



# A Walk-Through Guide to Guardianship & Supported Decision Making

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DAVIS &  
PLEDL,<sub>S.C.</sub>



# Victoria Davis Dávila

## Davis & Pledl, SC

- 10 years experience handling legal issues for people with special needs and their families
  - Guardianship & decision-making
  - Estate planning, including special needs planning
  - Service acquisition for high-needs children
  - Family-side special education law
  - Civil rights
  - Minor guardianships
  - Juvenile & family law
  - Probate
- Started solo practice in 2018; in March 2019 started Davis & Pledl with my mentor Rock Pledl.
- Older sister of a young adult with special needs; mother of two toddlers
- Using my knowledge of the law to help families break down barriers is my passion



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# When to Start Thinking About Decision-Making Options



- When you start to plan for transition through the IEP process
- Start making observations about how your child is transitioning to adulthood
- At age 17, consult with your child's psychologist or doctor
- Powers of Attorney and Supported Decision-Making – at age 18
- Guardianship – at age 17 and 9 months

# What Happens at 18?

- Young adult can make all decisions, including:
  - Deciding whether to continue school
  - Consent to medical treatment
  - Sign contracts
  - Apply for licenses
  - Apply for loans or credit cards

# Informed Decision



Being able to understand information needed to make the decision



Being able to understand the outcomes and the consequences of the decisions made



Having a method of expressing your decision



NOT a “perfect” decision every time or the first time!



# Options for Decision Making

## Supported Decision Making

- Informal - Family and friends, non-legal supports
- Formal – new Chapter 52 agreements

## Powers of Attorney

- Health Care
- Financial

## Guardianship

- Person
- Estate

# Supported Decision Making

*Supported decision making is an alternative to guardianship through which people use friends, family members and professionals to help them understand situations and choices they face, so they may make their own decisions without the “need” for guardianship. It is an emerging approach to providing decision-making assistance without imposing any long-term legal limitations on rights or personal liberties.*

- (Blanck & Martinis, 2015)



- Dual signature checking account
- Joint checking account
- Bring a loved one along to appointments
- Releases of information for health care providers/education/social services

Supported  
Decision  
Making -  
Informal



# Supported Decision Making Agreements

- Wisconsin Statutes Chapter 52
- Law took effect in 2018
- Advocacy groups helped pass law
- Person with a “Functional Impairment,”
  - Basically anything that limits at least one major life activity
- 18 years of age or older

# Supported Decision Making Agreements

- Covers decisions about
  - Where to live
  - Where to work
  - Receiving services
  - Receiving care
  - Managing finances
  - Applying for public benefits
- Creator can specify decisions to be made.
- Supporter has no authority unless expressly given
- Can have multiple agreements naming multiple people

# Supported Decision Making Agreements

- Supporter can be anyone
  - As long as no abuse or neglect charges/investigations against them
- Supporter can not make decisions on behalf of or without the creator
- Any mandatory reporter still has a duty to report suspicious activity
- May NOT sign legal documents
- May NOT legally bind the individual in any way.
- The existence of an SDM agreement does not preclude the individual from making independent decisions or from independently accessing protected information.
- Cannot be used as evidence of incompetency for guardianship

# Role of Supporter



**The Supporter can assist the person with:**



**Gathering information, including records, necessary to make life decisions**



**Understanding the information obtained**



**Helping the person understand the consequences, responsibilities and options related to those life decisions.**



**Communicating the individual's decision to others.**



**May only have access to information relevant to making authorized decisions**

Still need release authorizations to obtain the requested records.

Information obtained for these purposes must be kept confidential.

- Creation must be voluntary & knowing
- Must be signed with 2 witnesses and/or notarized
- Termination:
  - Creator can specify end date
  - Individual can revoke the agreement by destroying it, executing a written, signed, and dated revocation, or verbally revoking the agreement in the presence of two witnesses.
  - Unless otherwise provided by the agreement, the Supporter may resign by giving notice to the individual.
  - Automatic termination:
    - the county health and human services department substantiating a claim of abuse or neglect by the Supporter;
    - a criminal conviction of the Supporter for abuse or neglect; or
    - an individual-at-risk injunction against the Supporter.

