

# Legal Tools to Avoid Guardianship

Charlie Sabatino – Director ABA Commission on Law and Aging

Erica Wood – Assistant Director ABA Commission on Law  
and Aging

David Godfrey – Senior Attorney ABA Commission on Law  
and Aging

Jessica Hiemenz

National Consumer Law Center

National Elder Rights Training Project for the National Legal Resource Center.  
Sponsorship for this Webinar is provided by the National Consumer Law Center, and  
a grant from the Administration on Aging.



**August 29, 2012**



# NLRC

Providing Legal Support to the  
Aging Advocacy Network

- <http://www.nlrc.aoa.gov/>
- Collaboration developed by the Administration on Aging between the National Consumer Law Center, National Senior Citizens Law Center, American Bar Association Commission on Law and Aging, Center for Elder Rights Advocacy, and the Center for Social Gerontology
- See upcoming trainings, conferences, and webinars
- Request a training
- Request consulting
- Request technical assistance
- Access articles and resources

# Presenter – Charles Sabatino

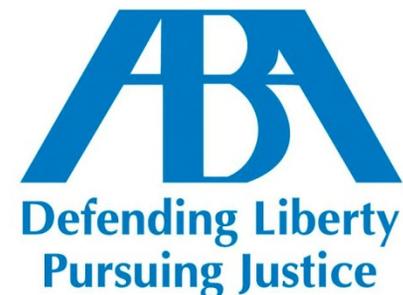
- Is a board member of the D.C. based Coalition to Transform Advanced Care and co-chairs their Public Policy Working Group.
- He also serves as the director of the ABA's Commission on Law and Aging, in Washington, D.C., where since 1984, he has been responsible for the ABA Commission's research, project development, consultation, and education in areas of health law, long-term care, guardianship and capacity issues, surrogate decision-making, legal services delivery for the elderly, and professional ethics.
- He has written and spoken extensively on capacity issues, surrogate decision-making, and advance care planning, health care reform, and legal ethics.
- Mr. Sabatino is also a part-time adjunct professor at Georgetown University Law Center where he has taught Law and Aging since 1987.
- He is a Fellow and former president of the National Academy of Elder Law Attorneys.

## Presenter – Erica Wood

- Assistant Director of the American Bar Association Commission on Law and Aging.
- She has been associated with the Commission since 1980, where she has worked primarily on issues concerning adult guardianship, legal services delivery, dispute resolution, health care and managed care, long-term care and access to court. She has participated in national studies on public guardianship and guardianship monitoring.
- Prior to 1980, she served as staff attorney at Legal Research and Services for the Elderly at the National Council of Senior Citizens.
- She was appointed by the Governor as a member of the Virginia Public Guardian and Conservator Advisory Board; and by the Virginia Senate as a member of the Commonwealth Council on Aging.
- She chaired the Arlington County Commission on Long-Term Care Residences; and served for over 20 years as legislative chair of the Northern Virginia Aging Network.

## Presenter – David Godfrey

- Is a senior attorney at the ABA Commission on Law and Aging.
- He is responsible for the ABA's role in the Administration on Aging funded National Legal Resource Center.
- Prior to joining the Commission he was responsible for elder law programming at Access to Justice Foundation in Kentucky.



