

Using Alternatives to Guardianship to Defend Against or Terminate Guardianship

CHAPTER SUMMARY • December 2021

David Godfrey, JD., Senior Attorney, ABA Commission on Law and Aging

ABA Commission on Law and Aging

The ABA Commission on Law and Aging is a collaborative and interdisciplinary leader of the Association's work to strengthen and secure the legal rights, dignity, autonomy, quality of life, and quality of care of aging persons. The Commission accomplishes its work through research, policy development, advocacy, education, training, and through assistance to lawyers, bar associations, and other groups working on issues of aging.

Introduction

The law in virtually every state says that a guardianship should be the last resort, only to be imposed when alternatives fail to protect a person in need of protection.¹ Often, cases are filed without exploring alternatives. A winning strategy for the defense against guardianship or for restoration of rights is to develop and present evidence that alternatives meet the needs of the person without regard to the person's ability or capacity.

Defending the respondent or defendant in a guardianship proceeding protects the legal, human, and civil rights of the person. Guardianship should be a last resort. Most state laws encourage or require the exploration of alternatives before considering guardianship, or accept as proof that an existing guardianship is no longer necessary and require that the rights of the person be restored, the guardianship modified, or terminated. Preparing and presenting evidence of alternatives is an essential defense strategy that should be pursued in EVERY guardianship defense.

Terminology

Traditionally, a guardian was a court appointed fiduciary to make personal decisions, and a conservator was a court appointed fiduciary to protect money and property. Many states and the Uniform Guardianship Conservatorship and Other Protective Arrangements Act maintain this distinction. But many states use the terms differently, with a guardian responsible for both person and property, or a conservator responsible for both. Some states use entirely different terms. Always check your state's terminology. For simplicity, this article uses the term "guardianship" for any court appointed fiduciary.

We use the term defense attorney for an attorney who is hired by or for, or court appointed, to represent the wishes of a person who is the subject of a guardianship action. A defense attorney is presumed to be a zealous advocate for the wishes of the client and obligated to protect the due process rights of the client. The defense attorney may represent the client in the initial case seeking to avoid appointment of a guardian, or in a motion to terminate or modify guardianship and restore the rights of the person. Other attorneys play different roles in a guardianship case, and the defense attorney should think like a defense attorney in a criminal case.

Capacity Assessment

The first defense strategy is always to examine the respondent's or defendant's mental capacity and their ability to make informed choices. If the person can make informed choices, no guardian should be needed. This process starts by spending time with the client. It is important to work with communication tools that work for

¹ Least Restrictive Alternative References in State Guardianship Statutes, ABA Commission on Law and Aging; americanbar.org/content/dam/aba/administrative/law_aging/06-23-2018-lra-chart-final.pdf

the client and to assure that language or cultural differences are not being misinterpreted as a lack of ability to make informed choices. If a defense attorney disagrees with the existing capacity assessments, they can question and cross examine the experts, or consider requesting an independent evaluation. For more information see [“Assessing Legal Capacity: Strategies for an Elder Rights-Centered Approach.”](#)

While defending based on capacity is important, it should not be the only defense. When state law refers to the least restrictive options or alternatives to guardianship, the defense should develop and present evidence of alternatives that are already in place or can be put in place.

Health Care Decision Making

About one third of adults have named a health care agent, and about 45 states have laws guiding who has legal authority to make health care decisions for a person who needs help doing so. Research shows that the majority of health care providers in states that don't have default health care decision making laws accept consent from a family member or friend who shows genuine concern for the well-being of the person.

The first step for advocates is to understand your state laws and to know how a health care surrogate can be appointed in your state. In writing is ideal, but some states allow oral appointments recorded in medical records. Also, advocates should become familiar with what default or statutory consent options are available.

The next step is to inquire about existing advance directives that name a health care decision-maker. Ask the person, family, friends, and past health care providers. If there is an indication that someone has a copy of an advance directive and is hesitant to share it, a defense attorney can ask the court to subpoena it.

When disputes between family members on health care decisions arise, the family should try mediation or group counseling to resolve the dispute. If that fails, the court can provide a limited protective order clarifying who can consent to health care. This is a very limited protective arrangement as anticipated under Article 5 of the Uniform Guardianship, Conservatorship, and other Protective Arrangements Act. There are a very limited number of persons who truly have no identifiable family or friends, and a limited order only for health care decision making may resolve the issue.

