

# Using Alternatives to Avoid Guardianship

---

David Godfrey, JD,

Director

ABA Commission on Law and Aging

[David.Godfrey@Americanbar.org](mailto:David.Godfrey@Americanbar.org)



# About the ABA Commission on Law and Aging

---



AMERICAN **BAR** ASSOCIATION

---

Commission on  
Law and Aging

*The ABA Commission on Law and Aging leads the association in strengthening and securing the legal rights, dignity, autonomy, quality of life and quality of care of older adults. The Commission accomplishes its work through research, policy development, advocacy, education, training and through assistance to lawyers, bar associations and others working on aging issues.*

*My goal is for the Commission to empower lawyers to be more effective lawyers*

*You can support our work*

*[https://www.americanbar.org/groups/law\\_aging/](https://www.americanbar.org/groups/law_aging/)*

*ABA membership for legal aid, public interest, solo and small firm lawyers is \$150 a year or less,*

*And includes access to a library of over 600 CLE accredited webinars.*

*[www.Americanbar.org](http://www.Americanbar.org)*

# Overview

---

- ❑ Alternatives to guardianship can be used to avoid guardianship, to defend against a filing for guardianship or to build the case to modify or terminate a guardianship and restore the persons rights.
- ❑ This session will talk about the most common alternatives such as advance health care directives, powers of attorney, authorized signers, direct financial arrangements, trusts, decision supports and supported decision making, and how these build the case against the need for guardianship.
- ❑ We will also cover how to build oversight and accountability into the alternatives.

# Can the Persons' needs be

---

- Virtually all state guardianship laws refer to one or more of these:
  - Least restrictive alternative
  - Only to the extent necessary
  - Less restrictive alternative
  - Only as required



States are starting to require evidence that alternatives have been tried, and why they will not meet the need

[Least Restrictive Alternative References in State Guardianship Statutes](#)

# Guardianship or Conservatorship

---

- ❑ Should always be the last resort
- ❑ Only when all other options have failed
- ❑ There is a real need
- ❑ No other way exists to protect a person who cannot protect themselves from imminent and **serious** harm





Adults have  
a right to  
make bad  
choices,  
As long as  
they  
understand

---

# Health Care Decisions

---

- All states allow an adult to name a health care agent (decision-maker, surrogate, proxy)
  - Most require in writing
  - Some allow verbal appointments
  - Capacity standard can be low.
    - “Please ask X.”
  - Ask about past health care directives
    - Past health care providers
    - Family members
    - Who might have helped create it
    - Civil procedure – to compel

# Default Health Care Surrogates

---

- 45 states have default health care decision making statutes
  - Family - Increasingly close friends
  - Social services, and medical ethics consultants





# Research Shows

---

**That even in states that do not have default health care decision-making laws:**

- **Most health care providers will accept consent from family or close friends**
- **Most don't know the law in the state they are practicing medicine in**
- **Unless there is a concern about liability**

**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

Washington, DC

David Godfrey

Charlie Sabatino

The project made possible by generous support from:

Retirement Research Foundation

**RRF Grant #2015-233**

# Living Will

---

Instructions on life prolonging care at end of life

Mostly statutory forms

Focus is on end of life – life prolonging care

Replacing or supplementing life sustaining function

Tube Feeding (should be specific - Cruzan)

Can include more depending on document



# Power of Attorney for Health Care

---

Likely the most important written planning step is

- Naming a health care decision maker in writing

Even if the person named, is the same as the statutory default, having it in writing can save time and doubt



# Poll Question

---

Do you have an advance health care directive?

A) Yes

B) No

C) Someplace, I don't know where



# Health Care Values, Goals of Care, Preferences

---

- Values are strongly held personal beliefs that shape our choices-
- Goals of Care, the desired outcome of a course of treatment – or personal goal that shapes care choices
- Preferences – what a person wants or does not want
- These shape supporting decision making



# Values Tools

The Conversation Project

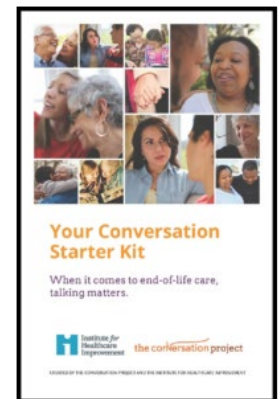
Five Wishes

Prepare For Your Care

Go Wish Cards/Game



Commission on  
Law and Aging



# How to support health care decision making

---

- Always involve the Person,
  - Explain what is happening
  - What the options are
  - Ask what they prefer
  - Help with making appointments to see providers
  - With permission, accompany, but allow privacy
  - Even a person who is comatose has a right to know
    - And may understand even if they can't communicate



