

Guardianship & Conservatorship

Less-Restrictive Alternatives

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Alabama Supreme Court Commission on Adult Guardianships and Conservatorships

The goal of the Commission is to improve guardianship and conservatorship practices in Alabama.

The Commission delivers information, resources, and tools throughout the legal system and to the public as a means of providing appropriate decision-making supports and protective services to individuals.

<http://alabamawings.alacourt.gov/>

Long-Term Goals of the Commission

- Provide Qualified and Trained Guardians/Conservators for Adults in Need of Protective Services or Decision-Making Support.
- Educate Attorneys and Courts on Best Practices in Guardianship and Conservatorship Proceedings.
- Educate Professionals and the Public on Alternatives to Guardianship and Conservatorship.
- Increase Data Collection for Better Monitoring of Guardianships and Conservatorships.
- Identify and Address Abuse and Financial Exploitation by Guardians or Conservators.

History of Guardianships

- Guardianship has its origins in Roman and English common law, under which the sovereign had the power to safeguard the property of incompetent persons. The king was the “parent of the country”. If a 12-man jury found the proposed incompetent was a “lunatic” or “idiot”, the person’s family/friends were charged with the person’s care, while the king protected the person’s property. An “idiot” referred to a person afflicted with profound mental retardation. A “lunatic” meant an insane person. The earliest reported adult guardianship case in Alabama was in 1830. Alabama’s Uniform Guardianship and Protective Proceedings Act was passed in 1987.

Guardian of “Incapacitated Person”

- Any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, physical or mental infirmities accompanying advanced age, chronic use of drugs, chronic intoxication, or other cause (except minority) *to the extent of* lacking sufficient understanding or capacity to make or communicate responsible decisions. Ala. Code § 26-2A-20(8).

Appointment of Guardian

- The court may appoint a guardian as requested if it is satisfied that the person for whom a guardian is sought is incapacitated and that the appointment is necessary or desirable as a means of providing continuing care and supervision of the person of the incapacitated person. Ala. Code § 26-2A-105.
- What is the effect of being appointed a guardian?

Appointment of Conservator

- [T]he person is unable to manage property and business affairs effectively for such reasons as mental illness, mental deficiency, physical illness or disability, physical or mental infirmities accompanying advanced age, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, or disappearance; and
 - the person has property that will be wasted or dissipated unless property management is provided, or that
 - funds are needed for the health, support, education, or maintenance of the person or of those entitled to the person's support and that protection is necessary or desirable to obtain or provide the funds.

Fiduciary Duties of Conservators

- Act only in the incapacitated person's best interest
- Manage the person's money and property carefully
- Keep the person's money and property separate from yours
- Keep good records and report to the court

[Managing Someone Else's Money: Help for Court-Appointed Conservators in Alabama](#)

Less-Restrictive Alternatives (aka Guardianship Avoidance Strategies)

- Surrogate Decision-Making
 - Advance Directive for Healthcare (Living Will and Healthcare Proxy)
 - Healthcare Power of Attorney
 - Statutory Default Surrogate Decision-Maker
 - Financial Power of Attorney
- Supported Decision-Making
- Living Trust
- SSA Representative Payee or VA Fiduciary
- Elder Abuse Protection Orders

Surrogate vs. Supported Decision-Making

- Surrogate Decision-Making. Think “substitute” – someone else is making your decisions.
- Supported Decision-Making. Legal and social concept in which an individual (especially someone with intellectual disabilities) remains at the center of the decision-making process, consulting with a network of supporters.

Surrogate Decision-Making Options

- Healthcare Decision-Making
 - Advance Directive for Healthcare under the Alabama Natural Death Act. Ala. Code § 22-8A-1, et. seq.
 - Healthcare Power of Attorney. Ala. Code § 26-1A-404.
 - Statutory Default Surrogate Decision-Maker. Ala. Code § 22-8A-11.
- Financial Decision-Making
 - Financial Power of Attorney under the Alabama Uniform Power of Attorney Act. Ala. Code §§ 26-1A-101 thru 26-1A-301.

Advance Directive for Healthcare

- Living Will: The individual expresses their wishes related to end-of-life treatment. Whether they want life-sustaining treatment or artificially provided food and hydration if they are terminally ill/injured or permanently unconscious.
- Appointment of Healthcare Proxy: The individual appoints a surrogate to make end-of-life decisions if the individual is unable to communicate those decisions.
- Effective: When you are not able to speak for yourself and two physicians determine you are terminally ill or injured or permanently unconscious.
- Capacity to make: 1) age 19 or over; 2) alert; 3) capable of understanding a lay description of medical procedures, and; 4) able to appreciate the consequences of providing, withholding, or withdrawing medical procedures.

Healthcare Power of Attorney

- Broader in scope than an Advance Directive for Healthcare.
 - Consent to, refuse, or withdraw consent to all types of medical care
 - Access to and right to disclose medical reports/records
 - Authorize admission to or discharge from healthcare facilities
 - Contract for health and personal care services
 - + any number of other directions/preferences related to person/health
- Effective: When the principal is incapacitated -- no longer able to give directions to healthcare providers.
- Capacity to make: Ability to understand and comprehend the nature and effect of his or her actions at the time of execution.

