

# *Understanding Guardianship and the HCBS Settings Final Rule*

March 31, 2016

The Lewin Group  
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Department of Health Care  
Policy & Financing

# *Our Mission*

**Improving** health care access and outcomes for the **people** we serve while demonstrating sound stewardship of financial **resources**



# WebEx Quick Reference

- Use chat to answer questions, make comments, share insights
- For technology issues, please chat to “Host”
- For questions, comments or insights please chat to “All Participants”



# *Goals and Objectives*

- Provide an overview of Colorado's Guardianship law, recent trends in guardianship law in Colorado (and elsewhere), and the relationship of guardianship to the HCBS Final Rule.
- Understand guardianship and alternatives to guardianship and the role and limits in Colorado law.
- Explore scenarios related to participant rights, and guardianship within various residential and non-residential settings.



# *Today's Presenters*

- Adam Tucker and Caitlin Phillips, HCPF
- Mary Catherine Rabbitt, Disability Law Colorado
- Steve Valente, Residential Provider-Dungarvin Colorado
- Michelle King, Non-Residential Provider-King Adult Day Program (KADEP)
- Krissy Rerucha-Azeem, Lewin Group



# *Questions to Consider*

- What tools/practices/strategies will your organization implement in the next month to ensure individual rights as required by the Final Rule, while working in partnership with guardians?
- What changes will your organization make in the next month to better align your policies or procedures with Colorado law around guardianship?



# *Rule Includes Two Provisions*

- Home and Community Based Service Settings
  - Increases protections relating to where individuals receive Home and Community Based Services, and
  - Ensures individuals are afforded opportunities to be fully integrated into their community.
- Person-Centered Planning Process
  - Increases individual's input on how services are planned and what is included in the plan of care.



# *Final Rule will Ensure:*

- Each individual gets the most out of community living
- All services are provided in integrated settings
- Provision of services is person-centered



# *Important Characteristics for all HCBS Settings*



# ADULT GUARDIANSHIP IN COLORADO AND THE HCBS FINAL RULE

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# I. INTRODUCTION

*“Guardianship is both an essential tool and a dangerous weapon:”*  
(quote from Joanne Marlatt Otto, former Adult Protective Services Program Administrator for Boulder County).

**In the United States, all adults are considered legally capable of making decisions regarding their personal and financial affairs *UNLESS & UNTIL* a court of law determines otherwise. For that reason, it is important in any discussion of Guardianship to consider less restrictive alternatives.**

**Under Colorado Guardianship law, a court may only appoint a limited or unlimited guardianship if it finds by *“clear and convincing evidence”* that an individual’s needs cannot be met by less restrictive means.**

## II. CURRENT ADULT GUARDIANSHIP LAW IN COLORADO

### Definitions

1. **“Guardian”** means an individual at least twenty-one years of age, a resident or non-resident, who has qualified as a guardian of a minor or incapacitated person pursuant to appointment by a parent or court. C.R.S. §15-14-102(4)
2. **“Incapacitated person”** means an individual other than a minor, who is unable to effectively receive or evaluate information or both or make or communicate decisions to such an extent that the individual lacks the ability to satisfy requirements for physical health, safety, or self-care, even with appropriate and reasonably available technological assistance. C.R.S. §15-14-102(5)

## II. CURRENT ADULT GUARDIANSHIP LAW IN COLORADO (Definitions cont.)

3. “**Legal representative**” includes a representative payee, a guardian or conservator acting for a respondent in this state or elsewhere, a trustee or custodian of a trust or custodianship of which the respondent is a beneficiary, or an agent designated under a power of attorney, whether for health care or property, in which the respondent is identified as the principal. C.R.S. §15-14-102(6)
4. “**Letters**” includes letters of guardianship or letters of conservatorship. C.R.S. §15-14-102(7)
5. “**Respondent**” means an individual for whom the appointment of a guardian or conservator or other protective order is sought C.R.S. §15-14-102(12)
6. “**Ward**” means an individual for whom the appointment of a guardian or conservator or other protective order has been appointed. §15-14-102(15)

