

Disability Rights

ARKANSAS

Alternatives to Guardianship & Rights of the Ward

Notice

- These slides have been developed for educational purposes only. This information is not intended to constitute legal advice and should not be relied upon in lieu of consultation with legal counsel. This presentation is current through the date of presentation. Because laws change frequently, this information may change with future legislative changes and/or court rulings.

Disability Rights Arkansas

- Disability Rights Arkansas (DRA) is a private, nonprofit organization designated by the governor to implement the federally funded Protection and Advocacy System and Client Assistance Program throughout the state.
- Every state has a Protection and Advocacy System and Client Assistance Program.
- DRA is federally funded but is not part of the state or federal government.

History of Protection & Advocacy Systems



Disability Rights Arkansas Mission Statement

- To vigorously advocate for and enforce the legal rights of people with disabilities in Arkansas.

What DRA Does

- Provides free advocacy and/or legal services to individuals with disabilities.
- Provides information and referrals to callers.

DRA Priority Areas

- Abuse, Neglect, and Exploitation
- Community Integration
- Access
- Education & Post-Secondary Education
- Employment
- Self-Advocacy & Self-Determination
- Voting Rights

DRA Access Authority

- As the state's Protection and Advocacy system, DRA has reasonable unaccompanied access to public and private facilities which provide services, supports, and other assistance to individuals with disabilities.
 - To investigate abuse and neglect
 - To monitor
 - To provide rights trainings to individuals with disabilities

Continuum of Decision-Making Supports

- **The Person**
- Supported Decision-Making
- Advance Directive and/or Power of Attorney
- Rep Payee
- Substitute or Surrogate Health-Care Decision-Maker
- Court-Appointed Guardian or Conservator
 - Temporary → Permanent
 - Limited → General/Plenary

Patient Self-Determination Act of 1990

- Inform patients of rights under state law to make own decisions about health care
- Document in patient's current medical record existence of advance directive
- Formulate policies for implementing patient's rights to prepare advance directives
- Comply with state laws about advance directives
- Educate staff and community on advance directives issues

Important Concepts

- Informed Consent
- Right to Refuse Treatment
- Capacity vs. Competency
- Self-determination

Informed Consent

- Treating health care provider
- Discloses appropriate information
- To a competent patient
- So that the patient may make a voluntary choice
- To accept or refuse treatment

Healthcare provider explains to patient –

- What treatment is needed
- What the treatment involves
- What are the benefits and risks of treatment
- Are there alternatives to the treatment

Right to Refuse Treatment

Patients have the right to refuse treatment and to refuse to give consent to treatment.

Some exceptions:

- Court ordered treatment
- Guardian consents to treatment
 - This does not apply to all situations
- Emergencies

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Supported Decision-Making

- Supports and services that assist an adult with a disability make his or her own decisions, by using friends, family members, professionals, and other people he or she trusts to:
 - Help understand the issues and choices
 - Ask questions
 - Receive explanations in language he or she understands
 - Communicate his or her own decisions to others

Supported Decision-Making

- No “one size fits all” method of Supported Decision-Making
- It is a paradigm, not a process or program
 - It means working with the person to identify where help is needed, and finding a way to provide any help needed.
 - Solutions are different for each person
 - Key Question: “What will it take?”

Supported Decision-Making

- “Solutions are different for each person. Some people need one-on-one support and discussion about the issue at hand. For others, a team approach works best. Some people may benefit from situations being explained pictorially. With supported decision-making, the possibilities are endless.”

Administration for Community Living, “Preserving the Right to Self-determination: Supported Decision-Making”

Supported Decision-Making

- All forms of supported decision-making recognize:
 - The person's autonomy, presumption of capacity, and right to make decisions on an equal basis with others
 - That a person can take part in a decision-making process that does not remove his or her decision-making rights
 - People will often need assistance in decision-making through such means as interpreter assistance, facilitated communication, assistive technologies, and plain language

Supported Decision Making: WHY?

- Self-Determination
 - Life Control – People’s ability and opportunity to be “causal agents” – To be actors in their lives instead of being acted upon.

(Wehmeyer, Palmer, Agran, Mithaug, & Martin, 2000, p. 440)

- People with greater self-determination are:
 - More independent
 - More integrated into their communities
 - Healthier
 - Better able to recognize and resist abuse.

(Powers, et al., 2012; Shogren, Wehmeyer, Palmer, Rifenshark & Little, 2014; Wehmeyer & Schwartz, 1997 & 1998; Wehmeyer & Palmer, 2003; Khemka, Hickson & Reynolds 2005; Wehmeyer, Kelchner & Reynolds, 1996)

Supported Decision Making: WHY?

