Alternatives to Guardianship and Conservatorship in South Carolina Frequently Asked Questions

WARNING: You are strongly encouraged to seek the advice of an attorney in any legal matter. If you move forward without an attorney, it may negatively affect your legal rights. If you have questions about your legal rights or the laws concerning your case, please talk with an attorney.

DISCLAIMER: The general information provided in these Frequently Asked Questions (FAQs) is not legal advice, cannot be cited as legal authority, and cannot replace the advice of a licensed South Carolina attorney. The information in these FAQs is accurate as of the date of publication. If you decide to bring a lawsuit in a South Carolina court without an attorney, you are responsible for researching the law on your own. Please note that the presiding judge decides what law applies in each case.

Guiding Principles: When a person needs help making decisions about his or her care and well-being, a guardianship is one important option to consider. Likewise, when a person needs help making decisions and/or managing his or her financial affairs and/or assets a conservatorship is one important option to consider. There are other options called less restrictive alternatives to both a guardianship and a conservatorship. Less restrictive alternatives encourage independence and allow a person to be involved in decisions about his or her care, well-being, and financial affairs and/or assets, while still providing protection for the person.

In some situations, a guardianship and/or a conservatorship may be the best choice to protect a person and that person's rights. This may be a full guardianship or a limited guardianship. Likewise, a conservatorship could include a full conservatorship or a limited conservatorship. Because a guardianship and/or a conservatorship can be very restrictive for an individual, it is important to explore other alternatives first.

Information about Less Restrictive Alternatives

What options are there besides a guardianship and/or a conservatorship?

Some other options are listed in the chart below.

You are strongly encouraged to seek the advice of a licensed South Carolina attorney in deciding whether a guardianship and/or a conservatorship is necessary for your friend or relative.

A guardianship and/or a conservatorship is not necessary for every person with a disability. Many people with disabilities are able to manage their own affairs with appropriate services and support systems.

A guardianship limits the rights of an individual and may restrict choices about where to live, who to see, and what to do. Likewise, a conservatorship limits the rights of an individual to make financial decisions, including but not limited to, paying bills, managing and/or selling property, etc. You should give serious consideration to alternatives.

Alternatives

Alternative	Effect of the Alternative
Representative Payee	A representative payee is appointed by a government agency to receive, manage, and spend government benefits for a beneficiary. The representative payee's authority is limited to only the government funds. Usually, this applies to Social Security. For more information, see http://www.socialsecurity.gov/payee/.

Health Care Power of Attorney (POA) Note: In order to sign a HCPOA, you must have the capacity to understand the document and the consequences of signing it. If a person's mental capacity is at issue, a HCPOA is not an appropriate alternative.	A health care power of attorney (HCPOA) is a document that allows you to name another person to make health care decisions if you become unable to do so. The document may include guidance about the type and extent of health care desired. For more information, see https://www.scbar.org/public/get-legal-help/free-forms-and-publications/ or https://www.scbar.org/media/filer_public/8d/3c/8d3ce0d9-da7d-4b4d-bd2e-2bae811fe810/2020_health_care_power_of_attorney_1020.pdf **Note:** When you die, the HCPOA is no longer valid.
Adult Health Care Consent Act	The Adult Health Care Consent Act is a South Carolina law that may provide legal authority for certain people (for example, spouses, children or parents) to make health care decisions for an adult who cannot make or communicate such decisions. For more information, see S.C. Code Ann. §§ 44-66-10 - 80 at http://www.scstatehouse.gov/code/t44c066.php.
Power of Attorney (POA) Note: In order to sign a POA, you must have the capacity to understand the document and the consequences of signing it. If a person's mental capacity is at issue, a POA is not an appropriate alternative.	A power of attorney (POA) is a legal document that may give another person the authority to make decisions. This document may affect property, assets, money, debts, health care, and pets. For more information, see https://www.scstatehouse.gov/code/t62c008.php. **Note:** When you die, the POA is no longer valid.

Living Will	A living will is a very limited document that controls treatment you do or do not want to receive when you are about to die. In South Carolina, a living will is also known as a Declaration of Desire for a Natural Death. For more information, see https://www.scbar.org/public/get-legal-help/free-forms-and-publications/. **Note**: This document is **not** the same as your Last Will and Testament. This document is **not** the same as your HCPOA. **Note:** When you die, the living will is no longer valid.
Health Care Advance Directive	A health care advance directive may combine the health care power of attorney and living will documents into one document.
Joint Ownership	Joint ownership occurs when more than one person has authority over assets, such as bank accounts, house/land (called real property), and vehicles. **Note:** There are several types of joint ownership, and the particular type used could affect ownership of the property after the death of a joint owner.
Trust	A trust is a legal document that gives authority to a person called a trustee to manage some or all of your assets for you or another person's benefit.

