**CHAPTER TWO**

**ALTERNATIVES TO GUARDIANSHIP & CONSERVATORSHIP**

Before the appointment of a guardian or a conservator, it is necessary to explore less intrusive alternatives that may preserve an individual’s autonomy. Guardianship and conservatorship are processes by which an individual becomes a surrogate decision maker for another. The individual who is alleged to be incapacitated and in need of a guardian or conservator will lose the right to make their own decisions in the process. In other words, they will lose the option for self-determination. Self-determination is a big indicator of quality of life. People with greater self-determination are more likely to be healthier, independent, employed, and better able to recognize and resist abuse. Because of the value of self-determination and the importance of helping individuals maintain their rights for as long as they can, the guardianship and conservatorship sections of the probate code note that alternatives to guardianship should be explored prior to a guardian or conservator being appointed. Guardianship and conservatorship are to be used only when less restrictive alternatives are not available or appropriate. A “less restrictive alternative” is defined as “the provision of supports and assistance . . . which maximizes the alleged incapacitated individual’s capacity for self-determination and autonomy in lieu of a guardianship or conservatorship.”[[1]](#footnote-1) “Supports and assistance”[[2]](#footnote-2) include:

(a) systems in place for the alleged incapacitated individual (A.I.I.) to make decisions in advance or to have another person to act on his behalf, including, but not limited to, having an agent under a durable power of attorney, a health care power of attorney, a trustee under a trust, a representative payee to manage social security funds, a Declaration of Desire for Natural Death (living will), a designated health care decision maker under Section 44-66-30, or an educational representative designated under Section 59-33-310 to Section 59-33-370; and

(b) reasonable accommodations that enable the A.I.I. to act as the principal decision maker, including, but not limited to, using technology and devices; receiving assistance with communication; having additional time and focused discussion to process information; providing tailored information oriented to the comprehension level of the A.I.I.; and accessing services from community organizations and governmental agencies.

If there are supports and assistance reasonably available, then the individual is not incapacitated.[[3]](#footnote-3)

The guardian *ad litem* (GAL) must identify less restrictive alternatives to guardianship and conservatorship.[[4]](#footnote-4) Therefore, the GAL must be familiar with the alternatives to guardianship and conservatorship which may meet the decision-making needs of the A.I.I.

One tool available to the GAL is the PRACTICAL tool.[[5]](#footnote-5) The American Bar Association (ABA) developed the PRACTICAL Tool to help lawyers, as well as GALs, identify and implement decision-making options for persons with disabilities that are less restrictive than guardianship or conservatorship. “PRACTICAL” is an acronym for the nine steps to identify these options:

**P**resume guardianship is not needed. The GAL should try to determine if there are alternatives to a guardianship or conservatorship. Under the Probate Code, the GAL is specifically tasked with identifying less restrictive alternatives to guardianship and conservatorship.

**R**eason – Clearly identify reasons for concern. The GAL should consider whether the individual can meet certain needs such as managing money; making health care decisions; maintaining employment; maintaining relationships with friends, family, and others; living in the community; making personal decisions; and maintaining personal safety.

**A**sk if concerns are caused by temporary or reversible conditions. For example, a short-term medical condition, such as a urinary tract infection (UTI), dehydration, or delirium, might be causing the individual’s incapacity, and could be alleviated with medical intervention. Other potential temporary or reversible conditions may include: cultural barriers, such as language or cultural differences, which may be addressed with the aid of a translator; psychological conditions, such as stress or depression; or medication, the side effects of which might impact an individual’s capacity.

**C**ommunity – Are there community resources available to help? Examples include in-home care, adult day care, home-delivered meals, care management, or financial management. Making accommodations to the individual’s home, utilizing assistive technology, or moving to a different environment, such as assisted living or a group home, might also alleviate the concerns.

**T**eam – Is there a team to help make decisions? The GAL should determine whether family members, friends, co-workers, or other professionals can provide the support the individual needs.

**I**dentify areas of strength and limitations in decision-making. Can the individual make decisions with support, or can the individual appoint someone to make the decisions? Is the individual capable of making consistent decisions, understanding the consequences of decisions, and articulating the reasoning for a decision?

**C**hallenges presented by supports and supporters. If there are potential supporters or a support system, the GAL should determine if there are any challenges which might render the support ineffective. Such challenges may include the individual’s eligibility for the support, such as government benefits, or the cost of accessing the support. The GAL should consider whether the potential supporters are trustworthy and reliable, and whether there is any risk that the individual could be unduly influenced, exploited, or abused by the supporter.

