



Legal options for decision making at age 18

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DAVIS &
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Victoria Davis Dávila

- 8 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
- Formed Davis & Pledl, SC in March of 2019 with my mentor, Rock Pledl
- Older sister of a young adult with special needs; mom of one with another on the way
- Using my knowledge of the law to help families break down barriers is my passion

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

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 is an 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

Informal Options

- Entity specific
- Potential for time & material limitations
- Examples:
 - Release authorizations
 - Dual signature account
 - Joint account
 - No court oversight

Supported Decision Making Agreements

- Legal agreement
- Supporter can help gather & evaluate information
- Can be changed or revoked at any time
- No court oversight

Powers of Attorney

- Health Care
- Financial
- Agent acts on principal's behalf
- Can be changed or revoked at any time
- No court oversight (generally)

Limited/ Full Guardianship

- Person
- Estate
- Guardian acts on behalf of ward
- Permanent unless a petition filed with court
- Ongoing court oversight

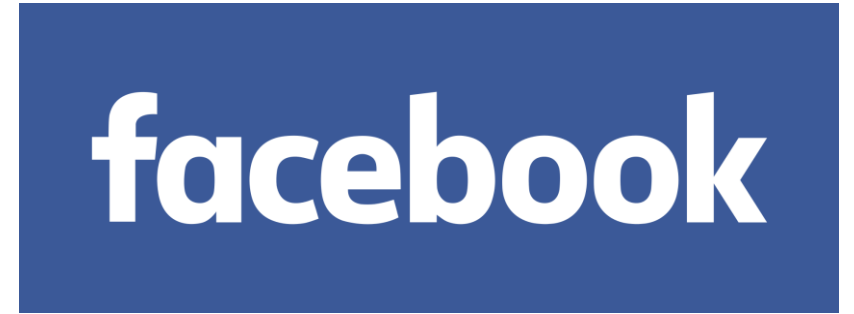


Supported Decision Making

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)

Are You Already Using Supported Decision-Making?



- 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

History of Supported Decision- Making in Wisconsin

- Wisconsin Statutes Chapter 52
- Law took effect in April 2018
- Advocacy groups helped pass law

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

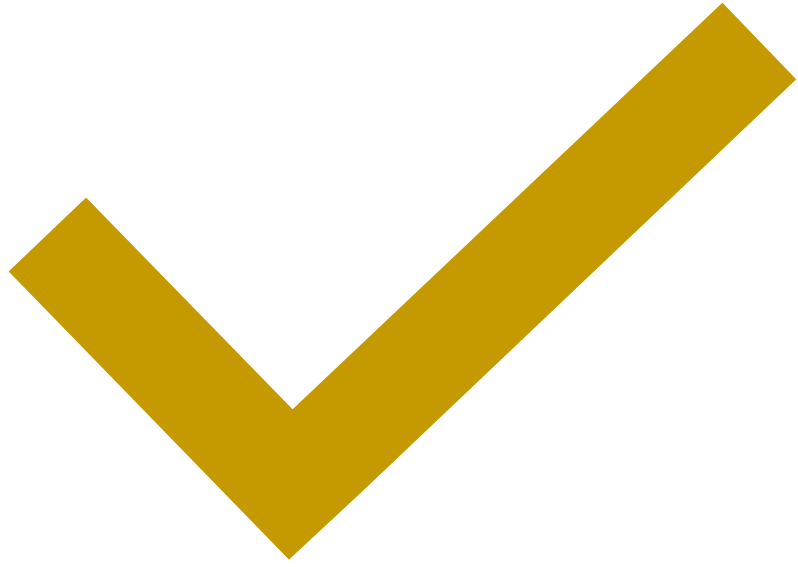
Still need release authorizations to obtain the requested records. Information obtained for these purposes must be kept confidential.

- 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





Is a Power of Attorney Appropriate?

- 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?