Protective Order	A protective order protects your assets and may provide other protections as ordered by the Probate Court.
Case/care management	Case or care managers are people who have been trained to assist with personal care. Examples of assistance may include: • arranging health appointments • managing medication • helping with paperwork • assisting with transportation
Money Management	Money management services help people with their financial affairs, including check depositing and writing, checkbook balancing, bill paying, insurance claim preparation, tax preparation and counseling, and public benefit applications and counseling.

What other resources are there for assistance?

Some other resources include:

- **South Carolina Department on Aging** – This state agency provides information and services to seniors and vulnerable adults. The State Long Term Care Ombudsman Division advocates for vulnerable adults in long term care facilities. For more information, see https://aging.sc.gov/.

- **South Carolina Bar Lawyer Referral Service** – This is a free, statewide service offered by the South Carolina Bar. It offers a referral to a licensed South Carolina attorney in your location who practices the type of law you request. All attorneys who participate in this service are in good standing with the South

Carolina Bar and must maintain malpractice insurance. These attorneys have also agreed to charge no more than $50 for the first 30-minute consultation. After the first 30 minutes, their regular fees may apply. For more information, see https://www.scbar.org/public/get-legal-help/find-lawyer-or-mediator/.

- **Protection and Advocacy for People with Disabilities, Inc. (P&A)** – P&A is authorized by state and federal law to protect the rights of individuals with disabilities. P&A provides free legal advocacy for individuals with a disability who have been discriminated against because of their disability or denied a service to which they are entitled. For more information, see http://pandasc.org/.

- **South Carolina Legal Services** – South Carolina Legal Services provides legal representation in civil matters to low-income South Carolinians who meet eligibility requirements. For more information, see http://sclegal.org/ and http://lawhelp.org/sc/.

- **Community-based services** – In the community, various state and local agencies provide services for persons with disabilities, such as homemaker services, respite care, residential care, self-directed care for veterans, and adult foster care homes. Sometimes these services are available through Medicaid. For more information, see https://www.medicaid.gov/medicaid/section-1115-demo/demonstration-and-waiver-list/Waiver-Descript-Factsheet/SC#0405.

- **Community Long Term Care (CLTC)** – For individuals who qualify for Medicaid, the CLTC office can connect them to services or long term care, including services to help them live in the community or in facility-based nursing care. For more information, see https://www.scdhhs.gov/historic/insideDHHS/Bureaus/BureauofLongTermCareServices/how%20do%20i%20apply-3.html.

- **Reporting abuse, neglect, and exploitation of vulnerable adults**- As a caregiver, it may be difficult to always be aware of

the treatment your loved one is receiving, and you may not know who to contact. A person experiencing abuse or other mistreatment may find it difficult to tell a loved one about the abuse that they have experienced. If you or your loved one has been mistreated, **where you are living** will determine who to call for help. Below is a list of the departments who handle reports of mistreatment.

- Live in a licensed nursing home or assisted living facility: — *Long Term Care Ombudsman, 1 (800) 868-9095*

- Live in a residential facility contracted by the SC Department of Mental Health or Department of Disabilities and Special Needs: — *SLED Special Victims Unit, 1 (866) 200-6066*

- Live at home or in the community: — *Adult Protective Services at DSS, 1 (888) 227-3487*

  For more information, see https://dss.sc.gov/adult-protection/adult-advocacy-division/

- Have been affected by Identity Theft and/or Scams: — *Department of Consumer Affairs, 1 (800) 922-1594*

- **If you or your loved one are in immediate danger or harm, *please call your local law enforcement agency or 911*.**

  Local law enforcement may also conduct wellness checks of vulnerable adults who live in the community. Contact your city or county law enforcement office for more information.

- Community Crisis Response & Intervention – The South Carolina Department of Mental Health provides services 24/7/365 to provide adults with clinical screening in order to de-escalate a crisis and provide linkage to ongoing treatment and other resources. CCRI Access Line: 833-DMH-CCRI / 833-364-2274.

What is a power of attorney?