**A**ppoint a legal supporter or surrogate. Examples include an agent under a health care power of attorney or durable power of attorney for financial matters; a trustee of a trust for the benefit of the individual; a representative payee for Social Security; or a VA fiduciary.

**L**imit any necessary guardianship or conservatorship petition and order. The Probate Code focuses on the idea of limited guardianships and conservatorships whenever possible. The order must be specific about what rights will be affected by the guardianship or conservatorship.

The ABA intended the PRACTICAL Tool to blend with the case interview process. For the GAL, it may be best to keep the various considerations in mind while letting the interview proceed naturally, rather than relying on the PRACTICAL Tool as a checklist during the interview.

**Alternative Legal Processes**

Sometimes guardianship or conservatorship may be contemplated by caregivers, family, or friends for an individual who is struggling with issues which may be resolved through another process. At times, guardianship or conservatorship may also be needed. At other times, the other process may resolve concerns and guardianship or conservatorship may not be needed. Below are some alternative protective systems, all of which are also judicial processes outlined in South Carolina law. A GAL should be familiar with these other legal processes in the event that using one of these systems would be more appropriate or less restrictive than guardianship or conservatorship, or in the event one of these systems is needed in conjunction with guardianship or conservatorship.

* *Adult Protective Services for Vulnerable Adults through the Department of Social Services*

Neither guardianship nor conservatorship is a replacement for Adult Protective Services (APS) provided by the Department of Social Services (DSS). APS may provide services on a voluntary basis or on a involuntary basis through the Omnibus Adult Protection Act (OAPA), which grants DSS the authority to provide protective services voluntarily or to require a vulnerable adult in need of protection to receive protective services through an order of the Family Court. Even the emergency guardianship process is not a substitute for calling police in an emergency, or for calling APS if abuse, neglect, or exploitation is suspected. Guardianship provides only a decision maker and not services. If the individual needs services, especially emergency services, then APS may be an appropriate resource.[[6]](#footnote-6)

* *Medicaid Fair Hearings to Access Services*

Lack of access to healthcare is frequently an issue that brings someone to wonder if guardianship is necessary. That lack of access can be caused by many issues, only some of which may be resolved by appointing a guardian to make decisions.

For older individuals, Medicaid can provide funding and services for long-term care. Long-term care may be provided in a facility, like a skilled nursing facility, or it may be provided in the community through the Medicaid Waiver Programs. Frequently the services funded through Medicaid can assist an individual in attaining the maximum level of independence. For example, Medicaid-funded training is available for people with developmental disabilities to learn life skills like balancing a checkbook or shopping for groceries.

Medicaid is also a very important resource for individuals with significant disabilities. For individuals who are eligible for Medicaid and under age 21, the South Carolina Department of Health and Human Services (SCDHHS) must provide all medically necessary services which “correct or ameliorate defects and physical and mental illnesses and conditions . . . .” These services are known as Early Periodic Screening Diagnosis and Treatment (EPSDT) services.[[7]](#footnote-7)

Sometimes SCDHHS may make a decision that detrimentally affects someone’s access to healthcare due to denial of coverage, termination of benefits, or some other decision. The individual may appeal these decisions, and the hearings on these decisions are often called “fair hearings.” Guardianship is not needed for an individual to represent a Medicaid beneficiary in a fair hearing. SCDHHS must inform every applicant or beneficiary for services that he can “represent himself or use legal counsel, a relative, a friend, or other spokesman” to assist him in the hearing.[[8]](#footnote-8) A guardian can represent a ward at a hearing, but it is not necessary. Medicaid is a very important resource for individuals with significant disabilities. For individuals who are eligible for Medicaid and under age 21, SCDHHS must provide all medically necessary services which “correct or ameliorate defects and physical and mental illnesses and conditions . . . .”[[9]](#footnote-9) These services are known as Early Periodic Screening Diagnosis and Treatment (EPSDT) services.

* *Commitment Proceedings[[10]](#footnote-10)*

State law allows the probate courts to commit individuals to treatment, if they meet certain strict qualifications, like being a danger to self or others. An individual may be committed because of chemical dependency (including alcohol abuse) or mental illness, or may be committed to the care of the Department of Disabilities and Special Needs. The law provides for emergency and non-emergency (judicial) commitment procedures.

