

Who Decides? The Unique Dynamics of Serving Survivors with Guardians

Alicia Aiken, J.D.

Director, Confidentiality Institute

John Whitcomb, J.D.

Monahan Law Group

Learning Objectives

This session will assist victim service providers to:

- Recognize the basic concepts of adult guardianship.
- Acquire simple strategies to determine whether an adult has a legal guardian and the form of the guardianship.
- Identify some unique circumstances around confidentiality, informed consent, and VAWA.
- Access assistance to ensure services are within the legal boundaries and survivor-centered.

Guardianship



Why Do We Need to Understand Adult Guardianship?

- Increased outreach to survivors with disabilities & older adults
- Need to be survivor-centered when survivor appears to have issues with mental capacity
- Need to know who is able and allowed to give informed consent to share information

Presumed to Be Competent

- Individuals are presumed legally competent
- This means that they are able & allowed to make decisions for themselves
- ...unless or until court determines otherwise



Guardianship

- “Guardians” for adults are ALWAYS court-appointed
- “Wards” are individuals with guardians
- Courts maintain ongoing oversight of guardian
- Individual issues can be reviewed by the court

Incompetency

- This is a court's decision!
- If a person is found incompetent, it means that the court believes that the person is unable to make knowing and voluntary decisions and a guardian is appointed



Types of Guardianship

- The types of guardianship available in a state are subject to that state's laws
- Limited – court lists which decisions by guardian and which by person
- General or “Plenary” – makes all decisions
- Personal – empowered to make personal decisions and advocate for the individual
- Financial or “of the Estate” (Conservatorship) – empowered to handle the person's money and assets

Why Are There Different Types of Guardianship?

- Courts are required to choose least restrictive alternative when choosing a type of guardianship
- A ward may have decision-making ability in one area (e.g. where to live) but be legally incompetent in other areas (e.g. finances)

Length of Guardianship

- Temporary – appointed to make immediate and often limited decisions
- Permanent – appointed for life or until court orders person competent
- Termination or Modification – court orders person regained competency, ends the guardianship or restores some decision-making to individual

Services and Support Impacted by Guardianship

- Responding to sexual violence:
 - Forensic sexual assault exam, medical care, mental health counseling, legal advocacy
- Responding to domestic violence:
 - Legal advocacy, shelter, medical care, mental health counseling, divorce
- Information sharing of any kind

Impact of Guardianship on Providing Services



Informed Consent to Services

Policies and procedures for domestic and/or sexual violence services (e.g., support groups, shelter house rules)

- Not statutorily defined medical or mental health treatment
- Individual signing consent form for services is competent to give informed consent

Informed Consent to Share Info

- Giving actual permission
- To take a specific action (i.e. disclose to housing that I have been the victim of domestic violence)
- With an understanding of the information that will be shared, and
- An ability to weigh the pros and cons of the decision

Informed Consent is NOT...

- Making the same decision you would make
- Signing the form where told to sign



How Do We Know If A Person Is A Court- Appointed Guardian?

Ask to see the paperwork!

- Some family members may believe they have legal guardianship when they don't

The Paperwork

- Called “Letter of Guardianship” or “Letter of Administration”
- Find out what it is called in your state
- Will be issued by the court
- **If there is no paperwork, there is no guardian!**

These Are *Not* Guardianships

- “Power of Attorney” means a competent individual gave someone legal authority to act on his/her behalf
 - Individual also keeps authority to make decisions
- “Representative payee” means a person was chosen to receive federal disability benefits and pay bills and manage finances on behalf of a person with a disability
- Parents of an adult with a disability are not legal guardians of the adult unless a court appoints them

How Do We Know What Powers a Guardian Has?

Ask to see the paperwork!



How Do We Know if a Guardian Has Power to Get or Release Info?

- “Plenary” or “General” guardian typically assigned to exercise the ward’s informed consent rights
- Check paperwork in case exceptions articulated
- If Limited Guardian, look at the description of decision-making power in the paperwork

VAWA / FVPSA / VOCA

- To ensure safety of victims of violence and their families:
- Grantees shall protect the confidentiality and privacy of persons receiving services.

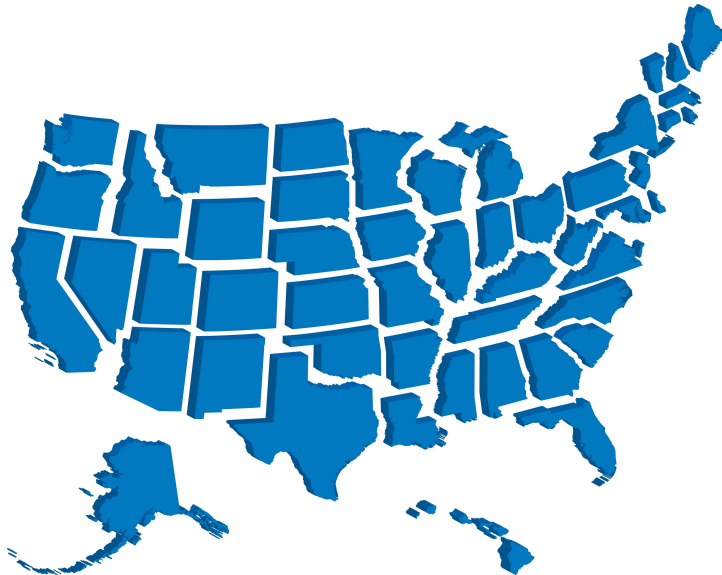


VAWA / FVPSA / VOCA on Releases

- Grantee shall not disclose individual client information without:
 - The informed, written, reasonably time limited consent,
 - signed by the person, or
 - in the case of legal incapacity, the guardian
- If a person could receive services without consent of his/her guardian, then person signs release of information without guardian

Your State Law

- Find out how your state law addresses:
 - 1) A ward's right to access services without guardian consent or knowledge.
 - 2) A guardian's role in consenting to disclosure of information.



