

WINGS ACTION TOOLS

Promoting Options Less Restrictive Than Guardianship¹

WINGS have tremendous potential to promote less restrictive options than guardianship.² This Action Tool supports stakeholders' efforts to facilitate the increased use of less restrictive options in their states by providing:

- ✓ stakeholder action strategies;
- ✓ background on less restrictive options; and
- ✓ resources.

Less restrictive options can:

- ✓ prevent or delay unnecessary and/or overly restrictive guardianship;
- ✓ avoid costly and burdensome time in court;
- ✓ involve family, friends and other supports in creative, collaborative strategies;
- ✓ encourage modification or termination of a guardianship order and restoration of rights; and
- ✓ modify a guardianship care plan.

¹ Guardianship terms vary by state. In this Tool, the general term “guardianship” refers to guardians of the person as well as guardians of the property, frequently called “conservators” unless otherwise indicated.

² A note on language: Many sources reference “alternatives to guardianship” instead of “less restrictive options.” The phrase “less restrictive options” is preferable because “alternatives to guardianship” implies we consider guardianship first and then look for alternatives. With less restrictive options, we assume there is a world of possibilities before considering guardianship.

When developing strategies to promote less restrictive options, strive to balance the dual goals of self-determination *and* protection from exploitation:

- ✓ Less restrictive options, which often delegate decision-making authority to another party, can provide the appointed decision-maker with an opportunity for exploitation.
- ✓ There are situations when a guardianship is needed to address the issues that brought the case to the court's attention.

WINGS Stakeholder Action Strategies

WINGS can be a force behind increasing the use of less restrictive options! Consider adapting the following strategies to work in your state. Whatever path your WINGS chooses, be sure to build evaluation outcome measures.

- ✓ **Design and Disseminate Public Education:**
 - Distribute the Consumer Financial Protection Bureau's guides for [Managing Someone Else's Money](#). These are four free guides for lay people who are serving as an agent under a power of attorney, representative payee or fiduciary, trustee, or guardian of property. You can use the national guides or adapt the contents to the specific laws and regulations in your state. CFPB has created state-specific guides in six states, and other states have adapted the guides using a CFPB template. Links to state-specific adaptations and the adaptation template are provided on the same page as the national guides.
 - Oregon WINGS has developed a state guide on options for decision-making. Entities in Massachusetts, Missouri, Florida, North Carolina, and other states have created similar state-specific guides. See the State Resources section below for examples.

- ✓ **Develop and Promote Education for Judges and Lawyers:**
 - Topics for a judicial program could include: (1) constitutional roots of the less restrictive options principle; (2) state statutory language requiring examination of options; (3) benefit to judicial economy of weeding out unnecessary guardianship cases; and (4) relevant press stories featuring unnecessary or overbroad appointments.
 - See the Social Security Administration’s [guide on representative payees for judges](#) for an example of judicial education materials.
 - Develop state-specific continuing legal education programs for attorneys on less restrictive options and supported decision-making.
 - Disseminate the ABA’s [PRACTICAL Tool for Lawyers: Steps in Supporting Decision-Making](#) through educational programs and other means. Tailor information as appropriate for your state.

- ✓ **Bring Together WINGS Stakeholders to Discuss Less Restrictive Options**
 - Invite stakeholders and outside speakers to share their experiences at WINGS meetings, including:
 - Individuals who use representative payees, powers of attorney, supported decision-making, or other less restrictive options.
 - Professionals such as attorneys who draft powers of attorney, your state’s Social Security Administration WINGS liaison, and hospital social workers who assist patients with completing healthcare decision-making forms.

- ✓ **Study State Statutes and Court Decisions for Instruction on Implementing Less Restrictive Options Before and After Appointment of a Guardian:**
 - Review the [Uniform Guardianship, Conservatorship and Other Protective Arrangements Act](#), a cutting edge model law that requires review of less restrictive options prior to appointment of a guardian. See Sec. 301(a)(1)(B). The model law also prohibits the appointment of a plenary guardianship if a less restrictive alternative would meet the needs of the respondent. Sec. 301(b).
 - Examine local court practices for reviewing guardianships. See the Commission on Law and Aging’s [2013 review of state laws on restoration](#).
 - Study examples of judges refusing to appoint a guardian, or terminating a guardian, because a less restrictive option is available.

- [In re Orshansky](#) – The District of Columbia Court of Appeals held guardianship was not necessary when an elderly woman with dementia had already appointed a family member as her healthcare proxy.
- [In re Dameris](#) – a New York court determined a guardianship was no longer necessary because in the three years following the appointment of a guardian, sufficient decision-making supports were developed and implemented.
- [Ryan King](#) – The District of Columbia trial court terminated Ryan King’s guardianship after Ryan King and his parents/guardians presented evidence that a guardianship was no longer necessary.

