

Alternatives to Guardianship and Conservatorship for Adults in Iowa



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for the Iowa Department of Elder Affairs**

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TABLE OF CONTENTS

This booklet discusses arrangements available to protect the welfare of individuals in addition to full guardianship and conservatorship.

1. Introduction	4
A. What Alternatives are Available?	4
B. What is Guardianship?	4
C. What is Conservatorship?	5
2. Alternatives for Financial Management	6
A. Daily Money Management	6
i. Bill Payer Programs	6
ii. Representative Payee/Federal Fiduciary	6
B. Banking Arrangements/Dual Signature Accounts	6
C. Joint Property Arrangements	7
D. Power of Attorney-Financial Matters	7
E. Trusts	8
F. Limited Conservatorship	8
G. Standby Conservatorship	9
3. Alternatives for Personal Care	9
A. Community Based Services	9
i. Case Management for the Frail Elderly	9
ii. Targeted Case Management Services	9

Alternatives for Personal Care (continued)

iii.	Adult Day Services	10
iv.	Respite	10
v.	Other Supportive Services	11
	a. Area Agencies on Aging	
	b. Iowa Governor’s Developmental Disabilities Council	
	c. Iowa Protection & Advocacy Services, Inc.	
	d. Community Mental Health Centers	
B.	Advance Directives	12
	i. Durable Power of Attorney for Health Care	
	ii. Living Will	
C.	Limited Guardianship	13
D.	Standby Guardianship	13
4.	Other Issues to Consider	13
A.	Mental Health Commitment	13
B.	Substitute Medical Decision Making Board	14
5.	Resources	15

1. Introduction

Independence, respect, and equality are values important to all people. These values help define the concepts of autonomy (independence and freedom) and self-determination (the right to make decisions for one's self). Because these rights are so valued in our society and are something that most of us would value for ourselves, the "least restrictive alternative" should always be considered before taking away a person's civil and legal rights to make decisions for him or herself.

The least restrictive alternative is an option, which allows a person to keep as much autonomy, and self-determination as possible while providing only the level of protection and supervision that is necessary. Some examples may include: representative payee for certain government benefit checks, joint bank accounts or advance directives for health care.

A. What Alternatives are Available?

The planning tools discussed on the following pages are generally considered to be less restrictive alternatives to a full guardianship and full conservatorship. Once they are in place, a guardianship or conservatorship may not be needed at all. The best choice of alternatives depends on individual needs and preferences.

B. What is Guardianship?

A guardian is court appointed to make decisions about the ward's needs or affairs other than financial matters. These may include decisions about things like medical treatment, where the ward lives, and arrangements for services such as meals, personal care, training and education.

A guardian's duties and powers are divided into two distinct categories: those powers and duties that can be exercised without prior court approval, and those powers and duties that can be exercised only with the court's prior approval.

Powers that a guardian can exercise without prior court approval include: providing for the care, comfort and maintenance of the ward, including appropriate training and education intended to maximize the ward's potential; taking reasonable care of the ward's clothing, furniture, vehicle and other

personal effects; assisting the ward in developing maximum self-reliance and independence; ensuring that the ward receives necessary emergency medical services and routine medical care; ensuring that the ward receives professional care, counseling, treatment and services as needed; plus any other powers and duties that the court may specify.

Even though the guardian has been appointed to make decisions, there may be times that the guardian will need to ask the court's permission before acting. The powers the guardian can exercise only with the court's prior approval include: changing the ward's permanent residence if the proposed residence is more restrictive than the current residence; arranging the provision of major elective surgery or any non-emergency major medical procedure; and consenting to the withholding or withdrawal of life-sustaining procedures.

C. What is Conservatorship?

A conservator is responsible for making decisions about the financial affairs of the ward. The court appoints the conservator. The ward's financial affairs include assets—such as stocks, bonds, bank accounts, cash and real estate—for which the conservator has assumed responsibility. Generally, the conservator controls all of the ward's income and property, takes care of paying bills, and handles other financial matters.

The conservator's duties are to first, take possession of all the real and personal property of the ward. The conservator should immediately establish a bank account on which the conservator has signature authority. All of the ward's income, including Social Security, investment income and other sources should go into this account so the conservator can control it and render appropriate accounting when it is required.