## **II. CURRENT ADULT GUARDIANSHIP LAW IN COLORADO:**

### **Key Provisions of Colorado Guardianship Law**

#### **1. Pre-Adjudication**

##### **a. Filing of Petition C.R.S. § 15-14-304**

(1) Filing Fee: \$164.00

(2) Other fees for Court Visitor (flat fee or hourly rate)

##### **b. Accompanying Documentation**

(1) Medical information to support the need for Guardianship C.R.S. § 15-14-306

(2) Names and Addresses of the Respondent, the Respondent's spouse or partner in a civil union or an adult with whom the Respondent has resided for six months or more, adult children or parents, an adult nearest in kinship. C.R.S. § 15-14-304

##### **c. Notice Requirements**

(1) A copy of the Petition and Notice of hearing must be personally served on the Respondent. C.R.S. § 15-14-309(1)

(2) Notice of hearing to the persons listed in the Petition. C.R.S. § 15-14-309(2) (by mail).

## **II. CURRENT ADULT GUARDIANSHIP LAW IN COLORADO (Key Provisions of Colorado Guardianship Law - cont.)**

### **2. Other Matters Preliminary to the Hearing**

**a. Setting of Hearing Date and Time C.R.S. § 15-14-305(1)**

**b. Appointment of Court Visitor C.R.S. §15-14-305(1)**

**c. Appointment of a Lawyer to represent respondent**

(if requested by the Respondent or recommended by the court visitor  
if the Court determines that the Respondent needs representation).

C.R.S. §15-14-308

**d. Right of Respondent to be present and participate in the Hearing and  
present witnesses C.R.S. §15-14-308**

## II. CURRENT ADULT GUARDIANSHIP LAW IN COLORADO (Key Provisions of Colorado Guardianship Law - cont.)

### 3. Hearing

#### a. Findings of the Court.

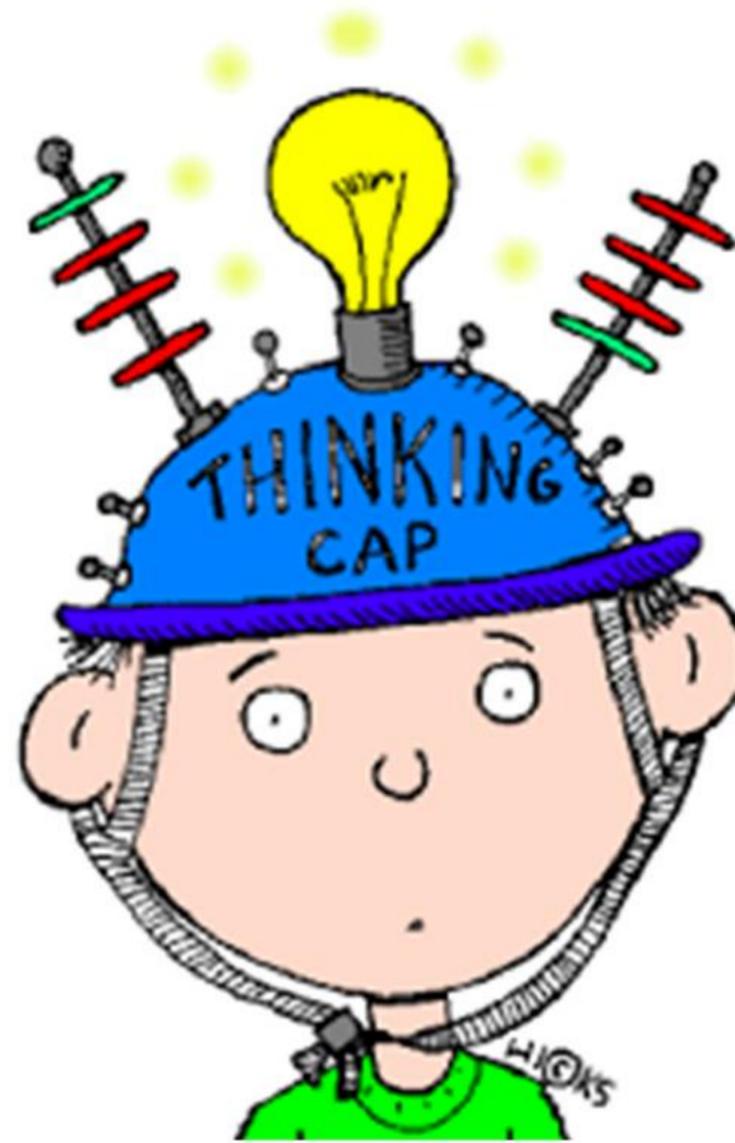
The Court may appoint a limited or unlimited guardianship for a Respondent only if it finds by “**clear and convincing evidence**” that:

(1) The Respondent is an incapacitated person.

