

# North Carolina Initiatives for Guardianship Proceedings: A Legal and Medical Perspective

Michele A. Haber, MD, MS, MPH

Dennis J. Toman, JD, CELA

# Overview

- Nuts and bolts of guardianship
  - Legal concepts
  - When appropriate/needed
- Evaluating capacity
  - Defining incapacity
  - Medical evaluation of cognitive impairment
- Innovative guardianships

# *Nuts and Bolts of Guardianship*

# What is Guardianship

- Guardianship is an adversarial proceeding
- 2 step process
  - Determination of incompetence
  - Appointment of guardian
- Dynamics of initial proceeding often akin to family law/divorce matters

# Legal Definition

- "Incompetent adult"
  - Lacks sufficient capacity to manage own affairs or to make or communicate important decisions concerning his/her person, family, or property
  - Whether the lack of capacity is due to mental illness, mental retardation, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition.

– G.S. § 35A-1101

# Types of Guardian

- Guardian of Person, Guardian of Estate or General Guardian
- Clerk can make findings on “nature and extent of incompetence” → Limited Guardian

–G.S. § 35A-1112

# Avoiding Guardianships

- Best advice: Avoid guardianship if possible
- Plan ahead
  - Durable Power of Attorney
  - Health Care Power of Attorney
  - Living Trust
  - HIPAA Declaration
  - Title to assets (house, bank accounts, retirement accounts)

# Guardianship Needed When...

- No planning – no powers of attorney
- Poor planning – inadequate powers of attorney, e.g. agents have died or are unwilling to serve, or no gifting power
- Need legal decision – get additional protection against others taking advantage
- Someone unwilling to let agents/ children act

# When Guardianship Unavoidable

- If an individual is incompetent and a disgruntled family member (or DSS) brings action → *NO WAY TO STOP THE GUARDIANSHIP UNDER NC LAW*
- In a dysfunctional family situation, prior planning may not be able to prevent a guardianship proceeding

# Procedure

- Petition the Court
- Guardian ad Litem appointed
- Timetable set
- Multi-Disciplinary Evaluation?
- Mediation?
  - New in 2006
- Clerk decides if incompetent
- Is a “limited guardianship” appropriate?
- Appointment of guardian(s)

# Key Players

- Clerk of Court
- Petitioner
- Respondent
- Guardian ad Litem
  - Advocate for respondent
  - Must be an attorney
- Temporary Guardian?
- Counsel?
- Mediator?

# Guardianship

## 1997 Uniform Guardianship and Protective Proceedings Act

### ***(Cognitive)***

“An individual who . . . Is unable to receive and evaluate information or make or communicate decisions to such an extent that. . .”

### ***(Functional)***

“. . . the individual lacks the ability to meet essential requirements of physical health, safety, or self-care, even with appropriate technological assistance.”

# *Evaluating Capacity*

# Signs of Potential Cognitive Impairment During Interview

- Poor short term memory
- Language difficulties
- Comprehension problems
- Disorientation - space, time or location
- Calculation problems
- Lack of mental flexibility
- Significant emotional distress
- Emotional lability or inappropriateness
- Delusions
- Hallucinations
- Poor grooming

***Note consistency over these domains; everyone is entitled to a bad day!***

# Mitigating Factors Affecting Observations

- Hearing and vision loss
- Medical factors
- Stress, grief, depression, recent events affecting stability of client
- Time of day variability
- Educational / cultural / ethnic barriers

# Decision-Making Capacity

- No universal definition; no clear markers of “incapacity”
- Task-specific and time-limited

## Requires:

- Possession of a set of *values and goals*
- Ability to *communicate and understand* the information
- Ability to *reason and deliberate* about choices

# Different Types of Decisions

- Healthcare
- Self care and living situation
- Financial management
- Advance directives
- Testamentary capacity
- Contractual capacity
- Donative capacity
- Capacity for deeds

# Model for Assessing Legal Decisional Capacity

## ***Functional components***

- Ability to articulate reasoning behind decision
- Variability of state of mind
- Ability to appreciate consequences of decision

## ***Substantive components***

- Irreversibility of decision
- Substantive fairness/injury risk to someone
- Consistency with lifetime commitments of client

# Inherent Tension with Diminished Capacity

Balance between:

**desires to protect persons from  
potentially harmful decisions**

and

**deeply held beliefs about the  
inviolability of individual choice**

*In other words, does the person have the  
wherewithal to make “bad” decisions?*

