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## **Ask the Lawyer: Power of Attorney, Guardianship and Representative Payee**

*By Anne Parette, Esq.*

### **Question**

*My 28-year-old daughter recently sustained a severe traumatic brain injury in an automobile crash. I'm not sure what she will be able to do for herself. How can I help her make important decisions if she needs help? I've heard of "power of attorney," "guardianship," and "representative payee." What are the differences? How do I know what's best for my daughter?*

### **Introduction**

When a person has a traumatic brain injury (TBI) or any grave illness, family members and loved ones are confronted with serious questions, such as: Is my family member able to manage her finances?" "Who will determine her long-term care situation?" How do I know if my family member needs a court-appointed guardian?" This response is intended to offer you and others in your situation an overview of the complicated legal processes and terms surrounding surrogacy law. It is not intended to be a "how-to" manual or a substitute for qualified professional advice. Before making any decisions concerning legal matters, families always should consult an appropriate "professional."

Families and friends dealing with TBI, illness or with the aging process are faced with the difficult, often emotional task of determining what is in the best interest of their family member in terms of managing finances and personal affairs. This task is not simple. It is important to understand the legal processes surrounding the decision-making process, so that family members make informed choices. It also is important for family members to have a basic understanding of the laws surrounding "surrogacy."

There are two parties to most surrogate relationships the *Principal* (i.e., the person giving authority to another to act) and the *Agent/Attorney-in-Fact* (i.e., the person authorized to act in place of the principal). Most states have statutes dealing with surrogacy and the standard to be applied by the agent. Some states follow a "substitute judgment" model, while others apply a "best interest of the person" model. The following information is general. Surrogacy laws, terms and definitions vary widely from state to state. Individuals should consult the appropriate state's laws and regulations for specific information.

### **Power of Attorney**



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A Power of Attorney is an agreement in which a “*non-incapacitated*” person (i.e., the *principal*) gives authority to another person (i.e., the *agent* or *attorney-in-fact*) to act in place of the principal. The key word in this definition is “non-incapacitated.” Only a non-incapacitated person can enter into a power of attorney agreement. Generally, a power of attorney begins when it is executed (i.e., signed) and ends with either the death of the principal or with the principal’s revocation of the agreement. Historically, the agreement ended when the principal became incapacitated. (AUTHOR’S NOTE: Some states continue to use the term “incompetent” in their statutes to refer to a person who is no longer able to manage his/her affairs and money. Most states have switched to using the term “incapacitated.”) There are two types of power of attorney agreements, a *durable* power of attorney, and a *springing durable* power of attorney.

### Durable Power of Attorney

A *durable power of attorney* is an agreement that endures, even after the once non-incapacitated principal becomes incapacitated. In a durable power of attorney, the non-incapacitated principal names another person to act on his/her behalf in the event that the principal becomes unable to manage his/her own affairs. The person named in the durable power of attorney will not have to petition a court formally to declare the principal incapacitated. A durable power of attorney agreement is important because if the condition of the principal deteriorates, it will not be necessary for the family to seek formal guardianship— a process that takes time, often results in high legal fees and is more restrictive on the rights of the principal.

Hospitals and health care providers are required to discuss the use of a durable power of attorney with individuals with brain injury and their families under the *Patient Self- Determination Act*. Unfortunately, most health care facilities do not have the time or resources to assign a social worker or patient advocate to every individual to explain the benefits of a durable power of attorney agreement. A durable power of attorney agreement is recognized in all states and the District of Columbia. Also, the *Uniform Durable Power of Attorney Act* has been adopted in several jurisdictions. Other states have developed their own durable power of attorney legislation.

### Springing Durable Power of Attorney

A *springing durable power of attorney* is an agreement that becomes effective (i.e., “springs” into effect) after a “date certain.” For example, it may take effect when the principal becomes incapacitated after a certain event, such as a medical procedure. Unlike the durable power of attorney, the springing durable power of attorney is not recognized in every state. Often, it is difficult to determine when the power to act becomes vested in



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the agent. For instance, it may be difficult to determine exactly when the principal becomes incapacitated.

