

How Can Restorative Justice Help in Family Guardianships?

Introduction: Guardianship and Family Disputes

Guardianship Benefits and Drawbacks. Guardianship is a legal device in which a court appoints someone to make decisions about the care and/or finances of an adult the court has found unable to make such decisions for themselves.¹ The aim is to protect the adult from harm. Guardianship can be a lifesaving solution for elder abuse, neglect, or exploitation, often in crisis situations. But there are downsides.

In naming a surrogate decision-maker, the court removes basic rights, reducing self-determination. It is a drastic step. Moreover, although most guardians are caring and dedicated, an unknown number may take advantage of the adults they are appointed to protect. Adults are often subject to guardianship for years—generally for the rest of their lives—and court monitoring is uneven.

Family Dynamics in Guardianship. While some guardians are professionals, or public or private agencies, the majority are family members. In some cases, family disputes can lead to the guardianship.



Siblings may argue over control of their parent's money, or over who should provide care.



An older parent may suffer abuse by a grown child, yet keep silent because of fear of retaliation or reluctance to subject the child to punishment.



In stepfamilies, adult children may be locked in battle with their parent's partner.



The parent of an adult child with developmental disabilities may seek guardianship to protect them, unnecessarily reducing the child's life choices.

Family Fragmentation. Guardianship is an adversarial process. There is a hearing, and an adult is found to be “incapacitated.” Thereafter, the adult's decisions about where they live, who they see, what medical treatments they get, and/or how their money is used are not their own. In family disputes, the court may appoint a third-party professional as guardian, or may appoint one family member over others, building tensions.

Because guardianship is such an extreme step, it can fragment—or further fragment—families, aggravating conflict rather than resolving it.

Less Restrictive Alternatives. State laws and national standards call for a thorough examination of less restrictive decisional options before seeking or imposing a guardianship. For instance, perhaps a financial power of attorney, a health care advance directive, or a supported decision-making agreement can provide the needed protection. Implementation of this concept can be challenging and inconsistent.

A Different Lens: Restorative Justice Approaches

What is Restorative Justice? Restorative justice is a holistic, person-centered, and solutions-oriented form of justice that promotes accountability, reparation, and resolution between parties and among the larger community. It aims to build trust and strengthen relationships between those who were harmed and those who caused the harm by promoting effective communication and understanding.



Instead of an adversarial process, restorative justice uses collective problem-solving to meet the needs of both parties. It is future-facing, aiming to change patterns of behavior and ways of interacting. Pioneering projects have begun to explore the use of restorative justice approaches to address complex elder abuse cases.² These projects are based on principles of safety and respect for individuals, and provide support for both the older adult and the harmer. Their goal is to facilitate family reconciliation, understanding, and healing.

Do Restorative Justice Approaches Have Potential to Divert Family Conflict Cases from Guardianship?

Facilitated Discussion About Less Restrictive Options and Supportive Services. Early discussions can identify options to address both the needs of the adult and their family members. Planning documents such as powers of attorney and advance directives can empower the adult to choose trusted decision-makers who will honor their values and preferences. Case managers can develop service plans centered on the adult's priorities, while considering supports for family members. An adult may develop a “circle of support” bringing together trusted family members, friends, and/or service providers. Community services, such as home-delivered meals and in-home care, can help meet an adult's needs.



Early, collaborative planning helps adults retain autonomy while ensuring safety and support.

Mediation of Guardianship Cases. Mediation is a voluntary, confidential method of resolving disputes in which a trained neutral facilitator helps parties arrive at a mutually acceptable agreement. Mediators look for the parties' real interests behind their stated positions.

Mediation is an empowering process in that the agreement is that of the parties, not the mediator. It aligns with restorative justice goals of repairing past relationships and looking ahead. State and local efforts have explored the use of mediation in adult guardianship cases.³ In some jurisdictions, a judge may refer a pending guardianship case to mediation before making a judicial determination. The mediator can help the parties examine less restrictive options that might make guardianship unnecessary, limit the order, or agree on who should be guardian of the person and/or property.