# Supported Decision Making Agreements

# Powers of Attorney



- Does the person understand that he/she needs help with important decisions?
- Is the person willing to accept help?
- Is the person willing to share some decision making power?
- Does the person understand the concept of a power of attorney?

Is a Power of  
Attorney  
Appropriate?



- Effective immediately
  - Unless the principal says otherwise
  - Can become effective based on a contingency like finding of incapacity
- Power of Attorney lasts until:
  - Death
  - Revoked
  - Principal provided for it to terminate
- Unless otherwise specified, is “durable” meaning still valid if the person becomes incapacitated.

# Financial Power of Attorney

# Financial Power of Attorney

- Created to allow another person to manage finances and property
- Voluntary and can be rescinded
- Creator is called the “Principal”
- Power is transferred to person called “Agent”
- Person must be able to:
  - Select an agent
  - Understand their income and assets
  - Understand the powers they are transferring

# Financial Power of Attorney – Disadvantages



Revocable at any time



No court oversight



Not always accepted by banks, etc.



Validity can be challenged

# Other Financial Management Options



## Conservatorship

Same powers and duties as a guardian of the estate

Voluntary

No finding of incompetence

Potential for court oversight



## Trusts

Money is transferred by grantor to another person, “trustee”

Trustee manages the funds and must act loyally

Special needs trusts – allow person to remain eligible for Medicaid and Social Security



## ABLE Account

- Person who manages (SSI) Supplemental Security Income in a separate account
- Use funds for the support and maintenance of the person
- Comply with Social Security reporting requirements

Representative  
Payee

# Health Care Power of Attorney

- Created to allow another person to make decisions related to health care
- Creator is principal; person to whom power is delegated is agent.
- Principal must be:
  - At least 18 years old
  - Of sound mind
    - Statute says that means, no finding of incompetence

# Health Care Power of Attorney

- Takes effect upon finding of *incapacity* by
  - Two physicians OR
  - One physician and one psychologist
  - Who personally examine the principal
  - And sign a statement saying the person has incapacity
- Old age, eccentricity or physical disability, singly or together, do not equal incapacity.



# Powers of Health Care Agent

- Act in good faith consistently with the desires of the principal
- Act in good faith consistently with any valid Living Will (Declaration to Physicians)
  - HCPOA supersedes any directly conflicting provisions of a valid Living Will.
  - In the absence of a specific directive by the principal or if the principal's desires are unknown, the health care agent shall, in good faith, act in the best interests of the principal
- Make authorized health care decisions for pregnant principal
- If necessary to carry out wishes, sign any documents, waivers or releases related to the principal's care or treatment
- Agent may make an anatomical gift with permission from principal

# Health Care Power of Attorney

- Can be revoked by principal by:
  - Destroying the document or directing someone else to do so
  - Writing, signing and dating a revocation
  - Verbally revoking in presence of 2 witnesses
  - Executing a new HCPOA

# Things POAs do not do:

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## **Educational decision making**

POA for Educational Decisions does exist in WI

[http://www.waisman.wisc.edu/cedd/connections/pdfs/Description\\_EPOA\\_and\\_sample.pdf](http://www.waisman.wisc.edu/cedd/connections/pdfs/Description_EPOA_and_sample.pdf)



## **Social Security – you still need to be a rep payee**

# Guardianship



# For ALL Guardianships:

- Person must be at least 17 years, 9 months when the guardianship is entered
- The individual's need for assistance in decision making or communication is
  - unable to be met effectively and less restrictively
  - through appropriate and reasonably available
  - training, education, support services, health care, assistive devices, or other means
  - that the individual will accept.

