



Decision-Making Options That Are Less Restrictive Than Guardianship

Introduction

What is a guardianship?

Guardianship is the appointment by a court of an individual or entity to make personal, health care, and/or financial decisions for an adult whom the court finds unable to make decisions for themselves. State laws and terms about guardianships vary.¹

Who can be a guardian, and what is their role?

Guardians can be family members, friends, professionals, public agencies, or private for-profit or not-for-profit agencies. Guardians of property can be banks or other financial institutions. Guardians are fiduciaries. A fiduciary manages money or property for someone else. Fiduciaries have a high duty of trust, confidentiality and honesty. They must act in the best interest of the person they serve, and keep the person's money and property separate from their own.

Why is guardianship considered a last resort?

Typically, adult guardianships remove fundamental rights such as the right to vote, get married, make medical decisions, manage assets, and sign legal documents. Because guardianship removes basic rights, most state laws say courts must consider other less restrictive ways of decision-making before they appoint a guardian.

What are less restrictive alternatives?

Less restrictive alternatives are ways to help someone else make decisions without going to court and without removing rights through guardianship. These options may meet the decision-making needs of an adult in ways that support their preferences and independence.

Less restrictive options can be informal supports or formal legal tools. Informal supports may involve family, friends, the use of technology, and community-based services. Formal legal arrangements use tools such as financial powers of attorney and health care advance directives. Planning ahead, using either informal or formal means, can preserve a person's rights and help protect them from later harm.

¹ In addition, state laws determine the specific term to describe guardianship status. Some states refer to "guardian" as someone the court appoints to make personal decisions, and "conservator" to describe someone the court appoints to make financial decisions, but some states use different terms. This fact sheet uses the generic term "guardianship" to describe a court-appointed person or entity that makes personal or financial decisions; and the term "conservator" for someone who makes only financial decisions

Supported Decision-Making

Supported decision-making enables an adult to select people they trust to advise and support them in *making their own decisions* and in communicating those decisions to others. Supporters are trusted advisors who help the person in understanding choices, risks, benefits, and consequences. Sometimes an adult has more than one supporter, which helps to make sure that other supporters fulfill their role.

Supported decision-making is very different from many other less restrictive alternatives in that the person makes their own decisions with help, instead of someone else making the decisions on their behalf. Supported decision-making can be for both health care or personal decisions and financial decisions.

People who use supported decision-making can write down what types of support they need and who they want to provide it in a document called a supported decision-making agreement. Some state laws recognize supported decision-making agreements as a legal document.

Health Care and Personal Decisions

Here are options for health and personal decision-making that are less restrictive than guardianship, going from least to most restrictive of an individual's independent decision-making:

Informal help and services

Friends, family and technology can help with decision-making. For example, a family member might help find medical providers and home care, drive an older person to appointments, and be there at a medical appointment to give medical history and make a doctor's advice more understandable. Technology, such as telemedicine, wearable monitors, and smart phone apps can connect people to a range of services. Services funded by the Older Americans Act could include transportation, meals on wheels, and chore services.

Medical Power of Attorney

[also known as health care agent, health care proxy, health care power of attorney]

Individuals use a legal document to name a trusted person to make health care decisions if and when they are not able to do so.

Advance Directive

Previously known as a living will, these documents do two things: name a health care agent and give instructions to the agent on the person's preferences and choices. The advance directive could be on a state form but the form is not required.

Physician Orders for Life Sustaining Treatment

[POLST, also called POST, MOLST, MOST, or other terms in various states and regions]

Patients with serious or advanced illness discuss treatment options for the end of life. Then doctors and other authorized health care providers record the patient's preferences on a form that is recognized as a medical order. These orders can help ensure that a seriously ill patient's wishes are honored and give them more control over their care.

Limited Guardianship

After a hearing on a guardianship petition, the judge transfers some but not all of the individual's rights to a guardian. The order should be tailored to the abilities and limitations of the person. For example, a court might give the guardian the authority to make medical decisions but allow the individual to decide who visits them and where they want to live.

Financial Decisions

These tools and methods for financial decision-making range from informal supports to more formal arrangements:

Informal Supports available through financial institutions and other providers

Individuals can set up direct deposit of income payments, eliminating lost or stolen checks, trips to the bank, and the need to remember to make deposits. Automatic bill payment also makes financial management easier. Automatic payment can be set up for most things that a person needs – utility bills, insurance payments, credit card bills, and rent or mortgage payments. Bill payer programs and daily money managers can help with paying bills but the bill payer does not make financial decisions.

Authorized signers on financial accounts

Some bank or other accounts allow a second person to make transactions, but that second person does not own the funds in the account or inherit them if the primary account-holder dies. These may be called convenience accounts and may not be available in all states.

Joint accounts

Joint accounts allow more than one person to own and manage an account and to withdraw funds. Joint accounts can be convenient because they allow the second person to pay bills and manage funds for the other account holder. However, there are risks that the second person (who may not have contributed any of the funds) may misuse the money, and that their creditors could get the money.

Financial power of attorney

A financial power of attorney is a document in which one person appoints someone (the agent) to make decisions about money and property for them if they are unable to do so. The power of attorney could grant broad powers or be for a limited purpose. The agent is a fiduciary and should be someone trustworthy. The power of attorney must fit the individual's needs and circumstances, so it is generally a good idea for an attorney to draft it.

Revocable living trusts

An individual sets up a trust to hold property and manage funds for the benefit of a named person. Trusts are complicated and usually are set up by attorneys, typically when an individual has substantial funds or other property. Like agents under a power of attorney, trustees are fiduciaries with high duties of care and accountability.

Representative payees

When an individual receives benefits [such as Social Security, SSI, or veterans benefits] but cannot manage the payments independently, the agency that pays the benefits selects a payee to receive and manage the funds. The payee can only manage the person's public benefits and not any other money or property.

Limited conservatorship

As with a limited guardianship, the court may transfer some but not all rights to make financial decisions to a guardian of property, sometimes called a conservator. For example, the court might appoint a conservator to manage a business but the individual might still have the right to a bank account with limited funds.

Good Communication Makes Less Restrictive Options Work

The range of less restrictive alternatives offers ways of decision-making to meet many different needs. But none of them will work as intended without clear communication of the person's values and preferences.

For example, in supported decision-making, a supporter must ask questions and find the best way to communicate with the adult who is the decision-maker. An agent under a health care advance directive must have conversations with the person to know about their health care wishes - and an agent under a financial power of attorney must be familiar with the person's financial history and patterns of decisions. If the person is no longer able to say what they want, agents must look to past statements and past actions. Sometimes it is hard to figure out, and may take some digging and lots of thought.

A legal document is just a piece of paper – it takes an understanding of what the person wants to breathe life into it and to act according to the person's choices.

