

Overview of Guardianship and Alternatives to Guardianship

CHAPTER SUMMARY • July 2018

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About the American Bar Association Commission on Law and Aging

The mission of the American Bar Association Commission on Law and Aging is to serve as the collaborative, 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, particularly low-income and vulnerable elders. Since 1979, the ABA Commission has carried out this mission through research, policy development, technical assistance, advocacy, education, and training.

Introduction

Lawyers working with older adults are often confronted with questions about guardianship, other types of agents, and alternative forms of decision-making. This Chapter Summary will help lawyers understand a guardian's responsibility and authority, as well as the roles of other agents, like default health care surrogates, health care agents, representative payees, joint account holders, and authorized signers. The Summary also explains how guardianship and its alternatives are created and terminated, and the responsibilities of individuals serving in different decision-making roles.

Key Lessons

- 1. There are important differences in the creation, authority, and termination of guardianship and powers of attorney.** Guardians are appointed and overseen by a Court based on a finding of incapacity or need. A power of attorney is created when an individual voluntarily appoints a decision-making agent. There are important differences in how each is created, the authority of each, and how each is terminated.
- 2. Review all documents to understand the agent's authority and limitations.** The best way to understand the authority of a guardian, a power of attorney, or health care agent is to know the underlying state law and read the paperwork.
- 3. An agent's authority can be modified or revoked.** An individual can modify or revoke an agent's authority as long as the individual who established the agency has the legal capacity to do so. In contrast, only the courts can modify or terminate guardianships.
- 4. Guardianship requires a court order.** When guardianship is necessary, it is essential to know the basic legal process.

Not All Agents Are Created Equal

An agent is an individual who can make decisions on behalf of the other person. An agent can be a guardian, conservator, agent appointed in a power of attorney, and a health care surrogate. The methods to appoint these agents, determine the scope of their authority, modify or terminate their authority are all very different. It is critical to understand both the *type* of agent, and the agent's *scope* of authority, to assure that the rights of the person are protected, and the actions authorized by the agent are appropriate. This section explores the basics of guardianship and distinguishes guardianship from other decision-making agents.

Guardianship

Historically, a Guardian was responsible for protecting the *person*, and a Conservator was responsible for the *money and property* of the protected person. By statute, many states use the term Guardian for both person and property, other states use the term Conservator for both the person and property, and other states split the two. Lawyers representing older adults should be familiar with the terms in their state. For simplicity, this Summary will refer to guardianship or conservatorship as Guardianship from this point.

Guardians are agents appointed by a Court. This appointment gives Guardians the responsibility and authority to make decisions on behalf of a person that the Court determines is a person in need of protection under the laws of the state the person is in. The person with authority is known as the Guardian, and the person whose rights are removed is called the protected person or ward.

Because of the severity of this appointment, before appointing a guardian, the Court must determine that the person is in need of protection as defined by state law. The Court needs to see evidence that the person is unable to make choices necessary to protect the person or property from harm. The evidence should include reports from one or more professionals who have evaluated the person. The person is always given written notice that a guardianship has been filed and an opportunity to object. The person has a right to be present at the hearing or trial, to be represented by an attorney, and to present evidence that a guardianship is not necessary, should be limited, or to express their preference for who should be appointed by the Court.

Limited guardianships

Guardianship can be limited in authority. In a way, all guardianships are limited, as there are some rights, such as voting, that a guardian can never exercise on behalf of the protected person. Asking for limited orders on guardianship protects and preserves the freedoms and Constitutional rights of the person. Guardianship should always be the last resort, and it is important to consider alternatives to guardianship and guardianship limitations. The American Bar Association Commission on Law and Aging's [PRACTICAL](#) guide includes suggestions for supporting decision-making to avoid guardianship and asking for a limited guardianship.

Guardians are accountable to the Court that appointed them. State statutes describe the records that must be kept, and reports that must be filed. When a guardian breaches a fiduciary duty or fails to act, the Court can take action to hold the guardian accountable, and to remove and replace the guardian.

PRACTICE TIP

When a person says they are the “power of attorney” or the “guardian” for someone, ask to see the document giving them authority. Reading the document will tell you the type of agent the person is, and give you some idea of the scope of the authority the person has to act on behalf of the person. If the agent is unable to provide the document, they likely lack legal authority to make decisions for the person.

Modifying or terminating a guardianship

Guardianship can be modified or terminated by a Court order. Some guardianships are overly broad from the beginning, allowing the guardian to make decisions that the person could well make for themselves. Other times the person regains the ability to make decisions after a guardian has been appointed, such as when they are created after an illness or injury and the person recovers. When a person asks for the return of their rights, they very likely have the capacity to make choices—especially with appropriate supports. The legal standards for modifying or terminating a guardianship will vary from state-to-state. In all states, the Court looks for evidence, usually in the form of evaluations by qualified professionals, that the person will be able to make informed choices and is no longer in need of protection on the issues for which the guardianship was formed.

