



South Carolina Bar

Continuing Legal Education Division

Preparing for 2019 Changes to Guardianship and Protective Proceeding Cases in Elder Law

18-33

Thursday 8 & Friday, 9 November, 2018

presented by

**The South Carolina Bar
Continuing Legal Education Division**

<http://www.scbar.org/CLE>

SC Supreme Court Commission on CLE Course No. 187750

Day 1: This program qualifies for 6.25 MCLE credit hours,
including up to 1.0 LEPR credit hour

Day 2: This program qualifies for 6.0 MCLE credit hours

Both Days: This program qualifies for 12.25 MCLE credit hours,
including up to 1.0 LEPR credit hour

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Preparing for 2019 Changes to Guardianship and Protective Proceeding Cases in Elder Law

Thursday, November 8, 2018

Midlands Tech NE Campus, 151 Powell Rd, Columbia, SC 29203, Columbia, SC

Day 1: This program qualifies for 6.25 MCLE credit hours, including up to 1.0 LEPR credit hours
Both Days: This program qualifies for 12.25 MCLE credit hours, including up to 1.0 LEPR credit hour
SC Supreme Commission on CLE Course #: 187750

8:30 a.m. Registration

9:00 a.m. Introduction

Andrew J. Atkins, Esq. - Millender Elder Law LLC

9:15 a.m. The Role of the Petitioner's Attorney

Chadwicke L. Groover, Esq. - Upstate Elder Law, P.A.

Franchelle C. Millender, Esq. - Millender Elder Law LLC

10:15 a.m. Mid-Morning Break

10:30 a.m. The Role of the Guardian *ad Litem*

Michael S. Large, Esq. - S.C. Legal Services

11:30 a.m. The Role of the Respondent's Attorney

Jonathan Martinis, Esq. - Senior Director for Law and Policy at The Burton Blatt Institute at Syracuse University

Sarah Garland St. Onge, Esq. - Protection and Advocacy for People with Disabilities, Inc.

12:15 p.m. Lunch (Included)

12:45 p.m. The Role of the Examiners

Dr. James Bouknight (Retired) & Dr. Kimberly Kruse - Palmetto Health Behavioral Medicine

1:45 p.m. The Role of the Probate Court

The Hon. Ashley H. Amundson, Probate Judge, Colleton County Probate Court

The Hon. Jacqueline D. Belton, Associate Probate, Judge, Richland County Probate Court

The Hon. Molly D. Edwards, Associate Probate Judge, Dorchester County Probate Court

2:45 p.m. Mid-Afternoon Break

3:00 p.m. Miscellaneous Article 5 Topics

Andrew J. Atkins, Esq. - Millender Elder Law LLC

4:00 p.m. Panel Discussion

The Hon. Ashley H. Amundson

Andrew J. Atkins, Esq.

The Hon. Jacqueline D. Belton

Dr. James Bouknight

Chadwicke L. Groover, Esq.

Dr. Kimberly Kruse

Michael S. Large, Esq.

Jonathan Martinis, Esq.

Franchelle C. Millender, Esq.

Sarah Garland St. Onge, Esq.

4:30 p.m. Adjourn

Preparing for 2019 Changes to Guardianship and Protective Proceeding Cases in Elder Law

Friday, November 9, 2018

Midlands Tech NE Campus, 151 Powell Rd, Columbia, SC 29203, Columbia, SC

Day 2: This program qualifies for 6.0 MCLE credit hours

Both Days: This program qualifies for 12.25 MCLE credit hours, including up to 1.0 LEPR credit hour
SC Supreme Commission on CLE Course #: 187750

8:30 a.m. Registration

9:00 a.m. Welcome Introduction – P&A employee (TBD)

9:15 a.m. The ABC's of Defending a Guardianship Action or Protective Proceeding

Sarah St. Onge, Esq. - Protection and Advocacy for People with Disabilities, Inc.

Jonathan Martinis - Senior Director for Law and Policy at The Burton Blatt Institute at Syracuse University

10:30 a.m. Mid-Morning Break

10:45 a.m. Introduction to Less Restrictive Alternatives to Guardianship

Michael J. Polk, Esq. - Belser & Belser, PA

Charlie Walters, Director - Transition Programs at Able South Carolina

Carol Page, Director - South Carolina Assistive Technology Program and the Center for Disability Resources

Involuntary/Surrogate Alternatives – AHCCA/ASWDERCA/Rep Payee

Sarah St. Onge - Protection and Advocacy for People with Disabilities, Inc.

The Hon. Heather Galvin – Associate Judge, Beaufort County

Video & Questions – Able SC

Panel Discussion and Questions for all Speakers

Sarah St. Onge - Protection and Advocacy for People with Disabilities, Inc.

Jonathan Martinis - Senior Director for Law and Policy at The Burton Blatt Institute at Syracuse University

Mike Polk - Belser & Belser, PA

Charlie Walters, Director - Transition Programs at Able South Carolina

Carol Page, Director - South Carolina Assistive Technology Program and the Center for Disability Resources

The Hon. Heather J. Galvin – Beaufort County Judge

11:45 a.m. Lunch (Included)

12:15 p.m. HOT TOPIC LUNCH: Panel Discussion on Voting and Guardianship

Kathleen Warthen - Protection & Advocacy for People with Disabilities

The Hon. Heather J. Galvin - Beaufort County

M. Leigh Flynn - Law Office of Leigh Flynn, LLC

1:00 p.m. Ethical implications in representing an individual with a disability

Jonathan Martinis - Senior Director for Law and Policy at The Burton Blatt Institute at Syracuse University

2:00 p.m. Break

2:15 p.m. Creative ways to comply with the Americans with Disabilities Act (ADA)

Amanda C. Hess - Protection & Advocacy for People with Disabilities

2:45 p.m. Abuse, Neglect and Exploitation – What to do when you learn the worst?

Anna Maria Darwin - Protection & Advocacy for People with Disabilities

3:30 p.m. Why Defend Against Guardianship and Protective Orders

Jonathan Martinis - Senior Director for Law and Policy at The Burton Blatt Institute at Syracuse University

4:00p.m. Adjourn

1:00 p.m. Ethical implications in representing an individual with a disability

Jonathan Martinis - Senior Director for Law and Policy at The Burton Blatt Institute at Syracuse University

2:00 p.m. Break

2:15 p.m. Creative ways to comply with the Americans with Disabilities Act (ADA)

Amanda C. Hess - Protection & Advocacy for People with Disabilities

2:45 p.m. Abuse, Neglect and Exploitation - What to do when you learn the worst?

Anna Maria Darwin - Protection & Advocacy for People with Disabilities

3:30 p.m. Why Defend Against Guardianship and Protective Orders

Jonathan Martinis - Senior Director for Law and Policy at The Burton Blatt Institute at Syracuse University

4:00p.m. Adjourn

Preparing for 2019: Changes to Guardianships and Protective Proceedings Under the New Article 5 of the Probate Code

SPEAKER BIOGRAPHIES

(by order of presentation)

Andrew J. Atkins

Millender Elder Law LLC

Columbia, SC

(course planner)

Andrew Atkins is an attorney-at-law with Millender Elder Law LLC. He is admitted to practice in South Carolina. He is a member of the Richland County Bar Association, the National Academy of Elder Law Attorneys (NAELA), and the South Carolina Chapter of NAELA (SC NAELA). Mr. Atkins is the former Chair of the Elder Law Committee of the South Carolina Bar and is the current President of SC NAELA. In 2013, he was selected as Outstanding Chapter Member of SC NAELA. Mr. Atkins earned his B.A. degree from Furman University and his J.D. degree from the University of South Carolina School of Law.

Chadwicke L. Groover

Upstate Elder Law, P.A.

Greenville, SC

Chad Groover practices law at Upstate Elder Law, PA. His law practice focuses on estate planning, probate administration, long term care planning, Medicaid qualification, special needs trusts, and guardianship/conservatorship actions. Prior to being in private practice, Chad served as a Special Assistant United States Attorney prosecuting federal narcotics and firearms crimes and as a Counsel on the U.S. Senate Judiciary Committee, Subcommittee on Crime. He is the current Chair of the SC Bar Elder Law Committee. He and his wife Gwen live in Simpsonville and have two children, Ava and Willes.

Franchelle C. Millender

Millender Elder Law LLC

Columbia, SC

Franchelle C. Millender is a certified as a specialist in elder law by the National Elder Law Foundation. Her primary practice is Elder Law, including long-term care planning, special needs planning, estate planning, guardianship and conservatorship proceedings, probate, and related real estate matters. She received both her undergraduate and law degrees from The University of South Carolina. She is a member of the National Academy of Elder Law Attorneys, served on the National Board of Directors from 2009 to 2013, and is a charter member of its Council of Advanced Practitioners. Franchelle was named a NAELA Fellow in 2012. She served as the first chair of the Elder Law Committee of the South Carolina Bar from 2004 to 2006 and was selected as a Fellow of the American College of Trust and Estate Counsel in 2008. She is a member of the Special Needs Alliance.

She is a frequent presenter on long-term care and special needs planning and is the principal author and

editor of A Practical Guide to Elder and Special Needs Law in South Carolina, published by the South Carolina Bar.

Michael S. Large

S.C. Legal Services
Conway, SC

Michael Large is an attorney and the elder law unit head at South Carolina Legal Services. SCLS is an independent non-profit law firm representing low income South Carolina residents in a wide range of civil legal matters. Mr. Large's practice focuses on helping seniors and people with disabilities understand their rights and navigate roadblocks that impede those rights. He has litigated cases on behalf of vulnerable adults in the areas of guardianship/conservatorship, abuse and neglect, probate, public benefits appeals, and long term care matters. He works collaboratively with local community, state, and national aging organizations to protect the rights of vulnerable adults. Mr. Large is a member of the South Carolina Bar Elder Law Committee, chairs the Guardianship/Conservatorship sub-committee and is a member of the Vulnerable Adult Task Force. Mr. Large also serves on the Board of Directors for the Champion Autism Network. He graduated from Temple University School of Law in 1991 and received his B.A. in Criminal Justice from Richard Stockton College in 1987.

Jonathan Martinis

Burton Blatt Institute
Syracuse, NY

Jonathan Martinis is the Senior Director for Law and Policy for the Burton Blatt Institute at Syracuse University. Jonathan has over twenty years' experience representing people with disabilities to protect their legal and human rights, including precedent-setting cases securing access to critical community-based services.

In 2013, Jonathan represented Margaret "Jenny" Hatch in the "Justice for Jenny" case – the first trial to hold that a person has the right to use Supported Decision-Making to make her own life choices instead of being subjected to a permanent, plenary guardianship. Since then, Jonathan has spoken to and trained thousands of people, families, attorneys, advocates, judges, teachers, health care workers, and other professionals across the country about everyone's Right to Make Choices and direct their own lives.

Sarah Garland St. Onge

Protection and Advocacy for People with Disabilities, Inc.
Columbia, SC
(course planner)

Since 2008, Mrs. St. Onge has been an attorney at Protection and Advocacy for People with Disabilities, Inc., (P&A) advocating for the civil, legal, and human rights of people with disabilities. While at P&A, Mrs. St. Onge has brought federal litigation to enforce the rights guaranteed by the Americans with Disabilities Act, drafted amicus briefs in both state and federal court, and investigated allegations of abuse and neglect at facilities throughout South Carolina. Mrs. St. Onge's experience includes work in estate planning, probate, elder law, administrative law, mental health law, litigation, appellate practice, and affirmative litigation. She received her J.D. from the University of Tennessee College of Law in 1991 with high honors. Her law school honors include Order of the Coif, the American Jurisprudence Award in Professional Responsibility and Constitutional Law, Executive Research Editor of the Tennessee Law Review, and recipient of the John W. Green Scholarship. She received her B.A. degree in philosophy in 1987 from Agnes Scott College in Decatur, Georgia. At the University of South Carolina School of Law, she taught Legal Writing for five years and has also taught Advanced Legal Writing. She is active in the South Carolina Bar, serving on the Elder Law Committee; a member of SC Chapter of the National Academy of Elder Law Attorneys, serving on the Board

of Directors; and has taught continuing legal education classes on guardianship and protective proceedings, Medicaid, estate planning, ethics, and advanced directives. She is a contributing author to [A Practical Guide to Elder Law and Special Needs Law in South Carolina](#) by Franchelle Millender. In December, Mrs. St. Onge will begin working at Millender Elder Law.

Dr. James G. Bouknight

Palmetto Health Behavioral Medicine
Columbia, SC

Dr. James Bouknight spent almost a decade as an economist before returning to school in the mid-1980's to pursue his medical education. He earned a doctor of medicine from the Medical University of South Carolina, Charleston, South Carolina. Prior to his medical degree, he received a bachelor of arts in economics from Wofford College, Spartanburg, South Carolina; a master of arts in economics from Duke University, Durham, North Carolina; and a Ph.D. in economics from the University of South Carolina, Columbia, South Carolina.

After serving a residency at William S. Hall Psychiatric Institute, Columbia, South Carolina, Dr. Bouknight was employed by the Columbia Area Mental Health Center and WJB Dorn Department of Veterans Affairs Medical Center, Columbia, South Carolina; and Charter Rivers Hospital, West Columbia, South Carolina. During five years at Charter Rivers Hospital he served as Director of the Partial Hospitalization Program, Director of the Geriatric Psychiatry Service and president of the medical staff. Dr. Bouknight joined the faculty of the USC School of Medicine in 1993, and was named Director of Geriatric Psychiatry in 2004.

Board certified in psychiatry and geriatric psychiatry, Dr. Bouknight has added qualifications in geriatric psychiatry. His special interests are in the treatment of dementias and mood disorders.

Dr. Kimberly Kruse

Palmetto Health Behavioral Medicine
Columbia, SC

Dr. Kimberly Kruse is a Licensed Clinical Neuropsychologist with a variety of practice roles. She functions in a dual Chief Executive Officer capacity over Detachment-1, a leadership development company, as well as Neurobehavioral Diagnostics, LLC, thru which she performs forensic, cognitive and psychological evaluations. She is a hospitalist for Prisma Health, formerly Palmetto Health and is a provider at Senior Primary Care. She also performs consultations for Kershaw Health and Encompass Health, formerly HealthSouth Hospital. Over the course of a decade, Dr. Kruse has held the role of Assistant Professor in the Department of Neuropsychiatry and Behavioral Sciences, at the USC School of Medicine. In addition, she performs Compensation and Pension examinations at the Veterans Administration and disability evaluations for the state of South Carolina. Dr. Kruse has extensive experience with patients who have experienced Traumatic Brain Injury (TBI), as well as degenerative brain diseases, which has led to her being called as an expert witness in several high-profile trials. Dr. Kruse has used her expertise to develop and implement systematic training programs, employing principles of neuroscience to help individuals train their brains to operate efficiently under extreme stress, from the battlefield to the boardroom. She appreciates opportunities to provide education to select groups on neuropsychological and neurophysiologic processes, in hope that the information might allow attendees to better understand themselves and others. In her free time, she enjoys hiking diverse mountainous ranges, surfing in remote destinations around the world and exploring historical sites throughout Europe.

The Hon. Ashley H. Amundson

Probate Judge, Colleton County Probate Court

Ashley H. Amundson is the Colleton County Probate Judge and has been serving in that position since January 2011. Amundson graduated magna cum laude from the South Carolina Honors College at the University of South Carolina with a B.S. in Business Administration. Upon graduation, she went on to earn her law degree from the University of North Carolina at Chapel Hill.

Amundson began her legal career as an assistant city attorney in Charlotte, North Carolina, where she focused primarily on contracts and procurement related to the City's transit system. She then moved back to her hometown of Walterboro in 2008. From 2008 until her election as Probate Judge, Amundson practiced general civil law.

Amundson is the past President of the South Carolina Association of Probate Judges and currently serves as a member of the Advisory Committee for the South Carolina Probate Judges. She is former Chair of the Walterboro-Colleton County Chamber of Commerce, former Campaign Co-Chair of the Colleton Center, and a graduate of Leadership Colleton. She and her husband reside in Walterboro and are the parents of two children.

The Hon. Molly Edwards

Associate Probate Judge

Dorchester County Probate Court

Molly Edwards is a part-time Associate Probate Judge with Dorchester County Probate Court. When not working at the Court, she is working at her private practice in North Charleston, South Carolina. Since she is focused exclusively on estate planning, probate litigation and administration, and guardianships/conservatorships, she has developed a statewide practice in these specific areas that allow her to assist families through these delicate and often difficult times.

Molly has co-chaired local wills clinics for first responders, and she has been a presenter at local educational seminars presented to the public. Additionally, she served on the forms committee with the Probate Section of the South Carolina Bar to assist in the revision of the probate court forms following the 2014 Probate Code revision.

Molly graduated magna cum laude from Winthrop University and cum laude from Charleston School of Law. During law school, she served as a Research Editor for the Charleston Law Review and was published in the Student Works edition of the publication. Following law school, she served as the law clerk for the Honorable Mary Blunt of the Dorchester County Probate Court.

When she's not working, Molly and her husband, Andy, are chasing around their two young children.

The Hon. Jacqueline D. Belton

Associate Probate, Judge

Richland County Probate Court

Judge Jacqueline D. Belton has served as the Associate Probate Judge for the Richland County Probate Court since 1999. The majority of the cases Judge Belton hears at the Court are guardianship and conservatorship cases, along with estate and commitment cases, and she is currently the primary judge for the Richland County Mental Health Court.

Before coming to the Probate Court, Judge Belton was staff counsel in the Office of General Counsel, S.C. Department of Mental Health. Her areas of practice there were primarily in the areas of employment law, probate law, and administrative law. Judge Belton also rotated with other SCDMH attorneys in serving as a Clinical Instructor for the U.S.C. School of Medicine, leading a seminar for fellows in the forensic psychiatry

program covering landmark legal cases in the area of mental health law.

Judge Belton was also an Assistant Clinical Professor at the USC School of Law, and a legal services attorney. She and her husband, David E. Belton, were honored as the S.C. Bar Young Lawyers of the Year in 1991, the only husband and wife to have jointly received that honor. She has made numerous CLE and Bridge the Gap presentations, presented at the School for New Probate Judges, and was a member of the faculty of the National Judicial College from 2005 to 2008. Judge Belton also presents several times a year in an advanced course at the S.C. Criminal Justice Academy entitled, "Law Enforcement Awareness for the Mentally Ill." Jackie is from a military family, and proudly describes herself as an "Army Brat." She graduated from Würzburg American High School, in Würzburg, Germany, and then received her A.B. degree in Sociology from Duke University and her J.D. from Antioch School of Law, in Washington, D.C.

Michael J. Polk

Belser & Belser, PA
Columbia, SC

Mike Polk is an attorney at Belser & Belser in Columbia. His practice focuses on probate administration and litigation, elder law, creditor rights, and general civil litigation. He attended Virginia Tech as an undergraduate and was a member of the Corps of Cadets. He served in the Navy for 4 years. Among other accomplishments, after appearing before King Neptune and his Royal Court, Mike was initiated into the Solemn Mysteries of the Ancient Order of Shellbacks. Mike attended USC Law School. After passing the bar in 1994, he practiced law in Winnsboro for one year with Kenneth G. Goode and Associates. He joined Belser & Belser in 1995. Mike is the Richland County Bar Treasurer and newsletter editor, was recently appointed head of the South Carolina Bar Technology Committee, and worked on the Probate Code Revision Committee. Mike enjoys watching hockey on TV and playing fantasy baseball, which, it turns out, is somehow even lamer than it sounds. Mike is married to Betsy Polk, who is also an attorney. Their daughter Jane is a senior in high school. They all thought it was a good idea to get two border collie puppies last year, and boy were they wrong.

Charlie Walters

Able South Carolina
Columbia, SC

Charlie Walters serves as the Director of Transition Programs at Able South Carolina. He is currently the Chair for the Transition Alliance of SC and the SC Disability Employment Coalition's Transition to Careers Committee. From youth involvement in statewide Employment First initiatives to the oversight of youth programming at Able SC, Charlie lives his belief that the empowerment of youth to be self-determined should be the chief aim of all professionals working alongside young adults with disabilities. Charlie holds a Master's degree in Special Education from the University of South Carolina, and he has been working in education since 2009, including roles in museum education, outdoor education, and inclusive higher education. He is proud to call himself the husband of Dorothee and the father of Sebastian. When he is not working to foster inclusivity and access for people with disabilities in South Carolina, Charlie enjoys spending time with his beautiful family, fishing, surfing, hiking, skateboarding, and drinking coffee.

Carol A. Page

South Carolina Assistive Technology Program (SCATP) USC School of Medicine
Columbia, SC

Carol A. Page is the Program Director of the South Carolina Assistive Technology Program (SCATP) at the USC School of Medicine, a University Center for Excellence in Developmental Disabilities, Center for Disability Resources, Department of Pediatrics. She received her PhD degree in speech-language pathology from the University of South Carolina, her Assistive Technology Professional certificate from the

Rehabilitation Engineering and Assistive Technology Society of North America (RESNA), and her Brain Injury Specialist certification from the Brain Injury Association of America. Carol is an Adjunct Faculty member for the University of South Carolina Communication Sciences and Disorders department. Carol promotes and coordinates activities of the SC Assistive Technology Program including training, device loan, device demonstration, device reuse, technical assistance with other agencies, and public awareness. She supervises and mentor's students from SC State's speech-language pathology master's program who participate in the Leadership Education in Neurodevelopmental and Related Disorders (LEND) grant. Carol provides trainings at the local, state, national and international level on assistive technology for persons with disabilities of all ages, their caregivers and professionals who serve them. Training topics include augmentative and alternative communication, adapted books and literacy software, computer access, AT for behavior supports, and a variety of other resources. She is the 2017 recipient of the Norman J. Arnold Alumni Award from the USC School of Public Health and the 2017 Louis M. DiCarlo Award for Outstanding Clinical Achievement from SCSHA.

Hon. Heather J. Galvin

Associate Judge
Beaufort County, SC

Mrs. Galvin graduated from Kent State University with a Bachelor of Arts in political science where she was a member of the Golden Key National Honor Society and the Delta Zeta Sorority. She obtained her Juris Doctor from the Cleveland Marshall School of Law and is admitted to the practice of law in Ohio, South Carolina, and Washington D.C. Prior to moving to South Carolina; Ms. Galvin worked for LexisNexis as an Applications Consultant and Senior Legal Research Associate. Upon relocating to South Carolina, she served as an Assistant Solicitor for the 14th Judicial Circuit. In 2007, Ms. Galvin opened the Law Offices of Heather Galvin and specialized in the areas of family and probate law. As part of her practice she had the opportunity to serve as part-time Staff Attorney for the Beaufort County Probate Court; contract attorney for the Guardian ad litem programs in Allendale, Beaufort, Colleton, Hampton, and Jasper Counties in abuse and neglect proceedings involving children; and pro-bono Special Prosecutor in Beaufort County for animal cruelty cases. In October of 2012, she was sworn in as full-time Associate Probate Judge for Beaufort County. In her spare time, she enjoys jogging, reading, and tennis.

Kathleen Warthen

Protection and Advocacy for People with Disabilities, Inc.
Columbia, SC

Kathleen Warthen is the policy attorney for P&A. Kathleen is currently serving on the Employment First Study Committee; supervises the Representative Payee program, which investigates financial exploitation of beneficiaries of Social Security; and performed polling place ADA accessibility surveys for the first time on November 6.

M. Leigh Flynn

Law Office of Leigh Flynn, LLC
West Columbia, SC

M. Leigh Flynn is a retired attorney, and attended the University of Mississippi (B.A., M.A) from and the University of South Carolina School of Law. She served as President of the South Carolina chapter of the National Academy of Elder Law Attorneys, and twice as the Chair of the Elder Law Committee for the South Carolina Bar.

Ms. Flynn is a contributing author to A Practical Guide to Elder and Special Needs Law in South Carolina. She also served on the South Carolina Supreme Court Task Force on State Courts and the Elderly, the South Carolina Supreme Court Access to Justice Commission's Guardianship Committee, the South Carolina Bar

Probate Code (Guardianship and Conservatorship Section) Revision Committee, the South Carolina Bar Elder Law Committee, and has served in various capacities on numerous other committees and sub-committees.

Ms. Flynn is a volunteer and speaker on issues of the elderly and disabled, served as Guardian ad Litem for hundreds of people and also served as Guardian for over 20 disabled individuals. She is a member of Mt. Hebron United Methodist Church, and is active in animal rescue.

Amanda C. Hess

Protection & Advocacy for People with Disabilities
Charleston, SC

Amanda Hess is an attorney and the Equal Access Team Leader for Protection and Advocacy for People with Disabilities, Inc. (P&A). P&A is a nonprofit corporation dedicated to protecting the rights of people with disabilities in South Carolina. More information about P&A can be found on its website at <http://www.pandasc.org>. Amanda is a summa cum laude graduate of Syracuse University and a magna cum laude graduate of Syracuse University College of Law. After law school, Amanda clerked for the Honorable Eugene D. Serpentelli, when he was the Assignment Judge of the Superior Court, Ocean Vicinage in New Jersey. Since 2007, Amanda has worked for P&A representing people with disabilities regarding their legal rights. She has worked on disability discrimination matters including special education, assistive technology, effective communication, housing, accessibility, and matters involving barriers to work.

Anna Maria Darwin

Protection & Advocacy for People with Disabilities
Greenville, SC

Ms. Darwin was born and raised in Henderson County, North Carolina. She attended Furman University where she obtained a B.A. in Political Science. Ms. Darwin then earned her J.D. from the University of South Carolina School of Law in 1990. Until the fall of 2001, Ms. Darwin concentrated her practice in labor and employment law on behalf of management. Currently, Ms. Darwin is the team leader and one of the attorneys for the Protection and Independence Team (PI Team) at Protection and Advocacy for People with Disabilities, Inc. (P&A). P&A, the protection and advocacy system for South Carolina, is a private non-profit corporation which protects the legal, civil and human rights of people with disabilities in the state. The PI Team focuses on issues of abuse and neglect and community integration. During her career, Ms. Darwin has handled administrative hearings, litigated in state and federal court, and appeared before the Fourth Circuit Court of Appeals. Ms. Darwin works in the Greenville office of P&A.



South Carolina Bar

Continuing Legal Education Division

**Preparing for 2019 Changes to
Guardianship and Protective Proceeding
Cases in Elder Law**

Thursday, November 8, 2018

The Role of the Petitioner's Attorney

Chadwicke L. Groover
Franchelle C. Millender

THE ROLE OF THE PETITIONER'S ATTORNEY IN GUARDIANSHIP AND PROTECTIVE PROCEEDINGS

Franchelle C. Millender, CELA*

Millender Elder Law LLC

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*certified as an elder law attorney by the
National Elder Law Foundation

Chadwicke L. Groover

Upstate Elder Law, PA

chad@upstateelderlaw.com

THE ROLE OF THE PETITIONER'S ATTORNEY IN GUARDIANSHIP AND PROTECTIVE PROCEEDINGS

Never has the role of the lawyer as advisor and counselor been more important than it will be when representing a Petitioner or potential Petitioner under the new version of Article 5. Most potential Petitioners are seeking to protect someone they believe to be unable to protect themselves, but in doing so they are also seeking to take away the rights of that person. It is the need to balance these two competing interests that sets up the complexities of guardianship and protective proceedings.

INITIAL CONTACT

An attorney can be contacted by anyone who has a concern. Most often the initial contact is from a family member, but it could be a neighbor or a friend of the Alleged Incapacitated Individual. It could be a professional who has interactions with the individual. The contact might come from another attorney who is handling an estate, a personal injury settlement or a divorce where there is concern that a party to the action is in need of protection.

INITIAL CONFERENCE WITH CLIENT OR POTENTIAL CLIENT

THE ATTORNEY AS LISTENER

It is very important to listen to the concerns of the client. Why has the client reached the conclusion that legal action may be needed? If a minor child with birth injuries is receiving a settlement, then clearly there must be a protective proceeding because of minority. If the person receiving the settlement is an adult, then it is necessary to explore further the question of capacity. (Note: Amounts under a net aggregate of \$15,000 per year for a minor or an incapacitated individual may be handled under the facility of payment provisions of SC Code Section 62-5-103 without the necessity of a court action.) If the client's parent has developed memory problems, is that sufficient to require the appointment of a conservator and/or a guardian? Does the child with intellectual disabilities or autism need a guardian just because he or she is turning 18? It is likely that the client has been grappling with concerns for some period before they meet with you. They have probably talked to other relatives, friends, and neighbors, and have received a lot of advice, good and bad. You need to really pay attention to what they are saying so that you can give them well-considered advice and counsel.

Learn about the alleged incapacitated person. Draw out from the client not only the limitations perceived but also the abilities and strengths of the person.

THE ATTORNEY AS EDUCATOR

Before engaging you to represent them in petitioning for Guardianship or a Protective Order, your client needs to understand what is being sought, what is the process, what are the requirements, what is the impact on the Alleged Incapacitated Individual. Several major points need to be emphasized. The court must find that the person is incapacitated before a guardian or

conservator can be appointed. The statutory definition of incapacity should be shared with the client and distinction made between what is needed for guardianship and for protective orders. The client should be fully aware of the rights that may be removed by virtue of a finding of incapacity. The client should understand the evidentiary standard that must be met in order to meet burden of proof required for a finding of incapacity. SC Code Sections 62-5-304 and 62-5-404 require “clear and convincing” evidence for appointment of a guardian and for the issuance of a protective order.

THE ATTORNEY AS ADVISOR

The attorney must help the client determine whether the action is needed or whether there are alternatives. Are there already documents in place that would avoid the necessity of the action? Is there a durable power of attorney for financial matters? Is there a health care power of attorney? Who is the agent? Is the agent actively involved? Is there any concern that the agent is neglecting or abusing his or her authority? Is there a trust in place for financial management? Does the client believe it is too late for the alleged incapacitated person to execute valid documents? What other alternatives have been tried unsuccessfully or eliminated and why?

There is a new publication from the American Bar Association called the PRACTICAL Tool for Lawyers. Every attorney involved in guardianship and protective proceedings should become familiar with it.

https://www.americanbar.org/groups/law_aging/resources/guardianship_law_practice/practical_tool/

This tool can be used when meeting with the client to guide the discussion to determine whether there are less restrictive alternatives to guardianship or protective orders. If the answer is no, then it helps focus on limiting the scope of any order to that which is essential to protect the incapacitated person. The attorney should review less restrictive alternatives and should go through the list of rights to be removed or retained and discuss any restrictions or limitations to be imposed on the guardian or conservator.

If the prospective client and the attorney agree that a court action may be required, then a decision needs to be made as to what relief will be requested. If appointment of a guardian and or conservator is to be requested, who will be proposed? Who has priority under 62-5-308 to serve as guardian, under 62-5-408 to serve as conservator? Will the priority be followed or is there a reason to ask the court to override.

REALITY CHECK

The client is usually seeking legal advice because of legitimate concerns about the Alleged Incapacitated Individual and a desire to protect. The attorney is typically trying to be helpful, but it is important that both attorney and client understand that the filing of a summons and petition sets off a chain of events that may not be as predictable and clear-cut as the client thinks. Before agreeing to serve as attorney for the Petitioner, you need to be certain that your client understands the financial commitment. Under SC Code Section 62-5-105, the Petitioner is personally responsible for his or her own attorney’s fees and for costs and expenses of the action.

The court may issue an order altering this but neither the attorney nor the client should rely on this. The attorney should discuss his or her fees and also the costs and expenses for which the client might be responsible including but not limited to filing fees, fees for the attorney for the respondent, fees for the guardian ad litem and at least one examiner, and court reporter charges. The attorney's scope of representation, method of billing for fees and costs, and retainer should all be addressed in the fee agreement with the client. If you use flat fee billing, be very careful to specify that the fee arrangement changes if the action becomes contested. The contest might be over capacity or who will serve as guardian or conservator but it may also be about the extent of the rights removed or retained, so craft your fee agreement accordingly.

PREPARING THE INITIAL PLEADINGS

If your prospective client has decided that the action is necessary even with all of the requirements and with the potential financial risk, then the drafting begins. Prior to commencement of the action, the Petitioner's attorney will prepare a Summons and Petition. There are approved probate court forms:

Application or Summons and Petition for Conservatorship for a Minor

Summons and Petition for Appointment of a Guardian

Summons and Petition for Protective Order

Summons and Dual Petition for Appointment of Guardian and Conservator

In some cases, it may be necessary or desirable to include a Supplemental Petition to flesh out the facts and the reasons for the requested relief.

The new code requires that a Notice of Right to Counsel be served on the Alleged Incapacitated Individual together with a copy of the Summons and Petition. SC Code Sections 62-5-303A and 403A

Fully completing the Petition will be a critical element in setting out the Petitioner's case for relief. SC Code Sections 62-5-303 and 403 provide a detailed list of the required factual information to be provided, information about a proposed guardian or conservator, and the necessary parties to the action. The primary Respondent is the person for whom protection is sought, and there is a list of persons or entities that must be included as corespondents. In addition to an explanation of why the guardianship or protective order is necessary and a description of the nature and extent of the alleged incapacity, the Petitioner must explain why less restrictive alternatives are not available or appropriate. Finally, the Petitioner must enumerate the rights and powers that the Petitioner is requesting be removed, any restrictions to be placed on the Alleged Incapacitated Individual and any restrictions sought to be imposed on the guardian or conservator. SC Code Section 62-5-304A sets forth the rights and powers that can be removed from the Ward. If not specifically removed, the rights are retained by the Ward. Some but not all of the rights that are removed from the Ward may be vested in the Guardian.

Following are the listed rights and powers that can be removed from the Ward:

- (1) marry or divorce;
 - (2) reside in a place of the ward's choosing, and consent or withhold consent to any residential or custodial placement;
 - (3) travel without the consent of the guardian;
 - (4) give, withhold, or withdraw consent and make other informed decisions relative to medical, mental, and physical examinations, care, treatment and therapies;
 - (5) make end-of-life decisions including, but not limited to, a 'do not resuscitate' order or the application of any medical procedures intended solely to sustain life, and consent or withhold consent to artificial nutrition and hydration;
 - (6) consent or refuse to consent to hospitalization and discharge or transfer to a residential setting, group home, or other facility for additional care and treatment;
 - (7) authorize disclosures of confidential information;
 - (8) operate a vehicle;
 - (9) vote;
 - (10) be employed without the consent of a guardian;
 - (11) consent to or refuse educational services;
 - (12) participate in social, religious or political activities;
 - (13) buy, sell, or transfer real or personal property or transact business of any type including, but not limited to, those powers conferred upon the conservator under Section 62-5-422;
 - (14) make, modify, or terminate contracts;
 - (15) bring or defend any action at law or equity; and
 - (16) any other rights and powers that the court finds necessary to address.
- SC Code Section 62-5-304A(A)

Here are the powers that can be vested in the Guardians

- (1) determine the place where the ward shall reside and consent or withhold consent to any residential or custodial placement;
 - (2) consent to travel;
 - (3) consent or refuse to consent to visitation with family, friends and others;
 - (4) give, withhold, or withdraw consent and make other informed decisions relative to medical, mental, and physical examinations, care, treatment and therapies;
 - (5) make end-of-life decisions, including, but not limited, to a "do not resuscitate" order or the application of any medical procedures intended solely to sustain life, and consent or withhold consent to artificial nutrition and hydration;
 - (6) consent or refuse to consent to hospitalization and discharge or transfer to a residential setting, group home, or other facility for additional care and treatment;
 - (7) authorize disclosures of confidential information;
 - (8) consent to or refuse educational services;
 - (9) consent to employment;
 - (10) make, modify, or terminate contracts related to the duties of the guardian;
 - (11) bring or defend any action at law or equity; and
 - (12) exercise any other rights and powers that the court finds necessary to address.
- SC Code Section 62-5-304A(B)

The Petition should clearly address the rights and powers to be removed from the Ward and those to be vested in the Guardian.

In a protective proceeding, there is a different list of rights and powers that can be removed from the Protected Person:

- 1) buy, sell, or transfer real or personal property or transact business of any type including, but not limited to, those powers conferred upon the conservator under Section 62-5-422;
 - (2) make, modify, or terminate contracts; or
 - (3) bring or defend any action at law or equity.
- SC Code Section 62-5-407B

Again, the Petition should specifically address the rights and powers to be removed.

WALKING THROUGH THE PROCESS

Once the pleadings are prepared, the attorney should review them with the client and have the client sign the verification. The original pleadings should be filed with the Probate Court and then a copy of the Summons, Petition, and Notice of Right to Counsel, and any affidavits or physician's reports filed with the Petition should be served on the Alleged Incapacitated Individual and a copy of the Summons and Petition and any affidavits or physician's reports filed with the Petition should be served on all corepondents. SC Code Section 62-5-303A. Pursuant to SC Code Sections 62-5-303B and 62-5-403B, once the Probate Court has received proof of service of the Summons, Petition, and Notice of Right to Counsel on the Alleged Incapacitated Individual, the Court will appoint certain individuals to protect the rights of the Alleged Incapacitated Individual. The Probate Court will appoint Counsel to represent the Alleged Incapacitated Individual, if no attorney has filed a notice of appearance within 15 days of the filing of the Proof of Service by the Petitioning Attorney. The Court will also appoint a Guardian ad Litem and Physician Examiner within 30 days from receipt of the Proof of Service.

WORKING WITH THE GUARDIAN AD LITEM

Under the revised Article 5, the new position of Guardian ad Litem combines some of the duties previously held by the Visitor and the Court Appointed Counsel/Guardian. SC Code Section 62-5-106 sets out the responsibilities and duties of the Guardian ad Litem which include: (1) acting in the best interest of the Alleged Incapacitated Individual and (2) conducting an independent investigation and writing a report with recommendations to be filed with the Court within 48 hours of the hearing.

The appointment of the Guardian ad Litem will most likely be handled differently by the various counties. In many counties, the Probate Court will select a Guardian ad Litem from a list of individuals who they regularly appoint. However, in some counties, the Petitioner will be required to find a willing and able Guardian ad Litem to be appointed by the Court. Regardless of the county, it will be critical for the Petitioning Attorney to have a good working relationship with all of the potential Guardians ad Litem.

Once the Court has appointed a Guardian ad Litem, the Petitioning Attorney will want to have a conversation with him/her to discuss the case. This conversation should address the following issues:

- (1) family history and dynamic,
- (2) basis for the incapacity,
- (3) why less restrictive means are not available,
- (4) how much limitation of the rights is necessary,
- (5) Petitioner's purpose in bringing the action,
- (6) the fitness of the proposed Guardian and/or Conservator, and
- (7) any plan for the care of the Alleged Incapacitated Individual.

The Petitioning Attorney may also want to offer to arrange a meeting between the Guardian ad Litem and the Petitioner. It may be helpful to also include other members of the family who are involved in the process. These meetings and/or discussions can help allay any fears the Guardian ad Litem may have and prevent any misconceptions about need, motive, and ability.

WORKING WITH THE ATTORNEY FOR THE ALLEGED INCAPACITATED INDIVIDUAL

The Probate Court will appoint an Attorney for the Alleged Incapacitated Individual, if an attorney has not already filed a Notice of Appearance in the 15 days after the filing of the Proof of Service by the Petitioner. See SC Code Section 62-5-303B (Guardian cases) and 62-5-403B (Conservator cases). The Counsel position will no longer serve as a Guardian ad Litem in addition to the duties of an Attorney. Instead, the Attorney will be an active representative of the Alleged Incapacitated Individual's wishes to the degree the Attorney understands what they are.

In some Counties, the Court will ask the Petitioner to name the Attorney they would like. Other Counties appoint someone from a pre-vetted list of probate attorneys willing to serve in these cases. Where able to do so, the Alleged Incapacitated Individual may hire their own Attorney instead of using the Court appointed lawyer.

Once the alleged incapacitated individual has an Attorney, the Petitioning Attorney should call the opposing counsel to discuss the case. This person will not know any of the facts at this point and may not be able to rely on his/her client for reliable information. This first conversation allows you to frame the litigation in terms favorable to your client and to clear up any potential misunderstandings before they happen.

SECURING A PHYSICIAN EXAMINER'S REPORT OF INCAPACITY

The Court will also appoint a Physician Examiner within 30 days from receipt of the Proof of Service. Pursuant to SC Code Section 62-5-303D, the Physician examiner must complete a notarized report setting forth an evaluation of the condition of the Alleged Incapacitated Individual. If requested by the Alleged Incapacitated Individual or his Guardian ad Litem, the Court will appoint a second examiner, who must be either a physician, nurse, social worker, or psychologist.

The examiner report is the most significant piece of evidence in a guardianship or conservatorship action. The new report form tracks the revised statute and itemizes the areas of life that the Alleged Incapacitated Individual no longer has capacity to manage. SC Code Sections 62-5-303D and 62-5-403D requires that the notarized report include the following:

- (1) a description of the nature and extent of the incapacity;
- (2) a diagnosis and assessment of the Alleged Incapacitated Individual's mental and physical condition;
- (3) an evaluation of the Alleged Incapacitated Individual's ability to exercise the rights set forth in Section 62-5-304A;
- (4) an evaluation of the Alleged Incapacitated Individual's ability to learn self-care skills, adaptive behavior, and social skills, and a prognosis of improvement;
- (5) the date of all examinations and assessments upon which the report is based;
- (6) the identity of the person with whom the examiner met or consulted regarding the Alleged Incapacitated Individual's individual mental or physical condition;
- (7) the signature and designation of the professional license held by the examiner.

Unlike under the old statute, unless otherwise directed by the Court, the exam must be no older than which is the basis of the report must be conducted within a ninety days prior period immediately preceding to the filing of the petition. It must also be filed with the Court more than 48 hours prior to the hearing in the case, unless the Petitioner can show good cause why he/she was unable to comply with the timeline. See SC Code Section 62-5-303D and 62-5-403D.

The fact that the report is so much more detailed than under the old law may make it more difficult for a Petitioning attorney to obtain a Physician Examiner's Report. The best place to start is the Alleged Incapacitated Individual's primary care physician. This doctor arguably has the best understanding of the Alleged Incapacitated Individual to know what areas of life are now beyond the Alleged Incapacitated Individual's ability to manage.

In some instances, the primary care physician may argue that he or she is unable to complete the report. In those cases, the Petitioner with the assistance of the Petitioning attorney will have to find another physician who can examine the Alleged Incapacitated Individual and submit the notarized report. It is usually best to use a geriatrician, neurologist or psychiatrist for this purpose.

After the Examiner has signed a Report, the Petitioner's attorney will want to have a conversation with the Examiner to gain deeper insight into the real-world limitations of the Alleged Incapacitated Individual. This will help the Petitioning Attorney have a better insight into how to present their case at the final hearing and how to draft the Court's Order limiting the Alleged Incapacitated Individual's rights and establishing the Guardian/Conservator's responsibilities.

ENGAGING IN DISCOVERY AND MEDIATION

In the majority of cases there should be no need for traditional discovery, because the main evidence of incapacity is the Examiner Report and the Guardian's Report. However, in

some contested cases, the Petitioner may want to send Interrogatories, Requests to Produce, and Requests to Admit to the Alleged Incapacitated Individual or to one of the other Respondents (this is especially true where one of the other respondents has financially taken advantage of or physically abused the Alleged Incapacitated Individual).

Depositions can be a useful tool in many situations. They may be necessary where there is disagreement about the Alleged Incapacitated Individual's limitations of ability. Like in other civil litigation cases, deposing the Alleged Incapacitated Individual will give the Petitioning Attorney a better sense of how the Alleged Incapacitated Individual will testify and what explanations the Alleged Incapacitated Individual has for the Physician Examiner findings. Depositions may also be needed to uncover and explore financial abuse of the Alleged Incapacitated Individual by one of the other Respondents. Depositions could also be useful to gain evidence regarding fitness or the lack thereof where there are competing petitions for appointment of a Guardian/Conservator.

After the discovery process has run its course, the Petitioning Attorney may want to ask the parties to engage in some form of alternative dispute resolution. This could be anything from a simple family meeting to full blown mediation with a professional mediator.

Where the Alleged Incapacitated Individual is not completely and unquestioningly incapacitated, it is often a good idea to have the parties meet to discuss the concerns of the Petitioners and the objections of the Alleged Incapacitated Individual. This meeting could produce an agreement of the parties and a framework for a consent order.

CONDUCTING THE HEARING

If an agreement cannot be reached by the parties, a final hearing should be scheduled. After the hearing is scheduled, Petitioner may also need to subpoena the examiners or any other witnesses who they plan to call at the hearing.

Prior to the hearing, Petitioner's Attorney will need to sit down with Petitioner and any other supportive witnesses to advise them on what to expect at a hearing and to review their testimony.

At the hearing, the Petitioner Attorney should initially present its case through the testimony of the Petitioner. The Petitioner can typically communicate the family dynamic, basis for incapacity, how the Alleged Incapacitated Individual needs protection, how the proposed Guardian/Conservator is in the best person to be appointed.

The Petitioner Attorney may want to call additional witness to present evidence supporting its case. Under the revised statute it may be helpful for the Petitioner to call the examiner(s) to testify, especially where there is disagreement on what rights to take away and what rights to give to the Guardian. The examiner's testimony would give the Court a better understanding of what rights to curtail and what responsibilities to place on the Guardian/Conservator.

If the Alleged Incapacitated Individual contests the action and chooses to testify, the Petitioner's Attorney may need to cross-exam the Alleged Incapacitated Individual. Cross examining the Alleged Incapacitated Individual could be useful to demonstrate to the Court the Alleged Incapacitated Individual's incapacity. However, this must be done carefully and respectfully.

DRAFTING THE ORDER

If the Petitioner is successful at the hearing, the Court will most likely ask the Petitioner's Attorney to draft the Order. It is important that the proposed Order accurately represents the Court's findings and does not add to them. The Petitioner's Attorney should then circulate the proposed Order to other counsels in the case and with their consent to the Court.

The Order will need to detail the Court's findings of what rights and powers are being removed from the Alleged Incapacitated Individual. It will also need to set forth the rights and powers being invested in the Guardian/Conservator. These may not correlate, since some of the rights and powers of the Alleged Incapacitated Individual cannot be bestowed upon the Guardian/Conservator, such as the right to marry or vote. See SC Code Sections 62-5-304A; 62-5-405; and 62-5-407.

AFTER THE APPOINTMENT IS MADE

After the Court has appointed a Guardian or Conservator for the Alleged Incapacitated Individual, the work of the Petitioning Attorney may not be complete. How the Attorney handles the post appointment period may have a significant impact on the lasting successfulness of the Guardian or Conservator.

