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# Guardianship Determinations by Judges, Attorneys, and Guardians

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**Guardianship is intended to protect incapacitated individuals through the appointment of a surrogate decision maker. Little is known about how judges, attorneys, and professional guardians assess the need for guardianship, to what extent they apply statutory guidelines when making these determinations, and how their decisions compare. Three groups of participants (probate judges, elder law attorneys, and professional guardians) read vignettes portraying older adults that varied in the extent to which the evidence supported the appointment of a guardian. They were asked about the appropriateness of various resolutions. Participants were reluctant to endorse full guardianship even when warranted by the evidence and preferred informal, family-based interventions that do not involve legal action. Professional groups did not always agree on the appropriate resolutions, suggesting that one's professional orientation may play a role in perceptions of older adults.** 

## INTRODUCTION

In 2003, 36 million Americans were aged 65 and older; by 2030 this number is expected to jump to 72 million and represent 20% of the population (U.S. Bureau of the Census, 2005). Individuals over the age of 85 constitute the fastest growing segment of the population; in 2000 they numbered 4.2 million and by 2030 are expected to number 8.9 million (U.S. Administration on Aging, 2006). One consequence of longevity is an increase in the number of older adults with chronic diseases, functional impairments, and dementias, and a concomitant increase in the incidence of impairment in mental capacity. Mental capacity is the collection of skills such as memory, reasoning, judgment, and decision making required to manage

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one's affairs and perform everyday tasks. Questions of capacity arise in many contexts, including medical and research consent, driving, executing a will, and entering into contracts. The legal system uses different standards for determining capacity in each of these realms.

All adults are presumed to possess capacity unless adjudicated as incapacitated in guardianship or conservatorship proceedings (ABA Commission on Law and Aging & American Psychological Association, 2005). The determination of capacity in guardianship is ultimately a judicial one, guided by state statutes. In the past, standards for determining capacity were based primarily on diagnoses of mental illness. In recent years, though, all 50 states have modified their guardianship statutes to define more precisely the bases for judgments of capacity, to include more specific and functional standards that emphasize a respondent's ability to manage the tasks of daily living and to decrease vulnerability to exploitation (Moye, 1999). Although they vary by jurisdiction, guardianship laws now generally require that several elements be proved before guardianship can be initiated, including a disabling condition such as a mental illness or infirmity; cognitive impairment; impairment in functional abilities (such as managing the activities of daily living); and the lack of feasible alternatives to guardianship (i.e., less restrictive means will not suffice) (ABA Commission on Law and Aging & American Psychological Association, 2005). In addition to plenary, or full, guardianship appointments, most states also allow for limited guardianships in situations where older adults' needs are domain specific (e.g., health care).

A finding of incapacity necessitates that the state intervene in order to protect both the older adult and society (Moye, 2003). Thus, a guardian is appointed to make important decisions on behalf of this older adult in day-to-day matters such as living arrangements, health care, recreation, travel, making or revoking a will, getting married or divorced, spending money, driving, and the purchase, use, or disposal of property. The loss of the right to make these decisions can have a profound effect on an older adult's life.

Although judges ultimately decide whether someone lacks capacity, elder law attorneys routinely make *de facto* decisions when they agree to make changes to a will, draft contracts, and provide other legal services for older adults. Additionally, attorneys and professional guardians may be called upon to serve as guardians *ad litem* and to prepare reports on older adults' abilities prior to guardianship hearings or to provide reports to the court about the progress of a ward after a decision about capacity has been made. Given the profound impact of these decisions on the older adult, it is important to understand how professionals assess and make determinations of mental capacity. This is the intent of the current research. In this paper, we describe an experimental study that uses vignette methodology to compare decisions of probate court judges, elder law attorneys, and professional guardians. We examine whether guardianship determinations made by these groups are in accordance with statutory requirements and how these professional groups compare.

## Guardianship Proceedings

Although processes for determining the need for guardianship vary from state to state (Wood, 2006), the proceedings tend to follow a general pattern. In most cases, a



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family member, friend, or agency initiates guardianship proceedings, usually after a precipitating event such as an acute illness, financial mismanagement, or institutional placement (Friedman & Starr, 1995). After a petition is filed, a physician or mental health professional conducts an evaluation of the older adult and prepares a report describing the medical condition, cognitive and functional capacities, attempts to increase capacity, and level of supervision needed. A court investigator or guardian *ad litem* may also evaluate the individual and prepare a report, providing information on the precipitating event, the risk of harm, less restrictive alternatives to guardianship, and the family situation.