It is also the conservator's duty to preserve and protect the ward's property. At all times the conservator should exercise the same diligence that he/she would practice handling his/her own financial affairs. The conservator should invest prudently, keep records, and return the assets at the termination of the conservatorship. The conservator must be careful not to mix his/her property with the ward's property.

A conservator's powers are divided into two distinct categories: those powers that can be exercised without prior court approval, and those powers that can be

exercised only with the court's prior approval. Powers that the conservator can exercise without prior court approval include: collecting principal and income from any source; suing or defending claims in favor of, or against, the ward; selling or transferring perishable personal property; voting for the ward at corporate meetings; and receiving additional property from any source.

The powers that the conservator can exercise only with the court's prior approval include: making payments to or for the benefit of the ward, including payments for nursing homes, medical expenses; investing the ward's funds; executing leases on behalf of the ward; applying any part of the ward's income or property for the support of anyone else; settling a legal claim; selling any property of the ward's; canceling contracts entered into by the ward that are no longer beneficial to the ward; and making gifts.

2. Alternatives for Financial Management

A. Daily Money Management

i. Bill Payer Programs

Serve clients with limited income who are still in charge of their own financial affairs but need some help organizing their bills and checkbook. A bill payer assists the client in organizing monthly income and expenditures, writes checks for the client's signature, and assists the client with paperwork related to bill paying.

ii. Representative Payee

Serves clients who have been determined to be incapable of handling their federal benefit checks, such as Social Security benefits. A representative payee maintains control over the benefits, signs all checks, and spends the money to meet the basic needs of the client.

B. Banking Arrangements/Dual Signature Accounts

There are some simple banking options, which in some cases could be used as alternatives to conservatorships. A person can often retain control of his or her own affairs with the help of automatic deposits and withdrawals for bills or banking by mail or phone. Another method often used is establishing joint bank accounts where a trusted friend or family member's name

is added to the account. Both persons on the account have ownership of the account, so great caution should be taken.

C. Joint Property Arrangements

Joint property arrangements where two or more people share ownership of real estate or bank accounts are a common form of property management. Advantages of joint property arrangements: 1. Joint property arrangements, particularly joint bank accounts, generally are easy and inexpensive to establish and 2. No court supervision is necessary. The disadvantages of joint property arrangements are: 1. Joint property arrangements are inherently risky because of the control they allow the co-owner over money or property; and 2. These arrangements may be less flexible once control over the property is given to the co-owner.

D. Power of Attorney-Financial Matters

A power of attorney is a written document by which one person (the principal) gives to another person (attorney-in-fact) the authority to act on the first person's behalf in one or more matters. The person giving legal authority must be competent to grant a power of attorney and only a trusted individual should be chosen to act as the attorney-in-fact. A power of attorney for financial matters grants authority to the attorney-in-fact to transact business on the person's behalf. The power of attorney can grant the attorney-in-fact one or all of the following:

- Open, maintain or close bank accounts or brokerage accounts;
- Sell, convey, lease or maintain real estate;
- Access to safe deposit boxes and their contents;
- Make financial investments;
- Borrow money, mortgage property, or renew or extend debts;
- Prepare and file federal and state income tax returns;
- Vote at corporate meetings;
- Purchase insurance for the principal's benefit;
- Initiate, defend, prosecute, or settle any lawsuit;
- Start or carry on business;
- Employ professional and business assistances of all kinds, including lawyers, accountants, real estate agents, etc;
- Apply for benefits and participate in governmental programs;
- Transfer to a trustee any and all property; and
- Disclaim part or all of an inheritance

There are several types of power of attorney, including the following:

- a. **General Power of Attorney:** authorizes the attorney-in-fact to act on the person's behalf in all personal affairs and financial transactions. The authorization ceases upon death. Unless the document is a durable power of attorney, it also terminates upon disability or incapacity.
- b. **Limited Power of Attorney:** authorizes the attorney-in-fact to act on the person's behalf only in matters specifically designated in the written document. The authorization ceases upon death. Unless the document is a durable power of attorney, it also terminates upon disability or incapacity.
- c. **Durable and Standby Powers of Attorney:** continues to be effective even in the event of disability or incapacity. Furthermore, a durable power of attorney can be made effective upon occurrence of a certain date or event such as a diagnosis by a physician of disability or incapacity. Because the effective date is delayed, this type of durable power of attorney is referred to as a standby power of attorney.

