



**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  
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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](http://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:**

**T**EAM. 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:

**I**DENTIFY 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:

**C**HALLENGES. 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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# PRACTICAL Resource Guide

The **PRACTICAL Tool** for lawyers is a joint product of four American Bar Association entities—the Commission on Law and Aging; Commission on Disability Rights; Section on Real Property, Trust and Estate Law; and Section on Civil Rights and Social Justice, with assistance from the National Resource Center for Supported Decision-Making. These four ABA entities recognize the need to raise the awareness of lawyers about decision-making options for persons with disabilities that are less restrictive than guardianship.<sup>1</sup>

“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 population<sup>2</sup> and the increase in individuals with disabilities,<sup>3</sup> 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.

<sup>1</sup> 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.

<sup>2</sup> 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>.

<sup>3</sup> *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).<sup>4</sup> 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),<sup>5</sup> adopted in 2006,<sup>6</sup> 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"<sup>7</sup> 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.

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<sup>4</sup> *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](http://www.uniformlaws.org/shared/docs/guardianship%20and%20protective%20proceedings/UGPPA_2011_Final%20Act_2014sep9.pdf).

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

<sup>6</sup> Ratification of the CRPD currently is pending with the U.S. Senate.

<sup>7</sup> 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](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”<sup>8</sup> 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”<sup>9</sup> 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.<sup>10</sup>

<sup>8</sup> 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>.

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

<sup>10</sup> 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](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* decision<sup>11</sup> requiring community integration, in that it unnecessarily isolates and segregates individuals in efforts to protect them.

### Practice Standards

The *National Probate Court Standards*<sup>12</sup> 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*<sup>13</sup> 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 1.14<sup>14</sup> instructs attorneys to recognize client self-determination, less restrictive alternatives, and the need for supports. If the lawyer suspects a client has “diminished capacity”<sup>15</sup> 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

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

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

<sup>13</sup> *National Guardianship Association Standards of Practice*, National Guardianship Association, available at [http://www.guardianship.org/documents/Standards\\_of\\_Practice.pdf](http://www.guardianship.org/documents/Standards_of_Practice.pdf).

<sup>14</sup> *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](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_14_client_with_diminished_capacity.html).

<sup>15</sup> 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”<sup>16</sup> in their lives is consistent with gerontological findings<sup>17</sup> 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 adults<sup>18</sup> 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 needs<sup>19</sup> (adapted from Missouri’s tool on alternatives to guardianship<sup>20</sup>) 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

<sup>16</sup> 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](http://supporteddecisionmaking.org/sites/default/files/promoting_causal_agency_self-determined_learning_model_instruction.pdf).

<sup>17</sup> 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>.

<sup>18</sup> 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>.

<sup>19</sup> *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).

<sup>20</sup> *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:<sup>21</sup> UTIs often can cause confusion in older people.
- Delirium<sup>22</sup> (acute temporary disorientation): in older people often triggered by medical illness or post-operative stress.
- Dehydration,<sup>23</sup> malnutrition:<sup>24</sup> Inadequate nutrition, hydration, and vitamin deficiencies can lead to reversible cognitive changes.
- Traumatic brain injury:<sup>25</sup> may affect cognitive, social, physical, and psychological functioning but has a significant recovery rate.
- Oral health:<sup>26</sup> poor oral health has been linked to poor self-esteem, lack of nutrition, and diminished cognitive functioning.

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

<sup>22</sup> *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>.

<sup>23</sup> 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/>.

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

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

<sup>26</sup> 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:<sup>27</sup> may be isolating and may be perceived as dementia or diminished understanding.
- Vision loss:<sup>28</sup> can be disorienting but is easily correctable.

## Medication Effects; Polypharmacy

Prescription and over-the-counter medication, while potentially improving health, may affect mental status<sup>29</sup>—especially if multiple drugs are taken simultaneously,<sup>30</sup> 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.<sup>31</sup> Careful review<sup>32</sup> of medications could identify changes that significantly improve mental functioning.

## Pain

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

## Emotional Conditions

- Depression:<sup>34</sup> Ongoing depression can impair judgment and cause fatigue.
- Stress; grief:<sup>35</sup> 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.

<sup>27</sup> 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/](http://www.dana.org/News/Can_Hearing_Loss_Predict%E2%80%94or_Lead_to%E2%80%94Cognitive_Decline/).

<sup>28</sup> 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>.

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

<sup>30</sup> 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](http://well.blogs.nytimes.com/2012/02/27/cocktail-of-popular-drugs-may-cloud-brain/?_r=0).

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

<sup>32</sup> *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](http://www.healthinaging.org/files/documents/tipsheets/Tip.Avoiding_OverMedication.pdf).

