

Guardianship and Power of Attorney

Defining Incapacity (as defined by Missouri state law):

- When a person is determined by a doctor, and sometimes by the court if disputed, as being unable by reason of physical or mental condition to receive and evaluate information or to communicate decisions to such an extent that she/he lacks the capacity to meet the essential requirements for food, clothing, shelter, safety or other care, such that physical injury, illness or disease is likely to occur.

Defining Incompetence (as defined by Nolo's Plain-English Law Dictionary):

1. The inability or lack of qualifications to do something -- for example, perform a job duty or testify at a trial.
2. The inability, as determined by a court, to handle one's own personal or financial affairs

Resources that aid health care (and financial) decision making:

- Advance Directives – Durable Powers of Attorney
- Living Will Declarations
- Do Not Resuscitate Orders
- Guardianship /Conservatorship

Power of Attorney (POA):

A "power of attorney" is a legal instrument which grants another person the authority to act as a person's legal representative, and to make binding legal and financial decisions on the person's behalf.

- The authority must be granted in writing and must be the stated wishes of the individual.
- Family cannot set up a POA without the consent of the individual. The individual has to sign it and designate the person they want to make decisions on their behalf.
- The POA should make decisions in accordance with the previously stated wishes of the individuals or at least in keeping with that individual's values and beliefs.

Types of Power of Attorney:

- A "**general**" power of attorney is unlimited in scope and duration, and permits the named individual to act as legal representative in relation to financial matters until such time as it is revoked. It is effective immediately.
- "**Springing**" becomes effective only when the individual is no longer competent to make their own decisions. Competency is determined by 1-2 doctor's statement depending on what is set forth in the document.

Durable Power of Attorney for Financial Issues:

- Allows an individual to delegate to another person all financial powers the individual could do him/herself (as defined by MO state law).

Durable Power of Attorney for Health Care (Springing POA):

- Individual appoints someone to make medical decisions the individual could make for self (as defined by MO State Law)
- Allows access to Principal's medical information, consent and refusal of treatment, hiring, firing of health care personnel, medical placement decisions (i.e., rehabilitation, skilled nursing care, hospice, etc.), surgery, laboratory and diagnostic testing, etc.

- If specified, can delegate authority to withdraw or terminate artificial nutrition and hydration

Living Will:

A written statement that details health care preferences (what an individual wants or does not want if he/she should become incapacitated). **A Living Will, also known as an "Advance Medical Directive,"** is a document that allows a designated person to make decisions about an individual's medical treatment should the individual become so ill that he/she is only being kept alive by life support systems, including artificially or technologically supplied nutrition and hydration.

A Living Will usually applies when the individual is in a terminal condition or in a permanently unconscious state of mind, or conscious but with irreversible brain damage.

Do Not Resuscitate Order (DNR):

A DNR is another kind of advance directive. A DNR is a request not to have cardiopulmonary resuscitation (CPR) if your heart stops or if you stop breathing. (Unless given other instructions, hospital staff will try to help all patients whose heart has stopped or who have stopped breathing.) An advance directive form can be used to tell the doctor whether the individual wants to be resuscitated or not. A DNR order is put in the individual's medical chart by the doctor. DNR orders are accepted by doctors and hospitals in all states.

When a Living Will Takes Effect:

- When a doctor determines the individual lacks the capacity to make their own health care decisions—
 - Can't understand nature and consequences of the choices available
 - Unable to communicate wishes orally, in writing or through gestures
- The person designated to make decisions on the individual's behalf (the 'agent' or 'proxy') must always act in the best interest of the individual and diligently follow their expressed wishes

When a Health Care Document is no Longer Effective:

- The document is revoked (by the individual—if they are competent to make this decision, or by the person they designated to make decisions for them—if they state they no longer want this authority)
- If the person designated to make decisions dies
- A court invalidates the document
- A court revokes the authority of the individual designated to make decisions
- The individual gets divorced
- After death

Guardianship/Conservatorship (as defined by Missouri state law):

(For more information, reference this 70 page document called "A Basic Guide for Understanding Guardianship and Conservatorship in Missouri", provided by the Missouri Protection and Advocacy Services and available at http://www.moadvocacy.org/Manuals/Guardianship_Conservatorship_2007.pdf)

Guardian:

- A guardian is a person who has been appointed by the court (usually the probate division of the circuit court) to have the care and custody of a minor or of an adult person who has been legally determined to be incapacitated.
- Guardians must not benefit at the expense of those they care for (wards), and in many cases are required to make accountings to the court on a periodic basis. In some courts, a guardian may be reimbursed for attorney fees related to the guardianship. Court rules regarding accountings of expenses and requirements of guardians vary and local court rules should be consulted.
- Guardianship is likely not needed if a Durable Power of Attorney is in place.

- The same individual can serve as both guardian and conservator.
- Fees associated with petitioning for guardianship may include a fee for filing the petition, attorney fees, guardian ad litem fees (a person appointed to represent the incapacitated person), sheriff's fees to serve the individual, and court fees.

Conservator:

- A conservator is a person or a corporation, such as a bank or trust company, appointed by a court, to manage the PROPERTY of a minor or of an adult person who has been legally determined to be disabled. "Disabled"-One who is unable by reason of any physical or mental condition to receive and evaluate information or to communicate decisions to such an extent that the person lacks ability to manage his or her financial resources.

Who may serve as Guardian or Conservator?

The court considers suitability before appointment. The court will consider in order: spouse, parents, adult children, brothers and sisters, and other close adult relatives, any other eligible person, including Public Administrators, and persons living out of state.

How is Guardianship/Conservatorship established?

- The process begins when a "petitioner" files an application. A petitioner is an individual seeking guardianship over another. Cost of the proceedings shall be paid for from the respondent's estate if found incapacitated or disabled. A respondent is the person for whom guardianship is being sought. If estate is insufficient, costs shall be paid by the county. After application is filed, the court will set a date for a hearing.
- The petitioner and the respondent (person who is alleged in a petition to be incapacitated or disabled) must be represented by attorneys. The court will appoint an attorney for the respondent if they cannot afford an attorney.
- At the court hearing, the petitioner must meet a burden of proof to demonstrate the respondent needs a Guardian or Conservator. The judge will make a decision and rule on the degree of supervision necessary for the protection of the respondent. The court's decision will allow for the greatest amount of personal liberty and freedom possible, and depends on whether the respondent is found to have a partial or total incapacity or disability. The court issues letters appointing either full or limited Guardianship and/or Conservatorship.

Emergencies:

Life of a Person is threatened:

If the life of a person who has no guardian is threatened and the person's consent to a necessary medical or surgical procedure cannot be obtained, the court on a petition of guardianship and after a hearing, may authorize consent for the surgery or medical procedure to be performed.

Senior Citizens:

Senior citizens may take advantage of the Protective Services Act. Provisions of the law provide assistance to persons 60 and older who are unable to protect themselves, cannot care for themselves, or who are likely to suffer serious harm. The act requires the Department of Health and Senior Services to investigate all reports of abuse. During the investigation, if it is determine there is likelihood of serious harm, the Dept shall provide protective services.

Appointment of Guardians/Conservators Ad Litem:

If an incapacitated person has no guardian or conservator and an emergency develops which presents a substantial risk that serious harm will occur, the court may appoint a guardian ad litem or conservator ad litem to protect the person. The ad litem is appointed for a specified period of time not to exceed 30 days. After a hearing and a showing that an emergency need still exists, the court may extend the time the ad litem may serve.