It is important to make sure that the appointed Guardian or Conservator are fully informed of their duties and responsibilities. The Petitioning attorney will need to make sure the appointee is fully engaged with the Court staff and has submitted all paperwork required by the Court. The attorney may also need to assist a Conservator with performing the initial Inventory and Appraisal, obtaining a restricted account, and/or submitting an initial budget. In some rare cases, the Guardian/Conservator may want to keep the attorney on retainer to handle issues which arise. This is particularly true in hotly contested cases involving contentious family members.

THE ROLE OF THE PETITIONER'S ATTORNEY IN GUARDIANSHIP AND PROTECTIVE PROCEEDINGS

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INITIAL CONTACT

INITIAL CONFERENCE

THE ATTORNEY AS LISTENER

- WHAT ARE THE CLIENT'S CONCERNS
- WHAT DOES CLIENT THINKS IS NEEDED
- LIMITATIONS OF THE ALLEGED INCAPACITATED INDIVIDUAL
- ABILITIES OF THE ALLEGED INCAPACITATED INDIVIDUAL

INITIAL CONFERENCE

THE ATTORNEY AS EDUCATOR

- IS THE PERSON INCAPACITATED?
- CAN INCAPACITY BE PROVEN BY CLEAR AND CONVINCING EVIDENCE?
- WHAT IS THE PROCESS INVOLVED?

INITIAL CONFERENCE

THE ATTORNEY AS ADVISOR

- ARE PROTECTIONS ALREADY IN PLACE?
- COULD NEW PROTECTIONS BE PUT IN PLACE WITHOUT COURT INTERVENTION?
- IF COURT INTERVENTION IS REQUIRED, WHAT IS THE LEAST RESTRICTIVE MEANS?

INITIAL CONFERENCE

PRACTICAL TOOL FOR LAWYERS

DEVELOPED BY THE ABA FOR LAWYERS TO USE IN DETERMINING
NEED FOR GUARDIANSHIP OR PROTECTIVE ORDER

INITIAL CONFERENCE

- WHAT RELIEF WILL BE REQUESTED?
- WHO WILL BE THE PROPOSED GUARDIAN OR CONSERVATOR?

INITIAL CONFERENCE

REALITY CHECK

- WHAT ARE POTENTIAL NEGATIVE CONSEQUENCES OF BRINGING THE ACTION?
- WHAT ARE THE POTENTIAL COSTS?

INITIAL CONFERENCE

SECTION 62-5-105. Costs and expenses; attorney's fees.

- (A) In a formal proceeding, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney's fees, to any party, to be paid by another party or from the assets of a ward or protected person who is the subject of a formal proceeding.
- (B) If not otherwise compensated for services rendered, the court-appointed guardian ad litem, counsel for the alleged incapacitated individual, counsel for the minor, and designated examiner are entitled to reasonable compensation, as determined by the court.
- (C) Unless the court issues an order stating otherwise, petitioners are responsible for their own attorney's fees and costs, as well as the other costs and expenses of the action.

RETAINER AGREEMENT

- SCOPE OF REPRESENTATION
- FEE
 - FLAT (ADD PROTECTIONS IF UNCONTESTED CASE BECOMES CONTESTED)
 - HOURLY
 - INITIAL RETAINER

PREPARING THE INITIAL PLEADINGS

- SUMMONS
- PETITION FOR GUARDIANSHIP
- PETITION FOR PROTECTIVE ORDER
- DUAL PETITION FOR APPOINTMENT OF GUARDIAN AND CONSERVATOR
- SUPPLEMENTAL PETITION
- NOTICE OF RIGHT TO COUNSEL

PREPARING THE INITIAL PLEADINGS

THE PETITION

- IDENTIFY PETITIONER, RESPONDENT, CORESPONDENTS
- NATURE OF INCAPACITY
- WHY GUARDIANSHIP OR PROTECTIVE ORDER IS NECESSARY
- WHY LESS RESTRICTIVE ALTERNATIVES ARE NOT AVAILABLE OR APPROPRIATE

PREPARING THE INITIAL PLEADINGS

THE PETITION

- RIGHTS AND POWERS TO BE REMOVED AND WHY
- RIGHTS AND POWERS TO BE VESTED IN THE GUARDIAN OR CONSERVATOR

INITIATING THE ACTION

FILING ACTION

- REVIEW PLEADINGS WITH CLIENT
- HAVE CLIENT SIGN VERIFICATION
- FILE SUMMONS, PETITION, AND FILING FEE WITH PROBATE COURT

INITIATING THE ACTION

SERVING THE ACTION

- PERSONALLY SERVE THE AII WITH THE FOLLOWING:
 - Summons and Petition
 - Notice of Right to Counsel
 - Any Physician Reports
- SERVE ALL OTHER RESPONDENTS

INITIATING THE ACTION

APPOINTMENTS

- PROBATE COURT WILL APPOINT AN ATTORNEY FOR AII IF NO ATTORNEY FILES A NOTICE OF APPEARANCE WITHIN 15 DAYS
- PROBATE COURT WILL APPOINT A GUARDIAN AD LITEM FOR AII WITHIN 30 DAYS
- PROBATE COURT WILL APPOINT A PHYSICIAN TO EXAMINE AII WITHIN 30 DAYS

WORKING WITH GUARDIAN AD LITEM

DUTIES OF GUARDIAN AD LITEM

- ACT IN THE BEST INTEREST OF THE AII
- CONDUCT AN INDEPENDENT INVESTIGATION
- FILE WRITTEN REPORT AND RECOMMENDATIONS WITH PROBATE COURT WITHIN 48 HOURS OF THE HEARING IN THE MATTER

WORKING WITH GUARDIAN AD LITEM

BUILD RELATIONSHIP WITH GAL

- CONTACT GAL TO DISCUSS CASE
- ARRANGE MEETING WITH GAL AND PETITIONER
- BE AVAILABLE TO ANSWER QUESTIONS

WORKING WITH ATTORNEY

BUILD RELATIONSHIP WITH ATTORNEY FOR AII

- PROBATE COURT WILL APPOINTED ATTORNEY IF ONE HAS NOT BEEN RETAINED BY AII WITHIN 15 DAYS OF RECEIPT OF PROOF OF SERVICE
- CONTACT THE ATTORNEY TO DISCUSS CASE
- ARRANGE MEETING WITH PETITIONER AND/OR PROPOSED GUARDIAN/CONSERVATOR
- BE AVAILABLE TO ANSWER QUESTIONS AND REBUT MISCONCEPTIONS OR MISINFORMATION

OBTAINING EXAMINERS REPORTS

APPOINTMENT OF EXAMINER(S)

- PROBATE COURT WILL APPOINT A PHYSICIAN EXAMINER WITHIN 30 DAYS OF RECEIPT OF PROOF OF SERVICE
- EXAMINER MUST BE A MEDICAL DOCTOR - IDEALLY THE AII'S PRIMARY CARE PHYSICIAN
- AII OR GAL MAY ASK FOR A SECOND EXAMINER. THIS EXAMINER MUST BE A PHYSICIAN, NURSE, SOCIAL WORKER, OR PSYCHOLOGIST.

OBTAINING EXAMINERS REPORTS

EXAMINER'S REPORT: CONTENTS

- DESCRIPTION OF NATURE AND EXTENT OF INCAPACITY
- DIAGNOSIS AND ASSESSMENT OF MENTAL AND PHYSICAL CONDITION
- ABILITY TO EXERCISE RIGHTS
- ABILITY TO LEARN SELF-CARE SKILLS, ADAPTIVE BEHAVIOR, AND SOCIAL SKILLS
- DATE OF EXAM
- IDENTITY OF PERSONS PHYSICIAN MET WITH
- SIGNATURE AND DESIGNATION OF PROFESSIONAL LICENSE

OBTAINING EXAMINERS REPORTS

EXAMINER'S REPORT: TIMELINE

- EXAMINATION MUST OCCUR NO EARLIER THAN 90 DAYS PRIOR TO FILING PETITION
- EXAM MUST BE FILED WITH COURT NO LESS THAN 48 HOURS PRIOR TO HEARING, UNLESS GOOD CAUSE IS SHOWN

OBTAINING EXAMINERS REPORTS

EXAMINER'S REPORT: BENEFIT & OBSTACLES

- PETITIONER ONLY HAS TO OBTAIN ONE REPORT UNDER NEW LAW
- LENGTH AND DEPTH OF REPORT MAY MAKE IT MORE DIFFICULT TO FIND AN EXAMINER WILLING TO BE APPOINTED
- EXAMINER MAY NEED TO PERFORM MORE INVOLVED TESTING
- REPORT MAY BE MORE EXPENSIVE TO OBTAIN

DISCOVERY & MEDIATION

DISCOVERY

- TYPICALLY UNNECESSARY, UNLESS CONTESTED CASE
- WRITTEN DISCOVERY GOOD WHERE THERE ARE ALLEGATIONS OF FINANCIAL ABUSE OF THE AII BY ANOTHER RESPONDENT
- DEPOSITION OF AII MAY BE HELPFUL WHERE THERE IS DISAGREEMENT ABOUT DEGREE OF INCAPACITY – MAY NEED TO DEPOSE EXAMINER
- DEPOSITIONS MAY BE USEFUL WHERE THERE ARE COMPETING PETITIONERS SEEKING APPOINTMENT

DISCOVERY & MEDIATION

MEDIATION

- FAMILY MEETING MAY BE USEFUL WHERE COMPETING PETITIONERS ARE WILLING TO WORK TOGETHER TO RESOLVE SITUATION
- MEDIATION WITH PROFESSIONAL MEDIATOR MAY BE USEFUL WHERE COMPETING PETITIONERS ARE UNREASONABLE OR ACRIMONIOUS
- MEDIATION MAY BE USEFUL FOR REACHING AGREEMENT ON RIGHTS TO BE REMOVED AND RIGHTS TO BE GIVEN TO GUARDIAN/CONSERVATOR

HEARING

PRE-HEARING PREP

- MAKE SURE YOU HAVE A GOOD WORKING KNOWLEDGE OF THE MEDICAL AND/OR PSYCHIATRIC EVIDENCE
- MAY NEED TO MEET WITH PROFESSIONAL WITNESSES TO MAKE SURE YOU UNDERSTAND THEIR TESTIMONY
- MEET WITH PETITIONER AND OTHER WITNESSES TO PREPARE THEM FOR HEARING

HEARING

CONDUCTING HEARING

- PRESENT CASE THROUGH TESTIMONY OF PETITIONER
- MAY NEED TO "CALL THE DOCTOR"
- MAY NEED TO CALL OTHER WITNESSES TO VERIFY FITNESS TO SERVE
- CROSS EXAMINE ALL VERY CAREFULLY AND RESPECTFULLY

HEARING

PREPARING PROPOSED ORDER

- ACCURATELY AND COMPLETELY CAPTURE THE COURT'S ORDER
- PAY SPECIAL ATTENTION TO RIGHTS BEING RESTRICTED AND RIGHTS BEING BESTOWED ON THE GUARDIAN/CONSERVATOR
- THESE MAY NOT BE CORRELATED AS CERTAIN RIGHTS CANNOT BE GIVEN TO ANOTHER PERSON (EX. MARRIAGE, VOTING, ETC.)

CONTINUING SERVICE TO PETITIONER

- ASSIST WITH INITIAL PAPERWORK FROM COURT (I.E. CONSERVATOR'S OATH, INVENTORY, ETC)
- MAY NEED TO HELP FORMULATE ANNUAL BUDGET
- IF GUARDIAN/CONSERVATOR WANTS TO KEEP YOUR FIRM ON RETAINER, IT MUST BE INCLUDED IN ANNUAL BUDGET – THIS IS HELPFUL IN CONTESTED CASES
- ASSIST WITH ANNUAL REVIEW



South Carolina Bar

Continuing Legal Education Division

**Preparing for 2019 Changes to
Guardianship and Protective Proceeding
Cases in Elder Law**

Thursday, November 8, 2018

The Role of the Guardian *ad Litem*

Michael S. Large

THE ROLE OF GUARDIAN AD LITEM 2019 AMENDMENTS TO ARTICLE 5

Presented by
Michael Scott Large
South Carolina Legal Services



ARTICLE 5 GAL AMENDMENTS AND KEY GAL CHANGES

NEW GAL QUALIFICATIONS

SEPARATES THE ROLE OF THE GUARDIAN AD LITEM FROM THE ROLE OF THE ATTORNEY

COMBINES THE ROLE OF VISITOR AND GAL

SETS FORTH DETAILED GAL RESPONSIBILITIES, INVESTIGATIVE DUTIES AND REPORTING REQUIREMENTS

2017 AMENDMENTS: ROLES SEPARATED

Clarifies the GAL will not be acting as counsel for the Individual

Separate roles avoid the inherent conflict of interest.

GAL QUALIFICATIONS: SECTION 62-5-101 (10)

Definition:

“Guardian ad litem” means a person licensed in the State of South Carolina in law, social work, nursing, medicine, or psychology, or who has completed training to the satisfaction of the court, and who has been appointed by the court to advocate for the best interests of the alleged incapacitated individual.

TIMELINE FOR THE APPOINTMENTS:

5-303B—5-403B

Upon receipt of proof of service, court shall:

- After 15 days appoint counsel (for A.I.I.)
- No later than 30 Days, appoint
GAL and
One examiner—physician [court may appoint another examiner]

NON-ATTORNEY GAL—APPOINTMENT OF LEGAL COUNSEL 62-5-303B (B) and 62-5-403B (B)

AMENDMENTS CONTEMPLATE CASES WHERE A GAL MAY NEED AN ATTORNEY APPOINTED BY COURT ORDER TO ASSIST THE GAL DURING THE GUARDIANSHIP AND PROTECTIVE PROCEEDINGS

WHEN?

GAL RESPONSIBILITIES, DUTIES AND REPORTING

62-5-106



GAL RESPONSIBILITIES AND INVESTIGATIVE DUTIES

62-5-106(A)

OFFERS GUIDANCE FOR ADDRESSING POTENTIAL ISSUES
ARISING DURING THE GAL APPOINTMENT

PROVIDES A TEMPLATE FOR THE GAL INVESTIGATIVE DUTIES

THE 7 GAL RESPONSIBILITIES

- Acting in the best interests of All
- **Conducting an independent investigation**
- Advocating for the best interests of All
- Avoid conflicts of interest, impropriety, or self-dealing
- Participating in all court proceedings including discovery
- Filing written GAL report with the court (with recommendations) 48 hours prior to the hearing
- Moving for any necessary temporary relief to protect All

GAL INVESTIGATION: SECTION 62-5-106A(2)



OBTAINING AND REVIEWING RELEVANT DOCUMENTS

62-5-106(A)(2)(a) **MANDATORY**

ALWAYS START BY REVIEWING THE PETITION

MD REPORT IS A CRITICAL PIECE OF INFORMATION

MEETING WITH A.I.I.

SECTION 62-5-106(A)(2)(b) MANDATORY

**MUST MEET AT LEAST ONCE WITHIN THIRTY DAYS
FOLLOWING APPOINTMENT, OR WITHIN SUCH
TIME AS THE COURT MAY DIRECT**

.

INVESTIGATING THE RESIDENCE OR PROPOSED RESIDENCE OF A.I.I.

62-5-106(A)(2)(c) MANDATORY



INTERVIEWING ALL PARTIES

62-5-106(A)(2)(d) MANDATORY



DISCERNING THE WISHES OF A.I.I. 62-5-106(A)(2)(e)

MANDATORY

- Health
- Money
- Visitation
- Activities
- Diet
- Living Arrangements
- Clothing
- Travel



IDENTIFYING LESS RESTRICTIVE ALTERNATIVES TO G/C

62-5-106(A)(2)(f) MANDATORY

ALTERNATIVES CAN INCLUDE:

POWER OF ATTORNEY;

JOINT ACCESS TO BANK ACCOUNTS;

MONITORING ACCOUNTS ONLINE;

HEALTH CARE POWER OF ATTORNEY;

SC ADULT HEALTHCARE CONSENT ACT; AND

OTHER “STAY AT HOME” OPTIONS

POLL QUESTION



Do you know what the P.R.A.C.T.I.C.A.L. tool is?



PRESUME
guardianship
is not needed.

REASON
Clearly identify
the reasons for
concern.



ASK
If a triggering
concern may
be caused by
temporary
or reversible
conditions.

COMMUNITY
Determine if concerns
can be addressed
by connecting the
individual to family
or community
resources and making
accommodations.

PRACTICAL Tool for Lawyers:

Steps in Supporting Decision-Making



TEAM
Ask the person
whether he or
she already has
developed a team
to help make
decisions.

IDENTIFY
abilities. Identify
areas of strengths
and limitations in
decision-making.

CHALLENGES
Screen for and
address any
potential challenges
presented by the
identified supports
and supporters.

APPOINT
legal supporter
or surrogate
consistent with
person's values and
preferences.

LIMIT
any necessary
guardianship
petition and order.



Jointly produced by 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



Presume guardianship is not needed.

Reason – Clearly identify reasons for concern

Ask if concerns are temporary or reversible

Community – Are resources available to help?

Team – Is there a team to help make decisions?

Identify – Areas of strength and limitations in decision-making

Challenges – presented by supports and supporters

Appoint a legal supporter or surrogate

Limit any necessary guardianship petition and order

**REVIEWING A CRIMINAL BACKGROUND CHECK OF
PROPOSED G/C 62-5-106(A)(2)(g) MANDATORY**

IT IS REQUIRED IN BOTH SECTIONS II AND III OF THE
GAL REPORT

THE COURT WILL LIKELY REQUIRE THIS AT TIME OF
FILING

REVIEWING CREDIT REPORT OF PROPOSED C

62-5-106(A)(2)(h) MANDATORY

REQUIRED IN SECTION III OF NEW GAL REPORT

PROBATE COURT WILL LIKELY REQUIRE THIS AT TIME OF
FILING

INTERVIEWING PROPOSED G/C

62-5-106(A)(2)(i) MANDATORY

- (i) KNOWLEDGE OF THE FIDUCIARY'S DUTIES, REQUIREMENTS, AND LIMITATIONS; AND
- (II) STEPS G/C INTENDS TO TAKE TO IDENTIFY AND MEET THE NEEDS OF A.I.I.;

INVESTIGATIVE OPTIONS—YOU MAY ALSO INCLUDE WHEN APPROPRIATE



CONSULTING WITH OTHERS WHO HAVE INTEREST IN A.I.I.'S WELFARE 62-5-106(A)(2)(j)



**CONTACTING DSS TO INVESTIGATE IF ANY ACTION
CONCERNING A.I.I. OR PROPOSED G/C
62-5-106(A)(2)(k)**



WHO ELSE CAN I CONTACT TO REPORT SUSPECTED ABUSE, NEGLECT AND EXPLOITATION?

STATE LAW ENFORCEMENT DIVISION (SLED), Vulnerable Adult Investigation Unit—1-866-200-6066.

<http://www.sled.sc.gov/Vulnerable.aspx?MenuID=VulAdult>

SC LONG TERM CARE OMBUDSMAN –Toll Free: 800-868-9095.

<http://aging.sc.gov/programs/ombudsman/Pages/default.aspx>.

PROTECTION AND ADVOCACY—866-275-7273

DETERMINING THE ABILITY OF PROPOSED C:

62-5-106(A)(2)(I)

(i) PREVIOUS EXPERIENCE IN MANAGING ASSETS SIMILAR TO THE A.I.I.'S;

(II) PLANS TO MANAGE THE A.I.I.'S ASSETS; AND

(III) WHETHER THE PROPOSED CONSERVATOR HAS PREVIOUSLY BORROWED FUNDS OR RECEIVED FINANCIAL ASSISTANCE OR BENEFITS FROM THE ALLEGED INCAPACITATED INDIVIDUAL;

INTERVIEWING ANYONE WITH KNOWLEDGE OF A.I.I.'S FIANANCES OR THOSE OF PROPOSED C.

62-5-106(A)(2)(m)



THE 7 GAL RESPONSIBILITIES cont...

- Acting in the best interests of All
- Conducting an independent investigation
- Advocating for the best interests of All
- Avoid conflicts of interest, impropriety, or self-dealing
- Participating in all court proceedings including discovery
- Filing written GAL report with the court (with recommendations) 48 hours prior to the hearing
- **Moving for any necessary temporary relief to protect All**

MOVING FOR TEMPORARY RELIEF 62-5-106 (A) (7)

Moving for any necessary temporary relief to protect the A.I.I. from abuse, neglect, abandonment, or exploitation,

or to address other emergency needs of the A.I.I..

WHAT IS AN EMERGENCY?

62-5-101 (7) defines “Emergency” as:

Circumstances that are likely to result in substantial harm to the alleged incapacitated individual’s health, safety, or welfare or in substantial economic loss to the alleged incapacitated individual.

EMERGENCY EXAMPLES



EMERGENCY AND TEMPORARY RELIEF 62-5-108

1. Filing a motion, affidavit, summons and petition, and
2. MD affidavit must be from an exam within the last 30 days
3. Any adverse party affected by an ex parte order can move to have the order dissolved or modified
4. Protective Orders require a surety

GAL Notes: 62-5-106(B)



GAL REPORT: 62-5-106(C)



GAL REPORT CRITERIA

- (1) Date and place of the meeting
- (2) Description of All
- (3) Known medical diagnoses
- (4) Description of residence
- (5) Identification of persons with significant interest
- (6) Any prior DSS actions
- (7) Statement of any prior relationship between GAL and A.I.I.
- (8) Description of care and treatment needs; and
- (9) Other relevant info

GAL Report, Continued 62-5-106(D)



REPORT RECOMMENDATIONS

- (1) Whether G/C is needed
- (2) Propriety and suitability of the proposed G/C
- (3) A.I.I.'s approval or disapproval of proposed G/C
- (4) Evaluation of future care and treatment needs
- (5) Opinion regarding housing needs
- (6) Recommendation as to rights that should be retained or removed from A.I.I. (listed on GAL report)
- (7) Whether a formal hearing should be held; and
- (8) Any other relevant recommendations

REMEDIES—FINAL RECOMMENDATIONS

GAL MAY SUPPORT THE PETITION, OPPOSE IT, OR SUGGEST ALTERNATIVE SOLUTIONS.

GOAL OF THE RECOMMENDATION IS ALWAYS TO PUT THE INDIVIDUAL IN THE BEST POSSIBLE POSITION.

Judicial Discretion: SECTION 62-5-106 (E)

The court in its discretion may extend or limit the responsibilities or authority of the guardian ad litem as it deems necessary





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PRACTICAL Tool for Lawyers: Steps in Supporting Decision-Making

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PRESUME guardianship is not needed.

- Consider less restrictive options like financial or health care power of attorney, advance directive, trust, or supported decision-making
- Review state statute for requirements about considering such options

Observations and Notes:

REASON. Clearly identify the reasons for concern.

Consider whether the individual can meet some or all of the following needs:*

Money Management:

- Managing accounts, assets, and benefits
- Recognizing exploitation

Health Care:

- Making decisions about medical treatment
- Taking medications as needed
- Maintaining hygiene and diet
- Avoiding high-risk behaviors

Relationships:

- Behaving appropriately with friends, family, and workers
- Making safe decisions about sexual relationships

Community Living:

- Living independently
- Maintaining habitable conditions
- Accessing community resources

Personal Decision-Making:

- Understanding legal documents (contracts, lease, powers of attorney)
- Communicating wishes
- Understanding legal consequences of behavior

Employment:

- Looking for, gaining, and retaining employment

Personal Safety:

- Avoiding common dangers
- Recognizing and avoiding abuse
- Knowing what to do in an emergency

Observations and Notes
(List supports needed.):

*Adapted from University of Missouri Kansas City, Institute for Human Development, "MO Guardianship: Understanding Your Options & Alternatives," <http://moguardianship.com>.

ASK if a triggering concern may be caused by temporary or reversible conditions.

Look for steps to reverse the condition or postpone a decision until the condition improves.

Are concerns the result of or related to temporary or reversible conditions such as:

- Medical conditions:** Infections, dehydration, delirium, poor dental care, malnutrition, pain
- Sensory deficits:** hearing or vision loss
- Medication** side effects
- Psychological conditions:** stress, grief, depression, disorientation
- Stereotypes or cultural barriers**

Observations and Notes:

COMMUNITY. Determine if concerns can be addressed by connecting the individual to family or community resources and making accommodations.

Ask “what would it take?” to enable the person to make the needed decision(s) or address the presenting concern.

Might any of the following supports meet the needs:

Community Supports:

- In-home care, adult day care, personal attendant, congregate and home delivered meals, transportation
- Care management, counseling, mediation
- Professional money management

Accommodations:

- Assistive technology
- Home modifications

Residential Setting:

- Supported housing or group home
- Senior residential building
- Assisted living or nursing home

Informal Supports from Family/Friends:

- Assistance with medical and money management
- Communication assistance
- Identifying potential abuse

Observations and Notes:

TEAM. Ask the person whether he or she already has developed a team to help make decisions.

- Does the person have friends, family members, or professionals available to help?
- Has the person appointed a surrogate to help make decisions?

Observations and Notes:

IDENTIFY abilities. Identify areas of strengths and limitations in decision-making if the person does not have an existing team and has difficulty with specific types of decisions.

Can the individual:

- Make decisions and explain his/her reasoning
- Maintain consistent decisions and primary values over time
- Understand the consequences of decisions

Observations and Notes:

CHALLENGES. Screen for and address any potential challenges presented by the identified supports and supporters.

Screen for any of the following challenges:

Possible challenges to identified supports:

- Eligibility, cost, timing or location
- Risk to public benefits

Possible concerns about supporters:

- Risk of undue influence
- Risk of abuse, neglect, exploitation (report suspected abuse to adult protective services)
- Lack of understanding of person's medical/mental health needs
- Lack of stability, or cognitive limitations of supporters
- Disputes with family members

Observations and Notes:

APPPOINT legal supporter or surrogate consistent with person's values and preferences.

Could any of these appointments meet the needs:

- Agent under health care power of attorney or advance directive
- Health care surrogate under state law
- Agent under financial power of attorney
- Trustee
- Social Security representative payee
- VA fiduciary
- Supporter under representation agreement, legally or informally recognized

Observations and Notes:

LIMIT any necessary guardianship petition and order.

If a guardian is needed:

- Limit guardianship to what is absolutely necessary, such as:
 - Only specific property/financial decisions
 - Only property/finances
 - Only specific personal/health care decisions
 - Only personal/health care decisions
- State how guardian will engage and involve person in decision-making
- Develop proposed person-centered plan
- Reassess periodically for modification or restoration of rights

Observations and Notes:

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South Carolina Bar

Continuing Legal Education Division

**Preparing for 2019 Changes to
Guardianship and Protective Proceeding
Cases in Elder Law**

Thursday, November 8, 2018

The Role of the Respondent's Attorney

Jonathan Martinis
Sarah Garland St. Onge



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PRACTICAL Resource Guide

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“PRACTICAL” is an acronym for nine steps for lawyers to identify these options. The lawyer can use the PRACTICAL checklist of steps during the client interview and immediately after to assist in case analysis. The steps blend in naturally with the case interview process. Lawyers serving in different roles may use the steps differently.

- A lawyer **representing a potential petitioner** for guardianship can go through the steps with the client to screen for other options, including creative ways to target concerns and prevent harm that could moot the need for guardianship.
- A lawyer **representing a respondent** in a guardianship proceeding can use the steps to contest the petition if the client wishes to do so. For example, the lawyer could ask for a continuance to address reversible conditions or put in place community supports that might make guardianship unnecessary. The lawyer could use the steps in preparing hearing arguments identifying the person’s abilities and supports.
- A lawyer **serving as guardian ad litem** can use the steps in interviewing the person and preparing a report for the court.
- A lawyer **serving as guardian** can use the steps to enhance the self-determination of the individual and assess for possible modification of the order or restoration of rights.

Background

Lawyers increasingly encounter the need for decision-making by and on behalf of adults with disabilities—as an advisor to clients who are considering a guardianship petition; as counsel for petitioner or respondent or as a guardian ad litem in a guardianship proceeding; as guardian or conservator; when counseling clients on legal and financial planning; and when advising families on the transition of a minor with disabilities to adult status. With the aging of the population² and the increase in individuals with disabilities,³ lawyers practicing in any area of the law increasingly may encounter issues of consent and capacity when clients need to execute contracts, transfer property or give informed consent for treatment.

¹ In this guide, the generic term “guardianship” refers to guardians of the person as well as guardians of the property, frequently called “conservators,” unless otherwise specified.

² Jennifer M. Ortman, Victoria A. Velkoff, and Howard Hogan, *An Aging Nation: The Older Population in the United States* (May 2014), U.S. Department of Commerce, Economics and Statistics Administration, available at <https://www.census.gov/prod/2014pubs/p25-1140.pdf>.

³ *Disability and Health*, World Health Organization Fact Sheet No 352 (December 2015), available at <http://www.who.int/mediacentre/factsheets/fs352/en/>.

Guardianship is one of society's most drastic interventions, protecting individuals yet infringing upon fundamental human rights and opportunities for self-determination. Many state statutes prioritize less restrictive legal options such as: for financial decisions, appropriate use of joint accounts, durable powers of attorney, trusts, and representative payment for public benefits; and for personal and health decisions, advance directives, living wills, and use of state default consent laws.

If a guardian is appointed, it should be as a last resort, and the order limited to only those areas in which the individual needs decision-making assistance. The importance of limited guardianship is a major theme of the Uniform Guardianship and Protective Proceedings Act (UGPPA).⁴ Limited guardianship, participation of the individual in decision-making, and use of the person's values and preferences are key concepts in many state guardianship laws.

A recent shift in the decision-making landscape is the advent of "supported decision-making." The United Nations Convention on the Rights of Persons with Disabilities (CRPD),⁵ adopted in 2006,⁶ recognizes in Article 12 that persons with disabilities have the "legal capacity" and the right to make their own decisions, and that governments have the obligation to support them in doing so. For people with cognitive, intellectual, or psychosocial disabilities, Article 12 is critical to self-determination and equality. It calls for a switch in perception from a focus on disabilities to abilities, and from protection to support. Supported decision-making can be viewed as a key part of the "least restrictive alternative" spectrum; and has been called "a critically important alternative"⁷ to the guardianship model. Also, supported decision-making precepts can guide guardians in maximizing the voice of individuals they serve.

Despite the strong mandates in statute and standards, use of the least restrictive alternative principle in practice appears uneven at best—and "supported decision-making" is still in the early stages of recognition. While statistics are scant, anecdotal evidence and numerous press accounts confirm that guardianship orders are frequently overly broad or perhaps unnecessary; and that guardians regularly are appointed when practical supports and/or a less drastic legal intervention would have sufficed.

The *PRACTICAL Tool* offers concrete steps to implement the least restrictive alternative principle as a routine practice of law. The *PRACTICAL Tool Resource Guide* describes each of the nine steps, offering examples and including hyperlinks to key materials and community resources.

⁴ *Uniform Guardianship and Protective Proceedings Act (1997/1998)*, drafted by the National Conference of Commissioners on Uniform State Laws, available at http://www.uniformlaws.org/shared/docs/guardianship%20and%20protective%20proceedings/UGPPA_2011_Final%20Act_2014sep9.pdf.

⁵ *United Nations Convention on the Rights of Persons with Disabilities*, available at <http://www.un.org/disabilities/convention/conventionfull.shtml>.

⁶ Ratification of the CRPD currently is pending with the U.S. Senate.

⁷ Leslie Salzman, *Guardianship for Persons with Mental Illness—A Legal and Appropriate Alternative?*, Saint Louis University Journal of Health Law & Policy (Vol. 4, No. 271), available at http://supporteddecisionmaking.org/sites/default/files/guardianship_for_persons_with_mi.pdf.

PRESUME guardianship is not needed. Notably, such a presumption is typically required by state statutes allowing guardianship only where a person’s needs cannot be met by less restrictive means.

Guardianship historically has been a protective device, rooted in the ancient concept of *parens patriae*, in which the state must care for people who cannot care for themselves. In guardianship, an individual’s powers, rights, and authority are transferred from the person to a surrogate in the name of protection from harm—a process that has been said to “unperson”⁸ an individual.

When a client presents a situation in which someone seems at risk and unable to protect him or herself, a natural and well-meaning impulse, compounded by collective legal practice over many years, may be for the lawyer to begin to draw up a requested guardianship petition to prevent harm and maximize safety.

In the PRACTICAL approach, the lawyer *stops*—and uses as a starting point that there may be other practical and legal options that can address needs and challenges at hand. Best practice requires that the lawyer thoroughly examine these options *before* proceeding with the guardianship petition.

In effect, the PRACTICAL approach confirms and operationalizes the presumption that guardianship is not the answer, yet retains it in the most limited form as a last resort option if needed. Consider the following rationales:

Statutory Mandate

The “least restrictive alternative”⁹ principle was first established by the U.S. Supreme Court in 1960, limiting state intervention in individual rights and liberties to only what is necessary for the health and welfare of individuals. This principle has been statutorily applied to the state’s intervention in the form of guardianship proceedings. The Uniform Guardianship and Protective Proceedings Act requires a court visitor report to specify “whether less restrictive means of intervention are available.” Most state guardianship laws similarly emphasize exploration of less restrictive decisional options before the filing for, and appointment of, a guardian. Finding less restrictive options is not only good practice; it is generally a state statutory mandate. Check requirements for your state.¹⁰

⁸ Fred Bayles and Scott McCartney, *Guardians of the Elderly: An Ailing System Part I: Declared ‘Legally Dead’ by a Troubled System*, Associated Press (Sep. 19, 1987), available at <http://www.apnewsarchive.com/1987/Guardians-of-the-Elderly-An-Ailing-System-Part-I-Declared-Legally-Dead-by-a-Troubled-System/id-1198f64bb05d9c1ec690035983c02f9f>.

⁹ *Shelton v. Tucker*, 364 U.S. 479 (1960), available at <https://www.law.cornell.edu/supremecourt/text/364/479>.

¹⁰ *Adult Guardianship Statutory Table of Authorities*, American Bar Association Commission on Law and Aging, available at http://www.americanbar.org/content/dam/aba/administrative/law_aging/2014_AdultGuardianshipStatutoryTableofAuthorities.authcheckdam.pdf.

Moreover, a compelling argument can be made that unnecessary guardianship without the examination of workable alternatives violates the 1999 Supreme Court decision in the *Olmstead* decision¹¹ requiring community integration, in that it unnecessarily isolates and segregates individuals in efforts to protect them.

Practice Standards

The *National Probate Court Standards*¹² require that a guardianship petition include “representations that less intrusive alternatives to guardianship or conservatorship have been examined” (3.3.1); provide that a court “should encourage the appropriate use of less intrusive alternatives to formal guardianship and conservatorship proceedings” (3.3.2); and specify that a court visitor report should state “whether less intrusive alternatives are available” (3.3.4 commentary).

The 2013 *National Guardianship Association Standards of Practice*¹³ require that guardians 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).

Ethical Standards

ABA Model Rules of Professional Conduct 1.14¹⁴ instructs attorneys to recognize client self-determination, less restrictive alternatives, and the need for supports. If the lawyer suspects a client has “diminished capacity”¹⁵ that may inhibit the client’s ability to make decisions regarding the attorney’s representation, the lawyer must seek to maintain a “normal client-lawyer relationship.” The Comment notes that this is based on the assumption that the client, “when properly advised and assisted, is capable of making decisions about important matters” (emphasis added). If the attorney believes that the client is at risk of substantial harm, the attorney may take “protective action,” including seeking out and consulting with the client’s support network or assisting the client in executing a power of attorney or another form of legal support.

In taking protective action, the lawyer should be guided by the person’s “wishes and values” to the extent known, with the goal of “intruding into the client’s decision-making autonomy to the least extent feasible, maximizing client capacities. . .” Further, in considering “appointment of a legal representative” the lawyer should “be aware of any law that requires the lawyer to advocate

¹¹ *Olmstead v. L.C.*, 527 U.S. 581 (1999), available at <https://www.law.cornell.edu/supct/html/98-536.ZO.html>.

¹² *National Probate Court Standards*, National Center for State Courts, available at <http://ncsc.contentdm.oclc.org/cdm/ref/collection/spcts/id/240>.

¹³ *National Guardianship Association Standards of Practice*, National Guardianship Association, available at http://www.guardianship.org/documents/Standards_of_Practice.pdf.

¹⁴ *Rule 1.14: Client with Diminished Capacity, Model Rules of Professional Conduct*, American Bar Association, available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_14_client_with_diminished_capacity.html.

¹⁵ The Model Rules of Professional Conduct use the phrase “diminished capacity,” and many state guardianship laws use the phrase “incapacitated person” or similar language based on capacity. Because the Convention on the Rights of Persons with Disabilities provides that individuals with disabilities have legal capacity and must be given decision support, this guide avoids these phrases.

the *least restrictive action* on behalf of the client.” Most state ethics opinions also instruct the attorney to identify any less restrictive alternatives.

Mental Health and Quality of Life

Encouraging individuals to retain as much autonomy as possible and be “causal agents”¹⁶ in their lives is consistent with gerontological findings¹⁷ that maintaining opportunity for choice and control is an important component of mental health; and that loss of ability—or perceived ability—to control events can lead to or exacerbate physical or emotional illness. Complete loss of status as an adult member of society could in effect act as a self-fulfilling prophecy, intensifying any disability an older person may have. Similar findings show that younger adults¹⁸ with higher levels of self-determination have a more positive quality of life.

Expense and Delay

Identifying supportive arrangements that are less restrictive than guardianship can avoid expenses of legal and court fees, and the delays of court action.

REASON. Clearly identify the reasons for concern. Which of the individual’s needs are not met?

State the specific triggering concern(s) in your own words (e.g., the person is being financially exploited; the person needs medical treatment requiring informed consent). Be as specific as possible. Use the following checklist of domains of functional needs¹⁹ (adapted from Missouri’s tool on alternatives to guardianship²⁰) as a starting point. For each, consider whether the person can meet some or all of the needs:

Money Management

- Managing accounts, assets and benefits—including daily expenditures, paying bills, making change, and using a bank account

¹⁶ Wehmeyer, et al., *Promoting Causal Agency: The Self-Determined Learning Model of Instruction*, *Exceptional Children* (Vol. 66, No. 4, pp. 439-453), The Council for Exceptional Children, available at http://supporteddecisionmaking.org/sites/default/files/promoting_causal_agency_self-determined_learning_model_instruction.pdf.

¹⁷ Mallers, et al., *Perceived Control in the Lives of Older Adults: The Influence of Langer and Rodin’s Work on Gerontological Theory, Policy, and Practice*, *The Gerontologist* (Vol. 54, No. 1), available at <http://gerontologist.oxfordjournals.org/content/54/1/67.full.pdf+html>.

¹⁸ Heller, et al., *Self-Determination Across the Life Span: Issues and Gaps*, National Gateway to Self Determination (2011), available at <http://ngsd.org/news/self-determination-across-life-span-issues-and-gaps>.

¹⁹ *MO Guardianship: Understanding Your Options & Alternatives*, at <http://moguardianship.com/#materials>, sponsored, revised and updated by Jane St. John & Rachel Hiles, Missouri Family to Family, UMKC-Institute for Human Development, sponsored by Missouri Planning Council for Developmental Disabilities, developed and produced by UMKC Institute for Human Development, in collaboration with the Missouri Protection and Advocacy Services & the Missouri Department of Mental Health, Appendix 3 (2013).

²⁰ *MO Guardianship: Understanding Your Options and Alternatives*, Institute for Human Development (Sep. 2013), available at <http://moguardianship.com/MO%20Guardianship%20RESOURCE%20GUIDE%20rev%20Sept%20%202013.pdf>.

- Recognizing exploitation

Health Care

- Making decisions about medical treatment
- Taking medications as needed
- Maintaining hygiene, dental care and diet
- Avoiding high-risk behaviors (such as substance abuse, overeating, high-risk sexual activities, wandering)

Relationships

- Behaving appropriately with different kinds of relationship partners: family, friends, co-workers, intimate partners
- Making safe decisions concerning marriage and sexual relationships

Community Living

- Living independently without risk of serious harm or injury
- Maintaining habitable conditions at home (cleanliness, maintenance, security)
- Accessing community resources (transportation, bank, stores, post office, restaurants, home repair, emergency services)

Personal Decision-Making

- Understanding and communicating consent concerning legal documents (contracts, lease, deed, power of attorney)
- Identifying someone to represent interests and support with decision-making
- Communicating wishes, including specific desire to participate in the voting process
- Understanding legal consequences of behavior

Employment

- Looking for, gaining, and retaining employment

Personal Safety

- Avoiding common dangers (traffic, problems in driving, sharp objects, hot stove, poisonous substances)
- Recognizing and avoiding abuse
- Knowing what to do in an emergency

ASK if a triggering concern may be caused by *temporary or reversible conditions*. Look for steps to reverse the condition and postpone a decision until the condition improves.

Use the following list to systematically screen for conditions or environmental factors affecting decision-making ability that could be mitigated or reversed, mooting the need for a guardianship, or at least delaying the decision to seek guardianship.

Acute Temporary Medical Conditions

- Urinary tract infections:²¹ UTIs often can cause confusion in older people.
- Delirium²² (acute temporary disorientation): in older people often triggered by medical illness or post-operative stress.
- Dehydration,²³ malnutrition:²⁴ Inadequate nutrition, hydration, and vitamin deficiencies can lead to reversible cognitive changes.
- Traumatic brain injury:²⁵ may affect cognitive, social, physical, and psychological functioning but has a significant recovery rate.
- Oral health:²⁶ poor oral health has been linked to poor self-esteem, lack of nutrition, and diminished cognitive functioning.

²¹ *Urinary tract infections (UTIs) and dementia*, Alzheimer's Society, available at http://www.alzheimers.org.uk/site/scripts/documents_info.php?documentID=1777.

²² *When Patients Suddenly Become Confused*, Harvard Women's Health Watch (May 2011), available at <http://www.health.harvard.edu/staying-healthy/when-patients-suddenly-become-confused>.

²³ David Benton, *Dehydration Influences Mood and Cognition: A Plausible Hypothesis?*, National Institutes of Health (May 2011), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3257694/>.

²⁴ M. Hickson, *Malnutrition and ageing*, National Institutes of Health (Jan. 2006), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2563720/>.

²⁵ *Basic Information about Traumatic Brain Injury and Concussion*, Center for Disease Control and Prevention, available at <http://www.cdc.gov/traumaticbraininjury/basics.html>.

²⁶ Alan Mozes, *Could Poor Dental Health Signal a Faltering Mind?*, HealthDay (Dec. 2013), available at <http://consumer.healthday.com/senior-citizen-information-31/misc-aging-news-10/could-poor-dental-health-signal-a-faltering-mind-682728.html>.

Sensory Deficits

- Hearing loss:²⁷ may be isolating and may be perceived as dementia or diminished understanding.
- Vision loss:²⁸ can be disorienting but is easily correctable.

Medication Effects; Polypharmacy

Prescription and over-the-counter medication, while potentially improving health, may affect mental status²⁹—especially if multiple drugs are taken simultaneously,³⁰ as is common for older persons, producing drug-to-drug interactions. In addition to the fact that older people take many drugs, as the body ages it may be less able to cope with certain drugs and drug interactions.³¹ Careful review³² of medications could identify changes that significantly improve mental functioning.

Pain

Chronic or acute pain can be associated with cognitive impairment.³³ Effective pain reduction or management could enhance mental status.

Emotional Conditions

- Depression:³⁴ Ongoing depression can impair judgment and cause fatigue.
- Stress; grief:³⁵ Grief and stress due to loss of a loved one are particularly common to older persons. Health problems or loss of employment can cause stress.

²⁷ Jeremy Shere, *Can Hearing Loss Predict—or Lead to—Cognitive Decline?*, The Dana Foundation (Aug. 2014), available at http://www.dana.org/News/Can_Hearing_Loss_Predict%E2%80%94or_Lead_to%E2%80%94Cognitive_Decline/.

²⁸ Allen L. Pelletier and Jeremy Thomas, *Vision Loss in Older Persons*, American Family Physician (Jun. 2009), available at <http://www.aafp.org/afp/2009/0601/p963.html>.

²⁹ *Prescription Medication in the Elderly*, Net Wellness Consumer Health Information, available at <http://www.netwellness.org/healthtopics/aging/faq16.cfm>.

³⁰ Roni Caryn Rabin, *Cocktail of Popular Drugs May Cloud Brain*, Well Blog (Feb. 2012), The New York Times, available at http://well.blogs.nytimes.com/2012/02/27/cocktail-of-popular-drugs-may-cloud-brain/?_r=0.

³¹ *Medications & Older Adults*, Health in Aging Foundation (Oct. 2015), available at <http://www.healthinaging.org/medications-older-adults/>.

³² *Avoiding Overmedication and Harmful Drug Reactions*, Health in Aging Foundation (Sep. 2015), available at http://www.healthinaging.org/files/documents/tipsheets/Tip.Avoiding_OverMedication.pdf.

³³ John Gever, *Chronic Pain Disrupts Resting Brain Dynamics*, MedPage Today (Feb. 2008), available at <http://www.medpagetoday.com/PainManagement/PainManagement/8225>.

³⁴ *Depression*, Mayo Foundation for Medical Education and Research (July 2015), available at <http://www.mayoclinic.org/diseases-conditions/depression/basics/symptoms/con-20032977>.

³⁵ Cell Press, *How repeated stress impairs memory*, ScienceDaily (Mar. 2012), available at <http://www.sciencedaily.com/releases/2012/03/120307132202.htm>.

- Transfer trauma.³⁶ This is stress and confusion caused by a sudden and perhaps forced move, usually by a person with dementia, as from hospital to nursing home and perhaps back, or from home to assisted living or nursing home.

Age and Disability Discrimination

The trigger for a guardianship petition may well lie not in the person's abilities but the attitudes of others. Social workers, protective services, lawyers, and judges are not immune from the deeply entrenched societal belief that individuals with disabilities and older adults cannot live independently or make their own decisions.

- Age & disability discrimination; stereotyping.³⁷ Myths and stereotypes about aging³⁸ and disability³⁹ can cause skepticism about decision-making abilities, resulting in unnecessary guardianship. "Ageism" is systematic stereotyping and discriminating against individuals or groups on the basis of their age. It is important for lawyers to examine and confront their own perceptions and biases⁴⁰ to minimize unnecessary intrusive actions.
- Cultural barriers.⁴¹ Cultural variations and language differences may be a barrier to understanding a person's behaviors, but can be addressed by awareness and techniques for cultural competency, and sometimes by translation services.

