

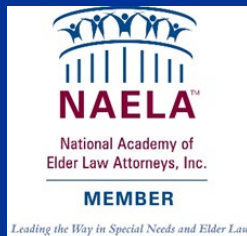
# Guardianship:

## *What You Need To Know*



Presented by:  
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Courtesy of:  
Bergen County Special Services  
CAPE Resource Center  
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# What we will cover

- What is a Guardianship
- Types of Guardianship
- When is Guardianship Appropriate
- How do you become a Guardian
- Alternatives to Guardianship



# What is Guardianship?

- Legal authority to make decisions for another person and manage his/her affairs
- Guardianship of person, property or both
- NJ law provides for limited guardianship
- Guardianship is established through a court proceeding



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# Impact on Individual Rights

Person (the ward) loses legal rights and the ability to make many or all his/her own decisions



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# Role of Parents



◆ Parents of children under 18 are considered “natural” guardians of their children

◆ Parents of children 18 or older are no longer considered guardians unless appoint legal guardians by the court



# Children under 18

## ◆ Parents can:

- ◆ Make decisions regarding medical care
- ◆ Manage education
- ◆ Determine where the children will live

## ◆ Parents cannot:

- ◆ Make decisions regarding any significant assets of their children, such as inheritance or awards they receive



# Children 18 and Over

- ◆ Children become legally emancipated at 18, *regardless of their physical or mental condition*
- ◆ If the child is incapacitated, parents must seek guardianship in order to have authority over the child's person and property



# Requirements for Guardianship

Person is likely to suffer harm because of:

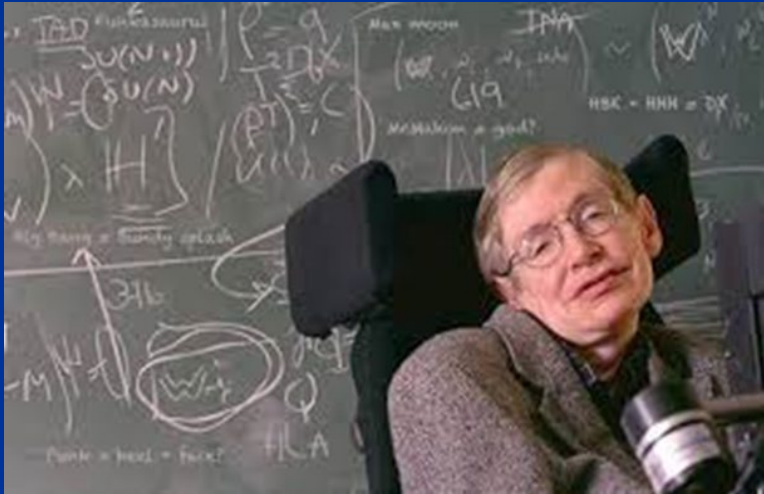
- inability to provide for personal needs or property management
- inability to understand and appreciate the nature and consequences of such inability





# Requirements for Guardianship

## Disability $\neq$ Incapacity



# Types of Guardianship

## Full Guardianship

- ✓ Guardian is given all rights of decision-making on behalf of the ward
- ✓ Can be guardian of the person, property or both

## Limited Guardianship

- ✓ Guardianship Order specifically identifies the powers of the Guardian
- ✓ Ward retains decision-making authority for all other matters



# Guardianship Process

## Title 3B

- ❖ Petition and Order to Show Cause
  - ❖ Reason for proposed guardianship
  - ❖ Scope of authority requested
- ❖ Medical evidence of need for guardian (two physicians or one physician and one licensed practicing psychologist)
- ❖ Must file petition within **30 days** of 1st doctor visit
- ❖ Judge will appoint an attorney to represent the AIP
- ❖ Hearing and decision