E. Trusts

A trust is a legal relationship in which one person (a “trustee”) holds property for the benefit of another (the “beneficiary”). The property can be any kind of real or personal property—money, real estate, stocks, bonds, collections, business interests, personal possessions, and other tangible assets. Trusts can be useful planning tools for incapacity because they can be established and controlled by a competent person and later continue in operation under a successor trustee if the person establishing the trust becomes unable to manage his/her affairs. One person often establishes a trust for the benefit of another. This type of trust involves at least three people: the grantor (the person who creates the trust; may also be known as the trustor); the trustee (the person or financial institution who holds and manages the property for the benefit of the grantor and others); and the beneficiary or beneficiaries (the person(s) who receives the benefits from the trust). Trusts that can be changed or terminated at any time by the grantor are called revocable. Trusts that cannot be changed or terminated before the time specified in the trust itself are called irrevocable. The trustee holds legal title to the property transferred to the trust and the trustee has the legal duty to use the property as provided in the trust agreement as permitted by law. The beneficiaries retain equitable title, which is the right to benefit from the property as specified in the trust.

F. Limited Conservatorship

A limited conservatorship is an arrangement like what is described earlier in this document but gives only those specific powers that are set out in the court order. By doing this, the court says that in all other matters, the ward can still make his or her own decisions. By law,

the court must attempt to give the conservator the fewest powers necessary to meet the needs of the ward. By contrast, a general or full conservatorship gives the conservator the authority to make all but a few decisions on behalf of the ward.

G. Standby Conservatorship

A person may currently be able to handle his/her affairs but anticipate a time when he/she may not be able. To plan for any infirmities without giving up present control over the property, a person of sound mind can establish a standby conservatorship. To establish a standby conservatorship, a verified petition must be executed for the voluntary appointment of a conservator. The petition shall contain the express condition that the petition be acted upon by the court only upon the occurrence of an event specified or the existence of a described condition of mental or physical health of the petitioner. The occurrence of the event, or the existence of such condition, shall be established in the manner directed by the petition. The petitioner, before the appointment, may revoke the petition provided the petitioner is of sound mind.

3. Alternatives to Personal Care

A. Community Based Services

A person may be eligible for a wide variety of community-based services that would permit the person to continue meeting personal needs. The services could include home nursing, home health aides, homemakers, home delivered meals, mental health services, transportation and many others.

i. Case Management for the Frail Elderly

The case management for the frail elderly program is a multi-disciplinary approach to coordinating community based services to frail and vulnerable elderly persons which helps the elderly person and their family to make long term care choices and avoid inappropriate or premature institutionalization. For program information, contact the Iowa Department of Elder Affairs at 1-800-532-3213 or www.state.ia.us/elderaffairs.

ii. Targeted Case Management Services

Targeted case management in the State of Iowa is a Medicaid (Title XIX) funded service designed to help consumers meet their needs in the service system in a way that allows

optimal opportunity for independence, for self determination, and for becoming a positive part of society. Each consumer has one case manager. The case manager, through an interdisciplinary team process, plans, coordinates, and monitors goal completion and service delivery.

The goal of case management is to enhance the ability of the consumer to exercise choice, make decisions, take risks, which are a typical part of life, and fully participate as members of the community. Case management services consist of the following processes: assessment, development of an individual comprehensive plan, coordination and facilitation of services, monitoring of services, and crisis assistance.

Eligibility criteria include:

- Need for targeted case management services i.e. need assistance moving through the service system, need a placement, have frequent psychiatric hospitalizations, etc.; and
- A diagnosis of mental retardation, developmental disability, or chronic mental illness. Persons with a brain injury who receive HCBS/BI waiver services also meet criteria; and
- Be 18 years of age or older. Persons under 18 meet criteria if receiving HCBS/MR services; and
- Be Title XIX eligible or have another funding source available to pay for the case management service.

In some counties, persons with brain injury may qualify if the criteria above are met.