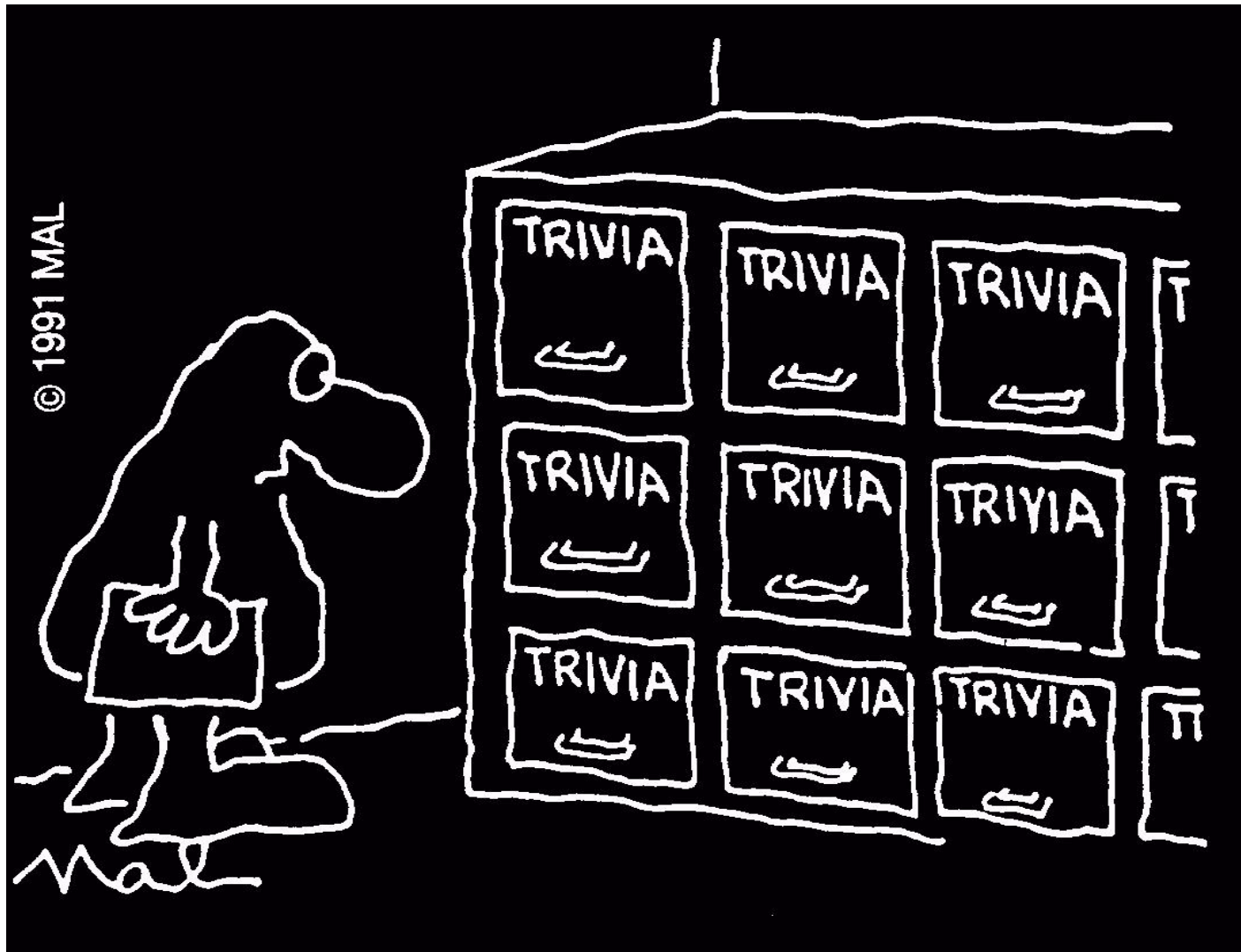
# Cognitive Dysfunctions

- Short-Term Memory Problems
- Language / Communications Problems
- Comprehension Problems
- Lack of Mental Flexibility
- Calculation Problems / Financial Management
- Disorientation

# Causes of Cognitive Differences

- Normal Aging Changes
- Sensory Changes
  - Vision
  - Hearing
- Dementia / Alzheimer's Disease
- Minimal Cognitive Impairment
- Depression or "Pseudo-dementia"
- Substance Abuse
- Other psychiatric disorders
- Delirium
  - Medical Illness
  - Medications

# Normal Aging Changes in Memory



# Cognitive Changes with Aging

## *Least Affected by Age*

- Language and vocabulary
- Abstract reasoning and problem solving
- Visual-spatial ability
- Recall of events in the personal past

## *Most Affected by Age*

- Episodic memory
- Timed memory tests
- Tests requiring focused attention
- Recall
- Processing of new information (“working memory”)