- When denied self-determination, people can:
 - “Feel helpless, hopeless, and self-critical” (Deci, 1975, p. 208)
 - Experience “low self-esteem, passivity, and feelings of inadequacy and incompetency,” decreasing their ability to function (Winick, 1995, p. 21)
- Decreased Life Outcomes
 - Overbroad or undue guardianship can cause a “significant negative impact on . . . physical and mental health, longevity, ability to function and reports of subjective well-being.” (Wright, 2010, p. 354)

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Psychiatric Advance Directive

“PAD”

- Way to document a person’s specific instructions or preferences about future mental health treatment
- Allows the person to prepare for the possibility that he or she may lose capacity to give or deny informed consent due to acute psychiatric illness

A PAD is

- a special form of advance directive
- by a currently capacitated person with a mental illness
- that allows the person to be prepared in the event of a mental health crisis that prevents them from making decisions

Goals for PADs

- Specifies instructions for mental health treatment during a psychiatric emergency or crisis
- Ensure that a trusted competent person is the substituted decision-maker
- Allows patient to identify who will care for his/her children and who will take of his/her responsibilities when he/she is unable

Benefits of PADs

- PAD acts as patient's voice
- Allows patient to examine current treatment - what is and is not working
- Improves communication with mental health care provider by opening up discussion of treatment options
- Helps patient's loved ones assist him/her during a psychiatric crisis

Additional benefits

- Decrease perceived coercion
- Increase treatment collaboration, motivation, and adherence
- Expedite crisis care
- Reduce psychiatric hospitalizations

Facts about PADs

- 25 states have laws that permit PADs
- NAMI supports use of PADS
- Gives patient more control over treatment decisions

Different Kinds of PADs

- Instructive PAD - describes treatment preferences of the person with mental illness
- Proxy PAD - names a health care proxy or agent to make treatment decisions if the person with a mental illness be unable to make decisions due to their illness
- A PAD can be both instructive and name an agent in the same documents

PADs in Arkansas

Ark. Code Ann. §§ 20-6-101 *et seq.*

Arkansas Healthcare Decisions Act (2013)

- Amended in 2017
 - Repealed Durable Power of Attorney for Healthcare Act
 - Durable Power of Attorney language was added to the Arkansas Healthcare Decisions Act
 - Allows individual to include durable power of attorney for healthcare and living will in psychiatric advance directive

Agent's authority

- Make decisions about the individual's healthcare at times when the individual is unable to make them for him/herself
- Includes medication and hospital treatment
- An agent "shall" make healthcare decisions in accordance to the individual's instruction
Ark. Code Ann. § 20-6-103(e)(1)
- In the absence of instruction, the agent "shall" make the decision in accordance with the agent's determination of the individual's best interest
Ark. Code Ann. § 20-6-103(e)(2)

When is the agent's authority effective?

Ark. Code Ann. § 20-6-103(c)-(d)

- Unless otherwise specified in an advance directive, the authority of an agent becomes effective only upon determination that the principal lacks capacity
- Ceases to be effective upon a determination that the principal recovered capacity
- If necessary, a licensed physician will determine whether an individual lacks or has recovered capacity

Revocation

Ark. Code Ann. § 20-6-104

- An individual having capacity may revoke all or part of an advance directive
 - At any time and in any manner
 - This includes, without limitation, a living will or durable power of attorney
- A decree of annulment, divorce, dissolution of marriage, or legal separation revokes a previous designation of a spouse as agent unless otherwise specified in the decree or advance directive
- An advance directive that conflicts with an earlier directive revokes the earlier directive to the extent of the conflict

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Rep Payee

- Financial management for Social Security and SSI payments
- For those incapable of managing their Social Security or SSI payments
- Includes payment for food, shelter, clothes, medical care and personal comfort items
- Can be institutions, professionals, or friends/family

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Substitute or Surrogate Health-Care Decision Maker

Ark. Code Ann. §§ 20-6-105 , 106

- Allows patients to designate an individual to act as surrogate by personally informing healthcare provider
 - May be oral or in writing
 - The surrogate may only make healthcare decisions if the patient has been determined by a licensed physician to lack capacity
 - The surrogate cannot make decisions if the patient has an agent or guardian that is reasonably available
 - A supervising healthcare provider can appoint a surrogate if the patient lacks capacity and does not have a surrogate or guardian who is reasonably available

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Pros of Guardianships

- Offers some protections and safeguards against abuse
- Provides standards for decision-making
- No ambiguity about decision-maker
- Provides third parties with certainty about the validity of decisions and actions

Cons of Guardianships

- Loss of legal personhood
 - “Civil Death”
- Loss of right to make decisions about own health, purchases, etc.
- Denied the “dignity of risk”
 - No opportunity to try new things, test limits, etc.