(2) The Respondent’s identified needs cannot be met by less restrictive means.

(3) “*The Court, whenever feasible, shall grant to a Guardian **only those powers necessitated** by the ward’s limitations and demonstrated needs and make appointive and other orders **that will encourage the development of the ward’s maximum self-reliance and independence.**” C.R.S.§15-14-311*

# *Take a Minute to Reflect*



## II. CURRENT ADULT GUARDIANSHIP LAW IN COLORADO (Key Provisions of Colorado Guardianship Law - cont.)

### D. Duties, Powers, Limitations & Responsibilities of the Guardian

#### 1. Duties of the Guardian

a. Colorado law gives guardians the authority to make decisions regarding the ward's support, care education, health and welfare.

C.R.S. § 15-14-314

b. *“A guardian shall exercise authority only as necessitated by the ward limitations.”* C.R.S. § 15-14-314(1)

c. *“A guardian shall consider the express desires and personal values of the ward to the extent known.”* C.R.S. § 15-14-314(1)

d. A guardian shall expend the money of the ward for the ward's needs.  
C.R.S. § 15-14-314(2)

e. Notify the Court if the ward's condition changes, if the ward's address changes or if the ward dies. C.R.S. § 15-14-314(2)

## **II. CURRENT ADULT GUARDIANSHIP LAW IN COLORADO (Key Provisions of Colorado Guardianship Law - cont.)**

### **D. Duties, Powers, Limitations & Responsibilities of the Guardian**

#### **2. Powers of the Guardian**

- a. Apply for and receive funds for the support of the ward. C.R.S. § 15-14-315(2)
- b. Establish the ward's residence. C.R.S. § 15-14-315(1)(b)
- c. Consent to medical or other care for the ward. C.R.S. § 15-14-315(1)(d)
- d. The Court may authorize or direct the guardian to consent to the adoption or marriage of the ward. C.R.S. § 15-14-215(2)
- e. Petition the Court for authorization to commence an action for dissolution of marriage or legal separation on behalf of the ward, but only after notice and hearing. C.R.S. § 15-14-315(5)

## **II. CURRENT ADULT GUARDIANSHIP LAW IN COLORADO (Key Provisions of Colorado Guardianship Law - cont.)**

### **D. Duties, Powers, Limitations & Responsibilities of the Guardian**

#### **3. Limitations on Guardian's Authority**

a. Guardian may not revoke Medical Durable Power of Attorney absent an Order from the Court. C.R.S. § 15-14-315(5)

b. Guardian may not initiate the commitment of a ward to involuntary commitment, or care and treatment of a ward for mental illness, developmental disability, or for alcoholism or substance-abuse – except in accordance with the statutes that specifically address those issues.  
C.R.S. § 15-14-315(5)

## **II. CURRENT ADULT GUARDIANSHIP LAW IN COLORADO**

### **(Key Provisions of Colorado Guardianship Law - cont.)**

#### **E. Post-Adjudication**

##### **1. Responsibilities of Guardian:**

###### **a. File required reports to the Court**

(1) within 60 days of the appointment;

(2) at least annually – with current contact information for the

C.R.S. §15-14-317(1)