Commitment orders may be for inpatient services and/or outpatient services. Guardianship is not a substitute for the commitment process, which provides due process protections, and is specifically tailored to the treatment needs of an individual. In addition, a commitment is designed to address a temporary situation. For example, if a long-term solution is needed to address the fact that an individual will not consistently attend appointments or take his or her mental health medications in order to remain stable, or an individual has a serious addictive illness with multiple relapses and consistent dissipation of money, that may require the long-term solution of guardianship as opposed to solely relying on the civil commitment process.

**Less Restrictive Alternatives to Guardianship and Conservatorship**

Guardianship and conservatorship are not necessary for every A.I.I. Less restrictive alternatives are options that encourage independence and allow an A.I.I. to make decisions about his or her care and well being while still providing protection for this individual. A.I.I.s who can protect themselves should retain their rights. If less restrictive alternatives can sufficiently protect an A.I.I., these options should be used instead of guardianship or conservatorship. The alternatives detailed below include options to allow an individual to designate an agent to make health, financial, and other decisions for the individual.

1. *Supported Decision Making (SDM)*.[[11]](#footnote-11)

Many people with disabilities are able to manage their own affairs with appropriate services and support systems. SDM is an ongoing problem-solving process used to help an individual who may have some cognitive or other impairment plan for the future. In SDM, friends, family members, and professionals help the individual with a disability better understand his or her situation and choices he or she faces so that the individual may make decisions without the need for a guardian. SDM encourages independence and self-determination. Support can range from informal assistance to formal agreements.

2. *Social Security Representative Payee Program[[12]](#footnote-12)*

Social Security has a program by which those who receive a check from Social Security can have that check managed by a representative payee (sometimes referred to as a “rep payee”). A conservator can be appointed as a representative payee but an individual does not have to have a conservator appointed in order to be appointed a representative payee. The individual can request a representative payee or if Social Security receives information that the individual requires a payee, then Social Security may take action to ensure that a payee is named. The representative payee’s authority is limited to the government funds. Usually, this applies to Social Security benefits, including Social Security Disability and Supplemental Security Income (SSI). 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 representative 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 a need for a representative 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 the 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.

3. *U.S. Department of Veteran Affairs (VA) Fiduciary Program.[[13]](#footnote-13)*

A fiduciary is appointed when a veteran or other designated beneficiary is no longer able to manage his or her finances. The fiduciary must undergo an investigation of their suitability to serve, which includes a criminal background check, review of credit report, personal interview, and recommendations of character references. The fiduciary is responsible to the veteran or other designated beneficiary and oversees financial management of the VA benefits. The fiduciary typically must account to the federal government for the use of the funds.

4. *Power of Attorney (POA).*

A POA is a legal document that grants one person, called an agent (or attorney-in-fact), authority to make decisions on behalf of the person appointing them (the “principal”). To execute a POA, the principal must be able to understand that he or she is appointing the agent the kinds of authority he or she is giving the agent. Legally speaking, the principal must possess contractual capacity. The scope of the agent’s authority is limited by the terms of the document and state law. This document often affects property, assets, money, debts, health care, and pets. A POA may be effective when it is executed, but upon the principal’s incapacity, it must be recorded for an agent to exercise the authority granted in the POA, but this only applies to a POA executed for the purpose of business affairs, and not health care.[[14]](#footnote-14) The POA may be recorded at the Register of Deeds (or Clerk’s Office where public records like a deed are filed) in the county in which the principal resides. Revocation of a power of attorney should be in writing, signed by the principal, with a copy delivered to the agent and anyone who is likely to be dealing with the agent. If the POA is recorded, then the revocation should be recorded as well.

However, there may be situations in which a person has become incapacitated,but does not have any language in the POA that indicates that the document cannot be revoked once the person is incapacitated (sometimes referred to as a “springing clause”). If there is a need to be sure an incapacitated person is not influenced to revoke a POA, a protective proceeding solely for the purpose of legally establishing incapacity and the inability of the individual to revoke the document can be filed.

5. *Health Insurance Portability and Accountability Act (HIPAA) Release.*

A HIPAA release allows an individual to choose a family member, friend, or other trusted person with whom health care providers may discuss the individual’s medical condition and treatment plan. This can allow a parent to enter an examination room with an adult child, for example, without needing Health Care Power of Attorney or a showing of incapacity. Typically, each medical provider provides a HIPAA release to the patient. It can be changed or revoked at any time by notifying the provider.