✓ **Change Court Practices**

- Revise court forms to require consideration of less restrictive options:
 - For example, Rhode Island’s Probate Court [Petition for Guardianship or Limited Guardianship](#). In states where different counties use different forms, WINGS may want to discuss the merits of encouraging uniformity or enhancing comparability.
- Design a screening program to identify guardianship cases that could be resolved with less restrictive options. [National Probate Court Standards](#) (NCPS 3.3.2, commentary) urge Probate Courts to consider establishing a screening procedure.
 - For example, Oregon’s Public Guardian and Conservator Program has piloted [High Risk Evaluation Teams](#) to evaluate complex cases of vulnerable and dependent adults currently facing a serious and imminent risk to their health and safety. The team’s priority is to identify and implement less restrictive options to guardianship.

Key Background

Law and Standards on Less Restrictive Options

- The Uniform Law Commission’s new model law, the [Uniform Guardianship, Conservatorship and Other Protective Arrangements Act](#), Sec. 301(a)(1)(B), requires a court to review whether any less restrictive options are available prior to appointing a guardian.

- The [National Guardianship Association](#) (NGA) states that a guardian should only be appointed if alternatives “have proven ineffective or are unavailable.” NGA standard #21 requires a guardian to seek termination or limitation of a guardianship if there is a “less restrictive alternative.”
- [National Probate Court Standard 3.3.2](#): Probate courts should encourage the appropriate use of less intrusive alternatives to formal guardianship and conservatorship proceedings.
- Many state guardianship statutes contain language about less restrictive options or alternatives. Consult the ABA’s [chart](#) to identify whether that language exists in your state’s statute.

Less Restrictive Options: Surrogate Decision-Making, Protective Arrangements, Other Interventions, and Supported Decision-Making

Finding the right option or combination of options is not easy. Less restrictive options require resources and often the active participation of others. Choosing one of the following options over guardianship may mean an increased risk of harm – each could result in abuse, neglect, or exploitation. Finally, these options are not one size fits all; what is restrictive for one person may be empowering for another.

WINGS are up to the challenge! A collaborative group of diverse stakeholders, with a wide array of expertise and experience, is in a unique position to promote the use of less restrictive options.

Surrogate Decision-Making

There are two main categories of surrogate decision-making: healthcare and financial. Most of the legal documents and laws discussed below give decision-making authority to another person. A few, however, offer guidance about the decisions a person would make if able to do so; these legal documents may help minimize disputes among family members or between family and professionals that sometimes lead to guardianship.

- **Healthcare Decision-Making**
 - Advance directive – a legal document that provides direction on healthcare decisions if the individual cannot communicate. An advance directive may include a living will that outlines the individual’s

- preferences for end-of-life decisions, and/or assigns a proxy decision-maker in a power of attorney for healthcare decisions (see below).
- Power of Attorney for Healthcare Decisions. See the ABA Commission on Law and Aging's [comprehensive chart of state statutes](#).
 - Substitute Healthcare Decision Making (Family Consent Laws) – Most [state laws](#) list, in order of preference, who can make a healthcare decision on behalf of someone who does not have a healthcare power of attorney and is not able to make decisions for him or herself.
 - [Physician Orders for Life Sustaining Treatment](#) (POLST) – Individuals who are likely to have a medical crisis within a year and want to state their end of life treatment wishes may want to discuss POLST with a medical professional. Patients, health care professionals, and loved ones can come together to discuss the patient's wishes, as articulated by the patient, and create a plan for end of life treatment which is clearly stated in a physician's order.
- **Financial Decision Making:**
 - Power of Attorney/Durable Power of Attorney – this document assigns financial decision-making to another.
 - [Social Security Representative Payee](#) – receives and manages Social Security Disability or Supplemental Security Income benefits on behalf of a beneficiary who Social Security finds cannot manage the benefits.
 - Every WINGS has a liaison at the Social Security Administration to contact about representative payee issues.
 - For an excellent series of materials about the representative payee programs, see [Justice in Aging's Representative Payee Toolkit](#).
 - [Veteran's Administration Fiduciary Program](#) – The VA's representative payee program for veterans and other beneficiaries receiving VA benefits payments.
 - Trusts – allows a third party, or [trustee](#), to hold assets on behalf of a beneficiary.
 - Joint Ownership – An arrangement in which two or more persons co-own a property such as an account.

Protective Arrangements

If surrogate decision-making options are not feasible, protective arrangements that require court involvement but are less restrictive than guardianship may suffice. The new model law from the Uniform Law Commission, the Uniform Guardianship, Conservatorship and Other Protective Arrangements Act, Art. V, includes “protective arrangements” as a less restriction option to guardianship. A court may order a protective arrangement – also known as a single court transaction – to authorize or direct a transaction necessary to meet the individual’s need for health, safety, or care, without the appointment of a guardian. Examples include a specific medical treatment, a move to a new location, a specific financial transaction, or permitting or denying visitation from a specific person.

Supported Decision-Making

Supported decision-making is more than a less restrictive option. It is a legal and social concept in which an individual remains at the center of the decision-making process, consulting with a network of “supporters.” Supported decision-making can infuse surrogate decision-making techniques. For example, a power of attorney for healthcare decisions could include [a supported decision-making provision](#). WINGS may face a lack of awareness when advancing supported decision-making. Academic research, legal reviews, and most importantly, tangible examples will be key to gaining support and understanding. See the following resources:

- [National Resource Center for Supported Decision-Making](#), funded by the Administration of Community Living.
- [Article 12 of the U.N. Convention on the Rights of Persons with Disabilities](#) formalized a supported decision-making paradigm.
- [The Supported Decision-Making Pilot Project](#).

