

How Decision Makers Can Help: Guardianship & Power of Attorney

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Powers of Attorney Terminology

- ▶ Principal: the person granted authority under a power of attorney.
- ▶ Agent: the person granted the authority to act under a power of attorney.

Powers of Attorney Terminology

- ▶ **Fiduciary:** a legal duty to act solely in another party's interests. Parties owing this duty are called fiduciaries. The individuals to whom they owe a duty are called principals. Fiduciaries may not profit from their relationship with their principals unless they have the principals' express informed consent. They also have a duty to avoid any conflicts of interest between themselves and their principals or between their principals and the fiduciaries' other clients. A fiduciary duty is the strictest duty of care recognized by the US legal system.

Competence vs Capacity

- ▶ Competence is a legal state, not a medical one. Competence refers to the degree of mental soundness necessary to make decisions about a specific issue or to carry out a specific act. All adults are presumed to be competent unless adjudicated otherwise by a court.
- ▶ Capacity is defined as an individual's ability to make an informed decision. Any licensed physician may make a determination of capacity. Neuropsychologists, however, are especially suited to assess a person's mental status and its potential for interfering with specific areas of functioning.

Incapacitated Person 15-14-102 (5)

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- ▶ "Incapacitated person" means an individual other than a minor, who is unable to effectively receive or evaluate information or both or make or communicate decisions to such an extent that the individual lacks the ability to satisfy essential requirements for physical health, safety, or self-care, even with appropriate and reasonably available technological assistance.

Medical Decision Makers:

Medical Power of Attorney (MPOA)

Medical Durable Power of Attorney

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- ▶ In Colorado, no one is automatically authorized to make healthcare decisions for another adult—not spouses, adult children, other family members, nor physicians
- ▶ Also called Power of Attorney for Healthcare
- ▶ Most cases only makes decisions when Principal can't
- ▶ Can get medical records and consult with doctors
- ▶ Act according to your wishes and values
 - ▶ Living will or MOST (Medical Orders for Scope of Treatment) form
- ▶ **ONLY AUTHORIZED TO MAKE HEALTHCARE DECISIONS**

Advanced Directives Related to MPOA

- ▶ Colorado Medical Orders for Scope of Treatment (MOST)
 - ▶ It is primarily intended to be used by the **chronically or seriously ill person** in frequent contact with health care providers, or already residing in a nursing facility.
 - ▶ Completed by the patient or authorized agent in conversation with a health care provider, then signed by the patient/agent and a physician, advanced practice nurse, or physician's assistant. The physician/APN/PA signature **translates patient preferences into medical orders.**
 - ▶ **“Travels” with the patient and is honored in any setting:** hospital, clinic, day surgery, long-term care facility, ALR, hospice, or at home. The original is brightly colored for easy identification, but photocopies, faxes, and electronic scans are also valid.

Advanced Directives Related to MPOA

- ▶ Living Will:
 - ▶ A living will is a document you sign telling your doctor not to use artificial life support measures if you become terminally ill.
 - ▶ Only goes into effect 48 hours after two doctors certify you are in a terminal condition **AND** can't make your own decisions **OR** you are in a persistent vegetative state.
 - ▶ Doctor must make a good effort to notify persons close to you that the certification has been made and they will withhold life-sustaining treatment with two days.
 - ▶ Should include a list of people you want notified with their contact information.

Advanced Directives Related to MPOA

- ▶ Cardio-Pulmonary Resuscitation (CPR) Directive
 - ▶ Refuse resuscitation
 - ▶ A DNR order is an order written in your medical chart by your doctor while you are being cared for in a healthcare facility (hospital, SNF)
 - ▶ Expires when you leave the facility
 - ▶ Written when your doctor believes resuscitation would not work or cause more harm than good

Medical Decision Makers: Guardianship

What is a Guardian ?

A guardian is a person or persons appointed by a court to assist with the personal affairs and make decisions on behalf of a minor or an adult who is incapacitated. A person under a guardianship is called a ward.