A power of attorney (POA) is a document that authorizes a person or persons to act or make decisions for another person. Durable means that the POA continues to be effective even if the person who signed the POA becomes incapacitated. Depending upon what the document says, the person who is authorized to act may make decisions about money, property, business, health care, residence, or other matters. The person identified in the POA to act and make decisions is called an agent. Only a very trustworthy person should be named as an agent. See The South Carolina Uniform Power of Attorney Act, S.C. Code Ann. §§ 62-8-101 - 403 https://www.scstatehouse.gov/code/t62c008.php.

It is strongly recommended that you have a licensed South Carolina attorney prepare a POA for you. Only an attorney can fully explain the risks and benefits of a POA and make sure that it is valid in South Carolina.

If I have named someone as an agent in a valid POA, do I need a guardianship?

It depends upon several factors:

- What you need;
- What the POA document allows your agent to do; and
- Whether the agent is meeting your needs.

If you have questions, please contact an attorney.

What is the difference between a POA and a health care power of attorney?

The POA may apply to many different types of decisions, not just health care. A health care power of attorney (HCPOA) applies only to health care decisions.

Where can I get a health care power of attorney (HCPOA)?

A free sample HCPOA is found in S.C. Code Ann. § 62-5-504 http://www.scstatehouse.gov/code/t62c005.php. See also https://aging.sc.gov/programs-initiatives/legal-assistance-seniors.

You can obtain a HCPOA that is tailored to your needs from an attorney.

What is a living will?

A living will only addresses end of life issues. A HCPOA allows a person to make decisions for you if you are not able to consent, regardless of whether your condition is terminal.

The best time to make a health care directive or a living will is when you are in good health and can think clearly about the decision. If you wait until after you are hospitalized or living in a facility, there are additional requirements to create the document.

In South Carolina, a living will is also known as a Declaration of Desire for a Natural Death. This document must be signed before two witnesses and a Notary Public. For more information, see https://www.scbar.org/media/filer_public/bd/d6/bdd6d988-970f-4b23-84fd-0b4ace64c7c7/livingwill2014.pdf or https://aging.sc.gov/programs-initiatives/legal-assistance-seniors.

Note: A living will is **not** the same as a Last Will and Testament. A living will does **not** direct how property is distributed.

What is the difference between a health care power of attorney (HCPOA) and a living will?

A HCPOA is a document that allows you to name another person to make health care decisions anytime you are unable to

do so. A living will is a very limited document that only declares what medical treatment you want or do not want if you are about to die. The HCPOA may also include more specific directions about the medical treatment you want or do not want if you are about to die. For more information, visit the website of the South Carolina Department on Aging at https://aging.sc.gov/programs-initiatives/legal-assistance-seniors.

What is a will?

A will is also known as a Last Will and Testament. A will is a document that only takes effect after you die and specifies how you want to distribute your property and money, among other things.

If you have questions, please contact an attorney.

What is the difference between a living will and a will?

These are two different documents with different purposes. A living will is a document that declares what medical treatment you want or do not want to receive if you are about to die. A will is a document that only takes effect after you die and specifies how you want to distribute your property and money, among other things.

What are less restrictive alternatives for decision making?

Less restrictive alternatives are options that encourage independence and allow you to make decisions about your care and well-being while still providing protection for you. People who can protect themselves should retain their rights. If less restrictive alternatives can sufficiently protect you, they may be used instead of guardianship.

Resources

- If you do not understand the information in these Frequently Asked Questions, you may want to contact an attorney.

- To find an attorney who practices law in this area, please contact the South Carolina Bar's Lawyer Referral Service (LRS) at 1-800-868-2284 (toll free) or 803-799-7100 (Columbia area). LRS offers a referral by the location and by type of law. The lawyers who sign up with LRS are in good standing with the South Carolina Bar and must maintain malpractice insurance coverage. The lawyers also agree to a 30-minute consultation for no more than $50. After the 30-minute consultation, the fees will be the lawyers' normal fees. Once you receive a referral, you will be expected to contact the lawyer by telephone to make an appointment.

- If you cannot afford an attorney, you may contact the South Carolina Legal Aid Telephone Intake Service (LATIS) at 1-888-346-5592 (toll free) or 803-744-9430 (Columbia area). Eligibility for assistance will depend on your income and assets and the type of problem you have. The income limit to be eligible for LATIS is 125% of the Federal poverty level, which changes every year in April. There is also an asset (money in bank accounts, property, etc.) limit. Additionally, the problem you have must be within the list of problems with which South Carolina Legal Services can help.

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