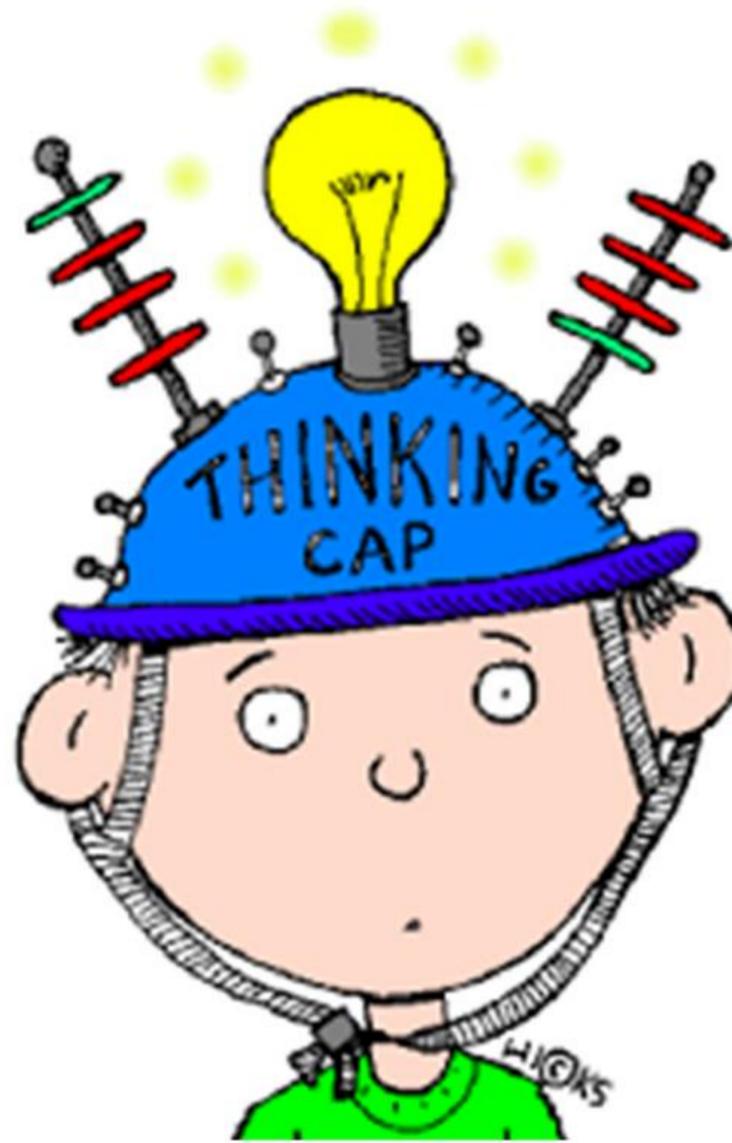
## **II. CURRENT ADULT GUARDIANSHIP LAW IN COLORADO (Key Provisions of Colorado Guardianship Law - cont.)**

### **E. Post-Adjudication (cont.)**

#### **2. Request for Modification or Termination of Guardianship**

- a. A guardianship terminates on the death of the ward or upon order of the Court. C.R.S. §15-14-318(1)
- b. A ward, guardian or another person interested in the ward's welfare may petition the Court to terminate or modify a guardianship. C.R.S. §15-14-318(2)
- c. The Court may remove a guardian pursuant to C.R.S. § 15-10-503 or permit the guardian to resign, pursuant to C.R.S. §15-14-112 [N.B. C.R.S. §15-10-503 provides for the judicial review of a fiduciary, including a guardian.]
- d. Proposed Colorado Legislation: SB16-131 would strengthen the provisions of C.R.S. §15-10-503 (cited above) and explicitly allows for the appointment of counsel for a ward in a post-adjudication proceeding.

# *Take a Minute to Reflect*



# III. RECENT TRENDS IN GUARDIANSHIP LAW

## A. Alternatives to Guardianship:

### 1. Re: Financial Matters

- a. Representative Payee (governed by the Social Security Administration)
- b. Financial Power of Attorney C.R.S. §15-14-700 et seq
- c. Limited Conservatorship C.R.S. §15-14-414 et seq
- d. Single Transaction (e.g., sale of residence) C.R.S. §15-14-412
- e. Trust C.R.S. §15-16-101 et seq  
See also C.R.S. § 15-14-412.5 et seq re: Special Needs Trusts

### 2. Re: Medical Decisions (“Advance Directives”)

- a. Medical Durable Power of Attorney C.R.S. §15-14-506 et seq. (effective 1.1.10)
- b. “Living Will” C.R.S. §15-18-101 et seq.
- c. CPR Directive C.R.S. §15-18.6-101
- d. MOST Directive C.R.S. §15-18.7-101
- e. If there is no Advance Directive, Proxy Decision Maker C.R.S. §15-18.5-101

### III. RECENT TRENDS IN GUARDIANSHIP LAW

**B. Limited Guardianship** [N.B. By law, all Guardianships in Colorado should be limited to “*only these powers necessitated by the ward’s limitations and demonstrated needs*”, pursuant to C.R.S. § 15-14-311(2), but if the Letters and Order are silent on restrictions, either the guardian or the ward can petition the Court for more explicit limitations].