Managing Finances

There are a variety of tools for managing money and finances that are effective alternatives to guardianship. These start with direct deposit and automatic billing paying services. Social Security and all government benefits are now paid only by direct deposit. Virtually all other income can be arranged to be paid by direct deposit. Direct deposit eliminates lost or stolen checks, trips to the bank, and the need to remember to make deposits. It assures that income is available when needed to pay bills. Automatic payment assures that bills are paid on time. With automatic payment, an invoice or notice is sent, often electronically, and unless an objection is made by the agreed time for payment, the account is paid automatically according to the terms set up with the vendor. Automatic payment can be set up for nearly everything that a person needs to pay, including most utilities, insurance, credit card, and for rent or mortgage payments. As using credit and debit cards has become the normal way of doing business for more and more adults, automatic payment has become a powerful tool for financial management.

Both direct deposit and automatic payment should have some monitoring or oversight. Banks and other financial institutions can set up “read only” access, allowing a trusted third party to verify that deposits are received in the correct amount and that bills being paid are correct and paid on time. It is easy to set up a shared email address for the electronic statements to come to, so a trusted advisor or supporter can review invoices and bills and discuss any concerns with the person. Using direct deposit and automatic payment with mutual agreement on oversight of statements avoids the need for managing income and expenses by a guardian.

A defense attorney needs to inquire into the financial arrangements in place and examine what arrangements can be set up to manage the income and expenses of the person they are defending. A determination needs to be made as to whether the defendant/respondent has the ability to agree to these arrangements if the arrangements are not already in place. If not, and approval or consent is needed, a defense attorney can file a motion asking the court for a limited protective arrangement or order, authorizing someone to set up direct deposit and automatic payment.

Social Security retirement, disability, and Supplemental Security Income (SSI) use a system of representative payees to receive, manage, and account for the income of beneficiaries that need help managing their benefits. For persons whose only income (about 19%) or nearly only income (about half) are Social Security Benefits, a representative payee is a viable defense to the need for a court appointed guardian to manage finances. Social Security does not recognize the authority of a guardian or conservator and requires appointment of a representative payee. This makes inquiry into the sources of income an essential part of defense of a guardianship case.

Families often manage finances with joint accounts. Joint accounts offer the greatest degree of access to the accounts. If the accounts exist and are working, they should be presented as evidence that guardianship is not needed. If the accounts **do not exist**, advocates should urge caution in creating them, as joint accounts can have unintended consequences, such as issues with ownership of assets and inheritance rights, and joint accounts are easy to exploit or abuse.

Direct payment looks a bit like automatic payment but requires approval each time before payment is made. While this provides oversight in the approval process, it is more likely to result in late or unpaid bills than automatic payment. If it is set up and working, it is evidence for the defense that care plans to manage finances are in place and working.

Power of Attorney

A power of attorney is a document appointing an agent to make decisions and transact business on behalf of the grantor—the person naming the agent. About one third of adults have named an agent in Power of Attorney. Inquiry into the existence of a power of attorney is an essential step in defense. The defense attorney should ask the person, family, friends, and business that may have a copy of the document. Banks often keep copies of power of attorney documents on file—in some places the documents are recorded in the public records or filed with the clerk. If you identify a possible power of attorney and have difficulty getting a copy, ask the court to subpoena it. The authority granted in a power of attorney varies with state law and with the language of the document. Most powers of attorney are very broad and sweeping in authority, often done with the intention of avoiding guardianship. The defense should present any existing power of attorney as evidence of the client's planning and of lack of need for a guardian.

If a Power of Attorney does not exist, the defense attorney should question if it is possible to create one. The attorney will need to determine if the client is able to: select a person they trust, understand that the person they name can bind them to decisions and choices, and generally understand the basic kinds of authority they are granting to the agent. Do the independent evaluators agree that even if the person needs help in managing decisions, the person is able to understand and select a person they trust to help? If so, this evidence should be developed and presented to the Court, with a motion to create a power of attorney as an alternative to guardianship.

Trusts

In many ways, establishing and funding a trust to control and manage assets while the person is alive and provide for distribution after death is the ultimate in advance planning for assets. An existing trust is clear evidence of the intention of the wishes of the grantor. Existence of a trust should be presented as evidence of the intent of the grantor to plan for all eventualities. Trusts have provisions for successor trustees, and courts that

regularly oversee the administration of trusts are an appropriate forum for raising questions on changing trustees. Defending by presenting evidence of a trust is especially important in states that allow guardians or conservators to modify, revoke, or create trusts, as the guardian may be able to undue the planning that the person worked to put in place.