Family Disputes

The trigger for a guardianship petition may lie in family disputes over care and control of finances, with long-standing sibling feuds re-emerging. In aggravated situations, one sibling may prevent visitation by another, isolating and perhaps neglecting the elder, or misusing powers of attorney. There are many reasons why families may fight⁴² over the care or support for the person, often leaving out the voice of the person him or herself. Family conflict may be addressed by mediation—especially by mediators skilled in elder care or guardianship cases.

³⁶ Kate Jackson, *Prevent Elder Transfer Trauma: Tips to Ease Relocation Stress*, Social Work Today (Vol. 15, No. 1), available at <http://www.socialworktoday.com/archive/011915p10.shtml>.

³⁷ *Are you ready? What you need to know about ageing*, World Health Day Toolkit, World Health Organization, available at <http://www.who.int/world-health-day/2012/toolkit/background/en/index3.html>.

³⁸ Melissa Dittmann, *Fighting ageism*, Monitor (May 2003), American Psychological Association, available at <http://www.apa.org/monitor/may03/fighting.aspx>.

³⁹ *About Independent Living*, National Council on Independent Living, available at <http://www.ncil.org/about/aboutil/>.

⁴⁰ *Understanding the Four C's of Elder Law Ethics*, American Bar Association Commission Law and Aging, available at http://www.americanbar.org/groups/law_aging/resources/ethics_and_counseling_older_clients.html.

⁴¹ Serena Patel, *Cultural Competency Training: Preparing Law Students for Practice in Our Multicultural World*, UCLA Law Review Discourse (Vol. 62, 2014), available at <http://www.uclalawreview.org/cultural-competency-training-preparing-law-students-for-practice-in-our-multicultural-world-2/>.

⁴² Jeff Anderson, *10 Reasons Families Fight about Senior Care*, Senior Living Blog (Mar. 2014), A Place for Mom, available at <http://www.aplaceformom.com/blog/reasons-families-fight-about-senior-care-02-27-2012/>.

COMMUNITY. Determine if concerns can be addressed by connecting the individual to family or community resources, and making accommodations in place.

At the heart of the PRACTICAL approach are practical actions that can be taken, connections that can be made, and creative accommodations that can be made to enhance decision-making ability. The PRACTICAL steps bring these essential non-legal solutions to the heart of the process. Rather than asking whether the person can make the decisions at hand, ask whether the person can make them with support.

Poor and inadequate social services and poor quality residential care can lead to a dire living situation, which may be the crux of the problem. A fix in social services or living arrangements may moot the need for a guardianship petition.

Community Supports

Lawyers can call on multiple networks of supportive community services for individuals with disabilities and older adults.

- **Human Services.** Most local jurisdictions have human services divisions, often with customer care or intake lines to help match the services to the needs. Some communities have an extensive set of supportive services for older persons and individuals with disabilities, while others have only the rudiments. Local resources may serve as an information or access point for state resources such as Medicaid. Find out about mental health resources, subsidized housing and rental assistance, assistive technology, home modification, supportive memory aids, training and education, and recreation/socialization opportunities that could support the person.
- **Legal Services.** Consider calling on the expertise of legal services,⁴³ especially those funded to help older people under the Older Americans Act, to access public benefits for low and moderate income individuals. Protection and Advocacy Programs (P&As)⁴⁴ in every state have the authority to provide legal representation and advocacy for individuals with disabilities. P&As represent individuals with disabilities on a wide variety of matters including employment and housing discrimination, as well as abuse and neglect.
- **Agencies on Aging.** Under the Older Americans Act⁴⁵ there is an established network of state and area agencies on aging either providing or contracting for key community-based aging services such as congregate or home delivered meals, senior centers, adult day health, care management, money management, transportation, in-home care, and assistance

⁴³ *Find Legal Aid*, Legal Services Corporation, available at <http://www.lsc.gov/find-legal-aid>.

⁴⁴ *P&A/CAP Network*, National Disability Rights Network, available at <http://www.ndrn.org/about/paacap-network.html>.

⁴⁵ Administration on Aging (AoA) Older Americans Act, Administration for Community Living, available at http://www.aoa.gov/AoA_programs/OAA/.

with Medicare problems. To find resources in your area quickly, use the [national Eldercare Locator](#).⁴⁶

- **ADRCs.** The U.S. Administration on Community Living, with the Centers for Medicare & Medicaid Services (CMS) and the Veterans Health Administration has developed a “No Wrong Door” system of Aging and Disability Resource Centers ([ADRC](#)).⁴⁷ These centers streamline access to long-term services and support options and aim to simplify access.
- **Independent Living Services.** There is also a system of Independent Living Services—programs established under the Rehabilitation Act, currently based at the [Administration for Community Living](#)⁴⁸ in the U.S. Department of Health and Human Services. The independent living programs seek to maximize the independence, well-being, and health of people with disabilities across the lifespan.
- **Ombudsman Programs.** Each state and many localities have [long-term care ombudsman programs](#).⁴⁹ Ombudsmen serve as advocates for residents in nursing homes, assisted living, and other residential settings. An ombudsman may be able to craft a resolution to problems in care or residents’ rights that will meet the perceived need for a guardian.
- **Developmental Disability (DD) Councils.** State Developmental Disability Councils⁵⁰ receive federal funding to promote self-determination, inclusion, and integration for individuals with developmental disabilities.
- **Mediation.** There may be mediators in the community specially trained in elder or guardianship mediation. While there is no specific list of such mediators, contact your state mediation association or your area agency on aging. To be sure the mediator has the relevant experience and skills, review the Association for Conflict Resolution’s (ACR) [Training Objectives for Eldercare Mediation](#).⁵¹ In especially high conflict cases, find out if your court is piloting an “[eldercaring coordination](#)”⁵² program according to ACR guidelines.

⁴⁶ Eldercare Locator available at <http://www.eldercare.gov/Eldercare.NET/Public/Index.aspx>.

⁴⁷ Aging & Disability Resource Centers Program/No Wrong Door System, Center for Integrated Programs (CIP), Office of Consumer Access and Self Determination, available at <http://www.acl.gov/Programs/CIP/OCASD/ADRC/index.aspx>.

⁴⁸ Administration for Community Living website available at <http://www.acl.gov/>.

⁴⁹ National Consumer Voice for Quality Long-Term Care website available at <http://ltombudsman.org/>.

⁵⁰ National Association of Councils on Developmental Disabilities website available at <http://www.nacdd.org/home/>.

⁵¹ *Elder Care and Elder Family Decision-Making Mediation: Training Objectives and Commentary*, ACR Section on Elder Decision-Making and Conflict Resolution Committee on Training Standards, available at http://acrelldersection.weebly.com/uploads/3/0/1/0/30102619/eldercareobjectives_7_30_2012.pdf.

⁵² *Guidelines for Eldercaring Coordination*, Association for Conflict Resolution Task Force on Eldercaring Coordination (2014), available at <http://www.eldersandcourts.org/~media/Microsites/Files/cec/ACR%20Guidelines%20for%20Elder%20Caring%20Coordination%202014.ashx>.

Informal Supports

Family caregivers⁵³ provide the bulk of long-term care in the U.S.

- Have all family members who could provide support been identified? Sometimes it takes a comprehensive search, and is worth digging.
- Is there a network of supportive friends able and ready to work with the individual on decisions in line with his or her values and preferences? Check for close friends over many years, neighbors, co-workers, providers who have become familiar with the person, volunteers, and members of faith-based communities.

Accommodations and Communication Techniques

*It is the person's will and preference, plus support plus accommodations that equals legal capacity.*⁵⁴

Finding the right combination of supports and accommodations can boost understanding and decision-making ability, and may alleviate the need for a guardianship. Start with the challenge at hand and ask “*what would it take*” to enable this person to make the needed decisions in a supportive environment.

There may be accommodations as required under the Americans with Disabilities Act (ADA) that can boost the person's functioning. But beyond the ADA there is a host of creative possibilities. While some involve funding, others are low-cost or no-cost, limited only by imagination. For example, an individual with an intellectual disability wanted to donate a kidney to his brother, but there were legal questions about his capacity to consent. Accommodations to aid understanding for such a person might include the use of drawings, a conversation with someone who has donated a kidney, a visit to the hospital, and communicating in plain language in a comfortable environment.⁵⁵

There are many communication techniques⁵⁶ that can markedly enhance understanding and response:

- Break information down into more manageable segments.
- Pay special attention to developing trust and confidence.
- Use paraphrasing and active listening.
- Don't make important points in passing, rephrase them.
- Use plain language, short sentences, active voice.
- Speak directly to the person, not “past” the person.
- Use hands and facial expressions to emphasize what you say.

⁵³ *Caregiving*, Family Caregiver Alliance (2009), available at <https://caregiver.org/caregiving>.

⁵⁴ Michael Bach, *A Disability-Inclusive Approach to the Right to Decide*, Developmental Disabilities Lecture Series (2013), available at <http://rwjms.rutgers.edu/boggscenter/documents/Bach5-3-13packet.pdf>.

⁵⁵ Kristin Booth Glen, *Supported Decision-Making and the Human Right of Legal Capacity*, Inclusion (Vol. 3, No. 1, 2015).

⁵⁶ *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers*, American Bar Association Commission on Law and Aging and American Psychological Association (2005), available at <https://www.apa.org/pi/aging/resources/guides/diminished-capacity.pdf>.

TTEAM. Ask the person whether he or she already has developed a “team” to help make decisions.

Ask if there are any people or entities already assisting the person in making decisions—and if the person wants such help. It is important the person is able to identify any supporters.

Network of Supporters

The person over time may have developed an informal system for making decisions with the help of a network of trusted supporters such as friends, relatives, colleagues, acquaintances from the community, supportive staff, or co-workers.

The person may have created—or may want to create—a structured “circle of support”⁵⁷ that includes trusted supporters who regularly meet as a group for planning, problem-solving, and decision-making. The circle members help the person with managing and budgeting goals, evaluating risks and consequences, and recognizing and making full use of abilities.

Appointed Surrogate

Guardianship may not be necessary if the person already has appointed a trusted surrogate authorized under state law to make decisions on his or her behalf, ideally with his or her participation.

- Is there already an appointed surrogate?
- Does the surrogate have authority to act in the situation at hand?
- Is the surrogate trustworthy?
- Will the surrogate act in accordance with the person’s values and preferences, and with the person’s involvement?

Legally authorized surrogates⁵⁸ could include:

- An agent under a financial power of attorney.
- A trustee under a revocable living trust.
- An agent under a health care power of attorney or advance directive.
- A family member or other person authorized to make health care decisions under a state default surrogate consent law.
- A representative payee for Social Security or other public benefits, or a VA fiduciary.
- While not a “surrogate,” a supporter under a legally or informally recognized representation agreement can help the person make decisions.

⁵⁷ NYS Self-Determination Consolidated Supports & Services Project, Circle of Support (COS) Training, available at http://www3.opwdd.ny.gov/wp/images/cos_master_01_12.pdf.

⁵⁸ See more information about legally authorized surrogates in the later section of this guide under “APPOINT.”

IDENTIFY abilities. If the person does not already have an existing team and has difficulty with specific types of decisions, identify areas of strengths and limitations in decision-making.

Determine whether:

- The person is able to make the specific decision(s) with support from a trusted friend, family member or someone else.
- The person is able to name one or more supporters to help in decision-making; or appoint a surrogate to make the decision(s) in question.

Without a system of decision-making support in place, there is a need to clearly assess the individual's abilities—both strengths and limitations—in the specific areas in which decisions are needed; as well as the ability to name a supporter or appoint a surrogate.

Sometimes this may be an informal assessment by the lawyer and others involved in the case about what the person is able to do and what support is necessary. The American Bar Association and the American Psychological Association have developed a [Handbook for Lawyers](#)⁵⁹ detailing the elements of such assessments for older clients, with a framework of factors including statutory provisions and ethical rules. Consider whether the person can:

- Articulate reasoning leading to a decision.
- Maintain consistent decisions and primary values over time;
- Appreciate consequences of decisions.

As explained in the *Handbook*, it is generally not appropriate for a lawyer to use formal clinical instruments such as the Mini-Mental Status Examination (MMSE). Lawyers are not trained to administer these tests or interpret the results. The test questions (such as clock drawing or counting backwards) have little direct bearing on understanding of the tasks or decisions at hand. Even for clinical professionals, the MMSE is simply a screening tool to determine whether further evaluation is needed, not an assessment tool itself.

In some cases, a lawyer may find that consultation with a *clinical specialist* would be helpful.

- The lawyer could **consult informally** with a clinician such as a geriatrician, geriatric psychiatrist, psychologist, neurologist or other mental health professional with experience in assessments.
- Or the lawyer could **seek a formal clinical assessment** with the individual's consent. Such an assessment can be a good tool in planning for needed supports, determining whether the person has the ability to either make certain decisions or to appoint a legal representative to

⁵⁹ *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers*, American Bar Association Commission on Law and Aging and American Psychological Association (2005), available at <http://www.apa.org/pi/aging/resources/guides/diminished-capacity.pdf>.

assist. If there is a decision to file for limited guardianship, an assessment can help to clarify the specific powers that would be retained, making for a much more tailored court order.

- In seeking a formal assessment, be specific with the clinician about the reason for the referral, and the person's circumstances, history and values. Ask for opinions on supports in any areas of deficit, and approaches less restrictive than guardianship.

CHALLENGES. Screen for and address any potential challenges presented by the identified supports and supporters.

Once a support system or individual supporters are identified, the biggest challenge is making sure the situation remains viable and the supporters are trustworthy.

Challenges with Support Systems

- Are there challenges in accessing community or other support systems? Are there barriers in eligibility, cost, timing or location?
- Is an institutional support system—such as a community-based mental health agency or a homeless outreach organization—underfunded, overburdened with paperwork and bureaucratic delay?
- Does the individual receive public benefits that are at risk if not vigilantly protected?
- Are there certain prerequisites that the individual must establish in order to access the support systems?

Challenges with Supporters

- Do the identified supporters present any risk of substantial physical, emotional, or financial harm?
- Do you have any suspicion that the supporters may engage in abuse, neglect, exploitation or undue influence? Be sure to report any suspected abuse to Adult Protective Services.⁶⁰
- Do the supporters understand the individual's potentially complex medical and/or mental health needs?
- Are the supporters stable? Do they need an incentive to remain so?

Coercion; Undue Influence

It is important to consider whether concerns triggering a possible guardianship petition may be rooted in coercion, fraud, intimidation, or undue influence. Guardianship may be perceived as a key strategy in protecting an individual from the perpetrator. However, making a report to adult protective services and removing the cause of the undue influence—admittedly often not an

⁶⁰ National Adult Protective Services Association website *available at* <http://www.napsa-now.org/>.

easy task—may reduce the impetus for guardianship. Often the person will not recognize what is happening and will side with the perpetrator.

Undue influence⁶¹ has been defined as instances in which “people use their role and power to exploit the trust, dependency, and fear of others. They use this power to deceptively gain control over the decision-making of the second person” (psychologist Margaret Singer). Legal definitions⁶² vary, but often include factors relating to: (1) the relationship between the alleged influencer and the alleged victim; (2) the alleged victim’s vulnerability to undue influence; (3) the alleged influencer’s opportunity to gain control; and (4) whether the alleged victim’s decisions were the outcome of the undue influence. Other definitions focus on the nature of the transaction(s) at hand, the mental condition of the individual, and the relationship of the parties. Be alert to the possibility that a supporter might potentially unduly influence the person in the guise of support.

Note that being subject to undue influence does not necessarily mean a person has “diminished capacity” as defined under state guardianship laws. Be careful to separate the external coercion from the individual’s abilities.

APPOINT. If the person is able and wishes to select a trusted supporter to help make decisions and/or to appoint a legal surrogate, help the person do so in a way that is consistent with the person’s values and preferences.

Consider the following options for clarifying or implementing a supporter relationship in a legally recognizable form that may help ensure the person’s wishes are honored. The National Guardianship Network has a full list of options⁶³ for decision-making that are less restrictive than guardianship.

Health Care Advance Directive

The person may be able to name someone as an agent to make health care decisions in a written advance directive document,⁶⁴ which also could include statements of the person’s wishes concerning medical treatment. The real challenge will be ensuring that the person effectively

⁶¹ Lisa Nerenberg, *Undue Influence: An Insidious Form of Elder Abuse*, NYC Elder Abuse Center website (2013), available at <http://nyceac.com/undue-influence-an-insidious-form-of-elder-abuse/>.

⁶² Lori A. Stiegel, *Legal Issues Related to Elder Abuse: A Pocket Guide for Law Enforcement*, Bureau of Justice Assistance (2014), available at <https://www.bja.gov/Publications/ABA-ElderAbuseGuide.pdf>.

⁶³ *Decision Making Without Guardianship*, National Guardianship Network, available at [http://www.naela.org/NGN/About Guardianship/Decision Making Without Guardianship/NGN/About GuardianshipMain/Decision Making.aspx?hkey=eb9c2ced-35aa-4499-acd1-26cd208f02ac](http://www.naela.org/NGN/About%20Guardianship/Decision%20Making%20Without%20Guardianship/NGN/About%20GuardianshipMain/Decision%20Making.aspx?hkey=eb9c2ced-35aa-4499-acd1-26cd208f02ac).

⁶⁴ *Living Wills, Health Care Proxies, & Advance Health Care Directives*, American Bar Association Section of Real Property, Trust and Estate Law, available at http://www.americanbar.org/groups/real_property_trust_estate/resources/estate_planning/living_wills_health_care_proxies_advance_health_care_directives.html.

communicates his or her values and wishes to the agent. Check your state's laws⁶⁵ for any specific requirements. Some state laws⁶⁶ also direct a guardian to comply with a health care advance directive if possible.

A health care agent may consent to or participate in discussion concerning two other kinds of advance care planning documents—a Do Not Resuscitate (DNR) Order⁶⁷ directing a physician not to perform cardio-pulmonary resuscitation if an individual's breathing or heart stops; and in some states a Physician's Orders for Life-Sustaining Treatment (POLST)⁶⁸ in which a seriously ill patient can indicate and document his or her desired end of life care, which is translated into a physician's order.

Health Care Surrogate Under State Law

In the Uniform Health Care Decisions Act and statutes in 44 states,⁶⁹ if the person is not able to make health care decisions him or herself, the authority to make some or all health care decisions automatically devolves to a surrogate generally designated according to a hierarchy of family members. In over 20 of these states, a “close friend” familiar with the person's history and values can make decisions if there is no family, and in approximately 12 states some combination of physicians and ethics committee can decide if there is no one else. It is important to consider whether these legally authorized health care surrogates actually know or try to find out what the person wants or would have wanted and support the person in those choices. A surrogate could be a member of a support team assisting the person—or may be the only one on which the clinicians rely.

Financial Power of Attorney

The person may be able to execute a financial power of attorney,⁷⁰ a legal document assigning authority to make financial decisions to another party. Unlike the healthcare advance directive, a financial power of attorney can be effective while an individual has capacity. Or, it can become effective only if the individual loses capacity. It is helpful to delegate specific categories of authority, such as managing pensions, control over a checking account, or accountability for a lease.

⁶⁵ *Links to State-Specific Advance Directive Forms*, American Bar Association Commission on Law and Aging, available at [http://www.americanbar.org/content/dam/aba/administrative/law_aging/Links to State Advance Directive Forms_authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/law_aging/Links_to_State_Advance_Directive_Forms_authcheckdam.pdf).

⁶⁶ *Guardianship Law & Practice Resource Website*, American Bar Association Commission on Law and Aging, available at <http://ambar.org/guardianship>.

⁶⁷ *Do-not-resuscitate order*, MedlinePlus, U.S. National Library of Medicine, available at <http://www.nlm.nih.gov/medlineplus/ency/patientinstructions/000473.htm>.

⁶⁸ The National POLST website is available at <http://www.polst.org/>.

⁶⁹ *Default Surrogate Consent Statutes*, American Bar Association Commission on Law and Aging (July 2014), available at http://www.americanbar.org/content/dam/aba/administrative/law_aging/2014_default_surrogate_consent_statutes.pdf.

⁷⁰ *Power of Attorney*, American Bar Association Section of Real Property, Trust and Estate Law, available at http://www.americanbar.org/groups/real_property_trust_estate/resources/estate_planning/power_of_attorney.html.

Trustee

For complex or substantial assets, the person may be able to execute a document transferring title and authority to manage property to a trustee⁷¹ for the benefit of either the person or others as beneficiaries, under a revocable living trust.

Representative Payee

The Social Security Administration administers a representative payment program⁷² for recipients of Social Security and SSI who it deems “incapable” of managing their own funds. The representative payee receives and manages the payment, using it to pay for current and foreseeable needs such as rent, food and spending money. An individual can apply to Social Security to become a payee for a recipient, or designated organizations can serve as payees for many recipients. The representative payee has authority only over the benefits and cannot make any other decisions on the person’s behalf. It is very difficult for an individual to revoke a payee’s status once appointed.

The Veterans Administration can appoint a VA Fiduciary⁷³ upon a determination that a VA beneficiary is unable to manage his or her VA benefits. Generally, family members or friends serve as fiduciaries for beneficiaries, but when friends and family are not able to serve, VA looks for qualified individuals or organizations to serve. The VA fiduciary has authority only over VA benefits.

Legally Recognized Supporter

Law in selected Canadian and other jurisdictions allows individuals who require some decision-making assistance to enter into a “representation agreement”⁷⁴ with a support person or network, which is legally recognized by third parties. Under a representation agreement, an individual can authorize one or more “supporters” to assist in managing his or her affairs and help the person to make his or her own decisions. The agreement can be effective immediately or at a future date if circumstances change due to disability, age or another reason requiring support. The agreement can be revoked by the individual, and it can be supplanted by a legally appointed guardianship.

Under the Canadian model, an individual does not have to demonstrate “legal capacity” to enter into a representation agreement. The standard is that the individual has “trust” in the supporter/s in his or her network. This cutting edge alternative to guardianship is gaining international acceptance. Currently, the best resource to learn more about representation agreements is a Canadian nonprofit organization called Nidus, the Personal Planning and Resource Center Registry.⁷⁵ Texas has enacted a legally recognized supported decision-making agreement,⁷⁶ and in some areas in the U.S. such agreements are informally recognized.

⁷¹ *Revocable Trusts*, American Bar Association Section of Real Property, Trust and Estate Law, available at http://www.americanbar.org/groups/real_property_trust_estate/resources/estate_planning/revocable_trusts.html.

⁷² *When People Need Help Managing Their Money*, Social Security website, available at <http://www.socialsecurity.gov/payee/>.

⁷³ *Fiduciary*, U.S. Department of Veterans Affairs website, available at <http://benefits.va.gov/fiduciary/>.

⁷⁴ *Representation Agreement*, Nidus Personal Planning Resource Centre and Registry, available at http://www.nidus.ca/?page_id=46.

⁷⁵ The Nidus Personal Planning Resource Centre and Registry website is available at <http://www.nidus.ca/>.

⁷⁶ *Supported Decision-Making: Alternatives to Guardianship*, Texas Council for Developmental Disabilities, available at <http://www.tcdd.texas.gov/resources/guardianship-alternatives/supported-decision-making/>.

LIMIT any necessary petition and order.

*Judges are not like baseball umpires, calling strikes and balls or merely labeling someone competent or incompetent. Rather, the better analogy is that of a craftsman who carves staffs from tree branches. Although the end result—a wood staff—is similar, the process of creation is distinct to each staff. Just as the good wood-carver knows that within each tree branch there is a unique staff that can be “released” by the acts of the carver, so too a good judge understands that, within the facts surrounding each guardianship petition, there is an outcome that will best serve the needs of the incapacitated person, if only the judge and the litigants can find it*⁷⁷

If no less restrictive measures can reasonably meet the individual’s need, and there is risk of significant harm, seek a limited guardianship order transferring authority to a surrogate only in those areas in which decision-making support is needed. A major theme of the UGPPA, is that “limited guardianship or conservatorship should be used whenever possible.” Many state laws⁷⁸ reflect the emphasis on limited guardianship.

Through completing all of the foregoing PRACTICAL steps, you will gain a solid grasp of the individual’s needs, strengths, and deficits—as well as actual or potential substantial harm, and any ways the harm could be addressed without a guardianship. If after this “due diligence” analysis you determine a guardianship is in fact needed as a last resort, aim to limit the scope of the order.

Specify Limits in Petition and Order

There are barriers to petitioning for limited guardianship. Some petition forms don’t provide for it. Moreover, conditions change, and going back to court to petition again later for a modification of the order may be at significant cost to—or simply unaffordable for—your client. Some judges may not draft or approve limited orders, reasoning that a plenary order will give more flexibility without coming back to court. But despite these very real barriers, apply the statutory language concerning limited orders if possible.

- Use a good clinical assessment to clarify specific powers that should be retained
- Work with the court and bar to make petition and order forms acknowledge limitations. As a start, using templates for limited orders⁷⁹ in your court may work.

Seek Person's Participation in Decision-Making

Even though the guardian is a surrogate decision-maker, he or she should nonetheless consult with and allow the individual to lead in decisions when possible. Ideally, *the guardian is there as a support*, not as an authoritarian voice restricting self-determination.

⁷⁷ Lawrence A. Frolik, Promoting Judicial Acceptance and Use of Limited Guardianship, Stetson Law Review (Vol. 31, 2002), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1348105.

⁷⁸ *Limited Guardianship of the Person*, AARP Public Policy Institute, available at http://www.americanbar.org/content/dam/aba/administrative/law_aging/Limited_Guardianship_of_the_Person_Chart.authcheckdam.pdf.

⁷⁹ The form for the State of Rhode Island Petition for Limited Guardianship or Guardianship is available at <http://sos.ri.gov/documents/probate/PC2.3.pdf>.

- The UGPPA provides that “the guardian or conservator should always consult with [the individual] to the extent feasible, when making decisions.”
- State laws frequently provide that a guardian must seek to maximize the participation of the person in decision-making and be guided by the person’s values and preferences.
- Concepts of decision-making participation are embedded in court and guardian standards of practice (*National Probate Court Standards*⁸⁰ and *National Guardianship Association Standards of Practice*⁸¹).

Develop Plan to Maximize Self Determination

Some state laws require guardians to formulate forward-looking plans both as a practical tool and as a baseline of accountability for the courts. But even if a plan is not required, it is a good practice. The NGA *Standards of Practice* require the guardian to develop “a person-centered plan.” A plan should not only show anticipated actions and services over the upcoming period, but the means by which the guardian will seek out and incorporate the person’s voice.

Reassess for Restoration or Modification

Periodically reassess whether conditions have changed and rights could be restored.⁸² Under the NGA *Standards*, a guardian is to “assist the person under guardianship to develop or regain the capacity to manage his or her personal and financial affairs;” and should “seek termination or limitation of the guardianship: (A) When the person has developed or regained capacity . . . (B) when less restrictive alternatives exist; and (C) when the person expresses the desire to challenge the necessity of all or part of the guardianship” (Std #21).


A lawyer representing an individual in a restoration proceeding should:

- Thoroughly interview the person, seeking evidence of changes in abilities or circumstances that would make guardianship unnecessary. Interview those close to the person as well.
- Review evidence from the initial determination. Perhaps it was insufficient, inaccurate or overlooked at the time of the order.
- Ensure there is a solid clinical evaluation.
- Use evidence and testimony from third parties knowledgeable about the person’s abilities.
- Articulate plans for overcoming deficits with supports.
- Show that supports are in place or ready.
- Thoroughly prepare the individual for the hearing; and secure any needed accommodations.
- If full restoration is not possible, consider a plan to progressively restore rights.

⁸⁰ *National Probate Court Standards*, National Center for State Courts, available at <http://ncsc.contentdm.oclc.org/cdm/ref/collection/spcts/id/240>.


⁸¹ National Guardianship Association Standards of Practice, National Guardianship Association, available at http://www.guardianship.org/documents/Standards_of_Practice.pdf.

⁸² Jenica Cassidy, *State Statutory Authority for Restoration of Rights in Termination of Adult Guardianship*, Bifocal (Vol. 34, No. 6), American Bar Association Commission on Law and Aging, available at http://www.americanbar.org/publications/bifocal/vol_34/issue_6_august2013/guardianship_restoration_of_rights.html.



The PRACTICAL Tool aims to help lawyers identify and implement decision-making options for persons with disabilities that are less restrictive than guardianship. It is 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, with assistance from the National Resource Center for Supported Decision-Making.

Learn more about the ABA entities that produced this Tool:

- Commission on Law and Aging: www.americanbar.org/aging
 - Commission on Disability Rights: www.americanbar.org/disability
 - Section on Civil Rights and Social Justice: www.americanbar.org/crsj
 - Section on Real Property, Trust and Estate Law: www.americanbar.org/rpte
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The Role of the Respondent's Attorney

By

Sarah Garland St. Onge

One of the most significant changes in the new version of Article 5 is the separation of the role of the attorney for the Respondent and the guardian ad litem. Counsel for the Respondent must look to what the Respondent wishes to guide the litigation. The new version of the law adds additional due process protections, which will allow the attorney the tools necessary to carry out the wishes of the individual.

The Statute Emphasizes the Expressed Wishes of the Respondent

Definitions - S.C. Code § 62-5-101

- “ ‘Counsel for alleged incapacitated individual’ means a person authorized to practice law in the State of South Carolina who represents the alleged incapacitated individual in a guardianship proceeding or a protective proceeding. Counsel shall represent the expressed wishes of the alleged incapacitated individual to the extent consistent with the rules regulating the practice of law in the State of South Carolina.”
- “ ‘Guardian ad litem’ means a person licensed in the State of South Carolina in law, social work, nursing, medicine, or psychology, or who has completed training to the satisfaction of the court, and who has been appointed by the court to advocate for the best interests of the alleged incapacitated individual.”

Notice of Right to Counsel - S.C. Code §§ 62-5-303A (C) and 403A (C)

- “The notice of right to counsel shall advise the alleged incapacitated individual of the right to counsel of his choice and shall state that if the court has not received notice of appearance by counsel selected by the alleged incapacitated individual within fifteen days from the filing of proof of service, the court will appoint counsel. In appointing counsel, the court shall consider the expressed preferences of the alleged incapacitated individual.”

Priority for who is to serve as the guardian, if necessary – S.C. Code § 62-5-308

- Second priority is “a person nominated to serve as guardian by the alleged incapacitated individual if he has sufficient mental capacity to make a reasoned choice”

Petitioner Must Establish by Clear and Convincing Evidence that the Respondent is Incapacitated

Definition of Incapacity and Supports and Assistance Establishes Three Elements to Prove – S.C. Code § 62-5-101

- Respondent unable to access information or communicate a decision
- Respondent unsafe or property unsafe unless there is a guardian/protective order
- AND supports and assistance will not mitigate need

Definition of Supports and Assistance Points to Various Alternatives to Guardianship – S.C. Code § 62-5-101.

- Option #1 – Surrogates by other means
 - Advance planning
 - Power of Attorney – Health Care or Financial
 - Living Will
 - Trust
 - Legally recognized surrogate
 - Adult Health Care Consent Act
 - Adult Students with Disabilities Educational Rights Consent Act
 - Social Security Representative Payee
- Option #2 – Support allowing for Respondent to continue under a Self-Determination Model. These options are reasonable accommodations for a person with a disability.
 - Communication
 - Supported Decision Making
 - Accessing services

If a less restrictive alternative is available, then guardianship should not be imposed. S.C. Code §§ 62-5-101 and 106 (A)(2)(f) and 303 (B)(6) and 304 (A) and 403 (B)(6).

- “ ‘Less restrictive alternative’ means the provision of support and assistance as defined in this section which maximizes the alleged incapacitated individual’s capacity for self-determination and autonomy in lieu of a guardianship or conservatorship. “ S.C. Code § 62-5-101.
- The court “shall exercise its authority to encourage maximum self-reliance and independence of the incapacitated individual and issue orders only to the extent necessitated by the incapacity of the individual.” S.C. Code § 62-5-304 (A).

Incapacity Must Be Established as to Each Right to be Removed

The Petition, the GAL Report, and the Order must set forth the rights to be removed from the Respondent and proof must be established as to each right. S.C. Code §§ 62-5-106 (D)(6) and 303(B)(7) and 303D (A)(3) and 304A.

Rights and Powers which may be Retained or Removed

- Marry/divorce
- Where to reside
- Where to travel
- Medical care
- End of life decisions (“Do Not Resuscitate” Order)
- Hospitalization/discharge/transfers
- Disclose confidential information
- Operate a vehicle
- Vote
- Employment
- Education

- Participate in social, religious, or political activities
- Buy, sell, or transfer real or personal property/conduct business
- Contracts
- Lawsuits
- Anything else?

Rights and Powers which may be Vested in the Guardian

- Decide residence
- Travel
- Consent or refuse to consent to visitation with family, friends, and others
- Medical
- End-of-life decisions
- Hospitalization/discharge/transfer
- Disclose confidential information
- Education
- Employment
- Contracts
- Lawsuits
- Anything else?

Rights as to the Litigation

The due process protections under the new version of the code include:

- Right to counsel and the Respondent must receive notice of right to counsel along with the summons and petition. S.C. Code §§ 303A and 403A.
- Right to attend the hearing, which cannot be waived by the guardian ad litem. S.C. Code §§ 62-5-303C and 403C.
- Right to request a second examiner be appointed. S.C. Code §§ 62-5-303B (A)(2)(b) and 403B (A)(2)(b). Under the new version, only one examiner is mandatory.
- Right to thirty days to change his mind. If a consent agreement is made between all the parties, the Respondent may waive the hearing. However, the Respondent has thirty days to change their mind and ask for a formal hearing. S.C. Code § 62-5-303C.

Tips in Representing the Respondent

These materials are not exhaustive. Attorneys involved in guardianship cases and protective proceedings need to carefully read through the new statute.

- Do not procrastinate. If you are representing a person with a disability, they may need extra time to become comfortable with you. They may also need extra time to communicate if they use a speech device or other technology. Counsel needs to be able to discover as much about the case as possible and to have time to accommodate the client.
- ANSWER THE PETITION.
- Review and share the PRACTICAL Tool provided by the ABA and included in these materials.

- Be familiar with the timing of the proceedings and do not get caught off guard.
- Negotiate with the parties to the case if that will accomplish the goals of your client.
- Advocate for the wishes of your client.

S 415 & Art V Crosswalk by Sarah St. Onge

Old Section Number	New Section Number	Purpose/Description	Substantive Changes	Notes
Misc Changes				For this Crosswalk: PC = Probate Court; SNT = Special Needs Trust; GAL = Guardian ad Litem
N/A	62-1-112	Clarify Probate Court's (PC) Power to impose penalties for contempt and grant motion to proceed in forma pauperis	New	Currently, PCs are split on whether they have the authority to waive fees for indigents.
8-21-800	8-21-800	Limits PC's ability to relieve a party from court costs and filing fees	Allows PC to waive fees for indigents and notaries	George Cauthren's Catch/I think Jennifer Rainville w/ SCLS drafted this for us
62-1-302	62-1-302	PC Jurisdiction	Added that PC can establish a special needs trust	Prior to the passage of the 21st Century Cures Act in 12/2016, special needs trust (SNT) couldn't be self-settled. The PC could create a special needs trust for someone who is incapacitated but did not have jurisdiction to create a SNT for someone who has capacity but needs a SNT due to disability. Addresses the gap in the law that has now been corrected with the 21st Century Cures Act. However, because there may be some circumstances where the court may need to still create a SNT, we have not attempted to make a full last minute change and have kept the SNT language in the bill. This will provide jurisdiction if federal law changes again or if there are circumstances where the court needs to have this authority.
62-1-401	62-1-401	Notice section	Allow for commercial delivery service	Creates uniformity

Part 1 - General Provisions (New Sections under general provisions were designed to promote some best practices and uniformity between guardianship and conservatorship)				
Old Section Number	New Section Number	Purpose/Description	Substantive Changes	Notes
62-5-101; 62-5-106(A)	62-5-101	Definitions	From 5 definitions to 24 definitions. Highlights: Counsel is to work for what the Respondent wishes not best interest. GAL does not have to be an attorney. Emergency means emergency (not something vague). Incapacity means you cannot evaluate info to make decisions EVEN WITH supports or assistance. Supports and assistance is a system already in place that addresses the needs (like POA or AHCCA) and having access to natural supports and services that allow you to make decisions. Least restrictive alternative means supports and assistance options.	The new definitions address some of the goals of the project including increasing consistency between counties; consistency with guardianship and conservatorship; and due process protections. Also, the GAL does not have to be an attorney (can be licensed in social work, nursing, medicine, or psychology, or someone who has completed training to the satisfaction of the court).
62-5-102(b)	62-5-102	Consolidation	No substantive change	Previous 102(a) moved to 201
62-5-103	62-5-103	Facility of Payment or Delivery	From 10K to 15K. For "net aggregate amount" see definition section. Employer provision. Clarifies that this section can't be used if person to make the payment has knowledge of conservatorship or pending conservator action.	
62-5-105	62-5-104	Department of Mental Health (DMH) collections	From 10K to 15K.	Raised the amount to be consistent with proposed 103.
62-5-414	62-5-105	PC can award costs of the proceedings, including attorney fees. Court appointed participants (like the GAL) are entitled to reasonable compensation. Petitioners pay their own fees unless PC orders otherwise.	New section, but reflects current practice for most (maybe all) PCs.	To codify the court's authority to award costs. Some petitioners assume they will be paid from the respondent's funds. Hopefully this section will clarify that the petitioners should not make that assumption.
n/a	62-5-106	Responsibilities and Duties of the GAL	New section. Consider "best practice" and current practice for some GALs.	This section involved compromise to require a basic set of best practices that are comprehensive but not onerous. The GAL
62-5-408	62-5-107	testamentary capacity	new - codifies and clarifies case law	

Old Section Number	New Section Number	Purpose/Description	Substantive Changes	Notes
62-5-310; 62-5-408	62-5-108	emergency orders & temporary orders	Mainly clarifies the process. Same process to be used for gaurdianship and conservatorship. Requires summons, motion, affidavits, verified pleading, and notice. MD affidavit must be from an exam w/in the last 30 days. Any adverse party affected by an ex parte order can move to have the order dissolved or modified. For protective orders, there must be surety. Temporary orders require notice and a hearing (distinguished from emergencies).	Emergency is defined in 62-5-101.
Part 2 - Jurisdiction				
62-5-201; 62-5-402;	62-5-201	Jurisdiction	Just clarifies/no substantive change	
Part 3 - Guardians				
62-5-301	62-5-301	Testamentary nominations	Went from testamentary appointments to just nominees. However, someone who is nominated has priority under the Adult Health Care Consent Act, as noted. The nominee also gets priority under 5-308. Over wills drafted prior to the effective date of the bill, the PC has discretion to follow the previous appointment process or the new nomination process.	This section involved compromise to come to this solution.
62-5-302	62-5-302	Venue	No substantive changes	
62-5-303	62-5-303	Summons and Petition	Specifies what must be in the Petition	No visitor
62-5-303; 62-5-309(A)	62-5-303A	Personal service on Respondent ASAP. Service of Notice of Right to Counsel.	Counsel does not serve as the GAL. Counsel chosen by Respondent has 15 days to appear prior to appointment of counsel by the PC.	Separating the role of the attorney and the role of the GAL was an important goal of the Art. V Task Force and was supported by public input on the goals and initial draft on which the public was allowed to comment.
62-5-303	62-5-303B	Appointments	Mostly New. Only 1 physician DE is required. May have a second appointment. GAL has duties in 5-106.	Counsel cannot serve as GAL. However, counsel may file a motion to be relieved as counsel in rare circumstances where the Respondent cannot communicate. If the motion is granted, the attorney can ask to be appointed as GAL. This should be very rare and is one example of ballancing costs with due process rights.

Old Section Number	New Section Number	Purpose/Description	Substantive Changes	Notes
62-5-303; 62-5-309(B)	62-5-303C	Hearings	Similar rights for the Respondent. Respondent may waive the right to a hearing.	Respondent's counsel's ability to be relieved and the option that the hearing may be waived are part of the legislation's attempt to balance due process protections with costs of the proceedings. These were major areas of compromise.
62-5-303	62-5-303D	Examiner Details	New	Statute sets out details on what must be contained in the report, when it must be filed, etc.
62-5-304	62-5-304	Details on Determination of Incapacity and appointment of a guardian	Clarifies that the evidentiary standard is clear and convincing; Adds instructions if co-guardians are being considered; clarifies apt of guardian terminates agent's powers under a HCPOA; clarifies guardian must act consistently w/ advance directives executed prior to incapacity	Continues w/ current law that emphasizes limiting guardianship authority to maximize independence and self-reliance
n/a	62-5-304A	Rights Removed/Rights Vested in guardian. Any right not specifically removed is retained.	New	The list of rights that may be removed is not identical to the list of rights that may be vested in the guardian. The rights that may be removed from the ward but cannot be vested in the guardian are 1. right to marry 2. right to vote 3. right to participate in social, religious, or political activity 4. operate a vehicle. Powers relating to money may be removed from a ward, but can only be vested in a conservator.
62-5-305	62-5-305	Acceptance of appointment and consent to Jurisdiction	Adopted notice and waiver requirements from 62-1-401 and 402	
62-5-306; 62-5-106(B)	62-5-306	Termination upon death of ward	Added section to specify what happens to any funds of the ward upon the ward's death (if no conservatorship). Specifies that termination of appointment does not affect any liability of the guardian for acts prior to the termination. Language dealing with testamentary appointment under an informally probated will is removed since that process is no longer an option.	
62-5-307; 62-5-106(B)	62-5-307	Options for post-appointment informal actions.	Codifies the practice of some PCs that allow someone interested in the welfare of the ward (including the ward) to ask the court for relief.	The person asking for relief submits to the jurisdiction of the court.

Old Section Number	New Section Number	Purpose/Description	Substantive Changes	Notes
62-5-307	62-5-307A	Options for post-appointment formal actions.	A ward can file an informal (letter) requesting readjudication under 307, but the court does not have to accept that request. This would force the ward to file a formal request for relief under 307A. The organization is different but most of this section is similar to the current 307. One other change is that an attorney can file a motion with the court for permission to represent the ward in an action under 307A.	Preponderance of the evidence is the evidentiary standard necessary for a determination the ward is no longer incapacitated (in contrast to clear and convincing evidence to determine that a Respondent is incapacitated).
62-5-308	n/a	Visitors	Removed	While the visitor position is incorporated into the duties and responsibilities of a GAL for the initial determination of incapacity and apt of a guardian, the court has tremendous flexibility under 307 and 307A to make any appointments that are needed to protect the ward or investigate whether the ward has regained capacity.
62-5-311 (also part of 62-5-410)	62-5-308	Priorities	PC may ignore the priorities if it is in the best interest of the Respondent. The changes in the list of priorities are not dramatic: a currently serving guardian is listed first and a catch all is added. The list also distinguishes between someone caring for the person outside a facility (higher priority) and someone nominated by a facility.	For consistency, language from 410 about the judge and court employees being guardians for their family members was added to 308.
62-5-104; 62-5-312; 62-5-104.	62-5-309	Duties, Rights, Powers of Guardian	Expands upon the duties outlined in previous sections. Adds provisions requiring the guardian to take steps toward assisting the ward in becoming more independent and self-reliant. Adds a requirement to file a plan of care, including steps being taken to develop or recover independent decision making. Clarifies that a guardian does not have to provide funds for the ward's care. Increased a period of delegation of the guardian's duties by a Power of Attorney to 60 days.	Much of the limits on liability, etc. are still in this section. It is mostly reorganized w/ the additions noted in the reporters comments.

Old Section Number	New Section Number	Purpose/Description	Substantive Changes	Notes
62-5-313	62-5-310	PC maintains Jurisdiction/Venue may be transferred	Amended for better/clearer organization and for consistency w/ Part 7 (SCAGAPPJA)	
Part 4 - Protective Proceedings				
62-5-403	62-5-401	Venue	For a Respondent who doesn't live in SC, venue may be in any county where the Respondent has property or has a right to take legal action (a little broader than current)	
62-5-401(1); 62-5-407(a)	62-5-402	Protective orders relating to the estate and affairs of minors	Sets out an informal proceeding for protective orders relating to the estate and affairs of Minors. (A) explains when a protective order is needed. (B) explains the informal process. (C) gives the court authority to require a formal process. (D) deals w/ the requirement for a bond and/or restricted account. (E) allows limits of distributions to keep minor from being disqualified from receiving public benefits. (F) allows the PC to appoint a GAL.	
62-5-401(2); 62-5-404	62-5-403	Protective orders relating to the estate and affairs of individuals who are alleged to be incapacitated.	(A) notes when a protective order should be sought. (Using a counterclaim to request appointment is not sufficient to effectuate appointment. Counter parties must file counter summons and petitions to be appointed.) (B) sets out what must be in the Petition for a Protective Order. (C) notes that an individual may file a petition on their own behalf. (D) allows consolidation.	The bill does not include an informal process for protective proceedings involving adults. All cases must be formal.
62-5-405	62-5-403A	Notice and Service	Notice of right to counsel must be served along w/ the summons and petition and affidavits. Like with the guardianship process, notice of appearance by counsel needs to happen in 15 days from the filing of the proof of service or the court will appoint counsel for that Respondent.	Counsel does not serve as the GAL. Counsel chosen by Respondent has 15 days to appear prior to appointment of counsel by the PC.

