

# Alternatives to Guardianship in Civil Legal Aid Practice

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## ABA Commission on Law and Aging

The ABA Commission on Law and Aging is a collaborative and interdisciplinary leader of the American Bar 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

Civil legal aid attorneys provide free legal assistance in every state to low- and middle-income individuals on a variety of issues and services, including housing, health care, government benefits, employment, and educational services.<sup>1</sup> Attorneys working with older adults encounter urgent cases that, at first, may seem to require guardianship, such as obtaining public benefits or housing for individuals with diminished capacity. As civil legal aid attorneys encounter guardianship cases in their efforts to assist low-income individuals with their civil legal problems, it can be challenging to know what less restrictive alternatives are available to meet their client's specific needs, how to assist their clients in accessing them, and how to ensure effective communication accommodations as required under Title II of the ADA so that clients can engage in meaningful due process in all aspects of the judicial process.

Most states require alternatives to be considered before initiating a guardianship action or may require proof that a guardianship is necessary before continuing an existing guardianship. Less restrictive alternatives to guardianship typically include a power of attorney, health care representative or agent, financial representative or agent, trust, and other decision-making supports.

Almost every state requires that a guardianship should be considered as a last resort and should only be sought when alternatives fail to protect an individual.<sup>2</sup> Most states also require alternatives to be considered first before initiating a guardianship action or require proof that a guardianship is necessary before continuing an existing guardianship. As such, it is important for civil legal aid attorneys to understand the existing alternatives to guardianship to assist clients in defending against improper guardianships, as well as help clients in modifying or terminating unnecessary guardianships.

## Terminology

Under the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act<sup>3</sup>, a “guardian” is defined as someone appointed by a court to make personal decisions on behalf of an individual and a “conservator” is defined as someone appointed by a court to make decisions with respect to the property or

1 Civil Legal Aid 101, White House Legal Aid Interagency Roundtable, [Civil Legal Aid 101 \(justice.gov\)](https://www.justice.gov/civil-legal-aid-101)

2 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](https://americanbar.org/content/dam/aba/administrative/law_aging/06-23-2018-lra-chart-final.pdf)

3 Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act, National Conference of Commissioners on Uniform State Laws, [Uniform Guardianship and Protective Proceedings Act \(1998\)](https://www.nacubl.org/Uniform-Guardianship-and-Protective-Proceedings-Act-1998)

financial affairs of an individual. Many states only use one of these terms, with a guardian responsible for both the person and property or a conservator responsible for both. Civil legal aid attorneys should always check the statutes for the term used in their state. For purposes of this Chapter Summary, the term “guardianship” will be used to identify any court appointed fiduciary.

## Capacity

When seeking to defend against improper guardianship proceedings or looking to modify or terminate an unnecessary guardianship, civil legal aid attorneys should always first consider their client’s mental capacity and their ability to make informed choices. If the client can make informed choices regarding their care and/or finances, a guardianship is not necessary. Make sure you spend an appropriate amount of time listening to the client and using effective communication tools to ensure that language or cultural differences are not being misinterpreted as a lack of ability to make informed choices. For more information on strategies to assess the client’s capacity, see [“Assessing Legal Capacity: Strategies for an Elder Rights-Centered Approach.”](#)

## Power of Attorney

A power of attorney is an alternative to guardianship that could be considered if the client does not need a guardian. This document appoints an agent to make decisions or act on behalf of the person creating the document. During initial client consultations, civil legal aid attorneys should always inquire into the existence of any power of attorney documents. Copies of these documents may be kept by the client’s friends or family members, or by businesses frequented by the client. Banks or financial institutions may also keep copies of power of attorney documents on file and, in some places, these documents are recorded in the public records or filed with a county clerk. If you identify a possible power of attorney and have difficulty getting a copy of the document, 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. Any existing power of attorney could be brought as evidence of the client’s planning and of the lack of a need for a guardian.

If a power of attorney does not exist, civil legal aid attorneys should consider creating one for their client. They will first need to determine if the client is able to: 1) select a person they trust; 2) understand that the person they name could bind them to decisions and choices; and 3) generally understand the basic kinds of authority they are granting to the agent. Civil legal aid attorneys could also present a motion to the court to create a power of attorney as an alternative to an existing guardianship if the person under guardianship is found by an independent evaluator to have decision-making capacity.

## Health Care Representatives or Agents

A health care representative or agent is another alternative to guardianship. 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 most health care providers in states that do not 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.

It is recommended that civil legal aid attorneys understand the applicable state laws and know how a health care surrogate could be appointed in their state. Appointing a health care surrogate in writing is ideal, but some states allow for oral appointments to be recorded in medical records. Civil legal aid attorneys should also become familiar with the default or statutory consent options available in their state.

Civil legal aid attorneys should also inquire with their clients into any existing advance directive documents that name a health care decision-maker. Ask for copies of these documents from the client or their family, friends, or past health care providers. If there is any indication that someone has a copy of an advance directive

document and is hesitant to share it, civil legal aid attorneys could always ask the court to subpoena the document.

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 could provide a limited protective order clarifying who could 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. Civil legal aid attorneys should especially seek a limited protective order, instead of guardianship, if there are no identifiable family members or friends to make health care decisions on behalf of the client.

## Financial Representatives or Agents

There are also a variety of tools for managing money and finances that are effective alternatives to guardianship.