Targeted case management is available in all counties in Iowa. It is provided either by the Department of Human Services, the county itself, or by a subcontractor selected by the county. The Central Point of Coordination (CPC) Administrator may be contacted to locate the targeted case management program coordinator for an individual county. To locate county specific information, visit www.iowacounties.org or call 515-244-7181.

iii. Adult Day Services

Adult day care service is a program that provides an organized program of supportive care during the day in a group environment to persons who need a degree of supervision and assistance, or both. Services may include, but are not limited to rehabilitation, personal care, transportation, social/recreational activities and preventive or restorative services. Contact your local Area Agency on Aging for more information.

iv. Respite

Respite care provides temporary relief to the caregiver of a dependent individual, one or both of whom are aged 60 or older. The respite may be brief, 2-3 hours in duration, or longer than 24 hours, and the care may take place at the individual's residence or elsewhere. Contact your local Area Agency on Aging for more information.

v. Other Supportive Services

a. Area Agencies on Aging (AAA)

The Iowa Department of Elder Affairs has designated 13 Area Agencies on Aging (AAAs) to administer programs for older persons at the local level throughout the state. Each AAA is responsible for developing, coordinating, and delivering aging services within its designated geographical area. The AAAs strive to meet the needs of Iowa's older population and provide many types of services to Iowans aged 60 and over including: 1. Access services—transportation, outreach, and information and referral; 2. Community service—congregate meals, legal services, case management, and continuing education; 3. In-home services—home health, homemaker, home-delivered meals and chore maintenance; and 4. Services to residents of care-providing facilities. To locate the AAA closest to you, contact the Iowa Department of Elder Affairs at 1-800-532-3213 or through www.state.ia.us/elderaffairs

b. Iowa Governor's Developmental Disabilities Council

The Iowa Governor's Developmental Disabilities (DD) Council advocates for improving the system of support and services so that all Iowans with disabilities have the freedom to make their own choices, exercise their rights as citizens, and participate fully in society. For more information contact 515-281-9082 or visit www.state.ia.us/ddcouncil/.

c. Iowa Protection & Advocacy Services, Inc.

The Iowa Protection and Advocacy Services, Inc. (P&A) pursues various administrative and legal remedies within four advocacy programs. The first program provides advocacy to remedy abuse or neglect of individuals with developmental disabilities, and assists with accessing entitlements and services such as special education and residential services. The second provides advocacy and legal assistance to remedy abuse or neglect of individuals with mental illness who are residents of certain care and treatment facilities, or who have recently been discharged from such facilities. The third program serves individuals with disabilities who require advocacy assistance to overcome discrimination or barriers to living independently. The fourth program provides advocacy to individuals with disabilities who seek access to assistive technology devices and services. There are no income guidelines or costs to clients for Iowa P&A services, but the issues must relate to the disability and Iowa P&A will generally pursue resolution at the lowest level of conflict possible. For more information, contact 515-278-2502 or 1-800-779-2502.

d. Community Mental Health Centers

Community mental health centers provide mental health services to help people who are not coping well with everyday problems as well as to relieve more serious problems. Services include medication management, counseling and other support. Contact the Iowa Compass program at 1-800-779-2001 or visit www.medicine.uiowa.edu/iowacompass to locate a center in your area.

B. Advance Directives

Advance directives are oral or written instructions an adult gives to health care providers, family and loved ones while able to communicate. The reason for giving advance directives is to make sure your wishes regarding your own health care are followed in case you are no longer able to communicate with providers. Advance directives should be executed while the principal is competent. The principal (person entering into an advance directive) must be able to understand whom he or she is appointing to make health care decisions and should choose an agent who is trusted. Iowa recognizes two types of advance directives. One is the durable power of attorney for health care and the second is the living will.

i. Durable Power of Attorney for Health Care

The durable power of attorney for health care is a legal document that allows you to choose someone as your agent (someone who acts for you) to make health care decisions whenever you cannot, due to unconsciousness or loss of ability to think and reason. This agent is required to make health care decisions according to directions provided by the principal. If the principal's wishes are not clearly understood and defined, then the agent must make decisions based on what he or she believes to be in the principal's best interests. The durable power of attorney for health care only comes into play when the principal's doctor has determined that the principal is unable to make health care decisions for him or herself, even when the situation is temporary.

ii. Living Will

A living will is a document directing the principal's doctor to withhold or withdraw certain treatments (life-sustaining procedures) that could prolong the dying process. This advance directive becomes effective only at the point when, in the written opinion of the doctor (confirmed by one other doctor), the principal is expected to die soon and is unable to make health decisions for him or herself (because he/she is unconscious or unable to think and reason) or because of permanent unconsciousness (irreversible coma or persistent vegetative state).