# Legal Tools to Avoid Guardianship

Charlie Sabatino

Erica Wood

David Godfrey

American Bar Association

Commission on Law and Aging

August 29, 2012

# Guardianship should always be the last resort!

**1**

- An adult lacks capacity to make informed decisions;
- and

**2**

- Alternatives have been exhausted and either don't work or have failed;
- and

**3**

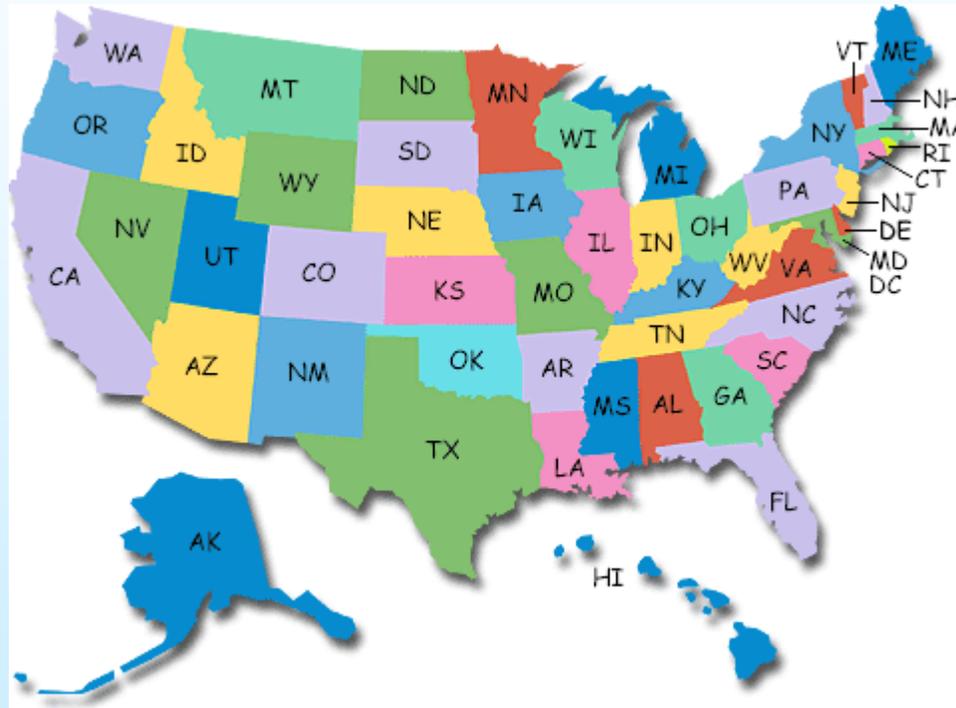
- Decisions must be made to protect the person or property

# What IS Adult Guardianship?

- Relationship
- Created by state law
- In which court gives
- One person or entity (guardian)
- Duty and power
- To make personal and/or property decisions
- For another (incapacitated person)
- Upon finding that adult lacks capacity to make decisions.
- State terminology differs!



# 51 State Guardianship Laws; Variability in Practice



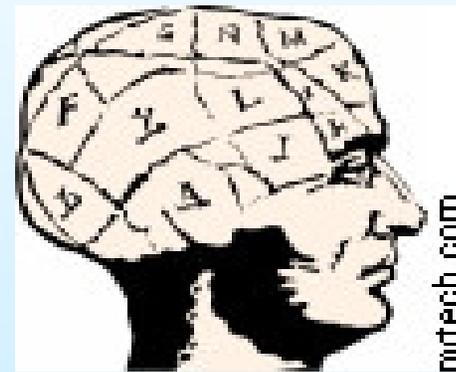
## Who Is Under Guardianship?

- Elders with dementia, chronic cognitive impairments
- Adults with
  - Intellectual disabilities
  - Mental illness
  - Head injuries
  - Substance abuse
  - Dual or multiple conditions