Decision Supports / Supported Decision-Making

All people rely on trusted advisors to help them understand options, risks, benefits and consequences of decisions and for recommendations and support in making and carrying out choices. This is the essence of supported decision-making, or decision supports. All people do it, and the only thing that varies is the scope of issues that individuals seek advice or support on. The core of decision supports is that the person selects persons that they trust to advise and support them, and the supporters counsel, but ultimately allow the person to make the decision. Evidence of a support system, formal or informal, should be developed and presented in defending against a guardianship. About one-quarter of states now have some statutory recognition of supported decision-making as an alternative to guardianship. A written agreement between the defendant and the supporters is strong evidence, but testimony from the supporters about the relationship can also be presented as part of the defense.

Conclusion

Defending against a guardianship involves much more than reviewing the capacity assessments. In nearly every state, guardianship is a last resort, only to be used if alternatives to guardianship are unable to protect a person unable to make choices to protect themselves. In acting as a zealous advocate for their client, a defense attorney should develop and present evidence of alternatives that might prevent the need for a guardian or justify a guardianship no longer being needed. If the alternatives are working, even a person who is comatose should not need a guardian.

Historically, the defense provided in guardianship cases has been weak. In raising these defenses, advocates can expect some degree of surprise that evidence in a defense is being proposed. Defense attorneys should be prepared, develop evidence, and know the rules of evidence for the court. Strategies such as using a motions in limine to give the court time to review why evidence is admissible or asking the court for subpoenas where needed to gather evidence can help develop a zealous defense to guardianship.

Check List for a Defense Attorney in a Guardianship Case

- What do the evaluations say about client capacity?
- Do you or others disagree with the findings of the evaluations? If so:
 - » What are the qualifications and experience of the persons who did the evaluations?
 - » How were the evaluations conducted?
 - » Do you want a second opinion?
- Under state law who can make health care decisions for the person?
 - » Do any advance directives exist?
- What sources of income exist?
 - » How is income received?
 - » What arrangements can be made?
- What expenses need to be paid?
 - » What arrangements have been made?
 - » What can be set up to pay bills?

- Is there a Power of Attorney?
 - » Investigate places it might be found.
 - » Is it possible to create a valid power or attorney?
- Is there a trust?
 - » Are there any unmet needs for legal authority to consent or transact business?
 - » Can limited court orders fill those needs without the need for a permanent guardianship?
- How are personal decisions made?
 - » What existing decision supports are in place?
 - » Are there family and friends available to help with non-legal decision supports?
 - » Is your client able to select advisors or supporters that they trust?
 - » Is there an existing supported decision-making agreement?
- If the reason for the Guardianship is intrafamily disputes:
 - » Have mediation or counseling been exhausted?
 - » Are there alternatives that can support the needs of the person?

Additional Resources

- [NCLER: Assessing Legal Capacity: Strategies for an Elder Rights-Centered Approach](#)
- [Assessment of Older Adults with Diminished Capacities: A Handbook for Lawyers, 2nd Edition by the ABA Commission on Law and Aging](#)
- [Capacity Definition & Initiation of Guardianship Proceedings, ABA Commission on Law and Aging](#)
- [Default Surrogate Consent Statutes, ABA Commission on Law and Aging](#)
- [Guardianship, Conservatorship, and Other Protective Arrangements Act, Uniform Law Commission](#)
- [Least Restrictive Alternative References in State Guardianship Statutes, ABA Commission on Law and Aging](#)
- [Selected Issues in Power of Attorney Law, ABA Commission on Law and Aging](#)
- [State-Specific Advance Planning Forms, ABA Commission on Law and Aging](#)
- [Supporting Decision Making Across the Age Spectrum, ABA Commission on Law and Aging](#)
- [Who Decides if the Patient Cannot and There is No Advance Directive: Research and Recommendations on Clinical Practice, Law and Policy. ABA Commission on Law and Aging](#)

Case consultation assistance is available for attorneys and professionals seeking more information to help older adults. Contact NCLER at ConsultNCLER@acl.hhs.gov.

This Chapter Summary was supported by a contract with the National Center on Law and Elder Rights, contract number HHSP233201650076A, from the U.S. Administration on Community Living, Department of Health and Human Services, Washington, D.C. 20201.