CASE EXAMPLE

An older widow with three daughters began showing signs of dementia. One daughter moved in to care for her. She isolated her mother from her sisters, and used some of her mother's Social Security money for herself. The sisters objected and called APS, but the agency was denied entry. The live-in daughter filed a guardianship petition. The court referred the case to mediation. The mother and all three daughters talked with a trained facilitator who found that the harmer daughter was in debt, needed a job and place to live, and felt threatened by her sisters. The mediator helped the daughter access an employment program and affordable housing, and identified community services to enable the mother to live at home, visited by all daughters.



By addressing both the mother's care needs and the daughter's financial and housing challenges, mediation created a plan that reduced family conflict and supported the mother to remain safely at home.

How Can Restorative Justice Approaches Be Applied to Family Guardianship Cases?

Examination of each of the elements of a guardianship case⁴ can highlight ways to divert cases to restorative remedies, applying principles of repairing harm and building family relationships.



Restorative approaches can repair harm and strengthen family bonds in guardianship cases.

Petition. The petition form addresses the need for guardianship and may include whether “less restrictive options” have been or could be tried. Mediation may help uncover less restrictive options. To encourage consideration of such options—and to fully inform the court about the history of the conflict—the petition form could ask whether the petitioner had attempted mediation to resolve disputes.



Notice. The person named in the petition must get written notice of the proceedings. The form could include a brief description of mediation and how it may help parties resolve the issues without a court hearing or determination. It could list local mediation resources, including community mediation organizations, court-based mediation programs, and private mediators, with links to their websites.⁵



Counsel. When family members disagree over whether the adult needs a guardian or who should serve, adults named in guardianship petitions need counsel to represent their wishes in court and advocate for their rights. Counsel should inform the respondent about any restorative approaches or mediative options that may help reduce or resolve the conflict. If the adult wants to participate in those activities, the attorney should advocate for the client’s inclusion and for any accommodations that would enhance that participation.

Court Investigator. Court investigators (or, in some jurisdictions, court visitors or “guardians ad litem”) report to the court about the abilities and needs of the adult named in the petition, the suitability of the proposed guardian, and other key information. Guardianship cases often are triggered by mistreatment of the adult, including neglect, but typically the alleged harmer is not a focus of the court investigation or interviewed by the investigator. Restorative approaches examine the relationship between the mistreated adult and the harmer, and the ways in which supporting the harmer (who might be an adult child or a spouse) can improve and bolster a crucial relationship. A court investigator could identify both the adult’s and the harmer’s need for services or supports, and report that information to the judge.

Capacity Assessment. The adult’s capacities (for example, capacity to manage money, to make residential and health care decisions) are central to the court’s determination of whether to appoint a guardian. Restorative approaches are person-centered, and clinical evaluations and judicial determinations of capacity should be person-centered as well. This means looking beyond diagnoses to task- and decision-specific capacity, and observing the adult within the context of their environment, including their living arrangements, family dynamics, and other relationships.⁶



Court Hearing. Restorative approaches explore ways to accommodate and support the adult at the center of the guardianship case. These could include holding the hearing in a less adversarial and intimidating setting, such as permitting remote participation via videoconferencing or convening at a care facility or residence. Other accommodations—from assistive hearing technology to permitting a support person to sit with the adult to waiving the requirement of testifying from the witness stand—make the hearing more person-centered.



Court Order. Judges must determine whether least restrictive options can meet the adult’s needs, and could do this by referring a case to mediation about such options before making a ruling. Alternatively, the court may appoint a guardian with limited powers. In making this decision, the court must look carefully at the adult’s capacities, not just their limitations, and determine, for example, whether the adult can manage a limited amount of money or make certain medical decisions. Limited orders can empower the adult, and preserve their right to make choices.

Depending on the court’s jurisdiction, the court might order some degree of financial restitution by the harmer. For example, the Cook County Public Guardian’s office in Illinois has helped restore large sums lost by their exploited clients.⁷

Sometimes family conflicts grow into complex, litigious guardianship cases with competing petitions, often dominated by personal agendas, and the voice of the adult gets lost. When family conflict is aggravated and guardianship becomes a tool wielded in a family feud, more than mediation is needed. Eldercaring coordination is a dispute resolution model that was created to address the unique needs of families with high conflict dynamics.⁸ In this model, a court may refer a pending guardianship case to a trained neutral eldercaring coordinator who helps for up to two years to reduce conflict and resolve issues.