6. *Adult Health Care Consent Act (AHCCA).*

The AHCCA is a state law that determines who can make health care decisions for a patient over age 16 who is unable to consent to health care.[[15]](#footnote-15) The inability to consent to health care may be temporary or permanent, but the law applies in any setting where health care is being provided. When a patient is unable to consent, the statute identifies a list of people who have priority to make healthcare decisions for the patient.[[16]](#footnote-16) If a guardian is appointed, the guardian has priority. If the individual has a Health Care Power of Attorney (see below), then the agent has the second priority. For others, the statute essentially provides for the next of kin to make health care decisions. The statute also provides for implied consent. This provision is very important in emergency situations. Health care providers, if they cannot find someone to consent, may provide care under the implied consent provision.[[17]](#footnote-17) Health care providers acting in good faith are specifically granted immunity from civil and criminal liability for following the statute.[[18]](#footnote-18) If someone with priority under the AHCCA is able and willing to make decisions for an individual who is unable to consent to health care, a guardianship may not be needed.

7. *Health Care Power of Attorney (HCPOA) or Living Will.*

A HCPOA is a legal document that may allow a principal (the individual signing the HCPOA) to name another person (agent) to make health care decisions, in the event he or she is unable to make decisions. This individual will have priority to act as the decision maker for health care pursuant to the AHCCA.[[19]](#footnote-19) Only a guardian has higher priority. The scope of the authority is defined in this document, and may include guidance about the type and extent of health care desired. The authority of a health care agent 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. As long as the person has capacity, the person can revoke or modify the appointment of a surrogate.

A living will, also called a Declaration of a Desire for a Natural Death or an advance directive, is a document in which an individual sets forth end-of-life decisions. Forms for both the HCPOA and living will are available online.[[20]](#footnote-20)

8. *Adult Students with Disabilities Educational Rights Consent Act (ASDERCA).[[21]](#footnote-21)*

ASDERCA provides an alternative to guardianship for students receiving special education services from ages 18 to 21 to ensure that the education of a student with disabilities is not detrimentally affected by the lack of having someone to consent to the education process. With the enactment of this statute, students with disabilities receiving special education services have a number of options, from least restrictive to guardianship, by which educational decisions may be made by them or on their behalf. The options are as follows:

* the student can manage education decisions independently;
* the student can use a supporter to assist with their decisions about their education;
* the student can appoint a decision maker through a power of attorney;
* if the student cannot communicate, a decision maker can be appointed for that student; and
* Finally, if a guardian has been appointed, the guardian would make educational decisions for the student.

It should be noted that an 18-year old who has a cognitive disability may still need the appointment of a guardian for other reasons, or the continuation of an existing conservatorship if he or she is not able to manage their own resources with appropriate supports and assistance.

9. *Bank Accounts.*

A common way to manage another person’s finances is to authorize an agent to transact the business of the account holder. Even if a broader POA is not in place, there are two ways to have another assist with managing a bank account: 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 will affect estate planning if not taken into consideration. One common problem which arises is a parent making one child a joint account holder. When the parent dies, only the one child will receive those assets, and the funds will not pass under a will, which may have left assets equally to all the children. Therefore, joint accounts may be helpful for married or committed couples, but for other family members or friends, joint accounts should be used with great caution. Rather than create a joint account, the bank can authorize someone to be a signature party 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 or by an account holder who is not incapacitated. 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.

10. *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 recurring 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.

11. *Trusts.*

A trust is a legal document that gives authority to a person, a trustee, to manage some or all assets for the benefit of another, a beneficiary. The trust document explains the trustee’s authority, how the trust is to benefit the beneficiary, and how and when the trust is to terminate.

A special needs trust (SNT) is a trust that preserves the eligibility of a disabled minor or disabled adult for needs-based government benefits such as Medicaid and Supplemental Security Income (SSI) when the minor or adult receives assets that would otherwise disqualify them from benefits. Because the beneficiary does not own the assets in the trust, he or she can remain eligible for benefit programs that have an asset limit. As a general rule, the trustee will supplement the beneficiary’s government benefits but not replace them. By placing assets in trust, a beneficiary may avoid the need to have a conservator appointed by the probate court.