Probate judges theoretically use these evaluations and input from a variety of other sources, including attorneys, friends or family members, care providers, and the respondents themselves to guide their decision making. Judicial decisions typically fall into one of three broad categories: (1) the respondent is not incapacitated and a less restrictive alternative to guardianship is arranged; (2) the respondent is deemed partially incapacitated and limited guardianship is instituted; or (3) the respondent is deemed incapacitated and full, or plenary, guardianship is put into place and a guardian is appointed to make decisions on his or her behalf. In many cases, the appointed guardian is also the petitioner and a family member (Iris, 1988; Lisi & Barinaga-Burch, 1995), although professional guardianship (in which a trained professional is paid to act as a surrogate decision maker) has become an important alternative arrangement (Reynolds & Carson, 1999; Wilber, Reiser, & Harter, 2001).

## Diversity of Opinions Among Professionals

A number of different professional groups, including home health care workers, social workers, nurses, professional guardians, physicians, psychologists, lawyers, and judges, may be involved in guardianship cases. Data suggest that members of different professions may rely on different criteria to determine issues of capacity. Kjervik, Weisensee, Anderson, and Carlson (1998) administered a 22-item survey to 206 individuals who were working either as professional guardians, court-appointed guardians, or informal caregivers. Each item listed a different reason for pursuing guardianship (e.g. ''The person in question has short term memory problems'' and ''The person in question does not participate in usual activities'') and participants indicated the relative importance of that item in capacity assessments. Differences in responses across groups were apparent; there was agreement on only 9 of the 22 items. (In addition, the items on which the groups agreed tended to be deemed relatively unimportant in assessing capacity.) In general, informal caregivers rated interpersonal problems and problems with daily tasks as more important than professionals did. These groups obviously have different experiences in and knowledge of aging and care giving issues, yet the observed differences underscore the need for clear understanding of guardianship statutes among the many groups who work with older adults.

Discrepancies among different professional groups may be expected, yet one might anticipate agreement *within* members of the same profession on the relevant criteria for capacity assessment. However, Marson, McInturff, Hawkins, Bartolucci, and Harrell (1997) found that physicians' judgments of the capacity to consent to



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medical treatment in patients with mild Alzheimer's disease varied substantially when legal standards were not provided to help guide these assessments. A subsequent study (Marson, Earnst, Jamil, Bartolucci, & Harrell, 2000) that included legal standards for assessing capacity and use of a standardized instrument resulted in improved consistency in capacity assessments.

Standards for assessing diminished capacity in older adults have been made available to attorneys and judges (ABA Commission on Law and Aging & American Psychological Association, 2005, 2006). Yet it is unclear to what extent these groups as well as professional guardians apply standards and make reasoned judgments about the balance between individual rights, on one hand, and safety and well-being, on the other. Some research shows that attorneys, who usually have no formal training in capacity assessment, regularly evaluate their older clients' capabilities by relying on inaccurate and incomplete information about decision-making ability (Helmes, Lewis, & Allan, 2004). Other research shows that judges' reasoning can be biased as well (Guthrie, Rachlinski, & Wistrich, 2001).

## The Present Study

The purpose of this study was to determine how these professionals assess the evidence and make guardianship decisions in two fictitious cases. We examined the extent to which professionals attend to the requirements of guardianship statutes (i.e., prior to instituting guardianship, each of the following factors must be proven to exist: a disabling condition such as a mental illness or infirmity, impairment in functional abilities such as managing the activities of daily living, cognitive impairment, and the lack of feasible alternatives to guardianship). We also compared responses to portrayals of older adults by different professional groups (*probate judges*, *elder law attorneys*, and *guardians*). Thus, all participants were given a generic legal standard for assessing capacity and then asked to apply that standard to two vignette-portrayals in which we manipulated incrementally the amount of evidence provided. One-third of participants in each professional group knew only that the older adult lacked some *functional abilities*; one-third also knew that *neuropsychological testing* indicated cognitive impairment and provided a diagnosis (either vascular injury or early Alzheimer's disease); and one-third also knew that the proposed ward was apparently unable to function independently even with *supportive services* in place. According to the statute provided, full guardianship would be appropriate only in the last situation and not in the first two, whereas interventions short of full guardianship (e.g. further evaluation, limited guardianship) would be appropriate in the other conditions.

