

About the author



Mr. Snider is a former police officer, a board certified respiratory therapist, an author, and Elder Law attorney. This diverse background gives Mr. Snider the unique ability to understand patients' social, medical & legal needs. With advanced degrees in Health Sciences, Psychology and a Doctorate of Law (JD), Mr. Snider has worked in and managed departments in ICUs, LTACHs, skilled nursing facilities, home care and hospice. He is a member of the Utah State Bar, the American Bar Association, American Inns of Court and hospital ethics boards. In 2015 Mr. Snider formed the Snider Law Group with the goal of helping health care providers and patients navigate complex legal issues. Mr. Snider is always willing to meet pro bono (free) with health care providers, patients and family members to answer any initial questions regarding Asset Protection Trusts, POAs, Advanced Health Care Directives or Guardianships/Conservatorships.

Contact Us

If you have questions or require additional information you can contact Mr. Snider at:

2825 East Cottonwood Parkway, Suite 500

Salt Lake City, Utah 84121

Mobile: 801-837-2598

Email: AttorneyKentSnider@gmail.com

Web: sniderlaw.org



The Clinician's Guide to: *POAs,

***Guardianships, *Conservatorships, and**

***Health Care Directives**

The Clinician's Guide to -

- * Powers of Attorney,***
- * Guardianships,***
- * Conservatorships, and***
- * Health Care Directives***



Kent E. Snider, JD, RCP

Table of Contents

Overview	1
Plan Ahead.....	2
What is a Power of Attorney.....	2
Durable vs. Springing POA.....	1
Capacity, Making Changes & Notarization of a POA.....	2
Things to look for when examining a POA	2
Considerations for Health Care Providers.....	3
Guardianships and Conservatorships	4
What is a Guardian.....	4
“Incapacity”	4
What is a Conservator	4
Duties and Scope of Authority of a guardian/conservator	5
Emergency Appointment of a guardian/conservator	6
Health Care Agents and Advanced Directives.....	7
Notes to Health Care Providers.....	7-9
Additional Resources for Patients and Families.....	10

Additional Resource

Utah Office of Public Guardian

195 North 1950 East
Salt Lake City, Utah 84116
Phone: 801-538-8255
Web: opg.utah.gov

The OPG is responsible for providing public guardianship and conservatorship services to incapacitated adults without family members or friends available to serve as their guardians.

Utah Legal Services

205 North 400 West
Salt Lake City, Utah 84103
Phone: 801-924-3182
Web: andjusticeforall.org/uls

ULS provides legal services to low-income parties in several areas. ULS may assist an incapacitated adult who wants to contest a guardianship or conservatorship.

Legal Aid Society of Salt Lake

205 North 400 West
Salt Lake City, Utah 84103
Phone: 801-328-8849
Web: legalaidsocietyofsaltlake.org

LAS provides legal services to low income families and individuals, and victims of domestic violence. They will provide representation for proposed protected persons and protected persons contesting a guardianship/conservatorship. They also contest actions filed by the OPG.

Plan Ahead

An adult who loses the capacity to make decisions needs special protection. Planning ahead can help ensure a patient's preferences and values are protected. When making decisions about health care and finances, the saying, "An ounce of prevention is worth a pound of cure" is very true. Informed decisions made when a patient is competent are *easier, better and less expensive*. The best clinical care you can provide is to encourage your patients and their loved ones to **talk about it**.

The best health care providers are the ones who talk with their patient about the future.

What is a Power of Attorney?

A power of attorney, (POA), is a document in which one person (called the "principal") gives to another person (the "agent" or "attorney in fact") the authority to act on behalf of the principal.

A POA can be very broad and grant authority to perform a wide range of tasks, (i.e. handling bank accounts, selling real property, running a business, applying for public benefits, etc.). A POA can also be very limited, and restrict the agent to only one or two specific tasks, (i.e. selling a specific piece of real estate or accessing a principal's bank accounts). If a patient has executed a POA, read it very carefully so you understand what powers have been granted. In every circumstance the agent cannot use the principal's assets contrary to the principal's wishes and a Medical POA cannot make medical decisions contrary to what is the principal's best interest.

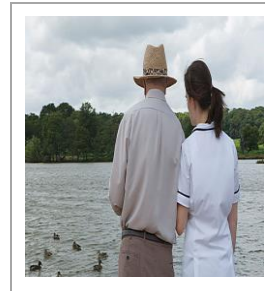
Overview- What Do I Need?