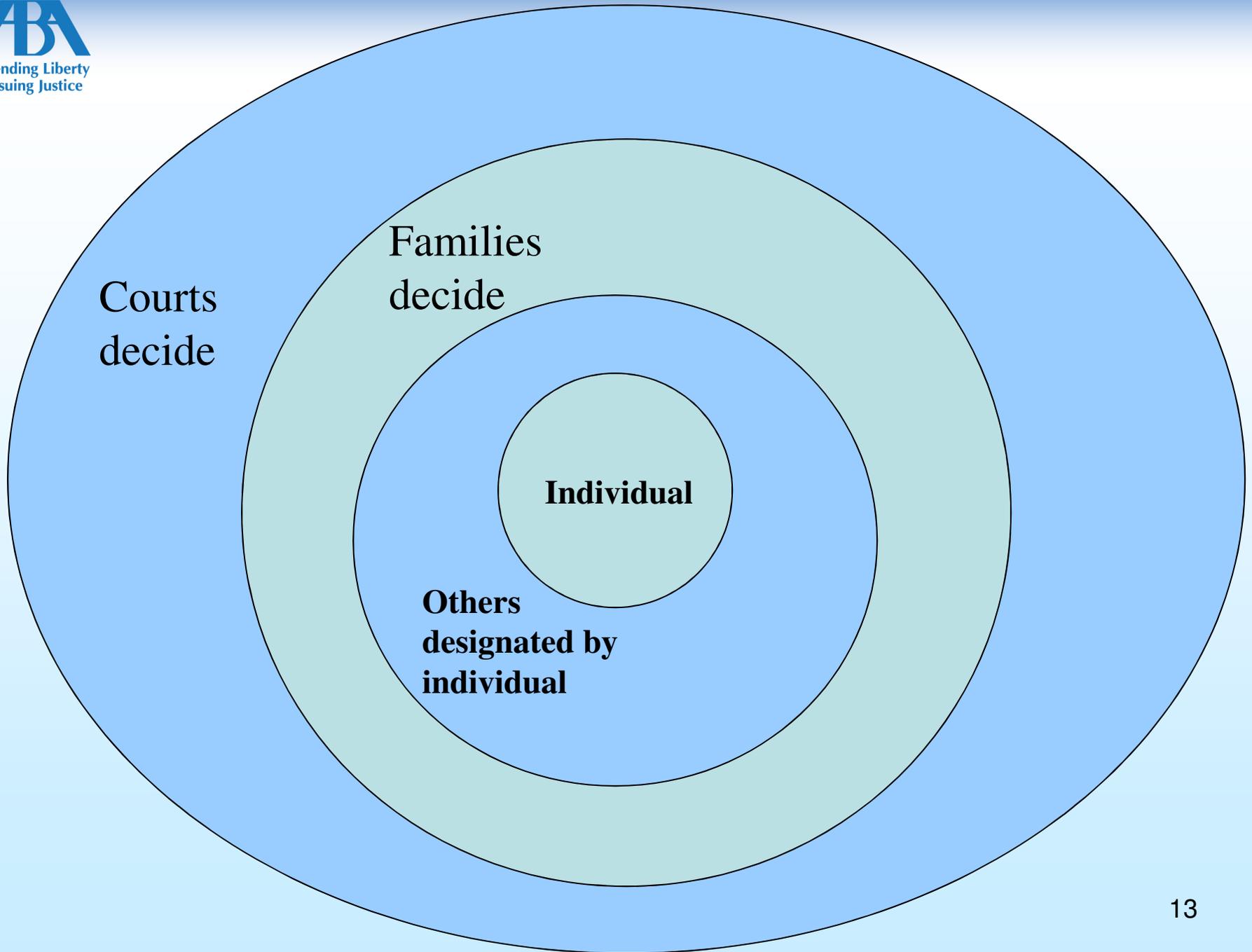
## What Is An “Incapacitated Person”?

- State statutory definitions
- Four elements
  - **Medical condition**
  - **Functional element**
  - **Cognitive element**
  - **Harm; necessity**



# Considerations in Capacity Assessment

- What evidence is before judge?
- Need for professional assessment
- Temporary or mitigating factors
- Severity, reversibility of risks
- Not advanced age; not eccentricity



## Guardianship: A Double-Edged Sword

- Guardianship “unpersons” individual (Associated Press, 1987)
- Loss of fundamental rights
- Inherent tension
  - Between rights and needs
  - Between autonomy and beneficence
  - Between self-determination and protection
- Society’s most extreme intervention; Use “least restrictive alternative”



## Least Restrictive Alternative

- **Constitutional principle – *Shelton v. Tucker*, 364 U.S. 479 (1960)**
- **Application to guardianship – examples**
  - ***In Re Mollie Orshansky*, 804 A.2d 1077 (D.C. App.2002)**
  - ***Hedin v. Gonzales*, 528 N.W.2d 567 (1995)**



## Why Avoid Guardianship

- **Expense; use up estate**
- **Cumbersome; time consuming**
- **Stigmatizing**
- **Intimidating; confusing**
- **Families in court maze**
- **Benefit of third parties over individual**
- **Blunt tool**

