

Elder Guardianship  
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It is no secret that the population of the United States (and indeed, the world) is aging. In 2006 there were 37.3 million persons 65 years or older in the United States and these numbers will keep increasing so that by 2030 that number is expected to almost double. With this rapid growth in a vulnerable population, physicians are often met with questions about competency. It is a complicated area of medical and legal convergence, often misunderstood by physicians. Knowledge is the key to helping a potentially vulnerable elder with questionable competence.

Guardianship may be necessary for younger persons with disabilities, but this article will focus on elder guardianship.

### **What is guardianship?**

Often an adult child who has power of attorney, or who simply cares for an elder thinks of himself as the “guardian,” however guardianship has a specific legal meaning. Whereas power of attorney is a self-initiated, private process in which one voluntarily confers decision-making authority to a designee, guardianship is an other-initiated, public process in which one’s decision-making authority is **given** against one’s will to a designee. Unlike power of attorney, a guardianship is very difficult to reverse and requires judicial involvement, and most states (including Texas) require a physician’s opinion before a guardianship is established.

Guardianship is not necessarily an “all or none” proposition. There may be permanent *versus* temporary and partial *versus* full guardianships. As participants in the process (including judges, physicians, advocates, guardians, and wards) have become more experienced, they have crafted innovative solutions to certain problems posed by guardianship. Because of the many ways of crafting guardianships, it is very important for physicians to carefully examine a proposed ward (person being considered for guardianship) so as to fully identify areas in which the person might be able to function independently. For example, an elder who may no longer be able to drive or manage his or her finances may still be able to live independently if assisted with transportation and banking.

### **The Physician’s Role in the Guardianship Process**

Often, physicians are asked to provide an informal opinion as to the cognitive status of their own patients. Occasionally this request comes from a court or attorney, but usually, a family member asks for “just a letter” to “use to help Mom with her finances.” Unfortunately, such requests cause a conflict of interest for the physician which serves no one in the process. Physicians have a duty of confidentiality to patients, and releasing information to legal authorities breaches that confidentiality. In addition,

patients so betrayed might never return to their physician for needed medical care--or in fact trust another physician. It is the best practice to have an independent physician evaluate a person being considered for guardianship. In this way no such conflict will interfere with the physician/patient relationship.

### **What Is Important in the Medical Examination?**

Unlike most medical examinations, the examination for guardianship is not designed so much to diagnose and **treat** as it is to diagnose and estimate **function**. For example, a diagnosis of dementia is not sufficient to justify a guardianship. The diagnosis has to link to the persons functional disabilities. So, does the dementia allow him or her to make decisions about residence, but not handle finances? An adequate medical opinion will answer multiple questions regarding functionality as related to a diagnosis. The court needs to know in what manner the diagnosis intersects with functioning.

After understanding the way the diagnosis informs functionality, the court must know prognosis, or expectation of improvement. For example, with functional incapacity arising from a diagnosis of depression or delirium, a guardianship would be necessary only until the proposed ward recovered from the incapacitating episode. On the other hand, dementia is most likely to be irreversible and progressive, so the court would need to have information that would help in crafting a guardianship to meet the needs of the proposed ward for the present and for the foreseeable future.

It is very important that the physician performing the examination have sufficient knowledge about psychiatric illnesses affecting elders--especially diseases such as dementia, depression, and delirium. Many forms of dementia cause significant impairment in independent functioning, but do not show the "classic" symptoms usually associated with dementia such as memory loss.

Neuropsychological testing might be indicated in evaluating cognitive capacity, but is not always required. Again, it is important to choose a neuropsychologist with experience and expertise in cognition in the elderly.

### **How Does One Seek Guardianship?**

The best place to start is with an experienced elder attorney. There are many attorneys who specialize in guardianship, and the local bar association can be a good place to start looking for one.

