

# Overview of Guardianship and Alternatives to Guardianship

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# Housekeeping

- All on mute. Use Questions function for substantive questions and for technical concerns.
- Problems getting on the webinar? Send an e-mail to [NCLER@acl.hhs.gov](mailto:NCLER@acl.hhs.gov).
- Written materials and a recording will be available at [NCLER.acl.gov](http://NCLER.acl.gov). See also the chat box for this web address.

# About NCLER

The National Center on Law and Elder Rights (NCLER) provides the legal services and aging and disability communities with the tools and resources they need to serve older adults with the greatest economic and social needs. A centralized, one-stop shop for legal assistance, NCLER provides Legal Training, Case Consultations, and Technical Assistance on Legal Systems Development. Justice in Aging administers the NCLER through a contract with the Administration for Community Living's Administration on Aging.

# About ABA COLA

The ABA Commission on Law and Aging is a collaborative and interdisciplinary leader of the Association's work to strengthen and secure the legal rights, dignity, autonomy, quality of life, and quality of care of aging persons.

The Commission accomplishes its work through research, policy development, advocacy, education, training, and through assistance to lawyers, bar associations, and other groups working on issues of aging.

# Key Lessons

- There are important differences in the creation, authority and termination of guardianship and powers of attorney.
- Review all documents to understand the agent's authority and limitations.
- An agent's authority can be modified or revoked.
- Guardianship requires a court order.

# Section 1: Voluntary Appointments

# Voluntary With Capacity

- Power of Attorney
- Health Care Surrogate
- Authorized on Bank Accounts
- Direct Deposit and Automatic Payments

# Capacity

- Capacity is the ability to make an informed decision or choice.
- All voluntary planning requires capacity at the time the planning is done.



# Capacity (cont.)

- Capacity is the ability to make an informed decision or choice.
- No single standard for capacity:
  - Spectrum
  - Task specific
  - Transient (NCLER webinar on July 31 will discuss in greater detail)

# Power of Attorney

- Appointment of an Agent or Attorney in Fact to act on behalf of the person (grantor)
- Power of Attorney is a document (not a person)
- Requires capacity to create
- Must be in writing
- State specific laws for creation
- Can be revoked or modified with capacity

# Durable?

- Most powers of attorney are durable: the authority survives the incapacity of the grantor.
- Some states require specific language on durability
  - Know your law and read the document.
- Modern trend is to assume all powers of attorney are durable unless specifically not.

# Scope of Authority

- Terms of the document and state law define scope of authority
- Read the document
- Some acts cannot be delegated
  - Voting
  - Marriage: in at least 45 states

# Health Care Surrogate

- Appointed by a person to make health care decisions when needed.
- Also known as health care agent, or proxy.
- Individual must have capacity to designate:
  - Important to understand health care decisions and who you want to make health care decisions.
- A surrogate makes decisions when the person lacks capacity or knowingly defers to the surrogate.

# Scope of Surrogate's Authority

- Read all documents
- State laws define or limit

# Case Example: Marta

Marta is in her early 80s and concerned that she might get sick and not be able to make decisions. She has a home, a car, Medicare and supplemental health insurance. She wants to be sure that her youngest daughter who trained as a nurse is able to make her health care decisions, and she does not want to burden her husband who is nearing 90 years of age and in very fragile health.

What can you recommend?

# Financial Accounts



# Authorized Signer on Account

- Banks and other financial institutions.
- Authorized to conduct financial transactions:
  - Account owners have capacity at the time established.
- Can be modified or revoked with capacity.
- Does not create ownership interest.
- Business accounts: few banks want to do this for individual accounts.

# Joint Accounts

- Common for spouses and committed couples
- Created, with capacity
- Cautions:
  - Any joint account holder can withdraw all funds in the account
  - Can create an inheritance right
  - May be subject to liens or judgements against any joint owner
- Can be modified or revoked with capacity.

# Authorized by Power of Attorney (POA)

- Created with capacity
- Power of Attorney recognized by the bank or financial institution
- Bank may require approved form (state or bank)
- Assure acceptance while the person has capacity
- Caution: can still be used to empty the account
- Avoids inheritance issues and lien or judgement concerns

# Direct Deposit

- All Social Security, nearly all recurring income
- Voluntarily created (payors may force)
- Eliminates lost or forgotten checks
- Assures income is available when needed

# Direct or Automatic Payment

- Most utilities
- Increasingly taxes and fees
- Credit cards
- Created voluntarily with capacity
- Modify or revoke with capacity
- Notice or statement
- Paid on agreed or due date
- All or minimum payment
- Avoids past due bills in the event of illness

# Case Example: Alex

Alex is widowed and lives alone. He has income from Social Security and a pension. He has three utility bills, annual home owners insurance, taxes, and a monthly premium for Medigap coverage. He has trouble getting to the mailbox, and sometimes his mail is stolen. He is only able to get to the bank a couple of times a month when a local volunteer group picks him up to run errands and see his doctor. He has been late paying bills a couple of times in the past year.

What can you recommend regarding money management?

