

The PRACTICAL Tool: A Decision-Guide for Lawyers and Guardians

PRACTICE TIP • December 2018

Dari Pogach, ABA Commission on Law and Aging

A Guide for Guardians: Using the PRACTICAL Tool to Enhance Self-Determination and Assess for Modification of Guardianship or Restoration of Rights

Guardianship is a drastic intervention; it is a protective measure, but it also removes fundamental human rights. Many states prioritize the “least restrictive alternative principle,” mandating, when possible, the use of legal options such as powers of attorney, representative payees, or living wills instead of guardianship. In addition to legal options, the concept of “supported decision-making” promotes the rights of people with disabilities to make their own decisions. In practice, supported decision-making means the individual makes their own decisions with the advice and assistance of trusted supporters chosen by the individual.

Sometimes, because legal options are not available, or a person does not have a supported decision-making network, or for other reasons, a guardianship may be necessary. When a guardian is appointed, the scope of the guardian’s powers should be as limited as possible. Furthermore, supporting the development of decision-making skills and self-determination need not end with the appointment of a guardian. In fact, the 2013 National Guardianship Association Standards of Practice require a guardian to provide a person “with every opportunity to exercise those individual rights that the person might be capable of exercising” (Std 9); “carefully evaluate alternatives that are available” (Std 8); and “identify and advocate for the person’s goals, needs, and preferences” (Std 7).

PRACTICAL Tool for Lawyers: Steps in Supporting Decision-Making

The [PRACTICAL Tool](#) aims to help lawyers avoid guardianship for their clients, if possible, by identifying and implementing decision-making options for persons with disabilities that are less restrictive than guardianship. The Tool is also applicable to guardians as a guide for ensuring a guardianship is limited to those areas in which the individual needs assistance, and working with the individual to develop and use decision-making skills. In an ideal guardianship scenario, the guardian is so successful that the guardianship becomes unnecessary and the person’s rights are restored.

The [PRACTICAL Tool](#) and accompanying Resource Guide are a joint product of four American Bar Association entities – the Commission on Law and Aging, Commission on Disability Rights, Section on Civil Rights and Social Justice; and Section on Real Property, Trust, and Estate Law. The tool is available for free at www.ambar.org/practicaltool.

The Steps (The PRACTICAL Resource Guide provides many additional resources for each of the following steps):

Presume guardianship is not needed. A guardian can question whether a guardianship remains necessary. Currently most guardianships terminate only when the individual dies. Yet all state statutes provide for restoration of rights if an individual no longer requires the protections and substituted decision-making of a guardian. If a person can make decisions, with or without assistance, and has the right supports and services, they may no longer require the protections of a full or limited guardianship.

Reason—clearly identify the reasons for concern. Are the reasons that led to the guardianship still an issue? There may have been safety concerns that the guardian addressed with permanent solutions. Or, if a guardian was appointed when a person could not consent to medical treatment, and subsequently the person's health improved, is a guardian still necessary?

Ask if a triggering concern may be caused by temporary or reversible conditions. For example, a lack of appropriate housing can lead to the appointment of a guardian. If the guardian has successfully assisted the person in obtaining housing, is there reason for concern that the person would lose their housing without a guardian? If not, perhaps a guardian is no longer necessary.

Community—determine if concerns can be addressed by connecting the individual to family or community resources and making accommodations. Community evolves and changes. Are there new supports and accommodations that were not available when the guardian was appointed? Are there advances in technology or new options for residential settings?

Team—ask the person whether he or she already has developed a team to make decisions. The guardian can be part of a person's decision-making team. Other team members may include friends, family members, or professionals.

Identify abilities—identify areas of strength and limitations in decision-making if the person does not have an existing team and has difficulty with specific types of decisions. The guardian should evaluate on a periodic basis whether the person can make decisions and explain their reasoning; maintain consistent decisions and primary values over time; and understand the consequences of a decision.

Challenges—screen for and address any potential challenges presented by the identified supports and supporters. Available supports or supporters can present cause for concern, such as whether certain supports could incur a risk to public benefits or whether there is a risk of undue influence, abuse, neglect, or exploitation.

Appoint a legal supporter or surrogate consistent with the person's values and preferences. Are there new options that were not available prior to the appointment of a guardian, such as someone who could act as an agent under a healthcare power of attorney? Or is someone willing and trustworthy to act as a supporter?

Limit any necessary guardianship petition and order. Is the guardianship order limited to only what is needed? For example, a guardianship could be limited to: specific property/financial decisions or personal/healthcare decisions. The guardian and person should reassess the order for modification or restoration of the person's rights.

Please contact ConsultNCLER@acl.hhs.gov for free case consultation assistance. Sign up for our email list and access more resources at NCLER.acl.gov.