Old Section Number	New Section Number	Purpose/Description	Substantive Changes	Notes
62-5-407(b)	62-5-403B	Appointments	Mostly New. Only 1 physician DE is required. May have a second appointment. GAL has duties in 5-106.	Mirrors Guardianship. Counsel cannot serve as GAL. However, counsel may file a motion to be relieved as counsel in rare circumstances where the Respondent cannot communicate. If the motion is granted, the attorney can ask to be appointed as GAL. This should be very rare is one example of ballancing costs with due process rights. This section (and others) refers to the different procedure related to VA benefits (see 431 which replaces Part 6 formerly the Uniform Veterans' Guardianship Act).
62-5-405; 62-5-406; 62-5-407(b)	62-5-403C	Hearings	Similar rights for the Respondent. Respondent may waive the right to a hearing.	
62-5-407(b)	62-5-403D	Examiner Details	New	Statute sets out details on what must be contained in the report, when it must be filed, etc.
62-5-408; 62-5-426	62-5-404	Details on Determination of Incapacity and issuing protective orders (for minors and adults).	Specifies clear and convincing standard applies for protective orders over adults. Notes that a conservatorship may be limited (like a limited guardianship).	
62-5-408; 62-5-409	62-5-405	PC's authority over issuing Protective Orders	Adds some clarity to the protective orders that can be issued and upon what decisions may be made (like wishes of the Respondent, etc.).	
n/a	62-5-406	RESERVED		
n/a	62-5-407	Rights removed/Affect on POAs	New (a mirror for 304 and 304A) - (A) - maximum self-reliance; (B) rights removed noted; (C) if the right to bring or defend a lawsuit is removed from the Respondent, he can still bring an action to modify a protective order under 428; (D) conservatorship terminates POAs	
62-5-410	62-5-408	Priorities and standards by which the PC may want to skip someone w/ priority.	Like in the guardianship section, a person providing care outside a healthcare facility has priority over someone nominated by a healthcare facility. Also a catchall is added.	See definition of "person" in 101 which is where the part from current 410 discusses who can be a conservator.
62-5-411	62-5-409	Bond	Added language that authorizes use of a restricted account. (Current practice in some PCs). Modifications can be made upon application to the PC.	Not significant change to practice, just change in how it is organized and spelled out.
62-5-412	62-5-410	Terms of Bonds	No substantive changes	

Old Section Number	New Section Number	Purpose/Description	Substantive Changes	Notes
62-5-413	62-5-411	PC has Personal Jurisdiction over the conservator	Just reworded for clarity	
62-5-414	62-5-412	compensation	No substantive changes	See also new 62-5-105
n/a	62-5-413	Post-appointment informal action options	Codifies the practice of some PCs that allow someone interested in the welfare of the protected person (including the protected person) to ask the court for relief.	See new 62-5-307. The person asking for relief submits to the jurisdiction of the court.
62-5-417; 62-5-408	62-5-414	Conservator is a fiduciary/allows for a financial plan	(B) through (D) are new. They allow the PC to require the conservator to submit a financial plan (like the care plan in a g'ship). (C) Sets out what needs to be in the plan. (D) deals with the interaction of estate plans established by the protected person and the conservatorship.	The financial plans may help with the court's monitoring of a conservatorship. Also, a financial plan must note any options for restoring the protected person's ability to manage his own money.
62-5-418	62-5-415	Inventory	Copy to be provided to guardian and to anyone the PC directs it to be given.	
62-5-419	62-5-416	Reporting requirements	Clarifies requirements and gives PC more flexibility (reports can be required more often than 1x per year). Clarifies what should be in the report. Clarifies the process (formal) for dealing w/ any unsettled liabilities relating to the conservatorship.	
62-5-420	62-5-417	Title to property	No substantive changes	
62-5-421	62-5-418	Fiduciary letters	Added reference to filing fiduciary letters with credit reporting agencies.	
62-5-422	62-5-419	Sales and purchases of property	PC must approve transaction that is affected by a conflict of interest.	
62-5-423	62-5-420	Dealings with Conservator	Adds protection to bona fide purchasers of protected property.	
n/a	62-5-421	Protected person cannot transfer or assign property in the conservatorship. Protections for 3rd parties dealing in good faith with the protected person.	New. Third parties who deal with a protected person in good faith may have some protections if they are a bona fide purchaser.	

Old Section Number	New Section Number	Purpose/Description	Substantive Changes	Notes
62-5-421; 62-5-408	62-5-422	Authority of Conservator	(A) Sets out what action a conservator may take without prior approval. (B) Sets out when the conservator should file an application prior to acting. (C) Conservator may seek instructions from the court (or ratification). (D) Appointment of a conservator does not terminate attorney client privilege.	
62-5-425; 62-5-408	62-5-423	Authorization of Conservator to expend funds and guidance on spending funds	Deals with payments to dependents. Allows distributions for child and spousal support payments. Refers to financial plan. Sets out methods for applying funds to the protected person. References net aggregate amount (defined).	
n/a	62-5-424	RESERVED		
62-5-427	62-5-425	Estate plan must be considered by the court/conservator in investing and distributed estate assets.	From "should consider" to "must consider" estate plan. Adds language requiring PC/conservator to consider other arrangements originated by the protected person that provides a benefit at death.	
62-5-428; 62-5-402	62-5-426	Claims	(A) deals with "internal" matters of the conservatorship. (B) deals with "external" matters of the conservatorship -- things outside the day to day administration of the conservatorship. (C) Deals with a preference for claims for care, maintenance, and education of the protected person or dependents and claims of administration.	
62-5-429	62-5-427	Liability of Conservator	n/a	
62-5-430; 62-5-426; 62-5-415; 62-5-416; 62-5-106(B)	62-5-428	Post-appointment options	Some actions may be made upon application and some require summons and petition. For anything in the "application" list, the PC can require the filing of a summons and petition. An attorney can request permission to represent the protected person.	

Old Section Number	New Section Number	Purpose/Description	Substantive Changes	Notes
62-5-431	62-5-429	Payment of debt or delivery of property	n/a	
62-5-432	62-5-430	Foreign Conservators	Modified to be consistent with 5-716.	
62-5-436	62-5-431	VA Section	Previous legislation amended. Nothing substantive.	This section was adopted in 2016 as Section 62-5-436 and was renumbered in the 2017 version. This section is a distillation of provisions of the Uniform Veterans' Guardianship Act, which was formerly Part 6 of Title 62.
n/a	62-5-432	Special Needs Trust	Allows court to create a special needs trust (even if beneficiary is not incapacitated but beneficiary must be disabled).	21st Century Cures Act/SNT Fairness Act may have made this a bit redundant, but that was passed in late 2016. Best to keep because of future applications or changes in the law.
62-5-433	62-5-433	Settlement of Claims	No substantive changes	The Art. V committee felt like any substantive change to this section needed to be a separate bill and involve input from Circuit Court judges and attorneys working on personal injury cases, etc.

Part 7 - SC Adult Guardianship and Protective Proceedings Jurisdiction Act

No significant/substantive changes. Sarah St. Onge or Katherine Wells can provide a redline version.

Information Gathering Under Article 5 Petitioner's Attorney and Respondent's Attorney

By

Sarah Garland St. Onge

Personal Information:

- Name
- Address
- Contact Information
- Date of Birth
- US Citizen
- Marital Status
- Children

Information Needed Regarding the Petitioner/Proposed Fiduciary

- Who is going to be the Petitioner and who will be the Proposed Fiduciary, if different
- Criminal History (Proposed Fiduciary)
- Credit History (Proposed Fiduciary)
- Proposed Fiduciary's knowledge of Respondent and Duties involved
- Steps taken or intended to take if appointed
- If Protective Order – financial capabilities
 - Experience managing assets
 - Plans for managing Respondent's assets
 - Borrowed anything from the Respondent or received any financial assistance
 - Proposed Fiduciaries financial integrity

Information Needed Regarding the Respondent

- Name
- Address/residence (currently safe?)
- US Citizen
- Date of Birth
- Description
- Relatives
 - Married
 - Children
 - Other relatives
 - Close friends who are like relatives
- Any guardianship/conservatorship already in place

- Care Takers/Others with a “significant interest” in Respondent’s welfare
- Medical condition/diagnosis
 - Nature
 - Cause
 - Degree of incapacity
- Care and treatment needs of Respondent
- Services being received
 - What is currently in place
 - Medicaid status
 - Type
 - On a Medicaid Waiver
 - Could Qualify for a Medicaid Waiver
 - Any Level of Care Determinations
- Services Needed
- APS involvement, if any
- Financial, if known
 - Income
 - Salary/wages
 - Retirement
 - Rental
 - Other
 - Assets
 - Bank accounts
 - IRA/Annuities
 - Stocks
 - Bonds
 - Real Estate
 - Mutual Funds
 - Brokerage Account
 - Retirement/401K
 - Life Insurance
 - Personal Property (Autos, boats, etc)
 - Business Interests
 - Debts Owed to Respondent (owed by Petitioner)
 - Debts Owed by Respondent
 - Any Public Benefits
 - SSI
 - SSDI
 - VA
- Any advance directives

- Healthcare POA
- Financial POA
- Living Will/Declaration of Desire for Nature Death
- Any will/trust
- Methods by which Respondent Communicates
 - Describe ability and method of communications
 - Speech difficulties
 - Can respond to questions
 - Focus concerns
 - Memory concerns
 - Need ASL
 - Language(s) spoken
 - Need/Use a communication device
 - Can only be understood by some
- Medical Professionals
 - Primary Care
 - Other MDs and/or Nurse Practitioners
 - Pharmacy
 - Other medical
 - Mental Health Practitioners
 - Others?
- Educational Professionals (if school age)
 - School
 - Teachers
 - Program
 - Accommodations Made for Student (particularly regarding communication)
- Concerns of Petitioner
 - Healthcare concerns
 - Financial concerns
 - Educational concerns
 - Other
- Needs of Respondent
 - Unmet healthcare needs
 - Unmet financial needs
 - Unmet education needs
 - Other
- Anticipated wishes of the Respondent

Attempts to Meet the Needs of Respondent/Concerns of Petitioner

- What interventions have been attempted

- Prior systems (if any) used for the Respondent or by the Respondent to make decisions or for a surrogate to make decisions
- Healthcare Concerns
 - Accessing services
 - HIPAA release
 - Using POA
 - APS
 - Supported Decision Making – (more info at www.scsupporteddecisionmaking.org)
 - Adult Health Care Consent Act
 - Case or Care Management
- Financial Concerns
 - Financial/Money Management
 - POA
 - APS
 - Supported Decision Making
 - Trusts
 - Representative Payee (social security)
 - Joint Ownership
- Education Concerns (Adult Students with Disabilities Educational Rights Consent Act Provides several alternatives to allow a parent to be involved in IEP process without becoming a guardian)
 - Transition Planning
 - POA for education
 - Surrogate Decision Maker under the Adult Students with Disabilities Educational Rights Consent Act
 - Supported Decision Making
- Communication Concerns
 - Accessing speech therapy
 - Using speech devices
 - HIPAA release for assistance
 - Using a recording device
 - Extra Time for Communication
 - Materials presented in easy to read and understand language

Rights

- Rights (each of these rights may be removed from or retained by the Respondent)
 - Marry/divorce
 - Where to reside
 - Where to travel

- Medical care
- End of life decisions (“Do Not Resuscitate” Order)
- Hospitalization/discharge/transfers
- Disclose confidential information
- Operate a vehicle
- Vote
- Employment
- Education
- Participate in social, religious, or political activities
- Buy, sell, or transfer real or personal property/conduct business
- Contracts
- Lawsuits
- Anything else?
- Rights which can be vested in a guardian
 - Decide residence
 - Travel
 - Consent or refuse to consent to visitation with family, friends, and others
 - Medical
 - End-of-life decisions
 - Hospitalization/discharge/transfer
 - Disclose confidential information
 - Education
 - Employment
 - Contracts
 - Lawsuits
 - Anything else?

Information Regarding Whether there is an Emergency

- Information regarding any safety issues
- Food/Shelter/Healthcare (namely basic needs being met)
- Concerns regarding financial issues

Documentation Needed, if possible

- Respondent
 - Power of Attorney/Advance Directives/Living Will
 - Will, codicil, trust
 - Life Insurance and annuity policies
 - Bank/Brokerage account statements
 - Benefits statement
 - Medicaid Information

- Info on any previous guardianship/conservatorship
- Any current plans of care or education plans (guardians and conservators will be required to develop a plan of care and/or financial plan for the ward)
 - If in school, IEP or 504 plan
 - Nursing home plan of care
 - Medicaid waiver support plan (or similar document)
 - Medication Lists (MAR)
 - Behavior Support Plans
 - Any master treatment plan
 - Any recent discharge plans
 - Any financial plans
 - Estate plans
 - Budgets
- Petitioner
 - Credit Report
 - Criminal background check

Information to Consider for a Care Plan (Not Exhaustive)

- Rights Retained by Individual
- Rights/Powers Vested in the Guardian
- Goals (to extent possible include ward/protected person)
 - Educational
 - Improvement/Maintenance Health
 - Behavior
 - Employment
 - Independence
 - Entity/Person Responsible
- Services Being Received/or needed (include provider, description and any responsible party)
 - At Home
 - Personal Care/Attendant Care
 - Nursing
 - Respite
 - Meal services (meals on wheels)
 - Assistive Technology
 - Medical Equipment
 - Medical Supplies
 - Medications
 - Case/care management (or in an office)
 - In offices

- OT, PT, Speech
 - Psychological services (psycho-social therapy, etc)
 - Medical
 - Behavioral
 - Substance Abuse
 - Employment Services
 - Other
- In facilities
 - Adult Day
 - Other Day
 - Residential
 - Assisted Living/CRCF
 - Nursing
 - DDSN facilities
 - ICF/IID
 - CTH 2
 - CTH 1
 - SLP 2
 - SLP 1
 - CRCF
 - Psychiatric
 - PRTF
 - Hospital
 - Other
 - Substance Abuse
- Living Arrangements (if not included in services being received)
- How will activities of daily living be met (if not already covered)
 - Food
 - Cleaning
 - Personal needs
 - Clothing
 - Supervision
 - Plans for increasing independence/restoration
- Financial
 - Accounts
 - Bills
 - Income
 - Budget
 - Who responsible
 - Plans for increasing independence/restoration

- Attachments
 - NF Care Plan
 - Behavioral Support Plan
 - Medicaid HCBS Case Plan
 - Treatment Plan

**Supported Decision-Making:
Protecting Rights,
Empowering Capacity**

Jonathan
Martinis
Senior Director for
Law and Policy,
The Burton Blatt
Institute at Syracuse
University
Co-Project Director,
National Resource
Center for Supported
Decision-Making

RIGHTS=CHOICES

“I am my choices. I cannot not choose. If I do not choose, that is still a choice. If faced with inevitable circumstances, we still choose *how we are* in those circumstances.”

- Jean Paul Sartre

**RIGHTS=CHOICES
CHOICES=SELF DETERMINATION**

- Life control
- People’s ability and opportunity to be “causal agents . . . actors in their lives instead of being acted upon”

- Wehmeyer, Palmer, Agran, Mithaug, & Martin, 2000

BENEFITS OF SELF-DETERMINATION

People with greater self determination are:

- Healthier
 - More independent
 - More well-adjusted
 - Better able to recognize and resist abuse
- Khemka, Hickson, & Reynolds, 2005; O'Connor & Vallerand, 1994; Wehmeyer & Schwartz, 1998

Why Guardianship?

Guardianship happens when people can't "take care of themselves in a manner that society believes is appropriate."

- Kapp, 1999

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BUT, WHEN GUARDIANSHIP IS NOT NECESSARY

Study after Study shows that when people are denied self-determination they:

- "[F]eel helpless, hopeless, and self-critical" - Deci, 1975
- Experience "low self-esteem, passivity, and feelings of inadequacy and incompetency," decreasing their ability to function - Winick, 1995

**PRACTICE TIP:
FRAME THE ISSUE**

Guardianship is appropriate when people truly cannot make decisions or direct their own lives, even with help

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**PRACTICE TIP:
FRAME THE ISSUE**

Guardianship is never appropriate

JUST

- “Because you have ___”
- “Because you’re ___ years old”
- “Because you need help”
- “Because that’s the way its always been”
- “For your own good

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**FRAME THE ISSUE
WHAT DOES IT MEAN TO HAVE “CAPACITY”**

- People may be able to “meet essential requirements” in some areas but not others.
- Or be able to “meet essential requirements” only with assistance.
- Or be unable to “meet essential requirements” unless they get help understanding them.
- e.g. Salzman, 2010

CAPACITY DOES NOT EXIST IN A VACUUM!

**APPLICATION:
IN RE: TM**

Examining Psychologist says TM needs a guardian because, due to her cognitive impairment, there's no way she can:

- Manage money/doesn't know how much she has in her account or earns
- Take care of her health
- Arrange for housing

NEVER asked if she had any help to do that

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**APPLICATION
IN RE: TM**

The same week as the examiner's report, TM's case manager filed a report detailing how:

- She successfully assists TM with medical care/medication management
- She supported TM to take part in housing programs
- She provided support with budgeting and spending

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**PROVING CAPACITY:
MARGARET "JENNY" HATCH**

Margaret "Jenny" Hatch

Twenty-Nine year old woman with Down syndrome.

- High School graduate
- Lived independently
- Employed for 5 years
- Politically active



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**FRAMING CAPACITY
QUESTIONS TO EXAMINER**

- Independent Living Skills: **“If she had assistance, she may be able to do that”**
- Legal Skills: **“she would need assistance to understand a legal document”**
- Money Management: **She needs “assistance with [a] bank account.”**

**FRAMING CAPACITY:
QUESTIONS TO EXAMINER**

“She’s going to need assistance to make decisions regarding her healthcare, her living arrangements and such like that, she will need someone to guide her and give her assistance.”

**FRAMING CAPACITY:
QUESTIONS TO EXAMINER**

“I believe what would be beneficial to Jenny is that she is afforded the opportunity to have individuals around her who support and love her, who give her the assistance she needs.”

**FRAMING CAPACITY:
WHAT HAS SHE DONE BEFORE?**

How could Jenny execute a Power of Attorney?
“[N]ot only did Jenny have an opportunity to review the documents, but also the attorney had the opportunity to get to know Jenny and understand her capabilities and limitations in understanding legal documents. Based on this series of observations over several visits, the attorney concluded, and we concurred, that Jenny was capable of understanding these documents.”

FRAMING CAPACITY

Jenny Needs Support:

- To Understand Legal Issues
- To Understand Medical Issues
- To Understand Monetary Issues
 - In her Day to Day Life

IN OTHER WORDS

JENNY IS A PERSON

We Are All Jenny Hatch

So...

If people can only make decisions and manage their lives are they “incapacitated”?

ARE YOU?

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WHICH MEANS: ASK A QUESTION

BEFORE seeking or recommending guardianship:

What ELSE Have You Tried?

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**A WAY FORWARD:
SUPPORTED DECISION-MAKING**

“a recognized alternative to guardianship through which people with disabilities use friends, family members, and professionals to help them understand the situations and choices they face, so they may make their own decisions without the “need” for a guardian.”

- Blanck & Martinis, 2015

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THINK ABOUT IT

How do you make decisions?
What do you do if you're not familiar with the issue?

- Taxes?
- Medical Care?
- Auto Repairs?

What Do You Do?

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So, SUPPORTED DECISION-MAKING IS A LOT OF WORDS FOR

Getting help when its needed

Just like you and me

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OR, AS THE NATIONAL GUARDIANSHIP ASSOCIATION SAYS

"Alternatives to guardianship, including supported decision making, should always be identified and considered whenever possible prior to the commencement of guardianship proceedings."

- National Guardianship Association Position Statement on Guardianship, Surrogate Decision Making and Supported Decision Making, 2015

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SUPPORTED DECISION-MAKING CAN HELP PEOPLE “TAKE CARE OF THEMSELVES” AND EXERCISE CAPACITY

- Supported Decision-Making can help people:
- Understand information, issues, and choices;
 - Focus attention in decision-making;
 - Weigh options;
 - Ensure that decisions are based on their own preferences
 - Interpret and/or communicate decisions to other parties.
- Salzman, 2011

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IT’S A PARADIGM, NOT A PROCESS

- There is no “one size fits all” method of Supported Decision-Making.
Can include, as appropriate
- Informal support
 - Written agreements, like Powers of Attorney, identifying the support needed and who will give it
 - Formal Micro-Boards and Circles of Support
- Martinis, Blanck, and Gonzalez, 2015.

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**PRACTICE TIP:
ADVOCATING FOR SUPPORTED DECISION-MAKING**

- Think Broadly:
 - What decisions does the person make now?
 - What help does the person get now?
 - How does the person use help?
- Resources: Missouri Stoplight tool:
[le:///C:/Users/BB1%20ADMIN/Downloads/Guardianship%20Manual%20Appendix%201%20\(1\).pdf](file:///C:/Users/BB1%20ADMIN/Downloads/Guardianship%20Manual%20Appendix%201%20(1).pdf)
- Beyond the Binary Guide:
<https://www.aclu.org/other/beyond-binary-using-supported-decision-making-lens-evaluating-competence>

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**APPLICATION:
IN RE: RYAN KING**

Used Stoplight Tool as a guide to show how Ryan:

- Works
- Banks
- Self-Care
- Cooks
- Social Life

Drafted POA
Guardianship Terminated:
In re: Ryan Herbert King,
Case No. 2003 INT 249
(DC Sp Ct (Probate), 2016).



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**PRACTICE TIP:
ADDRESS THE "REAL ISSUE"**

Ask: Can guardianship REALLY solve the problem?

Can a guardian REALLY make the person:

- Take medication?
- Stay away from "bad" people?
- Not have sex?

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**APPLICATION:
IN RE: TM**

Examiner said TM needs a guardian to:

- Make her take medication
- Make her attend appointments
- Make her get "bad people" out of her life
- Make her get a different job

**HOW CAN ANYONE DO THAT?
THESE ARE NOT THE GUARDIANS OF THE GALAXY!**

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**PRACTICE TIP:
CONSIDER ALL OPTIONS**

- **Presume** guardianship is not needed.
- **Reasons** for guardianship. Why does the person “need” a guardian?
- **Ask** if those problems are temporary or may be addressed in a different way than guardianship. Can medication or therapy help medical or mental health issues? Financial guidance, POA or a rep payee address financial?
- **Community** resources. Identify people, professionals, and organizations that may be able to help address the problem. Consider Centers for Independent Living (“CILs”), Medicare and Medicaid providers, Vocational Rehabilitation agencies, Adult and Disability Resource Centers, and others
- **Team** with the person’s friends, family members, and professionals. Does the person already know people or professionals who do or could provide support and assistance? If so, engage them in the discussion

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**PRACTICE TIP
CONSIDER ALL OPTIONS**

- **Identify** support resources. Work with the person to locate and engage people and professionals who could be part of a support team.
- **Challenges** should be addressed and minimized. Are there team members who have financial or other conflicts of interest? Is there a risk of undue influence, abuse, or neglect? If so, explain these and warn the person.
- **Appoint** the person or people the individual wants to provide support in a way that is consistent with his or her abilities, needs, and preferences. Consider Formal or informal Support Plan, Power of Attorney, Advanced Directive, SDM Agreement, or other plan.
- **Limit** guardianship. As a last resort, if less-restrictive alternatives have not helped the person make his or her own decisions without a guardian, consider whether guardianship is appropriate. If so, the guardianship should be limited to those life areas where the person truly cannot make his or her own decisions, even with support.

- American Bar Association, 2016

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ADDRESS THE UNDERLYING ISSUE:

“Supported Decision-Making has the potential to increase the self-determination of older adults and people with disabilities, encouraging and empowering them to reap the benefits from increased life control, independence, employment, and community integration”

- Blanck & Martinis, 2015

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PRECEDENT

- *In re Peery*, 727 A.2d 539 (Pa. 1999).
- *In re Dameris L.*, 956 N.Y.S.2d 848 (N.Y. Sur. Ct. 2012).
- *Ross v. Hatch*, No. CWF120000426P-03 (Va. Cir. Ct., 2013)
- *In re: Ryan Herbert King*, Case No. 2003 INT 249 (DC Sp Ct (Probate), 2016).
- In re: CB, Docket No. 4-9-16 OsGS, Sp Ct (Family Division)
- In re: DD, File No. 2014-2185, Surrogate's Court (Kings)
- In Re: JB (Indiana): <https://www.pal-item.com/story/news/local/2018/06/13/jamie-beck-makes-state-history-1st-regain-decision-making-rights/698874002/>
- In RE: SH (Kentucky): <http://www.supporteddecisionmaking.org/sites/default/files/suzies-story.pdf#overlay-context=impact-stories/freed-guardianship-kentucky-first-suzie-wins-her-rights-court-using-sdm>

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**BRINGING IT TOGETHER:
IN RE: DD**

In re: DD, File No. 2014-2185, Surrogate's Court (Kings)

- DD was 29 years old with Down syndrome and full scale IQ of 54
- Two doctors certified that bc of his ID, he could not make his own decisions
- Evidence showed he worked, managed his own transportation, social life, personal hygiene

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IN RE: DD

- DD said he wanted to get married
- Mother moved for guardianship
- GAL investigated, said he could make his own decisions with support, recommended alternatives to guardianship
- Held: guardianship denied. There was no evidence that he couldn't make his own decisions, with support.

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IN RE: DD

Held:
“the standard here is not whether the petitioners can make **better** decisions than DD, it is **whether or not DD has the capacity to make decisions for himself with the support he abundantly has.**”

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**INFORMATION AND RESOURCES ON SDM:
NATIONAL RESOURCE CENTER FOR SUPPORTED
DECISION-MAKING**

- www.SupportedDecisionMaking.Org
- Provide information, training, and technical assistance regarding SDM
- Model forms, research materials, educational material, SDM news
- Conduct research to determine links between SDM, self-determination, and quality of life

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JOIN THE CONVERSATION

National Resource Center for Supported Decision-Making:
SupportedDecisionMaking.Org

The Burton Blatt Institute at Syracuse University: BBI.Syr.Edu

Jonathan Martinis, Senior Director for Law and Policy, JGMartin@Law.Syr.Edu

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South Carolina Bar

Continuing Legal Education Division

**Preparing for 2019 Changes to
Guardianship and Protective Proceeding
Cases in Elder Law**

Thursday, November 8, 2018

The Role of the Examiners

Dr. James Bouknight

Dr. Kimberly Kruse

RIGHTS AND POWERS OF WARDS AND GUARDIANS SECTION 62-5-304A

DR. KIMBERLY KRUSE, PsyD
PALMETTO HEALTH
JAMES G. BOUKNIGHT, MD, PhD
ADULT AND GERIATRIC PSYCHIATRY

THE PROPOSED WARD

THE INDIVIDUALS BEING CONSIDERED BY THE COURT TO HAVE A GUARDIAN ARE EXTREMELY DIVERSE
INDIVIDUALS WITH INTELLECTUAL DISABILITY
INDIVIDUALS WITH AUTISM SPECTRUM DISORDER
INDIVIDUALS WITH MENTAL ILLNESS (EXACTLY HOW SEVERE? WHAT DIAGNOSIS?)
INDIVIDUALS WITH MAJOR OR MINOR NEUROCOGNITIVE DISORDERS (WAS CALLED DEMENTIA)
INDIVIDUALS WITH SUBSTANCE ABUSE DISORDERS
INDIVIDUALS WITH MEDICAL ILLNESSES THAT HAVE AFFECTED COGNITION OR THEIR PHYSICAL ABILITY TO FUNCTION

CHALLENGES

- SOME OF THESE DISORDERS ARE STABLE BUT SOME ARE PROGRESSIVE OR MAY, ACTUALLY, NOT BE PERMANENT
- WOULD THE COURT NEED TO REEXAMINE THE INDIVIDUAL EACH TIME THEIR CONDITION CHANGES?
- IN SOME COUNTIES IN SOUTH CAROLINA THERE CAN BE CONSIDERABLE DELAYS BETWEEN THE REQUEST FOR A GUARDIAN, THE EXAMINATION OF THE INDIVIDUAL AND THE ACTUAL HEARING. WOULD THE EXAMINER'S REPORT BE VALID OVER A TIME PERIOD THAT MAY LAST SEVERAL MONTHS? (CASE OF A 94 YO FEMALE WITH DELIRIUM)
- IF SUBSTANCE ABUSE IS THE REASON FOR THE GUARDIAN, WOULD THE COURT NEED TO REEXAMINE THE PATIENT IF THEY OBTAINED SOBRIETY? HOW LONG SHOULD THE PATIENT HAVE BEEN FREE OF SUBSTANCES? WHAT IF THE WARD RELAPSES (AS IS COMMON)?
- MEDICAL ILLNESSES CAN ALSO CAUSE A LACK OF CAPACITY. WHAT WILL BE THE GUIDELINES FOR RECOVERY AND THE RESTORATION OF CAPACITY?

RIGHTS AND POWERS OF WARD AND GUARDIAN

THE NEW LAW DIRECTS THE EXAMINERS TO RECOMMEND TO THE COURT WHICH RIGHTS AND POWERS ARE TO BE REMOVED FROM THE WARD. IF THE RIGHTS ARE NOT REMOVED, THEY ARE RETAINED BY THE WARD.

RIGHTS AND POWERS OF THE WARD AND POSSIBLE ISSUES INVOLVED

MARRY AND DIVORCE

ISSUES WOULD INCLUDE THE TIMING OF THE EVALUATION AND THE DECISION TO MARRY OR DIVORCE. EX: MRS. X IS FOUND TO BE CAPABLE OF DECIDING ON HER MARITAL STATUS IN JANUARY BUT SHE HAS A RAPIDLY PROGRESSIVE NEUROCOGNITIVE DISORDER. IF SHE DECIDES TO DIVORCE IN DECEMBER TO MARRY AN 18 YEAR OLD SHE MET IN A BAR THE NIGHT BEFORE, SHOULD THERE BE FURTHER INTERVENTION?

RESIDE IN A PLACE OF THE WARD'S CHOOSING, AND CONSENT OR WITHHOLD CONSENT TO AN RESIDENTIAL OR CUSTODIAL PLACEMENT

ISSUES WOULD INCLUDE GEOGRAPHIC DISTANCE. IF THE WARD DECIDES SHE/HE DESIRES TO RESIDE IN AUSTRALIA WHILE THE GUARDIAN IS IN SC, IS THAT PERMITTED?

RIGHTS AND POWERS OF THE WARD AND POSSIBLE ISSUES INVOLVED (CONTINUED)

TRAVEL WITHOUT CONSENT OF THE GUARDIAN

ISSUES INCLUDE THE DISTANCE OF THE PROPOSED TRAVEL AND IT'S DURATION. IF THE WARD DECIDES TO TAKE AN AROUND-THE-WORLD CRUISE FOR SIX MONTHS, HOW CAN THE GUARDIAN FULLFIL ANY OF HER/HIS RESPONSIBILITIES? IS THERE ANY REQUIREMENT THAT THE GUARDIAN BE AWARE OF WHERE AND WHEN THE WARD WILL TRAVEL SINCE NO CONSENT IS REQUIRED.

GIVE, WITHHOLD, OR WITHDRAW CONSENT AND MAKE OTHER INFORMED DECISIONS RELATIVE TO MEDICAL, MENTAL, AND PHYSICAL EXAMINATIONS, CARE, TREATMENT AND THERAPIES.

ISSUES WOULD INCLUDE THE CONDITION FOR WHICH THE TREATMENT IS TO ADDRESS. AN EXAMINER, EVEN IF A PHYSICIAN, MAY NOT HAVE THE KNOWLEDGE OF A SPECIFIC DISEASE TO KNOW IF REFUSING TREATMENT IS RATIONAL FOR MENTAL ILLNESS. A KNOWLEDGE OF THE PATIENT'S CONDITION WHEN IT IS NOT TREATED WOULD BE NEEDED TO KNOW IF THE WARD NEEDED TREATMENT. TAKING A MENTAL HEALTH PATIENT OFF OF MEDICATIONS TO ESTABLISH A BASELINE WOULD BE A RISKY PROCEDURE.

RIGHTS AND POWERS OF THE WARD AND POSSIBLE ISSUES INVOLVED (CONTINUED)

- MAKE END-OF-LIFE DECISIONS INCLUDING BUT NOT LIMITED TO, A "DO NOT RESUSCITATE" ORDER OR THE APPLICATION OF ANY MEDICAL PROCEDURES INTENDED SOLELY TO SUSTAIN LIFE, CONSENT OR WITHHOLD CONSENT TO ARTIFICIAL NUTRITION AND HYDRATION
 - ISSUES WOULD INCLUDE, AGAIN, THE TIME PERIOD BETWEEN THE COURT ORDER THAT THE WARD RETAINS THESE RIGHTS AND THE TIME WHEN THE WARD MAKES THE DECISION. MENTALLY ILL PATIENTS MAY HAVE PERIODS OF SEVERE DEPRESSION WHEN THEY DESIRE THEIR LIFE TO END BUT THEY MAY HAVE FUNCTIONED WELL AT THE TIME OF EVALUATION. DOES THE COURT NEED TO INTERVENE AT THE POINT OF EACH DECISION?
- CONSENT OR REFUSE TO CONSENT TO HOSPITALIZATION AND DISCHARGE OR TRANSFER TO A RESIDENTIAL SETTING, GROUP HOME, OR OTHER FACILITY FOR ADDITIONAL CARE AND TREATMENT
 - ISSUES WOULD, AGAIN, INCLUDE THE TIME PERIOD BETWEEN THE COURT ORDER AND THE DECISION DATE. IF THE GUARDIAN BELIEVES THE WARD IS MAKING AN UNSAFE CHOICE, WOULD THE COURT NEED TO BE REINVOLVED? WHAT IF THIS IS AN EMERGENCY SITUATION?

RIGHTS AND POWERS OF THE WARD AND POSSIBLE ISSUES INVOLVED (CONTINUED)

- AUTHORIZE DISCLOSURES OF CONFIDENTIAL INFORMATION
 - ISSUES AGAIN INCLUDE THE TIME PERIOD BETWEEN THE COURT ORDER AND THE AUTHORIZATIONS.
- OPERATE A VEHICLE
 - ISSUES ARE MAJOR FOR THIS RIGHT. I KNOW OF NO EXAMINERS WHO POSSESS THE QUALIFICATIONS TO DETERMINE AN INDIVIDUAL'S ABILITY TO DRIVE. IN SOME CASES (THE PATIENT IS PARALYZED) THIS IS A DECISION THAT AN EXAMINER COULD MAKE BUT IF THERE IS ANY QUESTION, I DON'T BELIEVE AN EXAMINER WOULD OFFER AN OPINION. THIS IS NOT ONLY BECAUSE OF ANY LIABILITY FEARS BUT ALSO OUT OF ACCEPTED PRACTICE. WE DON'T OFFER OPINIONS OUTSIDE OF OUR AREAS OF EXPERTISE.

RIGHTS AND POWERS OF THE WARD AND POSSIBLE ISSUES INVOLVED (CONTINUED)

- VOTE
 - ISSUES AGAIN WITH THE TIMING OF THE EVALUATION, THE ORDER AND THE VOTE. MANY VOTERS, IN MY VIEW, MAKE IRRATIONAL CHOICES. WHO DECIDES THAT A WARD CAN MAKE A REASONABLE CHOICE? I DON'T THINK MOST EXAMINERS HAVE EXPERTISE IN THIS AREA.
- BE EMPLOYED WITHOUT CONSENT OF THE GUARDIAN
 - ISSUES INCLUDE TIMING AS ABOVE BUT THERE IS THE CHANCE FOR SOME CONTRADICTIONS. SUPPOSE THE COURT RULES THAT THE WARD CANNOT DRIVE BUT THEY RETAIN THE RIGHT TO BE EMPLOYED. WHAT IF THEY ARE HIRED TO DRIVE A TRUCK? HOW IS THE GUARDIAN TO REMAIN INFORMED OF THE WARDS ACTIVITIES IF THE GUARDIAN'S CONSENT IS NOT REQUIRED?

RIGHTS AND POWERS OF THE WARD AND POSSIBLE ISSUES INVOLVED (CONTINUED)

- CONSENT TO OR REFUSE EDUCATIONAL SERVICES
 - ISSUES SHOULD BE MINIMAL. IF THE WARD DOES NOT WANT EDUCATIONAL SERVICES, THEY ARE UNLIKELY TO PARTICIPATE EVEN IF THE GUARDIAN DIRECTS THEM TO. I CAN SEE NO REASON WHY THE RIGHT TO CONSENT TO EDUCATIONAL SERVICES WOULD BE DENIED.
- PARTICIPATE IN SOCIAL, RELIGIOUS OR POLITICAL ACTIVITIES
- ISSUES MIGHT INCLUDE THE EXTENT OF PARTICIPATION. IF THE WARD DECIDES TO CHALLENGE MR. TRUMP, THERE MIGHT BE REASON TO QUESTION HER/HIS JUDGEMENT.

RIGHTS AND POWERS OF THE WARD AND POSSIBLE ISSUES INVOLVED (CONTINUED)

- BUY, SELL OR TRANSFER REAL OR PERSONAL PROPERTY OR TRANSACT BUSINESS OF ANY TYPE INCLUDING, BUT NOT LIMITED TO, THOSE POWERS CONFERRED UPON CONSERVATOR UNDER SECTION 62-5-422J
- ISSUES: IF THE WARD HAS THIS RIGHT, WOULD THERE BE NEED A CONSERVATOR? IF THERE IS NO CONSERVATOR, WE AGAIN HAVE THE ISSUE OF TIMING. IF THE EVALUATION AND COURT RULING OCCURRED SEVERAL YEARS OR MONTHS PRIOR TO THE TRANSFER OR TRANSACTION, WOULD THE WARD RETAIN THE ABILITY? DOES THE COURT NEED TO BE REINVOLVED?
- MAKE, MODIFY OR TERMINATE CONTRACTS
- THE ISSUE OF TIMING IS AGAIN IMPORTANT. I HAVE BEEN AN EXPERT WITNESS IN SEVERAL CASES THAT INVOLVE EXACTLY WHEN AN INDIVIDUAL LOSES THE ABILITY TO ENGAGE IN CONTRACTS. THE SAFEST WAY TO APPROACH THIS IS TO HAVE A NEUROPSYCHOLOGICAL EVALUATION AT THE SAME TIME AS THE CONTRACT PARTICULARLY FOR AN INDIVIDUAL WITH A PROGRESSIVE NEUROCOGNITIVE DISORDER.
- BRING OR DEFEND ANY ACTION AT LAW OR EQUITY
- ISSUES: TIMING OF THE EVALUATION, THE COURT RULING AND THE DECISION

SUMMARY

- THE NEW LAW WILL REQUIRE MORE DETAILED EVALUATION THAN OUR CURRENT PROCEDURE. MORE THAN ONE MENTAL HEALTH SPECIALIST MAY BE REQUIRED FOR A THOROUGH EVALUATION, AND SPECIALISTS FROM OTHER FIELDS MAY BE NEEDED (OCCUPATIONAL THERAPISTS FOR DRIVING EVALUATION).
- MANY OF THE INDIVIDUALS CONSIDERED FOR THE NEED FOR A GUARDIANSHIP HAVE PROGRESSIVE NEUROCOGNITIVE DISORDERS SO THEIR ABILITIES CHANGE OVER MONTHS AND YEARS. A DETERMINATION OF THE RIGHTS THAT THEY RETAIN NEEDS TO BE FLUID TO FIT THEIR ABILITIES.
- WE ARE CONCERNED THAT THE NEW LAW MAY PLACE ADDED BURDENS ON THE PROBATE COURTS.
- THERE MAY BE DIFFICULTIES INVOLVED IN FINDING EXAMINERS SINCE THE LEVEL OF EXPERTISE NEEDED TO FULFILL THE REQUIREMENTS OF THE NEW LAW IS MORE THAN THAT CURRENTLY REQUIRED.
- THE NEED FOR DETAILED TESTING AND MULTIPLE EXAMINERS MAY PLACE A BURDEN ON PROPOSED WARDS AND THEIR FAMILIES AND MAY DELAY THE PROCESS.



South Carolina Bar

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**Preparing for 2019 Changes to
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Thursday, November 8, 2018

The Role of the Probate Court

The Hon. Ashley H. Amundson

The Hon. Jacqueline D. Belton

The Hon. Molly D. Edwards

**PREPARING FOR 2019:
CHANGES TO GUARDIANSHIPS and
PROTECTIVE PROCEEDINGS
UNDER THE NEW ARTICLE 5
OF THE PROBATE CODE**

Midlands Technical College, Northeast Campus
Columbia, South Carolina
November 8, 2018

THE ROLE OF THE PROBATE COURT

Ashley H. Amundson, Probate Judge, Colleton County Probate Court

Jacqueline D. Belton, Associate Probate, Judge, Richland County Probate Court

Molly D. Edwards, Associate Probate Judge, Dorchester County Probate Court

PART 1 – PRE-HEARING MATTERS; HEARING AND ORDER

Judge Ashley H. Amundson

I. Fees and Costs

- a. Proceeding in Forma Pauperis - §8-21-800
 - i. Probate judge may grant waivers of filing fees for indigent persons as in other civil cases; court cannot waive fees or court costs associated with value of an estate or conservatorship.
 - ii. *Form: Motion to Proceed In Forma Pauperis; Affidavit of Indigency; Order.*
- b. Authority to Award Fees and Costs - §62-5-105
 - i. Clarifies that court may award fees, costs to any party by another party in formal proceeding.
 - ii. Petitioners responsible for own attorney's fees/costs unless court orders otherwise.

II. Emergency and Temporary Relief - §62-5-108

- a. Emergency Relief: immediate, irreparable injury, loss, or damage before notice can be served and hearing held.
- b. *Forms: Notice, Motion, Order for Emergency Relief; Notice, Motion, Order for Temporary Relief; Physician's Affidavit in Support of Emergency/Temporary Relief; Motion and Order for Appointment of Counsel for Emergency or Temporary Proceedings; and Motion and Order for Appointment of GAL for Emergency or Temporary Proceedings.*

III. Filing for Guardianship - §62-5-303

- a. Must state why guardianship is necessary, including why less restrictive alternatives are not available/appropriate.

- b. Must state any rights to be removed from A.I.I. (checkboxes on form), any restrictions to be placed on A.I.I., and any restrictions to be imposed on G's powers and duties.
- c. Note: anyone seeking appointment must file summons and petition (cannot just answer someone else's petition as a counterclaim).
- d. *Form: Petition for Guardianship*

IV. Filing for Conservatorship

- a. Minors – §62-5-402 allows filing of a verified application in lieu of a formal petition; court discretion to require formal proceeding. Amount increased from \$10,000 to \$15,000 per facility of payment statutory change.
- b. Adults - §62-5-403
 - i. Formal proceeding required;
 - ii. Anyone desiring appointment must file summons & petition (can't counterclaim);
 - iii. Specifies creation of SNT as a reason to file for protective order;
 - iv. Specifies who must be served, given notice;
 - v. Petition must state why less restrictive options are insufficient and what rights should be removed.
- c. *Forms: Application/Petition for Minor Conservatorship/Protective Order; Petition for Conservatorship/Protective Order*

V. Role of the Guardian *ad Litem* - §62-5-106

- a. Expanded role to include duties or former Visitor role.
- b. GAL may be person licensed in SC in law, social work, nursing, medicine, or psychology or who has completed training to court's satisfaction.
- c. Must advocate for best interests of A.I.I.
- d. Must prepare and file GAL Report.

- e. Must conduct an investigation.
 - i. Mandatory tasks: Obtaining, reviewing relevant documents; Meeting with A.I.I.; Investigating the residence or proposed residence; Interviewing all parties; Discerning wishes of A.I.I.; Identifying less restrictive options to G/C; Reviewing criminal background check of proposed G/C; Reviewing credit report of proposed C; Interviewing proposed G/C.
 - ii. Optional tasks: Consulting with others who have interest in A.I.I.'s welfare; Contacting D.S.S. to see if any action regarding A.I.I. or proposed fiduciary; Determining ability of proposed conservator; Interviewing persons who know about A.I.I.'s financial affairs or those of proposed conservator.
- f. *Form: Report of Guardian ad Litem*

VI. Service of Pleadings - §§62-5-303A, -403A, - 303B, -403B

- a. A.I.I. must be served with summons, petition, notice of right to counsel, and physician's affidavits, if any.
- b. All co-respondents must be served summons and petition and physician's affidavits, if any.
- c. Must serve pleadings, along with notice of right to counsel, within 120 days.
- d. Upon receipt of proof of service, court shall:
 - i. After 15 days, appoint counsel if none retained.
 - ii. No later than 30 days, appoint GAL and one examiner (physician).
- e. Attorney may file motion, with affidavit, to be relieved if A.I.I. unable to communicate.

VII. Examiner - §§ 62-5-303D, 5-403D

- a. Must file no later than 48 hours before hearing. Includes: description of incapacity; diagnoses and assessment; evaluation of ability to exercise specific rights; dates of all exams; identity of persons consulted; signature, designation of professional license.
- b. Exam must be within 90 days of report (unless directed otherwise by Court).
- c. Examiner has immunity from liability for breach of confidentiality.
- d. Report is admissible as evidence.
- e. *Form: Examiner's Report/Affidavit*

VIII. Hearing Options - §§ 62-5-303C, 62-5-403C

- a. If the alleged incapacitated individual waives his right to a hearing, the court may require a formal hearing; require an informal proceeding as the court shall direct; or proceed without a hearing.
- b. *Form: Waiver by Alleged Incapacitated Individual*
- c. If no formal hearing is held, the court issues a temporary consent order, which shall expire within 30 days. A ward or protected person may request a formal hearing anytime during that period (notice to be given). If no request made, the court issues a final order upon such terms agreed to by the parties and the GAL.

IX. The Court Order

- a. Order must specify rights retained, lost and those vested in fiduciary. If not specified, rights are retained.
- b. Clear and convincing evidentiary standard.
- c. Guardianship:
 - i. Co-guardians may be appointed.
 - ii. Limited G'ship may be ordered.

- iii. Unless Court orders otherwise, appointment of G terminates agent's power under HCPOA or durable POA (if related to G's powers); G must act consistently with most recent living will and/or HCPOA.
- iv. Rights to be addressed: Marry or divorce; Reside in a place of own choice, consent/withhold consent to placement; Travel without G's consent; Give, withhold, withdraw consent, make decisions re: medical, mental, and physical exams, treatment, care; Make end-of-life decisions; Consent/refuse consent to hospitalization, discharge/transfer to residential setting, group home, etc.; Authorize disclosure of confidential info; Be employed w/o G's permission; Operate vehicle; Vote; Consent/refuse consent to educational services; Participate in social, religious, political activities; Buy, sell, or transfer property or transact business of any kind; Make, modify, terminate contracts; Bring or defend action at law or equity; Any other rights court wants to include.

d. Conservatorship

- i. Rights to be addressed: Buy, sell, or transfer real or personal property or transact business; Make, modify, terminate contracts; Bring or defend any action at law or equity.
- ii. Appointment of conservator terminates POA relating to conservator powers (unless order says otherwise).

Part 2 - GUARDIANSHIPS

Associate Judge Jacqueline D. Belton

Richland County Probate Court

1701 Main Street, Room 207

Columbia, S.C. 29201

I. INITIATING THE ACTION

- A. New Code section - S.C. Code Ann. § 62-5-303
- B. Filing of Petition for Appointment of Guardian or filing of Dual Petition for Guardianship and Conservatorship/Protective Order
- C. Rights to be removed must be plead and there must be consideration of what “supports and assistance” can be used to minimize removal of rights and autonomy, and how “supported decision-making” can be employed as a tool to encourage autonomy and self-choice.
- D. As Judge Amundson discussed, a hearing may not be necessary.