Powers of the Guardian

15-14-208. Powers of guardian

- (1) Except as otherwise limited by the court, a guardian of a minor ward has the powers of a parent regarding the ward's support, care, education, health, and welfare.
- (2) A guardian may:
 - (a) Apply for and receive money for the support of the ward otherwise payable to the ward's parent, guardian, or custodian under the terms of any statutory system of benefits or insurance or any private contract, devise, trust, conservatorship, or custodianship;
 - (b) If otherwise consistent with the terms of any order by a court of competent jurisdiction relating to custody of the ward, take custody of the ward and establish the ward's place of custodial dwelling, but may only establish or move the ward's custodial dwelling outside the state upon express authorization of the court;
 - (c) If a conservator for the estate of a ward has not been appointed with existing authority, commence a proceeding, including an administrative proceeding, or take other appropriate action to compel a person to support the ward or to pay money for the benefit of the ward;
 - (d) Consent to medical or other care, treatment, or service for the ward;
 - (e) Consent to the marriage of the ward; and
 - (f) If reasonable under all of the circumstances, delegate to the ward certain responsibilities for decisions affecting the ward's well-being.
- (3) The court may specifically authorize the guardian to consent to the adoption of the ward.

Duties of the Guardian

15-14-314. Duties of guardian

(1) Except as otherwise limited by the court, a guardian shall make decisions regarding the ward's support, care, education, health, and welfare. A guardian shall exercise authority only as necessitated by the ward's limitations and, to the extent possible, shall encourage the ward to participate in decisions, act on the ward's own behalf, and develop or regain the capacity to manage the ward's personal affairs. A guardian, in making decisions, shall consider the expressed desires and personal values of the ward to the extent known to the guardian. A guardian, at all times, shall act in the ward's best interest and exercise reasonable care, diligence, and prudence.

(2) A guardian shall:

- (a) Become or remain personally acquainted with the ward and maintain sufficient contact with the ward to know of the ward's capacities, limitations, needs, opportunities, and physical and mental health;
- (b) Take reasonable care of the ward's personal effects and bring protective proceedings if necessary to protect the property of the ward;
- (c) Expend money of the ward that has been received by the guardian for the ward's current needs for support, care, education, health, and welfare;
- (d) Conserve any excess money of the ward for the ward's future needs, but if a conservator has been appointed for the estate of the ward, the guardian shall pay the money to the conservator, at least quarterly, to be conserved for the ward's future needs;
- (e) Immediately notify the court if the ward's condition has changed so that the ward is capable of exercising rights previously removed;
- (f) Inform the court of any change in the ward's custodial dwelling or address; and
- (g) Immediately notify the court in writing of the ward's death.

Financial Decisions: General Power of Attorney

General Power of Attorney (POA)

May make a broad statement regarding an attorney-in-fact to manage a broad range of non-medical affairs. A general power of attorney may allow an attorney-in-fact to deal with any or all of a principal's real property by selling, leasing or mortgaging it on the principal's behalf.

Special (Limited) Power of Attorney

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A limited power of attorney contains language that authorizes one or a few acts, often related to a specific event

A Principal May:

- ▶ A principal may designate two or more persons to act as coagents
 - ▶ Each agent may exercise its authority independently
- ▶ May designate one or more successor agents
 - ▶ May not act until predecessor resigns, dies, becomes incapacitated, is no longer qualified to serve or declines to serve
- ▶ May nominate a conservator or guardian

Agent's Authority

- ▶ Authority comes from state law (C.R.S. 15-14-701 through 740) and from the power of attorney document that describes the agent's duties and powers.
- ▶ It is very important you read the document so that you are aware of the agent's authority and responsibilities. It may contain specific provisions that are being violated.

Agent's Authority

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- ▶ An agent under a power of attorney may do the following **only** if the power of attorney expressly grants the authority and exercise of the authority is not otherwise prohibited by another agreement or instrument to which the authority or property is subject:
 - ▶ Create, amend, revoke, or terminate an Inter-Vivos trust
 - ▶ Make a gift
 - ▶ Create or change rights of survivorship
 - ▶ Create or change a beneficiary designation
 - ▶ Delegate authority granted under the power of attorney
 - ▶ Waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan.