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Guardian Responsibilities. Guardians have the difficult balancing act of providing for the adult's safety while respecting their self-determination. Restorative justice maximizes the adult's ability to make their own choices to the greatest extent possible. Guardians can enhance the adult's participation by providing a safe environment for the adult to express concerns, and avoid anything that would isolate the person. To the extent that it is safe for the adult, the guardian could encourage family members to interact with and support the person. If conflicts arise among family members or with others in the adult's circle, the guardian can recommend using a mediative approach to resolving them.

Court Monitoring of Guardian. Court systems to receive and investigate complaints about a guardian's behavior or neglect can uncover harm and the need for additional support for the adult as well as other family members. When appropriate and safe for the adult, the court could consider referral to mediation or eldercaring coordination for resolving complaints by including all relevant parties.

If court monitoring uncovers mistreatment by the guardian, courts may respond with limitations on the guardian's role or sanctions, including removal and replacement of the guardian. Court awareness of family dynamics could help shape how the court modifies the order – for instance, including restitution of funds by the guardian.

Restoration of Rights. If a court finds that a guardianship is no longer necessary, it may terminate the order and restore the adult's rights. Restoration of rights is rare. More frequent examinations of whether a court order is still needed would support the choice and voice of the adult.



Restoration of rights is possible, but rare — more frequent reviews ensure adults keep as much autonomy as they can.

Conclusion: Raising Awareness of Restorative Options

Guardianship is an adversarial process in which the petitioner and the adult said to be incapacitated are opposing parties. If appointed, a family guardian assumes control in a way that may not recognize the voices of the adult or the other family members. Including restorative justice practices throughout the process could bring a paradigm shift in guardianship that would better repair harm and restore relationships.



Restorative justice practices in guardianship can shift the process from conflict and control toward repairing harm and strengthening family relationships.



ENDNOTES

1 Frequently, “guardian” refers to someone appointed to make personal decisions, and “conservator” refers to someone appointed to make financial decisions, but definitions vary from state to state. Here, “guardian” will be used to describe both appointments

2 RISE Collaborative, RISE Model, <https://risecollaborative.org/contact/>; Groh, A., “Restorative Justice: A Healing Approach to Elder Abuse,” Restorative Justice Exchange (2015), <https://restorativejustice.org/rj-archive/a-healing-approach-to-elder-abuse/>. Also see Nerenberg, L., Elder Justice, Ageism, and Elder Abuse, Springer Publishing Company (2019).

3 Crampton, A., “Elder Mediation in Theory and Practice: Study Results From a National Caregiver Mediation Demonstration Project,” Journal of Gerontological Social Work, Vol. 56(5), 423-437 (2013), <https://pmc.ncbi.nlm.nih.gov/articles/PMC4036675/>

4 Karp, N. & Wood, E., “Anatomy of a Guardianship: Case Study and Red Flags for Abuse,” National Center on Elder Abuse (2023), https://eldermistreatment.usc.edu/wp-content/uploads/2023/07/NCEA_IB_GuardianshipAnatomy_web.pdf

5 To find mediation programs, contact the state or local court system for a directory, or the member directory of the Association of Conflict Resolution, <https://acrnet.org/search/>.

6 University of Southern California, “Guardianship Evaluation Worksheet,” which “provides a holistic, organizational paradigm for judges to comprehensively and incisively evaluate and integrate relevant evidence of capacity,” Elder Justice Initiative, U.S. Department of Justice (2025), <https://www.justice.gov/elderjustice/help-judges-hearing-guardianship-cases>.

7 Cook County Public Guardian, Financial Recovery Unit, <https://www.publicguardian.org/adult-guardianship-division/opg-departments-responsibilities/>. The Financial Recovery Unit has recovered over \$33 million over the past eight years.

8 Eldercaring Coordination, <https://www.eldercaringcoordination.com/>