II. COURT MANAGEMENT OF THE CONTESTED CASE

- A. Proper service of process on the statutorily required parties, including the A.I.I., is required.
- B. Service must be accomplished within 120 days.
- C. New Code section S.C. Code Ann. § 62-5-303A, § 62-5-308, rule 4 SCRCP; Acceptance of Service, Renunciation/Nomination of Guardian/Conservator.

III. CRITERIA IN THE APPOINTMENT OF A GUARDIAN

- A. The new statute, S.C. Code Ann. § 62-5-106 requires the GAL to review the criminal background check of the proposed guardian or co-guardians.

- B. Mediation can be used to try to reach agreement in a contested case. However, before mediation the issue of capacity/incapacity must be decided by the court and the proposed guardian or co-guardians must be vetted and qualified by the GAL and the court.

IV. REPORTING REQUIREMENTS FOR GUARDIANSHIP and HOW TO
TEMPORARILY DELEGATE THE GUARDIAN'S POWER

S.C. Code Ann. § 62-5-309

- A. Plan of Care for Ward
- B. Annual Report of Guardian/Co-Guardian
- C. Special POA – Temporary Delegation of Guardian's Power

PART 3 - CONSERVATORSHIPS

Associate Judge Molly D. Edwards

YOUR CLIENT WAS APPOINTED AS CONSERVATOR . . . NOW WHAT?

- I. Sign a Conservator Contract and File it with the Court.
 - The Conservator Contract (Form #___GC) is a sworn statement signed by the Conservator that outlines all the duties and responsibilities required of a Conservator as provided for by the South Carolina Probate Code.

- II. Secure a Bond as Directed by the Court.
 - S.C. Code § 62-5-409 requires that the Probate Court require a bond, except upon a finding of good cause.
 - Upon appointment, the Conservator shall file:
 - An Affidavit of Conservator Regarding Bond (Form #___GC); and
 - A Bond, executed by the Conservator and the corporate surety, for the value of the personal property of the Protected Person and the income expected for the Protected Person during the next calendar year.

- III. Establish a Conservatorship Bank Account.
 - RESTRICTED ACCOUNT: The Probate Court may permit a reduction of the bond amount if some or all of the conservatorship liquid assets are placed in a restricted account that prevents distributions without a Court Order. See S.C. Code § 62-5-409.
 - UNRESTRICTED ACCOUNT: The Probate Court may authorize an unrestricted account to be used by the Conservator for expenses on behalf of the Protected Person. All activity in this account must be reported by the Conservator on the Annual Conservator Report. See S.C. Code § 62-5-409.

- IV. Complete a Financial Plan (if required by the Court).
 - The Financial Plan (Form #___GC) sets forth how the Conservator plans to manage, expend, and distribute the assets of the Protected Person's estate. See S.C. Code § 62-5-414(B)
 - The Plan shall be revised as the needs and circumstances of the Protected Person change.
 - The Court will approve, disapprove, or modify the plan.
 - The Conservator must provide a copy of the Financial Plan to either (i) the Protected Person's Guardian, if any, or (ii) the Protected Person, if there is no Guardian.

V. Complete an Inventory and Appraisal.

- Within 30 days of appointment, the Conservator shall file a complete Inventory and Appraisal (Form #550GC) of the Protected Person's estate.
- The Conservator must provide a copy of the Inventory to either (i) the Protected Person's Guardian, if any, or (ii) the Protected Person, if there is no Guardian.

VI. Complete a Conservator Report on an Annual Basis.

- Pursuant to S.C. Code § 62-5-416, a Conservator Report must be submitted:
 - Annually;
 - Upon the Conservator's resignation or removal;
 - Upon the termination of the Protected Person's minority or disability;
 - Upon the death of the Protected Person; and
 - At any other times as the Court directs.
- There are three (3) types of Conservator Reports:
 - Long Form (Form #___-LF GC) – for more complexed conservatorships;
 - Short Form (Form #___-SF GC) – for a standard conservatorship; and
 - Minor Form (Form #___GC) – for minor conservatorships.
- Report includes:
 - Accounting of receipts and disbursements;
 - List of assets under the Conservator's control and their location;
 - Recommendations for changes in the Financial Plan; and
 - The Conservator's opinion regarding the continued need for the conservatorship and scope of the conservatorship.
- The Conservator must provide a copy of the Conservator Report to the Protected Person if he has attained the age of 14 and has sufficient mental capacity to understand the report and (i) to any parent with whom the Protected Person resides or (ii) to the Guardian of the Protected Person.

VII. Terminating the Conservatorship.

- S.C. Code § 62-5-428(A)(1) provides that a conservatorship may be terminated through an **informal process** by filing a final Conservator Report and an Application for Relief (Form #___GC) if:
 - The conservatorship has a net aggregate amount of less than \$15,000;
 - The Protected Person dies;
 - The sole reason for the conservatorship is the minority of the Protected Person, and he attains the age of 18 or is emancipated by a court order; or
 - Also seeking the restoration of the Protected Person's capacity.
- S.C. Code § 62-5-428(B)(1) provides that a conservatorship may also be terminated for any reason through a **formal process** by filing a Summons and Petition for Formal Relief (Form #571GC) and a final Conservator Report.
- If a Protected Person dies, the Conservator shall:

- Deliver to the Court for safekeeping any Will of the deceased Protected Person in the Conservator's possession;
- Inform the Personal Representative or a beneficiary named in the Will of the delivery; and
- Retain the conservatorship estate for delivery to the appointed Personal Representative.



South Carolina Bar

Continuing Legal Education Division

**Preparing for 2019 Changes to
Guardianship and Protective Proceeding
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Thursday, November 8, 2018

Miscellaneous Article 5 Topics

Andrew J. Atkins

**ARTICLE 5 POTPOURRI:
PROTECTIVE PROCEEDINGS FOR MINORS,
IN FORMA PAUPERIS, AND TESTAMENTARY NOMINATIONS**

by Andrew J. Atkins, Esq.
Millender Elder Law LLC

The new Article 5 of the South Carolina Probate Code will bring about changes to protective proceedings for minors, indigents, and testamentary guardians.

PROTECTIVE PROCEEDINGS FOR MINORS

The old Article 5 had little to say about protective proceedings for minors. Under § 62-5-401(1), after service of the summons and petition and notice of hearing, the court could appoint a conservator or make other protective order for a minor if the court determined that a minor owns money or property that requires management or protection which cannot otherwise be provided, has or may have business affairs which may be jeopardized or prevented by his minority, or that funds are needed for his support and education and that protection is necessary or desirable to obtain or provide funds. Section 62-5-407(a) set out some additional procedures where minors are concerned, such as the appointment of a Guardian ad Litem.

The new §62-5-402 goes into more detail, setting out an informal proceeding for protective orders relating to the estate and affairs of minors.

§62-5-402(A) explains when a protective order is needed:

SECTION 62-5-402. Protective proceedings; minors.

Section effective January 1, 2019. See, also, Sections 62-5-401 and 62-5-407 effective until January 1, 2019.

(A) The appointment of a conservator or issuance of a protective order may be made in relation to the estate and affairs of a minor if:

- (1) a minor owns real or personal property that requires management or protection;
- (2) a minor has or may have business affairs that may be adversely affected by a lack of effective management; or
- (3) it is necessary to obtain and administer funds for the health, education, maintenance, and support of the minor.

§62-5-402(B) explains the informal process:

(B) The appointment of a conservator or issuance of a protective order for a minor may be made in the following manner:

(1) By filing a verified application setting forth the following information:

(a) the interest of the applicant;

(b) the name, age, current address, and contact information for the minor;

(c) physical location of the minor during the six-month period immediately preceding the filing of the application and if the minor was not present in South Carolina for that period, sufficient information upon which the court may determine it has initial jurisdiction;

(d) the name and address of the non-applicant parent of the minor, the person with whom the minor resides, and other persons as the court directs;

(e) any person who has equal or greater priority for appointment as the person whose appointment is sought pursuant to Section 62-5-408;

(f) the name and address of the person whose appointment is sought and the basis of priority for appointment;

(g) the reason why the appointment is necessary; and

(h) an estimate of the value of the minor's assets and the source of the minor's income, if any.

(2) Upon consideration of the application and in the court's discretion, with or without a hearing, if the court concludes it is in the best interests of the minor, the court shall issue its order of appointment or protective order.

§62-5-402(C) gives the court the authority to require a formal process:

(C) The court may at any time require the filing of a summons and petition for the appointment of a conservator or for issuance of a protective order, and the appointment or order must be made in the following manner:

(1) the petition shall set forth the information required in subsection (B);

(2) the summons and petition must be served on the minor, the minor's parents whose identity and whereabouts are known or reasonably ascertainable, the person or persons having custody of the minor, and other persons the court directs; and

(3) after the time has elapsed for the filing of a response to the petition and a

hearing, if the court concludes it is in the best interests of the minor, the court shall issue its order of appointment or a protective order.

§62-5-402(D) addresses bonds and restricted accounts:

(D) Except upon a finding of good cause, the court shall require the conservator to furnish bond, or establish a restricted account, or both pursuant to Section 62-5-409.

§62-5-402(E) allows limitations on distributions to prevent minors from being disqualified from government benefits:

(E) If a minor is receiving needs-based government benefits the court may limit access to the minor's funds to prohibit payments that would disqualify the minor from receipt of benefits.

§62-5-402(F) allows the court to appoint a Guardian *ad Litem*:

(F) At any time and in any proceeding if the court determines the interests of the minor are not or may not be adequately represented, it may appoint a guardian ad litem to represent the minor.

IN FORMA PAUPERIS

A revisions to the Probate Code specifically grants courts the authority to grant motions to proceed *in forma pauperis*. Under the old Article 5, courts were divided over whether they had the authority to waive fees for indigents. The new §62-1-112 states:

SECTION 62-1-112. Inherent power of court.

Section effective January 1, 2019.

The inherent power of the court to impose penalties for contempt extends to all filing requirements, proceedings, judgments, and orders of the court. The court has the power to grant a motion to proceed in forma pauperis.

TESTAMENTARY NOMINATION OF GUARDIAN

Under the old Article 5, a guardian could be *appointed* in a decedent's Will. Under the new Article 5, a guardian may be *nominated* in a Will. Both a parent and a spouse can nominate a guardian for an incapacitated individual. New §62-5-301 states:

SECTION 62-5-301. Testamentary nomination of guardian for incapacitated individual.

Section effective January 1, 2019. See, also, Section 62-5-301 effective until January 1, 2019.

(A) The parent of an alleged incapacitated individual may by will nominate a guardian for an alleged incapacitated individual. A testamentary nomination by a parent gives the nominee priority pursuant to Section 62-5-308 in any proceeding to determine incapacity and appoint a guardian. A testamentary nomination by a parent gives priority to the nominee to make health care decisions for the alleged incapacitated individual pursuant to Section 44-66-30. Such nomination creates priority under Sections 62-5-308 and 44-66-30 when the will is informally or formally probated, if prior to the will being probated, both parents are deceased or the surviving parent is adjudged incapacitated. If both parents are deceased, the nomination by the parent who died later has priority unless it is terminated by the denial of probate in formal proceedings.

(B) The spouse of an alleged incapacitated individual may by will nominate a guardian for an alleged incapacitated individual. A testamentary nomination by a spouse gives the nominee priority pursuant to Section 62-5-308 in any proceeding to determine incapacity and appoint a guardian. A testamentary nomination by a spouse gives priority to the nominee to make health care decisions for the alleged incapacitated individual pursuant to Section 44-66-30. Such nomination creates priority under Sections 62-5-308 and 44-66-30 when the will is informally or formally probated. An effective nomination by a spouse has priority over a nomination by a parent unless the nomination is terminated by the denial of probate in formal proceedings.

(C) This State shall recognize a testamentary nomination under a will probated at the testator's domicile in another state.

The testamentary nominee also gets priority to be appointed by the court under §62-5-308. A testamentary nominee by a spouse has the fourth highest priority, while a testamentary nominee of a parent has the sixth highest priority.

For Wills drafted prior to January 1, 2019, the court has the discretion to follow either the previous testamentary *appointment* process or the new testamentary *nomination* process.

The PRACTICAL Tool¹

by Andrew J. Atkins, Esq.
Millender Elder Law LLC

The PRACTICAL Tool, produced by the American Bar Association, is a guide to help identify less restrictive alternatives to guardianships and protective proceedings. The PRACTICAL Tool is a good fit for the new Article 5, with its emphasis on the rights and abilities of an individual. Attorneys representing petitioners, attorneys representing respondents, and attorneys who serve as Guardian *ad Litem* can use these steps to identify the less restrictive alternatives.

P: PRESUME guardianship is not needed.

The first step of PRACTICAL is to *presume that guardianship or conservatorship is not needed*. For the attorney, this means considering whether alternatives exist which might take the place of a guardianship or protective proceeding. Examples include health care powers of attorney, durable powers of attorney for financial matters, trusts, and supported decision-making.

The new Article 5 specifically calls for identifying the less restrictive alternatives wherever possible. For example, §62-5-101(14) defines less restrictive alternatives:

(14) "Less restrictive alternative" means the provision of support and assistance as defined in this section which maximizes the alleged incapacitated individual's capacity for self-determination and autonomy in lieu of a guardianship or conservatorship.

In §62-5-106(A)(2)(f), the Guardian *ad Litem* is specifically tasked with doing an independent investigation and must identify any less restrictive alternatives to guardianship and conservatorship.

R: Clearly identify the REASONS for concern.

The attorney should determine the specific areas of concern for which a guardianship or protective proceeding might be necessary. For this, the attorney should consider whether the individual can meet certain functional needs (adapted from the University of Missouri Kansas City, Institute for Human Development, MO Guardianship: Understanding Your Options & Alternatives, <http://moguardianship.com>):

1. Money Management – managing assets and recognizing exploitation, paying bills, dealing with bank accounts

¹ Portions of these materials are adapted from *PRACTICAL Tool for Lawyers: Steps in Supported Decision-Making*, published by the American Bar Association. Reprinted by permission of the American Bar Association. All rights reserved.

2. Health Care – making decisions about medical treatment, taking medications, maintaining hygiene and diet
3. Employment – searching for and maintaining employment
4. Relationships – appropriate behavior with friends, family, and co-workers; safe decisions about sexual relationships
5. Community Living – living independently, accessing community resources
6. Personal Decision-making – understanding legal documents, communicating wishes
7. Personal Safety – avoiding dangers and abuse, know what to do in an emergency

A: ASK if a triggering concern may be caused by temporary or reversible conditions.

The attorney should consider what factors might affect the individual's ability to make decisions, and whether there are ways to reverse the condition or at least postpone a guardianship until the condition improves. Some conditions which may be temporary or reversible include:

1. Short-term Medical Conditions – Urinary tract infection (UTI), dehydration, malnutrition, oral health problems, chronic or acute pain, brain injury, delirium
2. Sensory Deficits – vision or hearing loss
3. Side Effects of Medication
4. Psychological Conditions – stress, depression
5. Cultural Barriers – language or cultural differences

C: Determine if concerns can be addressed by connecting the individual to family or COMMUNITY resources.

The attorney should try to determine what it would take for the individual to be able to make decisions or deal with a concern. Supports may come from the community, such as in-home care, a personal attendant, adult day care, home-delivered meals, care management, or financial management. Support may also come from friends and family, assisting with healthcare or financial needs, communication problems, or recognizing physical or financial abuse. The concerns may be alleviated by making accommodations to the individual's home, assistive technology, or moving to a different environment, such as assisted living or a group home.

T: Ask the individual whether he or she has a TEAM to help with decisions.

The attorney should determine whether there are already people assisting the individual, such as friends, family members, co-workers, or other professionals, and whether they can provide the support the individual needs.

I: IDENTIFY areas of strengths and limitations in decision-making if the person does not have an existing team.

The attorney should determine whether the individual can make the decision with support or whether they can appoint someone to do it for them. The ability to make consistent decisions, to understand the consequences of a decisions, and to articulate the reasoning for a decision are critical. The attorney may want to seek an opinion from a doctor with the individual's consent.

C: Address any potential CHALLENGES presented by the identified supports and supporters.

If there are supporters or a support system to assist the individual, the attorney should look for any challenges which might render them ineffective.

For support systems, these challenges may include the individual's eligibility for the support, the cost of accessing the support, or the location of the support. Are there any potential government benefits which might be jeopardized?

If there are potential supporters, the attorney should consider whether they are trustworthy and reliable. Is there is a risk of unduly influencing or exploiting the individual? Do the potential supporters present any risk of physically or financially abusing the individual? Do the potential supporters understand the individual's healthcare needs? Are they financially and emotionally stable? These are just some of the questions the attorney should think about.

A: APPOINT a legal supporter consistent with the person's values and preferences.

Consider whether one or more individuals can be appointed to act on behalf of the individual. Examples include an Agent under a Health Care Power of Attorney or Durable Power of Attorney; a Trustee; a Representative Payee for Social Security; and a VA fiduciary.

L: LIMIT any necessary guardianship.

If a guardianship or conservatorship is the only choice, it should be limited as much as possible. The new Article 5 focuses on the idea of limited guardianships and conservatorship wherever possible. Petitioners will no longer be able to ask for a "full guardianship" or "full conservatorship." Instead, Petitioners must be specific about what rights will be affected by the

proposed guardianship or conservatorship. According to the new §62-5-303(6), the petition for a finding of incapacity, appointment of guardian, or both, must state:

(6) reasons why a guardianship is necessary, including why less restrictive alternatives are not available or appropriate, and a brief description of the nature and extent of the alleged incapacity;

And according to §62-5-303(7), the petition must also include:

(7) a statement of any rights that a petitioner is requesting be removed from the alleged incapacitated individual, any restrictions to be placed on the alleged incapacitated individual, and any restrictions sought to be imposed on the guardian's powers and duties;

Once the guardianship is established under the new Article 5, the guardian must file a plan of care and try to assist the ward in becoming more independent. A petition for the appointment of a conservator or issuance of a protective order has similar requirements in §62-5-403 and, if a conservatorship is established, the conservator must make a financial plan, like the guardianship's plan of care.

For more information about the PRACTICAL Tool and to download a resource guide and checklist, visit the ABA's website:

https://www.americanbar.org/groups/law_aging/resources/guardianship_law_practice/practical_tool/



South Carolina Bar

Continuing Legal Education Division

**Preparing for 2019 Changes to
Guardianship and Protective Proceeding
Cases in Elder Law**

Friday, November 9, 2018

**The ABC's of Defending a Guardianship Action
or Protective Proceeding**

Please see materials under Day 1 The Role of Respondent's Attorney

Sarah Garland St. Onge

Jonathan Martinis

**Guardianship,
Supported Decision-
Making, and Quality
of Life**

Jonathan
Martinis
Senior Director for
Law and Policy,
The Bartoo Blatt
Institute at Syracuse
University
Co-Project Director,
National Resource
Center for Supported
Decision-Making

THERE ARE STUPID QUESTIONS

What's Your Favorite
Right?

RIGHTS=CHOICES

"I am my choices. I cannot not choose.
If I do not choose, that is still a choice.
If faced with inevitable circumstances,
we still choose *how we are* in those
circumstances."
- Jean Paul Sartre

**RIGHTS=CHOICES
CHOICES=SELF DETERMINATION**

- Life control
- People’s ability and opportunity to be “causal agents . . . actors in their lives instead of being acted upon”

- Wehmeyer, Palmer, Agran, Mithaug, & Martin, 2000

BENEFITS OF SELF-DETERMINATION

People with greater self determination are:

- Healthier
- More independent
- More well-adjusted
- Better able to recognize and resist abuse

- Khemka, Hickson, & Reynolds, 2005; O’Connor & Vallerand, 1994; Wehmeyer & Schwartz, 1998

ANOTHER STUPID QUESTION

Are Your Rights Worth ANYTHING If You’re Not Allowed to Use Them?

AND YET: 2,000 YEARS AND COUNTING

- **Ancient Rome:** “Curators” appointed for older adults and people with disabilities.
- **5th Century Visigothic Code:** “people insane from infancy or in need from any age . . . cannot testify or enter into a contract”
- **Feudal Britain:** divided people with decision-making challenges into “idiots” and “lunatics” and appointed “committees” to make their decisions

GUARDIANSHIP IN THE U.S.

“Plenary” or “Full” Guardianship

- Gives the Guardian power to make ALL decisions for the person.
 - Used in the **VAST** Majority of cases
 - “As long as the law permits plenary guardianship, **courts will prefer to use it.**”
- Frolik, 1998

AS A RESULT

Guardians have “substantial and often complete authority over the lives of vulnerable [people].”
4 NAELA J. 1, 7 (2008).

This includes power to make the most basic health, personal, and financial decisions.
AARP, *Guardianship Monitoring: A National Survey of Court Practices* 1-2 (2006).

WHEN PEOPLE ARE DENIED LIFE CONTROL

Study after Study shows:

- “[F]eel helpless, hopeless, and self-critical”
- Deci, 1975
- Experience “low self-esteem, passivity, and feelings of inadequacy and incompetency,” decreasing their ability to function
- Winick, 1995

THE PROBLEM

“The typical ward has fewer rights than the typical convicted felon By appointing a guardian, the court entrusts to someone else the power to choose where they will live, what medical treatment they will get and, in rare cases, when they will die. It is, in one short sentence, the most punitive civil penalty that can be levied against an American citizen.”
- House Select Committee on Aging, H.R. Rpt. 100-641 (opening statement of Chairman Claude Pepper)

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EVERYONE has the Right to Make Choices

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WHERE DO WE GO FROM HERE?

Guardianship **MAY** be Needed:

- In emergency situations when
 - The person is incapacitated and cannot give consent
 - The person did not previously identify how decisions should be made in that situation
 - There is no one else available in the person’s life to provide consent through a Power of Attorney, Advanced Directive, or other means
- To support People:
 - Who face critical decisions and have no interest in or ability to make decisions
 - Who need immediate protection from exploitation or abuse

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GUARDIANSHIP IS NEVER NEEDED

JUST

- “Because you have ____”
- “Because you’re ____ years old”
- “Because you need help”
- “Because that’s the way its always been”
- “For your own good”

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EVERYONE has the Right to Make Choices 13

BUT WE MEANT WELL

“Experience should teach us to be most on our guard to protect liberty when the Government’s purposes are beneficent. . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.”
Olmstead v. U.S., 277 U.S. 438 (1928)

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EVERYONE has the Right to Make Choices 14

RESEARCH

People under guardianship can experience a “**significant negative impact** on their physical and mental health, longevity, ability to function, and reports of subjective well-being”
- Wright, 2010

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EVERYONE has the Right to Make Choices 15

ON THE OTHER HAND

People with disabilities who exercise greater self-determination have a **better quality of life**, more independence, and more community integration.

- Powers et al., 2012; Shogren, Wehmeyer, Palmer, Rifenshark, & Little, 2014; Wehmeyer and Schwartz, 1997; Wehmeyer & Palmer, 2003

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AND

Women with intellectual disabilities exercising more self-determination are **less likely to be abused**


- Khemka, Hickson, and Reynolds, 2005

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AND

People with Intellectual and Developmental Disabilities who do **NOT** have a guardian are more likely to:

- Have a paid job
- Live independently
- Have friends other than staff or family
- Go on dates and socialize in the community
- Practice the Religion of their choice

2013-2014 

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So, WHERE DO WE GO FROM HERE?

If:

- We **KNOW** that some people need more support as they age or due to disability
- We **KNOW** that guardianship can result in decreased quality of life and
- We **KNOW** that increased self-determination leads to improved quality of life

Then we need a means of **INCREASING** self-determination while **STILL** providing support

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**A WAY FORWARD:
SUPPORTED DECISION-MAKING**

“a recognized alternative to guardianship through which people with disabilities use friends, family members, and professionals to help them understand the situations and choices they face, so they may make their own decisions without the “need” for a guardian.”

- Blanck & Martinis, 2015

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EVERYONE has the Right to Make Choices 20

IN COMMON

ALL Forms of Supported Decision-Making recognize:

- That **EVERYONE** has the Right to Make Choices to the Maximum of Their Ability;
- That you can get help exercising your Right to Make Choices without giving it up; and
- That there are as many ways to give and get help as there are people

- Dinerstein, 2012.

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EVERYONE has the Right to Make Choices 21

OR, AS THE NATIONAL GUARDIANSHIP ASSOCIATION SAYS

“Alternatives to guardianship, **including supported decision making**, should always be identified and considered whenever possible **prior to the commencement of guardianship proceedings.**”

- National Guardianship Association Position Statement on Guardianship, Surrogate Decision Making and Supported Decision Making, 2015

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SUPPORTED DECISION-MAKING AND SELF DETERMINATION

“Supported Decision-Making has the potential to increase the self-determination of older adults and people with disabilities, encouraging and empowering them to reap the benefits from increased life control, independence, employment, and community integration”

- Blanck & Martinis, 2015

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THE ELEPHANT IN THE ROOM: SAFETY

NOTHING: Not Guardianship, Not Supported Decision-Making is 100% "Safe."

HOWEVER: Supported Decision-Making Increases Self-Determination (Blanck & Martinis, 2015), which is correlated with increased Safety (Khemka, Hickson, & Reynolds, 2005).

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SIGNS AND SIGNALS –ABUSE, NEGLECT, EXPLOITATION

- Injuries
- Unusual bruising or abrasions
- Fear or nervousness
- Withdrawal Basic needs not being met
- Bills not being paid
- Living below means
- Unexplained changes in lifestyle

REMEMBER: PROTECTION IS AVAILABLE

If you see Abuse, Neglect or Exploitation:

Neglect

- Police
- APS
- CPS
- Attorney General’s Fraud Unit
- Protection and Advocacy System

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BUT REMEMBER: ADULTS ARE ALLOWED TO MAKE BAD DECISIONS

- Health
- Money
- Love
- Living Conditions

REMEMBER THE CHALLENGE

EVERY great advance in civil rights fundamentally changed the way “things have always been”

REMEMBER THE OBSTACLES

Change is **HARD**
“We were not promised ease. The purpose of life . . . is not ease. **It is to choose, and to act upon the choice.** In that task, we are not measured by outcomes. We are measured only by daring and effort and resolve.”
- Stephen R. Donaldson

REMEMBER THE GOAL

EVERYONE making decisions to the maximum of their ability
EVERYONE giving and getting the support they need to live their best life
EVERYONE the “causal actor” in their lives
“If we change the culture, we will change the world.”
- Gustin & Martinis, 2016

JOIN THE CONVERSATION

National Resource Center for Supported Decision-Making:
SupportedDecisionMaking.Org

The Burton Blatt Institute at Syracuse University: BBI.Syr.Edu

Jonathan Martinis, Senior Director for Law and Policy, JGMartin@Law.Syr.Edu

National Resource Center for Supported Decision-Making
EVERYONE has the Right to Make Choices



South Carolina Bar

Continuing Legal Education Division

Preparing for 2019 Changes to Guardianship and Protective Proceeding Cases in Elder Law

Friday, November 9, 2018

Introduction to Less Restrictive Alternatives to Guardianship

Michael J. Polk

Charlie Walters

Carol Page

Sarah St. Onge

The Hon. Heather J. Galvin

THIRTY THINGS ABOUT DURABLE POWERS OF ATTORNEY
AND TRUSTS

by Michael J. Polk, Esquire

November 9, 2018

Thirty things works out to two per minute, which is not too shabby!!

DURABLE POWERS OF ATTORNEY

1. There was a major rewrite of the South Carolina power of attorney laws in 2015 to conform to the Uniform Power of Attorney Act, which has been passed by 26 state and more coming.
2. The person acting under the power is an Agent (they used to be called Attorneys-in-Fact). The person signing it is the Principal. You can name more than one Agent acting jointly or name successor Agents
3. A Durable Power of Attorney can be used to delegate financial decisions in the event the principal is incapacitated or unavailable—someone stands in your shoes for all (or some) financial matters. So, if you can't make your own decisions or handle your own affairs, someone can access your stuff, pay your bills, and keep your affairs in order.
4. When people refer to a financial power of attorney, they usually mean a Durable Power of Attorney. However, some old school attorneys put health care powers in their Durable Powers of Attorney.
5. A big advantage to having a power of attorney is that you can avoid the cost and time involved in filing for conservatorship and the administrative requirements after it is set up. (See 3 above). It is probably the cheapest, most cost-effective method to hedge against incapacity.
6. An Agent owes the principal a fiduciary duty to act with the utmost loyalty in the best interest of the Principal. The Agent works for the Principal, not the other way around!
7. A Durable Power of Attorney can provide that it is not affected by incapacity (that is what is meant by durable) or it is only effective in times of incapacity (sometimes called a springing power of attorney). Springing powers of attorney are great in theory but difficult in practice.

8. The durable part used to have to be specified – “This power of attorney is not affected by physical disability or mental incompetence of the principal” but if it has been executed since 2015 it is implied.
9. A person can execute a power of attorney if they are able to understand the nature of the transaction and its effect upon his or her legal rights and interests at the time of execution. Prior planning is essential.
10. The power of attorney should be recorded in the register of deeds in the county where the Principal lives or owns property to ensure its validity and durability. SC is only one of a couple of states to require filing.
11. The power of attorney generally must be recorded if it is used for a real estate transaction.
12. The power of attorney generally terminates if a guardian or conservator is appointed.
13. A power of attorney can be revoked by recording a revocation, executed and filed in the same manner and place as the power of attorney.
14. The power of attorney terminates upon the death of the principal.
15. Powers of attorney are much cheaper than trusts.
16. One big advantage is to avoid the cost and time involved in securing a guardianship or conservatorship.
17. Some states have a statutory form financial power of attorney. South Carolina does not have a statutory financial power of attorney (we do have a statutory health care power of attorney).
18. Does the Agent have the power to do something? Read the power of attorney. Some things, like the power to gift, must be specified. It may be a good idea, but it may not.
19. The appointment of an Agent must be considered very carefully. If you don't trust someone, for goodness sake don't name them!

TRUSTS

20. Trusts are not a cure to everything financially wrong with someone. Don't eat a free rubber chicken dinner at some hotel on a random weekend and pay

thousands of dollars for a trust kit. In its simplest terms, a settlor or trustor transfers property to a trustee for the benefit of a third party (beneficiary). The person creating the trust needs to know (1) their estate, (2) the objects of their affections, and (3) to whom they wish to give his property. The capacity to understand as opposed to actual knowledge or understanding is sufficient. It is a lower standard than that required to sign a deed or contract.


21. Once again, if it has been properly set up, you can avoid the cost and expense associated with setting up a conservatorship, because when you can't handle your own affairs, someone can access the trust principal and income to make sure bills are paid and affairs are kept in order,
22. The trustee has a fiduciary duty to care for the property even more carefully than their own property.
23. A trust can be revocable (it can be revoked) or irrevocable (it is permanent). In either case, to create, amend, revoke, or add property to a revocable trust,
24. You need to look at a trust's terms to figure out who gets what when.
25. A trust that is found in a will is called a testamentary trust.
26. A pour over will pours the probate estate into a trust.
27. A revocable living trust usually has the settlors fund a trust, and during their lifetime they are also the trustees and the beneficiaries. At any point, they can take everything out of the trust. When they can't act as trustee, typically someone else takes over. When the last of the settlors dies it is usually, but not always distributed out.
28. Some people use a trust for asset protection, some for tax reasons, some to avoid or minimize probate and for greater privacy.
29. A special needs trust, also known in some jurisdictions as a supplemental needs trust, is a specialized trust that allows the disabled beneficiary to enjoy the use of property that is held in the trust for his or her benefit, while at the same time allowing the beneficiary to receive essential needs-based government.
30. Trusts can be a pain. They involve a lot of retitling accounts and real estate. They also may have different tax and other reporting requirements. There is follow up work involved. So, administrative costs should be considered when establishing a trust. Also, most banks don't want to be your trustee.

BONUS FACT (NO EXTRA CHARGE)

31. If you are a beneficiary of a trust, and the trustee won't keep you informed, or if you think that the trustee is stealing from you, or if the Agent under a power of attorney is abusing their power or breaching their fiduciary duty, you can go to probate court to try to get some relief.


THE SC SUPPORTED DECISION MAKING PROJECT

Charlie Walters, Director of Transition Programs at Able SC



WHAT IS THE SC SUPPORTED DECISION MAKING PROJECT?

- A three year, grant-funded project made possible by the SC Developmental Disabilities Council
 - Able SC, The Arc of SC, P&A, and Family Connection
- Capacity building for alternatives to guardianship
 - Manuals, videos, professional trainings, handouts, and a website for families and professionals
- Direct support to families in exploring alternatives to guardianship
 - Information and Referral; one-on-one, in-person trainings for families



BARRIERS TO FAMILIES USING LEAST RESTRICTIVE MEANS OF SUPPORT

- The feeling that something must be done as someone with a disability approaches 18
- Professionals adept at sounding the alarm but not necessarily accustomed to thinking creatively about supports in decision making or proactively addressing skill/knowledge deficits
- Age of majority discussion in IEP meetings and medical provider procedure
- IQ scores/developmental ages and other info overgeneralized
- We have trained people to look for a "silver bullet" solution
- Medical model of disability
 - If we scrutinized the decision making of all 18 year-olds...
 - We have to begin understanding people in the context of their strengths and the support of their communities

SDM RESOURCES IN SC

- SC Specific Videos, SDM manuals, SDM Agreement, and more
- www.scsupporteddecisionmaking.org



Additional Information and Resources on Alternatives to Guardianship

Communication

From the South Carolina Assistive Technology Program:

WHAT IS AN AUGMENTATIVE AND ALTERNATIVE COMMUNICATION DEVICE?

An augmentative and alternative communication (AAC) device can be a picture, word or alphabet board or an electronic picture, word or alphabet device with voice output. AAC devices should be used with other ways of communicating: body posture, eye gaze, gestures, sign language, vocalizations, and spoken word approximations to maximize language and communication skills. Augmentative communication can be used by children and adults alike.

What is the goal of communication?

The goal is to be able to communicate in a functional manner throughout the day. AAC devices are tools used to learn language and functional communication.

Will an augmentative and alternative communication device make a child stop using natural speech?

Not at all! Many studies have been done on this topic. Not one showed that children stop using natural speech when using a communication device. Research does show that children often become more verbal when using a communication device.

For more on Augmentative and Alternative Communication (ACC) visit the South Carolina Assistive Technology Program's website at <http://scatp.med.sc.edu/resources/augmentative-and-alternative-communication-aac/>

Adult Protective Services (Also Known as Adult Advocacy)

From the South Carolina Department of Social Services:

What meets the APS criteria of a vulnerable adult?

"Vulnerable adult" means a person eighteen years of age or older who has a physical or mental condition which substantially impairs the person from adequately providing for his or her own care or protection. This includes a person who is impaired in the ability to adequately provide for the person's own care or protection because of the infirmities of aging including, but not limited to, organic brain damage, advanced age, and physical, mental, or emotional dysfunction. A resident of a facility is a vulnerable adult.

Who is a Vulnerable Adult?

Situation 1:

Carol is a 35 year old female who is in general good health. However, two weeks ago she got into a car accident and broke her left leg. Although it has become a challenge for her to complete daily tasks, she is expected to make a full recovery. Is Carol a vulnerable adult?

Answer: No. Carol is temporarily challenged. She does not have a disability or physical or mental condition that permanently disables her from providing care or protection for herself. However, if Carol's injuries substantially impair her ability to adequately provide for her care, as by not being able to bathe or take care of her injury, she may be a vulnerable adult.

Situation 2:

Joey is a 25 year old man with an intellectual disability. He has completed school and is attending a day program to learn work skills. Joey wants to be independent and resists getting help. He is trying to live on his own, but his roommate is taking his money. He does not have the skills to manage his money, clean his apartment consistently, or eat properly. Is he a vulnerable adult?

Answer: At the moment Joey is a vulnerable adult because he is being exploited by his roommate. If Joey gets assistance in transitioning to the work force, learning life skills such as healthy eating, and living in an appropriate community setting, then he would not a vulnerable adult because he is not in danger. People with disabilities who seek independence have an opportunity to make themselves less vulnerable by making themselves less dependent upon other people. However, if loses his apartment and becomes homeless, he may be a vulnerable adult because he does not have the means to provide care for himself

Situation 3:

Roy is a 65 year old man who is having problems with his living conditions. He is clear and oriented and still drives his car. He does his own grocery shopping and pays his own bills. He gets and administers his own medication. However, his house is in what neighbors described as "deplorable condition". Roy reports that he knows that his home needs some fixing up, but he does not have the money to fix it up at the current time and he has a pathway through the home in case he needs to exit quickly. Is Roy a vulnerable adult?

Answer: Not based only on these facts. The South Carolina Court of Appeals has ruled that, "Poverty or the lack of adequate resources may have a deleterious effect on an individual's ability to adequately provide for her care and protection; however, poverty alone is not sufficient to satisfy the definition of a vulnerable adult under the Act. Rather, there must be evidence of other factors that cause the deleterious effect."

If Roy broke his leg and could not maneuver through house, or if he could not maintain transportation to get to food or medical care, he might be a vulnerable adult then.

Situation 4:

Maria, age 57, resides in a community residential care facility. She receives disability benefits for several medical conditions, including diabetes, hypertension, and depression. Recently one of the staff at the CRCF verbally abused Maria and locked her in her room. Is Maria a vulnerable adult?

Yes, because she is a resident of a facility; however, the Long Term Care Ombudsman, and possibly DHEC, not DSS, would investigate her situation.

What Meets the Criteria to Accept a Report or Referral for Investigation?

For a report or referral to meet the criteria to be accepted for investigation, there must be an allegation that meets the legal definition of a vulnerable adult. There also, must be reason to believe abuse, neglect, self-neglect, or exploitation of the vulnerable adult has occurred or is likely to occur in a community setting. If you know of someone that meets this criteria please call your [County DSS Office](#) to make a report.

For more information on APS, visit <https://dss.sc.gov/abuseneglect/adult-protective-services/what-is-adult-advocacy/>.

SOUTH CAROLINA HEALTH CARE POWER OF ATTORNEY

INFORMATION ABOUT THIS DOCUMENT

THIS IS AN IMPORTANT LEGAL DOCUMENT. BEFORE SIGNING THIS DOCUMENT, YOU SHOULD KNOW THESE IMPORTANT FACTS:

1. THIS DOCUMENT GIVES THE PERSON YOU NAME AS YOUR AGENT THE POWER TO MAKE HEALTH CARE DECISIONS FOR YOU IF YOU CANNOT MAKE THE DECISION FOR YOURSELF. THIS POWER INCLUDES THE POWER TO MAKE DECISIONS ABOUT LIFE-SUSTAINING TREATMENT. UNLESS YOU STATE OTHERWISE, YOUR AGENT WILL HAVE THE SAME AUTHORITY TO MAKE DECISIONS ABOUT YOUR HEALTH CARE AS YOU WOULD HAVE.
2. THIS POWER IS SUBJECT TO ANY LIMITATIONS OR STATEMENTS OF YOUR DESIRES THAT YOU INCLUDE IN THIS DOCUMENT. YOU MAY STATE IN THIS DOCUMENT ANY TREATMENT YOU DO NOT DESIRE OR TREATMENT YOU WANT TO BE SURE YOU RECEIVE. YOUR AGENT WILL BE OBLIGATED TO FOLLOW YOUR INSTRUCTIONS WHEN MAKING DECISIONS ON YOUR BEHALF. YOU MAY ATTACH ADDITIONAL PAGES IF YOU NEED MORE SPACE TO COMPLETE THE STATEMENT.
3. AFTER YOU HAVE SIGNED THIS DOCUMENT, YOU HAVE THE RIGHT TO MAKE HEALTH CARE DECISIONS FOR YOURSELF IF YOU ARE MENTALLY COMPETENT TO DO SO. AFTER YOU HAVE SIGNED THIS DOCUMENT, NO TREATMENT MAY BE GIVEN TO YOU OR STOPPED OVER YOUR OBJECTION IF YOU ARE MENTALLY COMPETENT TO MAKE THAT DECISION.
4. YOU HAVE THE RIGHT TO REVOKE THIS DOCUMENT, AND TERMINATE YOUR AGENT'S AUTHORITY, BY INFORMING EITHER YOUR AGENT OR YOUR HEALTH CARE PROVIDER ORALLY OR IN WRITING.
5. IF THERE IS ANYTHING IN THIS DOCUMENT THAT YOU DO NOT UNDERSTAND, YOU SHOULD ASK A SOCIAL WORKER, LAWYER, OR OTHER PERSON TO EXPLAIN IT TO YOU.
6. THIS POWER OF ATTORNEY WILL NOT BE VALID UNLESS TWO PERSONS SIGN AS WITNESSES. EACH OF THESE PERSONS MUST EITHER WITNESS YOUR SIGNING OF THE POWER OF ATTORNEY OR WITNESS YOUR ACKNOWLEDGMENT THAT THE SIGNATURE ON THE POWER OF ATTORNEY IS YOURS.

THE FOLLOWING PERSONS MAY NOT ACT AS WITNESSES:

- A. YOUR SPOUSE, YOUR CHILDREN, GRANDCHILDREN, AND OTHER LINEAL DESCENDANTS; YOUR PARENTS, GRANDPARENTS, AND OTHER LINEAL ANCESTORS; YOUR SIBLINGS AND THEIR LINEAL DESCENDANTS; OR A SPOUSE OF ANY OF THESE PERSONS.

- B. A PERSON WHO IS DIRECTLY FINANCIALLY RESPONSIBLE FOR YOUR MEDICAL CARE.
- C. A PERSON WHO IS NAMED IN YOUR WILL, OR, IF YOU HAVE NO WILL, WHO WOULD INHERIT YOUR PROPERTY BY INTESTATE SUCCESSION.
- D. A BENEFICIARY OF A LIFE INSURANCE POLICY ON YOUR LIFE.
- E. THE PERSONS NAMED IN THE HEALTH CARE POWER OF ATTORNEY AS YOUR AGENT OR SUCCESSOR AGENT.
- F. YOUR PHYSICIAN OR AN EMPLOYEE OF YOUR PHYSICIAN.
- G. ANY PERSON WHO WOULD HAVE A CLAIM AGAINST ANY PORTION OF YOUR ESTATE (PERSONS TO WHOM YOU OWE MONEY).

IF YOU ARE A PATIENT IN A HEALTH FACILITY, NO MORE THAN ONE WITNESS MAY BE AN EMPLOYEE OF THAT FACILITY.

7. YOUR AGENT MUST BE A PERSON WHO IS 18 YEARS OLD OR OLDER AND OF SOUND MIND. IT MAY NOT BE YOUR DOCTOR OR ANY OTHER HEALTH CARE PROVIDER THAT IS NOW PROVIDING YOU WITH TREATMENT; OR AN EMPLOYEE OF YOUR DOCTOR OR PROVIDER; OR A SPOUSE OF THE DOCTOR, PROVIDER, OR EMPLOYEE; UNLESS THE PERSON IS A RELATIVE OF YOURS.

8. YOU SHOULD INFORM THE PERSON THAT YOU WANT HIM OR HER TO BE YOUR HEALTH CARE AGENT. YOU SHOULD DISCUSS THIS DOCUMENT WITH YOUR AGENT AND YOUR PHYSICIAN AND GIVE EACH A SIGNED COPY. IF YOU ARE IN A HEALTH CARE FACILITY OR A NURSING CARE FACILITY, A COPY OF THIS DOCUMENT SHOULD BE INCLUDED IN YOUR MEDICAL RECORD.

SOUTH CAROLINA HEALTH CARE POWER OF ATTORNEY

1. DESIGNATION OF HEALTH CARE AGENT

I, _____, hereby appoint:

(Principal)

(Agent's Name) _____

(Agent's Address) _____

Telephone: home: _____ work: _____ mobile: _____

as my agent to make health care decisions for me as authorized in this document.

Successor Agent: If an agent named by me dies, becomes legally disabled, resigns, refuses to act, becomes unavailable, or if an agent who is my spouse is divorced or separated from me, I name the following as successors to my agent, each to act alone and successively, in the order named:

a. First Alternate Agent:

Address: _____

Telephone: home: _____ work: _____ mobile: _____

b. Second Alternate Agent:

Address: _____

Telephone: home: _____ work: _____ mobile: _____

Unavailability of Agent(s): If at any relevant time the agent or successor agents named here are unable or unwilling to make decisions concerning my health care, and those decisions are to be made by a guardian, by the Probate Court, or by a surrogate pursuant to the Adult Health Care Consent Act, it is my intention that the guardian, Probate Court, or surrogate make those decisions in accordance with my directions as stated in this document.

2. EFFECTIVE DATE AND DURABILITY

By this document I intend to create a durable power of attorney effective upon, and only during, any period of mental incompetence, except as provided in Paragraph 3 below.

3. HIPAA AUTHORIZATION

When considering or making health care decisions for me, all individually identifiable health information and medical records shall be released without restriction to my health care agent(s) and/or my alternate health care agent(s) named above including, but not limited to, (i) diagnostic, treatment, other health care, and related insurance and financial records and information associated with any past, present, or future physical or mental health condition including, but not limited to, diagnosis or treatment of HIV/AIDS, sexually transmitted disease(s), mental illness, and/or drug or alcohol abuse and (ii) any written opinion relating to my health that such health care agent(s) and/or alternate health care agent(s) may have requested. Without limiting the generality of the foregoing, this release authority applies to all health information and medical records governed by the Health Information Portability and Accountability Act of 1996 (HIPAA), 42 USC 1320d and 45 CFR 160-164; is effective whether or not I am mentally competent; has no expiration date; and shall terminate only in the event that I revoke the authority in writing and deliver it to my health care provider.

4. AGENT'S POWERS

I grant to my agent full authority to make decisions for me regarding my health care. In exercising this authority, my agent shall follow my desires as stated in this document or otherwise expressed by me or known to my agent. In making any decision, my agent shall attempt to discuss the proposed decision with me to determine my desires if I am able to communicate in any way. If my agent cannot determine the choice I would want made, then my agent shall make a choice for me based upon what my agent believes to be in my best interests. My agent's authority to interpret my desires is intended to be as broad as possible, except for any limitations I may state below.