Supported decision-making also means providing the necessary support for a person to continue to make their own decisions. Some of these services are described in what [National Probate Court Standard #3.3.2](#) defines as “intervention techniques,” including as adult protective services, money management services, respite support services, counseling, and mediation.

Resources

- American Bar Association Commission on Law and Aging, Commission on Disability Rights, Section on Civil Rights and Social Justice, Section on Real Property, Trust and Estate Law, PRACTICAL Tool for Lawyers: Steps in Supporting Decision-Making (2016).
https://www.americanbar.org/groups/law_aging/resources/guardianship_law_practice/practical_tool.html
- American Bar Association Commission on Law and Aging, state statutory guardianship charts:
 - “Conduct and Findings of Guardianship Proceedings” (2016).
https://www.americanbar.org/content/dam/aba/administrative/law_aging/chartconduct.authcheckdam.pdf
 - With Eleanor Crosby Lanier, “Limited Guardianship of the Person and Property” (2016).
https://www.americanbar.org/content/dam/aba/administrative/law_aging/chartlimitedguardianshipofthepresonandproperty.authcheckdam.pdf
 - “Selected Issues in Power of Attorney Law” (2016).
https://www.americanbar.org/content/dam/aba/administrative/law_aging/chartpoa.authcheckdam.pdf
 - With Jenica Cassidy, “Restoration in Adult Guardianship (Statutes)” (2013).
https://www.americanbar.org/content/dam/aba/administrative/law_aging/2013_CassidyRestorationofRightsChart7-13.authcheckdam.pdf
- National Resource Center for Supported Decision-Making.
<http://www.supporteddecisionmaking.org>
- Uniform Law Commission, *Uniform Guardianship, Conservatorship and Other Protective Arrangements Act* (2017).
<http://www.uniformlaws.org/Act.aspx?title=Guardianship,%20Conservatorship,%20and%20Other%20Protective%20Arrangements%20Act>

- U.S. Consumer Financial Protection Bureau, *Managing Someone Else's Money*, Guides on Power of Attorney, Court Appointed Guardians, Trustees, and Government Fiduciaries.
<https://www.consumerfinance.gov/consumer-tools/managing-someone-elses-money/>
- American Bar Association Commission on Law and Aging, "Giving Someone Else a Power of Attorney for Your Health Care" 2011.
https://www.americanbar.org/content/dam/aba/administrative/law_aging/2011_aging_hcdec_univhcpaform.authcheckdam.pdf
- *Supported Decision-Making and Alternatives to Guardianship*, Statewide Parent Advocacy Network.
<http://www.spanadvocacy.org/content/supported-decision-making-and-alternatives-guardianship>
- The Arc, Position Paper, "Autonomy, Decision-Making Supports, and Guardianship." <http://www.thearc.org/who-we-are/position-statements/rights/Autonomy-Decision-Making-Supports-and-Guardianship>
- Videos
 - "Making Healthcare Choices: Perspectives of People with Disabilities." American Civil Liberties Union.
<https://www.youtube.com/watch?v=QTyZrSC2I6U>
 - "Supported Decision Making: Gabby's Story." Special Hope Foundation,
<https://withfoundation.org/>.
- State Specific Resources
 - Oregon Department of Human Services and Oregon WINGS, *Options in Oregon to Help Another Person Make Decisions*.
<http://www.leadingageoregon.org/assets/docs/Other-resources/2014/guardianship%20and%20other%20options%20booklet.pdf>

- Massachusetts Guardianship Association, *Healthcare and Financial Planning, Alternatives to Guardianship and Conservatorship for Adults*.
<http://www.massguardianshipassociation.org/information/alternatives-to-guardianship-and-conservatorship/>
- Alternatives to Guardianship Project, *Missouri Guardianship: Understanding Your Options & Alternatives*.
<http://moguardianship.com/>
- Florida Developmental Disabilities Council, Inc., *Lighting the Way: To Your Choices, Your Decisions, and Your Life*.
http://www.fddc.org/sites/default/files/LTW%20SA%20Booklet_0.pdf
- Disability Rights North Carolina, *Alternatives to Guardianship*.
<http://www.disabilityrightscnc.org/sites/default/files/Alternatives%20To%20Guardianship%20GU-01.pdf>
- Social Security Representative Payee Program
 - Justice in Aging, *Representative Payee Toolkit*.
<http://www.justiceinaging.org/our-work/economic-security/rep-payee-program/>
 - U.S. Social Security Administration
 - *A Guide for Representative Payees*.
<https://www.ssa.gov/pubs/EN-05-10076.pdf>.
 - *Judicial Training Guide – Social Security Representative Payees*.
https://www.ssa.gov/payee/rp_training2.html

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