# Guardianship Process – Title 30

- Enrolled in Division of Developmental Disabilities (DDD)
- Required Documentation
  - Affidavit of NJ licensed physician or NJ licensed clinical psychologist and 1 of the following:
    - Certification from School District personnel with copy of latest IEP
    - Certification in Support of the Guardianship from a person with knowledge of functional capacity
      - Administrator of the DDD program
      - Another physician or psychologist
      - Licensed-care professional
  - Must file petition within **180 days** of 1st doctor visit



# Guardianship Process

## Court Hearing

- Formal proceeding
- AIP may/may not be present
- Witnesses may testify
- Evidence of disability is presented if  
AIP has not consented to guardianship
- Incapacity must be shown by clear and  
convincing evidence
- May be contested by AIP or competing  
proposed guardians



# Guardianship Process

## Result of Hearing

- ◆ Order for Guardianship Issued
  - ◆ Person and/or Property
  - ◆ Full, limited or temporary
  - ◆ Periodic reporting and review
  - ◆ Guardian must take course/video
  - ◆ Guardian may have to post bond
- ◆ No Order for Guardianship  
Case dismissed



# Guardianship Termination

- When the ward dies
- On the expiration date originally set by the Court
- When the Court or Guardian determines that guardianship is no longer needed
- When the Court determines that the Guardian is not able to continue to serve in this capacity



# Other Areas of Guardian Involvement



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# Health Care

- ✓ Health services may not be provided without a clear understanding of the ward's legal capacity to consent to treatment or services
- ✓ Access to records may be restricted (HIPAA)
- ✓ Copies of guardianship documents should be made available to health care providers to avoid problems
- ✓ Guardianship order should set out authority regarding “DNR” and life support



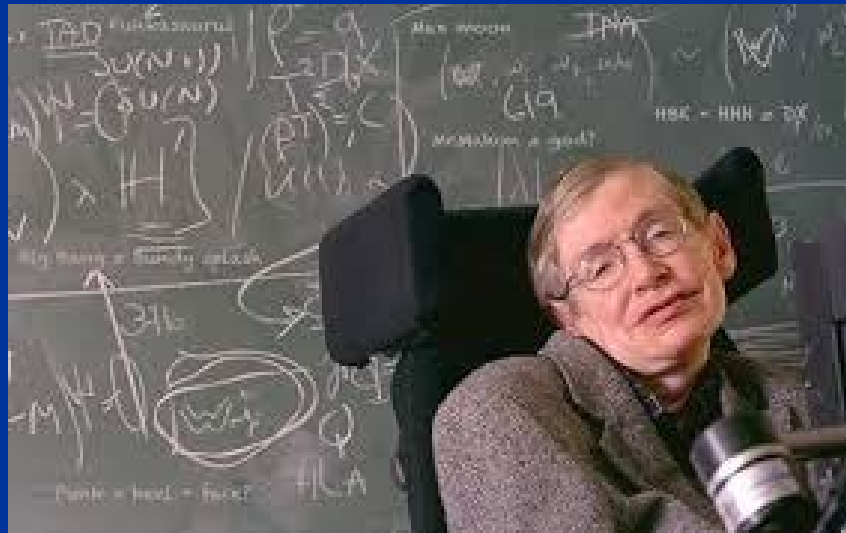
# Informed Consent

- A Guardian must be given the same information and freedom of choice as the ward would receive
- The Guardian must weigh the advantages/ disadvantages and the risks/benefits of treatment
- The Guardian must make decisions that are in the best interest of the ward