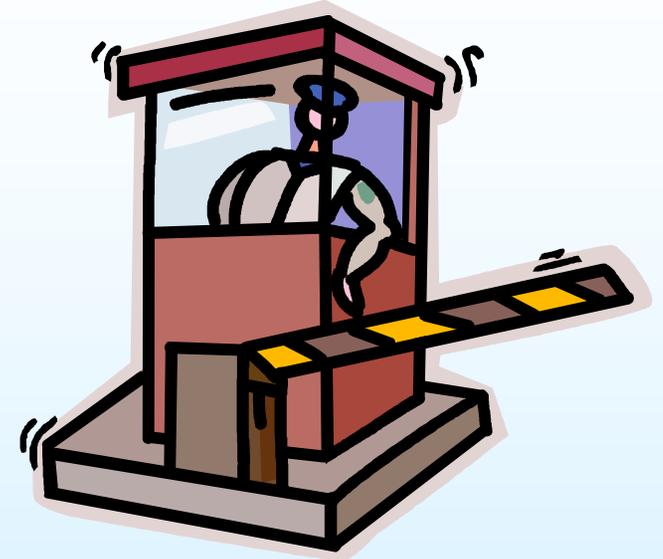
## Why Plan Ahead?

- ✓ Call the shots
- ✓ Empowerment
- ✓ You decide who decides
- ✓ Like insurance policy
- ✓ Avoid guardianship

# Less Restrictive Alternatives

- **Financial Alternatives**

- Direct Deposit - Automatic Bill Pay
- Joint accounts
- Financial power of attorney
- Representative payee
- Trusts
- Money management



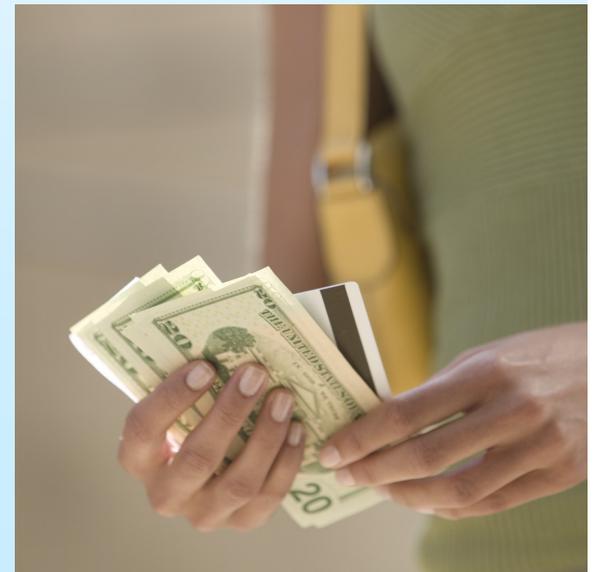
- **Health Care/Personal Care Alternatives**

- Health care default surrogate law
- Health care power of attorney
- Health care “living will” instructional directive
- Advance directive
- POLST/MOLST



# Direct Deposit – Automatic Bill Pay

- Paying bills is a frequent issue
- Direct Deposit of income
  - Required by Social Security and increasingly pensions and other benefits
  - Assures that money is in the account
- Direct pay on recurring bills
  - Utilities
  - Credit cards
  - Taxes – fees



# Joint Accounts



- **“And” accounts require two signatures**
- **Convenience accounts**
- **Joint account default for most banks**
- **Any person named on a joint or Convenience account can empty the account**
- **Benefit and Risk**
- **Most effective when combined with direct deposit and automatic bill pay**

# Durable Financial Power of Attorney

- **Legal Document**
- **Appointing an Agent to act**
- **On behalf of the Grantor**
- **Authority is that granted in the document**
- **If “Durable” can be used if the Grantor is incapacitated**
- **Effective when signed, unless otherwise described**



# Financial Power of Attorney: How Created

- **Must have capacity at the time a POA is created**
- **Recommend consultation with an attorney experienced in this area of the law**
- **More than a fill in the blanks form**
- **Benefit – Agent has authority to act**
- **Risk – Agent has authority to act**
- **Careful selection of agent(s)**
- **Drafting for accountability**