Because judges have the most experience applying the facts of a case to the requirements of law, we expected that they would be most likely to adhere to the legal standards and would appoint guardians only when the evidence warranted (i.e. when all the legal requirements were met). Because lawyers have more legal knowledge than laypeople, we expected that their judgments would be more correct than those of guardians, who, as laypeople, may be less attuned to the legal nuances of guardianship statutes. Yet, much of the research to date (e.g. Dudley & Goins, 2003; Moye et al., 2006) implies that neither judges nor attorneys will apply the rule that a



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full complement of evidence must be present before an older adult's independence can be rescinded and a guardian appointed, suggesting that all groups might opt for the establishment of full guardianship when the evidence to support this decision is lacking.

# METHOD

## Participants

Data came from three groups of participants: professional guardians, elder law attorneys, and probate court judges. The guardians ($n = 57$, from 22 different states, all non-lawyers) were members of the National Guardianship Alliance, who participated while attending a joint conference of the National Guardianship Alliance, the National Academy of Elder Law Attorneys, and the National College of Probate Judges. We gathered data from attorneys ($n = 56$, from 23 different states) and judges ($n = 38$, from 15 different states) in two ways. Eleven attorneys and five judges also participated while attending the joint conference. Subsequent to the conference, we acquired mailing lists from the National Academy of Elder Law Attorneys and the National College of Probate Judges, randomly selected from the names on these lists, and sent a series of email messages over several weeks following Dillman's (2000) recommendations for conducting an internet survey. The email messages asked participants to follow an on-line link to the study materials, read the vignettes and instructions, and complete questionnaires online or print them and return by mail. In all, we sent messages to 455 attorneys and received responses from 45 (10% response rate) and to 283 judges and received responses from 33 (12%).

## Design

The design was a 3 (evidence variation) $\times$ 3 (professional group) between-subjects design with repeated measures (i.e., each respondent read and responded to two vignettes).

## Materials and Procedure

We assessed decision-making using vignette methodology, a type of data collection that is widely used in decision making research (see, e.g., Finkel, 2000) and that involved providing representative portrayals of two older, infirmed adults: ''Edna,'' who was not eating well and losing weight, and ''Lillian,'' who was mismanaging her finances. Health care professionals distinguish ''activities of daily living'' (ADLs) such as dressing, eating, mobility, toileting, and personal hygiene from ''instrumental activities of daily living'' (IADLs) such as financial and health management, transportation, and meal preparation. The former are generally necessary for fundamental functioning and the latter can usually be delegated to others.



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We constructed the ''Edna'' scenario to test reactions to impairment in an ADL (i.e., eating) and the ''Lillian'' scenario to examine responses to limitations in the ability to perform an IADL (i.e., financial management).

The vignettes varied in the extent to which the evidence supported the appointment of a guardian and the evidence conditions were additive (i.e., one-third of vignettes included only evidence of *functional impairment*; one-third included evidence of functional impairment and *neuropsychological test results* showing cognitive impairment and providing a diagnosis; and a final third included evidence of functional impairment, neuropsychological testing, and evidence that the impairment led to an inability to provide for essential needs, even with the assistance of *supportive services*). The vignettes are shown in Table 1, along with the variations in evidence.

Participants were randomly assigned to groups so that approximately equal numbers of the three professional groups received each of the three versions of the evidence. After completing an informed consent form, participants read one of the vignettes (either ADL or IADL) in one of the three evidence conditions (*functional impairment, neuropsychological testing, supportive services*) and a model guardianship statute, and then answered a series of questions that examined their thoughts about that situation. We provided the following generic statute, modeled loosely on the definition of an incapacitated person in the Uniform Guardianship and Protective Proceedings Act (1997):

> An incapacitated person is an individual who a) for reasons of mental or physical illness or disability or substance abuse b) lacks sufficient understanding or capacity to make or communicate responsible decisions c) to such an extent that the individual lacks the capacity to meet essential requirements for health and safety. The appointment of a guardian may be necessary or desirable to provide care and supervision.

Participants were asked to apply this definition when responding to questions about the older adult, and not to presume anything about the portrayal that was not specified in the materials.

The first question was open ended and asked ''How should this situation be resolved?''. Subsequent questions asked participants to rate the appropriateness of different resolutions (further evaluation, limited guardianship, full guardianship) using a seven-point Likert scale where $1 =$ *not at all appropriate* and $7 =$ *extremely appropriate*. Participants also indicated their confidence in each answer on a similar 1 (*not at all confident*) to 7 (*extremely confident*) scale.

After participants had completed the first questionnaire, they proceeded to read the second case vignette and complete an identical, second questionnaire. The vignettes were presented in counterbalanced order but always in the same evidence condition (e.g. *functional impairment* only) for any given participant.