# Engage Health Care Providers

---

Provide Copies of all Advance Directives

- Provide lots of copies

Schedule conversations with medical staff

- Repeat with each new provider

Supporters should actively Participate in Care Planning Conferences for nursing home patients





# Family Disputes over Health Care Decisions

---



- Sadly, we see family disagreements on health care decisions, end up in Guardianship Court
- Family Meetings
- Counseling
- Mediation

# Smoking

---



Rebecca is 52, neurocognitively impaired, and has smoked since she was a teenager. Over the years there have been several attempts to get her to stop. When cigarettes are taken away, she becomes agitated, upset, and within a couple of days her family and caregivers relent. When asked about the health risks, she responds with “smoking makes me calmer, I feel better.”

- What if she starts smoking in bed?
- What if she starts falling asleep while smoking in bed?
- Prohibit or agree to restrictions for safety?



# Uncomfortable Fact #1

---

- Research shows that financial judgement peaks at age 52



## Uncomfortable Fact #2 Decline in Capacity

---

Credit Scores, on average start to decline 7 years before a person is diagnosed with Alzheimer's

- Collections or judgements, credit utilization, timely payment

Unpaid bills are most common,

Unusual spending is less common

Increased vulnerability to exploitation



# Put it on Autopilot

---



## Direct Deposit On All Income

- Mandatory on most Pensions, Social Security, Dividends, Interest
- Automatic periodic distributions from defined contribution plans (RMD at 72 for tax deferred accounts.)
- Harder to capture things like rental income, farm income, business income

# Income

---

- For about 20% of Social Security beneficiaries, Social Security is the person's only source of income
  - SSI – seldom have non-SS related income
- For about half of Social Security beneficiaries, Social Security is the majority of income
- Guardianship has no legal effect on Social Security Benefits
- Representative Payee is required –
  - Guardians must also become payees



AMERICAN **BAR** ASSOCIATION

Commission on  
Law and Aging

# Auto Payment

---

Reoccurring Bills Are Paid Directly From A Bank Account Or Charged To A Credit Card.

Reminder Sent, Unless An Objection Is Filed, Is Automatically Paid

Requires Monitoring, But Not Action To Assure Payment

Credit Cards Can Be Paid Automatically

Will Not Cover Everything



# Oversight

---

- Financial intuitions are increasing eager to set up
  - Read only access.
- Verify deposits that should be made
- Monitor payments from the account
- On billing statements
  - A shared email does not authorize others to charge to the account,
  - But allows oversight



# Authorized Signers on Bank Accounts

---

## Joint Account Owners

- Default Joint Accounts
- Create ownership, and likely inheritance rights

## Authorized Signers

- Like a business account
- May be done with a power of attorney

## General cautions:

- Trust the person
- Ask for a heads up on judgements, divorce, tax liens, bankruptcy
- Provide oversight



AMERICAN **BAR** ASSOCIATION

---

Commission on  
Law and Aging

# On Finances

---

- Setting up direct deposit and automatic payment are evidence that the Person was making plans to assure that income is received, and expenses paid, even if they are unable to oversee the day-to-day details.
- Ask for bank records
- Look at how income is received, and bills are paid
- Oversight can easily be provided by read only access to statements; copies of electronic invoices
- Document, prepare and present this as evidence of advance planning using alternatives

# Power of Attorney

---

A Power of Attorney (POA) is a document naming an agent to transact business on behalf of the grantor, the person appointing the agent

A Person needs to be able to understand a few things to create a Power of Attorney

- That the person being named can make decisions for them
- The agent's decisions are binding
- The general nature of the authority being granted
- That they can revoke or change the appointment

# Power of Attorney – Agents and Authority

---

- If You Have Any Doubts, Don't Name That Agent.
- Customize for clients' needs
- Be careful on hot powers
  - Gifts
  - Changing beneficiaries
  - Real Property
  - Large financial transactions
  - Opening and closing accounts
  - Taxes (want)
  - Insurance claims (want)



AMERICAN **BAR** ASSOCIATION

---

Commission on  
Law and Aging

# Oversight Starts with Instructions

---

- Let them know they are a fiduciary
- Records to Keep
- Keeping separate accounts
- Avoiding insider dealing
- How to sign as agent
- Accountability to grantor and third party