Power of Attorney



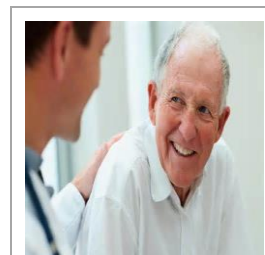
A power of attorney, (POA), is a document in which one person (called the "principal") gives to another person (the "agent" or "attorney in fact") the authority to act on behalf of the principal. A POA cannot grant an agent the power to keep a patient in a locked or long term care facility against their will.

Guardianship vs. Conservatorship



A **guardian** is a person or institution appointed by a court to make decisions about an incapacitated adult's (protected person's) well-being (their care). A **conservator** is a person or institution appointed by the court to make decisions about a incapacitated adult's estate. Both provide better oversight and protection of an incapacitated adult.

Advance Health Care Directives



A **Living Will** is a document outlining a patient's wishes regarding medical care. A living will does not go into effect until a patient is deemed incapacitated or unable to communicate. A **Medical POA** is a document in which a patient appoints an agent to make health care decisions on their behalf.

Durable vs. Springing Power of Attorney

A "**Durable**" power of attorney means the agent can act even if the principal becomes disabled or incapacitated. A POA is durable if it contains the words - "this power of attorney shall not be affected by disability of the principal,"

A "**Springing**" Power of Attorney means the agent can act ONLY WHEN a certain event occurs, usually when the principal becomes disabled or incapacitated. A Springing POA should contain the words - "this power of attorney shall become effective upon the disability of the principal"

If a POA contains the words in paragraph number 1, ("**Durable**") the agent's authority begins immediately and continues even if the principal becomes disabled or incapacitated.

If a POA contains the words in paragraph number 2, ("**Springing**") the agent's authority does not begin until the principal becomes disabled or incapacitated and continues only as long as the principal remains incapacitated. If a POA is "Springing" the document should describe how the principal's disability or incapacity is to be determined

Mental Capacity to Sign a Power of Attorney?

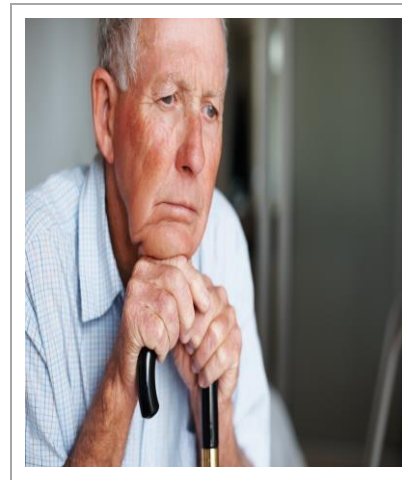
Before signing a POA, the principal must have sufficient mental capacity to – (1) Understand who the agent is, and (2) Understand that they are appointing the agent to make decisions (medical and/or financial) regarding the principal's affairs. The principal does not have to understand how the agent will manage the principal's affairs, only that he/she is giving the agent the power to act on their behalf.

Changing a Power of Attorney

As long as a principal is competent they can revoke or change their POA at any time. Changes should be notarized to prevent fraudulent changes, however, notarization is not required in Utah.

- A revocation must be in writing, signed, and dated. It does not need to be notarized.
- When a notary signs a POA they are only witnessing the principal's signature. Notarization does not mean the principal was competent.
- A non-durable POA terminates upon the incapacity of the principal.
- A durable POA automatically terminates upon the death of the principal.

Things to Look for When Examining a POA



A vulnerable adult can be "tricked" into signing a POA and clinicians should always question the validity of a POA and question if the agent is actually acting in the principal's best interest.

There are many POA forms available on the internet — but many of them are too general and some do not comply with Utah law. The biggest problem with most POAs is they do not protect a patient against financial exploitation or abuse.

- A POA does not have to be witnessed, and it does not have to be signed by the agent, but if it's not, you should question its validity.
- Because there is no court oversight, there is the real potential for exploitation and abuse. For this reason alone, anyone

- There is a huge difference between a durable POA and a medical POA. The granting of a Durable POA does not always give an agent the power to access medical records or make medical decisions on behalf of the principal. Medical POAs are discussed under the Advanced Directive section below.

The primary difference between a POA and a guardianship/conservatorship is the lack of judicial oversight. Guardianships and Conservatorship require periodic reporting to the court. The advantage of a POA is it avoids the legal process and expense of a judicial appointment. The major problems with a POA are the results of the advantages – no oversight - minimal accountability and – potential for abuse.