## RESULTS

Given the exploratory nature of this research, we opted to conduct all statistical analyses using a $p$ value of .05 in order to maximize power. We take into account the increased risk of a Type 1 error by interpreting our findings with caution and relying on effect sizes to aid our interpretation of significant results.



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Table 1. Vignettes and evidence variations

| |
|---|
| *ADL vignette (with evidence of functional impairment)* |
| Edna is an 83 year old woman who has lived independently from the time of her husband's death 15 years ago. Edna and her husband lived in the same town the entire length of their marriage, and although Edna no longer lives in the house they once shared, she moved only a mile away, to a nearby retirement community. She has lived there for about 10 years, taking advantage of the many services and amenities they offer. She has been very happy with her decision to move, especially since there was a large amount of work involved in keeping up the house and the yard. Since her husband's death, Edna has taken care of all the daily aspects of her life, like cooking, driving, bill-paying, and shopping, by herself. In the past, she enjoyed an active life, spending time with both of her daughters, who live nearby, and her friends at the retirement community. She enjoyed walking on the trail system in town and occasionally swam at the retirement community's pool. She has been less active recently. Occasionally, Edna attends one of the knitting classes offered at the community center. Weekly, Edna and a group of her friends get together for a few hours, usually to go to the movies. Recently, Edna's daughter, Sara, noticed that her mother had lost weight. Moreover, Edna stayed with Sara and her family for a week a short time ago. Eating meals with them regularly, in only one week Edna regained much of the weight she had lost, only to lose it again quickly when she returned home. A social worker was called in to evaluate the situation, and she reported that Edna ate very little and that there was only a small amount of food in her kitchen and refrigerator. |
| *Evidence of neuropsychological testing results* |
| Worried that perhaps Edna's recent decline was related to some sort of cognitive problem, Sara asked her mother to undergo a neuropsychological assessment. She agreed, and the results indicated that Edna had significant deficits in executive functioning impacting her ability to develop a plan, initiate a plan, and carry through a plan of action. The most likely etiology is a vascular injury (e.g. a stroke). |
| *Evidence related to implementation of supportive services* |
| Sara decided to hire someone to do grocery shopping for her mother and prepare meals that she could heat up for dinner each night. This service provided Edna with meals and groceries at the beginning of each week. Sara was soon informed by the providers, though, that the meals were left uneaten, and her mother couldn't explain why. After a month of using this service, Edna had lost even more weight. |
| *IADL vignette (with evidence of functional impairment)* |
| Lillian is an 81 year old woman who has lived alone from the time of her husband's death 11 years ago. Her husband was a successful commercial photographer who opened his own business soon after their marriage, photographing many local weddings. After her children went to school, Lillian often helped out with her husband's business, although she never pursued photography herself. She also worked part-time as a substitute English teacher at the local high school before retiring 20 years ago. Lillian has conscientiously paid her bills, cooked, and shopped by herself since becoming a widow. She even collaborated on a small cookbook several years ago with a few friends from her church, contributing most of the dessert recipes. She lives in the same small town where she raised her family, with both of her children living nearby. Lillian participates in a variety of activities and often spends time with her friends and her children. She goes out to eat frequently with her children and grandchildren. She has been playing the violin for over 65 years, and still practices almost daily, although she has recently been troubled by arthritis in her hands. On a recent visit, her daughter, Kim, noticed quite a few unpaid, overdue bills at her mother's house, including the 'final notice before disconnection' for her utilities. Since she was familiar with her mother's financial situation, Kim knew that her mother had the money to pay the bills, but had neglected them. A social worker was called in to evaluate the situation, and she reported that Lillian had also bounced several checks recently. |
| *Evidence of neuropsychological testing results* |
| Concerned that Lillian's difficulties with the bills indicated some type of cognitive decline, Kim asked her mother to undergo a neuropsychological assessment. Lillian agreed, and the results indicated significant impairment in memory indicative of an early dementia of the Alzheimer's type. Lillian scored at the 10th percentile in comparison to her age matched peers on memory and executive function tests. |
| *Evidence related to implementation of supportive services* |
| Kim decided to hire a service to help her mother pay the bills. Bi-monthly, an individual came in and assisted in writing and mailing checks to pay bills. Soon after the service began, though, Kim was informed that her mother was unable to keep track of her bills, apparently losing them or throwing them away before her appointments with the bill-paying service. After about a month of using the service, Lillian's telephone was turned off for non-payment. |