Therefore, the springing durable power of attorney, if used at all, must contain clear, concise, direct language as to how the principal's incapacity will be determined, ensuring protection of the individual's rights. The springing durable power of attorney should not contain ambiguous language. Also, since a springing durable power of attorney takes effect some time in the future, it is not certain whether third parties, such as a bank or nursing home, will recognize the authority of the agent at that time.

### **Creation of a Power of Attorney Agreement**

A power of attorney agreement must be in writing. The principal executing the power of attorney must have legal capacity (i.e., appreciate the nature of his/her act). (NOTE: In general, contract law allows an otherwise-incapacitated person to execute a contract, such as a power of attorney agreement, when that person has a "lucid moment.")

Few formalities are required by state law to execute a valid power of attorney. If states do require certain formalities, the formalities usually resemble those required to execute a Last Will and Testament. That is, the power of attorney may need to be *notarized or witnessed*. Some states may require that the document be *filed* if the authority vested in the agent is to sell real property.

The authority granted in the document may be *general*. For example, the language may state that the agent is granted authority to "manage all of the principal's affairs." The authority granted in the document also may be *specific*. For example, the language may state that the agent is granted the authority to "cash the principal's checks." (AUTHOR'S NOTE: Many banks require the use of special bank forms. Be sure to find out if your bank requires these forms *before* executing a durable power of attorney. Also, make sure the bank form is durable.)

### **Revocation of a Power of Attorney**

To revoke a power of attorney, the principal must be non-incapacitated and he/she must put the revocation in writing. Written notice of the revocation should be sent to all interested third parties. Unfortunately, a principal's attempt to revoke a power of attorney often leads to litigation by family members as to whether the principal is competent to revoke the document. Therefore, it is important for the principal to choose the agent carefully and to discuss the issues surrounding revocation prior to executing the document.



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## **Advantages and Disadvantages to a Power of Attorney**

**Advantages:** The power of attorney is a simple, straightforward way to convey power to an agent. If it is *durable*, it will remain effective despite the incapacity of the principal. The best advantage to a power of attorney agreement is that it may help families avoid the delays and costs associated with formal court proceedings for appointing a guardian and it can be designed to protect the rights of the principal. Finally, the principal—while not incapacitated—has greater control over who will manage his/her affairs and property.

**Disadvantages:** The power of attorney becomes effective immediately after it is executed, even if the principal still is able to make his/her own decisions (unless the power is springing or limited to the onset of the principal's incapacity). The agent must be chosen carefully, since the actions of the agent are not subject to court supervision. The agent, however, may be liable to the principal for money damages if he/she fails to act prudently. Good communication between the principal and the agent is crucial, since the agent is bound by a fiduciary duty to follow the wishes and intent of the principal. Finally, as noted above, third parties may choose not to recognize the power of attorney.

## **Guardianship**

*Guardianship* is a legal relationship between an individual who is incapacitated (the *ward*) and a person who is given the right to act on their behalf (the guardian). Unless a court limits the guardianship relationship, the guardian will manage all of the ward's personal, legal and financial affairs. (NOTE: In full (i.e., plenary) guardianship, the ward may lose basic rights such as the right to vote, hold a business license, marry or enter into contracts. Therefore, full guardianship should not be entered into lightly).

Courts appoint guardians for people who no longer can care for themselves safely. Many of these individuals do not have family members who are willing or able to take on the responsibilities of being a guardian. Still, most state statutes and courts favor family members as guardians. Courts next favor financial institutions and guardianship agencies when appointing a legal guardian. Most states have a provision for a public guardian when no one else is available or appropriate. Examples of public guardians are government agencies (i.e., Social Services), non-profit agencies or volunteer programs.

## **Advantages and Disadvantages to Public Guardianship**



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**Advantages:** Public guardianship provides a guardian of “last resort” when no one else is acceptable or appropriate. In theory, a public guardian will not have a conflict of interest as a family member might.

**Disadvantages:** Traditionally, public guardianship programs are not well funded, with too many wards and not enough staff.