**Applying the Knowledge of Alternatives through Examples**

The alternatives listed above will not always eliminate the need for the appointment of a guardian or conservator. The GAL should review whether alternatives have been attempted, and the reasons they may not be adequate for the A.I.I.

For example, a young adult who wishes to be more independent but needs help making decisions may benefit from supported decision making. This same individual may need a representative payee while they continue to develop the skills necessary to manage money. If family is concerned about being informed on health care issues, they can ask the individual to execute a HIPAA release. Some of these efforts should be attempted first prior to implementing guardianship or conservatorship, particularly if they will adequately address the health, safety, and welfare of the individual.

Likewise, an individual with a severe and persistent mental illness may have periods of capacity when they are in a period of recovery and periods of incapacity when his or her illness is active. Issues, like compliance with treatment, are difficult to navigate for family supporters. Guardianship may not help. If the individual is a danger to themselves or others, then commitment to a treatment facility may be necessary, regardless of whether a guardian has been appointed.

Finally, the elderly matriarch of a large family with a diagnosis of dementia may have planned for incapacity by establishing a trust and a power of attorney in advance of her cognitive demise. If her plan is effectively providing for her needs, then she may not need to have a guardian or a conservator appointed, even if she clearly lacks capacity. However, if the family is suspicious that the agent acting under the POA is stealing or misusing funds, then the family may need to seek court intervention.

1. S.C. Code Ann. § 62-5-101(14). [↑](#footnote-ref-1)
2. S.C. Code Ann. § 62-5-101(23). [↑](#footnote-ref-2)
3. See S.C. Code Ann. § 62-5-101(13). [↑](#footnote-ref-3)
4. S.C. Code Ann. § 62-5-106. [↑](#footnote-ref-4)
5. More information on the PRACTICAL Tool is available at: https://www.americanbar.org/groups/law\_aging/resources/guardianship\_law\_practice/practical\_tool.html [↑](#footnote-ref-5)
6. More information on APS is available at https://dss.sc.gov/abuseneglect/adult-protective-services/. For more information on spotting and reporting abuse, visit http://www.scddc.state.sc.us/documents/SpotAbuseFinal\_199.pdf. [↑](#footnote-ref-6)
7. For more information, on EPSDT services, see https://www.medicaid.gov/medicaid/benefits/downloads/epsdt\_coverage\_guide.pdf and the Appendix. For more information on Medicaid Waiver programs a helpful overview is available at https://www.familyconnectionsc.org/healthcare/medicaid-waivers/. [↑](#footnote-ref-7)
8. 42 C.F.R. § 431.206(b)(3). [↑](#footnote-ref-8)
9. 42 U.S.C. § 1396d(r)(5). [↑](#footnote-ref-9)
10. For more information about commitment, refer to Title 44 of the South Carolina Code of Laws. [↑](#footnote-ref-10)
11. Additional information and resources on SDM are available at http://scsupporteddecisionmaking.org/. [↑](#footnote-ref-11)
12. More information is available at https://www.ssa.gov/payee/index.htm. [↑](#footnote-ref-12)
13. For more information, visit: https://www.benefits.va.gov/fiduciary/. [↑](#footnote-ref-13)
14. S.C. Code Ann. § 62-8-109. [↑](#footnote-ref-14)
15. S.C. Code Ann. § 44-66-10 et seq. [↑](#footnote-ref-15)
16. S.C. Code Ann. § 44-66-30. [↑](#footnote-ref-16)
17. S.C. Code Ann. §§ 44-66-40, 44-66-50. [↑](#footnote-ref-17)
18. S.C. Code Ann. § 44-66-70. [↑](#footnote-ref-18)
19. S.C. Code Ann. § 44-66-30. [↑](#footnote-ref-19)
20. <https://aging.sc.gov/sites/default/files/documents/Legal/SCHealthCarePowerOfAttorney.pdf> and

    <https://www.scbar.org/media/filer_public/bd/d6/bdd6d988-970f-4b23-84fd-0b4ace64c7c7/livingwill2014.pdf> [↑](#footnote-ref-20)
21. For more information, please review the Fact Sheet contained in the Appendix or visit https://ed.sc.gov/districts-schools/special-education-services/oversight-and-assistance-o-a/indicator-13-module/summary-of-the-adult-students-with-disabilities-educational-rights-consent-act/ [↑](#footnote-ref-21)