# Differences in Decision-Making with Aging

- Less information requested
- Less complete rationales offered
- More immediate decision reached
- Importance of context with shorter working memory
- Greater reliance on habitual/automatic modes of responding

# Sensory Changes with Aging

- ↓ sense of smell
- ↓ high frequency hearing
- ↓ near vision
- ↑ time to adapt to light changes
- ↓ contrast sensitivity
- ↑ sensitivity to glare

# Dementia: Broadly Defined

- Observable loss of intellectual abilities
- Significant decline in mental functions, like memory, learning, judgment and abstract thinking
- Severe enough to impair social or occupational functioning
- NOT normal aging

# Alzheimer's Disease: Impacts

- Alzheimer's is the most common dementia in people over 65 years old
- Afflicts an estimated 4.5 million Americans
- Frequency increases dramatically with age
- By 2050, estimate 13-14 million Americans if no preventive treatments become available



*“Alzheimer’s Disease is the Kleenex® of the dementias”*

# Alzheimer's Disease: A Closer Look

- Memory impairment PLUS
- One or more of the following:
  - Problems with language
  - Problems with movement or actions
  - Problems with recognition
  - Impaired judgment
  - Impaired abstract reasoning
  - Impaired sequencing ability
  - Personality change

# Alzheimer's Disease

*Specific, progressive, irreversible brain disease affecting:*

**A** bilities (Activities of Daily Living)

**B** ehavior

**C** ognition

and

**C** ommunication

# Other Types of Dementia

- Vascular Dementia
- Dementia with Lewy Bodies
- Dementia with Parkinson's Disease
- Frontotemporal Dementias (Pick's Disease)
- Jacob-Creutzfeldt Disease
- Huntington's Disease
- Alcohol-related Dementias (Wernicke-Korsakoff Syndromes)

# Mild Cognitive Impairment

Memory complaints with objective memory impairment, BUT:

- Not dementia
- General cognitive function not impaired
- No disability in activities of daily living

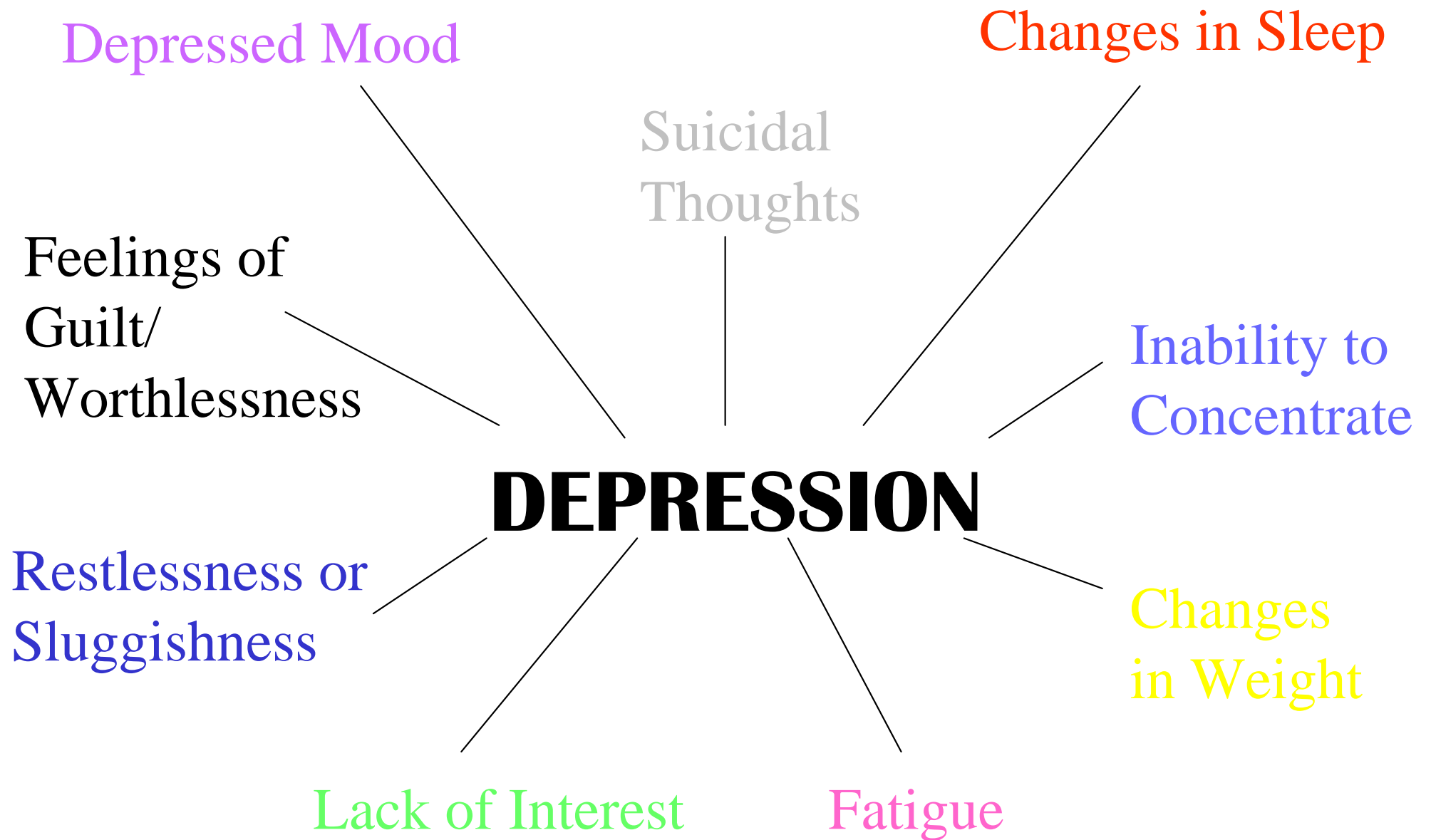
*Very unstable over time, with >40% reverting to normal within 2-3 years\*, 34% developing AD over 4-5 years\*\**