Alternatives to Guardianship

Guardianship is always the last resort and it is important to always explore less intrusive alternatives that may preserve an individual's autonomy. The alternatives detailed below include options to allow an individual to designate an agent to make health, financial, and other decisions for the individual.

Power of attorney

A power of attorney is a legal document. The document grants one person, generally called an agent, sometimes known as an attorney in fact, the authority to act on behalf of the person appointing them. The person appointing the agent is called the grantor. To create a power of attorney, an adult must be able to understand they are appointing the agent and understand the kinds of authority they are giving the agent. The scope of the agent's authority is limited by the terms of the document and by state laws. A grantor with capacity can revoke or modify the appointment of an agent in a power of attorney. Revocation of a power of attorney should be in writing, signed by the grantor, with a copy delivered to the agent and anyone who is likely to be dealing with the agent. In some states, the revocation needs to be recorded in the public records like a deed. A power of attorney is a private agreement and is not subject to automatic oversight by the Courts.

Health care surrogate

A health care surrogate is a person who makes health care decisions for a person, when the person lacks capacity to make health care decisions. This person may also be called a health care agent or proxy. In every state, a person with capacity can appoint a health care surrogate in a durable power of attorney that includes health care authority. Many states have a short form for naming a health care surrogate. A person has capacity to appoint a health care surrogate if they understand what a health care decision is, and can name a person they trust to make health care decisions.

If a person does not appoint someone, 45 state statutes give guidance on who can make health care decisions. Generally, statutes turn to the nearest relatives to make health care decisions. Health care decision-making is the only area of decision-making where the law creates a default agent when a person does not name an agent in writing.

The authority of a health care surrogate to make health care decisions does not start until the person loses capacity, or knowingly defers to the agent. The determination of loss of capacity is made by the person's health care providers. The criteria and documentation for the loss of capacity is based on state law. The scope of the authority is defined in the document and by state law. As long as the person has capacity, the person can revoke or modify the appointment of a surrogate. Many states have a very low standard of capacity for revocation of an advance directive.

Aside from leaving directions on who can make health care decisions, many people leave directions about the health care they want or do not want in the form of an advance directive or living will directive. When making health care decisions for another person, it is helpful to understand their health care values, goals of care, and specific wishes.

Social Security Representative Payee

A Social Security Representative Payee (rep payee) receives the benefits for a beneficiary who has been determined unable to manage money by the Social Security Administration (SSA). Rep payee is specific to Social Security benefits, including Social Security Disability and Supplemental Security Income (SSI). VA pensions and some private pensions have separate payee systems.

Social Security will place the benefits in payee status if SSA has reason to believe that the beneficiary is unable to manage benefits. The evidence is either a verification from a physician who has seen the person

recently, or evidence in a disability case of serious mental illness or substance abuse. The beneficiary can file voluntarily if they are unable to manage their benefits. The process is entirely administrative. Social Security does not recognize any other agents. Guardians and agents under powers of attorney must apply to Social Security to be recognized as a representative payee.

Someone seeking to be appointed as a rep payee should contact Social Security with the name and identifying information for the beneficiary, the reason the person needs a payee, and name and contact information of a physician who has recently seen the person, and may include a proposed payee. Social Security then sends notice to the beneficiary, and a verification form to the physician. The beneficiary has a right to object to the need for a payee, or to the proposed payee.

Upon finding of need for a rep payee, Social Security does a basic background check on the proposed payee. The payments must be directly deposited into a separate account, titled “payee as representative payee” for the benefit of the named beneficiary. Most payees file a very basic annual accounting.

Representative Payee status can be terminated, at request of the beneficiary with proof that the beneficiary has regained the ability to manage benefits. If the payee resigns or becomes unable to serve, benefits are held until a replacement payee can be appointed. There is a shortage of reliable volunteer payees and a need for representative payees. All payees are volunteers, with an exception for narrowly defined non-profits who are allowed to receive a limited fee from the benefits. In some states, inpatient residential settings, such as nursing homes, are allowed by state law or regulation to serve as representative payees.

Bank accounts

A common way to manage another person’s finances is to authorize an agent to sign on to that person’s bank accounts. There are two ways to do this: 1) add a person authorized to transact business on the account; or 2) make the bank account a joint account. A joint account creates a presumption of ownership in the account assets, and may create inheritance rights. Joint accounts are very helpful for married or committed couples. For more distant family members or friends, joint accounts should be used with great caution. Rather than create a joint account, the bank can authorize someone to sign on the account without creating an ownership interest in the account. This is most commonly done by the bank recognizing the authority granted under a power of attorney. In many states, the banks may insist on a state standard form, or a bank approved power of attorney form. Banks can also authorize signers on accounts without creating an ownership interest; many business accounts are structured this way.

Direct deposit and automatic payment

All Social Security benefits and virtually all retirement benefits are paid by direct deposit. Direct deposit eliminates the need to make deposits, and prevents lost or stolen checks. Nearly all reoccurring bills can be set up on automatic payment. The combination of direct deposit and automatic payments can help to assure that necessary bills are paid when a person is unable to attend to finances. These arrangements should be monitored to assure that all income is properly received and automatic payments are correct. Increasingly, financial institutions and utility providers are willing to send copies of invoices and statements to a third party, or to arrange online access for accounts oversight.