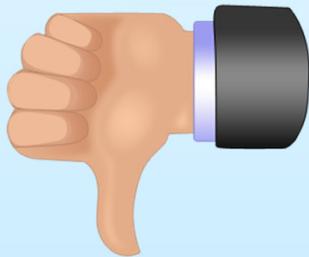


## PoA Advantages/Disadvantages

---



- ✓ Promotes autonomy – puts you in drivers seat
- ✓ Avoids guardianship
- ✓ Cuts costs
- ✓ Helps family members



- ✓ Lack of monitoring
- ✓ Unclear standards for agent conduct
- ✓ Lack of awareness of risks
- ✓ Broad decision-making authority

## Types of POA Abuse

---

### **In creating POA** (power given, not taken)

- Incapacity at execution
- Forgery/Fraud/Misrepresentation
- Undue influence

### **Implementing POA** (agent is a fiduciary)

- Transactions exceeding intended authority
- Transactions conducted for self-dealing
- Transactions contravening principal's expectations

# Uniform Power of Attorney Act

---

- ✓ Clear statement of agent's duties
- ✓ Act in accord with principal's expectations, best interests
- ✓ Stringent requirements for exercising "hot powers" likely to dissipate property or alter estate plan
- ✓ Third party refuse to honor if suspect abuse
- ✓ Liability of agents who commit malfeasance
- ✓ See [www.nccusl.org](http://www.nccusl.org) .

# Representative Payee



- Social Security (VA)
- Must provide due-process protection
- Application, allegation of incapacity
- Verification by SSA (form to Doctor)
- Notice to beneficiary – object to need or proposed payee
- Appointment by SSA
- Termination by application from beneficiary with documentation of capacity

# Representative Payee

- Reporting Annual, paper or online
- Guidelines on spending
- Separation of funds
- Titling of account
  
- Concerns:
  - Nominal due process
  - Minimal accounting to SSA only
  - SSA does not share
  - SSA benefits only



# Trusts

- A trust is an entity, that can own, buy, sell and manage assets
- A Trust can provide for successor trustees
- And set conditions for successor trustees taking over
- Trustee is less likely to be challenged in legal authority; very clear law on what trustee can and can't do
- Very helpful with complex assets
  - Rental property
  - Complex investments
- Harder to challenge than a POA
- More expensive to create; used for complex or substantial assets



# Money Management Services



- **Receive and account for income, pay expenses, provider personal financial management services**
- **Authority is as granted by contract**
- **Accountability is as required by contract**
  - **Require accounting and records to third party**
- **Regulation if at all is by state law**
- **Should be bonded and insured**
- **Money managers are not decision-makers**

# Fashion Police

- Help, need to file for Guardianship of Mom
- Money in trust
- Bills paid by accountant
- House keeper
- Cook
- Driver
- Doctors are god





# Health Care Advance Directives



# Landscape of Health Decisions Law Today

1. **Default Surrogate Laws**
2. **Health Care Advance Directives**
  - Health Care DPAs
  - Living Wills
  - Special Mental Health Advance Directives
3. **Out-of-Hospital DNR Laws**
4. **Organ Donation Laws**
5. **Guardianship Laws**
6. **Physician Orders for Life-Sustaining Treatment (POLST/MOLST/POST)**
1. **Physician Aid in Dying**

## 30+ Years of Research on Advance Directive Documents...

- Most people don't do.
- Hard to understand the forms.
- Standard form not useful guidance.
- People change.
- Agent/proxy slightly better than clueless.
- Health care providers clueless about the directive.
- Even if providers know directive exists, it's lost in space.
- Even if in the record, it's still lost in space.

# Communications Approach

## “Advance Care Planning”

- **Less focus on legal formalities**
- **Legal focus primarily on naming a proxy**
- **Discussion focused (with proxy, family, health care providers)**
- **More broadly focused on values, spiritual questions, family matters**
- **Less treatment focused**
- **Developmental and iterative in nature**

## Poster Child of ACP: The La Crosse Model - “Respecting Choices”

Study examining 2007-08 data, that under Gundersen Health Systems program:

- 99.4% of patients had an AD in the medical record at the time of death,
- In 99.5% of cases, medical treatment was in accord with patient wishes.

