

Decision Making:

Guardianship, conservatorship and other supports for individuals with developmental disabilities



DDS Office of Human Rights

All adults, including those with developmental disabilities are presumed to be competent and they maintain the legal rights to make decisions regarding health, education, finances and safety. In some instances, individuals may need support, assistance in making decisions. There is a range of legal options which are available. The least restrictive alternative should be utilized to support and protect the individual.

Types of Decision Making Supports

Guardianship of an Adult- Appointed by the Court

Guardianship is a legal process for adults who have a clinically diagnosed medical condition and are unable to make or communicate effective decisions about their everyday self-care, health, and safety. A Massachusetts Probate court can appoint a Guardian to make some or all personal and medical decisions on the adult's behalf. A guardian may be appointed for an incapacitated person "who for reasons other than advanced age or minority, has a clinically diagnosed condition that results in an inability to receive and evaluate information or make or communicate decisions to such an extent that the individual lacks the ability to meet essential requirements for physical health, safety, or self-care, even with appropriate technological assistance."

A guardianship should be tailored to protect the adult's rights and independence and can be limited to areas where the adult's abilities are impaired.

Conservatorship- Appointed by the Court

Guardians may be appointed for the care and protection of the person only. A conservator must be appointed to protect property and business affairs of a person in need of protection.

A conservator may be appointed for a person to be protected if "the person is unable to manage property and business affairs effectively because of a clinically diagnosed impairment in the ability to receive and evaluate information or make or communicate decisions, even with the use of appropriate technological assistance, or because the Individual is detained or otherwise unable to return to the United States; and the person has property that will be wasted or dissipated unless management is provided or money is needed for the support, care, and welfare of the person or those entitled to the person's support and that protection is necessary or desirable to obtain or provide money."

Limited guardianship - Appointed by the Court

A limited guardianship allows the Court to address specific areas of incapacity and tailor guardianship decrees (letters) to meet an individual's unique circumstances. Individuals may be competent for one purpose and not competent for another. For example, if appropriate, a guardianship may be limited or apply only to medical treatment decisions. Orders curtailing or removing an individual's liberty should be made only to the extent absolutely necessary to protect the individual from harm.

Limited conservatorship- Appointed by the Court

A conservator should be appointed only when necessary, and then with only those powers that are necessitated by the individual's actual limitations. For example, if appropriate, a conservatorship may be limited or apply only to investments or real estate and leave to the protected person the ability to receive pension income and pay for daily or monthly expenses.

Protective orders & Single Transactions- Instituted by the Court

In some instances, a narrowly tailored “protective order” or “authority for single transaction” will suffice to protect an individual’s assets/property. For example, the Court, without appointing a conservator, may authorize, direct or ratify any contract, trust, or other transaction relating to the protected person’s property and business affairs if the Court determines that the transaction is in the best interests of the protected person.

Full/plenary guardianship - Appointed by the Court

A full/plenary guardianship generally removes from an incapacitated person all personal decision making responsibility and authority. Under the current law, clinicians and the Court must now consider whether an incapacitated person’s legal rights can be preserved in specific areas and whether the guardianship can be limited or tailored accordingly.

Full/plenary conservatorship - Appointed by the Court

A full/plenary conservatorship generally removes from a person to be protected all control over his or her assets. Under current law, the Court must now consider if a conservatorship can be limited which means that the Court can preserve legal rights in specific areas.

Substituted judgement - Instituted by the Court

The court stands in the shoes of the individual and acts on the same motives and considerations as would the incapacitated person. The court must decide “what would the incapacitated person decide if they were able to make the decision.”

Guardian ad litem (GAL): - Appointed by the Court

A GAL is an impartial person appointed by the court to investigate or evaluate the case and to report back to the judge. The order appointing the GAL sets the scope of the investigation. This investigation or evaluation may include interviews with each party, interviews with the incapacitated person, and visits to facilities/residential programs. A GAL’s role is to gather information and file a report with the court. The report the GAL prepares will be reviewed and considered by the judge before making a final decision.