PRACTICE TIPS: Basics At A Glance

Power of Attorney

- » Voluntary appointment of an agent
- » Person must have capacity to create, modify or terminate
- » Scope of authority is defined in the document and state law
- » Does not terminate authority of the person
- » Private agreement without automatic Court oversight

Guardianship/Conservatorship

- » Involuntary appointment of an agent
- » Requires Court finding of incapacity
- » Transfers all or part of the rights of the person to the guardian
- » Scope of authority is defined in the document and by state law
- » Can be modified or terminated by the Court
- » Actions of agent are subject to oversight by the Court

Health Care Surrogate

- » Voluntarily appointed
- » Must have capacity to appoint
- » Most states provide a statutory surrogate for persons who fail to name a surrogate
- » With capacity, the person can revoke or modify the appointment
- » The authority granted is defined in the document and limited by state laws

Representative Payee

- » Involuntary appointment of a person to manage Social Security benefits
- » Requires a documented or voluntary admission of inability to manage benefits
- » Beneficiary receives notice and opportunity to object
- » Entirely an administrative process
- » Can be terminated with evidence of capacity
- » Social Security does not recognize any other agent

Bank Accounts

- » With capacity, the account owner can arrange a joint account or an authorized signer
- » In many states, banks will insist on a specific approved form for a power of attorney
- » Caution should be exercised on joint accounts
- » With capacity, can be modified or terminated

Direct Deposit and Automatic Payment

- » Direct deposit has become the norm for income
- » Automatic payment assures essential expenses are paid
- » Oversight is essential, arrange access to records
- » With capacity, can be revoked or modified

CASE EXAMPLE 1

Fred is single, has income from Social Security, and a private pension. His obligations are utilities and property taxes. His three children are adults. One lives nearby and has a substance abuse problem. His middle child is a nurse who lives an hour away. His third child is an accountant. Fred has been talking to his doctor about forgetting things and is having a hard time making decisions. What are his planning options?

- Place all income on direct deposit and arrange for the utility bills and taxes to be paid automatically.
- Name the child who is a nurse as his health care surrogate, and have a family meeting to discuss Fred's personal values and the kind of care he wants to receive.
- Name the child who is an accountant as his agent in a power of attorney, and assure that the bank recognizes the authority of the agent.
- Ask the child who lives nearest to assist with shopping and errands, and have the financial agent review and oversee all transactions.
- If Fred's memory gets to the point that he is unable to manage his Social Security, ask Social Security to appoint the financial agent as representative payee.
- Instruct the family in the person-centered and person-directed model of Supported Decision-Making and encourage them to keep everyone involved and informed about Fred's wishes and values.

CASE EXAMPLE 2

Wilma never planned for being too sick to make health care decisions or manage her money, and suddenly she is. Her son Bam is scrambling to try to help. Her income from Social Security and a survivors pension from the Bedrock Quarry are directly deposited into an account in her name only. Her electric bill is past due. Her doctors are recommending a permanent feeding tube and transfer to a long-term care facility. What can Bam do or not do?

- Under state law, Bam is a default health care surrogate, so he can make a decision on the feeding tube and, in most states, can consent to the transfer to long-term care. He will need to file to be appointed as her Representative Payee. If the Bedrock Quarry has a payee option, he may be able to do that. Otherwise, he may need to file for a limited guardianship (conservatorship) to gain access to the pension and to her existing bank account.

Conclusion

Different types of agents have different authority, and are created and terminated differently. Some agents are voluntarily selected and appointed by a person with capacity. Other types of agents are appointed involuntarily for a person who lacks capacity. An essential step in working with any agent is reviewing the document granting the person authority, and understanding the applicable state law. By knowing how each type of agent is empowered, you can understand who can do what, and learn what options are available based on the abilities of the person.

Additional Resources

- [David Godfrey](#), Senior Attorney, ABA Commission on Law and Aging
- [American Bar Association Commission on Law and Aging](#)
- "[State Statutes or Court Rules on Guardianship Complaint Processes](#)," ABA Commission on Law and Aging
- "[Selected Issues in Power of Attorney Law](#)," ABA Commission on Law and Aging

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- [Social Security Representative Payee](#)
 - “[Default Surrogate Consent Statutes](#),” ABA Commission on Law and Aging
 - “[State Health Care Power of Attorney Statutes](#),” ABA Commission on Law and Aging
 - “[PRACTICAL Guide to Supported Decision-Making](#),” ABA Commission on Law and Aging
 - [Surrogate decision-making guides](#), Consumer Financial Protection Bureau

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

This Chapter Summary was supported by a contract with the National Center on Law & Elder Rights, contract number HHSP233201650076A, from the U.S. Administration for Community Living, Department of Health and Human Services, Washington, D.C. 20201.