*J Am Geriatr Soc.* 2010 Jul;58(7):1249-55

Individuals are assisted in advance planning by trained “facilitators” through three stages of health: (1) healthy stage, (2) progressive advanced illness, (3) nearing EOL.

## Question

Do you have your own formal written  
advance directive?

Yes

No

## Self-Help Workbook Examples...

- ❑ **Finding Your Way: A Guide for End-of-Life Medical Decisions**, by the Center for Healthcare Decisions  
Sacramento Healthcare Decisions
- ❑ **Caring Conversations**, The Center for Practical Bioethics
- ❑ ***Good to Go* Toolkit and Resource Guide**, Compassion and Choices
- ❑ **Thinking Ahead – My Way, My Choice, My Life at the End**, California Dept. of Developmental Services
- ❑ **Consumer’s Tool Kit for Health Care Advance Planning**  
ABA Commission on Law and Aging
- ❑ **MyDirectives.com** - Free, interactive web-based program and registry

# Tools

- Appointing Health Care Proxy
  - Appointment of proxy
  - Durable power of attorney for health care
- Directives
  - Living will forms
  - Values History
- ACP discussions
  - Workbooks/Guides
- Converting patient wishes into actual plan of care with teeth: POLST

# Tools for Proxies

## **Making Medical Decisions for Someone Else: A How-To Guide**



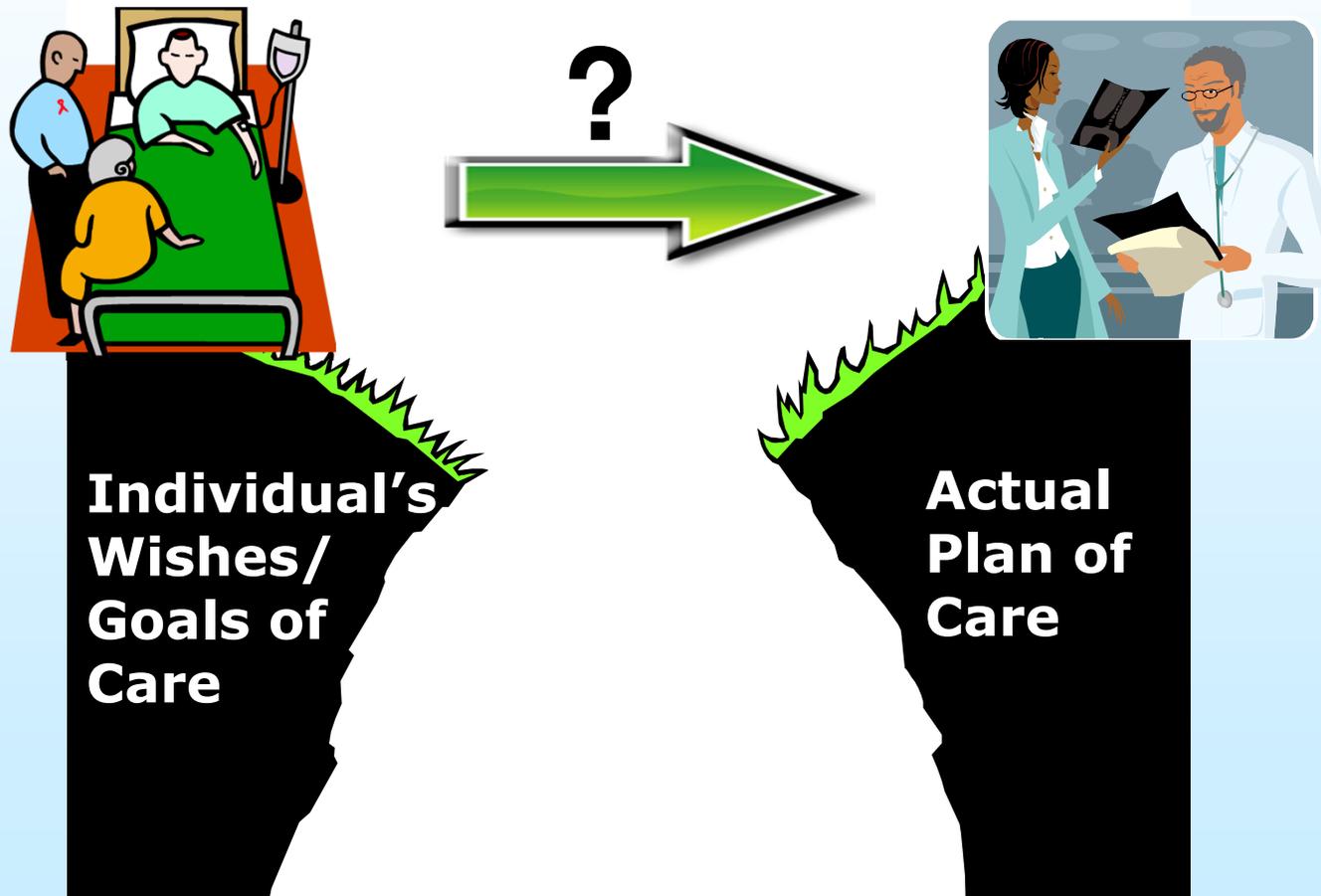
[www.americanbar.org/groups/law\\_aging/resources/health\\_care\\_decision\\_making/Proxyguide.html](http://www.americanbar.org/groups/law_aging/resources/health_care_decision_making/Proxyguide.html)