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

- Effective immediately
 - Unless the principal says otherwise
 - Can become effective based on a contingency
 - Can become effective based on a 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

- Agent's authority lasts until:
 - Agent is removed by principal
 - Agent resigns
 - Agent becomes incapacitated or dies
 - Agent and principal get divorced
 - Power of attorney terminates

Agent's Responsibilities



ACT IN THE BEST
INTEREST OF THE
PRINCIPAL



KEEP AN ACCOUNT
OF FINANCIAL
ACTIVITY



USE ONLY THE
POWERS GRANTED
BY THE PRINCIPAL



CARE,
COMPETENCE AND
DILIGENCE



ACT FAITHFULLY
AND LOYALLY TO
THE PRINCIPAL



DO NOT CREATE
CONFLICTS OF
INTEREST



Agent's Powers

- An agent can only do the following if the principal EXPRESSLY says so:
- Create living trusts
- Make gifts
- Create/change rights of survivorship
- Create/change beneficiary designations
- Delegate authorities granted
- Waive the principal's rights to be a benefit of a joint and survivor annuity i.e. retirement plan
- Exercises powers the principal has authority to delegate
- Disclaim property
- Access content of an electronic communication sent or received by principal

General authority

- Get money, make contracts, execute instruments, settle claims, hire accountants and other experts, promote the principal's interests legally, communicate on behalf of the individual with government entities, Access communications and communicate on behalf of principal, do any lawful act with respect to the following:
- Real property
- Personal property
- Digital property
- Stocks/bonds
- Commodities and options
- Banks and other financial institutes
- Operating entity or business
- Estates, trusts and other beneficial interests
- Claims and litigation
- Personal and family maintenance
- Government/military benefits
- Retirement plans
- Taxes

Agent May Not

Give him or herself an interest in the principal's property

Give anyone to whom the agent owes a legal obligation to support an interest in the principals' property

This is for an agent who is NOT a spouse or domestic partner and when the principal has not said otherwise.

- Nominate a guardian of the person or estate

Other
Functions



Revocable at any time



No court oversight



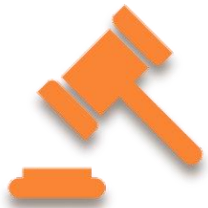
Not always accepted by banks, etc.



Validity can be challenged

Financial Power of Attorney – Disadvantages

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

Representative Payee

- 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

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

- To be valid, document must be:
 - In writing.
 - Dated and signed by the principal or by an individual who has attained age 18, at the express direction and in the presence of the principal.
 - Signed in the presence of 2 witnesses
 - Voluntarily executed.

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.

Health Care Power of Attorney

Person who has claim to principal's estate can't make incapacity finding

Person working in a health care facility taking care of principal, or their spouse cannot be the agent unless they are related to the principal

Powers of Health Care Agent

- Admit principal to a nursing home for 3 months or less for recuperative care directly from a hospital
- If principal lives with agent, admit principal to nursing home or community based residential facility for 30 days for respite
- With principal's authorization:
 - Admit to NH or CBRF with permission from principal
 - Consent to the withholding or withdrawal of a feeding tube, unless physician advises it will cause pain or reduce comfort. Agent may not consent to the withholding or withdrawal of orally ingested nutrition or hydration unless medically contraindicated.

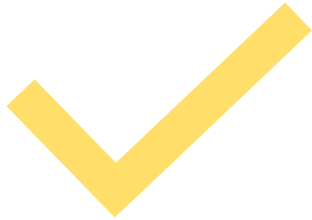
Powers of Health Care Agent

- Act in good faith consistently with the desires of the principal in the HCPOA or as otherwise specifically directed by the principal at any time.
- 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 in exercising his or her authority.
- If the principal is known to be pregnant - make authorized health care decisions
- 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

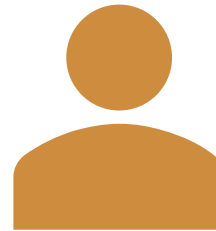
Things POAs do not do:



Educational decision making

POA for Educational Decisions does exist in WI

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.

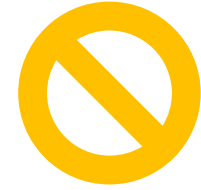


Court Ordered



Guardian of Person DOES

Exercise some Rights
Make Important Decisions



Does NOT

Make financial decisions

Guardianship of the Person

Key Terms

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



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

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">• Driving• Hunting• Fishing• Other licenses• Professional licenses/credentials

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Rights that can be transferred to guardian

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

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

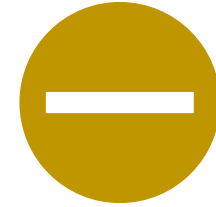
Related to property management or financial affairs to such an extent that

- 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

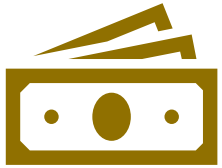


Settle claims



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/adformspoa.htm>



Questions?



My contact information



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