

Guardianship and Conservatorship in Iowa

Issues in Substitute Decision Making

Guardianship and conservatorship can be the most restrictive and costly options for substitute decision making. Other alternatives may work as well or better.

Alternatives to Guardianship and Conservatorship

Why Not Set Up a Guardianship or Conservatorship?

Guardianship and conservatorship may take away *all* of someone's decision making authority. Also, they can be ended *only* by a court order. For these two reasons, guardianships and conservatorships are very restrictive kinds of substitute decision making tools. They can also be more costly than alternative methods, since court review is required and regular reports must be filed.

American society values independence, freedom, and the right of an individual to make his or her own decisions. Because of these values, the "least restrictive alternative" should always be considered before setting up a guardianship or conservatorship. A guardianship or conservatorship should not be required, or used, simply because a person makes a decision that other people do not understand or like. The fact that a person has a disability or a certain diagnosis does not necessarily mean a guardianship or conservatorship is needed.

What Does "Least Restrictive Alternative" Mean?

A least restrictive alternative is one that allows a person to make as many decisions and be as independent as possible. Some examples of alternatives are: representative payees for government benefits, joint bank accounts, power of attorney appointments for health care, or finances.

Can Alternatives Be Planned Ahead?

There are a number of formal and informal ways in which a person can make their own plans for future care or assistance. No adult is too young or healthy to plan for the possibility of being unable to do things we normally take for granted, such as paying our bills or making our own health care decisions. This need for assistance could happen due to an accident, illness, disability or age.

Even when a person has not made advance plans, alternatives that are less restrictive than guardianship or conservatorship should be considered. Alternatives can be voluntary or involuntary. Persons retain some control over their lives when making their own advance plans or agreeing to planned help. The

voluntary alternatives can also be less stressful for persons needing help as well as for their family.

Some people may have difficulty talking about these things. However, people who are facing the need for assistance are often relieved to learn that there are ways for them to retain some control over their lives and ensure their wishes will be followed.

Alternatives can also be involuntary. This is when someone makes the arrangements for assistance on behalf of the person needing the help.

Alternative Planning Tools

The voluntary and involuntary planning tools discussed below are generally considered to be less restrictive alternatives to a guardianship or conservatorship. If they are put in place, a guardianship or conservatorship may not be needed at all. The best choice of alternatives, including a guardianship or conservatorship, depends on individual needs and preferences.

The descriptions below provide a general summary of the various planning tools. They are not a substitute for legal advice. An attorney should be consulted before making any decisions.

Voluntary Alternatives for Personal Needs

Community Based Services

A person may be eligible for a wide variety of community based services that would permit the person to continue meeting personal needs. The services include home nursing, home health aides, homemakers, "Meals on Wheels" (home-delivered meals), "Lifeline" (telephone service assistance), mental health services, transportation, work activity, and many others.

Case Management

Case management can be used to assess a person's needs, and to coordinate and monitor services. Case management is available for some people with disabilities, including persons with in-

tellectual disability or mental illness and some elderly persons. Through the use of case management services, persons with more complex needs may be able to stay in their own homes. For information on case management programs for older Iowans, contact the Iowa Department on Aging at 1-800-532-3213 or www.iowaaging.gov. For information on case management for other needs (for example, persons with brain injuries, intellectual disability or chronic mental illness), contact the Iowa Department of Human Services.

Health Care Facility

Sometimes a person's care needs can only be met by moving to a nursing home, residential care facility, or similar place. If a person voluntarily decides to move, a guardianship may not be needed.

Living Will

A competent adult may sign a "living will" directing that life-sustaining procedures be withheld or withdrawn. The living will is only effective if the signer's condition becomes terminal and if the signer is not able to make treatment decisions. The legal term in Iowa for a living will is "Declaration Relating to Use of Life-Sustaining Procedures".

Durable Power of Attorney for Health Care

A person can name another person (called the attorney-in-fact) to make health care decisions using a durable power of attorney for health care. This paper gives the attorney-in-fact the authority to make decisions regarding care, treatment, and health care services. A living will is limited to situations of terminal illness. A durable power of attorney for health care covers a broad range of future medical decisions.

