

A Discussion of Prevalent Questions/Topics from Long Term Care Facilities Involving Guardians, Residents' Rights, Durable Power of Attorneys and Discharges

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Disclaimer

Nothing herein should be taken as the official position of the Department of Health and Senior Services.

Additionally, I cannot give you legal advice.

For specific case questions, you will need to speak to your attorney for legal advice.

What is a Guardian?

A guardian is a person appointed by a court to have the care and custody of the person of a minor or of an incapacitated person.

Section 475.010(8), RSMo Definition

Types of Guardians

The Court can appoint a:

Guardian- full powers

Limited guardian- a person whose duties or powers are limited

Standby guardian- a person approved by the court to temporarily assume the duties of guardian of a minor or of an incapacitated person

Section 475.010(8), RSMo - Definitions

Who is an Incapacitated Person?

A person who is unable by reason of any physical, mental, or cognitive condition to receive and evaluate information or to communicate decisions to such an extent that the person, even with appropriate services and assistive technology, lacks capacity to manage the person's essential requirements for food, clothing, shelter, safety or other care such that serious physical injury, illness, or disease is likely to occur. Can include partially incapacitated person.

Section 475.010 (11), RSMo Definitions

What is a Conservator?

A person who is appointed by a court to have the care and custody of the estate of a minor or a disabled person. Can include a limited conservator whose duties or powers are limited.

Section 475.010(3), RSMo Definitions

Who is a Disabled Person?

A person who is:

Unable by reason of any physical, mental or cognitive condition to receive and evaluate information or to communicate decisions to such an extent that the person lacks ability to manage the person's financial resources; or

Can include the terms partially disabled or partially disabled person.

Section 475.010 (6), RSMo Definitions

Court Order Appointing Guardian

In order to appoint a guardian of the person, the Court or Jury must find by clear and convincing evidence that the person for whom a guardian is sought is incapacitated as defined in law and that the respondent's identified needs cannot be met by a less restrictive alternative.

Section 475.079.1, RSMo

Court Order Appointing Conservator

In order to appoint a conservator of the estate, it must be found that the person for whom a conservator of the estate is sought is a minor or is disabled as defined in section 475.010 by a disability other than or in addition to minority and that the respondent's identified needs cannot be met by a less restrictive alternative.

The Court may appoint a conservator of the estate, who may be the same person appointed guardian of the person.

Section 475.079.2, RSMo

The Judgment/Court Order for Guardianship/Conservatorship

The judgment from the Court should state whether the person is under a guardianship, conservatorship or both. The judgment from the Court will also state whether the person is appointed a guardian, limited guardian, standby guardian, conservator or limited conservator. If the guardian or conservator is limited, then the limitations should be stated in the court order.

What is a Durable Power of Attorney?

A written power of attorney in which the authority of the attorney in fact does not terminate in the event the principal becomes disabled or incapacitated or in the event of later uncertainty as to whether the principal is dead or alive and which complies with subsection 1 of section 404.705 or is durable under the laws of any of the following places:

- (a) The law of the place where executed;
- (b) The law of the place of the residence of the principal when executed; or
- (c) The law of a place designated in the written power of attorney if that place has a reasonable relationship to the purpose of the instrument;

Section 404.703(4), RSMo Definitions

Durable Power of Attorney

An attorney in fact is an individual or corporation appointed to act as agent of a principal in a written power of attorney.

The word principal refers to the person for whom the written durable power of attorney is for e.g. the resident.

Section 404.703(1), RSMo Definitions

Durable Power of Attorney

A durable power of attorney does not have to be recorded to be valid and binding between the principal and attorney in fact or between the principal and third persons, except for transactions affecting real estate.

A principal may appoint more than one attorney in fact in one or more powers of attorney and may provide that the authority conferred on two or more attorneys in fact shall or may be exercised either jointly or severally or in a manner, with such priority and with respect to such subjects as is provided in the power of attorney.

Sections 404.705.3 and 404.707.1, RSMo

Durable Power of Attorney

A power of attorney for health care may be revoked at any time and in any manner by which the patient is able to communicate the intent to revoke. Revocation shall be effective upon communication of such revocation by the patient to the attorney in fact or to the attending physician or health care provider. Upon learning of the revocation of a power of attorney for healthcare, the attending physician or other healthcare provider shall cause the revocation to be made a part of the patient's medical records. Unless the power of attorney providers otherwise, execution by the patient of a valid power of attorney for health care revokes any prior power of attorney for health care.