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## Comparisons of Vignettes

We first compared ratings of the appropriateness of various actions (further evaluation, limited guardianship, full guardianship) in the two vignettes, collapsing across variations in evidence and professional group. To do so, we conducted three paired-sample *t*-tests. Participants rated limited guardianship as less appropriate in the ADL portrayal ($M = 3.30$, SD = 2.05) than in the IADL portrayal ($M = 4.14$, SD = 1.93), $t(146) = 4.65$, $p < .05$, $\eta^2 = .13$, and rated full guardianship as more appropriate in the ADL portrayal ($M = 2.69$, SD = 2.02) than in the IADL portrayal ($M = 2.31$, SD = 1.73), $t(146) = 2.02$, $p < .05$, $\eta^{2=} .03$. There were no differences in participants' ratings of the appropriateness of further evaluation.

## Effects of Evidence Variation and Professional Group

To assess the effects of evidence variation and professional group on preferred case resolutions, we analyzed responses to the two vignettes separately, reasoning that participants might think differently about capacities related to an ADL (i.e. eating) and an IADL (i.e. financial management). To do so, we conducted six (three each for the ADL and IADL vignettes) 3 (evidence variation: *functional impairment, neuropsychological testing, supportive services*) × 3 (professional group: *guardian, attorney, judge*) between-subjects ANOVAs with appropriateness ratings as the dependent variables. (Participants' mean confidence ratings were invariably high and did not differ by evidence variation or professional group.) When necessary, *post hoc* tests were performed using Tukey's HSD. All means and standard deviations are shown for the ADL vignette in Table 2 and for the IADL vignette in Table 3.

### *ADL Vignette*

Overall, the informal measure of *further evaluation* received higher appropriateness ratings than formal measures such as *limited* or *full guardianship*. Ratings of the appropriateness of *further evaluation* differed by evidence variation, $F(2, 141) = 3.59$, $p < .05$, partial $\eta^2 = .05$, and by professional group, $F(2, 141) = 3.52$, $p < .05$, partial $\eta^2 = .05$. *Post hoc* tests revealed that participants rated further evaluation as more appropriate when there was only functional impairment than when there was also cognitive impairment and an inability to provide for essential needs even with supportive services. *Post hoc* tests revealed that guardians were more likely than judges to endorse further evaluation.

Analyses related to *limited guardianship* data showed an effect for evidence variation, $F(2, 139) = 4.81$, $p < .05$, partial $\eta^2 = .07$, but not for professional group. *Post hoc* tests revealed that limited guardianship was rated as less appropriate in the functional vignette than in the supportive services vignette.

Ratings of the appropriateness of *full guardianship* differed as a function of evidence variation, $F(2, 139) = 12.08$, $p < .05$, partial $\eta^2 = .15$; and marginally differed as a function of professional group, $F(2, 139) = 2.95$, $p = .056$, partial $\eta^2 = .04$. Participants rated full guardianship as less appropriate in the functional vignette than when there was cognitive impairment and an inability to provide for



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Table 2. Mean appropriateness ratings for the ADL vignette

| | Mean | SD | F | $p$ | $\eta^2$ |
|---|---|---|---|---|---|
| *Further evaluation* | | | | | |
| Professional group | | | | | |
| Judge | 5.50[a] | 1.87 | | | |
| Attorney | 5.64 | 1.53 | 3.52 | .04 | .05 |
| Guardian | 6.12[b] | 1.27 | | | |
| Evidence variation | | | | | |
| Functional | 6.14[a] | 1.21 | | | |
| Neuropsychological | 5.44[b] | 1.80 | 3.59 | .03 | .05 |
| Supportive services | 5.70[b] | 1.59 | | | |
| *Limited guardianship* | | | | | |
| Professional group | | | | | |
| Judge | 3.46 | 1.80 | | | |
| Attorney | 3.22 | 2.12 | .52 | .60 | .01 |
| Guardian | 3.19 | 1.88 | | | |
| Evidence variation | | | | | |
| Functional | 2.72[a] | 2.06 | | | |
| Neuropsychological | 3.35 | 1.84 | 4.81 | .01 | .07 |
| Supportive services | 3.86[b] | 1.75 | | | |
| *Full guardianship* | | | | | |
| Professional group | | | | | |
| Judge | 2.78 | 1.84 | | | |
| Attorney | 2.25[a] | 1.90 | 2.95 | .06 | .04 |
| Guardian | 2.95[b] | 2.21 | | | |
| Evidence variation | | | | | |
| Functional | 1.73[a] | 1.38 | | | |
| Neuropsychological | 2.85[b] | 2.12 | 12.08 | .001 | .15 |
| Supportive Services | 3.59[b] | 2.13 | | | |

On 1–7 scale. In each analysis, means with different superscripts differ significantly at $p < .05$ in the Tukey honestly significant difference comparison.

essential needs. Compared with attorneys, guardians were marginally more likely to endorse full guardianship across the vignettes.