A person appointed to act under a durable power of attorney for health care has priority to make health care decisions over any other person, including a court appointed guardian, unless the guardianship order specifically terminates the power of attorney appointment. **The attorney in fact has authority to make decisions only if the person is unable to make health care decisions (in the judgment of the attending physician).**

Standby Guardianship

The Iowa Code sets out a procedure for a competent adult to plan for a court-supervised guardianship. In a written petition, the person can specify that a guardian shall be appointed when certain conditions have been met. These could include particular events or the occurrence of a physical or mental condition. The petition also says how the occurrence of these events or conditions must be proven.

Voluntary Alternatives for Financial Needs

Banking Options

There are some simple banking options that may be appropriate alternatives to conservatorships for some people. A person may be able to control his or her own affairs with the help of automatic bill payments, direct deposits, or banking by mail, phone, or the Internet.

The person should have the ability to understand what is being done each month. This may not work for people who do not use computers or the internet.

Another method often used is adding a trusted friend or family member to bank accounts. This can be done by making the person a joint owner of the account or by naming the person as a signatory on the account. Trustworthiness is very important because in either case the person can take money out of the account. Care must also be taken in establishing the account so that it is clear who will get the money if one person dies.

These informal options provide some useful means to handle financial needs, but provide little in the way of third-party supervision.

Financial Powers of Attorney

This kind of power of attorney deals only with finances. A power of attorney appointment is signed voluntarily by a competent adult (the principal) authorizing another person (the attorney-in-fact or agent) to act on his or her behalf.

A financial power of attorney can be a general document used for all authorized transactions and affairs related to property owned by the principal. It can also be limited in various ways, such as, only covering transactions at one bank or only for a single transaction. The document should also specify how long it lasts.

A competent principal can revoke or end a power of attorney at any time. It should usually be revoked in writing. Any bank, brokerage firm, or other third party who may be relying on the power of attorney should be immediately notified of the revocation.

A financial power of attorney will usually end at the time the principal becomes incompetent unless it specifically states otherwise. A power of attorney that stays in effect even if the principal becomes incompetent is called a Durable Power of Attorney. If the goal of the power of attorney is to continue even when the principal is no longer able to make decisions, then a durable power of attorney is needed .

The drawback of a financial power of attorney is that it is not supervised by a court and there are no surety, bonding, or annual accounting requirements. This creates a risk of theft or mismanagement.

Trusts

A trust is a legal relationship in which one person (a "trustee") holds property for the benefit of another (the "beneficiary"). The property can be any kind of real or personal property such as money, real estate, stocks, bonds, collections, business interests, personal possessions, and other assets. Trusts can be useful planning tools for incapacity because they can be established and controlled by a competent person and later continue under the control of a successor trustee if the person who established the trust becomes unable to manage his or her affairs .

One person often establishes a trust for the benefit of another. This type of trust involves at least three people: the grantor or trustor (the person who creates the trust); the trustee (the person or financial institution who holds and manages the property); and the beneficiary or beneficiaries (the person(s) who receives the benefits from the trust). Trusts that can be changed or terminated at any time by

the grantor are called revocable. Trusts that cannot be changed or terminated before the time specified in the trust itself are called irrevocable. The trustee holds “legal title” to the property transferred to the trust and has the legal duty to use the property as provided in the trust agreement and as permitted by law. The beneficiaries have “equitable title,” which is the right to benefit from the property as specified in the trust.

There are several types of trusts that are used to plan for one’s own incapacity or the incapacity of another. There are also many other kinds of trusts that are used for different purposes. It is important to talk to a knowledgeable trust attorney.

Social Security Representative Payee

This alternative can be voluntary on the part of a person who gets Social Security. It can also be used without the person’s consent in some cases, making it involuntary. This is discussed below under non-voluntary alternatives.

Standby Conservatorship

The Iowa Code sets out a procedure for a court-supervised conservatorship. In a written petition, the person can specify that a conservator shall be appointed when certain conditions have been met. These could include particular events or the occurrence of a physical or mental condition. The petition also says how the occurrence of these events or conditions must be proved.