# Section 2: Involuntary Actions

# Involuntary

- Default health care surrogate
- Representative Payee
- Guardianship



# Health Care Surrogate

- I thought Health Care Surrogate was voluntary?
  - Default Health Care Surrogates
- Created by statute in most states
- When the person lacks capacity
  - And no surrogate has been named
- Scope of authority is defined in statute
- The only default agent – limited only to health care

# Representative Payee

- Social Security Retirement, Social Security Disability, Supplemental Security Income (SSI)
  - VA and some pensions have similar designations
- Social Security does not recognize any other agent.
- Appointed when the beneficiary is “unable to manage benefits” because of a mental or physical disability.
- Categorical for minors and some disabilities.

# Process for Representative Payee

- Anyone can file (including beneficiary):
  - Identity of the beneficiary
  - Reason the beneficiary is unable to manage benefits
  - Verification forms sent to Doctor who has evaluated the person recently
- Notice is sent to the beneficiary
- The beneficiary can object to need or proposed payee

# Responsibilities of Payee

- Separate account titled as
  - “X as representative payee for Y”
- Rep Payee:
  - Can only spend for the beneficiary’s needs
  - Must file an annual accounting, starting balance, received, spent on, cash on hand, ongoing need
- Volunteers (narrow exception)
- Abuse or exploitation should be reported
- New law is empowering state protection and advocacy to investigate

# Guardianship

- Court appointment of a fiduciary/agent
- Based on finding that the person is “a person in need of protection.”
- Guardian or Conservator is accountable to the Court for all actions
- Can revoke or override most voluntary appointments:
  - In most states is bound by specific written health care directions

# Guardian or Conservator

- There is no uniform definition
- Traditionally:
  - Guardian was of the person
  - Conservator was of the money and property
- Modern usage
  - Guardian may be both money and property
  - Conservator may be both money and property
  - May also be separated
- State law specific

# Guardianship Process

- Filing with appropriate Court
- In a jurisdiction where the Person has a connection
- Notice must be sent to the Person and the Person must have an opportunity to object
- The evidence should include report(s) by professionals (varies)

# Guardianship Process (cont.)

- Requires a finding by the Court that the person is a “person in need of protection” as defined by state law:
  - Most statutes call this a finding of disability
  - May decline to appoint a guardian
    - If voluntary planning is meeting the needs of the person, and there is no evidence of abuse, neglect or exploitation



# Court Selects and Appoints the Guardian

- Often the Guardian is the person who asked to be appointed
- Many states give preference to the agent named in the Power of Attorney

# Scope of Authority

- Read the order appointing the guardian, and know the state statute
- Virtually all state statutes talk about least restrictive, encourage self determination, or define limited guardianship
- All guardianships are inherently limited (voting)
- Most orders are very broad
- Guardians should practice Supported Decision-Making

# Reporting

- Varies
- Financial accounting
- Needs and condition of the Person
- Ongoing need for guardianship
- Only a handful of states have direct court follow up beyond written reports

# Case Example: Ursula

- Ursula is 72, she is unconscious, and not expected to get better.
- Ursula's brother Andy is joint on her checking account with \$2,000 in it.
- Ursula created a power of attorney naming her sister Bonnie as her agent for business matters.
- Ursula has a savings account in her name only, with \$15,000 in it.
- Ursula completed a "living will" form, but didn't name a health care agent.

# Who Can Help? (There may be more than one answer!)

- The premium on Ursula's Medigap policy is due?
- Ursula has co-pays and co-insurance totaling \$3,000 that are due?
- A check arrived payable to Ursula for \$7,000.
- Ursula's family has been advised to pre-pay her funeral, in anticipation of Medicaid application.
- A decision needs to be made about implanting a feeding tube.
- Who can sign a nursing home admissions agreement?

# It Can Get More Complicated

- The bank holding the savings account changed ownership, and is refusing to honor the power of attorney—and there is nothing in state law requiring them to do so.
- If a limited guardian is appointed to deal with the savings account, what else can they do?
- If a plenary or full guardian/conservator is appointed, what can they do?
- What will the guardian need to do about her Social Security retirement benefits?

# Conclusion

- The agent's authority varies and overlaps.
- Read all documents and know the limits of the law-one tool does not cover everything.
- Know the voluntary and involuntary tools in your state.
- Capacity is required for voluntary planning, and to revoke or modify a voluntary plan.
- Lack of capacity is required for guardianship.
- Health care is the only place where default agents occur.

# Additional Resources

- [NCLER Basics Trainings](#)
- [50 State Guardianship Laws](#)
- [50 State Power of Attorney Laws](#)
- [Social Security Representative Payee information](#)
- [50 State Default Health Surrogate Laws](#)
- [50 State Health Care Power of Attorney Laws](#)
- [American Bar Association Commission on Law and Aging](#)
- [PRACTICAL Guide to Supported Decision Making](#)
- [Consumer Financial Protection Bureau Surrogate Decision-Making Guides](#)



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# Case Consultations

Case consultation assistance is available for attorneys and professionals seeking more information to help older adults. Contact NCLER at [ConsultNCLER@acl.hhs.gov](mailto:ConsultNCLER@acl.hhs.gov).