### **Summary**

#### **TABLE 1**

**Guardianship** a legal arrangement wherein one individual (the guardian) possesses the legal right and duty to care for another individual (the ward) and his or her property (2)

--also termed "conservatorship" in some states

**Proposed Ward** an individual who is the subject of a proposed guardianship (3)

--also termed "respondent," "allegedly incapacitated person," and "proposed conservatee"

**Power of attorney** a document giving someone authority to act on behalf of the grantor

--also used to designate the holder of the document (i.e. the decision maker)

**Attorney ad litem** attorney appointed by court to act on behalf of the proposed ward and to represent his interests

**Guardian ad litem** person appointed by the court to act in the best interest of the the person with diminished capacity and give their opinions to the court as to whether a guardianship should be imposed

**Applicant** a person requesting that a guardianship be imposed on another

**Limited guardianship** something less than a full guardianship in which the removal of rights of a ward are tailored to his or her functional disabilities (3)

**Temporary guardianship** time-limited guardianship

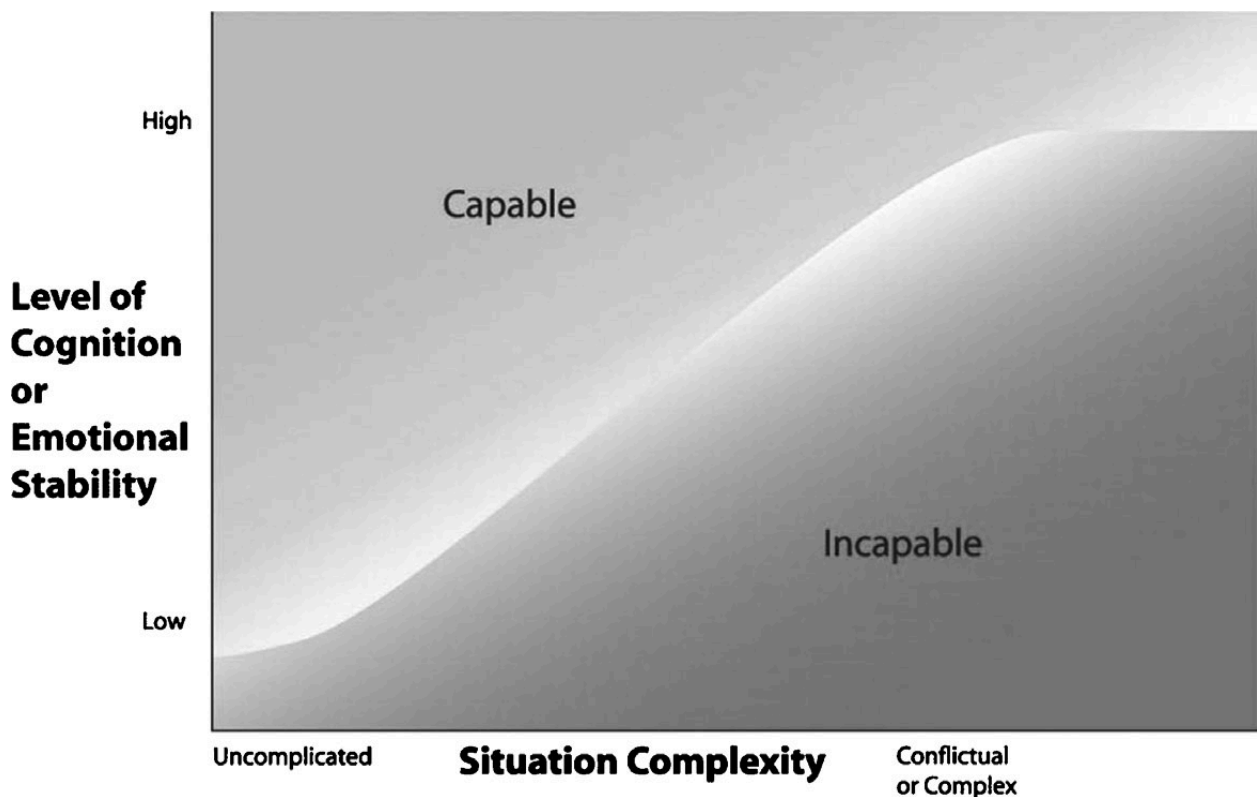


TABLE 1

Legend: Cognition, emotions, and situation specific capacity from Shulman et. al. reference 5 below

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