to the work of case managers, duplication of services must be evaluated and avoided. Therefore, the life care planner should not list separate case management services and fees without an identifiable need that a guardian cannot reasonably be expected to manage the case without additional support.

As in case management, the qualifications of professional guardians are variable. The guardian of the person role includes consulting with appropriate professionals to determine what resources, specialists, procedures, and equipment are necessary to provide the best quality of life for the ward in the least restrictive environment. The court is involved in determining if the proposed guardian has the proper credentials and knowledge to create and manage a person-centered plan of care for the ward. The court has the responsibility to review the guardian's annual reports to determine that the executed plan met the guardianship standards (NGA, 2013, pp. 4-5). Nurses, social workers, professional counselors, and other professionals frequently serve as guardian of the person and the court makes every effort to appoint the guardian who is best suited to meet the ward's individual needs. For instance, the court may appoint a guardian who is a nurse to be guardian of a ward with medically complex needs.

Fees

An approach to projecting guardian of the person fees is to calculate the amount of case management time required to meet the ward's care needs

and include additional time for consulting with attorneys, creating reports for the court and court appearances. Most states require a minimum of an annual report and many require an annual appearance to present the report. More frequent reporting may be required if the case has medical complexities, familial discord, or changes in living arrangement such as placement in a facility.

The life care planner should include additional time for the guardian of person if the case so warrants. Based on the authors' years of experience, it is reasonable to calculate guardian of the person expenses by doubling the time necessary for case management to cover the additional court reporting requirements and related tasks. However, cases vary in complexity and additional time may need to be included to best meet the needs of the ward.

Incorporation of Costs into the Life Care Plan

Guardianship is a process. The initial start-up fees should be outlined separately from the ongoing maintenance (see Table 1 for typical LCP costs). The costs for consideration are as follows

Start-up Fees

- Court costs which are county specific are usually several hundred dollars. Typically, there is one fee that covers the filings for both the person and estate. Absent of a conflict between the guardian of the estate and the guardian of the person, one fee for both is adequate; as it is customary to use the same attorney for filings.
- Attorney fees for setting up a guardianship—using the same attorney—can range from \$2,000 to \$10,000 depending on geographic location and complexity. If there is conflict between the two guardians, this fee could be doubled as each guardian has the right for legal representation.
- Guardian of the person set up fees can range from 20 to 40 hours at the guardianship rate. It is important to research the fees that are allowed in the geographic location of the ward,

Table 1: Typical Guardianship LCP Costs

HOME / FACILITY CARE	Begin at Age	Duration in Years	Frequency per year	Average Unit Cost	One Time Cost	Annual Cost	Lifetime Cost
Start up Court costs, to establish guardianships	54	1	1	\$800	\$800	NA	\$800
Start up Attorney fees, to establish guardianships	54	1	1	\$6,000	\$6,000	NA	\$6,000
Guardian of the person fees, professional, to establish guardianship	54	1	30	\$112.50	\$3,375	NA	\$3,375
Court fees, ongoing	55	25	1	\$400	NA	\$400	\$10,000
Attorney fees, ongoing	55	25	20	\$300	NA	\$6,000	\$150,000
Annual reporting and court appearances for guardians	55	25	1	\$7,000	NA	\$7,000	\$175,000
Guardian of estate fees, professional, ongoing	55	25	24	\$125	NA	\$3,000	\$75,000
Guardian of the person fees, professional, ongoing	55	25	84	\$125	NA	\$10,500	\$262,500
TOTAL HOME / FACILITY CARE*					\$10,175	\$26,900	\$682,675

**This is an example and should be treated as such. The need for guardianship(s) is different case to case, and these services and numbers may vary.*

but generally, they can run from \$75 to \$150 per hour.

Ongoing Maintenance Fees

- Annual reporting and appearance in court. This again includes attorney fees and typically range from \$2,000 to \$5,000 per year. Absent of conflict between the guardian of the person and estate, one attorney can appear for both guardians. If conflict is present this fee could be doubled as each guardian has the right for legal representation.
- Ongoing guardian of the estate fees do not vary from the financial management fees except for

reporting to the court and creating an annual accounting. A fee of \$100 to \$150 per hour averaging 2 hours a month is routinely adequate. If a family member assumes the role, there may be no cost.

- Ongoing guardian of the person fees—as noted previously—the role for guardian of person is similar to those of case management, but more time is needed for the guardian due to court reporting requirements. Case management fees should not be included when there is a professional guardian in place unless there is an identified reason why the guardian cannot fulfill the duties of

their role in planning or executing a plan of care. For instance, if a family member is guardian of person, case management fees may be warranted. For the majority of cases managing persons with disabilities, the guardian of person ranges from 4 to 10 hours a month on an ongoing basis. More complex cases with extensive medical needs or ongoing behavioral and psychiatric issues may require more time, as much as 20 hours per month.

Conclusion

Creating a life care plan that addresses an individual's needs is a monumental task. The individual's decisional capacity

can alter the plan when the protection of a guardianship is necessary. Guardianship is overseen by the state courts. The Universal Guardianship Act provides some uniformity from state to state, but additional research is needed in the states that have yet to adopt the act.

Guardianship is ever-changing. It is important to look to the national organizations for current standards of practice and ethical principles as guidance. There are times when a professional guardian is requisite due to the unavailability of family willing and able to serve in the role. In such

cases, cost research should include the cost of initiating a guardianship and the ongoing maintenance. Caution should be used to avoid duplication of services such as case management, financial services, and other services that are covered under the guardianship role.

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