Examples of limited guardianships:

1. Limited to medical decisions only
2. Limited to placement decisions only

**C. Supported Decision-Making (or Shared Decision Making)**

**1. Definition:**

*“Supported Decision Making is a recognized alternative to guardianship through which people with disabilities use friends, family members and professionals to help them understand the situations and choices they face, so they may make their own decisions without the ‘need’ for a guardian.”*

# III. RECENT TRENDS IN GUARDIANSHIP LAW

## 2. Excerpt from National Guardianship Association Position Statement on Guardianship, Surrogate Decision Making and Supported Decision Making:

*Current trends in guardianship, nationally and internationally, are leading policy makers... [and others] to consider supported decision making as an alternative to guardianship...*

## 3. Recent Legislative Initiatives:

- a. TEXAS: In 2015, Texas became the first state to formally recognize supported decision making as an alternative to guardianship.
- b. In 2015, Texas also adopted into law a *"Bill of Rights for Wards"*

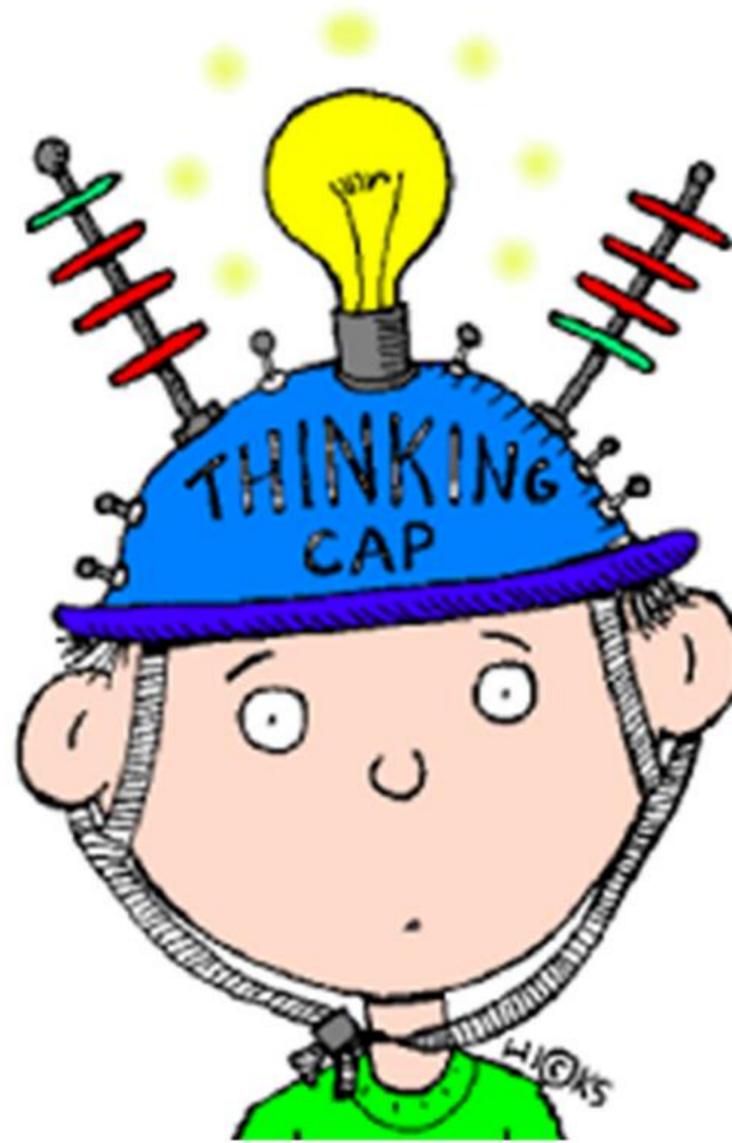
(1) Right to reside and receive support services in the most integrated setting, including home based and other community-based settings, as required by Title II of the ADA (Source: 42: U.S.C. §12131 et seq)

(2) Right to participate in social, religious and recreational activities, training employment, education, habilitation and rehabilitation of the ward's choice in the most integrated setting.