Basis for Guardianship

Ark. Code Ann. § 28-65-101

- “Incapacitated person” means a person who is impaired by:
 - mental illness,
 - mental deficiency,
 - physical illness,
 - chronic use of drugs,
 - or chronic intoxication
- Lack sufficient understanding or capacity to make or communicate decisions to meet the essential requirements for his or her health or safety or to manage his or her estate

Types of Guardianship

- Person
- Estate
- Person and Estate
- Limited

Rights Impacted by Guardianship

- Voting
- Marriage and Reproductive Rights
- Place of Residence and Travel
- Access to Own Money
- Health Care Decisions
- Right to Contract

Temporary Guardianship

Ark. Code Ann. § 28-65-218

- Imminent danger to the life or health of the incapacitated person
- Loss, damage, or waste to the property of an incapacitated person
- The court may, with or without notice, appoint a temporary guardian
- Shall not exceed ninety (90) days
- For Emergencies

Guardianship Due Process

- Notice
- Right to Respond
- Right to Counsel
- Supporting Evidence
- Evaluations
- Standard of Proof

Evaluations

Ark. Code Ann. § 28-65-212

- Professional with training, experience, and knowledge of the particular alleged disability
 - Physician
 - Licensed psychologist
 - Licensed Certified Social Worker
- Shall Include:
 - Medical and physical condition;
 - Adaptive behavior;
 - Intellectual functioning; and
 - Recommendation:
 - Specific areas for which assistance is needed
 - Least restrictive alternatives available

Duties of the Guardian (PERSON)

Ark. Code Ann. § 28-65-301

- “Care for and maintain”
- If ward is a minor, to see that he or she is properly trained and educated and has the opportunity to learn a trade, occupation or profession
- Substituted Decision-Making about everything except property

Duties of the Guardian (ESTATE)

Ark. Code Ann. § 28-65-301

- Exercise due care to protect and preserve property
- Invest and apply property in accordance with law
- Account for the property (Maybe)
- Return the property to the ward upon termination
- Fiduciary

Rights expanded in 2017

- A ward is not presumed to be incompetent and retains all legal and civil rights except those which have been expressly limited by the court or have been specifically granted to the guardian by the court.

Ark. Code Ann. § 28-65-106(a)

- Right to associate with persons of choosing
Ark. Code Ann. § 28-65-106(b)

Decisions Requiring Court Approval

Ark. Code Ann. § 28-65-302

- Abortion, Sterilization, Psychosurgery
- Removal of organs except in emergency, life-threatening situations
- Withhold life-saving treatment
- Authorize experimental procedures
- Authorize termination of parental rights
- Authorize the individual to vote (if appt. after 10/1/01)
- Prohibit the individual from obtaining a driver's license
- Consent to settlement

What does this mean for providers?

- Unless the court order expressly states otherwise:
 - The guardian cannot prohibit visitation and phone calls with any individual with whom the ward wishes to associate
 - If a ward associated with an individual prior to becoming unable to express consent, it is presumed that the ward wishes to continue that association
 - A ward can consent to the disclosure of information to a third party without approval from the guardian
 - A guardian cannot withhold or ask a service provider to withhold a ward's driver's license (or prohibit the ward from driving)

Institutionalization

Ark. Code Ann. § 28-65-303

- Requires Court approval
- The law does not provide specific requirements
- Court discretion
- Guardian may temporarily confine in emergency situations
 - Only while waiting to get the case in front of a judge

Removal of Guardian

- Guardian becomes mentally incompetent, disqualified, unsuitable, or incapable of discharging his or her trust
- Guardian mismanaged the estate
- Guardian has failed to perform any duty imposed by law or by any lawful order of the court
- The ward is no longer a resident of the state

Termination of Guardianship

- If the Guardianship is no longer necessary

AND

- If the Guardianship is no longer in the best interest of the ward
- If public guardian – not unless the court declares the ward is restored to capacity or a successor guardian appointed
- Capacity restored
 - Any person may allege in writing under oath and court shall inquire into the facts

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Limited Guardianship

- State law description of guardianship does not provide lots of guidance
- “If the court determines”
- The limited guardianship should state specific powers, authorities, and duties the guardian shall possess
- and/or powers or rights the incapacitated person may exercise without intervention of the guardian

Resources

- PAD template and user guide available at www.disabilityrightsar.org or contact Disability Rights Arkansas for electronic copies
- Bazelon Center for Mental Health Law, www.bazelon.org
- National Resource Center on Psychiatric Advance Directives, www.NRC-PAD.org

DisabilityRights

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