Minors

A person having physical and legal custody of a minor child may establish a standby conservatorship on behalf of the minor. The person can specify that a conservator shall be appointed when certain conditions have been met. These could include particular events or the occurrence of a physical or mental condition. The petition can also say how the occurrence of these events or conditions should be established.

If a conservator has not been appointed, up to \$25,000 in money or property may be paid to a custodian under the *Iowa Uniform Transfers to Minors Act* (See Iowa Code Chapter 565B). If more money is involved, a conservatorship may need to be established.

Custodian For a Minor

If a conservator has not been appointed for a minor, money or property may be transferred for the benefit of a minor to a custodian. These transfers may be a gift, or under a will or through a trust. This is done under the *Iowa Uniform Transfers to Minors Act* (See Iowa Code Chapter 565B).

Voluntary Conservatorship

An adult may ask the court to have a conservator appointed to make financial decisions. This results in a court supervised process over some or all of that person’s financial affairs.

Non-voluntary Alternatives for Financial Needs

Social Security Representative Payee

Unlike the voluntary alternatives to conservatorship, a representative payee (for Social Security and Supplemental Security Income benefits) can be set up after the person becomes incapacitated. Representative payees might be an appropriate alternative to conservatorship if Social Security is a person’s only income and there is no need to protect other assets.

The Social Security Administration (SSA) has an application process to establish a representative payee. Even if a conservator has been appointed, the conservator must apply to become the representative payee in order to receive the Social Security checks directly.

A representative payee is appointed by the SSA for persons who are unable to receive and manage their own Social Security benefits due to mental or physical impairments. It can be done with or without the consent of the person receiving the benefits. The person has several opportunities to challenge an unwanted appointment of a representative payee. Once established, the representative payee appointment can be terminated by showing that the beneficiary has regained the ability to manage the benefits. A person can also request changing the appointed representative payee to someone else.

Representative payees are to use the benefits in the person’s best interest. Representative payees

are personally liable for misuse of funds. It may be quite difficult to prove misconduct or even locate a payee who misuses funds. Using caution in choosing a representative payee is important. It may be best to have a trustworthy relative, friend, or residential facility (nursing home or group home where the person resides) as payee. Some communities may have programs that provide volunteer representative payees through a program sponsored by AARP. These arrangements can be changed as needed.

The SSA may require periodic accountings for the benefits. The SSA may remove payees for a breach of their duties, but there is no careful oversight. **A payee only has authority to handle matters relating to the Social Security benefits. The payee has no authority to handle property or income other than Social Security benefits.**

Under other SSA requirements for representative payees, a payee must:

- Keep records of how benefits were spent,
- Submit a report of such expenditures at the request of SSA,
- Report to SSA any event affecting eligibility for or amount of benefits,
- Register bank accounts and investments in a manner clearly indicating that the funds belong to the beneficiary,
- Monitor and report savings and investment income as countable income for SSI recipients,
- Notify SSA of any change of address of the recipient,
- Notify SSA if he or she is no longer able or willing to serve as payee, and
- Disburse all accumulated funds and interest as directed by SSA at the termination of the representative payee appointment.

Arrangements for Veterans and Railroad Retirement Benefits

Payees for Railroad Retirement Benefits or Veterans Benefits may also be set up. The process for substitute payment arrangements is established by each agency. The Veterans Administration or the Railroad Retirement Board should be contacted for details and procedures to follow. As with Social Security representative payees, these arrangements should be carefully considered based on individual needs and preferences.

General Relief Benefits

General relief benefits may be paid directly to a vendor (for example, rent to a landlord) if the county rules require. A person's ability to manage the grant may not matter in the county's decision.

These materials are a general summary of the law. They are not meant to completely explain all that you should know about guardianship and conservatorship. You should see a lawyer to get complete, correct and up-to-date legal advice. Iowa's law on guardianship and conservatorship is found in Iowa's Probate Code starting at section 633.551.



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