

Guardianship or Alternatives?

What are the Options and
How do I Choose?

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A Vision of a Good Life

Educators' Role

“The purposes of [IDEA] are ... to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and **prepare them further for education, employment, and independent living...**” 20 U.S.C.A. § 1400(d)(1)(A)

IDEA & Transfer of Rights

Unless otherwise planned, on student's 18th birthday, all rights and responsibilities granted to parents under IDEA transfer to the student.

- e.g. the parental handbook is now the student's rights, unless parents are invited notices will be sent to the student only, and the student must be present for meetings to occur.
- See ARSD 24:05:30:16.01, and "Technical Assistance Guide for Transfer in the IEP," updated July 2016:

<https://doe.sd.gov/sped/documents/TA-Guide.doc>

Schools must notify students and parents of rights transfer no later than the student's 16th birthday. *20 USC 14010*. Students must have opportunities to take part in their education and transition plans.

Other Plans/Alternatives to Transfer of Rights

- Full Guardianship/Conservatorship,
- Limited Guardianship and/or Conservatorship,
- Supported Decision Making,
- Durable Power of Attorney,
- Healthcare Power of Attorney,
- Representative Payee Designation,
- Or any combination of the above and/or other supports to form an individualized plan - **not a one-size-fits-all strategy!**

Full Guardianship and Conservatorship

- Prevents Transfer of Rights, if completed before 18th birthday
- Traditionally a default option, but also the most restrictive:

“The typical ward [protected person] has fewer rights than the typical convicted felon By appointing a guardian, the court entrusts to someone else the power to choose where they will live, what medical treatment they will get and, in rare cases, when they will die. It is, in one short sentence, **the most punitive civil penalty that can be levied against an American citizen.”**

(House Select Committee on Aging, H.R. Rpt. 100-641
(opening statement of Chairman Claude Pepper))

What is a Guardianship?

Relationship in which one or more individuals (guardians/conservators) make decisions on behalf of another individual (protected person).

- **Guardians** make decisions about everyday life (e.g. healthcare, food, living, associations, work, clothing, marriage, etc.)
- **Conservators** make decisions about finances (e.g. spending money, savings, real property ownership, personal property management, etc.)

Limited Guardianship/Conservatorship

- Can be expressly limited in TIME or in SCOPE - ask the court to order protection only for what's needed.
- The protected person retains all rights that have not been granted to the guardian/conservator. See SDCL 29A-5-118.

"A guardian/conservator shall exercise authority **only to the extent necessitated by the protected person's limitations, and if feasible, shall encourage the protected person to participate in decisions, to act on his own behalf, and to develop or regain the capacity to manage personal/ financial affairs.** A guardian/conservator shall, to the extent known, consider the express desires and personal values of the protected person when making decisions, and shall otherwise act in the protected person's best interests and exercise reasonable care, diligence, and prudence." SDCL 29A-5-402, 405

Guardianship Procedures

Can only be created by a court, legal counsel recommended.

- State forms and details at:

<http://uj.s.sd.gov/Forms/guardianship.aspx>

- Full Details (aka, the law – SDCL 29A-5):

https://sdlegislature.gov/Statutes/Codified_Laws/DisplayStatute.aspx?Type=Statute&Statute=29A-5

- South Dakota Bar, Attorney Referral:

www.FindALawyerInSD.com

Power of Attorney

While a guardianship takes away rights, a power of attorney creates rights

Commonly used in business and in estate planning

One competent person (the *principal*) gives another (the *attorney-in-fact or agent*) the right to act on their behalf in certain situations, e.g.

- Healthcare Decisions – provide copies to providers
- Financial Management – e.g. banking, bills, cell phone plans

Power of Attorney Procedures

- Requires notarized signature of competent principal.
- Can nominate or give agent power to designate a guardian if later necessary.
- Court is not involved - unless contested.
- Good idea to seek legal counsel in drafting – tailor it to individual needs as specifically as possible to promote independence.
- State Bar Association has contacts and resources: www.findalawyerinsd.com

Supported Decision-Making

Supported Decision Making (SDM) is a fancy name for what we all do everyday – ask people we trust for help in making decisions.

Sometimes it seems easier to just decide for someone, but by allowing them to make their own decisions and mistakes, we teach self-determination and allow for growth.

Supported Decision Making Procedures

- Flexible approach.
- Can be combined with any other the previous relationships, including guardianship!
- Many states have formalized this process in statute. Some require IEP teams to include discussions starting as early as elementary school. Some now have form agreements in their laws.
- See <http://www.supporteddecisionmaking.org> for example agreements and ideas – then get creative!

How to Decide Which Option is Best?

- Charting the Life Course
- Tool for Exploring Decision Making Supports
- Examples/Others' Stories

Questions?



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