### **III. RECENT TRENDS IN GUARDIANSHIP LAW**

- c. As mentioned earlier, Colorado's SB16-131 would clarify the procedure for monitoring of a guardianship and for appointment of counsel to represent a ward who wishes to challenge the guardianship or ask the Court to modify the Letters and Order. A second bill, SB16-026, would clarify the rights of third parties to visit with or otherwise communicate with a ward.

# *Take a Minute to Reflect*



## IV. RELATIONSHIP OF GUARDIANSHIP TO THE HCBS FINAL RULE

### A. 42 C.F.R. Part 441, Sub-part G, states the Intent of the Final Rule:

*“To ensure that individuals receiving LTSS through HCBS programs have full access to benefits of community living and the opportunity to receive services in the most integrated setting appropriate”*

### B. Requirements of the Final Rule include:

1. Settings that provide opportunities to seek employment and work in competitive integrated settings, engage in community life, and control personal resources.
2. A lease or other legally enforceable agreement
3. Lockable entrance doors
4. Choice of roommates and privacy in their sleeping or living unit
5. Choice of visitors at any time

*Source: CMS has created its own webinar interpreting the HCBS Final Rule. The following sections are drawn from that Outline.*

## **IV. RELATIONSHIP OF GUARDIANSHIP TO THE HCBS FINAL RULE (cont.)**

### **C. Modifications of these requirements must be:**

1. Supported by specific assessed need
2. Justified in the person-centered service plan
3. Documented in the person-centered service plan
4. The responsibilities of a legal guardian or other person authorized under state law to make decisions for the individual must be spelled out in the person-centered service plan.