Accordingly, unless specifically limited by the provisions specified below, my agent is authorized as follows:

- A. To consent, refuse, or withdraw consent to any and all types of medical care, treatment, surgical procedures, diagnostic procedures, medication, and the use of mechanical or other procedures that affect any bodily function, including, but not limited to, artificial respiration, nutritional support and hydration, and cardiopulmonary resuscitation;
- B. To authorize, or refuse to authorize, any medication or procedure intended to relieve pain, even though such use may lead to physical damage, addiction, or hasten the moment of, but not intentionally cause, my death;
- C. To authorize my admission to or discharge, even against medical advice, from any hospital, nursing care facility, or similar facility or service;
- D. To take any other action necessary to making, documenting, and assuring implementation of decisions concerning my health care, including, but not limited to, granting any waiver or release from liability required by any hospital, physician, nursing care provider, or other health care provider; signing any documents relating to refusals of treatment or the leaving of a facility against medical advice, and pursuing any legal action in my name, and at the expense of my estate to force compliance with my wishes as determined by my agent, or to seek actual or punitive damages for the failure to comply.

E. The powers granted above do not include the following powers or are subject to the following rules or limitations:

5. ORGAN DONATION (INITIAL ONLY ONE)

My agent may ___; may not ___ consent to the donation of all or any of my tissue or organs for purposes of transplantation.

6. EFFECT ON DECLARATION OF A DESIRE FOR A NATURAL DEATH (LIVING WILL)

I understand that if I have a valid Declaration of a Desire for a Natural Death, the instructions contained in the Declaration will be given effect in any situation to which they are applicable. My agent will have authority to make decisions concerning my health care only in situations to which the Declaration does not apply.

7. STATEMENT OF DESIRES CONCERNING LIFE-SUSTAINING TREATMENT

With respect to any Life-Sustaining Treatment, I direct the following:

(INITIAL ONLY ONE OF THE FOLLOWING 3 PARAGRAPHS)

(1) ___ GRANT OF DISCRETION TO AGENT. I do not want my life to be prolonged nor do I want life-sustaining treatment to be provided or continued if my agent believes the burdens of the treatment outweigh the expected benefits. I want my agent to consider the relief of suffering, my personal beliefs, the expense involved and the quality as well as the possible extension of my life in making decisions concerning life-sustaining treatment.

OR

(2) ___ DIRECTIVE TO WITHHOLD OR WITHDRAW TREATMENT. I do not want my life to be prolonged and I do not want life-sustaining treatment:

a. if I have a condition that is incurable or irreversible and, without the administration of life-sustaining procedures, expected to result in death within a relatively short period of time; or

b. if I am in a state of permanent unconsciousness.

OR

(3) ___ DIRECTIVE FOR MAXIMUM TREATMENT. I want my life to be prolonged to the greatest extent possible, within the standards of accepted medical practice, without regard to my condition, the chances I have for recovery, or the cost of the procedures.

8. STATEMENT OF DESIRES REGARDING TUBE FEEDING

With respect to Nutrition and Hydration provided by means of a nasogastric tube or tube into the stomach, intestines, or veins, I wish to make clear that in situations where life-sustaining treatment is being withheld or withdrawn pursuant to Item 7, (INITIAL ONLY ONE OF THE FOLLOWING THREE PARAGRAPHS):

(a) ___ GRANT OF DISCRETION TO AGENT. I do not want my life to be prolonged by tube feeding if my agent believes the burdens of tube feeding outweigh the expected benefits. I want my agent to consider the relief of suffering, my personal beliefs, the expense involved, and the quality as well as the possible extension of my life in making this decision.

OR

(b) ___ DIRECTIVE TO WITHHOLD OR WITHDRAW TUBE FEEDING. I do not want my life prolonged by tube feeding.

OR

(c) ___ DIRECTIVE FOR PROVISION OF TUBE FEEDING. I want tube feeding to be provided within the standards of accepted medical practice, without regard to my condition, the chances I have for recovery, or the cost of the procedure, and without regard to whether other forms of life-sustaining treatment are being withheld or withdrawn.

IF YOU DO NOT INITIAL ANY OF THE STATEMENTS IN ITEM 8, YOUR AGENT WILL NOT HAVE AUTHORITY TO DIRECT THAT NUTRITION AND HYDRATION NECESSARY FOR COMFORT CARE OR ALLEVIATION OF PAIN BE WITHDRAWN.

9. ADMINISTRATIVE PROVISIONS

A. I revoke any prior Health Care Power of Attorney and any provisions relating to health care of any other prior power of attorney.

B. This power of attorney is intended to be valid in any jurisdiction in which it is presented.

BY SIGNING HERE I INDICATE THAT I UNDERSTAND THE CONTENTS OF THIS DOCUMENT AND THE EFFECT OF THIS GRANT OF POWERS TO MY AGENT.

I sign my name to this Health Care Power of Attorney on

this ___ day of ___, 20 __. My current home address is:

Principal's Signature: _____

Print Name of Principal: _____

I declare, on the basis of information and belief, that the person who signed or acknowledged this document (the principal) is personally known to me, that he/she signed or acknowledged this Health Care Power of Attorney in my presence, and that he/she appears to be of sound mind and under no duress, fraud, or undue influence. I am not related to the principal by blood, marriage, or adoption, either as a spouse, a lineal ancestor, descendant of the parents of the principal, or spouse of any of them. I am not directly financially responsible for the principal's medical care. I am not entitled to any portion of the principal's estate upon his decease, whether under any will or as an heir by intestate succession, nor am I the beneficiary of an insurance policy on the principal's life, nor do I have a claim against the principal's estate as of this time. I am not the principal's attending physician, nor an employee of the attending physician. No more than one witness is an employee of a health facility in which the principal is a patient. I am not appointed as Health Care Agent or Successor Health Care Agent by this document.

Witness No. 1

Signature: _____ Date: _____

Print Name: _____ Telephone: _____

Address: _____

Witness No. 2

Signature: _____ Date: _____

Print Name: _____ Telephone: _____

Address: _____

(This portion of the document is optional and is not required to create a valid health care power of attorney.)

STATE OF SOUTH CAROLINA

COUNTY OF _____

The foregoing instrument was acknowledged before me by Principal on _____, 20 _____.

Notary Public for South Carolina _____

My Commission Expires: _____

Independence.

Together.

The South Carolina
Supported Decision Making
PROJECT

**Promoting alternatives to
guardianship that preserve
autonomy and wellbeing**

able
SOUTH CAROLINA
independent
living for all

P&A

PROTECTION & ADVOCACY
FOR PEOPLE WITH DISABILITIES, INC.


The Arc
of South Carolina


Family Connection


SOUTH CAROLINA
Developmental Disabilities Council

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INTRODUCTION

PURPOSE OF THIS MANUAL

This manual was written by partners of the South Carolina Supported Decision Making Project to provide information about Supported Decision Making to the legal community. You will read how Supported Decision Making can be used in place of more restrictive means, such as guardianship, to preserve a person's autonomy and independence, while still providing the person with support from his or her family, friends, and community. Supported Decision Making is a tool that can be used to support adults with disabilities to make their own decisions.

COLLABORATING AGENCIES

This manual was created through funding received from the South Carolina Developmental Disabilities Council. It represents a collaborative effort between:

- Able South Carolina
- Protection and Advocacy for People with Disabilities, Inc.
- Family Connection of South Carolina
- The Arc of South Carolina

Together these agencies form the South Carolina Supported Decision Making Project.

DISCLAIMER

This manual is intended for legal professionals. It is not intended to be legal advice. In South Carolina, there is currently no law that speaks to the issue of whether a Supported Decision Making Agreement is enforceable and no law that prohibits the use of such an Agreement.

IMPLICATIONS OF GUARDIANSHIP

The SC Supported Decision Making Project came into existence due to concerns highlighted in a 2015 national study conducted by TASH which found that school and adult service personnel were over-recommending guardianship for individuals with disabilities (Jameson et al., 2015). While the overall trend in the last twenty years has been one toward increased community inclusion and civil rights for people with disabilities, the number of people under partial or total guardianship in the US has tripled since 1995 (Jameson et al., 2015). In order to curtail this overused practice, this Project aims to provide accurate information and support to families and professionals who do not wish to overly restrict an individual's rights. While many families seek guardianship out of a desire to protect their loved ones, what they fail to realize is that guardianship takes away many opportunities for an individual to make decisions for him or herself. In fact, it has been said that a prisoner has more rights than a person under guardianship (House Select Committee on Aging, H.R. Rpt. 100-641). A guardian may remove a person's right to vote, sign contracts, receive money or pay bills, or get married. People under guardianship experience low self-esteem and feelings of inadequacy, in contrast with those who exercised self-determination showing greater quality of life and being better able to resist abuse and neglect (Jameson et al., 2015).

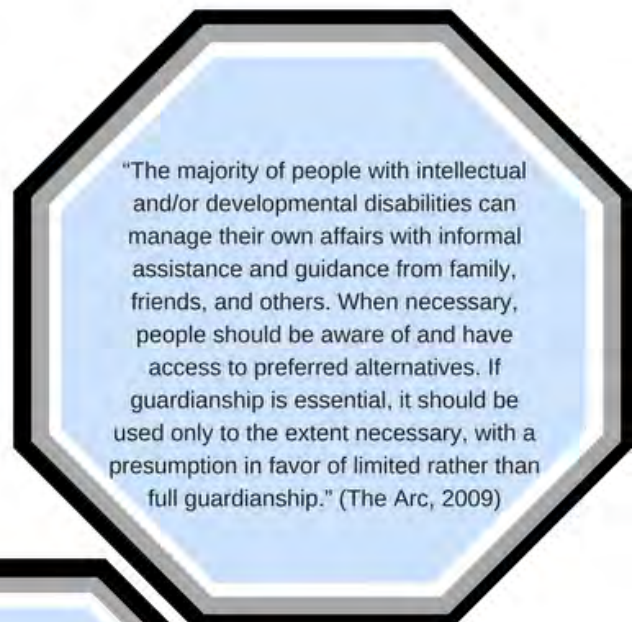
The process to obtain guardianship can be expensive, time-consuming, and may damage relationships. It also represents a profound responsibility on behalf of the guardian. If this person is unable to or unwilling to serve as a guardian in the future (due to illness or death, for example) additional legal hurdles will need to be addressed.

Guardianship should be used as a last resort when no other measure sufficiently protects a person with a disability. Overly restrictive measures can limit the development of important independent living skills (Quality Trust for Individuals with Disabilities et al., 2015). If there is not a less restrictive alternative, limited guardianship can be used in coordination with Supported Decision Making to help foster and develop independence.

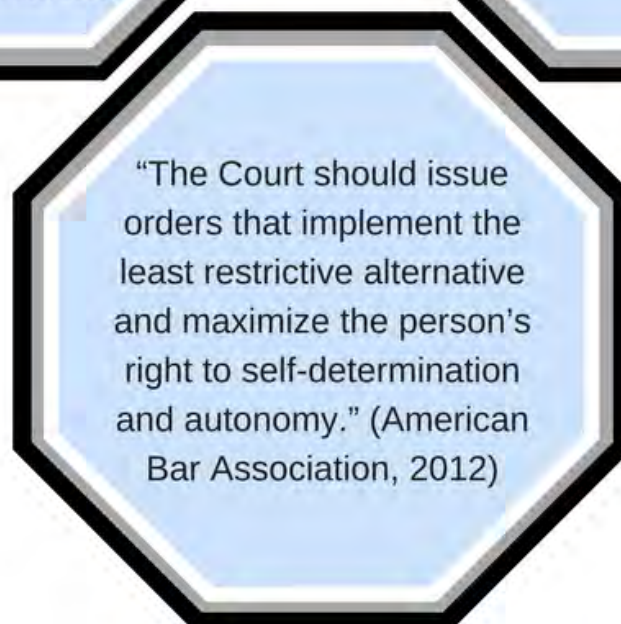
Below are statements from national organizations about why we should be cautious about seeking guardianship:



"[Guardianship] is an extraordinary exercise of governmental authority and, therefore, should be accompanied by due process protections. Guardianship allows the state, in effect, to strip individuals of their rights to make decisions about their own lives and their own property and to invest in another the authority to do so for them. Because guardianship is a broad and very restrictive form of substitute decision-making, guardianship proceeding should be approached with care and caution." (Fleischner, 2000)



"The majority of people with intellectual and/or developmental disabilities can manage their own affairs with informal assistance and guidance from family, friends, and others. When necessary, people should be aware of and have access to preferred alternatives. If guardianship is essential, it should be used only to the extent necessary, with a presumption in favor of limited rather than full guardianship." (The Arc, 2009)



"The Court should issue orders that implement the least restrictive alternative and maximize the person's right to self-determination and autonomy." (American Bar Association, 2012)

WHAT IS SUPPORTED DECISION MAKING?

Everyone relies on help and guidance from family, friends, co-workers, and others in the community when making big decisions, such as which car to buy or where to live. Supported Decision Making is not something specific to those with disabilities. Supported Decision Making is a concept that recognizes none of us exist in a vacuum! We all need advice from time to time in order to make decisions.

Some legal scholars and advocates have defined Supported Decision Making as ***“a less-restrictive alternative to guardianship that empowers people with limitations in decision-making to express their own preferences, make their own decisions, and direct their own lives without the need for a guardian.”*** (Quality Trust for Individuals with Disabilities et al. 2015, p.1).

A similar definition holds that this process is *a recognized alternative to guardianship through which people with disabilities use friends, family members, and professionals to help them understand the situations and choices they face, so they may make their own decisions without the need for a guardian* (Blanck & Martinis, 2015).

Supported Decision Making emphasizes the importance of letting the person with a disability decide, to the extent she is able, what her life should look like, and who should help her reach her goals.

Methods of support can be informal (asking a relative for help making financial decisions) or formal (signing a HIPAA release so a parent can help make medical decisions). The individual decides who will support her and how much support they will offer. The supporters and individual may sign a Supported Decision Making Agreement. Typically, a Supported Decision Making Agreement is a document that lists the areas in which an individual would like to be supported, along with the extent that this support should occur, and who should provide support. An example can be found in the appendix of this manual.

HOW DOES

Supported Decision Making

WORK?



choose

The individual decides who will be involved in supporting him or her. The supporters must also agree to be involved.



discuss

The individual and supporters talk about how the individual will be supported, which can include finance, healthcare, education, employment, and others. The individual can choose to have support in some areas but not others.



make a plan

The individual and supporters create a document that outlines how the individual will be supported. This is the Supported Decision Making agreement.



sign

The individual and supporters sign the Supported Decision Making agreement. The agreement can be revised if necessary in the future. Everyone receives a copy of the agreement.



For a complete copy of a Supported Decision Making Agreement, please see the appendix.

BENEFITS OF SUPPORTED DECISION MAKING

Supported Decision Making is an extension of **self-determination**, meaning an individual directs the plan for his life. He decides what is important to him, sets goals, and, with the support of those around him, he works to achieve those goals in order to live the most fulfilling life possible. Ask people with disabilities what they want for their lives, and most will tell you they desire independence, gainful employment, friendships, and romantic relationships. This is not different from what anyone else would want. And, as is true for anyone else, life is full of risks. An individual with a disability must learn to manage and avoid risks, as opposed to never being allowed to make any decisions for themselves.

Several studies have found that people who exercise more self-determination were more likely to live independently, have greater financial independence, be employed at higher paying jobs, and make greater advances in their employment (Wehmeyer & Palmer, 2003). In addition, self-determination has been shown as a predictor of post-high school success in employment and independent living (Test et al., 2009).

LEGAL PRECEDENCE FOR SUPPORTED DECISION MAKING

In South Carolina, capacity to consent is presumed at age 18. Any guardianship proceedings should be “subject to the highest constitutional standards” (Dayton et al., 2008) because guardians may limit the “civil rights of [people] and their property” (Sullivan v. Ganim).

South Carolina law upholds the tenets of Supported Decision Making:

The court shall exercise the authority conferred in this part so as to encourage the development of maximum self-reliance and independence of the incapacitated person and make appointive and other orders only to the extent necessitated by the incapacitated person’s mental and adaptive limitation or other conditions warranting the procedure.

S.C Code § 62-5-304(A).

The South Carolina Rules of Professional Conduct make it clear that sometimes an attorney should make an accommodation for any limited capacity of his or her client:

When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

SC Rule of Professional Conduct 1.14. The comments emphasize the importance of self-determination and describe supported decision making in the context of the attorney/client relationship.

The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. . . . [A]client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. . . . [I]t is recognized that some persons of

advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions. . . . The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must look to the client, and not family members, to make decisions on the client's behalf.

Comment to Rule 1.14.

In various jurisdictions, case law has been developing that specifically addresses Supported Decision Making as an alternative to guardianship.

Dameris L

In this case, a New York court terminated guardianship over Dameris, a woman with an intellectual disability, on the grounds that she made her own decisions using the support of people who “understood [their] role, not as deciding for her, but assisting her in making her own decisions.” The court also determined that “proof that a person with an intellectual disability *needs* a guardian must exclude the possibility of that person’s ability to live safely in the community supported by family, friends, and mental health professionals.” (In the Matter of the Guardianship of Dameris L., 2012).

Jenny Hatch

Perhaps the most well-known case to demonstrate the favorability of Supported Decision Making is that of Jenny Hatch. Ms. Hatch, who has Down syndrome, successfully overturned a court-appointed guardianship order that forced her into a group home and restricted her access to friends, legal counsel, and even a computer and cell phone. The petition for guardianship had been made by Ms. Hatch’s mother and stepfather, who wanted the authority to determine where she lived, which medical treatment she received, and which friends she could visit. The court decided in Ms. Hatch’s favor, allowing her network of chosen supporters to aid her in decision-making (Ross, et al. v. Hatch, 2013).

WHAT TO CONSIDER WHEN COUNSELING CLIENTS

When counseling clients and families who may be inclined to pursue guardianship, it is crucial to consider whether the objectives of the client(s) could be met using less restrictive means. Guardianship should be sought as a last resort, when no other measures will adequately ensure the safety and wellbeing of an individual. If guardianship is ultimately pursued, consider limiting it to specific areas that represent the greatest challenges for an individual.

Many families seek guardianship out of fear that not doing so will open their child up to abuse and exploitation. They may also seek guardianship because they are unaware of other alternatives. Sometimes informal support from family and friends and resources offered through disability agencies can be enough to support an individual. Also consider potential barriers present in an individual’s life (an untreated or worsening medical or psychological condition, or inadequate home modifications or assistive technology, for example) that may be preventing the person from exercising sound decision-making. If you aren’t sure what resources are available to support the individual, contact one of the Partners for the SC Supported Decision Making Project for guidance. See the appendix for more

information.

The PRACTICAL Tool for Lawyers

The American Bar Association, along with several other entities, have developed the PRACTICAL tool to “help lawyers identify and implement decision-making options for persons with disabilities that are less restrictive than guardianship.” (American Bar Association, 2016b). **This comprehensive planning tool can be accessed at www.ambar.org/practicaltool.**

The PRACTICAL tool encourages lawyers to work through the following paradigm:

- **Presume** guardianship is not needed.
- **Reason** whether an individual can meet some or all tasks of independent living, like managing money, making health care decisions, finding and retaining employment, fostering healthy relationships, maintaining personal safety, and other tasks.
- **Ask** if a triggering concern is caused by temporary or reversible conditions, such as depression, side effects from medication, or hearing/vision loss.
- **Community**. Could the needs of the individual be met through existing community resources and supports that are less restrictive?
- **Team**. Ask the individual if they already have a network of supporters in place to help with decision-making.
- **Identify abilities**. Can the individual explain reasoning for his or her decisions, do they remain consistent over time, and does the individual understand the consequences of the decision?
- **Challenges**. Are there barriers to supported decision-making, such as the undue influence of a supporter, or excessive cost, time, or risk to public benefits?
- **Appoint** a legal supporter or surrogate consistent with the person’s values and preferences.
- **Limit** any necessary guardianship petition and order. If guardianship is necessary, limit it only to the areas of a person’s life where it is needed, such as in financial or health matters. Periodically reassess for modification and restoration of rights.

Consider Alternatives

Below is a more comprehensive list of ways to promote independence within the Supported Decision Making framework. Some measures are formal, legal processes while others are informal. Note that this table does not include all possible alternatives.

Need	Tasks	Can this be accomplished by:
Money Management	<ul style="list-style-type: none"> Managing accounts, assets, and benefits Learning to recognize and prevent exploitation 	<ul style="list-style-type: none"> Conservatorship or trust Seeking financial counseling Representative Payee Program Money-managing app on phone
Health Care	<ul style="list-style-type: none"> Making decisions about medical treatment Taking medications as needed Maintaining hygiene and diet Avoiding high-risk behaviors 	<ul style="list-style-type: none"> Obtaining Health Care Power of Attorney or Living Will Having individual sign HIPAA release Using Adult Health Care Consent Act for areas of health care beyond the person's ability to understand (<i>read more about this in the "Alternatives to Guardianship" section</i>) Using apps to help remember to take medication and perform hygiene tasks Visiting a health care professional to discuss information regarding prevention and safety Allowing a home health aide to assist in daily living tasks Getting advice from professionals
Employment	<ul style="list-style-type: none"> Looking for, gaining, and retaining employment 	<ul style="list-style-type: none"> Enrolling in job coaching services, such as supported employment programs Using Vocational Rehabilitation, Medicaid waiver services, or other employment providers to become job-ready
Relationships	<ul style="list-style-type: none"> Behaving appropriately with friends, family, and co-workers Making decisions about sexual relationships 	<ul style="list-style-type: none"> Role-playing and practicing appropriate behavior Visiting a health center to learn more about contraception Speaking with loved ones about healthy relationships
Community Living	<ul style="list-style-type: none"> Living independently Maintaining habitable conditions Accessing community resources 	<ul style="list-style-type: none"> Incorporating adaptive and assistive technology Setting reminders to complete home maintenance tasks Making a list of community resources, such as transportation

Need	Tasks	Can this be accomplished by:
Personal Decision Making	<ul style="list-style-type: none"> Understanding legal documents (contracts, leases, powers of attorney) Communicating wishes Understanding legal consequences of behavior 	<ul style="list-style-type: none"> Allowing supporters to help explain contracts and other legal documents Having the individual demonstrate understanding of consequences, such as through role-playing Seeking advice from professionals
Personal Safety	<ul style="list-style-type: none"> Avoiding common dangers Recognizing and avoiding abuse Knowing what to do in an emergency 	<ul style="list-style-type: none"> Role-playing scenarios, such as what to do in case of fire Discussing signs of healthy and unhealthy relationships and abusive behaviors Writing down emergency numbers

Adapted from: American Bar Association, 2016

With a Supported Decision Making Agreement, the person, along with his or her circle of support, can decide which tools should be used in order to retain the highest level of independence while still providing appropriate levels of guidance.

Example: Johnny has autism and is about to turn 18. He is excited to begin classes at a community college next year. He, his family, and those close to him sit down together to form a Supported Decision Making Agreement. Even though he will be 18, Johnny still wants his parents to attend doctor’s appointments with him, and to be able to discuss any medical issues with his doctors. Together, they decide to sign a HIPAA release form to allow communication between Johnny’s parents and his medical providers. Johnny is also nervous about dating, making new friends, and adjusting to the changes that college will bring. Johnny’s pastor agrees to support Johnny by talking to him about approaching girls he is interested in, as well as what a healthy relationship and friendships should look like. Johnny’s aunt and uncle agree to check in with him regularly once he starts college to make sure he is spending time studying and completing assignments.

SOME LEGAL ALTERNATIVES TO GUARDIANSHIP

In some cases, an individual may want supporters to help him or her with finances, medical treatment, or other areas, and he or she may want formal means for obtaining this support. Below are common legal alternatives to guardianship that preserve an individual’s civil rights while allowing supporters to assist in making important decisions.

Power of Attorney and Living Will¹

A Power of Attorney allows one person to make decisions on behalf of another person (called a principal). Decisions can be about medical treatment (Health Care Power of Attorney), finances (Financial Power of Attorney), real estate, and other matters. The agent does not need to be an attorney to be authorized to make such decisions. Health Care Power of Attorney and other documents such as a living will (where an individual makes end-of-life decisions and documents those decisions in case they

¹ In South Carolina, a living will is called a “Declaration of Desire for Natural Death,” but is still commonly referred to as a “living will.”

become incapacitated) are some of the most common examples of an **advance directive**.

HIPAA Release

An individual can 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. Typically, each medical provider provides a HIPAA release to the patient. It can be changed or revoked at any time by letting the provider know.

Adult Health Care Consent Act

Many family members may worry about what happens in a medical emergency if a person with a disability uses a Supported Decision Making Agreement. First, if an individual has the ability to consent to medical care, they will do so. However, in an emergency where the person cannot communicate due to the emergency or a situation where the proposed health care and the decision to be made is so complicated that the person is not competent to make the decision, the Adult Health Care Consent Act might apply if two doctors find that the person is unable to consent to health care. In those situations, the Act would identify a surrogate decision maker for the person, usually the next of kin.

Adult Students with Disabilities Educational Rights Consent Act

Like the Health Care Consent Act operates for health care decisions, the Adult Students with Disabilities Educational Rights Consent Act provides alternative processes to ensure a student with a disability's education is not side-railed by the lack of having someone to consent to the education process. First option, the student can manage education decisions independently; second option, the student can use a supporter to assist with their decisions about their education; third option, the student can appoint a decision maker through a power of attorney; and fourth option, if the student cannot communicate, a decision maker can be appointed for that student.

Trust

Trusts allow a third party to hold money and assets on behalf of someone else (usually called a beneficiary). There are many different ways to set up a trust, and some are tailored specifically for those with disabilities so as not to impact other benefits. Because of the many different ways a trust may be arranged, it is best to speak with a financial manager who can more accurately assess your needs.

Representative Payee Program

Offered through the Social Security Administration, this program allows a representative to manage a beneficiary's Social Security or SSI payments. A representative may be responsible for using benefits to pay an individual's expenses and keeping track of expenditures. Typically a family member or other trusted adult is chosen to act in this role; however one may be appointed through the Administration.

Laws Protecting Vulnerable Adults

In South Carolina, the Omnibus Adult Protection Act (the Act), is designed to protect vulnerable adults from abuse, neglect, and exploitation. S.C. Code § 43-35-5 et seq. The Act provides both criminal and civil remedies for individuals who have been or who are at risk of abuse, neglect, or exploitation, including self-neglect. *Id.* Adult Protective Services is available to assist individuals and families with finding ways to protect the health and welfare of adults with disabilities.

1



I think about the people I trust. I ask them to support me. They have to agree to support me.

2



I think about how I want them to support me. I think about the areas that I want support in, like healthcare, education, money, getting a job, or relationships. I can ask for support in other areas too.

3



My supporters and I discuss how they will support me. We all agree in the ways I will be supported. I might have to ask for other professionals to help me too.

4

My supporters and I sign the agreement. I can change my mind at any time. My supporters can change their minds too.



Supported Decision-Making Guide

for

Individuals

Remember



You are always at the center of your Supported Decision Making agreement!

APPENDIX

WHO CAN I CONTACT FOR MORE INFORMATION?

South Carolina Supported Decision Making Project

For more information on the SC Supported Decision Making Project and resources, including a downloadable copy of this manual, visit www.scsupporteddecisionmaking.org

Able South Carolina

803-779-5121

Toll-free: 800-681-6805

TTY: 803-779-0949

www.able-sc.org

Family Connection of South Carolina

803-252-0914

www.familyconnectionsc.org

The Arc of South Carolina

803-748-5020

www.arcsc.org

Protection & Advocacy for People with Disabilities, Inc.

803-782-0639

Toll-free: 866-275-7273

TTY: 866-232-4525

www.pandasc.org

South Carolina Developmental Disabilities Council

803-734-0465

TTY: 803-734-1147

www.scdcd.state.sc.us

FREQUENTLY ASKED QUESTIONS

(A resource for your clients)

1. I, or my loved one, would like to begin the process of creating a Supported Decision Making agreement. How can I get started?

If you or a loved one are interested in learning more about the Supported Decision Making process, please contact Able South Carolina at 803-779-5121, or visit www.scsupporteddecisionmaking.org.

2. I have been told that if I don't obtain guardianship, I won't be able to help my child make medical, financial, educational, or other decisions. Is this true?

No. Many families are told that the only way to protect their children is to pursue guardianship. However, guardianship severely restricts a person's civil rights and can create unforeseen complications when a guardian is unable or unwilling to serve in this capacity (for example, if the guardian passes away). Many alternatives to guardianship exist that allow a person with a disability to receive support while still maintaining freedom, civil rights, and self-determination. See *Legal Alternatives to Guardianship* for more details.

3. Is a Supported Decision Making Agreement legally enforceable?

At this time, courts in South Carolina have not addressed Supported Decision Making Agreements. However, if an individual has not been deemed incompetent or incapacitated, providers should be obligated to respect the individual's wishes in how services are delivered. It is also important to note that at age 18, a person, regardless of disability, is presumed to have decision-making capacity. Going through the Supported Decision Making process also allows individuals and families to have important discussions about an individual's goals, dreams, and priorities. As you review the sample Supported Decision Making agreement in the appendix, note that either party can end the agreement at any time.

4. How can I stop my loved one from being taken advantage of?

In life, some risk is inherent. Unfortunately, many of us "had to learn the hard way" when it came to money, relationships, and other areas of our lives (and some of us are still learning!). It is no different for a person with a disability. Depending on the disability, he or she may have a harder time discerning someone's true intent, understanding the content of a contract fully, or budgeting money for the month. However, this does *not* mean a person with a disability should be precluded from opportunities to make decisions for herself. Sometimes, financial management training, or repeated discussions about what an abusive relationship looks like, can be enough to adequately support the individual. Other times, more formal means, such as a Health Care Power of Attorney or Representative Payee Program is more appropriate. It is important to understand that sheltering a person to the extent that they never exercise any freedom can leave them feeling depressed, unfulfilled, and unequipped to handle responsibility.

5. My child has a profound disability, and I do not think he has the capacity to make sound decisions or communicate his wishes. How can Supported Decision Making help me?

Guardianship should always be a measure of last resort, when no other less restrictive measures can adequately ensure the safety of an individual. If your child has trouble communicating, consider assistive technology that may enable him or her to do so. Complex topics can often be broken down into simple yes or no questions, or even by pointing at pictures of different scenarios. Consider medications your child may be taking that interfere with cognition as well as mental health status. A Supported Decision Making Agreement allows for a network of trusted supporters to help the individual make decisions, including formal and informal methods, while preserving civil rights and freedoms.

6. If I sign a Supported Decision Making Agreement, can I still seek guardianship later?

Yes. Signing a Supported Decision Making Agreement and attempting to allow a person with disabilities to make their own decisions and retain all of their rights will not prevent or restrict the ability of anyone to later file a petition for guardianship. However, if the person with a disability can show that they were successful at using supports to accommodate their disability, the person may use that as evidence to demonstrate that they have capacity and do not need a guardianship.



SUPPORTED DECISION MAKING AGREEMENT

READ THIS: This agreement is a sample of a Supported Decision Making Agreement. Having this sample is not a substitute for seeking legal advice from an attorney. In South Carolina there is no law that specifically says that a Supported Decision Making Agreement can be enforced. There is no law against having a Supported Decision Making Agreement either. If you have questions about your legal rights, please talk with an attorney.

This is the Supported Decision Making Agreement of

Name: _____ Date of birth: _____

Address: _____

Telephone: _____ Email: _____

A. I understand:

- I can talk to an attorney before I sign this agreement.
- This agreement is because I want supporters to help me make decisions.
- My supporter cannot make decisions for me.
- I can end this agreement when I want it to.
- I can change this agreement when I want to.
- I can change my list of supporters when I want to.
- My supporter(s) can quit if they want to.
- If I end this agreement or change this agreement, I must let my supporters know about the change. Anyone with a copy of the agreement needs to get a copy of the change in writing.

B. I need supporter(s) to help me make decisions about:

- Taking care of my financial affairs, like banking (Finances)
- My health care, including big and small health care decisions (Health Care)
- Talking to an attorney if I need one and working with the lawyer (Legal Matters)
- My education, including what classes I will take and what accommodations I will have (Education)
- My employment, including what work I will do and what accommodations I need to do it (Work)
- Where I live, what I do, the services I receive, and who helps me day to day (Life Plan)
- Other matters: _____

C. I expect my supporter(s) to help me in the following ways:

- Giving me information in a way I can understand
- Discussing the good things and bad things (pros and cons) that could happen if I make one decision or another
- Telling other people my wishes
- _____

D. I express myself and show what I want in the following ways:

- Telling people my likes and dislikes.
- Telling people what I do and do not want to do.
- _____
- _____

E. I designate the following individual(s) to be part of my Supported Decision Making Network to assist me in making decisions.

Network Supporter #1

Name: _____ Date of birth: _____

Address: _____

Telephone: _____ Email: _____

Relationship: _____

I want this supporter to help me with:

Finances

Health care

___ with a form to let this supporter see my private health information
___ without a form to let this supporter see my private health information

Legal Matters

Education

___ with a form to let this supporter see my private education information
___ without a form to let this supporter see my private education information

Work

Life Plan

Other (*please specify*):

Areas I don't want Supporter #1 to assist me with:

Network Supporter #2

Name: _____ Date of birth: _____

Address: _____

Telephone: _____ Email: _____

Relationship: _____

I want this supporter to help me with:

Finances

Health care

- ___ with a form to let this supporter see my private health information
- ___ without a form to let this supporter see my private health information

Legal Matters

Education

- ___ with a form to let this supporter see my private education information
- ___ without a form to let this supporter see my private education information

Work

Life Plan

Other (*please specify*):

Areas I don't want Supporter #2 to assist me with:

Network Supporter #3

Name: _____ Date of birth: _____

Address: _____

Telephone: _____ Email: _____

Relationship: _____

I want this supporter to help me with:

Finances

Health care

- ___ with a form to let this supporter see my private health information
- ___ without a form to let this supporter see my private health information

Legal Matters

Education

- ___ with a form to let this supporter see my private education information
- ___ without a form to let this supporter see my private education information

Work

Life Plan

Other (*please specify*):

Areas I don't want Supporter #3 to assist me with:

F. If I have more than one Supporter (Optional, but if you do not fill out this section, your Supporters will act “Successively”.)

My Supporters will act (*choose one*)

Jointly (work together to help me)

OR

Successively (For example: Supporter #2 helps me if Supporter #1 is not available)

Signature

Date

G. Notary Certification

State of South Carolina

County of _____

On this _____ day of _____, 20____, before me, the undersigned notary public, personally appeared _____ proved to me through satisfactory evidence of identification, which were _____, to be the person whose name is signed on the preceding or attached document in my presence.

(seal)

Notary Public Signature

H. Network Supporters' Statements

Network Supporter #1

I _____ consent to act as _____'s supporter. I understand that my job as supporter is to honor and express his/her wishes. My support might include giving him/her information in a way he/she can understand; discussing pros and cons of decisions; and helping him/her communicate his/her choice. I know that I may NOT make decisions for him/her. I agree to support his/her decisions to the best of my ability, honestly, and in good faith.

Signature

Date

Network Supporter #2

I _____ consent to act as _____'s supporter. I understand that my job as supporter is to honor and express his/her wishes. My support might include giving him/her information in a way he/she can understand; discussing pros and cons of decisions; and helping him/her communicate his/her choice. I know that I may NOT make decisions for him/her. I agree to support his/her decisions to the best of my ability, honestly, and in good faith.

Signature

Date

Network Supporter #3

I _____ consent to act as _____'s supporter. I understand that my job as supporter is to honor and express his/her wishes. My support might include giving him/her information in a way he/she can understand; discussing pros and cons of decisions; and helping him/her communicate his/her choice. I know that I may NOT make decisions for him/her. I agree to support his/her decisions to the best of my ability, honestly, and in good faith.

Signature

Date

ADDITIONAL RESOURCES

Center for Disability Resources

Provides resources, programs, and self-advocacy opportunities for people with intellectual and developmental disabilities.

<http://uscm.med.sc.edu/cdrhome/index.asp>

803-935-5231

I'm Determined Project

Focuses on providing direct instruction, models, and opportunities to practice skills associated with self-determined behavior. Look under the "resources" tab for activities and worksheets.

<http://www.imdetermined.org/>

National Resource Center for Supported Decision-Making

National and local resources and information about supported decision-making.

<http://supporteddecisionmaking.org/>

202-448-1448

PRACTICAL Tool for Lawyers: Steps in Supported Decision-Making

Helps lawyers identify and implement decision-making options for persons with disabilities that are less restrictive than guardianship.

www.ambar.org/practicaltool

South Carolina Assistive Technology Program

Provides access to assistive technology and devices, including device lending programs, training, and demonstrations.

<http://scatp.med.sc.edu/>

803-935-5263

Toll-free: 800-915-4522

South Carolina Department of Disabilities and Special Needs (SC DDSN)

The state agency that plans, develops, oversees and funds services for South Carolinians with severe, lifelong disabilities of intellectual disability, autism, traumatic brain injury and spinal cord injury.

www.ddsn.sc.gov

803-898-9600

Toll-free: 1-888-DSN-INFO (376-4636)

TTY: 803-898-9600

South Carolina Vocational Rehabilitation

Provides job training and readiness skills to those who qualify, including some individuals with disabilities. May also provide workplace adaptations and assistive technology.

www.scvrd.net

803-896-5500

Toll-free: 800-832-7526

TTY: 803-896-6533

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The Protection and Advocacy System for the State of South Carolina

3710 LANDMARK DRIVE, SUITE 208, COLUMBIA, SC 29204
803-782-0639; FAX 803-790-1946
IN STATE TOLL FREE: 1-866-275-7273 (VOICE) AND 1-866-232-4525 (TTY)
E-mail: info@pandasc.org
Website: www.pandasc.org

P&A FACT SHEET

ADULT STUDENTS WITH DISABILITIES EDUCATIONAL RIGHTS CONSENT ACT

BACKGROUND

Under the Individuals with Disabilities Education Act of 2004 (IDEA), a student who is eligible for special education services is entitled to a free and appropriate public education between the ages of 3 and 21.¹ At the age of 18 all parental rights under IDEA transfer to the student unless the student has been determined incompetent.² This gives the adult student many important rights and protections under IDEA that the parents previously held.

However, some students with severe disabilities may not be able to participate in their educational process. The IDEA provides a special rule for those students. The special rule says:

- If there is a procedure under state law for deciding that a student who is over age 18 lacks the ability to provide consent for educational rights and has not been declared incompetent, then,
- The state must establish procedures to appoint the parent (or another appropriate person if the parent is not available) to represent the educational interests of the adult student while he or she is in school.³

In 2016, South Carolina enacted the Adult Students with Disabilities Educational Rights Consent Act (Consent Act). This law provides procedures for complying with the special rule.⁴ This Fact Sheet explains the Consent Act.

¹ 20 USC § 1412(a)(1)(A); 34 CFR § 300.101

² 20 USC §1415 (m); 34 CFR § 300.520.

³ 34 CFR § 300.520(b); *see* 20 USC §1415 (m)(2)

WITH THE PASSAGE OF THE CONSENT ACT, WHAT OPTIONS DOES A STUDENT HAVE WHEN TURNING 18?

Option 1 – All Rights Transfer to the Student

Just like before passage of the Consent Act, most students with disabilities will be able to act independently and consent to their own educational programming.

Option 2 – Student Makes Decisions with Support and Assistance (Supported Decision Making)

The Consent Act notes that the student has the right to have an adult of his or her choice support the student in making education decisions. Supported decision making is simply an informal way to seek advice and assistance when making a decision—like asking friends and family what they think about a course of action. More information on Supported Decision Making is available from the SC Bar Association at:

<http://legacy.sbar.org/News/News-Details/ArticleId/2384/Supported-Decision-Making-An-Alternative-to-Surrogate-Decision-Making>

Option 3 – Delegation of Rights Using a Power of Attorney

A student with the capacity to do so may also sign a power of attorney and delegate his or her rights to an agent (such as a parent). The SC Department of Education is required to develop a special form for appointing an agent for making educational decisions. Students may use that form or a power of attorney for education.

Option 4 - Certification of an Educational Representative

A student who is unable to communicate wishes, interests, or preferences in respect to an educational program may have an educational representative certified to act on his or her behalf. The process is outlined in detail below.

Option 5 – Guardianship of the Student

If a student is incapacitated, the parents or other appropriate person may seek guardianship of the adult student through the Probate Court process. The Consent Act does not apply if the student has a court appointed guardian.

For more information on guardianship and alternatives to guardianship, see information on the website of the SC Supreme Court:

Guardianship: Frequently Asked Questions from a Caregiver or Potential Guardian:

<http://www.sccourts.org/selfHelp/FAQsFromACaregiver.pdf>

Guardianship: Frequently Asked Questions from a Ward:

<http://www.sccourts.org/selfHelp/FAQsFromAWard.pdf>

⁴ S.C. Code §§ 59-33-310 to 59-33-370

Alternatives to Guardianship in SC:

<http://www.sccourts.org/selfHelp/FAQsAlternativesToGuardianshipSC.pdf>

WHAT IS THE PROCESS FOR THE APPOINTMENT OF AN EDUCATIONAL REPRESENTATIVE?

Step 1 – A Medical Examination

The student first needs to have a medical examination. The examination must be done by one of the following medical professionals:

- Physician
- Nurse practitioner
- **Physician's** assistant
- Psychologist
- Psychiatrist

The medical professional must examine the student and certify that the student is incapable of communicating, with or without **reasonable accommodations, the student's** wishes, interests, or preferences regarding his or her educational program. The licensed medical professional may not be an employee of the school district.

Step 2 – The Medical Professional Must Certify in Writing that the Student Cannot Communicate

The Certification may be informal, but it must include the following information:

- Date of the examination
- Basis for the determination that the student is not able to communicate his or her wishes
- Whether the inability to communicate is likely to last until age 21

A sample letter is attached to this Fact Sheet.

Step 3 – Send the Letter to the Superintendent of the School District, or Other Designated School Official

It does not matter who mails the certification, but once the school district receives the certification, the district is required to notify the student in writing that (1) a professional has certified that he or she is incapable of communicating and (2) an educational representative will be designated to represent him or her. The student must be informed that he or she may challenge the designation of the educational representative. If the student challenges the certification of an educational representative, then the school district may not rely upon the educational

representative for any purpose. A challenge can be made at any time. Attached to this Fact Sheet is a sample letter for student to stop the certification process.

WHO WILL SERVE AS THE EDUCATIONAL REPRESENTATIVE?

The Consent Act lists the following priorities for who is to serve as an educational representative:

- Custodial parent/adult spouse
- Adult brother or sister
- Grandparent
- Other adult relative
- Surrogate parent designated by the school district

WHAT CAN THE EDUCATIONAL REPRESENTATIVE DO?

The educational representative has the authority to consent to educational services and **participate in the development of the educational program, similar to a parent's role** prior to a student turning 18. The representative does not have the authority to remove a student from educational services. The decisions made by the educational **representative must be based upon a determination of the student's preferences to the extent they can be determined.** If the preferences cannot be determined, then the **decisions must be based upon what is in the student's best interest.**

HOW CAN THE AUTHORITY OF AN EDUCATIONAL REPRESENTATIVE END?

The authority of the educational representative may end as follows:

- When the school district receives a challenge to the certification
- When the student is no longer eligible for special education services
- When the Probate Court issues a guardianship order which terminates the authority of the educational representative

This publication provides legal information, but is not intended to be legal advice. The information was based on the law at the time it was written. As the law may change, please contact P&A for updates. This publication is funded in part by the U.S. Department of Health and Human Services (Administration on Community Living and the Substance Abuse and Mental Health Services Administration), and by the U. S. Department of Education (Rehabilitation Services Administration). It does not necessarily represent the official views of the funding authorities.

P&A does not discriminate on the basis of disability, race, color, creed, national origin, ethnicity, ancestry, citizenship, age, religion, sex or sexual orientation, veteran status or any other class protected by law in the provision of its programs or services. Pete Cantrell is P&A's **designated coordinator for** Sec. 504 of the Rehabilitation Act of 1973 and Americans with Disabilities Act. Education-March 2017

SAMPLE CERTIFICATION LETTER
FROM A MEDICAL PROFESSIONAL

[Date]

Superintendent A. B. Jones
School District #1
[Street Address]
Jolly Good, SC

Re: [Student's Name]

Dear Superintendent Jones:

I am a licensed [physician, nurse practitioner, physician's assistant, psychologist, or psychiatrist]. On [insert date of examination], I examined [Student's Name]. **[Student's Name] is incapable of communicating, with or without reasonable accommodations, [his/her] wishes, interests, or preferences regarding [his/her] educational program. The reason for this determination is based upon [insert relevant diagnosis and conditions like being non-verbal and unable to use a communication device due to palsy or other condition]. [Student's name]'s inability to communicate is likely to last until after age twenty-one.**

Sincerely,

[Medical Professional's Signature]

SAMPLE LETTER
CHALLENGE OF CERTIFICATION

[Date]

Superintendent A. B. Jones
School District #1
[Street Address]
Jolly Good, SC

Re: [Student's Name]

Dear Superintendent Jones:

I am challenging the certification by a medical professional that I am unable to communicate, with or without reasonable accommodations, my wishes, interests, or preferences regarding my educational program. I am able to communicate my wishes, interests, and preferences regarding my educational program. Please do not use an educational representative for any purpose.

Sincerely,

[Student's Signature]

CHAPTER 66
Adult Health Care Consent Act

SECTION 44-66-10. Short title.

This chapter may be cited as the "Adult Health Care Consent Act".

HISTORY: 1990 Act No. 472, Section 1.

SECTION 44-66-20. Definitions.

As used in this chapter:

(1) "Health care" means a procedure to diagnose or treat a human disease, ailment, defect, abnormality, or complaint, whether of physical or mental origin. Health care also includes the provision of intermediate or skilled nursing care; services for the rehabilitation of injured, disabled, or sick persons; and the placement in or removal from a facility that provides these forms of care.

(2) "Health care provider" or "provider" means a person, health care facility, organization, or corporation licensed, certified, or otherwise authorized or permitted by the laws of this State to administer health care.

(3) "Health care professional" means an individual who is licensed, certified, or otherwise authorized by the laws of this State to provide health care to members of the public.

(4) "Patient" means an individual sixteen years of age or older who presents or is presented to a health care provider for treatment.

(5) "Person" includes, but is not limited to, an individual, a state agency, or a representative of a state agency.

(6) "Physician" means an individual who is licensed to practice medicine or osteopathy pursuant to Chapter 47, Title 40.