Rogers Authority- Appointed by the Court

A Rogers order is one in which the guardian obtains the court’s permission for extraordinary treatment. The types of medical treatments which the court may consider ‘extraordinary’ includes administering of antipsychotic medication, sterilization, abortion, electroconvulsive therapy, psychosurgery and removal of artificial maintenance of nutrition or hydration, and other treatments and procedures. In these cases, the court authorizes a treatment plan, rather than giving authority to the guardian to make the decision. When a Petition seeking authority to treat an incapacitated person with antipsychotic medication is filed, the Court will appoint an attorney to represent them.

Health Care Proxy - Instituted by the Person

A Health Care Proxy is a simple, legal document that enables a patient to appoint someone they trust to make health care decisions if the patient is unable to do so. These decisions include life-saving procedures such as CPR, life-sustaining treatments such as tube feedings and respirators, as well as other procedures

such as consent for surgery, blood transfusions, pain medications and other routine tests. **The patient must have capacity to understand the document that he/she is signing.**

Power of Attorney- Instituted by the Person

A durable power of attorney is a legal document where an adult appoints a trusted person, called an Attorney-in-fact, to manage and protect the adult's money, property and business affairs, when the adult becomes disabled or incapacitated, or is unable to manage his or her financial matters. A Durable Power of Attorney is legally binding and can be executed without involving the Court. **The individual must have capacity to understand the document that he/she is signing.**

Representative Payee – Appointed by the Social Security Administration

A representative payee is a person or organization authorized by the Social Security Administration (SSA) to cash and manage certain benefits checks – Supplemental Security Income (SSI) and Social Security Disability Insurance (SSDI) – for a person deemed unable to do so. Federal regulations set out when SSA will appoint a representative payee and define the payee's responsibilities.

The representative payee only has authority over income from the particular source of income for which he or she is the payee. For example, a payee for SSI checks cannot control a recipient's bank account if it contains funds from sources other than SSI, or even if it contains SSI funds if those funds were received prior to the representative payee's appointment. A representative payee cannot make personal decisions on behalf of the person with a disability and cannot make financial decisions about personal property or real estate that the recipient owns.

Trust– Appointed by an Individual

A trustee takes care of trust assets for the benefit of the beneficiary. The trustee may be either an individual or an organization such as a bank or trust company. The trust document sets out the specific duties of the trustee. Trust funds can be held in an individual trust or as part of a pooled trust.

Supported decision-making- Instituted by the Person

Supported decision-making (SDM) is a non-legally binding health planning alternative to guardianship that allows an individual with a disability to work with a team and make his or her own choices about his or her own life. Under this model, the individual designates people to be part of a support network to help with decision-making.

SDM promotes self-determination, control and autonomy. It fosters independence. Unlike substituted decision-making where guardians, family members or the courts make decisions for the individual, supported decision-making enables the person to make his or her own decisions with assistance from a trusted network of supporters.

Processes and Options for Action

Guardianship

- A Clinical Team assesses the capacity of the person and makes a written recommendation – the Clinical Team Report (CTR).
- If the person receives antipsychotic drugs, an affidavit and proposed treatment plan from the prescriber is required as well.
- The service coordinator completes a referral packet of forms, including the CTR and sends it to the DDS regional legal office.
- The legal office drafts all necessary court pleadings for filing with the court.
- The court appoints counsel (if required), and issues a citation which provides notice of the court filing, and must be served upon all interested parties (and perhaps also published in a newspaper). The citation has a return date, prior to which anyone objecting to the petition must notify the court.
- The individual can attend the hearing, and is entitled to legal representation if they so choose. If they are on antipsychotic medications, counsel is automatically appointed.
- The court reviews the evidence and makes a determination regarding the person's need for a guardian.
- A guardianship decree should only pertain to aspects of the person's life in which they are not able to make competent decisions.

Guardianship Options for Action

- At the initial competency hearing, the person can attend the hearing with counsel and provide testimony and evidence regarding their capacity.
- If a guardian is in place, the person can file with the court to limit the scope of the authority of the guardian.
- The person can file with the court to remove the guardian and have another one appointed.
- The person can file with the court to assert their restored capacity. This would require a new assessment from a clinician and a Clinical Team Report or Medical Certificate would need to be filed in support thereof.

