

NMHCA 2024 Convention

## Navigating Guardianship and Medicaid Issues for Incapacitated Residents

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## Preliminary Issues

- Experience check-in
- Please participate and ask questions!



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## UNDERSTANDING INCAPACITY



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### What Is Incapacity?

- Demonstrated over time
- Partial or complete functional impairment
- Person is unable to manage personal affairs or estate or financial affairs or both



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### Causes of Incapacity

- Mental illness
- Mental deficiency
- Physical illness or disability
- Chronic use of drugs
- Chronic intoxication
- Other causes



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### Identifying Incapacity

- Diagnoses alone is not enough
- Must have impact on abilities
- BIMS, MMSE, ADL's- useful tools



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### Inability to Manage Personal Care

- Inability to meet one's needs for medical care, nutrition, clothing, shelter, hygiene or safety
- Evidenced by recent behavior
- Physical injury, illness, or disease has occurred or is likely to occur soon



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### Inability to Manage Finances

- Gross mismanagement of income and resources *or*
- Medical inability to manage income and resources
- Evidenced by recent behavior
- Has led to or is likely to soon lead to financial vulnerability



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### Lack of Cooperation

- Failure to cooperate is not incapacity



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### Consequences of Incapacity

- An incapacitated resident cannot:
  - Sign documents/make contracts
  - Provide consent (medical/financial)
  - Assist with Medicaid process (generally)



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### Legal Agents

- Power of Attorney (POA)
- Guardian and/or Conservator
- Big differences: who makes appointment, are rights retained
- See it. Copy it. Otherwise, it doesn't exist.



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### Power of Attorney

- Appointed by principal
- Must have capacity to make appointment
- Principal is NOT stripped of rights
- Types: General, Healthcare



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### Guardian / Conservator

- Appointed by Court after finding of incapacity
- Ward IS stripped of rights, can no longer act for themselves
- Authority: Determined by Court



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### GUARDIANSHIP & CONSERVATORSHIP PROCESS



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### Guardian vs. Conservator

- Guardian: provide for the care, custody or control of the person -includes limited, emergency, and temporary appointments
- Conservator: manage the property and/or financial affairs



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### Basic Steps in Process

- Filing of Petition
- Appointment of Professionals
- Court Hearing



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### Petition

- Filed in District Court
- Can be filed by any interested party
- Requires an attorney



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### Appointment of Professionals

- Guardian ad litem (GAL): represent and protect the interests of alleged incapacitated person
- Qualified health care professional: training and expertise aid in the assessment of functional impairment



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### Appointment of Professionals

- Visitor: neutral; evaluates the needs of the person who is allegedly incapacitated
- All file a report with the court



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### Hearing

- Hearing is required
- Attendance of incapacitated person
- Testimony
- Evidence



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### Least Restrictive Intervention

- Only limitations necessary to provide care and services
- Protected person should enjoy greatest amount of personal freedom



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### Special Types of Appointment

- Emergency
- Temporary
- Limited Appointments



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### CONSIDERATIONS FOR FACILITY



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### Warning Signs

- Incapacitated Person + No Legal Agent = Problem
- Consent to treatment, payor source issues, Medicaid eligibility process
- Act quickly to start the Guardianship process



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Why should the facility file for a Guardian/Conservator?



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### Guardianship Costs

- Attorney Fees and Expenses
- Costs for Appointed Professionals
- Can costs be recovered?



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### Bad Acting Guardians

- Petition for Removal
- Grounds for removal:
  - incapacity of Guardian
  - abuse, neglect, or exploitation
  - unable or unwilling to carry out duties



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### MEDICAID APPLICATIONS FOR INCAPACITATED RESIDENTS



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### Applications- When to File

- ASAP- Just Do it
- Common issues:
  - Resident is incapacitated and cannot sign
  - Excess resources

*An individual who wants to file an application for Medicaid must have the opportunity to do so without delay.*



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### Applications - Who Can File

- The individual who is requesting assistance (the applicant)
- An authorized representative
- An individual acting responsibly for the applicant, if the applicant is incapacitated
- A representative of the long-term care facility where the individual resides



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### Requirements for Accepted Application

- Name
- Mailing Address
- Signature



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### Tips for Submitting Applications

- Do not guess
- If something doesn't exist, say so



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### Tips for Submitting Applications

- Provide notice of incapacity with application and intention to seek Guardian
- Request Agency's assistance



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### Excess Resources

- Just file the application- can't get benefits if you don't file
- Inaccessible resources



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### Tips for Pending Applications

- Regular follow-up (at least monthly)
- No news - probably NOT good news
- Communicate in writing
- If communication is by phone, follow-up with writing or document in notes



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### Tips for Pending Applications

- Notify Agency of changes and updates (within 10 days)
- Use delays to your advantage



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### Appeals

- If incapacitated resident is denied- file an appeal
- File a new application in conjunction with an appeal



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### Other Tips

- Report bad-acting legal agents to APS and have them removed and replaced
- Police report may also be needed
- File for representative payee of SSA income (even if there's a legal agent)



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Questions



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For questions or feedback regarding this session, please contact:

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