

ALTERNATIVES TO CONSERVATORSHIP IN MASSACHUSETTS

Prepared by the Mental Health Legal Advisors Committee
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What is a Conservatorship?

While a guardian may have the authority to handle small sums of money (like monthly Social Security income), a guardian does not have the authority to make financial decisions regarding significant income or assets. A person with significant income and assets may require a conservator.

A **conservator** makes decisions regarding the **protected person's** property and financial matters. A conservator serves as a **fiduciary** and manages property and/or assets, and has a duty to act in the best interests of the incapacitated person, not in the conservator's own self-interest.¹ A conservatorship, similar to a guardianship, is only necessary and appropriate where the incapacitated person is unable to make reasoned decisions regarding his or her finances.²

Alternatives to Conservatorship

Conservatorship may be appropriate under some circumstances. However, in most situations, one should consider less restrictive alternatives. The appropriate alternative depends, in part, upon the individual's degree of mental capacity and ability.

Any limitation on a person's autonomy should seek to meet both the needs of the individual as well as maximize the person's rights and liberties. Alternatives to guardianship are less restrictive to the individual and can help eliminate both the costs and burden of court involvement. Below are some alternatives to guardianship and conservatorship.

The purpose of estate planning

The purpose of estate planning is to make decisions about financial matters. Before doing so, the individual should consult with an experienced estate planning attorney. There are several financial planning tools described below that can be used to help a person maintain autonomy while also protecting his or her financial interests.

Representative Payee

A representative payee is person who receives United States Social Security Disability Insurance (SSDI) or Supplemental Security Income (SSI) for a person who is not fully capable of managing their own benefits.

Appointment of a representative payee

To become a representative payee, an individual must apply at the local Social Security Administration (SSA) office. There must be medical documentation that the person is unable to manage his or her own funds. A lawyer does not need to be involved in the appointment of a payee. The payee applicant must complete a Request to be Selected as Payee (Form SSA-11) and submit documents to prove his or her identity. Additionally, the applicant will need to provide his or her social security number participate in a face-to-face interview.

Responsibility and authority of a representative payee

A representative payee is expected to assist the person with money management, along with providing protection from financial abuse and victimization. Some of the payee's main responsibilities include:

- determining the needs of the individual and using the payments to meet those needs;
- putting any left over money from the SSDI or SSI payment in an interest bearing account for the beneficiary's future needs;
- reporting any changes that could change the individual's eligibility for payments;
- keeping records of how all payments are spent or saved; and
- completing an annual report showing how money has been spent and saved on behalf of the individual;³
- keeping the recipient's funds separated from his or her own funds

For more information, see:

- [Rights of Massachusetts Individuals with a Representative Payee Handout](#)⁴
- "When People Need Help Managing their Money," available at <http://www.socialsecurity.gov/payee/>

Power of Attorney⁵

A Power of Attorney is a legally enforceable document where a trusted person, called an Attorney-in-Fact, is appointed by the principal to manage and protect the money, property, and business affairs and make financial decisions.

Appointment of an Attorney-in-Fact

In Massachusetts, every competent adult has the right to appoint an Attorney-in-Fact to make financial decisions on the principal's behalf. The principal still may make all of his or her own financial decisions when he or she has capacity, but the Attorney-in-Fact may at the same time act on behalf of the principal or may be able to take over if the person becomes incapacitated. The arrangement depends on how the Power of Attorney document is written. Keep in mind that "attorney" in this context is a mere title. The Attorney-in-Fact need **not** be an attorney.

When an individual becomes incapacitated but does not have an Attorney-in-Fact, an interested person may petition the court to protect the person's estate. The court may appoint a Conservator to make financial decisions on the individual's behalf. With a Power of Attorney in place, the Attorney-in-Fact has the legal authority to make financial decisions without the burdens of the court process of appointing a conservator. This alternative to Conservatorship gives the incapacitated person the opportunity to choose the person who will make financial decisions on his or her behalf rather than the court appointing a person to make these decisions. It also allows the person to dictate when the authority will go into effect, and the extent of the authority.⁶ In cases with limited income and assets, a guardianship or representative-payee (see above) may suffice to cover routine financial decisions.

Authority of an Attorney-in-Fact

The Attorney-in-Fact may be authorized to complete a broad range of activities, including signing checks, making investment decisions, entering into contracts, making gifts, creating trusts and transferring property. The principal has discretion in deciding the amount of power the Attorney-in-Fact will have. Limited powers of authority restrict the attorney to tasks such as signing checks and overseeing bank accounts. However, general powers of authority allow the attorney to manage all of the individual's financial matters.

Powers of Attorney can be a robust estate planning tool. This tool should be used with discretion and care. Consult with an experienced estate planning attorney to draft this document. The attorney-in-fact should be selected with care, as he or she will have broad powers of the principal's estate (without court oversight). The person must be trustworthy and reliable.

Difference between a "Durable" and "Non-Durable" Power of Attorney

A Durable Power of Attorney allows the agent to continue acting on behalf of an individual even if he or she becomes incapacitated. A Non-Durable Power of Attorney becomes ineffective as soon as the individual becomes incapacitated. If the principal cannot make decisions due to incapacity, the durable power of attorney is still active while a non-durable power of attorney would be inactive. Thus, a Non-Durable Power of Attorney could be impractical because it terminates when it is most essential.

Springing Power of Attorney

A Springing Power of Attorney is executed when a person is competent, but does not come into effect until the individual is incapacitated.⁷ A springing power of attorney can be drafted in order to define the "triggering event" of incapacity.⁸ The definition of incompetence should be in the document or should state that a medical examination should determine if the individual is incapacitated.⁹ Keep in mind that while this sounds like a good option in theory, it can sometimes be difficult to get financial institutions to honor springing powers of attorneys because of the added documentation required to prove incapacity.¹⁰

Trusts

A trust is a legal arrangement through which a person or an organization, called the **trustee**, holds assets for another person, called the **beneficiary**, according to the terms of the trust document. A trust can be used as an alternative to a conservatorship. Generally, there is no court involvement unless there is a dispute.