POAs and Health Care Providers

- A personal representative named in a patient's will has no authority to act on behalf of a patient medically or financially. A will does not have any binding authority until a patient's death. A will can always be changed or revoked at any time. Likewise, an agent's authority under a POA ceases at the time of the principal's death.
- If a healthcare provider is presented with a form POA or a fill in the blank POA not drafted by a reputable attorney they should carefully review the patient's family/social history and contact their legal department if there are any concerns.
- Staleness - Unless a POA includes a termination date, the passage of time does not affect the agent's authority. However, most companies are reluctant to rely on a POA older than a year.

Disability of a Principal

If the principal becomes disabled or incapacitated, Utah Code §75-5-501 requires that the agent:

- within 30 days of the disability, notify all interested persons of the agent's changed mental capacity. This includes every member of the principal's family, and every company and individual who transacts business with or provides care for the principal.
- upon written request from any "interested person", an agent must provide a copy of the POA.
- upon written request of any interested person, the agent must provide an accounting of the assets covered under the POA, (unless the power of attorney expressly states the agent does not have to provide an accounting)



An Agent's Accountability under a Power of Attorney

A POA should never state the agent does not have to provide an accounting. Any type of wording in the POA that states the agent does not have to provide an account should be a red flag, especially if you already have concerns regarding the agent's relationship with or treatment of the patient.

If a healthcare provider suspects abuse or neglect of a venerable adult they **MUST** report it to Adult Protective Services.

<https://daas.utah.gov/adult-protective-services/aps-form/>.
[801-538-3910 or Toll free: 877-538-4395]

Guardianship and Conservatorship

A **guardian** is a person or institution appointed by a court to make decisions about an incapacitated adult's (protected person's) well-being

- For a court to appoint a guardian, it must find the person is:
- Incapacitated and;
- Appointment is necessary or desirable to provide continuing care and supervision of the incapacitated person.
- **"incapacity"** is measured by functional limitations and requires a judicial determination that an adult's ability to do the following is impaired to the extent that adult lacks the ability, (even with appropriate technological assistance), to meet the essential requirements for –
 - financial protection or physical health, safety, or self-care to:
 - receive and evaluate information;
 - make and communicate decisions;
 - provide for necessities of –
 - food
 - shelter
 - clothing
 - healthcare or safety

A **conservator** is a person or institution appointed by the court to make decisions about a incapacitated adult's estate, (the wages, investments, pensions, Social Security and other government benefits, real property, and personal property - furniture, cash, bank accounts, CD's, stocks, bonds, motor vehicles, jewelry, tools, furs, art, etc.)

- A conservator is under court order to use reasonable care, skill and caution to manage and invest the estate to meet the protected person's needs.
- As long as the conservator acts in the protected person's best interests, they are not personally liable for the protected person's debts or actions.

A person does not have to be incapacitated to have a court appoint a conservator

A conservator may be appointed if a person:

- Is unable to manage their property and affairs due to mental illness, mental deficiency, physical illness, disability, chronic drug or alcohol abuse, confinement, or disappearance, AND,
- The person has property which could be wasted or lost without proper management and oversight.
- A protected person needs assistance in obtaining funds for their support and/or care.

Authority and Duties of a Guardian/Conservator



Serving as a guardian or conservator requires a large amount of time, patience, sensitivity and selfless love. They must always act with the utmost **honesty, loyalty and fidelity** toward the protected person. A guardian and conservator owe a duty to the court, other members of the protected person's family and the protected person's health care providers.

- If the guardianship/conservatorship is **"Limited"** the letters of appointment will list the agent's powers.
- If the guardianship/conservatorship is **"Full"** the guardian has the same powers, rights, and duties a parent has over an un-emancipated minor child.
- Unless limited by the order of appointment, a conservator has the same authority as the protected person. [§75-5-408 U.C.A.](#)

Termination of a Guardian/Conservator

A guardian and/or conservator may resign. However, they cannot simply verbally resign or refuse to carry out their responsibilities. For a guardian/conservator to resign, they must file a request to the court and ask the court to appoint another guardian/conservator.

If the circumstances that justified the appointment of a guardian/conservator change and the protected person no longer needs a guardian or conservator, any interested person, including the protected person, can bring the matter back before the court.

If a health care provider believes a protected person's mental capacity has changed, and the protected person no longer needs a guardian/conservator, They should document their conversation in the patient's medical records, discuss the matter with risk management or legal counsel.



Emergency appointment of a Guardian or Conservator

An emergency appointment of a guardian and/or conservator is a great way to protect a vulnerable adult. An appointment can take as little as 24 hours.

An emergency appointment of a guardian is a good way to get a non-compliant patient into short term skilled nursing care, or memory care.

An emergency appointment of a conservator is a good way to help a patient to apply for government assistance, i.e. Medicaid.

