Hot Topics in Elder Law:

Supported Decision Making and Protective Arrangements

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Protective arrangements such as guardianship and conservatorship require a court to strike a delicate balance between protection from harm and autonomy. Most state laws require court-ordered arrangements to follow the constitutional principle first articulated in Shelton v. Tucker[1] an often-cited case which questioned whether an Arkansas statute violated the constitutional speech and privacy rights of teachers. In Shelton, the Supreme Court articulated the principle that where a state seeks to lawfully use its power to infringe on individual rights, it should do so using the least restrictive alternative available. The least restrictive alternative principle has been extended by the Supreme Court to other contexts, including institutionalization.[2] Shelton and its progeny recognize that "*even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose."*[3] Thus, while states may lawfully impose restrictions on the fundamental liberties of citizens, these restrictions must be narrowly structured.

In addition to applying the least restrictive principle to an analysis of laws infringing liberties, courts have also required due process protections in such cases. The 1979 case of Addington v. Texas[4] established that under the Fourteenth Amendment a "clear and convincing standard" of proof must be applied in an involuntary civil commitment case because it constitutes a "significant deprivation of

[1] 364 U.S. 479, 493-494 (1960.)
[2] See, for example, O'Connor v. Donaldson, 422 U.S. 463 (1975.)
[3] Shelton v Tucker, 364 U.S. 479, 489 (1960.)
[4] Addington v. Texas, 441 U.S. 418 (1979.)

liberty that requires due process protection."[5] And some courts have applied a constitutional analysis to adult guardianship cases and found the liberty interests at stake in adult guardianship are similar enough to the liberty interests in involuntary commitment cases as to require comparable constitutional protections.[6]

An overwhelming majority of state laws governing adult guardianship require an inquiry into whether less restrictive alternatives may be available/appropriate and, where guardianship is necessary, that guardianship orders be designed to maximize the independence of the person subject to the guardianship. However, the best available data indicates that most guardianship orders are plenary[7], removing rights on a wholesale basis rather than individually tailoring the guardianship. To many observers, the imposition of plenary guardianship contradicts the unambiguous statutory language in most states favoring a tailored approach that implements guardianships to maximize an individual's independence and autonomy.[8]

Supported Decision Making (SDM)[9] is a mindset that holds promise for helping tailor protective arrangements in a way that honors the goals, values and wishes of a vulnerable individual. Rooted in the disability community, SDM has value for older persons. These arrangements are person-centered, flexible and resilient. They can be developed outside of the court and combined with other planning documents such as psychiatric advance directives, medical or financial powers of attorney or trust

[5] Supra, at 425.
[6] See, for example, Hedin v. Gonzales, 528 N.W. 2nd. 567 (Iowa, 1995.)
[7] See, e.g., Pamela B. Teaster et al., *Wards of the State*: *A National Study of Public Guardianship,* 37 Stetson Law Rev. 193, 219 (2007) which found that courts ordered limited guardianships in less than 10 percent of cases studied.
[8] See, e.g. Arias, A Time to Step In: Legal Mechanisms for Protecting those with Declining Capacity, 39 Am. J.L. & Med. 134 (2013) at 137, advocating for mechanisms to address a gradual decline in capacity over a "bright line" standard.
[9] See www.supporteddecisionmaking.org , a national clearinghouse for information on supported decision making arrangements.

documents or folded into a court process such as guardianship or conservatorship.[10] SDM arrangements provide helpful guidance for supporters as to the content and range of decisions. Because SDM arrangements can be tailored, they can include growth clauses to trigger a reevaluation of the arrangement, provide standing for a third party to receive an accounting or to bring an action on behalf of the individual against an agent, revocation triggers in event of alleged abuse, or prevention from revocation to allow for investigation.

It has been argued that tailored guardianship orders are too cumbersome for families and are costly and difficult to implement.[11] To be successful, supported decision making arrangements require planning and drafting skills, as well as the involvement of all external service providers such as banks and health care providers to assure that SDM arrangements are recognized and that supporters have requisite authority and guidance to act. The ABA Commission on Law and Aging has developed a wonderful tool for lawyers and courts to use to determine whether a supported decision making arrangement is workable in any particular case.[12] Using the acronym PRACTICAL, it asks counsel to: 1) Presume that guardianship is not necessary2) Reason (identify the reason for the concern) 3) Ask- If trigger may be temporary or addressed with less restrictive measures 4) Community- Check to see if there are community resources or members that can help, 5) Team- ask the individual about potential team members 6) Identify strengths and limitations in decision-making 7) Challenges- Screen for and address any challenges that may arise 8) Appoint surrogates in areas where they may be needed, 9) Limit any necessary guardianship petition and finally, to create monitoring mechanism and alter the plan as needed.

[10] See, for example, Ross v. Hatch, No CWF120000426P-03, slip op. (Va. Cir. Ct. Aug 2, 2013.) where a SDM arrangement was folded into a temporary guardianship order.
[11] An opinion poll conducted by this author listed these as significant barriers to tailored guardianship orders.
[12] https://www.americanbar.org/groups/law_aging/resources/guardianship_law_practice/practical_tool.html