Legal options for decision making at age 18

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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?

- Pinterest
- HomeAdvisor
- Facebook
- WebMD
- Yelp
- TripAdvisor
• Dual signature checking account
• Joint checking account
• Bring a loved one along to appointments
• Releases of information for health care providers/education/social services
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.
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
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**
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.
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.
Guardianship of the Person

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

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

**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

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<th>Consent</th>
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| Consent to sterilization | Consent to marriage | Consent to bone marrow, organ or tissue donation | Apply for licenses  
• Driving  
• Hunting  
• Fishing  
• Other licenses  
• Professional licenses/credentials |
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/
• 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?