Appointment and Creation of a Trust

A trust can be created in many ways (i.e. a written instrument, an oral declaration, a will, or a court order). One should consult an attorney to appoint a Trustee and/or create a written trust.

Responsibility and Authority of a Trustee

When a beneficiary places his or her property into a trust, the trustee is given legal rights to the property but is obligated to act in the best interest of the beneficiary. There are several different kinds of trusts, including ones created for the purpose of providing for a minor child or an individual with special needs, trusts created for the purpose of giving to charities, and trusts created to minimize estate taxes.

Special or Supplemental Needs Trust

A Special or Supplemental Needs Trust (SNT) may be a useful tool for individuals receiving public benefits or disability benefits. A SNT may be used so that a person's assets do not place him or her over the asset limit for certain benefits as a way of protecting the beneficiary.¹¹ SNTs must meet the requirements discussed below to be valid.

Requirements of a SNT

For a SNT not to be counted toward the asset limit for the purpose of eligibility for public benefits, the SNT must be for the sole benefit of the person with the disability but managed by someone else, a **trustee**; and contain no direct payments to the beneficiary.

What expenses may be paid for from an SNT

The following are permissible expenses that a trustee may pay from an SNT without disqualifying the beneficiary for public benefits:

- payment for attendant care, dental care and eyeglasses;
- educational and vocational training expenses;
- recreational expenses;
- transportation (including reasonable vehicle purchase); and
- expenses for a telephone.¹²

Money from the SNT may not fund food, shelter, or clothing expenses because those are presumed to be already funded from government benefits. The SNT funds are meant to supplement the needs of the beneficiary that are not being met by their benefits, such as payment for items that add pleasure to a person's life. For example, this could include purchasing furniture or a television.

There may be other requirements as well, and different rules, depending upon the benefit program(s) for which the beneficiary is applying. Consult with an experienced trust and estates attorney for further information on setting up a SNT as careful drafting is essential.

Glossary

Conservator	A person who is appointed by a court to manage the estate of a protected person and includes a limited conservator, temporary conservator and special conservator. ¹³
Fiduciary	A person who is a personal representative, guardian, conservator, and trustee. ¹⁴
Power of Attorney	A durable power of attorney is a power of attorney by which a principal designates another his attorney-in-fact in writing and the writing contains the words “This power of attorney shall not be affected by subsequent disability or incapacity of the principal, or lapse of time,” or “This power of attorney shall become effective upon the disability or incapacity of the principal,” or similar words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding the principal’s subsequent disability or incapacity, and, unless it states a time of termination, notwithstanding the lapse of time since the execution of the instrument. ¹⁵
Attorney-In-Fact	The person whom Principal confers authority to in a Power of Attorney. ¹⁶ The person need not be an Attorney.
Beneficiary	The person that receives benefits, profits, or advantages through any present or future interest. ¹⁷
Trustee	Fiduciary for a trust. The person who administers the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries. ¹⁸
Petitioner	The person asking to be appointed guardian through filing for guardianship. ¹⁹
Respondent	The incapacitated person and/or the person who petitioner is seeking to be the guardian for. ²⁰
Protected person	A person for whom a conservator has been appointed. ²¹

ENDNOTES

¹ MASS. GEN. LAWS ch. 190B, § 5-419.

² MASS. GEN. LAWS ch. 190B, § 5-409. *See also* 104 CMR. 28.10.

³ Frequently Asked Questions (FAQs) for Representative Payees, U.S. SOC. SEC. ADMIN., *available at* <http://www.ssa.gov/payee/faqrep.htm#a0=4>.

⁴ Rights of Massachusetts Individuals with a Representative Payee, MENTAL HEALTH LEGAL ADVISORS COMM., *available at* http://www.mhlac.org/Docs/Representative_payees.pdf.

⁵ MASS. GEN. LAWS ch. 201D §§ 5-501, 5-502.

⁶ Alternative to Conservatorship: A Durable Power of Attorney, MASS. GUARDIANSHIP ASSOC., *available at* <http://www.massguardianshipassociation.org/information/alternatives-to-guardianship-and-conservatorship/alternative-to-conservatorship-a-durable-power-of-attorney/>.

⁷ Jeffrey Bloom & Howard Margolis, Example of Springing Attorney Language, 56 MASS. PRAC.: ELDER LAW § 2:20 (2014).

⁸ *Id.*

⁹ Patricia M. Annino, 23 MASS. PRAC.: ESTATE PLANNING § 3.5 (3d. ed. 2014).

¹⁰ 56 Mass. Prac., Elder Law § 2:19

¹¹ Sean M. Dunphy, Nature and Kinds of Trusts, 22 MASS. PRAC.: PROBATE LAW AND PRACTICE § 37.11 (2d ed. 1997).

¹² This list is not exhaustive.

¹³ MASS. GEN. LAWS ch. 190B § 5-101

¹⁴ MASS. GEN. LAWS ch. 190B § 1-201.

¹⁵ MASS. GEN. LAWS ch. 190B § 5-501.

¹⁶ *Id.*

¹⁷ MASS. GEN. LAWS. ch. 190B, § 1-201

¹⁸ MASS. GEN. LAWS. ch. 203E, § 801.

¹⁹ Appointing a Guardian, GCP MA-CLE 5-1

²⁰ MASS. GEN. LAWS. ch. 190B, § 5A-102.

²¹ *Id.*