(7) "Treatment" means the broad range of emergency, outpatient, intermediate, and inpatient services and care that may be extended to a patient to diagnose and treat a human disease, ailment, defect, abnormality, or complaint, whether of physical or mental origin. Treatment includes, but is not limited to, psychiatric, psychological, substance abuse, and counseling services.

(8) "Unable to consent" means unable to appreciate the nature and implications of the patient's condition and proposed health care, to make a reasoned decision concerning the proposed health care, or to communicate that decision in an unambiguous manner. This term does not apply to minors, and this chapter does not affect the delivery of health care to minors unless they are married or have been determined judicially to be emancipated. A patient's inability to consent must be certified by two licensed physicians, each of whom has examined the patient. However, in an emergency the patient's inability to consent may be certified by a health care professional responsible for the care of the patient if the health care professional states in writing in the patient's record that the delay occasioned by obtaining certification from two licensed physicians would be detrimental to the patient's health. A certifying physician or other health care professional shall give an opinion regarding the cause and nature of the inability to consent, its extent, and its probable duration. If a patient unable to consent is being admitted to hospice care pursuant to a physician certification of a terminal illness required by Medicare, that certification meets the certification requirements of this item.

HISTORY: 1990 Act No. 472, Section 1; 1992 Act No. 306, Section 3; 2002 Act No. 351, Sections 2, eff July 20, 2002; 2013 Act No. 39, Section 2, eff January 1, 2014.

Effect of Amendment

The 2002 amendment, in paragraph (6), added the last sentence relating to certification requirements for a hospice patient unable to consent.

The 2013 amendment substituted "Health care" for "It" in the second sentence in paragraph (1); inserted new text in paragraph (4) and redesignated former paragraphs (4) and (5) as paragraph (5) and (6); inserted paragraph (7); redesignated former paragraph (6) as paragraph (8); substituted "pursuant to

Chapter 47, Title 40" for "under Chapter 47 of Title 40" in paragraph (6); and substituted "This term does not apply to minors" for "This definition does not include minors" in paragraph (8).

SECTION 44-66-30. Persons who may make health care decisions for patient who is unable to consent; order of priority; exceptions.

(A) Where a patient is unable to consent, decisions concerning his health care may be made by the following persons in the following order of priority:

(1) a guardian appointed by the court pursuant to Article 5, Part 3 of the South Carolina Probate Code, if the decision is within the scope of the guardianship;

(2) an attorney-in-fact appointed by the patient in a durable power of attorney executed pursuant to Section 62-5-501, if the decision is within the scope of his authority;

(3) a person given priority to make health care decisions for the patient by another statutory provision;

(4) a spouse of the patient unless the spouse and the patient are separated pursuant to one of the following:

(a) entry of a pendente lite order in a divorce or separate maintenance action;

(b) formal signing of a written property or marital settlement agreement; or

(c) entry of a permanent order of separate maintenance and support or of a permanent order approving a property or marital settlement agreement between the parties;

(5) an adult child of the patient, or if the patient has more than one adult child, a majority of the adult children who are reasonably available for consultation;

(6) a parent of the patient;

(7) an adult sibling of the patient, or if the patient has more than one adult sibling, a majority of the adult siblings who are reasonably available for consultation;

(8) a grandparent of the patient, or if the patient has more than one grandparent, a majority of the grandparents who are reasonably available for consultation;

(9) any other adult relative by blood or marriage who reasonably is believed by the health care professional to have a close personal relationship with the patient, or if the patient has more than one other adult relative, a majority of those other adult relatives who are reasonably available for consultation.

(B) Documentation of efforts to locate a decision maker who is a person identified in subsection (A) must be recorded in the patient's medical record.

(C) If persons of equal priority disagree on whether certain health care should be provided to a patient who is unable to consent, an authorized person, a health care provider involved in the care of the patient, or any other person interested in the welfare of the patient may petition the probate court for an order determining what care is to be provided or for appointment of a temporary or permanent guardian.

(D) Priority pursuant to this section must not be given to a person if a health care provider responsible for the care of a patient who is unable to consent determines that the person is not reasonably available, is not willing to make health care decisions for the patient, or is unable to consent as defined in Section 44-66-20(8).

(E) An attending physician or other health care professional responsible for the care of a patient who is unable to consent may not give priority or authority pursuant to subsections (A)(5) through (A)(10) to a person if the attending physician or health care professional has actual knowledge that, before becoming unable to consent, the patient did not want that person involved in decisions concerning his care.

(F) This section does not authorize a person to make health care decisions on behalf of a patient who is unable to consent if, in the opinion of the certifying physicians, the patient's inability to consent is temporary, and the attending physician or other health care professional responsible for the care of the patient determines that the delay occasioned by postponing treatment until the patient regains the ability to consent will not result in significant detriment to the patient's health.

(G) A person authorized to make health care decisions pursuant to subsection (A) shall base those decisions on the patient's wishes to the extent that the patient's wishes can be determined. Where the patient's wishes cannot be determined, the person shall base the decision on the patient's best interest.

(H) A person authorized to make health care decisions pursuant to subsection (A) either may consent or withhold consent to health care on behalf of the patient.

HISTORY: 1990 Act No. 472, Section 1; 1992 Act No. 306, Section 4; 2016 Act No. 226 (H.3999), Section 1, eff June 3, 2016.

Effect of Amendment

2016 Act No. 226, Section 1, rewrote the section, making changes to the order of priority, adding classes of persons with the authority to make health care decisions, and for other purposes.

SECTION 44-66-40. Provision of health care without consent where there is serious threat to health of patient, or to relieve suffering; person having highest priority to make health care decision.

(A) Health care may be provided without consent to a patient who is unable to consent if no person authorized by Section 44-66-30 to make health care decisions for the patient is available immediately, and in the reasonable medical judgment of the attending physician or other health care professional responsible for the care of the patient, the delay occasioned by attempting to locate an authorized person, or by continuing to attempt to locate an authorized person, presents a substantial risk of death, serious permanent disfigurement, or loss or impairment of the functioning of a bodily member or organ, or other serious threat to the health of the patient. Health care for the relief of suffering may be provided without consent at any time that an authorized person is unavailable.

(B) Health care decisions on behalf of a patient who is unable to consent may be made by a person named in Section 44-66-30 if no person having higher priority under that section is available immediately, and in the reasonable medical judgment of the attending physician or other health care professional responsible for the care of the patient, the delay occasioned by attempting to locate a person having higher priority presents a substantial risk of death, serious permanent disfigurement, loss or impairment of the functioning of a bodily member or organ, or other serious threat to the health of the patient.

HISTORY: 1990 Act No. 472, Section 1.

SECTION 44-66-50. Provision of health care without consent to relieve suffering, restore bodily function, or to preserve life, health or bodily integrity of patient.

Health care may be provided without consent to a patient who is unable to consent if no person authorized by Section 44-66-30 to make health care decisions for the patient is reasonably available and willing to make the decisions, and, in the reasonable medical judgment of the attending physician or other health care professional responsible for the care of the patient, the health care is necessary for the relief of suffering or restoration of bodily function or to preserve the life, health, or bodily integrity of the patient.

HISTORY: 1990 Act No. 472, Section 1.

SECTION 44-66-60. No authority to provide health care to patient who is unable to consent where health care is against religious beliefs of patient, or patients prior instructions.

(A) Unless the patient, while able to consent, has stated a contrary intent to the attending physician or other health care professional responsible for the care of the patient, this chapter does not authorize the provision of health care to a patient who is unable to consent if the attending physician or other health care professional responsible for the care of the patient has actual knowledge that the health care is contrary to the religious beliefs of the patient.

(B) This chapter does not authorize the provision of health care to a patient who is unable to consent if the attending physician or other health care professional responsible for the care of the patient has actual knowledge that the health care is contrary to the patient's unambiguous and uncontradicted instructions expressed at a time when the patient was able to consent.

(C) This section does not limit the evidence on which a court may base a determination of a patient's intent in a judicial proceeding.

HISTORY: 1990 Act No. 472, Section 1.

SECTION 44-66-70. Person who makes health care decision for another not subject to civil or criminal liability, nor liable for costs of care; health care provider not subject to civil or criminal liability.

(A) A person who in good faith makes a health care decision as provided in Section 44-66-30 is not subject to civil or criminal liability on account of the substance of the decision.

(B) A person who consents to health care as provided in Section 44-66-30 does not by virtue of that consent become liable for the costs of care provided to the patient.

(C) A health care provider who in good faith relies on a health care decision made by a person authorized under Section 44-66-30 is not subject to civil or criminal liability or disciplinary penalty on account of his reliance on the decision.

(D) A health care provider who in good faith provides health care pursuant to Sections 44-66-40 or 44-66-50 is not subject to civil or criminal liability or disciplinary penalty on account of the provision of care. However, this section does not affect a health care provider's liability arising from provision of care in a negligent manner.

HISTORY: 1990 Act No. 472, Section 1.

SECTION 44-66-75. Designating a family member with whom provider may discuss medical condition; exemptions.

(A) A health care provider or the provider's agent shall provide on the patient information form or by electronic health records, the opportunity for the patient to designate a family member or other individual they choose as a person with whom the provider may discuss the patient's medical condition and treatment plan.

(B) The authorization provided for in subsection (A):

(1) satisfies the requirements of Title 42 of the Code of Federal Regulations, relating to public health, and the privacy rule of the Health Insurance Portability and Accountability Act of 1996 (HIPAA);

(2) must present the question in bold print and capitalized, or by electronic means: "DO YOU WANT TO DESIGNATE A FAMILY MEMBER OR OTHER INDIVIDUAL WITH WHOM THE PROVIDER MAY DISCUSS YOUR MEDICAL CONDITION? IF YES, WHOM?"; and

(3) must specify that the patient may revoke or modify an authorization with regard to any family member or other individual designated by the patient in the authorization and that the revocation or modification must be in writing.

(C) A health care provider may disclose information pursuant to an authorization unless the provider has actual knowledge that the authorization has been revoked or modified.

(D) A health care provider who in good faith discloses information in accordance with an authorization signed by a patient pursuant to this section is not subject to civil liability, criminal liability, or disciplinary sanctions because of this disclosure.

(E) Nothing in this section may be construed to:

(1) require a health care provider to disclose information that he otherwise may withhold or limit;

(2) limit or prevent a provider from disclosing information without written authorization from the patient if this disclosure is otherwise lawful or permissible;

(3) prohibit a provider from receiving and using information relevant to the safe and effective treatment of the patient from family members; and

(4) conflict with an individual's health care power of attorney as provided for in the South Carolina Probate Code.

(F) Notwithstanding any other provision of this chapter, this section does not apply to nursing homes, as defined in Section 44-7-130 or a dentist, dental hygienist, or dental technician licensed or registered in Chapter 15, Title 40.

HISTORY: 2013 Act No. 39, Section 1, eff January 1, 2014.

SECTION 44-66-80. Other laws mandating or allowing testing or treatment without consent unaffected.

No provision in this chapter affects the ability of a state agency or health care provider working in conjunction with a state agency to conduct testing or provide treatment which is mandated or allowed by other provisions of law.

HISTORY: 1990 Act No. 472, Section 1.



The Protection and Advocacy System for South Carolina

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Website: www.pandasc.org

P&A FACT SHEET

Involuntary Mental Health Commitments

What Is an Involuntary Mental Health Commitment?

An involuntary mental health commitment is the way that a Probate Court Judge can order you to have mental health treatment, even if you do not want treatment. Although most adults have a right to refuse medical treatment, the commitment process creates an exception. The Probate Court may order treatment if you have a mental illness, you need treatment, and you meet the legal commitment standards.

There are two processes for adult mental health commitment: (1) emergency and (2) judicial.

The emergency process is used when you are an immediate harm to yourself or to others due to mental illness. In an emergency, you may be taken into custody immediately and admitted for treatment against your will.

The judicial process is used when there is not an emergency, but someone (usually a family member) believes you need mental health treatment even if you do not want treatment. You do not have to be detained while you wait on the Court to decide in a non-emergency situation.

In both emergency and non-emergency situations, the Court must hold a hearing before finding that you continue to need mental health treatment.

This fact sheet outlines both emergency and judicial mental health commitment procedures for adults. It does not talk about commitment for chemical dependency (alcohol or drug addiction) or commitment procedures for children.

What Happens If You Have Immediate Need for Mental Health Treatment? (Emergency Process for Commitment)

Who starts the process?

Any person may file an "Affidavit," a writing signed under oath, stating (1) that he or she believes you have a mental illness and are likely to cause serious harm to yourself or others if not immediately hospitalized, and (2) the specific reasons why he or she believes that about you. S.C. Code § 44-17-410. Usually, this person is a family member or an emergency responder such as Emergency Medical Service (EMS), who must have observed your actions first-hand.

Serious harm means a substantial risk of physical harm or injury to you or to others. S.C. Code § 44-23-10.

If you are not already in a medical facility, such as a mental health center or a hospital, you may be detained. Usually that means that a member of law enforcement will take to you a hospital emergency room where you will be examined by a physician (medical doctor). You are not under arrest, but you cannot leave until you are examined by the doctor, and the doctor determines that you do not meet the standard for commitment. The hospital will release you if you do not meet the standard.

Is there anything else needed for Emergency Commitment?

Yes. A medical doctor must examine you. The doctor must certify in writing:

1. You have a mental illness;
2. Because of the illness, you are likely to cause harm to yourself or others unless you get treatment in a hospital; and
3. The specific reasons why you are likely to cause harm if you do not get treatment.

If you were detained by law enforcement, the doctor must examine you within 24 hours of being taken into custody. If the doctor finds all three criteria are **met, the doctor must complete and sign a document called a "Certification."**

Note: The doctor who signs the Certification must be different from the individual who signed the Affidavit.

If both the Affidavit and the doctor's Certification are completed, they authorize you to be admitted involuntarily to a psychiatric hospital for further evaluation and possible treatment. In most cases, you will be transported to the psychiatric hospital from the emergency room by law enforcement. You are not under arrest, but cannot leave the hospital without permission. S.C. Code § 44-17-410(b) (2).

What if the doctor does not examine you within 24 hours or the doctor does not complete a Certification?

If the doctor does not examine you within 24 hours from the time you are taken into custody, you must be released. Even if it is a weekend or holiday, the doctor must examine you within 24 hours. If the doctor does examine you, but does not think you meet the standard, he or she will not fill out the Certification, and you must then be released. S.C. Code § 44-17-430.

If I am admitted involuntarily to a hospital, how long must I stay there?

Within 48 hours of your admission involuntarily to a psychiatric hospital, the Affidavit and Certification must be sent to the Probate Court. Within 48 hours of receiving these documents, the Court must review them to see if there is probable cause to continue your emergency involuntary hospitalization. (Saturdays, Sundays, and holidays do not count toward the 48 hours). Probable cause means there is a reasonable likelihood that the information in the Affidavit and the Certification is correct. In other words, the Affidavit and Certification must indicate that there are still good reasons for an emergency commitment. S.C. Code § 44-17-410.

What happens if the Court finds there is "probable cause"?

If the Court finds that there is probable cause, the Court will:

- Issue an order for your continued involuntary hospitalization. (Called the **"Order for Continued Hospitalization,"** this order is valid only until you are examined or until a hearing is held.); and
- Issue an order appointing two mental health care professionals as **"Designated Examiners"** to examine you. One must be a medical doctor. The other one is usually the social worker working with you in the hospital.

If the Court determines that there is not probable cause, then it issues an Order for your immediate release from the hospital and for your case to be dismissed.

What Do the Results from the Exam Mean?

- The Designated Examiners (sometimes called **"DEs"**) must decide if you meet the standard of having a mental illness and being likely to cause serious harm to yourself or others.
- If both DEs find you do not meet the standard, then you are released and the case is dismissed.
- If one DE finds you meet the standard and the other does not, the Court might dismiss the case, or the Court might ask a third examiner to examine you.

- If two DEs find you meet the standard, then the Probate Court must hold a commitment hearing within fifteen (15) days of the date of your admission to the hospital.

Can I ask for an independent Designated Examiner?

Yes. If you cannot afford one, then the state will pay for the examination. S.C. Code § 44-17-530.

If there is a hearing, will I have a lawyer?

Yes. The Court will appoint an attorney to represent you, unless you have an attorney. Generally, the attorney appointed to represent you also serves as your Guardian ad Litem (GAL). As your attorney, he or she must advocate for what you want. As your GAL, he or she must advocate for what is in your best interest. Because these two points of view may be different, you may want to find an attorney on your own, or you may want to ask the Court to appoint an attorney who is not also your GAL. If the Court denies your request, contact P&A. Keep in mind that trying to get a new attorney could delay your hearing and may mean a longer stay in the hospital. If you choose to find an attorney on your own, have your attorney contact the Probate Court prior to the hearing so that he or she can be included in the notice of the hearing.

The Full Probate Court Hearing:

What are my rights?

- Before the hearing, your attorney should meet with you. Your attorney should explain your rights, review the DE reports with you, prepare to present any witnesses you have, and answer your questions.
- A full hearing must be held within 15 calendar days of your involuntary admission to the hospital. S.C. Code § 44-17-410.
- The Court must tell you the date and time of your hearing at least 5 business days before the hearing. S.C. Code § 44-17-420.
- You have a right to have an attorney with you. S.C. Code § 44-22-30 and S.C. Code § 44-17-530.
- You have a right to be present at the hearing. S.C. Code § 44-17-570.
- You and your attorney have a right to bring witnesses and ask questions of them. S.C. Code § 44-17-570.
- You and your attorney can ask questions of any other witnesses. S.C. Code § 44-17-570.
- If you can, try to take notes during the hearing. If you want to appeal, an attorney is in a better position to help you if you have detailed notes of the hearing.

How does the Court decide if I need treatment?

- The Court can require treatment if you meet the following standard:

- The Court must find you have a mental illness and you need treatment.
- The Court must also find because of the mental illness either (1) you do not have the ability to make good choices about your treatment, or (2) you are likely to cause serious harm to yourself or others.
- The Court must have clear and convincing evidence (strong facts) to order treatment. S.C. Code § 44-17-580.

Can I appeal the decision the Court makes?

Yes. You have a right to appeal after the hearing. S.C. Code § 44-17-620.

- You may appeal any treatment or commitment order following the hearing. You appeal to the Circuit Court.
- You must tell both the Probate Court and the Circuit Court that you want to appeal and the reasons for the appeal within 15 calendar days of the date of the order. You must act quickly if you want to appeal.
- You must pay for filing the appeal, unless the Court finds that you cannot afford to.
- If you have questions about bringing an appeal, you may contact P&A. If you want to ask P&A to represent you in an appeal, you must contact P&A as soon as possible after the hearing.

What Happens After the Hearing?

- If the Probate Court finds you do not meet the standard, the court will dismiss your case. If you are in a hospital, you will be able to leave.
- If the Probate Court finds you meet the standard, the Court can order:
 - In-patient treatment at a public or private mental health hospital;
 - Out-patient treatment at a public or private mental health facility;
 - or
 - Out-patient treatment following in-patient treatment.

What Should I Do if I am Being Committed?

- Listen to your attorney and the health professionals around you. If you do not agree with them, explain why not.
- **Follow the Court's order.** If you do not agree with the Court order, your only option is to file an appeal or other motion with the Court. If you are released from the hospital but have been ordered to receive out-patient treatment and do not attend that treatment, the facility must report you to the Court. The Court will have another hearing, and you can be re-committed or even sent to jail for not following the Court order.
- Learn about self-advocacy. P&A has brochures and is available to train individuals on how they can better advocate for their rights.

What Are My Rights to Be Released After Commitment?

- The facility can discharge you whenever your condition has improved to the point that you no longer meet the standard. S.C. Code § 44-22-70.
- If you disagree with the facility about whether you continue to meet the standard, **you or any "interested person" can ask the** Court for a re-examination. S.C. Code § 44-17-630.
 - **An "interested person" is your parent, guardian, spouse, adult next of kin, or nearest friend.** S.C. Code § 44-23-10(10).
- You can ask for re-examination every six months.
- The treatment facility must inform you and at least one other interested person of this right every six months. S.C. Code § 44-17-630.

What Is the Difference Between the Emergency Commitment Process and Judicial Commitment Process?

In an emergency admission, anyone can start the process (for example, an EMS worker who is called to the scene). A judicial commitment is different because **only an "interested person" or a superintendant of a mental institution can start** the process. S.C. Code § 44-17-510. **An "interested person" is your parent, guardian, spouse, adult next of kin, or nearest friend (someone who helps you do things you could not do on your own, such as drive you to doctors' appointments).** S.C. Code § 44-23-10(9).

Also different from the emergency process, is that in a judicial commitment, an interested person can ask the Probate Court to order you to have mental health treatment because he or she thinks you do not have the ability to make responsible decisions about your treatment. The document that is completed is **a "Petition for Judicial Commitment."** **In most counties, this Petition is prepared** with an intake staff person at the local mental health clinic. This process does NOT start at the Probate Court since it would create a conflict of interest if the Court later hears your case.

In an emergency admission you are taken into protective custody to have an exam. A judicial commitment is different in that before a judicial commitment process can start, a medical doctor must examine you and tell the Court if he or she thinks you have a mental illness and should be committed. If you do not want to have the exam, the interested person can give the Probate Court a statement saying you do not want the exam. Then, the Probate Court can order a law enforcement officer to take you into custody to have an exam. The difference is that in a judicial commitment you can agree to have the exam in the community, instead of in a hospital.

Once you are judicially committed, it will be up to the doctor to determine if you should be released. You can ask the Court to be re-examined once every six months.

Where Can I Get Help?

The Department of Mental Health Client Advocacy Program has advocates who can give you information and may be able to help you if you are in a DMH facility. You can contact the Client Advocacy Program at (803) 898-8557 or Toll Free at 1-866-300-9330.

If you believe that you have been abused or neglected in a DMH facility, contact the State Law Enforcement Division (SLED). Their telephone number is 1-866-200-6066. You may also contact the Client Advocacy Program or P&A. If you believe that you have been abused or neglected in a privately-operated facility, contact local law enforcement. You may also contact P&A.

The S.C. Code sections mentioned in this brochure can be found on-line at <http://www.scstatehouse.gov/code/title44.php>. If you do not have access to the internet, you can ask your social worker to print a copy of the relevant sections of the S.C. Code. If your social worker cannot help you or if you have trouble finding what you need, contact P&A for help.

Information about P&A Fact Sheets:

This publication provides legal information, but is not intended to be legal advice. The information was based on the law at the time it was written. As the law may change, please contact P&A for updates.

This publication is funded in part by the Substance Abuse and Mental Health Services Administration of the U.S. Department of Health and Human Services. It does not necessarily represent the official views of the funding authorities.

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[Mental Health] October 2018



PRESUME
guardianship
is not needed.

REASON.
Clearly identify
the reasons for
concern.



PRACTICAL Tool for Lawyers: Steps in Supporting Decision-Making

ASK
if a triggering
concern may
be caused by
temporary
or reversible
conditions.

COMMUNITY.
Determine if concerns
can be addressed
by connecting the
individual to family
or community
resources and making
accommodations.



TEAM.
Ask the person
whether he or
she already has
developed a team
to help make
decisions.

IDENTIFY
abilities. Identify
areas of strengths
and limitations in
decision-making.

CHALLENGES.
Screen for and
address any
potential challenges
presented by the
identified supports
and supporters.

APPOINT
legal supporter
or surrogate
consistent with
person's values and
preferences.

LIMIT
any necessary
guardianship
petition and order.



Jointly produced by 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



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PRACTICAL Tool for Lawyers: Steps in Supporting Decision-Making

The PRACTICAL Tool aims to help lawyers identify and implement decision-making options for persons with disabilities that are less restrictive than guardianship. It is 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, with assistance from the National Resource Center for Supported Decision-Making. Learn more about the PRACTICAL Tool and Resource Guide at www.ambar.org/practicaltool.

PRESUME guardianship is not needed.

- Consider less restrictive options like financial or health care power of attorney, advance directive, trust, or supported decision-making
- Review state statute for requirements about considering such options

Observations and Notes:

REASON. Clearly identify the reasons for concern.

Consider whether the individual can meet some or all of the following needs:*

Money Management:

- Managing accounts, assets, and benefits
- Recognizing exploitation

Health Care:

- Making decisions about medical treatment
- Taking medications as needed
- Maintaining hygiene and diet
- Avoiding high-risk behaviors

Relationships:

- Behaving appropriately with friends, family, and workers
- Making safe decisions about sexual relationships

Community Living:

- Living independently
- Maintaining habitable conditions
- Accessing community resources

Personal Decision-Making:

- Understanding legal documents (contracts, lease, powers of attorney)
- Communicating wishes
- Understanding legal consequences of behavior

Employment:

- Looking for, gaining, and retaining employment

Personal Safety:

- Avoiding common dangers
- Recognizing and avoiding abuse
- Knowing what to do in an emergency

Observations and Notes
(List supports needed.):

*Adapted from University of Missouri Kansas City, Institute for Human Development, "MO Guardianship: Understanding Your Options & Alternatives," <http://moguardianship.com>.

ASK if a triggering concern may be caused by temporary or reversible conditions.

Look for steps to reverse the condition or postpone a decision until the condition improves.

Are concerns the result of or related to temporary or reversible conditions such as:

- Medical conditions:** Infections, dehydration, delirium, poor dental care, malnutrition, pain
- Sensory deficits:** hearing or vision loss
- Medication** side effects
- Psychological conditions:** stress, grief, depression, disorientation
- Stereotypes or cultural barriers**

Observations and Notes:

COMMUNITY. Determine if concerns can be addressed by connecting the individual to family or community resources and making accommodations.

Ask “what would it take?” to enable the person to make the needed decision(s) or address the presenting concern.

Might any of the following supports meet the needs:

Community Supports:

- In-home care, adult day care, personal attendant, congregate and home delivered meals, transportation
- Care management, counseling, mediation
- Professional money management

Accommodations:

- Assistive technology
- Home modifications

Residential Setting:

- Supported housing or group home
- Senior residential building
- Assisted living or nursing home

Informal Supports from Family/Friends:

- Assistance with medical and money management
- Communication assistance
- Identifying potential abuse

Observations and Notes:

TEAM. Ask the person whether he or she already has developed a team to help make decisions.

- Does the person have friends, family members, or professionals available to help?
- Has the person appointed a surrogate to help make decisions?

Observations and Notes:

IDENTIFY abilities. Identify areas of strengths and limitations in decision-making if the person does not have an existing team and has difficulty with specific types of decisions.

Can the individual:

- Make decisions and explain his/her reasoning
- Maintain consistent decisions and primary values over time
- Understand the consequences of decisions

Observations and Notes:

CHALLENGES. Screen for and address any potential challenges presented by the identified supports and supporters.

Screen for any of the following challenges:

Possible challenges to identified supports:

- Eligibility, cost, timing or location
- Risk to public benefits

Possible concerns about supporters:

- Risk of undue influence
- Risk of abuse, neglect, exploitation (report suspected abuse to adult protective services)
- Lack of understanding of person's medical/mental health needs
- Lack of stability, or cognitive limitations of supporters
- Disputes with family members

Observations and Notes:

APPPOINT legal supporter or surrogate consistent with person's values and preferences.

Could any of these appointments meet the needs:

- Agent under health care power of attorney or advance directive
- Health care surrogate under state law
- Agent under financial power of attorney
- Trustee
- Social Security representative payee
- VA fiduciary
- Supporter under representation agreement, legally or informally recognized

Observations and Notes:

LIMIT any necessary guardianship petition and order.

If a guardian is needed:

- Limit guardianship to what is absolutely necessary, such as:
 - Only specific property/financial decisions
 - Only property/finances
 - Only specific personal/health care decisions
 - Only personal/health care decisions
- State how guardian will engage and involve person in decision-making
- Develop proposed person-centered plan
- Reassess periodically for modification or restoration of rights

Observations and Notes:

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South Carolina Bar

Continuing Legal Education Division

Preparing for 2019 Changes to Guardianship and Protective Proceeding Cases in Elder Law

Friday, November 9, 2018

Panel Discussion on Voting and Guardianship

Kathleen A. Warthen

The Hon. Heather J. Galvin

M. Leigh Flynn



Voting Rights

For People with Disabilities in South Carolina

Produced by the SC DisAbility Voting Coalition



South Carolina
DisAbility
Voting Coalition

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Since 1977 Protection and Advocacy for People with Disabilities, Inc. has been an independent, statewide, non-profit corporation that protects and advances the legal rights of people with disabilities. P&A's vision in South Carolina is that individuals with disabilities will be fully integrated into the community with control over their own lives; be free from abuse, neglect and exploitation and have equal access to services.

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Introduction

Voting isn't a right—it's *the* right—the one that all others depend upon. No matter where you live, no matter what you do for a living, no matter what challenges you may face, you have the right to vote. Voting gives people the ability to voice their opinions about important issues in their community such as healthcare, transportation, education, and much more.

This book was prepared to help voters with disabilities in South Carolina understand their rights in the voting process. This publication will explain:

- Who can vote (*page 3*)
- How to register to vote (*page 4*)
- Different ways to vote (*page 5*)
- Accessibility issues (*page 9*)
- How to report problems (*page 12*)
- Additional resources (*page 13*)

Important Note:

In South Carolina 17% of the voting age population has a disability.

Videos

This publication corresponds with a set of videos about voting:

Registering to Vote in SC: <http://bit.ly/28Sbgv9>

Ways to Vote in SC: <http://bit.ly/28Q89SB>

Voting Accessibility in SC: <http://bit.ly/28PVCgv>

Voting Glossary

Ballot: The official presentation of all of the candidates running in the current election.

Candidate: Person running for office.

Clerk: Poll manager in charge of a polling place.

Guardianship: A legal process to determine if someone is unable to make personal decisions like medical care or where to live. The judge will then name someone else to make those decisions.

Photo Identification (Photo ID): Official government-issued form of identification that includes a photo.

Polling Place: The designated location for a precinct to vote on Election Day.

Poll Manager: A person working at the polling place on Election Day.

Precinct: A subdivision of a county, town or city for election purposes.

Provisional Ballot: A provisional ballot is a temporary paper ballot that is used on Election Day at your assigned polling place.

Service Animal: Service animals are dogs or miniature horses individually trained to do work or perform tasks for people with disabilities.

Voting Rights for People with Disabilities

- You have the right to vote privately and independently.
- You have the right to request assistance, if needed.
- You have the right to vote for the candidates you choose.
- You have the right to vote even if you live in a group home, residential center, nursing home, or any other kind of facility.
- You have the right to vote even if you have a developmental or intellectual disability.
- You have the right to vote even if you have a [guardian](#) (depending on the terms of the guardianship).

Registering and Preparing to Vote in SC

Who is Eligible to Vote

- At least 18 years old on or before the next election.
- Resident of state, county and [precinct](#) in which you are registered to vote.
- Not under a court order declaring mental incompetency.
- Not in prison for a conviction of a crime.
- Not on probation or parole for a conviction of a felony or election law crime (unless the person has been pardoned).

Important Note:

[Most people with a guardian in South Carolina are eligible to vote.](#)

However, some may not. If you are not eligible, it will be written in your guardianship paperwork. If you have a guardian, it is best to talk with your guardian about whether or not you can vote.

The Different Ways to Register to Vote

There are three ways a person can register to vote. Registration closes thirty days before any election. To find a list of contact information for each county office go to:

[http://www.scvotes.org/how to register absentee voting](http://www.scvotes.org/how_to_register_absentee_voting)

Online: You can register online by going to www.scvotes.org and click on “online voter registration.” You will need either a South Carolina Identification Card or a South Carolina Driver’s License to register this way.

Mail: Either download the application from the website at www.scvotes.org or call, fax or mail your county office to request a form. Then you can mail, fax or email the completed form to your county office. You will need to mail a copy of one of the following forms of ID: [Photo ID](#), utility statement, bank statement, paycheck or government document that shows your name and address.

In person: Apply in person at your county voter registration office. You can also apply in person at any South Carolina Department of Motor Vehicles or social service offices like the Department of Social Services. Bring one of the following forms of ID: [Photo ID](#), utility statement, bank statement, paycheck or government document that shows your name and address.

Important Note:

Voters with a disability, age 65 and older, members of the armed services or citizens residing outside the US who do not currently have a photo ID or any of the other required documents needed to register to vote can check the exempt box.

The Four Ways a Person with a Disability Can Vote in South Carolina

People have different abilities and needs for accommodations, so it is important that you understand all your options. Choose the way that is best for you.

In Person at Your Polling Place

Go to your assigned [polling place](#) on Election Day, sign or place your mark in the poll book, and vote on the machine.

Curbside at Your Polling Place

Anyone who is 65 or older or a person with a disability is eligible to vote curbside. Curbside voting does not require a [SC Department of Motor Vehicle disabled placard or license plate](#). Go to your designated polling place on Election Day, find the curbside voting sign and park in the designated space. The area should be monitored at least every 15 minutes. Two [poll managers](#) will come out to assist you. You will be able to vote on the machine from your car. Unfortunately, other riders are not eligible to vote this way.

In-Person Absentee Voting

- Contact your [county voter registration office](#) to find out where and when in-person absentee voting will take place.
- You may vote using in person absentee until 5:00 p.m. on the day before the election.
- In-person absentee voting requires a photo ID.

Mail-In Absentee Voting

Absentee Voting allows voters to cast a [ballot](#) before Election Day. You can request your absentee ballot as early as January 1 of the election year. [Ballots](#) are usually available 30 days before Election Day.

Step 1: Request an absentee application in one of two ways:

Online: Go to www.scvotes.org to get your application online. If you choose to use the online method you **must** be able to print your application from a computer.

Paper: Make a request to your [county office](#) by phone, mail, email, or fax to receive your absentee application. This application will be mailed to your address.

Step 2: Complete and sign the application and return it to your county voter registration office. You should return the application as soon as possible, but no later than 5:00 p.m. on the 4th day prior to the election (the 4th day is Friday for all Tuesday elections). You may return the application by mail, email, fax, or personal delivery.

Step 3: Receive your absentee ballot in the mail.

Step 4: Complete the ballot. Follow the instructions closely. You may return the ballot personally or by mail to your county voter registration office by 7:00 pm on the day of the election. Please note it costs about \$1.15 to mail an absentee ballot. You may also have another person return the ballot for you, but you must first complete an authorization to return the absentee ballot form.

Important Note:

[Photo ID](#) is not required to vote absentee by mail.

Who Can Request an Absentee Ballot Application and Who Can Return an Absentee Ballot?

- The voter, a member of the voter's immediate family, or the voter's authorized representative may request the absentee ballot application. An authorized representative is a registered voter who, with a voter's permission, can request an absentee ballot application on behalf of a voter who qualifies because of illness or disability. [Candidates](#) and paid campaign workers may not serve as authorized representatives.
- Voters admitted to the hospital as an emergency patient on the day of the election or within four days prior to the election can have an immediate family member apply and carry a ballot to the voter.
- To have your absentee ballot returned by a person other than yourself, it is necessary for the absentee voter to complete an "Authorization to Return Absentee Ballot Form." The absentee voter completes Section 1, and the person returning the ballot completes Section 2 of the form. Candidates and paid campaign workers may return absentee ballots only if they are an immediate family member of the voter.



What You Need to Vote on Election Day

You must present one of the following forms of [photo ID](#) to vote in person on Election Day:

- SC driver's license
- SC DMV ID card
- SC voter registration card with photo
- Federal military ID
- United States passport

Important Note:

If you do not have a photo ID you may vote with a [provisional ballot](#) due to a reasonable impediment.

Provisional Ballot

If you do not have a photo ID due to a reasonable impediment such as a lack of transportation, lack of birth certificate, disability or illness you may request a [provisional ballot](#). A provisional ballot is a temporary paper ballot that you use on Election Day at your assigned polling place. To vote this way, present your current voter registration card, sign the affidavit stating why you could not obtain a photo ID, and cast a provisional ballot. The provisional ballot will be counted unless the county election office has reason to believe your affidavit is false. Refer to the written instructions located at the polling place to ensure your provisional ballot is counted.

Voting Accessibility

You may face challenges in the voting process. It is best to know your rights, the accommodations offered, and be prepared to advocate for yourself, if needed. Some of the features you may find helpful are:

- Large print voter registration forms.
- Written instructions for people who are deaf or hard of hearing on how to vote.
- Voting machines that offer an audio ballot with headset and braille buttons, large fonts, and touch screen. You may bring your own headphones.



- You are free to bring adaptive equipment such as a signature guide or magnifier with you to the polls. However, most electronic devices will not be allowed into the voting booth. If you would like to check to see if you can use a device on Election Day please call your local [county election office](#).

Important Note:

Audio ballots are available only during federal elections.

Physical Accessibility of Polling Places

All polling places in the US must meet Americans with Disabilities Act (ADA) polling place standards. However, accessibility problems are frequently found. Many people find it helpful to be proactive and drive by their polling place before voting to identify any barriers that might exist. Polling places should have:

- Accessible parking
- Ramps and curb cuts
- Paved parking lots and sidewalks
- Accessible doorways and door handles
- Accessible internal pathways
- Ability to move a voting machine to a table that is accessible for a person using a wheelchair

To learn more about the current accessibility standards for polling places go to <http://www.ada.gov/votingck.htm>

Service Animals

You have the right to have a [service animal](#) with you when you go to vote. If you have problems with someone questioning your right to a service animal, you may want to download the card “Service Dogs-Legal Rights” by Protection and Advocacy for People with Disabilities, Inc. and have it with you when you vote. <http://pandasc.org/2012/09/service-dogs-legal-rights/>

Right to Assistance

You may need assistance using the voting machine. If you have a disability or are unable to read and write you are entitled to receive assistance. You may choose anyone to assist you in the voting booth

except your employer or a representative of your employer's union. To receive assistance, you must tell the poll worker that you have a disability and that you need assistance. You must identify the person helping you or request the help of a [poll manager](#). You do not have to state your disability or provide any proof of disability.

How to Prepare to Vote

- Research candidates and issues on websites, TV, newspapers, and magazines
- Attend or watch a candidate debate or forum
- Download a sample [ballot](#) from www.scvotes.org
- Learn about any questions or amendments that are on the ballot at www.scvotes.org
- Visit your polling place beforehand to determine if it is accessible for you.
- Prepare a list of ballot selections ahead of time so it will be easy to complete your ballot.



Resolving Voting Problems

While at the Polling Place

If you are trying to vote and you believe your rights are being denied, please follow these steps to troubleshoot your problem at the polls:

- 1) Ask to speak to the [clerk](#). The clerk is in charge of the polling place.
- 2) If you are unable to resolve the matter with the clerk, ask the clerk to call the County Board of Voter Registration and Elections.
- 3) If the matter is still not resolved, ask the clerk to call the State Election Commission.
- 4) If you are unable to resolve your problem using the above method please contact one of the following organizations:

Protection and Advocacy for People with Disabilities, Inc.

3710 Landmark Dr., Suite 208, Columbia, SC 29204

Toll Free: 1-866-275-7273 | info@pandasc.org

County Board of Elections and Registrations

Go to http://www.scvotes.org/how_to_register_absentee_voting for a list of contact information for each county.

The SC State Election Commission

P.O. Box 5987, Columbia, SC 29250-5987

www.scvotes.org | (803) 734-9060

Americans with Disabilities Act Discrimination Complaint Form

<https://www.ada.gov/complaint/form.php?language=en>

Help America Vote Act Title III Complaint Form (Title III covers voting system standards, provisional voting, voting information, computerized statewide voter registration list, and registration by mail.)

http://www.scvotes.org/files/Title3_Complaint_Form.pdf

Voting Resources

There are many voting resources available. See below for more information.

South Carolina Resources:

- South Carolina State Election Commission www.scvotes.org
- Protection and Advocacy for People with Disabilities, Inc. www.pandasc.org
- Save All Votes South Carolina www.saveallvotessc.org
- List of contact information for each County in South Carolina [www.scvotes.org/how to register absentee voting](http://www.scvotes.org/how_to_register_absentee_voting)
- SC Judicial Department Self-Help Resources—Guardianship in SC-- Frequently Asked Questions from a Ward <http://www.judicial.state.sc.us/selfhelp/faqsfromAward.pdf>

National Resources:

- Bazelon Center for Mental Health Law – Information on guardianship and voting. <http://www.bazelon.org/SearchResults/tabid/41/Default.aspx?xsq=voting>
- #CripTheVote – View their www.disabilitythinking.com Election 2016 Voter Guide. Join the conversation online with *#CripTheVote*.
- Election Assistance Commission – The national clearinghouse of information on election administration. www.eac.gov

- Election Protection – Visit www.866ourvote.org or call 1-866-OUR-VOTE (1-866-687-8683) if you have any issues or concerns related to Election Day.
- One Vote Now – Partner project of National Association of Councils on Developmental Disabilities (NACDD) and Disability Rights Education & Defense Fund (DREDF) to enhance the voting by people with disabilities. Visit www.onevotenow.org for information on voting.
- RespectAbility Report – a nonpartisan political commentary on the 2016 U.S. elections with a focus on disability issues. www.respectabilityreport.org
- Rock The Vote – Get registered, get informed, and get involved. www.rockthevote.com
- Rooted In Rights – www.rootedinrights.org
- Self Advocates Becoming Empowered (SABE) – Information and resources at www.sabeusa.org/govoter/vote-toolkit/.
- www.Vote411.org and the League of Women Voters



Voting Rights and Guardianship – An Outline of Where We Have Been and Where We Are Going

By

Sarah Garland St. Onge

Article I of the United States Constitution leaves it up to the states to control and oversee federal elections, with of course notable exceptions in the 15th, 19th, 24th, and 26th Amendments and various voting rights laws. U.S. Const. art. I, § 4. When it comes to who is competent to vote, the issue continues to be in the hands of state legislatures.¹

Article II of the South Carolina Constitution identifies that “[e]very citizen of the United States and of this State of the age of eighteen and upwards who is properly registered is entitled to vote as provided by law.” S.C. Const. art. II, § 4. The General Assembly is given authority to establish disqualifications for voting “by reason of mental incompetence.” *Id.* at § 7. Without much expansion on the statement in the Constitution, the code states, “A person is disqualified from being registered or voting if he . . . is mentally incompetent as adjudicated by a court of competent jurisdiction.” S.C. Code § 7-5-120 (B)(1).

In contrast to these voting laws, the guardianship provisions of the probate code establish a process for identifying if an individual is “incapacitated,” but do not establish if an individual is “incompetent.” S.C. Code § 62-5-101. South Carolina does not have a process to adjudicate whether or not a person is “incompetent,” at least not a process that would seem to be relevant to voting.

Under the law in place until January 1, 2019, whether an individual who has been determined to be incapacitated can vote or not, is a murky question of law. The self-litigant materials on guardianship, approved and promoted by the South Carolina Supreme Court, provide an answer to a potential ward upon getting a guardianship, will the ward still be able to vote. The response is, “[y]es, unless the guardianship papers (“the order”) state that you cannot.”²

The 2019 changes to the guardianship portion of the probate code codify the approach in the self-litigant materials, namely the right is retained unless it is specifically removed. S.C. Code § 62-5-304A (A)(9). Each right, including voting, must be addressed by the petitioner when filing the action, the guardian ad litem when doing the investigation and making the report, and the examiner when making the report and possibly testifying. Unlike many of the other rights listed in Section 62-5-304A, the right to vote cannot be vested in the guardian. Therefore, the guardian cannot vote on behalf of the ward.

Attachments and Resources:

- S.C. Code § 62-5-304A.
- “Voting Rights for People with Disabilities in South Carolina,” produced by the SC DisAbility Voting Coalition.
- More information may be found at “Vote, It’s Your Right,” a guide published by the Bazelon Center for Mental Health Law and available at <http://www.bazelon.org/wp-content/uploads/2018/10/2018-Voter-Guide-Updated.pdf>.

¹ Federal Law permits a state to remove a person from the vote list due to mental incapacity. 52 U.S.C. § 20507 (a)(3). However, an individual cannot be given a “test” at the polls to determine if they have the capacity to vote. 52 U.S.C. § 10101 (a)(2) & (3).

² “Guardianship in South Carolina – Frequently Asked Questions from a Ward,” available at <https://www.sccourts.org/selfHelp/FAQsFromAWard.pdf> (last viewed Oct. 16, 2018).

SECTION 62-5-304A. Rights and powers of ward and guardian.

Section effective January 1, 2019.

(A) The court shall set forth the rights and powers removed from the ward. To the extent rights are not removed, they are retained by the ward. Such rights and powers include the rights and powers to:

- (1) marry or divorce;
- (2) reside in a place of the ward's choosing, and consent or withhold consent to any residential or custodial placement;
- (3) travel without the consent of the guardian;
- (4) give, withhold, or withdraw consent and make other informed decisions relative to medical, mental, and physical examinations, care, treatment and therapies;
- (5) make end-of-life decisions including, but not limited to, a 'do not resuscitate' order or the application of any medical procedures intended solely to sustain life, and consent or withhold consent to artificial nutrition and hydration;
- (6) consent or refuse to consent to hospitalization and discharge or transfer to a residential setting, group home, or other facility for additional care and treatment;
- (7) authorize disclosures of confidential information;
- (8) operate a vehicle;
- (9) vote;
- (10) be employed without the consent of a guardian;
- (11) consent to or refuse educational services;
- (12) participate in social, religious or political activities;
- (13) buy, sell, or transfer real or personal property or transact business of any type including, but not limited to, those powers conferred upon the conservator under Section 62-5-422;
- (14) make, modify, or terminate contracts;
- (15) bring or defend any action at law or equity; and
- (16) any other rights and powers that the court finds necessary to address.

(B) The court shall set forth the rights and powers vested in the guardian. These rights and powers include, but are not limited to, the rights and powers to:

- (1) determine the place where the ward shall reside and consent or withhold consent to any residential or custodial placement;
- (2) consent to travel;
- (3) consent or refuse to consent to visitation with family, friends and others;
- (4) give, withhold, or withdraw consent and make other informed decisions relative to medical, mental, and physical examinations, care, treatment and therapies;
- (5) make end-of-life decisions, including, but not limited, to a "do not resuscitate" order or the application of any medical procedures intended solely to sustain life, and consent or withhold consent to artificial nutrition and hydration;
- (6) consent or refuse to consent to hospitalization and discharge or transfer to a residential setting, group home, or other facility for additional care and treatment;
- (7) authorize disclosures of confidential information;
- (8) consent to or refuse educational services;
- (9) consent to employment;
- (10) make, modify, or terminate contracts related to the duties of the guardian;
- (11) bring or defend any action at law or equity; and
- (12) exercise any other rights and powers that the court finds necessary to address.