The American Bar Association  
Commission on Law and Aging

# Key Questions for Any Major Treatment Decision

1. Will treatment make a difference?
2. Do burdens of treatment outweigh benefits?
3. Is there hope for recovery?
  - If so, what will life be like afterward?
4. What does the patient value?
  - What is the goal of care?

# The Big Gap in the ACP Process



Solution? Instead of standardizing patients' directives, standardize what providers have to do to ascertain and implement patients' wishes?

Already have some experience with this:

Out-of-Hospital DNR Orders, but...

- Limited to CPR
- Not required to follow patients across care settings
- No obligation to offer an OOH-DNR order to any patient

# The POLST Paradigm

Additional, systemic step to bridge gap between patient's goals/preferences and implementation of an actual plan of care.

Four actions required:

1. **Discussion: Find out patient's goals/wishes re: CPR, care goals (comfort vs. treatment), N&H, etc.**
2. **Translate into doctors orders on visually distinct medical file cover sheet.**
3. **Ensure order set follows patient across care settings.**
4. **Review**

**POLST is not a form, it's a Process.**



**FORM SHALL ACCOMPANY PATIENT/RESIDENT WHEN TRANSFERRED OR DISCHARGED**

**Physician Orders  
 for Scope of Treatment (POST)**

This is a Physician Order Sheet based on the person's medical condition and wishes. Any section not completed indicates full treatment for that section. When need occurs, first follow these orders, then contact physician.

Last Name

First Name/Middle Initial

Date of Birth

**Section A**  
 Check One Box Only

**CARDIOPULMONARY RESUSCITATION (CPR): Person has no pulse and is not breathing.**  
 **Resuscitate (CPR)**                       **Do Not Attempt Resuscitation (DNR/no CPR)**  
 When not in cardiopulmonary arrest, follow orders in B, C, and D.