Agent's Authority

- ▶ Unless the power of attorney otherwise provides, an agent is entitled to reimbursement of expenses reasonably incurred on behalf of the principal and to compensation that is reasonable under the circumstances
- ▶ An agent is liable to the principal or the principal's successors in interest for the amount required to restore the value of the principal's property to what it would have been had the violation not occurred and reimburse the principal or the principal's successors in interest for the attorney's fees and costs paid on the agent's behalf

Agent's Duty

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- ▶ Act in accordance with the principal's reasonable expectations to the extent actually known by the agent and, otherwise, in the principal's best interest
- ▶ Act in good faith; and only within the scope of authority granted in the power of attorney
- ▶ Act loyally for the principal's benefit

Agent's Duty

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- ▶ Act so as not to create a conflict of interest that impairs the agent's ability to act impartially in the principal's best interest.
- ▶ Attempt to preserve the principal's estate plan, to the extent actually known by the agent, if preserving the plan is consistent with the principal's best interest based on all relevant factors.
- ▶ Cooperate with a person that has authority to make health care decisions for the principal to carry out the principal's reasonable expectations to the extent actually known by the agent and, otherwise, act in the principal's best interest.

When Do the Powers Start

- ▶ A power of attorney is effective when executed (signed) unless the principal provides in the power of attorney that it becomes effective at a future date or upon the occurrence of a future event or contingency.
- ▶ It is possible to grant a *springing power of attorney*; i.e., a power that takes effect only after the incapacity of the grantor or some other definite future act or circumstance.
- ▶ Any agency created by a POA continues until the principal ceased to exist, regardless of the length of time that elapses, unless it instrument states an earlier termination date.

When Do the Powers End

- ▶ Principal revokes
- ▶ Agent dies, becomes incapacitated, or resigns
- ▶ Dissolution, annulment or legal separation
- ▶ POA has termination date or the specified purpose is completed
- ▶ Not durable and principal becomes incapacitated
- ▶ A new POA is created but only if the new POA states previous POA's are revoked
- ▶ Agent must have knowledge of termination

Financial Decisions Makers

Conservatorship

Conservator

A conservatorship is a court appointment for an adult who is incapacitated, missing, detained or unable to return to the United States. The appointment of a conservator gives a person or an organization the responsibility to prevent waste or dissipation of the protected person's assets; to obtain or provide for the support, care, education or welfare of the protected person or someone entitled to support by the protected person.

Duties of the Conservator

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15-14-418. General duties of conservator - financial plan

- (1) A conservator, in relation to powers conferred by this part 4 or implicit in the title acquired by virtue of the proceeding, is a fiduciary and shall observe the standards of care applicable to a trustee.
- (2) A conservator shall take into account the limitations of the protected person, and to the extent possible, as directed by the order of appointment or the financial plan, encourage the person to participate in decisions, act in the person's own behalf, and develop or regain the ability to manage the person's estate and business affairs.
- (3) Within a time set by the court, but no later than ninety days after appointment, a conservator shall file for approval with the appointing court a financial plan for protecting, managing, expending, and distributing the income and assets of the protected person's estate. The financial plan shall be based upon a comparison of the projected income and expenses of the protected person and shall set forth a plan to address the needs of the person and how the assets and income of the protected person shall be managed to meet those needs. The financial plan must be based on the actual needs of the person and take into consideration the best interest of the person. The conservator shall include in the financial plan steps to the extent possible to develop or restore the person's ability to manage the person's property, an estimate of the duration of the conservatorship, and projections of expenses and resources.
- (4) In investing an estate, selecting assets of the estate for distribution, and invoking powers of revocation or withdrawal available for the use and benefit of the protected person and exercisable by the conservator, a conservator shall take into account any estate plan of the person known to the conservator. The conservator may examine the will and any other donative, nominative, or other appointive instrument of the person.
- (5) A conservator shall file an amended financial plan whenever there is a change in circumstances that requires a substantial deviation from the existing financial plan.

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Summary

- ▶ A person does not give up the right to have a say in their affairs once a POA is signed.
- ▶ An agent is not free to do whatever they want, especially if it is not what the Principal wants them to do or it is not in the Principal's best interest.
- ▶ The Principal and others specified in the statute may require an agent to give an accounting of assets.

4th Judicial District

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- ▶ 270 S Tejon St.
- ▶ Division W (Room 150 West).
- ▶ Magistrate Frances Johnson.
- ▶ File a General Motion In Room 101.

Thank You!

Questions or Comments