### **Limited Guardianship**

Many states now allow the appointment of a limited guardian or conservator, who handles specific responsibilities for the ward. In these instances, courts will tailor their orders to avoid the unnecessary removal of all of the ward’s rights, preserving the ward’s dignity and autonomy.

### **Temporary or Emergency Guardianship**

Most states allow the appointment of a temporary or emergency guardian in certain situations. For example, a medical or property emergency could occur suddenly, such as an unexpected surgery or a property foreclosure proceeding. Temporary or emergency guardianships usually offer fewer procedural protections for the ward (i.e., no counsel present, proposed ward not present). Generally, the appointment is short-term. Courts should enter specific orders regarding authority granted to temporary or emergency guardians, with a specific termination date.

### **Duties of a Guardian or Conservator**

Guardians and conservators (full or limited) must report to court to file an inventory of the ward’s assets, usually within the first three to six months of the guardianship. Guardians also must file annual accountings of receipts and disbursements. Courts are required to maintain ongoing authority over the actions of the guardian.

### **Termination of Guardianship**

Most states require the ward or another interested person to initiate action to dissolve a guardianship. Courts generally will not initiate this action. Interested parties must present evidence showing that the basis for the guardianship no longer exists (i.e., offer medical documentation). Some states require that the ward have the same rights during the termination of guardianship process that he/she had during the appointment (i.e., right to counsel).

### **Social Security Administration: Representative Payee**



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A representative payee is a person who has legal authority to receive a cash benefit check from the Social Security Administration (SSA), on behalf of a Supplemental Security Income (SSI) recipient or a Social Security Disability Insurance (SSDI) recipient who is deemed unable to manage his/her own money. (NOTE: A representative payee's authority is limited to receiving and managing benefits from the SSA.)

The beneficiary, a person seeking appointment as a representative payee or the SSA may initiate the appointment of a representative payee. The SSA will determine the need for a representative payee after a review of the beneficiary's medical or psychiatric records. The SSA is obligated to investigate the person applying to be a representative payee. The SSA beneficiary has the right to clear, written notice explaining his/her rights before SSA authorizes payment to a representative payee. The beneficiary always has the right to appeal the appointment of a particular payee or the need for the appointment in general.

The representative payee must use the SSA cash benefits to cover the beneficiary's basic needs (i.e., food, clothing, shelter). The SSA requires the representative payee to make periodic reports to the SSA. Family members and friends may want to consider the representative payee arrangement as an alternative to the more restrictive guardianship arrangement, especially when the SSA check is the only source of income. (AUTHOR'S NOTE: Even a court-appointed guardian must apply to SSA to become a representative payee).

### **Termination of a Representative Payee and the Appeals Process**

If an SSA beneficiary regains the capacity to manage his/her own finances, he/she should ask SSA for a termination of the representative payee arrangement. Of course, death of a beneficiary automatically terminates the relationship. SSA must send written notice of the right to a hearing to the beneficiary. The beneficiary has the right to a hearing on: 1) the need for a representative payee, 2) who will be appointed and 3) evidence favoring or disproving the beneficiary's alleged inability to handle his/her own money.

It often is difficult to establish competency. For example, if the guardian has been handling the ward's financial matters, how can the ward now exhibit financial competence? (AUTHOR'S NOTE: One option may be to seek a limited guardianship, as opposed to seeking total "restoration to competency.")

### **Advantages and Disadvantages to a Representative Payee**

**Advantages:** The representative payee arrangement is simple, inexpensive and the least restrictive alternative to guardianship for people with little



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income. Appointment is limited to the handling of specific government funds and does not affect other areas of decision making. The process does not require a formal, judicial finding of incompetency/incapacity, and the beneficiary may request a change in payee.

**Disadvantages:** The representative payee still has great control over the beneficiary's affairs without being subject to many procedural safeguards or judicial oversight. A payee also may be appointed against the beneficiary's will, and the only monitoring device in place is the requirement that the payee submit periodic reports to SSA.

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*This article contains general legal and consumer information. It is not an authoritative legal treatise. It is not intended to be construed as legal advice and, therefore, should not be relied upon as an authority for acting or refusing to act.*

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