Do We Need A Release To Give a Guardian Info?

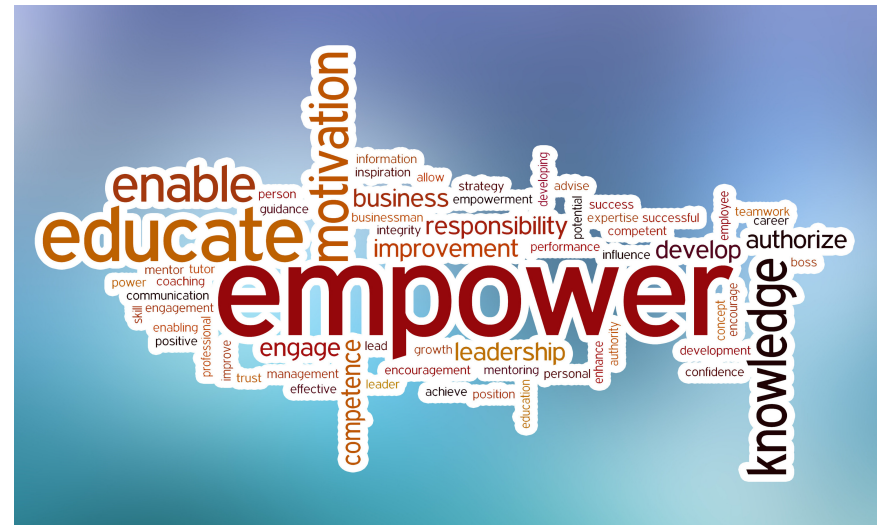
- A guardian with authority to make decisions about your services stands in the legal shoes of a survivor
 - So no release is needed to share information
- A guardian without that authority is legally the same as any other third party
 - So a release is needed

So, can we speak as freely with the guardian as we would with the survivor?



Information Sharing with Guardian: *Always Be Survivor-Centered*

- Give notice to the survivor
- Discuss options with the survivor
- Let the survivor see the records you are sharing
- Have the survivor present when you discuss anything with the guardian

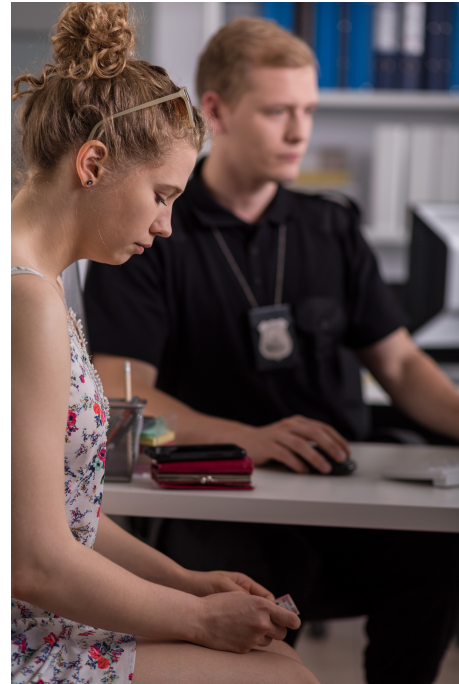


What If Person Appears Unable to Understand The Information & Does Not Have a Legal Guardian?

- Is it a communication problem rather than a cognition problem?
- Can you adjust how you communicate?
- Can the person identify a trusted person whose presence is necessary to facilitate understanding & decision-making?

What If it is an Emergency Situation and There's No Chance to See Paperwork?

- Always be survivor-centered
 - Does survivor identify person as guardian?
 - Does survivor want person to receive information or help in decision-making?



What if the Guardian is the Abuser?

- VAWA/FVPSA/VOCA do not allow an abusive guardian to sign a release of information
- Courts can investigate and remove guardians
- Courts can issue orders protecting wards from an abusive guardian
- Determine whether your state law requires a call to Adult Protective Services
- Consult/Refer to local Protection & Advocacy legal program

Some Real Life Scenarios

WHAT
DO
YOU
THiNK?



What Should You Do If...

A survivor is in your shelter & someone is banging on the door claiming to be the guardian?

- What does law require?
- What is good practice?

What Should You Do If...

A survivor with a guardian asks to have a meeting alone with advocate & guardian insists on being present?

- What does law require?
- What is good practice?

What Should You Do If...

A survivor is in the ER preparing for a SANE Exam and a guardian appears and objects?

- What does law require?
- What is good practice?

The Process

1. Is this actually a legal guardian with the right or authority?
2. Is this guardian abusive to the ward?
3. Can I educate the guardian about domestic / sexual violence & survivor-centered practice?
4. How do I support the ward to know what is happening with information?
5. Do we need outside help or technical assistance to handle this? If so, who do we contact?

Resources

National Clearinghouse on Abuse in Later Life

ncall@wcadv.org

NNEDV Safety Net & Confidentiality Institute

safetynet@nnedv.org

alicia@confidentialityinstitute.org

National Disability Rights Network (and your state's P&A)

www.ndrn.org

Questions or Comments?

Thank you!

Please take a moment to complete our online [survey](#) about this webinar.

Please don't forget to tune into the next *End Abuse of People with Disabilities* webinar, "You Report? Everyone Reports? Mandated Reporting Obligations When a Survivor Has a Disability" on October 17, 2017 at 2 pm ET. Click here to [register](#).