Section 404.850, RSMo

Durable Power of Attorney

It shall be unlawful for a physician, nurse or other individual who is a health care provider or an employee of a health care facility, hospital, nursing facility, residential care facility or other health care facility to require an individual to execute a durable power of attorney for health care as a condition for the provision of health care services or admission to a health care facility.

Section 404.835, RSMo

Durable Power of Attorney

A copy of a power of attorney for health care decisions shall be made a part of the patient's medical record when the existence of the power of attorney becomes known to the patient's health care provider and prior to the provider's taking any action pursuant to the decision of the attorney in fact.

Section 404.840, RSMo

Durable Power of Attorney

Notwithstanding any other provision of law to the contrary, an attending physician or an employee of the attending physician, or an owner, operator or employee of a health care facility in which the patient is a resident, shall not serve as an attorney in fact unless:

- (1) The patient and attorney in fact are related by affinity or consanguinity within the second degree;
- (2) The patient and attorney in fact are members of the same community or persons who are bound by vows to a religious life and who conduct or assist in the conducting of religious services and actually and regularly engage in religious, benevolent, charitable, or educational ministry, or the performance of health care services.

Section 404.815, RSMo

Durable Power of Attorney

Unless the patient expressly authorizes otherwise in the power of attorney, the powers and duties of the attorney in fact to make health care decisions shall commence upon a certification by two licensed physicians based upon an examination of the patient that the patient is incapacitated and will continue to be incapacitated for the period of time during which treatment decisions will be required and the powers and duties shall cease upon certification that the patient is no longer incapacitated. One of the certifying physicians may be the patient's attending physician. The certification shall be made according to accepted medical standards. The determination of incapacity shall be periodically reviewed by the attending physician. The certification shall be incorporated into the medical records and shall set forth the facts upon which the determination of incapacity is based and the expected duration of the incapacity. Other provisions of this section to the contrary notwithstanding, certification of incapacity by at least one physician is required.

Section 404.825, RSMo

Documents for DPOA and G/C

In order to determine whether someone is an attorney in fact for a resident, you will need to look at the durable power of attorney for healthcare document.

In order to determine whether someone is a guardian and/or conservator for a resident, you will need to look at the Court order/judgment.

Roles of DPOA and G/C Rights of Resident/Principal

DPOA- In making any health care decision in accordance with sections 404.800 to 404.865, the attorney in fact shall seek and consider information concerning the patient's medical diagnosis, the patient's prognosis and the benefits and burdens of the treatment to the patient. In withdrawing treatment, which withdrawal will allow the preexisting condition to run its natural course. The attorney in fact shall seek evidence of the medical diagnosis and the prognosis and the benefit and burden of the treatment to the patient to the extent possible within prevailing medical standards.

Section 404.822, RSMo

The power of attorney document will set forth the health care decisions that can be made by the attorney in fact. You will need to read this document to determine the powers of the attorney in fact.

Roles of DPOA and G/C Rights of Resident/Principal

Guardianship/Conservatorship-

If the court finds the respondent to be in some degree incapacitated or disabled, or both, the court, in determining the degree of supervision necessary, shall apply the least restrictive alternative principle as defined in this chapter and shall not restrict the respondent's personal liberty or the respondent's freedom to manage the respondent's financial resources to any greater extent that is necessary to protect the respondent's person and the respondent's financial resources. The limitations imposed upon the authority of the guardian or conservator as set forth in the findings of the court shall be stated in the letters of the guardian or conservator and shall be set forth in the notice of first publication of letters of conservatorship granted.

Section 475.075.12, RSMo

Roles of DPOA and G/C Rights of Resident/Ward

Guardianship/Conservatorship-

The court shall make and recite in its order detailed findings of fact stating:

- (1) The extent of the respondent's physical, mental and cognitive incapacity to manage essential requirements for food, clothing, shelter, safety or other care;
- (2) The extent of the respondent's physical, mental, and cognitive incapacity to manage the respondent's financial resources;
- (3) Whether the respondent requires placement in a supervised living situation and, if so, the degree of supervision needed;
- (4) Whether the respondent's financial resources require supervision and, if so, the nature and extent of supervision needed;
- (5) Whether the respondent retains the right to vote;
- (6) Whether the respondent is permitted to drive a motor vehicle if the respondent can pass the required driving test; and
- (7) Whether the respondent retains the right to marry.