# Guardianship of the Person



**Court Ordered**



**Guardian of Person DOES**

Exercise some Rights  
Make Important Decisions



**Does NOT**

Make financial decisions

# Key Terms

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## Petitioner

- The person who is asking for guardianship

## (Proposed) Guardian

- The person who will be the decision maker if the court approves

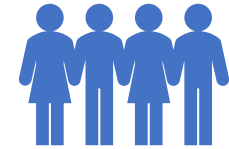
## (Proposed) Ward

- The person who is under guardianship



# Guardianships - Evidence

- Examining Physician's Report
  - A physician, psychologist, or both shall examine the ward
  - Statement of rights to be read to ward prior to examination
  - Answers questions about:
    - Individual's disability and needs
    - Meeting standards for guardianship
    - Gives medical opinion about individual's ability to exercise rights
    - Addresses need for protective placement



## Guardianship of the Person - Standard

Because of an impairment, the individual is unable to:

- Receive or evaluate information
- Make or communicate decisions

To such extent that the individual cannot meet essential requirements for his or her health and safety

# Categories of Disability

Law only names a few:

Developmental Disability

- i.e. Autism

Serious and Persistent Mental Illness

Degenerative Brain Disorder

- Alzheimer's/Dementia

“Other Like Incapacities”

- Traumatic Brain Injury

# 3 kinds of rights under guardianship

Rights removed in full – ward can't do this and no one can do it for them



Rights that may be exercised with consent – ward can do this if guardian says it's OK



Rights that may be transferred to the guardian

Fully

Partially

# Rights That May Be Removed



SERVE ON A JURY



EXECUTE A WILL



VOTE IN AN ELECTION

# Rights that can be exercised with consent

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Consent	Consent	Consent	Apply
Consent to sterilization	Consent to marriage	Consent to bone marrow, organ or tissue donation	Apply for licenses <ul style="list-style-type: none"><li>• Driving</li><li>• Hunting</li><li>• Fishing</li><li>• Other licenses</li><li>• Professional licenses/credentials</li></ul>

- Health Care Decisions
  - Treatment providers
  - Treatment
  - Participation in experimental treatment or research
  - Release of health care records

Rights that  
can be  
Transferred to  
Guardian

# Rights that can be Transferred to Guardian



## **Social Services**

Providers

Enrolling in programs

- Family Care or IRIS
- Social Security



## **Educational Decisions**

IEP

Post-Secondary



## **Vocational Decisions**

DVR



## **Protective Placement**



Rights that  
can be  
Transferred to  
Guardian

## Advocacy for the person

- Includes court proceedings
- Does not include contracts or money

## Receiving notices

## Divorce

## Mobility and Travel Decisions

# Full vs. Limited Guardianship

- Full
  - All rights that can be removed are removed
  - All rights that can be transferred are transferred
- Limited
  - Person may retain some rights
  - Person may be given input into decision making
  - Guardian's authority may be limited

# Guardianship of the Estate - Standard

Person's impairment makes them  
unable to

- Receive and evaluate information
- Make or communicate decisions

Related to property management or  
financial affairs to such an extent that

- Property will be dissipated in whole or in part
- Individual cannot support him or herself
- Individual is unable to prevent financial exploitation

# Guardianship of the Estate - Duties



Provide financial support for the ward



Enter into some contracts



Settle claims



Provide annual accounting to the court

# Guardian of the Estate Continued



**Probably not necessary for most 18 year olds**



**Usually requires a large estate or large income**



**Could be necessary to retain eligibility for Medicaid or SSI in some situations:**

Inheritance  
Legal Settlement  
Other unexpected money

# Others involved in Guardianship

- Guardian ad Litem
  - Independent Attorney
  - Represents individual's best interest
  - Meets with proposed ward and proposed guardian(s), advises of rights, may collect collateral information
- Advocate or Adversary Counsel
  - Appointed if individual objects to guardianship
  - Represents proposed ward in court proceedings and has attorney-client relationship; follows individual's directives
- Required county notice
  - County corporation counsel
  - County DHHS if individual is receiving benefits



# Resources

- Marquette Volunteer Legal Clinic
- Free assistance filling out forms
- Does not provide ongoing legal assistance
- Need to come with doctor's report already completed
- <http://law.marquette.edu/mvlc/>

# Resources

- Guardianship Support Center
  - <https://gwaar.org/guardianship-resources>
- National Center for Supported Decision Making
  - <http://supporteddecisionmaking.org/>
- The Arc of Wisconsin – GREAT RESOURCE
  - <https://arcwi.org/2018/04/13/supported-decision-making/>
- State of Wisconsin Advance Directives
  - <https://www.dhs.wisconsin.gov/forms/advdirectives/index.htm>



# Vicki's contact information



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Questions?