(C) Nothing in this section must be construed as removing any rights guaranteed by the Bill of Rights for Residents of Long-Term Care Facilities under Chapter 81, Title 44.

(D) The attorney-client privilege between the ward and the ward's counsel must not be removed by the appointment of a guardian.



South Carolina Bar

Continuing Legal Education Division

**Preparing for 2019 Changes to
Guardianship and Protective Proceeding
Cases in Elder Law**

Friday, November 9, 2018

**Ethical Implications in Representing an
Individual with a Disability**

Jonathan Martinis

Supported Decision- Making and the Law: Ethical Considerations

Jonathan
Martinis

Senior Director for
Law and Policy

*The Burton Blatt
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University*

Project Director,
*National Resource
Center for Supported
Decision-Making*

POP QUIZ

What is an attorney's
most important Ethical
Duty?

TRICK QUESTION

LOYALTY

LOYALTY IS BEHIND ALL THE ETHICAL RULES AND RESPONSIBILITIES

Rule 407, South Carolina Rules of Professional Conduct
PREAMBLE: A LAWYER'S RESPONSIBILITIES

[2] As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an **informed understanding** of the client's legal rights and obligations and **explains** their practical implications. As advocate, a lawyer **zealously** asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a **result advantageous** to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and **reporting about them to the client** or to others.

SOUTH CAROLINA RULES ON LOYALTY

South Carolina Rule of Professional Conduct, Rule 1.4

(a) A lawyer shall:

(1) **promptly inform** the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) **reasonably consult** with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client **reasonably informed** about the status of the matter;

(4) **promptly comply** with reasonable requests for information; and

(5) consult with the client about any **relevant limitation on the lawyer's conduct** when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer **shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions** regarding the representation.

SOUTH CAROLINA RULES ON LOYALTY

Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer

(a) Subject to paragraphs (c) and (d), **a lawyer shall abide by a client's decisions** concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. **A lawyer shall abide by a client's decision whether to settle a matter.** In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

SOUTH CAROLINA RULES ON LOYALTY

South Carolina Rule Rule 1.2, comment 1:
[1] Paragraph (a) **confers upon the client the ultimate authority** to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations.

SOUTH CAROLINA RULES ON LOYALTY

Rule 1.6 Confidentiality Of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

ANOTHER POP QUIZ

How do you meet these duties if the client has diminished capacity?

How do you:

- Promptly inform?
- Reasonably consult?
- Understand the clients decisions?
- Get informed consent?

SUPPORTED DECISION-MAKING: EMPOWERING LOYALTY TO CLIENTS

“people with disabilities use friends, family members, and professionals to help them understand the situations and choices they face, so they may make their own decisions. . . .”

- Blanck & Martinis, 2015

BENEFITS OF SELF-DETERMINATION

People with greater self determination are:

- Healthier
 - More independent
 - More well-adjusted
 - Better able to recognize and resist abuse
- Khemka, Hickson, & Reynolds, 2005;
O'Connor & Vallerand, 1994; Wehmeyer & Schwartz, 1998

SUPPORTED DECISION-MAKING AND SELF DETERMINATION

“Supported Decision-Making has the potential to increase the self-determination of older adults and people with disabilities, encouraging and empowering them to reap the benefits from increased life control, independence, employment, and community integration”

- Blanck & Martinis, 2015

Supported Decision-Making Is Required By South Carolina's Rules

South Carolina Rule 1.14:

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, **maintain a normal client-lawyer relationship with the client.**

COMMENTS TO RULE 1.14

“The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. . . [A] client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being.”

COMMENTS TO RULE 1.14

“The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must look to the client, and not family members, to make decisions on the client's behalf.”

WHAT ABOUT GUARDIANSHIP?

Rule 1.14

“(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, **the lawyer may take reasonably necessary protective action**, including consulting with individuals or entities that have the ability to take action to protect the client **and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian**”

BUT...

COMMENTS TO RULE 1.14

“paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decisionmaking tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. **In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client** to the extent known, the client's best interests and **the goals of intruding into the client's decisionmaking autonomy to the least extent feasible**, maximizing client capacities and respecting the client's family and social connections.”

FINDING SUPPORT: ASSESSING NEEDS

Tools to help people identify areas where they may need support.

Missouri Stoplight Tool:

[file:///C:/Users/BBI%20ADMIN/Downloads/Guardianship%20Manual%20Appendix%201%20\(1\).pdf](file:///C:/Users/BBI%20ADMIN/Downloads/Guardianship%20Manual%20Appendix%201%20(1).pdf)

MISSOURI STOPLIGHT TOOL

IDENTIFYING ALTERNATIVES TO GUARDIANSHIP			
Name of Individual: _____			
Name of person completing this form: _____			
Relationship to individual (circle one): Self Family Friend Guardian Other: _____			
How long have you known the individual? _____			
<p>This checklist is a tool designed to be used <i>only</i> for the purposes of the training program</p> <p>MO Guardianship: Understanding Your Options & Alternatives.</p> <p>It is designed to assist with identifying a person's ability to make decisions and manage key areas of the individual's life. It is intended to assist with exploring alternatives and less restrictive options to plenary or full guardianship.</p> <p>The questions listed below are <u>not</u> exhaustive and are <u>not</u> intended to provide a final determination of what a person should (or should not) do in their unique circumstances.</p>	LEAST RESTRICTIVE: Individual Makes Own Decisions		MOST RESTRICTIVE: Individual has NO RIGHTS to Make Decisions
	"YES" If the answer is "YES," place a ✓ in the box. If the answer is "NO," go to next column. →	"NO" If there is an ALTERNATIVE that meets this need, list it below If NO Alternative meets this need, go to next column. →	"NO" Place a ✓ in the box and consider whether you need to address the need through one of the GUARDIANSHIP OPTIONS
EMPLOYMENT			
Can the person make and communicate choices in regard to employment?			
Can the person look for and find a job (go to employment agency, respond to ads, use contacts)?			
MONEY MANAGEMENT			
Is the person able to manage their money (i.e. meet financial commitments, such as regular bills)?			
Is the person able to manage the monetary benefits he or she is supposed to receive?			
Is the person able to identify and resist financial exploitation?			
HEALTH & NUTRITION			
Does the person make decisions about where, when, & what to eat?			
Can the person follow a prescribed diet and/or take medicines as directed?			
Does the person understand the need to maintain personal hygiene and dental care?			
Can the person make and communicate decisions regarding medical treatment, including understanding the consequences of not accepting treatment?			
Does the person understand health consequences associated with high risk behaviors (substance abuse, overeating, high-risk sexual activities, etc.)?			
Can the person alert others and seek medical help for serious health problems?			

FINDING SUPPORT: ASSESSING NEEDS


Beyond the Binary Worksheet:

<https://www.aclu.org/other/beyond-binary-using-supported-decision-making-lens-evaluating-competence>

BEYOND THE BINARY WORKSHEET

3

Beyond the Binary Competence Evaluation Tool

	Check this box if the person makes their own decisions or can do this task independently .	Check this box if the person can make decisions or do this task with support . Describe supports needed or in place.	Check this box if the person cannot make decisions or complete this task even with supports . Describe why supports don't work.
COMMUNICATION			
Can express preferences			
Can provide detailed information			
Can explain means of communication			
PERSONAL CARE			
Choosing what to wear			
Getting dressed			
Choosing what to eat, and when to eat			
Taking care of personal hygiene (for example, showering, bathing, brushing teeth)			
Remembering to take medicine			
STAYING SAFE			
Making safe choices around the house (for example, turning off the stove, having fire alarms)			
Understanding and getting help if being treated badly (abused or neglected)			
Making choices about alcohol and drugs			

FINDING SUPPORT: IDENTIFYING SUPPORTERS

Setting the Wheels in Motion Worksheet:

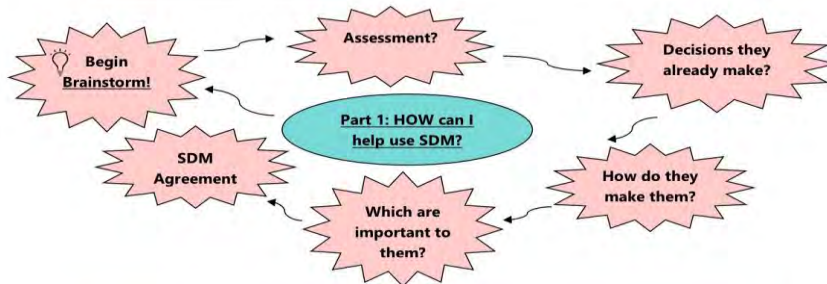
<http://supporteddecisionmaking.org/sites/default/files/Supported-Decision-Making-Teams-Setting-the-Wheels-in-Motion.pdf>

SETTING THE WHEELS IN MOTION WORKSHEET

Supported Decision-Making Teams: Setting the Wheels in Motion

Date: _____ Individual with Exceptional Abilities: _____

Current SDM Team Members or Assistants:



Part 1: HOW can I help my Friend or Family Member use SDM?

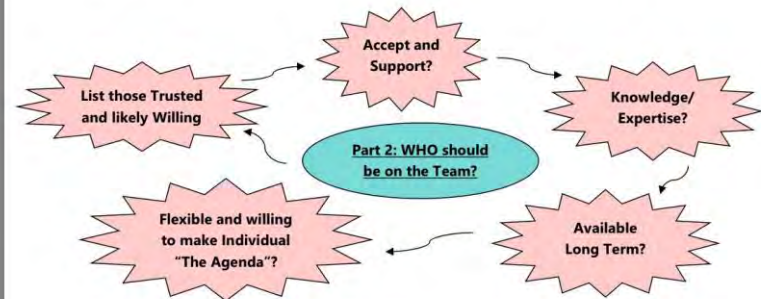
Start by BRAINSTORMING! (This can be free form or See ACLU Brainstorming Guide or others included in the SDM Toolkit attached.)

Is it necessary to have the individual assessed? Would it be beneficial? **Are there assessments already completed that can help determine this person's current decision making skills?** (See suggested SDM Assessments in the SDM Toolkit attached.)

What decisions can and does the person already make?

How are these decisions made?

What decisions are important to the person? (See suggested sample SDM Agreements in the SDM Toolkit.)



Part 2: WHO should be on the SDM Team?

List people who are both **trusted and likely willing** to go on this SDM journey.

Do these people also **accept and support** the individual?

Do these people have **knowledge/expertise** in an area we may include in the SDM agreement?

Will they likely be **available long term**? Could they be an interim Team member for the short term?

Are they **flexible** and willing to **make the individual "the agenda"**?

SOURCES OF SUPPORT: PROVIDERS AND AGENCIES

- **Education:** “Student Led” IEPs and Transition Plans
- **Employment:** Vocational Rehabilitation IEPs
- **Medical Care:** Person Centered Planning in Medicaid Waivers
- **Adult Services:** Centers for Independent Living PASS plans, ABLE Accounts

SOURCE OF SUPPORT: SPECIAL EDUCATION

The Purpose of Special Education

“to ensure that all children with disabilities have available to them a free appropriate public education. . . and **prepare them for further education, employment, and independent living.**”

20 U.S.C. § 1400(d)(1)(A) (emphasis added).

Source of Support: SpEd Transition Services

Transition services are “a coordinated set of activities”

- To “facilitate the child’s movement from school to post-school activities, including post-secondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, **independent living**, or community participation;”
- Are “based on the individual child’s needs, taking into account the child’s strengths, preferences, and interests; and
- Include “instruction, related services, community experiences, the development of employment and **other post-school adult living objectives**, and, when appropriate, acquisition of daily living skills and functional vocational evaluation.”

20 USC 1401(34)

Best Practices

Schools should help students improve their “goal setting, problem solving, decision-making and self-advocacy skills . . . and [provide] opportunities for students to use these skills.”

- Wehmeyer & Gragoudas, 2004.

SOURCE OF SUPPORT: VOCATIONAL REHABILITATION

VR program provides services and supports to help people with disabilities:

“prepare for, secure, retain, advance in, or regain employment”

Rehabilitation Act, 2006, § 722 (a)(1)

WHAT IF...

The skills you need to work are the **SAME** ones you need to build self-determination and avoid guardianship?

- Self-care
- Organization
- Communication
- Interpersonal Skills

EMPLOYMENT BASED SKILLS?

Would **YOU** hire or retain someone who has difficulty:

- Following directions or staying on task?
 - Communicating with you or your customers?
 - Getting along with co-workers?

THEREFORE

If these “life skills” limitations are related to a person’s disability and make it harder for him or her to prepare for, get, or keep work:

VR MUST PROVIDE SERVICES AND SUPPORTS TO HELP OVERCOME THEM

SOURCE OF SUPPORT: VOCATIONAL REHABILITATION

Some services that are available:

- Assessments
- Counseling
- Job search and retention services
- Education
- Assistive technology
- Medical and mental health care
- On the job training
- Job coaches
- Transportation
- Services to family members (like Day Care!)
 - 34 CFR 361.48

SOURCE OF SUPPORT: PERSON CENTERED PLANNING

Person Centered Plan MUST:

- Address “health and long-term services and support needs in a manner that reflects individual preferences and goals.”
- Result “in a person-centered plan with individually identified goals and preferences, including those related community participation, employment, income and savings, health care and wellness, education and others.”

www.medicaid.gov/medicaid-chip-program-information/by-topics/long-term-services-and-supports/home-and-community-based-services/downloads/1915c-fact-sheet.pdf

HYPOTHETICAL

35 year old woman with Down Syndrome. Had lived alone but is now having difficulties due to cognitive decline. Parents have moved for guardianship.

You are appointed Guardian Ad Litem. She tells you that she does not want a guardian and can live independently.

You think she needs help to take care of herself.

- What is your role?
- What are your ethical obligations?
- What steps should you take?
- What is your obligation to consider Supported Decision-Making?

HYPOTHETICAL 2

Same Facts As Hypothetical 1

But now you are appointed to represent the woman. You think she needs help to take care of herself, but she refuses it.

- What is your role?
- What are your ethical obligations
- What steps should you take?
- Does it matter that you are appointed rather than retained?
- What, if anything, is your obligation to discuss Supported Decision-Making with the client?

HYPOTHETICAL 3

Can an attorney represent a person in a guardianship case and serve as guardian ad litem at the same time?

What, if any, ethical problems can this cause?

HYPOTHETICAL 4

Mother, Father, 18 year old child with intellectual disabilities come to your office.

Say that they were advised to seek guardianship for the child, but don't want it.

Want to do Power of Attorney instead

- Who is the Client?
- What is your duty?
- What do you do?
- If you do a POA, how can you make sure client is competent to sign?
- How can you memorialize this?

HYPOTHETICAL

Same fact pattern, but parents say they want guardianship. You interview the child and he says he doesn't want guardianship.

- Who is the Client?
 - How does this impact the rest of your representation?
- What is your duty?
- What do you do?
- How do you do it?

HYPOTHETICAL

You are appointed to represent a criminal defendant. You believe he is incompetent to stand trial. He has a plea offer to resolve the case with no jail time. He wants to take it.

- What do you do?
- What factors influence your decision?

JOIN THE CONVERSATION

National Resource Center for Supported Decision-Making:
SupportedDecisionMaking.Org

The Burton Blatt Institute at Syracuse University: BBI.Syr.Edu

Jonathan Martinis, Senior Director for Law and Policy: JGMartin@Law.Syr.Edu

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South Carolina Bar

Continuing Legal Education Division

**Preparing for 2019 Changes to
Guardianship and Protective Proceeding
Cases in Elder Law**

Friday, November 9, 2018

**Creative Ways to Comply with the Americans
with Disabilities Act (ADA)**

Amanda C. Hess



The Americans with Disabilities Act (ADA) and Legal Offices

A General Discussion

11/9/2018

Amanda C. Hess, Esq.

1

Who is Protection & Advocacy (P&A)?

- Mandated by state and federal law to protect the rights of people with disabilities
- A private, non-profit S.C. corporation
- Independent of all agencies that provide treatment or other services to people with disabilities
- Services are free
- Services are statewide



2

Types of P&A Services



- **INFORMATION & REFERRAL**
- **SYSTEMS CHANGE**
- **CASE REPRESENTATION**
- **SELF-ADVOCACY TRAINING, EDUCATION & OUTREACH**

3

Title III of the ADA – General Rule

Public accommodations cannot discriminate against individuals with disabilities on the basis of disability in the full and equal enjoyment of:

- Goods
- Services
- Facilities
- Privileges
- Advantages
- Accommodations

42 U.S.C. § 12182(a)

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Public Accommodation

- Title III has a broad list of private entities that are considered public accommodations
- Includes: “office of an accountant or lawyer”

42 U.S.C. § 12181(7)(F)

5

Individual with a Disability

- Physical or mental impairment that substantially limits one or more major life activities
- Record of an impairment
- Regarded as having an impairment

Includes individual(s) accompanying the potential client/client.

42 U.S.C. § 12102(1)

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Some Notes About "Disability" under the ADA

- Substantially limits is not a demanding standard
- Major life activities
 - Examples: seeing, standing, breathing, walking, bending, eating, caring for oneself, learning, concentrating, communicating, hearing, reading, sleeping, etc.
 - Also includes major bodily functions, such as immune system, neurological, brain, bladder, bowel, respiratory, circulatory, endocrine, etc.

42 U.S.C. § 12102(2);(4)

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Under Title III, A Law Office...

- Must provide individuals with disabilities an equal opportunity to participate in and/or benefit from its programs and services
- Cannot exclude
- Make reasonable modifications
- Auxiliary aids and services
- Accessible facilities

42 U.S.C. § 12182(b)

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No Exclusion

- Law offices cannot exclude an individual with a disability on the basis of disability
- Beware of implicit bias
- Most individuals with disabilities can be accommodated to create an effective attorney/client relationship
- Educate yourself and train staff

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Reasonable Modifications

- To policies, practices, and/or procedures to provide individuals with disabilities an equal opportunity to participate in/benefit from its services
- Examples
 - Service animals
 - Client relationship

42 U.S.C. § 12182(b)(2)(ii); 28 C.F.R. § 36.302

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Example: Service Animals

- Not pets, working animals
 - Individually trained to perform a disability related task/work for a person with a disability
- Dog or miniature horse
- Can make 2 inquiries:
 - Is the service animal required because of a disability?
 - What work or task has the service animal been trained to perform?

28 C.F.R. § 36.302(c)

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Ex: Service Animals Continued

- Training
 - Does not need to be professionally done
 - Client does not need to show proof of training
- Modify policies to allow service animals
 - US DOJ settlement agreement examples
- Exceptions
 - Not under control of handler
 - Not housebroken
 - Direct threat

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Example: Client Relationship

Accommodations/modifications in office practice(s). Examples:

- Written communication: braille, electronic, font
- Language: clear & plain
- Longer or time sensitive meetings
- Mark/signature stamp
- Reminders/written follow up
- Support
- Attempts to ensure client understanding

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Reasonable Modification Thoughts

- Do not take things personally or focus on behavior
- Likely not going to be costly or difficult to provide
- Individual assessment

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Auxiliary Aids and Services

- Take necessary steps to ensure that individuals with disabilities are not excluded, denied services, segregated, or treated differently due to the absence of auxiliary aids and services.
- Examples: qualified interpreters, notetakers, written materials, Brailled materials, qualified readers, large print materials, video-based telecommunication products/systems (including text telephone (TTYs)), audio recordings.

28 C.F.R. § 36.303(a) & (b)

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Auxiliary Aids and Services: Effective Communication

- Provide appropriate auxiliary aids and services when needed to ensure effective communication
- Provide in a timely manner at no charge
- Type of auxiliary aid/service will vary:
 - Method of communication used
 - Nature, length, and complexity of communication
 - Consult with the individual with the disability

28 C.F.R. § 36.303(c)

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Example: Client Speaks Sign Language

- Different types of sign language systems
 - Qualified Interpreter
- Sign language has its own rules, syntax, and grammar
- Lip reading generally does not provide for effective communication
- Video relay calls
- DOJ settlement agreements

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Accessible Facilities

- Existing facilities
 - Readily achievable barrier removal (without much difficulty or expense)
- Newly constructed/renovated existing facilities
 - Follow new construction standards

42 U.S.C. § 12182(b)(2)(A)(iv)-(v); 28 C.F.R. § 36.304-305; 28 C.F.R. § 36.401-406

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Accessible Facilities Examples

- Parking
- Entrance
- Doors (handle)/(width of doorway)
- Restroom
- Interior of office
 - Location
 - Flooring
 - Arrangement of furniture
- Website

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Exceptions

- Pose a direct threat to the health/safety of others
 - significant risk to the health or safety of others
 - cannot eliminate by reasonable modification or by auxiliary aids or services
 - must make an individualized assessment
 - 28 C.F.R. § 36.104; 28 C.F.R. § 36.208
- Fundamental alteration of the program
- Undue burden
 - Significant difficulty or expense (28 C.F.R. § 36.104)

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Individualized Assessment

- Law offices cannot decline a client with a disability based on assumptions and stereotypes
- Each situation must be analyzed and determined based on its own facts about the person with the disability and the law office

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Resources

- Southeast ADA Center: <http://www.adasoutheast.org/>
- ADA Title III Technical Assistance Manual:
<http://www.ada.gov/taman3.html>;
Supplement: <http://www.ada.gov/taman3up.html>
- ADA Title III Technical Assistance Materials:
https://www.ada.gov/ta_titleiii.html (includes a section on effective communication, physical access, and service animals)

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Resources Continued

- ADA Information Line:
<http://www.ada.gov/infoline.htm> (800-514-0301 (voice); 800-514-0383 (TTY))
- ADA Standards for Accessible Design:
https://www.ada.gov/2010ADStandards_index.htm

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Protection & Advocacy



www.pandasc.org
 1-866-275-7273 (toll-free)
 1-866-232-4525 (TTY)
info@pandasc.org
 FAX: (803) 790-1946

**Protection and Advocacy for People with
 Disabilities, Inc.**
**3710 Landmark Drive, Suite 208
 Columbia, SC 29204**

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General Questions?

Thank you!

This presentation provides general information not intended to be legal advice. The information was based on the law at the time it was written. As the law may change, please contact P&A for updates. This presentation is funded by the US Department of Health and Human Services (the Administration for Community Living and the Substance Abuse and Mental Health Services Administration) and by the US Department of Education (Rehabilitation Services Administration). It does not necessarily represent the official views of the funding authorities. The views expressed are solely those of P&A.

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**Preparing for 2019 Changes to
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Cases in Elder Law**

Friday, November 9, 2018

**Abuse, Neglect and Exploitation — What to
do When you Learn the Worst?**

Anna Marie Darwin

EQUAL TREATMENT

P&A does not discriminate on the basis of disability, race, color, creed, national origin, ethnicity, ancestry, citizenship, age, religion, sex or sexual orientation, veteran status, or any other class protected by law in the provision of its programs or services.

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Pete Cantrell is P&A's designated coordinator for compliance with Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act.

CONTACT INFORMATION

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MAILING ADDRESS

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Columbia, SC 29204

ALTERNATE FORMATS

If you would like to receive this information in an alternate format, please contact P&A.

(In Spanish)

Si usted desea recibir información en español, por favor de comunicarse con P&A a la información de contacto anterior. Un defensor de habla hispana estará encantado de ayudarle.

P&A

PROTECTION & ADVOCACY
FOR PEOPLE WITH DISABILITIES, IN .

The Protection & Advocacy System for South Carolina

Advancing Disability Rights in South Carolina

Since 1977

Services Statewide

P&A SERVICES ARE FREE

ABOUT P&A

P&A was founded in 1977 and is the federally authorized and funded organization serving as the Protection and Advocacy System (P&A) and the Client Assistance Program (CAP) for individuals with disabilities in South Carolina. P&A is a private, non-profit corporation. P&A is independent of all agencies providing treatment or other services to people with disabilities.

MISSION

Protecting and advancing disability rights

VISION

We envision a society where all people, regardless of type or severity of disability:

- Live free from abuse, neglect, and exploitation
- Are empowered through self-determination and self-advocacy
- Have equal access to services such as education, public transportation, and health care
- Are productive members of society in which competitive, integrated employment is the first and preferred option
- Live, learn, work, and play independently in an integrated barrier free community

WHAT IS A DISABILITY?

Any physical, mental, sensory, or intellectual condition that limits a person's life activities or abilities. Some examples are:

- Chronic health conditions (diabetes, epilepsy, etc.)
- Developmental disabilities
- Intellectual disabilities
- Mental illnesses
- Physical disabilities
- Sensory (sight/hearing)
- Traumatic brain injuries

AREAS OF ASSISTANCE

P&A can assist people who have been discriminated against or denied a service because of their disability. Here are some of the areas where P&A helps:

- Abuse and Neglect
- Accessibility
- Assistive Technology
- Communication
- Community Integration
- Education (including college)
- Employment
- Housing
- Medicaid and Healthcare
- Service and Benefits Denial
- Social Security
- Transportation
- Vocational Rehabilitation
- Voting

P&A SERVICES

INFORMATION AND REFERRAL

P&A provides information about callers' problems, suggests ways to resolve the problems, and recommends additional resources. When appropriate, callers are referred for case representation.

CASE REPRESENTATION

P&A provides individual representation for clients whose issues meet our requirements. For information about our priorities for case selection please visit our website at www.pandasc.org.

EDUCATION AND OUTREACH

P&A staff provide self-advocacy training, education, and outreach in the community.

MONITORING AND INVESTIGATIONS

Due to concerns of abuse and neglect P&A staff monitor and investigate institutions and community facilities.

SYSTEMS ADVOCACY

P&A staff work to improve laws, regulations, policies, or practices to prevent abuse or neglect of individuals with disabilities, and work to enable individuals with disabilities to gain greater independence and full inclusion in the community and the workplace.



The Protection and Advocacy System for South Carolina

3710 LANDMARK DRIVE, SUITE 208, COLUMBIA, SC 29204
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IN-STATE TOLL-FREE: 1-866-275-7273 (VOICE) AND 1-866-232-4525 (TTY)
E-mail: info@pandasc.org
Website: www.pandasc.org

FACT SHEET

Reporting Abuse, Neglect, and Exploitation of People with Disabilities Who Live In a Facility

People with disabilities who cannot live in their own homes may live in facilities, including:

- Nursing homes,
- Residential facilities for individuals with developmental disabilities including Intermediate Care Facilities (ICF/ID) and Community Training Homes II (CTH II),
- Assisted living facilities or community residential care facilities (CRCF),
- State mental health or state substance abuse treatment hospitals, or
- Residential treatment facilities for children and adolescents (RTF).

Abuse, neglect, or exploitation of someone who lives in a facility is wrong and should be reported. Abuse includes being hit, kicked, pushed, or having hair pulled. Abuse includes sexual abuse. Abuse also means psychological abuse such as name-calling or threats. Neglect includes not providing adequate food, housing, or medical care. Exploitation means taking advantage of the person or **mishandling the person's money** or other property.

Anyone who **knows** that abuse, neglect, or exploitation has happened, or **any service provider** who **believes** that abuse, neglect, or exploitation has happened or will happen, **MUST** report it to the following places:

If the report is about an **adult** with a disability who lives in a facility AND:

- The facility or program is operated by the **Department of Disabilities and Special Needs (DDSN)** or **the Department of Mental Health (DMH)**, call the **Vulnerable Adult Investigation Unit of SLED** (State Law Enforcement Division) toll-free 1-**866-200-6066** at any time. Facilities and residential programs that have contracts with DDSN and DMH are also covered, including homes operated by county DSN boards and contractors such as the Babcock Center.

OR

- If the adult lives in **any other facility**, call the state **Long Term Care Ombudsman's (LTCO) office** toll-free at **1-800-868-9095** or 803 734-9900. After 5 p.m. and on weekends, leave a voice message. Contact information for local ombudsman is available at: <http://aging.sc.gov/contact/Pages/OmbudsmanRegionalContacts.aspx> More information about the LTCO office and about abuse and neglect is at <http://aging.sc.gov/programs/ombudsman/Pages/default.aspx>.

If the report is about a **child** with a disability who lives at a facility (such as a psychiatric residential care facility – RTF):

- **Call** the **county office** of **SC Department of Social Services** where the facility is located. County telephone numbers are found at: <https://dss.sc.gov/contact> (select from the list of counties). You will be prompted to a connection with the DSS Out of Home Abuse and Neglect (OHAN) division. DSS plans to have one state-wide toll-free number by January 2018.

In an **emergency**, call **local law enforcement** at 9-1-1. When making a report, give the name and location of the facility; the date and time the abuse took place; describe the abuse that took place; and leave your name and phone number, if you want.

Medicaid Fraud: Misuse of Medicaid funds, including financial exploitation of someone who is living in a facility and receiving Medicaid, may also be reported **to the SC Attorney General's Medicaid Fraud Unit**. The toll free telephone is 1-888-662-4328.

Note: To report abuse, neglect or exploitation of an **adult or child** who **lives at home**, call the county DSS office where the person lives. Telephone numbers for county DSS offices are found at: <https://dss.sc.gov/contact> (select from list of counties).

You may call the state Department of Social Services Monday-Friday between 8:30 am and 5:00 pm at 1-803-898-7669 or after hours at 1-888-722-2580.

For more information, please contact **Protection and Advocacy for People with Disabilities, Inc. (P&A)** using the numbers and information at the top of this fact sheet.

This fact sheet is based on the South Carolina Omnibus Adult Protection Act (SC Code of Laws, Section 43-35-5) The law is available at: <http://www.scstatehouse.gov/code/t43c035.php>.

This publication provides legal information, but is not intended to be legal advice. The information was based on the law at the time it was written. As the law may change, please contact P&A for updates.

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P&A does not discriminate on the basis of disability, race, color, creed, national, ethnicity, ancestry, citizenship, age, religion, sex or sexual orientation, veteran status, or any other class protected by law in the provision of its programs or services. Pete Cantrell is P&A's designated coordinator for Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act.

Abuse and Neglect August 2017



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FACT SHEET

Abuse, Neglect & Exploitation

Definitions & Warning Signs

Abuse...

is inappropriate treatment of an individual. It includes physical, psychological, emotional, and sexual abuse.

- **Physical Abuse** – use of physical force that may result in bodily injury, physical pain, or impairment. Examples include striking (with or without an object), hitting, beating, pushing, shoving, shaking, slapping, kicking, pinching, burning, inappropriate use of drugs and physical restraints, force-feeding, and physical punishment.
- **Psychological or Emotional Abuse** – causing anguish, pain or distress to another person through verbal or nonverbal acts. Examples include: verbal assaults, insults, threats, intimidation, humiliation, and harassment.
- **Sexual Abuse** – sexual contact or photographs of a person without permission. Also sexual contact with any person incapable of giving consent. Examples include unwanted touching and all types of sexual assault or battery including rape, sodomy, coerced nudity, and sexually explicit photographing.

Neglect...

is the refusal or failure of a caregiver to provide for the needs of a child or vulnerable adult.

- **Needs are the care, goods, and services** necessary to maintain the health or safety of an individual. Examples include: food, water, clothing, medicine, shelter, supervision, personal safety, personal hygiene, and medical services.
- **Neglect can be repeated conduct or a single incident** when the result could be serious physical or psychological harm or substantial risk of death.

Exploitation...

is taking improper advantage of an individual. It can involve finances, material, labor, or activity.

- **Financial or Material Exploitation** is the improper, illegal, or unauthorized use of an individual's funds, assets, property, power of attorney, guardianship or conservatorship for the profit or advantage of anyone besides the individual. Examples include cashing someone's checks without permission, forging someone's signature, misusing or stealing someone's money or possessions, and coercing or deceiving someone into signing any document.
- **Labor or Activity Exploitation** is causing or requiring an individual to engage in work or any activity which is improper, illegal, demeaning, or against the reasonable and rational wishes of the individual. Examples include forced chores or activities which are not a part of an individual's written plan of care or which are not prescribed or authorized by the individual's physician.

Warning Signs...

- **Physical Abuse**
 - Bruises, black eyes, welts, cuts, or rope marks;
 - Broken bones or skull fractures;
 - Open wounds, cuts, punctures, untreated injuries in various stages of healing;
 - Sprains, dislocations, or internal injuries/bleeding;
 - Broken eyeglasses/frames, physical signs of being subjected to punishment, or signs of being restrained;
 - An individual's report of being hit, slapped, kicked or mistreated;
 - A caregiver's refusal to allow visitors to visit the individual alone.
- **Psychological or Emotional Abuse**
 - Emotionally upset or agitated;
 - Extremely and unusually withdrawn, not communicating or not responding;
 - Unusual, childlike behavior (sucking, biting, rocking);
 - An individual's report of being verbally or emotionally mistreated.
- **Sexual Abuse**
 - Bruises around the breasts or genital area;
 - Unexplained venereal disease or genital infections;
 - Unexplained vaginal or anal bleeding;
 - Torn, stained, or bloody underclothing;
 - An individual's report of being sexually assaulted or raped.
- **Neglect**
 - Dehydration, malnutrition, untreated bed sores, or poor personal hygiene;
 - Unattended or untreated health problems;
 - Hazardous or unsafe living conditions/arrangements (improper wiring, no heat, or no running water);
 - Unsanitary and unclean living conditions (dirt, fleas, lice on person, soiled bedding, fecal/urine smell, or inadequate clothing);
 - An individual's report of being mistreated.

- **Financial or Material Exploitation**

- Sudden changes in bank account or banking practice, including an unexplained withdrawal of large sums of money by a person accompanying the individual;
- **Addition of names on an individual's bank signature card;**
- Unauthorized withdrawal of funds with an ATM card;
- Abrupt changes in a will or other financial documents;
- Unexplained disappearance of funds or valuable possessions;
- Substandard care being provided or bills unpaid despite the availability of adequate financial resources;
- Discovery of forged signature or documents;
- Sudden appearance of previously uninvolved relatives claiming rights to an **individual's affairs** or possessions;
- Unexplained or sudden transfer of assets to a family member or someone outside the family;
- Provision of services that are not necessary;
- **An individual's report of exploitation.**

- **Activity or Labor Exploitation**

- **An individual's report of being forced to participate in activities that are not part of a care plan; these could be forced chores or labor.**

What to do...

- There are several laws that protect vulnerable individuals from abuse, neglect, and exploitation. These laws and other agency regulations explain how to report suspected or actual knowledge of abuse and neglect. Please see the P&A **publication on "Reporting Abuse & Neglect."**
- **In emergency situations, and when in doubt where to report abuse, neglect, or exploitation, contact local law enforcement.**

This publication provides legal information, but is not intended to be legal advice. The information was based on the law at the time it was written. As the law may change, please contact P&A for updates.

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P&A does not discriminate on the basis of disability, race, color, creed, national origin, ethnicity, ancestry, citizenship, age, religion, sex or sexual orientation, veteran status, or any other class protected by law in the **provision of its programs or services**. **Pete Cantrell is P&A's designated coordinator for Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act.** Abuse & Neglect – August 2017

Abuse, Neglect & Exploitation

What To Do When You Learn the Worst

Anna Maria Darwin
Protection and Advocacy for People with Disabilities



Vulnerable Adult =

- Age 18
- Physical or Mental Condition
- Which Substantially impairs the person from adequately providing for his or her own care or protection
- Any adult in a facility is considered vulnerable under the Omnibus Adult Protection Act.
- Just being elderly does not equal vulnerable – *Doe v. DSS*, 407 S.C. 623, 757 S.E.2d 711 (2014)

Physical Abuse



Broadly defined and includes the use of medication outside the standards of reasonable medical practice for the purpose of controlling behavior, and unreasonable confinement.

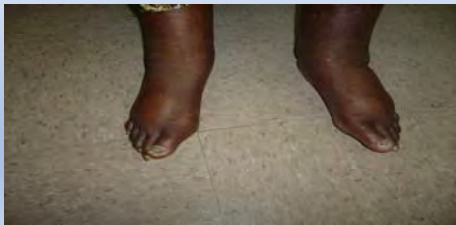
Psychological abuse

Deliberately subjecting a vulnerable adult to threats or harassment or other forms of intimidating behavior causing fear, humiliation, degradation, agitation, confusion, or other forms of serious emotional distress.



Neglect

By a caregiver includes the failure to provide for the care, goods, or services necessary to maintain the health or safety of a vulnerable adult.



Exploitation

- Making a vulnerable adult do improper or unlawful acts or labor.
- The improper, unlawful, or unauthorized use of the funds, assets, property, power of attorney, guardianship, or conservatorship of a vulnerable adult by a person for the profit or advantage of that person or another person.



Exploitation



Causing a vulnerable adult to purchase goods or services for the profit or advantage of the seller or another person through: (i) undue influence, (ii) harassment, (iii) duress, (iv) force, (v) coercion, or (vi) swindling by overreaching, cheating, or defrauding the vulnerable adult through cunning arts or devices that delude the vulnerable adult and cause him to lose money or other property.

S.C. Code § 43-35-10

Signs of Abuse, Neglect, Exploitation

- Injuries
- Unusual bruising or abrasions
- Fear or nervousness
- Withdrawal
- Unexplained changes in lifestyle



Basic needs not being met



Bills not being paid



Living below means



Self-Determination Reduces the Likelihood of Abuse, Neglect & Exploitation



Visibility and involvement of active family members

- Random visits, ask questions;
- Show appreciation for good staff & caregivers;
- Look for presence and vigilance by leadership. Acts of abuse and neglect are unlikely to occur in the administrative offices of a skilled care facility.



Person-centered care.

Staff trained to focus on the patient and to respect the patient's choices identify with the patient as an individual. Simply knocking on the door and waiting for a response shows respect and acknowledgment of individual autonomy that helps prevent abuse and neglect.

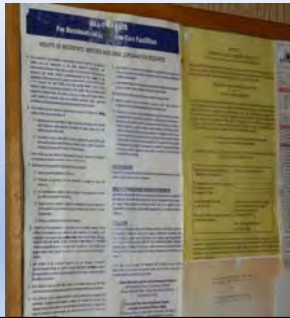


Communication.



Prominent display of important information.

Facilities should display information on who to contact if there is a complaint, including the phone number to State Law Enforcement Division (SLED) on the "Stop Abuse" poster. S.C. Code Ann. §43-35-65. The residents' bill of rights should also be prominently displayed. See S.C. Code Ann. §44-81-40. The Department of Health and Environmental Control (DHEC) license for the facility should also be displayed.



Investigative Agencies-Who to call?

- SLED Special Victims Unit (Child deaths and DMH/DDSN adult homes)
- Local Law Enforcement
- DSS Adult Protective Services (APS)
- DSS Out of Home Abuse/Neglect (OHAN)
- LTC Ombudsman
- DHEC (Licensing)
- LLR (Licensing of Administrators)
- Protection and Advocacy (P&A)





South Carolina Bar

Continuing Legal Education Division

**Preparing for 2019 Changes to
Guardianship and Protective Proceeding
Cases in Elder Law**

Friday, November 9, 2018

**Why Defend Against Guardianship and
Protective Orders**

Jonathan Martinis

**Guardianship,
Supported Decision-
Making, and Quality
of Life**

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THERE ARE STUPID QUESTIONS

What's Your Favorite
Right?

RIGHTS=CHOICES

"I am my choices. I cannot not choose. If I do not choose, that is still a choice. If faced with inevitable circumstances, we still choose *how we are* in those circumstances."
- Jean Paul Sartre

**RIGHTS=CHOICES
CHOICES=SELF DETERMINATION**

- Life control
- People’s ability and opportunity to be “causal agents . . . actors in their lives instead of being acted upon”

- Wehmeyer, Palmer, Agran, Mithaug, & Martin, 2000

BENEFITS OF SELF-DETERMINATION

People with greater self determination are:

- Healthier
- More independent
- More well-adjusted
- Better able to recognize and resist abuse

- Khemka, Hickson, & Reynolds, 2005; O’Connor & Vallerand, 1994; Wehmeyer & Schwartz, 1998

ANOTHER STUPID QUESTION

Are Your Rights Worth ANYTHING If You’re Not Allowed to Use Them?

AND YET: 2,000 YEARS AND COUNTING

- **Ancient Rome:** “Curators” appointed for older adults and people with disabilities.
- **5th Century Visigothic Code:** “people insane from infancy or in need from any age . . . cannot testify or enter into a contract”
- **Feudal Britain:** divided people with decision-making challenges into “idiots” and “lunatics” and appointed “committees” to make their decisions

GUARDIANSHIP IN THE U.S.

“Plenary” or “Full” Guardianship

- Gives the Guardian power to make ALL decisions for the person.
 - Used in the **VAST** Majority of cases
 - “As long as the law permits plenary guardianship, **courts will prefer to use it.**”
- Frolik, 1998

AS A RESULT

Guardians have “substantial and often complete authority over the lives of vulnerable [people].”
4 NAELA J. 1, 7 (2008).

This includes power to make the most basic health, personal, and financial decisions.
AARP, *Guardianship Monitoring: A National Survey of Court Practices* 1-2 (2006).

WHEN PEOPLE ARE DENIED LIFE CONTROL

Study after Study shows:

- “[F]eel helpless, hopeless, and self-critical”
- Deci, 1975
- Experience “low self-esteem, passivity, and feelings of inadequacy and incompetency,” decreasing their ability to function
- Winick, 1995

THE PROBLEM

“The typical ward has fewer rights than the typical convicted felon By appointing a guardian, the court entrusts to someone else the power to choose where they will live, what medical treatment they will get and, in rare cases, when they will die. It is, in one short sentence, the most punitive civil penalty that can be levied against an American citizen.”

- House Select Committee on Aging, H.R. Rpt. 100-641 (opening statement of Chairman Claude Pepper)

WHERE DO WE GO FROM HERE?

Guardianship **MAY** be Needed:

- In emergency situations when
 - The person is incapacitated and cannot give consent
 - The person did not previously identify how decisions should be made in that situation
 - There is no one else available in the person’s life to provide consent through a Power of Attorney, Advanced Directive, or other means
- To support People:
 - Who face critical decisions and have no interest in or ability to make decisions
 - Who need immediate protection from exploitation or abuse

GUARDIANSHIP IS NEVER NEEDED

JUST

- “Because you have ____”
- “Because you’re ____ years old”
- “Because you need help”
- “Because that’s the way its always been”
- “For your own good”

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EVERYONE has the Right to Make Choices 13

BUT WE MEANT WELL

“Experience should teach us to be most on our guard to protect liberty when the Government’s purposes are beneficent. . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.”
Olmstead v. U.S., 277 U.S. 438 (1928)

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RESEARCH

People under guardianship can experience a “**significant negative impact** on their physical and mental health, longevity, ability to function, and reports of subjective well-being”
- Wright, 2010

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ON THE OTHER HAND

People with disabilities who exercise greater self-determination have a **better quality of life**, more independence, and more community integration.

- Powers et al., 2012; Shogren, Wehmeyer, Palmer, Rifenshark, & Little, 2014; Wehmeyer and Schwartz, 1997; Wehmeyer & Palmer, 2003

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AND

Women with intellectual disabilities exercising more self-determination are **less likely to be abused**


- Khemka, Hickson, and Reynolds, 2005

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AND

People with Intellectual and Developmental Disabilities who do **NOT** have a guardian are more likely to:

- Have a paid job
- Live independently
- Have friends other than staff or family
- Go on dates and socialize in the community
- Practice the Religion of their choice

2013-2014 

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So, WHERE DO WE GO FROM HERE?

If:

- We **KNOW** that some people need more support as they age or due to disability
- We **KNOW** that guardianship can result in decreased quality of life and
- We **KNOW** that increased self-determination leads to improved quality of life

Then we need a means of **INCREASING** self-determination while **STILL** providing support

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**A WAY FORWARD:
SUPPORTED DECISION-MAKING**

“a recognized alternative to guardianship through which people with disabilities use friends, family members, and professionals to help them understand the situations and choices they face, so they may make their own decisions without the “need” for a guardian.”

- Blanck & Martinis, 2015

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EVERYONE has the Right to Make Choices 20

IN COMMON

ALL Forms of Supported Decision-Making recognize:

- That **EVERYONE** has the Right to Make Choices to the Maximum of Their Ability;
- That you can get help exercising your Right to Make Choices without giving it up; and
- That there are as many ways to give and get help as there are people

- Dinerstein, 2012.

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OR, AS THE NATIONAL GUARDIANSHIP ASSOCIATION SAYS

“Alternatives to guardianship, **including supported decision making**, should always be identified and considered whenever possible **prior to the commencement of guardianship proceedings.**”

- National Guardianship Association Position Statement on Guardianship, Surrogate Decision Making and Supported Decision Making, 2015

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SUPPORTED DECISION-MAKING AND SELF DETERMINATION

“Supported Decision-Making has the potential to increase the self-determination of older adults and people with disabilities, encouraging and empowering them to reap the benefits from increased life control, independence, employment, and community integration”

- Blanck & Martinis, 2015

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THE ELEPHANT IN THE ROOM: SAFETY

NOTHING: Not Guardianship, Not Supported Decision-Making is 100% "Safe."

HOWEVER: Supported Decision-Making Increases Self-Determination (Blanck & Martinis, 2015), which is correlated with increased Safety (Khemka, Hickson, & Reynolds, 2005).

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SIGNS AND SIGNALS –ABUSE, NEGLECT, EXPLOITATION

- Injuries
- Unusual bruising or abrasions
- Fear or nervousness
- Withdrawal Basic needs not being met
- Bills not being paid
- Living below means
- Unexplained changes in lifestyle

REMEMBER: PROTECTION IS AVAILABLE

If you see Abuse, Neglect or Exploitation:

Neglect

- Police
- APS
- CPS
- Attorney General’s Fraud Unit
- Protection and Advocacy System

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BUT REMEMBER: ADULTS ARE ALLOWED TO MAKE BAD DECISIONS

- Health
- Money
- Love
- Living Conditions

REMEMBER THE CHALLENGE

EVERY great advance in civil rights fundamentally changed the way “things have always been”

REMEMBER THE OBSTACLES

Change is **HARD**
“We were not promised ease. The purpose of life . . . is not ease. **It is to choose, and to act upon the choice.** In that task, we are not measured by outcomes. We are measured only by daring and effort and resolve.”
- Stephen R. Donaldson

REMEMBER THE GOAL

EVERYONE making decisions to the maximum of their ability
EVERYONE giving and getting the support they need to live their best life
EVERYONE the “causal actor” in their lives
“If we change the culture, we will change the world.”
- Gustin & Martinis, 2016

JOIN THE CONVERSATION

National Resource Center for Supported Decision-Making:
SupportedDecisionMaking.Org

The Burton Blatt Institute at Syracuse University: BBI.Syr.Edu

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