## *IADL Vignette*

A similar pattern emerged when participants were asked to rate the appropriateness of responses to the IADL scenario: they rated *further evaluation* as more appropriate than *limited* or *full guardianship*. Ratings of the appropriateness of *further evaluation* were affected by both evidence variation, $F(2, 139) = 4.71$, $p < .05$, partial $\eta^2 = .06$, and professional group, $F(2, 139) = 5.37$, $p < .05$, partial $\eta^2 = .07$. Participants deemed this action more appropriate for the functional vignette than for the vignette that included neuropsychological test results showing cognitive impairment. Guardians rated further evaluation as more appropriate than did attorneys and judges.

Ratings of the appropriateness of *limited guardianship* differed as a function of evidence variation, $F(2, 138) = 4.34$, $p < .05$, partial $\eta^2 = .06$. This resolution was rated as more appropriate in response to the supportive services vignette than to the functional vignette or the neuropsychological testing vignette.

Responses to the option of *full guardianship* differed as a function of both evidence variation, $F(2, 138) = 7.18$, $p < .05$, partial $\eta^2 = .09$, and professional



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Table 3. Mean appropriateness ratings for the IADL vignette

| | Mean | SD | F | $p$ | $\eta^2$ |
|---|---|---|---|---|---|
| *Further evaluation* | | | | | |
| Professional group | | | | | |
| Judge | 5.43[a] | 1.86 | | | |
| Attorney | 5.19[a] | 1.92 | 5.37 | .01 | .07 |
| Guardian | 6.17[b] | 1.31 | | | |
| Evidence variation | | | | | |
| Functional | 6.09[a] | 1.38 | | | |
| Neuropsychological | 5.03[b] | 2.08 | 4.71 | .01 | .06 |
| Supportive services | 5.64 | 1.62 | | | |
| *Limited guardianship* | | | | | |
| Professional group | | | | | |
| Judge | 4.24 | 1.99 | | | |
| Attorney | 3.94 | 2.33 | .46 | .63 | .01 |
| Guardian | 4.18 | 1.93 | | | |
| Evidence variation | | | | | |
| Functional | 3.67[a] | 2.75 | | | |
| Neuropsychological | 3.85[a] | 2.15 | 4.34 | .02 | .06 |
| Supportive services | 4.93[b] | 1.75 | | | |
| *Full guardianship* | | | | | |
| Professional group | | | | | |
| Judge | 2.56[a] | 1.89 | | | |
| Attorney | 1.83[b] | 1.41 | 4.40 | .01 | .06 |
| Guardian | 2.54[a] | 1.84 | | | |
| Evidence variation | | | | | |
| Functional | 1.72[a] | 1.35 | | | |
| Neuropsychological | 2.36[b] | 1.77 | 7.18 | .001 | .09 |
| Supportive services | 2.87[b] | 1.92 | | | |

On 1–7 scale. In each analysis, means with different superscripts differ significantly at $p < .05$ in the Tukey honestly significant difference comparison.

group, $F(2, 139) = 4.40$, $p < .05$, partial $\eta^2 = .06$. Participants rated guardianship as less appropriate with the functional vignette than with either the neuropsychological testing vignette or the supportive services vignette. Attorneys were less likely to endorse guardianship than were judges and guardians.

## Open-Ended Responses

Prior to giving appropriateness ratings, participants were asked ''How should this situation be resolved?''. We received responses from 104 participants (69%).[1] All responses were transcribed and evaluated for content. Based on this evaluation, we devised a coding system that categorized responses into the following groups. A given response could be categorized into multiple groups depending on its content: (1) further assessment or evaluation is necessary before any decisions could be made; (2) supportive services should be put in place to help the older adult; (3) the older adult should try different methods or aids (e.g. creating a durable power of attorney, moving to an assisted living facility); (4) the older adult's family should try to help her

[1]We were less likely to receive qualitative data from individuals who completed the study at the conference (primarily guardians) than from those who responded on-line (judges and attorneys), perhaps because the latter had no time constraints, perhaps because typing is easier and faster than handwriting for many people.