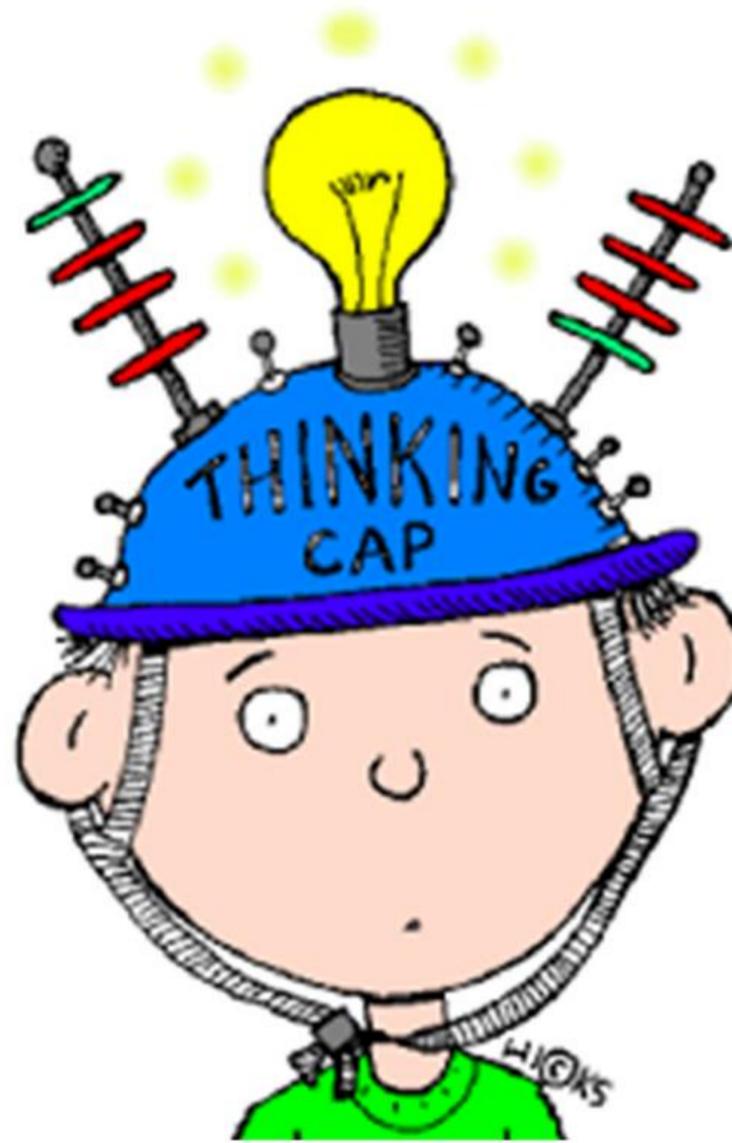
## V. CONCLUSION

- Guardians, especially those who are the guardian for a vulnerable family member, usually want to do “*what’s right*” for their ward
- Guardians may often approach this role and its incumbent responsibilities from the perspective of “*protection and safety first*” whereas the person who is the subject of the guardianship (the ward) may view the same situations from the perspective of choice and independence.
- These concepts need not be in opposition to one another, especially in instances where there is good, ongoing communication between the parties.
  - Mediation may be helpful in some instances, but it is also important that the guardian be continually educated about and be open to changes concerning his or her role and the limitations on their authority.

## V. CONCLUSION

- The implementation of the HCBS Final Rule presents such a situation: safety vs. independence.
- Your role as HCBS providers is to:
  - remind the guardian of the intent of the new rule and of your responsibility to comply with its requirements and
  - to assure them that they are not “*shirking*” their duty by allowing their ward to receive services “*in the most integrated setting... and to be fully integrated into the community.*”
- Remember, every great advance in civil rights has fundamentally changed the way “*things have always been.*” The HCBS Final Rule is no exception.

# *Take a Minute to Reflect*



# *Promising Practices from the Field*



# *Promising Practices from the Field*



Steve Valente, MSW, LSCW  
Senior Director, Dungarvin Colorado, LLC  
Residential Provider Perspective



Michelle King, MS CTRS  
Director, King Adult Day Enrichment Program  
Non-Residential Provider Perspective



# *Guardianship and the Final Rule*

- One of our main goals is to maintain independence for the people we support.
- In order to accomplish our goals and match the final rule we provide clients the opportunity of choice of activity and socialization throughout their day.
  - **Most guardians** simply want to know what is happening on a day-to-day basis, they want to be informed of their ward's schedule.
  - **Other guardians** need to better understand what is going on and require additional support, explanations and supportive conversations, but they can be brought on board!



# *The Key is Balance*

- We balance the intersection of health/safety/choice/and person centeredness with the majority of guardians by:
  - Creating a schedule for the client and sharing with the guardian
  - Allowing individuals to select which activities they participate in and supporting their choice through conversations with their guardians
  - Being transparent with guardians - letting them know what is going on - most of the time guardians defer to what individuals want to do if they are given the information they need to understand the value in the activity



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# *The Key is Balance*

- With other guardians:
  - Often, someone who has just become a guardian and is overwhelmed by the responsibility, usually a family member
  - They need open, honest, and calm communication
  - We invite the guardian and client to come in for a meeting to discuss how things are going and what the individual wants and needs
  - Balance is achieved after some, constructive conversation to promote understanding and allowing them to feel that they are supported as well as the client



# *Managing relationships between individuals and their guardians/family*

## Be Inclusive:

- No surprises - ask for their help, guidance, and recommendations
- Seek compromise
- Seek opportunities to test things out - temporary/short-term, dignity of risk, trial and error, mistakes are okay
- Educated guardians on PCP, self-determination, rights, dignity of risk, right to fail, final rule expectations and requirements

## Be Honest:

- Do not promise what can't be delivered
- Do not “sugar-coat” issues
- Choose battles wisely
- Look for little victories
- Communicate regularly via phone calls, emails, texts, and meetings. Always be prepared when communicating to guardians. With communications, be responsive within 24 hours or sooner
- Appeal to the basic human need for freedom and the right to make mistakes and fail



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# *Managing relationships between individuals and their guardians/family*

Ease worries, concerns, and burdens:

- Respect cultural and individual preferences
- Offer reassurance - note additional supports your organization offers
- Educate guardians on PCP, self-determination, rights, dignity of risk, right to fail, final rule expectations and requirements
- Find the underlying (unspoken) fears and concerns. Listen for what isn't being said
- Provide excellent person centered and behavioral supports:  
“An ounce of prevention...”