# Guardianship Alternatives

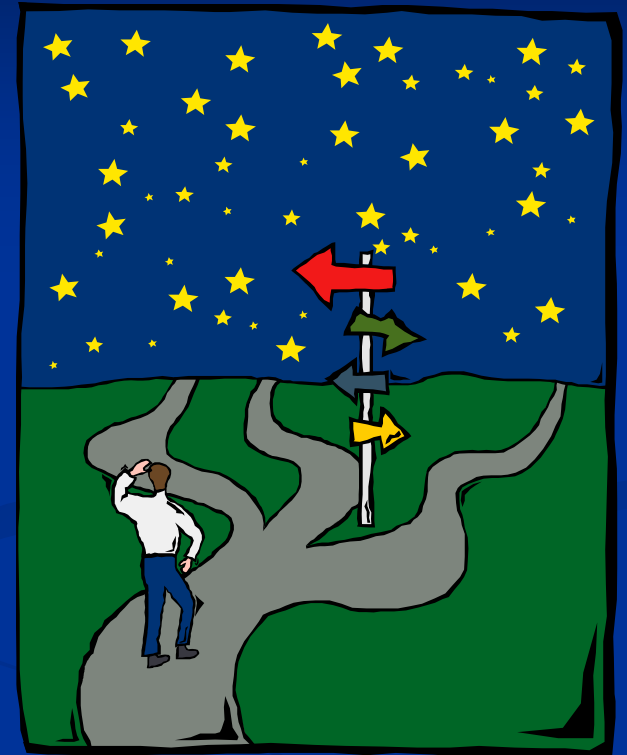
Disability  $\neq$  Incapacity



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# Guardianship Alternatives

- Conservatorship
- Power of Attorney
- Representative Payee
- Advanced Directive for Health Care
- Psychiatric Advanced Directive
- Supported Decision Making



# Conservatorship

- Person is not incompetent but cannot handle own financial affairs
- Conservator is appointed by Court to manage financial affairs of Conservatee
- Action can be brought by Conservatee, certain family members or other with an interest in Conservatee's well being
- Conservator manages Conservatee's property



# Conservatorship

- Conservator must account to Conservatee annually, with copy to Court
- Conservator must use assets for the benefit of Conservatee or persons dependent on Conservatee
- Conservatorship ends:
  - upon petition of Conservatee
  - upon legal incapacity of Conservatee
  - upon death of Conservatee



# Durable Financial Power of Attorney

- One person (principal) gives another (agent) power to make financial decisions on the principal's behalf
- The agent is also called an “Attorney in Fact”
- POA remains in effect even if the principal becomes incapacitated
- Principal must formally revoke the POA to terminate it
- POA also ends on death of principal



# Representative Payee

Person appointed to manage Social Security, and certain other state or federal benefits or entitlement program payments for an individual to make sure the individual's needs are met





# Advance Health Care Directive

Written instructions which guide care when an individual is terminally ill or incapacitated and unable to communicate his/her desires

## Part 1

Health Care Representative



## Part 2

Advance Directive  
(Living Will)



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# Health Care Representative



Choose a person to make medical decisions for you  
*IF YOU CANNOT MAKE THEM YOURSELF*



Give that person as much or as little authority as you  
want



Choose a person who will make the same decisions  
you would if you could make them yourself



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# Psychiatric Advance Directive



Specify circumstances where psychiatric treatment will be allowed



Give consent for psychiatric treatment when certain specified circumstances are present



Set out what treatments are acceptable



Permissible medications / experimental medications



Prohibited medications



Electroconvulsive Therapy (ECT)



Emergency intervention & restraint



Hospitalization / institutionalization



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# Supported Decision Making

- Some PWDs can make their own decisions with support
- PWD may appoint friends, family members or professionals to serve as support in decision making
- PWD who exercise greater self-determination have better overall life outcomes
  - Employment
  - Community involvement
  - More independent



# Supported Decision Making

Helps PWD:

- Understand information, issues, choices
- Balance options
- Focus attention
- Decide based on own preferences
- Communicate decisions to others



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# SUMMARY

Obtain a Power of Attorney and a Health Care Directive from the child at age 18

Prepare for Guardianship when child nears 18 if the child lacks sufficient capacity to grant a POA or appoint a Health Care Representative

Always seek the least restrictive alternative for the child



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*The best and most beautiful things in the  
world cannot be seen or even touched,  
They must be felt with the heart...*



# THANK YOU FOR YOUR ATTENTION!

Raymond J. Falcon Jr., Esq.



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