**Section B**  
 Check One Box Only

**MEDICAL INTERVENTIONS: Person has pulse and/or is breathing.**  
 **Comfort Measures** Treat with dignity and respect. Keep clean, warm, and dry. Use medication by any route, positioning, wound care and other measures to relieve pain and suffering. Use oxygen, suction and manual treatment of airway obstruction as needed for comfort. **Do not transfer to hospital for life-sustaining treatment. Transfer only if comfort needs cannot be met in current location.**  
 **Limited Additional Interventions** Includes care described above. Use medical treatment, IV fluids and cardiac monitoring as indicated. Do not use intubation, advanced airway interventions, or mechanical ventilation. **Transfer to hospital if indicated. Avoid intensive care.**  
 **Full Treatment** Includes care above. Use intubation, advanced airway interventions, mechanical ventilation, and cardioversion as indicated. **Transfer to hospital if indicated. Include intensive care.**  
*Other Instructions:* \_\_\_\_\_

**Section C**  
 Check One Box Only

**ANTIBIOTICS**  
 **No Antibiotics**  
 **Antibiotics**  
*Other Instructions:* \_\_\_\_\_

**Section D**  
 Check One Box Only

**Medically Administered Fluids and Nutrition: Oral fluids and nutrition must be offered if medically feasible.**  
 **No IV fluids (provide other measures to assure comfort)**                       **No feeding tube**  
 **IV fluids for a defined trial period**     **Feeding tube for a defined trial period**

# Compare:



	<b>POLST Paradigm</b>	<b>Advance Directives</b>
<b>Population:</b>	<b>Advanced progressive illness</b>	<b>All adults</b>
<b>Timeframe:</b>	<b>Current care/ current condition</b>	<b>Future care/ future conditions</b>
<b>Where completed:</b>	<b>In medical setting</b>	<b>In any setting</b>
<b>Resulting product:</b>	<b>Medical orders</b>	<b>Advance directive</b>
<b>Surrogate role:</b>	<b>Can consent if patient lacks capacity</b>	<b>Cannot do</b>
<b>Portability:</b>	<b>Provider responsibility</b>	<b>Patient/family responsibility</b>
<b>Periodic review:</b>	<b>Provider responsibility</b>	<b>Patient/family responsibility</b>

# Challenges

1. Ensuring the quality of the conversation underlying ACP and POLST.
2. Training health care providers (Facilitators).
3. Educating health care agents/proxies/guardians.
4. The extent of reliance on default surrogates for those who have done no advance care planning.
5. Evaluating protections for vulnerable population.
6. Decision-making for those who have no appointed proxy.
7. Relationship of the court and guardian to an appointed proxy.

# Default Surrogate Laws

## (Family Consent)

---

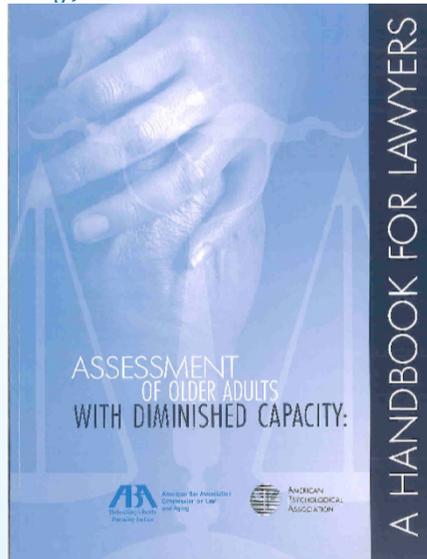
- **Range/Priority of Surrogates**
- **Scope of Decision Making Authority**
- **Triggers/Pre-conditions**
- **How Disagreements are Handled**
- ***Close Friend and Unbefriended Patient***

Summary chart:

<http://new.abanet.org/aging/Pages/StateLawCharts.aspx>



## The APA-ABA Collaboration



### ***Assessment of Older Adults With Diminished Capacity: A Handbook for Lawyers (2005)***

- ABA Commission on Law and Aging (COLA) & APA

Special Offer for webinar attendees -  
order before December 31, 2012

\$10.00

Send check to:

ABA Commission On Law and Aging

740 15<sup>th</sup> Street NW

Washington, DC 20005

Bulk pricing also available

# Questions



# Thank You!

- Charlie Sabatino
  - [Charles.Sabatino@Americanbar.org](mailto:Charles.Sabatino@Americanbar.org)
- Erica Wood
  - [Erica.Wood@Americanbar.org](mailto:Erica.Wood@Americanbar.org)
- David Godfrey
  - [David.Godfrey@americanbar.org](mailto:David.Godfrey@americanbar.org)