\* Larrieu, S., et al., *Neurology*, 2002, 59(10), 1594-9.

\*\*Bennett, DA., et al. *Neurology*, 2002, 59(2), 198-205.

# Depression (“Pseudodementia”)

- Not part of normal aging
- Characterized by at least one of the following:
  - Persistent sad mood
  - Loss of interest or pleasure in most activities
- May co-exist with dementia
- Treatable



# Depression in Older Adults

- Often presents differently
- Cognitive difficulties common
  - Decreased attention span
  - Poor attention, motivation, concentration
- Somatic complaints common
- Sadness may be absent
- Irritability common, esp. in males
- Impacts physical and social health

# Other Psychiatric Disorders

- Substance Abuse
- Anxiety Disorders
- Mood Disorders with Psychosis
- Bipolar disorder
- Schizophrenia / Late-Onset Schizophrenia
- Personality Disorders
- Adjustment Disorders
- (Developmental Disabilities)

# Delirium

- Medical syndrome
- Disturbance of attention, orientation and perception
- Clouding of consciousness
- Sudden onset, fluctuating course
- Medical basis
- Reversible
- Common in persons with dementia

# Causes of Delirium

- **D** Drugs
- **E** EKG (Cardiac)
- **L** Liver
- **I** Infection
- **R** Renal
- **I** Iatrogenic
- **U** Urinary
- **M** Metabolic

Remember: *Medical illnesses, both acute and chronic, and/or their therapies, may also affect cognitive functioning*

*Cognitive Impairment ≠  
Incapacity*

# The More Serious the Concerns, The Higher the Function Needed

- Will anyone be hurt by the decision?
- Is decision consistent with client's known long-term values or commitments?
- Is the decision objectively fair?
- Is the decision irreversible?

# Living Alone vs Relocation

- Potential risks: fire, malnutrition, dehydration, neglect of hygiene, medication noncompliance, financial exploitation, disorientation and paranoia
- Fear, upset, refusal to move elsewhere
- Others must weigh risks and benefits
- What are the options?
- Requires *global or functional assessment*

# Decisional vs Functional / Global Capacity

## *Decisional Capacity*

Related to specific decisions

## *Functional / Global Capacity*

Related to broader issues,  
e.g., guardianship, exploitation

# Functional / Global Capacity Assessment

- Causal
  - Diagnosis
- Functional
  - Cognitive and/or behavioral aspects
  - What the person can and cannot do
- Interactive
  - Social and/or environmental considerations
  - Standard of living, resources, supports
- Transactional
  - Personal history and values
  - Autonomy vs risk-taking continuum

# Functional Status – Activities of Daily Living

## ***Basic ADL's***

- Bathing
- Dressing
- Toileting
- Transfer
- Continence
- Feeding

## ***Instrumental ADL's***

- Telephone use
- Transportation
- Shopping
- Meal preparation
- Housework
- Handy man work
- Laundry
- Medication management
- Money management

# Functional Status – Retained Abilities

## *Personal Decisions*

- Relationships
- Living arrangements
- Employment
- Health treatment
- Care of minor health problems
- Contact service providers
- Social, religious, community activities

## *Financial Decisions*

- Limited money management
- Maintain personal property
- Contracts for social activities
- Residential contracts
- Contracts for health, legal services, etc.
- Consult with guardian about finances