Conservatorship

- The process and options for action are very similar to those with guardianships.
- There is not a requirement for an affidavit from a prescriber for persons who take antipsychotic drugs.
- A conservator is required to obtain a surety bond, which acts like an insurance policy to protect their resources from any misuse by the conservator.
- A conservator is required to file an Inventory within 90 days of being appointed, and must file annual accounts with the court regarding any business they transact on behalf of the Protected Person.

Rogers Authority

- If an individual is receiving some form of extraordinary treatment (typically antipsychotic medication for people served by DDS) then Rogers authority must be requested.
- If the individual is deemed not to be competent, this plan would need to be authorized by the court, to be reviewed at least annually.
- A clinician's affidavit and treatment plan should be forwarded to the Regional DDS legal office along with the guardianship referral, so that the legal office can request Rogers authority.
- At the time of the guardianship hearing, the court will decide whether to approve the treatment plan.
- Rogers Counsel is appointed to represent the interests of the individual.
- If the plan is authorized, a Rogers monitor is appointed to check in periodically with the person to insure that the treatment is effective and is not harmful.
- A Rogers Treatment plan must be reviewed by the court at least annually.

Health Care Proxy

- If a person is competent they can appoint their own health care proxy by signing a document in the presence of two witnesses and presenting it to health care practitioners.

Health Care Proxy Options for Action

- The person can revoke the proxy and/or appoint another person to be the proxy at will by eliminating the document and/or signing a new one.

Power of Attorney (POA)

- If a person is competent they can appoint someone to have their power of attorney by signing a document in the presence of two witnesses.

Power of Attorney Options for Action

- The person can revoke the POA and/or appoint another person to have the POA at will by eliminating the document and/or signing a new one.

Representative Payee

- A physician's letter is required by the social security administration to establish that the person does not have the capacity to manage their social security income.
- The letter is brought to the social security office along with an application for an individual or organization to be appointed as the representative payee for the person.
- A Representative Payee must account to the SSA as required regarding any transactions completed in their role as rep payee.

Representative Payee Options for Action

- If a person does not believe that they need a representative payee, they can appeal the decision to the social security administration.
- If the person wants a change in who their representative payee is, they can ask the new person or organization to file a new application with the social security office.

Additional Information about guardianship

- **Mass General Law regarding the authority of a guardian**

MGL chapter. 190B, section 5-309.

Section 5-309. [Powers, Duties, Rights and Immunities of Guardians, Limitations.]

(a) Except as limited pursuant to section 5-306(c), a guardian of an incapacitated person shall make decisions regarding the incapacitated person's support, care, education, health and welfare, but a guardian is not personally liable for the incapacitated person's expenses and is not liable to third persons by reason of that relationship for acts of the incapacitated person. ***A guardian shall exercise authority only as necessitated by the incapacitated person's mental and adaptive limitations, and, to the extent possible, shall encourage the incapacitated person to participate in decisions, to act on his own behalf, and to develop or regain the capacity to manage personal affairs. A guardian, to the extent known, shall consider the expressed desires and personal values of the incapacitated person when making decisions, and shall otherwise act in the incapacitated person's best interest and exercise reasonable care, diligence, and prudence.*** A guardian shall immediately notify the court if the incapacitated person's condition has changed so that he or she is capable of exercising rights previously limited. In addition, a guardian has the duties, powers and responsibilities of a guardian of a minor as described in section 5-209(b), (c), (d) and (e).

Additional Resources

- Mass Guardianship Association

<http://www.massguardianshipassociation.org/information/guardianship-of-an-adult-2/what-is-guardianship-of-an-adult/>

- Guardianship general information

<http://www.mass.gov/courts/selfhelp/guardians/>

- Mass Probate and Family Court Guardianship and Conservatorship Forms

<http://www.mass.gov/courts/forms/pfc/pfc-upc-forms-generic.html>

Decision Making Supports