These tools 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 could 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, unless an objection is made by the agreed time for payment, and the account is paid automatically according to the terms set up with the vendor. Automatic payment could be set up for nearly everything that a person needs to pay, including most utility bills, insurance payments, credit card bills, and rent or mortgage payments. Because 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 could 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 could review the invoices and bills and discuss any concerns with the person. Using direct deposit and automatic payment with oversight mutually agreed upon avoids the need for managing income and expenses by a guardian.

Civil legal aid attorneys should inquire into the financial arrangements currently in place for their clients and examine what arrangements could be set up to manage their income and expenses. A determination needs to be made as to whether the client could agree to these arrangements (if the arrangements are not already in place). If these arrangements are not in place, and approval or consent is needed, the attorney could file a motion asking the court for a limited protective arrangement or order, authorizing someone to set up direct deposit and automatic payment. Under this type of arrangement, the client’s needs would be met through a limited protective arrangement or order and a guardianship would not be necessary.

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 all of their income (about 50%) are Social Security benefits, a representative payee is a viable alternative to the need for a court appointed guardian to manage finances. **Note:** Social Security does not recognize the authority of a guardian or conservator and requires the appointment of a representative payee. As such, a court appointed guardian is NOT required to manage a person’s Social Security benefits.

Civil legal aid attorneys should also inquire into whether someone, usually family members or friends, are assisting their client by managing finances through joint accounts. Joint accounts offer the greatest degree of access into bank and financial accounts. If a joint account exists and is working, then a court appointed guardian

to manage the finances will likely be unnecessary. However, if a joint account does not exist, the attorney should urge caution in creating them, as joint accounts could have unintended consequences, such as ownership of assets and inheritance rights, and joint accounts are easy to exploit or abuse.

Direct payment is similar to automatic payment but requires approval each time before a payment is made. While direct payment provides oversight in the approval process, it could result in more late or unpaid bills than automatic payment. If direct payment is set up and working, such an arrangement could be used as a viable alternative to the need for a court appointed guardian to manage the finances.

## Trusts

Trusts might be another effective alternative to guardianship. Trusts are typically established to control and manage assets while the person is alive and provide for distribution after death. In many ways, trusts are the ultimate advance planning tool for assets. An existing trust is clear evidence of the intention of the wishes of the grantor, or the person creating the trust. A trustee is someone appointed by the grantor to assist in managing the trust funds or assets, thereby negating the need for a court appointed guardian. 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. 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 undo the planning that the grantor worked to put in place.

## Supported Decision-Making (or Decision Supports)

All people rely on trusted advisors to help them understand options, risks, benefits, consequences, and for recommendations and support in making and carrying out choices in life. 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. Supported decision-making permits a person to select individuals they trust to advise and support them, and although supporters counsel, ultimately they allow the person to make the decision. Civil legal aid attorneys should inquire whether their client has a support system, either formal or informal. If so, then a supported decision-making agreement could be another viable alternative to guardianship. About one-quarter of states now have some statutory recognition of supported decision-making as an alternative to guardianship. Even if a state does not statutorily recognize supported decision-making, a written agreement between the client and their supporters could provide evidence that the client's needs are being met through decision supports and obviate the need for a court appointed guardian. If the client has regained capacity, supported decision-making agreements could also be used to terminate or modify existing guardianship orders.

## Effective Communication

Effective communication is essential to ensuring that all aspects of judicial proceedings uphold every individual's right to access and engage in meaningful due process. The Americans with Disabilities Act (ADA) prohibits discrimination on the basis of disability. For courts, this means accommodations for litigants, witnesses, jurors, and observers with a broad range of disabilities impacting their ability to communicate, such as developmental disabilities, traumatic brain injury, dementia, Alzheimer's, or other disabilities associated with aging. Accommodations that provide accessible court communication are key not only to procedural fairness, but also the administration of justice.

In May 2021, the U.S. National Guardianship Network brought together 125 advocates, family guardians, judges, lawyers, scholars, and stakeholders for the Fourth National Guardianship Summit. Delegates approved 22 Recommendations to improve and reform the adult guardianship system in the U.S. Among them, Recommendation 1.2: "States and courts must ensure that all judicial proceedings which may impact any of an adult's rights to legal capacity provide meaningful due process." While most courts offer standard auxiliary services, it can be difficult for legal aid attorneys to ascertain what other accommodations may be available and how to access them for their client.

## Conclusion

Civil legal aid attorneys frequently encounter guardianship cases in their routine practice of law. However, most states require alternatives to be considered first before initiating a guardianship action or require proof that a guardianship is necessary before continuing an existing guardianship. Such alternatives to guardianship include a power of attorney, health care representative or agent, financial representative or agent, trust, and/or supported decision-making agreement. It is important to first assess the client's mental capacity and their ability to make informed choices. If the client can make informed choices regarding their care and/or finances, a guardianship is NOT necessary. Guardianships should only be sought when alternatives fail to protect an individual. If the alternatives are working, even a person who is comatose should not need a guardian.

## 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](#)
- [Estate Planning Info and FAQs, ABA Real Property, Trust and Estate Law Section](#)
- [Guardianship, Conservatorship, and Other Protective Arrangements Act, Uniform Law Commission](#)
- [Least Restrictive Alternative References in State Guardianship Statutes, ABA Commission on Law and Aging](#)
- [PRACTICAL Tool for Lawyers: Steps in Supported Decision-Making](#)
- [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](#)

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**Case consultation assistance is available for attorneys and professionals seeking more information to help older adults. Contact NCLER at [ConsultNCLER@acl.hhs.gov](mailto:ConsultNCLER@acl.hhs.gov).**

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