C. Limited Guardianship

A limited guardianship gives the guardian only those specific powers that are set out in the court order. By this, the court is saying that in all other matters the ward can still make decisions for him or herself. The court must, by law, only give the guardian the powers necessary for the guardian to meet the needs of the ward. By contrast, a general or full guardianship gives the guardian the authority to make all decisions on behalf of the ward, except those that require prior court approval.

D. Standby Guardianship

A person may currently be able to handle their affairs but anticipates a time when he/she may not be able to do so. To pre-determine who will serve as guardian, if in the future a guardianship becomes necessary, a person of sound mind can establish a standby guardianship. The standby guardianship takes effect only upon the occurrence of an event specified in the document (petition). With a standby petition, a person can retain control over his/her personal affairs until the event specified occurs.

To establish a standby guardianship, a verified petition must be executed for the voluntary appointment of a guardian. The petition shall contain the express condition that the petition be acted upon by the court only upon the occurrence of an event specified or the existence of a described condition of mental or physical health of the petitioner. The occurrence of the event, or the existence of such conditions shall be established in the manner directed by the petition. The petitioner, before the need for appointment, may revoke the petition, provided the petitioner is of sound mind.

4. Other Issues to Consider

A. Mental Health Commitment

If a person is determined by a judge to be seriously mentally impaired, the person can be committed for care and treatment. In order to find serious mental impairment, the court, at a hearing, must determine that the person:

- Is mentally ill;
- Because of the mental illness lacks sufficient judgment to make responsible decisions about treatment or hospitalization; and
- Because of the illness, is likely to:
 - a. Physically injure him/herself or others if allowed to remain at liberty without treatment; or

- b. Is likely to inflict serious emotional injury on members of the person's family or others who lack reasonable opportunity to avoid contact with the person if allowed to remain at liberty without treatment; or
- c. Is unable to satisfy the person's needs for nourishment, clothing, essential medical care, or shelter so that the person will suffer physical injury, physical debilitation, or death.

To have a person committed, someone must file an application with the county clerk of court and another person must fill out a supporting affidavit. These documents are presented to a judge, and, if sufficient, the judge will order a hearing. If the person is committed at the hearing, the judge enters an order identifying where the person will receive treatment and whether the treatment will be done on an inpatient or outpatient basis. A person remains under commitment until the court orders it terminated.

B. State Substitute Medical Decision Making Boards

Code of Iowa §135.28-29 establishes a State Substitute Medical Decision-Making Board and allows counties to establish Local Substitute Medical Decision-Making Boards. Only eight counties currently have local boards (Dallas, Dickinson, Emmet, Fayette, Jackson, Jasper, Linn and Washington counties). The state board can act for any county that does not have a local board.

These boards can give or refuse to give informed consent on behalf of a patient for specific proposed medical care. When an application is received, a panel is convened to hold a hearing. If possible the hearing is held in the patient's presence in-person or via videoconference. The panel reviews the information submitted, interacts with the patient, physicians, nurses, social workers, etc. and determines 1) whether the patient is capable of making his/her own medical care decision, 2) whether there are any other substitute decision makers available, and 3) if the patient is not capable and has no other decision maker, the panel either agrees to give consent or refuses to give consent. There are time frames built into the hearing process, so it takes a minimum of 5-7 days from the time an application is submitted until a decision is made and is effective. The boards do not have the authority to make decisions to withdraw life-sustaining treatment or to give do-not-resuscitate orders.

For further information contact: The Iowa Department of Public Health, Diana Nicholls Blomme at 515-242-6333 or dnicholl@idph.state.ia.us.

5. Resources

1. Case Management for the Frail Elderly
1-800-532-3213 or www.state.ia.us/elderaffairs
2. Targeted Case Management
515-244-7181 or www.iowacounties.org
3. Area Agencies on Aging (AAA)
To locate the AAA closest to you contact 1-800-532-3213 or www.state.ia.us/elderaffairs
4. Iowa Governor's Developmental Disabilities Council
515-281-9082 or www.state.ia.us/ddcouncil
5. Iowa Protection and Advocacy Services, Inc.
515-278-2502 or 1-800-779-2502 or www.ipna.org
6. Community Mental Health Centers
1-800-779-2001 or www.medicine.uiowa.edu/iowacompass
7. State Substitute Medical Decision Making Boards
515-242-6333 or dnicholl@idph.state.ia.us