Statutory Default Surrogate Decision-Maker

- Covers end-of-life decisions only. The surrogate, in consultation with the attending physician, determines whether to provide, withdraw, or withhold life-sustaining treatment or artificially provided food and hydration.
- Can be employed if:
 - No Advance Directive for Healthcare has been made, or
 - No duly appointed healthcare proxy or agent is reasonably available, or
 - The Advance Directive fails to address a particular circumstance.
- Priority of appointment: guardian, spouse, adult child, parent, adult sibling, other adult relative.

Financial Power of Attorney

- Appointment of an agent to conduct financial and property transactions on behalf of the principal.
- Agent's authority can be limited or general, and some types of authority must be specifically granted (e.g., to create or change a beneficiary designation; to create, amend, or revoke an inter vivos trust). Caution: An extremely limited power of attorney may not serve the purpose of avoiding the need for a conservator.
- Effective: The agent's authority can be effective immediately, or when the principal becomes incapacitated ("springing").
- Capacity to make: Ability to understand and comprehend the nature and effect of his or her actions at the time of execution.

A Note on the History of Powers of Attorney

- Powers of Attorney are the original guardianship/conservatorship avoidance instruments. National Conference of Commissioners on Uniform State Laws (NCCUSL):
- Model Special Power of Attorney for Small Property Interests Act (1964). Designed as a less expensive alternative to conservatorship or guardianship. Intended for those “who, in anticipation or because of physical handicap or infirmity . . . wish to make provision for the care of their personal or property rights or interests, or both when unable to adequately take care of their own affairs.”
- Uniform Probate Code (1969) expanded use of Powers of Attorney.

Fiduciary Duties of Agents Under a POA

- Act as the principal would want and in their best interest
- Manage the principal's money and property carefully
- Keep the principal's money and property separate from yours
- Keep good records

[Managing Someone Else's Money in Alabama: Help for Agents Under a Power of Attorney](#)

Supported Decision-Making Defined

- When an individual with cognitive challenges is the ultimate decision-maker, but is provided support from one or more persons who explain issues to the individual and, where necessary, interpret the individual's words and behaviors to determine his or her preferences. The individual voluntarily enters into the arrangement, informally or by formal agreement.

Supported Decision Making In Action



Supported Decision-Making Agreements

- Supported-decision making can also be formalized by private agreement between the cognitively-impaired individual and trusted third party. Some countries and states give these agreements state sanction.
- British Columbia (Canada) has statutorily enabled private contracts as alternatives to guardianship, called Representation Agreements.
 - Authorizes a third-party to act on an individual's behalf for a broad range of personal decisions and some financial decisions.
 - Minimal capacity requirement to enter into standard agreement, lower than power of attorney in Canada. Presumption that all people are capable of entering into one absent a showing to the contrary.
 - The representative must consult with the individual "to the extent reasonable" and the representative must comply with the individual's wishes "if reasonable to do so."

Supported Decision-Making in the States

- 12 states have passed laws that define supported decision-making agreements as legally enforceable arrangements (Texas, Delaware, District of Columbia, Alaska, Wisconsin, Indiana, North Dakota, Nevada, Rhode Island, Louisiana).
- National Resource Center for Supported Decision-Making
- <http://supporteddecisionmaking.org/>

Living Trust

- Permits lifetime/uninterrupted management of trust assets in the event of the settlor's incapacity. Complete funding of the trust is critical to conservatorship avoidance.
- Special Needs Trusts can be particularly useful for disabled beneficiaries.
 - Self-Settled: Funded with the assets of a disabled person under the age of 65. Trust created by a parent, grandparent, guardian, or court.
 - Third-Party: Created and funded by someone else. The disabled beneficiary can be of any age. No "payback provision."
- Capacity to make: Ability to understand and comprehend the nature and effect of his or her actions at the time of execution.

Social Security Representative Payee or VA Fiduciary

- Both the Social Security Administration and the Veterans Administration provide for benefits to be paid to a fiduciary on behalf of someone unable to manage his or her own money.
- For Social Security, a representative payee may be appointed if the beneficiary is physically or mentally incapable of managing his or her own benefits.
- For more on Social Security: www.ssa.gov/payee
- For Veterans Administration, a fiduciary may be appointed for a beneficiary who, due to injury, disease, or age, lacks the mental capacity to contract or to manage his or her own financial affairs.
- For more on Veterans Administration: <https://benefits.va.gov/fiduciary/>

Elder Abuse Protection Orders

- Elder Abuse Protection Order and Enforcement Act, codified at Ala. Code §§ 38-9F-1 thru 38-9F-12.
- Targeted, civil court order.
- Early intervention to stop abuse and continued financial exploitation.
- “Flexible and expeditious method” for elder abuse victims to seek court-ordered and court-enforced protection for themselves, and reclaim control of their lives and finances.
- Others with legal authority can petition on behalf of victims who can’t seek protection for themselves.
- Gives law enforcement an additional tool to assist victims and prevent further incidents of abuse.

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