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in an informal way; (5) limited guardianship or conservatorship should be put in place; (6) full guardianship should be put in place; and finally (7) that not enough information was presented in the vignette to make any suggestion. Two raters working independently categorized all responses and any discrepant coding was resolved through discussion. Examples are provided in the discussion section for illustrative purposes.

The two vignettes produced similar data. For the ADL scenario, 36% ($n = 37$) of participants who responded qualitatively indicated that more evaluation was necessary, 57% ($n = 59$) indicated that supportive services would help resolve the situation, 8% ($n = 9$) indicated that Edna should try different methods herself to help resolve the situation, 51% ($n = 53$) indicated that Edna's family should help her somehow, only 2% ($n = 2$) suggested that limited guardianship or conservatorship was appropriate, and 13% ($n = 13$) suggested that full guardianship was appropriate.

For the IADL scenario, 32% ($n = 33$) of participants who responded qualitatively indicated that more evaluation was necessary, 45% ($n = 47$) indicated that supportive services would help resolve the situation, 23% ($n = 23$) indicated that Lillian should try different methods herself to help resolve the situation, 51% ($n = 53$) indicated that Lillian's family should help her somehow, 12% ($n = 12$) suggested that limited guardianship or conservatorship was appropriate, and only 4% ($n = 4$) suggested that full guardianship was appropriate. A small number of participants ($n = 7$, 7%) indicated that not enough information was present in the vignette to answer this question.

## DISCUSSION

The intent of guardianship statutes is to ensure that professionals carefully evaluate the evidence and find that all elements of the statute have been proven prior to instituting guardianship. A main objective of this study was to determine whether professionals adhere to the statutory requirements for determining capacity and the need for guardianship. In the context of our experimental manipulations, full guardianship would be appropriate only in the condition in which the older adult lacked functional abilities, neuropsychological testing indicated cognitive impairment and provided a diagnosis, *and* essential needs were going unmet even with supportive services in place. So an important question is whether professionals endorsed full guardianship in situations in which some of the relevant evidence was lacking.

In general, full guardianship was not widely endorsed even when the full complement of evidence was present, and it is apparent that participants required more than mere functional deficits to support the appointment of a guardian. Importantly, though, participants did not distinguish the vignettes that portrayed functional and cognitive impairment *only*—the neuropsychological testing condition—from those that also described that essential needs were going unmet even with the implementation of supportive services.

A similar pattern emerged when the option of limited guardianship was considered; participants were least likely to endorse it when only functional impairments were described and most likely to endorse it when the evidence clearly supported it (i.e. in the supportive services evidence condition). However, in the



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IADL portrayal, participants did not distinguish the functional deficits from the combined functional and cognitive deficits and were equally likely to endorse limited guardianship in these two conditions.

Participants were quite likely to advocate further evaluation—an option that is considerably easier to implement and less formal than guardianship, and that does not threaten the older adult's autonomy and independence. In particular, further evaluation was deemed very appropriate especially for the vignette that described only functional deficits. Participants believed accurately that further testing is appropriate in these situations.

Open-ended responses illustrate these sentiments and show a preference for informal, family-based interventions that do not involve legal action (one notable exception was the commonly offered suggestion that the older adult execute a durable power of attorney). A typical response that suggests other interventions should be considered prior to instituting guardianship is as follows:

> The first course of action should be to determine whether or not Edna would be willing to move into an assisted living facility where structured mealtimes would ensure that Edna remembered to eat. An assisted living facility with meals provided and with staff that was aware they had to bring Edna to the dining room may be able to ensure that Edna eats. In the event that Edna refuses or there is no adequate facility for Edna either due to staff limitations or financial limitations and due to the immediate risks to Edna's health and well-being, guardianship over the person should be sought as a second alternative.

Other responses offered comparable sentiments:

> . . .a guardian should not be appointed at this time. Less restrictive alternatives should be examined such as a care manager or other method of delivery of meals.
> I prefer to find ways to set this [older adult] up to succeed. . . The mother's consent matters greatly. Absent that, there are a variety of creative ways to accomplish what a guardianship does without taking away Mom's rights completely.

Another objective of this study was to examine decision making preferences among different groups of professionals who work with older adults. We suspected that probate judges would be somewhat more exacting in their evaluation of the evidence and understanding of legal requirements for determining capacity than attorneys and guardians, and attorneys would be more attentive to these issues than guardians. In statistical terms, we predicted interactions between professional group and evidence variation, assuming that judges would be less likely than other groups to endorse guardianship in circumstances where evidence was lacking. In fact, none of the predicted interactions was significant, indicating that there were no differences among different professional groups in assessments of variations in the evidence. This is an auspicious finding and may indicate that statutory revisions and the attention they have generated have had the effect of moving professional groups closer in their understanding of the legal requirements and alternatives to full guardianship.