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

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

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

- Transfer trauma.<sup>36</sup> 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.<sup>37</sup> Myths and stereotypes about aging<sup>38</sup> and disability<sup>39</sup> 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 biases<sup>40</sup> to minimize unnecessary intrusive actions.
- Cultural barriers.<sup>41</sup> 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 fight<sup>42</sup> 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.

<sup>36</sup> 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>.

<sup>37</sup> *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>.

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

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

<sup>40</sup> *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](http://www.americanbar.org/groups/law_aging/resources/ethics_and_counseling_older_clients.html).

<sup>41</sup> 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/>.

<sup>42</sup> 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/>.

## **C**OMMUNITY. 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,<sup>43</sup> 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)<sup>44</sup> 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 Act<sup>45</sup> 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

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

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

<sup>45</sup> Administration on Aging (AoA) Older Americans Act, Administration for Community Living, available at [http://www.aoa.gov/AoA\\_programs/OAA/](http://www.aoa.gov/AoA_programs/OAA/).



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

- **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](#)).<sup>47</sup> 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](#)<sup>48</sup> 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](#).<sup>49</sup> 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 Councils<sup>50</sup> 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](#).<sup>51</sup> In especially high conflict cases, find out if your court is piloting an “[eldercaring coordination](#)”<sup>52</sup> program according to ACR guidelines.

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

<sup>47</sup> 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>.

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

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

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

<sup>51</sup> *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](http://acrelldersection.weebly.com/uploads/3/0/1/0/30102619/eldercareobjectives_7_30_2012.pdf).

<sup>52</sup> *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 caregivers<sup>53</sup> 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.*<sup>54</sup>

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.<sup>55</sup>

There are many communication techniques<sup>56</sup> 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.

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

<sup>54</sup> 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>.

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

<sup>56</sup> *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>.

## **T**TEAM. 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”<sup>57</sup> 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 surrogates<sup>58</sup> 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.

<sup>57</sup> 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](http://www3.opwdd.ny.gov/wp/images/cos_master_01_12.pdf).

<sup>58</sup> 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](#)<sup>59</sup> 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

<sup>59</sup> *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.

## **C**HALLENGES. 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.<sup>60</sup>
- 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

<sup>60</sup> 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 influence<sup>61</sup> 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 definitions<sup>62</sup> 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 options<sup>63</sup> 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,<sup>64</sup> which also could include statements of the person’s wishes concerning medical treatment. The real challenge will be ensuring that the person effectively

<sup>61</sup> 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/>.

<sup>62</sup> 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>.

<sup>63</sup> *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).

<sup>64</sup> *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](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 laws<sup>65</sup> for any specific requirements. Some state laws<sup>66</sup> 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) Order<sup>67</sup> 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)<sup>68</sup> 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,<sup>69</sup> 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,<sup>70</sup> 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.

<sup>65</sup> *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).

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

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

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

<sup>69</sup> *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](http://www.americanbar.org/content/dam/aba/administrative/law_aging/2014_default_surrogate_consent_statutes.pdf).

<sup>70</sup> *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](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 trustee<sup>71</sup> 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 program<sup>72</sup> 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 Fiduciary<sup>73</sup> 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”<sup>74</sup> 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.<sup>75</sup> Texas has enacted a legally recognized supported decision-making agreement,<sup>76</sup> and in some areas in the U.S. such agreements are informally recognized.

<sup>71</sup> *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](http://www.americanbar.org/groups/real_property_trust_estate/resources/estate_planning/revocable_trusts.html).

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

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

<sup>74</sup> *Representation Agreement*, Nidus Personal Planning Resource Centre and Registry, available at [http://www.nidus.ca/?page\\_id=46](http://www.nidus.ca/?page_id=46).

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

<sup>76</sup> *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*<sup>77</sup>

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 laws<sup>78</sup> 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 orders<sup>79</sup> 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.

<sup>77</sup> 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](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1348105).

<sup>78</sup> *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](http://www.americanbar.org/content/dam/aba/administrative/law_aging/Limited_Guardianship_of_the_Person_Chart.authcheckdam.pdf).

<sup>79</sup> 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*<sup>80</sup> and *National Guardianship Association Standards of Practice*<sup>81</sup>).

### **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.<sup>82</sup> 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 necessary 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.

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

<sup>81</sup> National Guardianship Association Standards of Practice, National Guardianship Association, available at [http://www.guardianship.org/documents/Standards\\_of\\_Practice.pdf](http://www.guardianship.org/documents/Standards_of_Practice.pdf).

<sup>82</sup> 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](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](http://www.americanbar.org/aging)
  - Commission on Disability Rights: [www.americanbar.org/disability](http://www.americanbar.org/disability)
  - Section on Civil Rights and Social Justice: [www.americanbar.org/crsj](http://www.americanbar.org/crsj)
  - Section on Real Property, Trust and Estate Law: [www.americanbar.org/rpte](http://www.americanbar.org/rpte)
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