A court may appoint an emergency guardian and/or conservator, who can serve for **no more than 30 days**. The temporary appointment can be extended by court order.



During an emergency appointment:

A **guardian** has the authority to make health care decisions for the protected person, including placement in a skilled nursing facility or a memory care unit.

A **conservator** has the authority to access bank accounts, pay bills, recover lost funds, and apply for governmental benefits.

Note to Health care providers – Social Security will not honor an emergency appoint of a conservator for at least 20 days, even if the patient is in risk of losing their housing or health care. This is a Social Security regulation.

Health Care Agents and Advance Health Care Directives

Note to Health care providers - The University of Utah Center on Aging is a great resource for Advance Health Care Directives: <http://aging.utah.edu/programs/utah-coa/directives/index.php>

Or you can call **Snider Law Group** and we will email you a free AHCD. Under §75-2a-104 U.C.A. any adult can create an AHCD. They can do this by creating a Living Will or Medical Power of Attorney. This means even an adult with limited capacity has the right to create an (AHCD).

- A **Living Will** is a written document outlining a patient's wishes regarding what medical care they would like, if they become incapacitated or unable to communicate their wishes. A living will does not go into effect until the patient is deemed incapacitated or unable to communicate.
- A **Medical Power of Attorney** is a written document in which the patient appoints an agent to make health care decisions on their behalf. A medical POA does not go into effect until the patient can no longer communicate their wishes, or until a physician, APRN or physician assistant determines the patient is incompetent to make decisions regarding their care.



Note to Health care providers - Blinking eyes or squeezing a hand can be appropriate forms of communication, if it is the way the patient routinely and accurately communicates (i.e. trach, quadriplegic or intubated.)

Note to Health care providers - Every adult is presumed to have the capacity to make, change and revoke a health care directive.

Mental Capacity for a Health Care Directive

A person appointing an agent must have sufficient mental capacity to understand they are appointing an agent to make decisions regarding their health care.

Note to Health care providers - A person might have capacity to appoint an agent even if the person does not have the capacity to make health care decisions for himself or does not have the capacity to make an advance health care directive.

- An advance health care directive may be oral or written, but a written document is more reliable. Both a written and oral advance healthcare directive must be witnessed, but do not have to be notarized.
- For an advance health care directive to be enforceable the witness cannot be:
 - Related to the patient by blood or marriage
 - Stand to inherit anything from the patient's estate under a will or by the laws of intestacy
 - An employee of the care facility where the patient is currently receiving care.

An AHCD or POA agent may not admit a patient against their will to a health care facility for long-term custodial placement (other than for assessment, rehab or respite care), even if the patient lacks capacity to make proper health care decisions.

Note to Health care providers – If you have a patient who refuses essential medical services (i.e. home care or SNF placement); especially if the patient has had frequent readmissions, you should contact a family member and advise them to consider a guardianship. This is not a HIPPA violation..

Objections to findings of incompetency

If two physicians determine that an adult lacks healthcare decision making capacity, a patient can challenge the finding at any time, by:

- Submitting a written notice to any health care provider stating that the patient disagrees with their physician's finding, or
- Orally informing a health care provider that they disagree with their physician's findings

Any health care provider who is informed of a patient's challenge of a physician's decisions regarding capacity SHALL promptly inform the patient's appointed agent, the health care facility providing care as well as any health care providers involved in the patient care.

Note to Health care providers – A finding of a physician that a patient lacks health care decision making capacity is NOT in effect if a patient challenges the finding orally or in writing

- The only exception to a patient's objection to a physician's findings is if a Court makes a legal determination that a patient is incapacitated as a part of:
 - An emergency guardianship
 - A permanent guardianship
 - An involuntary commitment (white sheet)

Notes to Health Care Providers

You have noticed several clinical practice notes as you have been reading. Here are a few more notes providers should consider.

- *If an adult does not challenge a finding that they lack health care decision making capacity, health care providers and health care facilities may rely on the decisions made by a surrogate regarding health care decisions.*
 - Exception - placement in a long term care facility (i.e. a SNF or a Memory Care Unit) requires a judicial determination of incompetency.
- *Any health care provider or facilities who relies on a surrogate to make decisions on behalf of an adult has an ongoing obligation to consider whether the adult continues to lack health care decision making capacity.*



Even if a patient has been determined to lack health care decision making capacity, the surrogate and all health care providers shall still consider the expressed wishes of the patient as much as possible.

- *If at any time a health care provider finds that a patient has passed a competency examination or assessment, and the adult has regained health care decision making capacity, the health care provider SHALL record the results of in the patient's medical records AND the adult should be allowed to make their own health care decisions.*