There were main effect differences as a function of professional group, however. In response to both the ADL and IADL vignettes, elder law attorneys rated full guardianship as less appropriate than did guardians. On the other hand, guardians gave higher ratings than judges or attorneys on the appropriateness of further evaluation in both the ADL and the IADL vignettes. These findings suggest that



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one's professional orientation may play some role in perceptions of older adults: attorneys who provide services to older adults and who may represent them in guardianship cases are apparently less willing than other professionals who read the same case facts to endorse the appointment of a guardian, and professional guardians who have more hands-on experience with issues of impairment than legal professionals are aware of the need for formal evaluations when older adults' functioning appears to decline.

Participants perceived differences in the portrayals of ADL (activities of daily living; in this study, eating) and IADL (instrumental activities of daily living; in this study, financial management) decrements and favored different resolutions to the two cases: they were more likely to endorse full guardianship and less likely to endorse limited guardianship in the ADL portrayal than in the IADL portrayal. Clearly, feeding and nutrition problems in older adults have a variety of etiologies and lead to significant and serious decrements in well-being so participants may have felt that limited interventions to address this problem might not suffice. Indeed, the open-ended responses to the ADL portrayal voiced these safety-related concerns; for example:

> This differs from the previous example [the IADL portrayal], in that I see this as a more immediate threat to Edna's health.
> Her [Edna's] inability to understand the importance of daily diet and the effects she may suffer from lack of supervision or immediate direct care can be fatal in a short period.

By contrast, the options for dealing with financial mismanagement are perhaps clearer and fit better with the objectives of limited guardianship: namely, to institute surrogate decision-making in one realm so as to compensate for compromised functioning in that area only. Open-ended responses on this issue suggested, for example, that ''Lillian needs financial assistance to start with'' and ''Someone should help her pay her bills.'' Participants also mentioned that conservatorship was a less restrictive alternative to guardianship and suggested it as an appropriate intervention.

Finally, we note that one of our major findings—that professional guardians, elder law attorneys, and probate judges view guardianship as only *somewhat* appropriate even when evidence supports it—is at odds with previous research. Whereas earlier analyses of court records indicated that determinations of incapacity were made without requisite proof (e.g. Bulcroft, Kielkopf, & Tripp, 1991; Friedman & Starr, 1995) and plenary guardianships are granted in most cases (Lisi & Barinaga-Burch, 1995), participants in our study were reluctant to endorse full guardianship even when the evidence apparently warranted it. This finding could be related to the increased advocacy for older adults and support for their autonomy that has characterized the last two decades of policy and legislation in eldercare (e.g. Agich, 2003), though admittedly it could also be an artifact of our vignette methodology in that participants may have balked at endorsing full guardianship without more evidence at their disposal.[2]

The results of our study come with several other caveats, as well. First, the design of our study may limit its ecological validity; whereas actual guardianship decisions

[2]Another possibility, pointed out by a reviewer, is that the pressures of court dockets cause judges to order plenary guardianships even in situations in which limited guardianship would be more appropriate. This could explain why we found less frequent use of plenary guardianships than exists in actual cases.



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are based on the review of extensive files, our materials included only short vignettes and a one-paragraph description of the applicable law. Further, actual guardianship hearings give decision makers the opportunity to ask questions of all interested parties, whereas participants in our study were forced to make decisions based only on the fact patterns we presented. Also, survey response rates for attorneys and judges were fairly low, raising the possibility that only those individuals who were particularly interested or experienced in guardianship cases responded and that different data would accrue from a wider cross-section of professionals. Additionally, the judges who participated all specialize in probate matters and undoubtedly have more experience with guardianships than general jurisdiction judges who handle these cases in many courthouses. Finally, the dependent measure we used, appropriateness rating, has some drawbacks. Obviously, these options (e.g. further evaluation, limited guardianship) were not considered in isolation (i.e., a given respondent may have deemed two or more interventions to be appropriate) so our data may not provide particularly useful information about the relative importance of each or of the absolute value of any particular course of action. We used appropriateness ratings because they seem to best capture the decisions that professionals in the real world must make when they weigh alternative resolutions and assess the appropriateness of each. Given these caveats, we acknowledge the tentative nature of our conclusions and the need for replication.

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