# Capacity Evaluation

*Examples of past functioning and behavior are likely to be better indicators than self reports.*

Supplement personal interviews with:

- Corroborating history from individuals familiar with the person's actual functioning
- Medical records
- Personal observations of current functioning with true-to-life examples and in the presence of others
- Consultations with specialists
- Formal assessments of abilities (e.g., executive function, living skills)

# Optimize Performance

- Interview client alone
- Appropriate physical environment
- Accommodate physiological needs
- Deal with one issue at a time
- Minimize distractions and interruptions
- Use caution with analogies
- Clarify understanding along the way
- Know Client's Value Framework
- *Presume Capacity*

# Eccentricity vs Impairment

*Capacity must be judged according to a standard set by **that person's own habitual or considered standards of behavior and values**, rather than by conventional standards held by others.*

Silberfeld, M. and Fish, A. *When the Mind Fails*, 1994.

# Autonomy vs Safety

*Tolerance of **acceptable safety risk**, or the desire to protect a loved one from potential harm, must be balanced against the desire to protect a loved one's **autonomy** and individual choice.*

# The Ideal Functional Capacity Assessment

- Multidisciplinary team
  - Physician (geriatrician or geriatric psychiatrist)
  - Social worker, nurse and/or psychologist
- Assessment including consideration of all components
  - *Functional, Causal, Interactive* and *Transactional*
- Final Report
  - Answers to the specific questions
  - Supported by systematic data
  - Coordinated recommendations addressing all pertinent components to optimize safety, dignity, and independence

*Innovative Guardianships:  
Meeting the Needs of Impaired  
Individuals Through  
Guardianships and Other Tools*

# When Your Only Tool is a Hammer...

- Every problem looks like a nail!
- Alternatives to guardianship
  - Titling assets
  - Power of attorney
  - Family arrangements
  - Trusts by third party e.g., spouse, parents, siblings
- Limit scope of guardianship

# First Line Alternatives to Guardianship

- Does the individual have legal capacity to sign own documents?
  - Start planning at the time of diagnosis...don't wait!
- Rearrange assets
  - Joint bank accounts – other owner can withdraw
  - Real estate – requires signature or DPOA
  - Caution: elder financial abuse liability

# Next: Use of Trusts

- Own funds: again, requires capacity
- Third party: establish trusts (even with gifted assets) for benefit of incapacitated person
- Medicaid concerns
  - Proper structure and drafting can protect these assets
- Broaden trust terms beyond traditional financial management

# Reducing Conflicts in Guardianship

- Contested Guardianship - 2 issues
  - Respondent fights incompetence hearing
  - Family can't agree on guardian
- Resolution
  - Find acceptable guardian
  - Limit scope of guardianship
  - Mediate differences

# Limited Guardianship

- Defines specifically preserved rights of the respondent
- Defines specific roles and responsibilities for the guardian
- May apply to financial and/or health care matters
- Creative thinking required to balance autonomy and safety concerns

# Guardianship Mediation

- New in North Carolina
- Either Party can request or Clerk can require
- If ordered
  - Participation is mandatory
  - Agreement is optional
- Settlement subject to Clerk's approval
- Formalizes a family settlement process
- Performed by professional mediators with special training

# Administering Guardianship

- Look for ways to benefit ward
  - Look beyond financial management
  - Hire care managers
  - Get extra medical care
  - Seek enriching experiences (socialization, companion care, meals, travel, entertainment, etc.)
- Move guardianship assets to a trust
- Get the Clerk's approval (educate)

# The Ideal Guardian Seeks to...

- Balance autonomy, dignity and safety
- Appreciate long-standing values
- Evaluate ability to make individual decisions
- Understand the nature of the impairments
- Minimize impacts of functional limitations
- Collaborate with health professionals
- Anticipate future decline
- NOTE: advantageous to nominate guardian through DPOA and HCPOA

# Summary

- Guardianship is legal process authorizing a surrogate decision maker based on an individual's need for assistance
- Understanding underlying medical causes and functional abilities in context helps to assess capacity and need for guardianship
- Medical and legal concepts are intertwined
- Consider guardianship alternatives and creative solutions and modifications

# Thank you!

Michele A. Haber, MD, MS, MPH

*Geriatrics Consulting Services*

*of Greensboro, P.A.*

(336) 292-7622

E-mail: [mahaber@att.net](mailto:mahaber@att.net)

Dennis J. Toman, JD, CELA

*The Elderlaw Firm, Greensboro NC*

(336) 378-1122

E-mail: [dtoman@elderlawfirm.com](mailto:dtoman@elderlawfirm.com)