AMERICAN **BAR** ASSOCIATION

---

Commission on  
Law and Aging

# Strong Evidence of Intent

---

- About 1/3<sup>rd</sup> of adults are believed to have signed a POA
  - Often with the express intent of avoiding guardianship
- A Person who needs help with day-to-day business, may still have capacity to execute a valid POA



# Finding POAs

---

## Ask:

- The client
- Family – family who didn't file
- Friends and neighbors
- Banks
- Health care providers
- Other businesses
- Previous lawyers (often done with wills and estate plans)
- Review of the client's files

## Civil Procedure

Request for production of documents

Request for admissions

Subpoena

Witnesses

Ask on cross examination

# Trusts

---

- Less common, but very strong evidence of advance planning
  - More common in states with complex probate
- Trust provisions and state law control successor trustees
- Look for assets in the name of the trust – trust bank accounts, brokerage accounts
- Bank should have a copy on file
- Drafting attorney – if you create, put conditions for releasing copy to third parties



# Communications Accommodations Are not a lack of capacity

---

- Not everyone communicates the same way
- Language
- Non-Verbal
- Written – communication accommodations

# Communication

---

- Slow down, talk slowly and clearly.
  - Simple direct questions and explanations
- Maintain an adult tone and communications style.
  - Avoid being patronizing or “baby talk”
- Limit the agenda – One Issue
  - Switching from one issue to another is difficult for many persons

# When to Stop

---

- End the meeting when the person is tired, confused or frustrated, and unable to refocus
  - Or when you are exhausted
- You may need to break an issue up into multiple meetings
- Take a break, and make it clear when you are changing the subject

# Sometimes it takes time

---

- Allow the person to talk,
- They may ramble before getting to the subject
- Talking may help the person organize thoughts or focus communications
- The stories they tell are important to them
  - And will help you understand what is important to the person
- A helpful book on this
  - How to Say It to Seniors: Closing the Communication Gap with Our Elders, by David Solie

# Aphasia

---

A technical term for finding the right words

- Most people have some minor challenges
- Some normal increase with age

Dementia increases difficulty with word finding

Allow more time for responses

When necessary, assure the person that this happens to everyone

The harder we try, the harder it is, relax

- “it will come to me/you in a minute”

# Word Finding

---

- Find meaning in context when the wrong word is used
- Encourage the person to describe what they can't find the word for
- Talk about other aspects of the issue, and see if the word comes to them
- Feed it back to confirm understanding
- Thought Formation and Communication are not always tied together
  - The person may know what the answer is, and struggle to communicate it

# The Majority

---

- 6.5 million older adults with Alzheimer's
- 38 million adults in the United States with severe disabilities
- 13.1 million Americans live with serious mental illness
- 1.3 million persons subject to guardianship
- Clearly the majority of persons who might be subjected to guardianship manage perfectly fine with decision supports – they may not call it that

# Abuse and Guardianship

---

- Abuse and exploitation happen in all settings
  - Abuse is not caused by the lack of a guardian
- Abuse happens because someone commits acts of abuse
- Abuse most often happens in the shadows
- An unnecessary or overly broad guardianship is a human rights abuse





AMERICAN **BAR** ASSOCIATION

Commission on  
Law and Aging

# Oversight and Accountability

---

- Draft it into every alternative and accommodation
- Create provisions and arrangements for multiple people to see financial statements, to hear about choices and decisions
- Broaden the number of people involved, abusers avoid crowds
- A guardianship report that is just stamped received and entered into the file, is no real protection

# Technology Redefines Ability



- Wearable health monitoring
- GPS to help find the way
- Voice Activated Devices
- Proximity activated locks

# Clancy-Client

---

Clancy is living with dementia that progressed to the point that Clancy often forgets to accomplish routine acts, such as checking the incoming mail, writing checks, or operating the ATM to get spending cash. His Social Security and Pension are on direct deposit. He has all his bills on automatic payment. He has set his bank account so if his checking account drops below \$1,000, money is automatically transferred from his savings account. If his savings account drops below \$10,000, an advance is taken on a home equity line of credit and the money is added to his account. He named his long-time companion, Ben, in writing to make health care decisions.

# Poll #3 Defending Clancy

---

Clancy's son has filed to be appointed as his guardian, citing Clancy's dementia and the fact that a "non-family" member is making health care choices. You are asked to defend Clancy. What evidence do you have that a guardian is not needed?

- A. Clancy arranged all income to direct deposited
- B. There is no evidence of unpaid bills
- C. Clancy has named the person of his choice to make health care decisions
- D. Any or All of the above



Thank You!

[David.Godfrey@Americanbar.org](mailto:David.Godfrey@Americanbar.org)