Section 475.075.14, RSMo

Roles of DPOA and G/C Rights of Resident/Ward

Guardianship/Conservatorship-

The guardian or limited guardian shall file annually on the anniversary date of the guardian's or limited guardian's letters a report concerning the personal status of the adult ward and plans by the guardian or limited guardian for future care. Such report may be combined with the settlement of accounts if the guardian is also conservator of the estate of the ward.

Section 475.082.2, RSMo

Roles of DPOA and G/C Rights of Resident/Ward

Guardianship/Conservatorship-

This report shall include the following information:

- (1) The present address of the ward;
- (2) The present address of the guardian;
- (3) Unless the report specifies that the ward is living with guardian, the number of times the guardian has had contact with the ward, and the nature of such contacts including the date the ward was last seen by the guardian;
- (4) A summary of the guardian's visits with the ward and activities on the ward's behalf and the extent to which the ward has participated in decisionmaking;
- (5) If the ward is institutionalized, whether the guardian has received a copy of the treatment or habilitation plan and, if so, the date of such plan, and whether the guardian agrees with its provision;
- (6) The date the ward was last seen by a physician or other professional and the purpose;
- (7) The current mental and physical condition of the ward and any major changes in the ward's condition since the last report;
- (8) The opinion of the guardian as to the need for the continuation of the guardianship and whether it is necessary to increase or decrease the powers of the guardian; and
- (9) A summarized plan for the continuing year. If an individual support plan, treatment plan, or plan of care is in place, such plan may be submitted in lieu of the requirements of this subdivision.

Section 475.082.2, RSMo

Roles of DPOA and G/C Rights of Resident/Ward

Guardianship/Conservatorship-

1. No medical or surgical procedure shall be performed on any ward unless consent is obtained from the guardian of his person except as provided in subsections 2 and 3 hereof.
2. If the life of the ward is threatened and there is not time to obtain consent, a medical or surgical procedure may be performed without consent after the medical necessity for the procedure has been documented in the medical record of the ward.
3. If the life of any person is threatened and his consent to a necessary medical or surgical procedure cannot be obtained, a court, on petition filed pursuant to section 475.060, after hearing, may authorize consent on behalf of such person.

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Section 475.123, RSMo

Medical Records After Discharge

Durable Power of Attorney-

Except to the extent the right is limited by the power of attorney or any federal law, an attorney in fact designated to make health care decisions has the same right as the patient to receive information regarding the proposed health care, to receive and review medical records and to consent to the disclosure of medical records. However, the right to access to medical records is not a waiver of any evidentiary privilege.

Section 404.840.2, RSMo

Medical Records After Discharge

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) authorizes the release of medical information to a patient's personal representative. A person authorized (under state or other applicable law e.g. tribal or military law) to act on behalf of the individual in making health care related decisions is the individual's personal representative.

You may want to speak to your attorney about these requests. Things to consider:

Whether the durable power of attorney is in effect and the attorney in fact can receive medical records.

What documents the durable power of attorney has authorized the attorney in fact to receive.

There are some documents that HIPAA does not authorize "personal representatives" to receive e.g. Psychotherapist's separate notes of counseling sessions.

Medical Records After Discharge

All physicians, chiropractors, hospitals, dentists, and other duly licensed practitioners in this state, herein called "providers", shall, upon written request of a patient, or guardian or legally authorized representative of a patient, furnish a copy of his or her record of that patient's health history and treatment rendered to the person submitting a written request, except that such right shall be limited to access consistent with the patient's condition and sound therapeutic treatment as determined by the provider. Beginning August 28, 1994, such record shall be furnished within a reasonable time of the receipt of the request therefor and upon payment of a fee as provided in this section.

Section 191.227.1, RSMo

Emergency Discharge

If a resident goes to the hospital for a change of condition and the resident has not improved in order for you accept the resident back in the facility, then please consider having your attorney file a motion to set aside the stay.

Missouri regulation 19 CSR 30-82.050(8) states that a discharge is stayed and the resident can remain in the facility until a decision in favor of the facility occurs. The facility can file a motion to set aside and show good cause why the resident should not remain in the facility until a written hearing decision has been issued by the hearing officer. Good cause shall include, but is not limited to, those exceptions when the facility may notify the resident of an emergency discharge from the facility.

Questions ????????????

Thank you!