# *Balancing the intersection of health/ safety/choice/and person centeredness*

- Use the PCP process including assessments, pre-planning, planning, and follow-up
- Use real life examples: successful and not so successful
- Technology: Increases independence, self-efficacy, and self-esteem while providing safeguards (reassurance for guardians/family)
- The new rules not only permit these levels of autonomy and risk, they require it
- In most cases, there's nothing that can't be undone



# *"Secrets" to Finding the Balance*

- There is no “Secret”
  - There are no short-cuts or substitutes for doing the hard, uncomfortable, and challenging work.
- Have patience
  - This process can take years to unfold.
- Commit to Person Centeredness and PCP
  - Keep your eye on the prize and never lose sight of the end goal.
  - Train and educate all employees and contractors on PCP.
  - Make person centeredness part of your culture.
- Educate not just the guardian, but all stakeholders. This will only work with buy-in from everyone.



# *"Secrets" to Finding the Balance*

- Acknowledge the need for support, but potential for independence
- Create a safe-zone for mistakes and trial and error
- Encourage the IDT to take chances
  - Small, incremental chances/opportunities
  - Offer creative options such as the use of technology
  - Hold frequent review meetings
- Reminders that allowing the individuals we support the dignity of risk is not only the right thing to do, it's actually required within the final rule (if needed)
- Asses, adapt, readjust, and try again



# *Take a Minute to Reflect*

- What tools/ practices/ strategies will your organization implement in the next month to ensure individual rights as required by the Final Rule, while working in partnership with guardians?
- What changes will your organization make in the next month to better align your policies or procedures with Colorado law around guardianship?



# Upcoming Trainings!

**April 28<sup>th</sup> at 9am MT:**

Balancing Individual Rights and Provider Liability

**May 18<sup>th</sup> at 1pm MT:**

Residency Agreements and the HCBS Settings Final Rule



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# *Where can I go for more information on the Final Rule?*

- A [summary of the regulatory requirements](#) of fully compliant HCBS settings and those settings that are excluded.
- Additional technical guidance on regulatory language regarding [settings that isolate](#).
- Exploratory questions that may assist states in the assessment of:
  - [Residential Settings](#)
  - [Non-Residential Settings](#)
- [Questions and Answers Regarding Home and Community-Based Settings](#)
- [Medicaid Home and Community Based Services Website](#)



# Resources from Disability Law Colorado

## 1. National Guardianship Association: [www.guardianship.org](http://www.guardianship.org)

Resources found under “*Position Statement on Guardianship, Surrogate Decision-Making & Supportive Decision-Making*”

“*Issues in Guardianship*” (found under that tab):

“*Questions and Answers*”

“*Rights of An Individual Under Guardianship*”

“*The Guardian and Informed Consent*”

“*The Guardian As Surrogate Decision-Maker*”

“*Guardianship and Developmentally Disabled Individuals*”

“*Assisting the Guardian In Selecting a Nursing Home*”

## 2. American Bar Association Commission on Law & Aging: [www.americanbar.org/aging](http://www.americanbar.org/aging)

Resources found under “*Resources and Research*” tab under “*Guardianship Law in Practice*”

“*Standards of Practice*”

“*State Adult Guardianship Legislation: Directions for Reform 2015*” by Sally Hulme



# Resources from Disability Law Colorado

3. **General Accounting Office (“GAO”):** [www.gao.gov](http://www.gao.gov)  
“*Guardianships: Cases of Financial Exploitation, Neglect and Abuse of Seniors*” (2010) -  
(N.B. a New Study is forthcoming)
4. **Colorado Guardianship Alliance:** [www.guardianshipallianceofcolorado.org](http://www.guardianshipallianceofcolorado.org) (Offers Guardianship Training classes and resources on Colorado Guardianship law)
5. **National Association for Court Management (“NACMNET”):** “*Adult Guardianship Guide*” at [nacmnet.org/resources](http://nacmnet.org/resources)
6. **Texas: “Ward’s Bill of Rights”**(found at Texas Estate Code §§ 1002.0015 & 1357.001).
7. **National Resource Center for Supported Decision-Making:**  
[supporteddecisionmaking.org](http://supporteddecisionmaking.org)



# *Questions?*



# *Contact Information*

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