

# Guardianships

## 101

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# Agenda

Introduction to Guardianship  
Law

Alternatives to Guardianship

Guardian Overreach





# Introduction to Guardianship Law





# *Guardians of Incapacitated Persons*

MCA Title 72, Chapter 5

Part 3

## Montana Code Annotated 2023

TITLE 72. ESTATES, TRUSTS, AND FIDUCIARY RELATIONSHIPS

CHAPTER 5. UPC -- PERSONS UNDER DISABILITY GUARDIANSHIP AND CONSERVATORSHIP

### Part 3. Guardians of Incapacitated Persons

[72-5-301 Consent to jurisdiction by acceptance of appointment](#)

[72-5-302 Testamentary appointment of guardian for incapacitated person -- when effective -- priorities](#)

[72-5-303 Recognition of appointment of guardian by foreign will](#)

[72-5-304 Objection by alleged incapacitated person to testamentary appointment](#)

[72-5-305 Definitions](#)

[72-5-306 Purpose and basis for guardianship](#)

[72-5-307 through 72-5-310 reserved](#)

[72-5-311 Venue for proceedings for court appointment of guardian](#)

[72-5-312 Who may be guardian -- priorities](#)

[72-5-313 Visitor in guardianship proceedings defined](#)

[72-5-314 Notices in guardianship proceedings](#)

[72-5-315 Procedure for court appointment of guardian -- hearing -- examination -- interview -- procedural rights](#)

[72-5-316 Findings -- order of appointment](#)

[72-5-317 Temporary guardians](#)

[72-5-318 Request for notice -- interested person](#)

[72-5-319 Contents of petition for appointment of guardian](#)

[72-5-320 Purposes for establishment of limited guardianship](#)

[72-5-321 Powers and duties of guardian of incapacitated person](#)

[72-5-322 Petition of guardian for treatment of ward](#)

[72-5-323 Repealed](#)

[72-5-324 Termination of appointment -- how effected -- certain liabilities and obligations not affected](#)

[72-5-325 Petition for removal or resignation of guardian -- termination of incapacity -- appointment of successor guardian](#)

# *Defining Capacity: MCA Section 53-21-1302 (2017)*

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There is only one mention of capacity in the Montana Code Annotated and it is in 53-21-1302 which is a definition statute and it only relates to the capacity in the context of health care decisions.

MCA Section 53-21-1302 (2)  
Capacity is the ability of a person to understand the significant benefits and risks and alternatives to proposed health care and to make and communicate a health care decision.



## *How a Guardianship is Established*


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- A court case is filed alleging that the proposed WARD has lost the ability to take care of their physical/mental needs and can not make appropriate decisions about their own wellbeing. Sworn statements from medical professionals and others are generally filed along with the Petition to the Court
  - The person who is alleged to be incompetent is entitled to an independent medical exam, their own attorney, and there is usually an impartial visitor appointed to interview individuals involved in the case. Adult Protective Services may be involved as well.
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## *Temporary Guardianship*

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- If the court believes that an emergency exists and that the person is unable to care for themselves appropriately and is in danger a temporary guardianship order can be issued without the formal procedure I've outlined in the last slide.
  - Again these are designed to be temporary and keep the alleged incompetent person safe while the court procedures are taking place.
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# *The Difference Between Guardianship and Conservatorships*

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- A guardianship is over the person and a conservatorship is over the assets
- It is not necessary to be declared incompetent for a conservatorship to take place.
- Usually the two actions are combined into one court action





# Alternatives to Guardianship



POWERS OF ATTORNEY,  
ASSISTED DECISION  
MAKING AGREEMENTS






# Power of Attorneys


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- It is a document where someone (THE PRINCIPAL) gives to another person (THE AGENT) the authority to act for them. THE PRINCIPAL does not lose any ability to manage their own affairs and can withdraw permission (REVOKE) from THE AGENT at any time.



# *Uniform Power of Attorney Act*

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- Montana has adopted the Uniform Power of Attorney effective October 1, 2011
  - The Montana Code Annotated Sections 72-31-301 through 72-31-354 codifies this uniform Act
  - MCA 72-31-353, and MCA 72-31-354 provides a concise, optional statutory form for creating a Power of Attorney and a certification of the Agent.
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# *Different Types of POAs*

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Medical/Health  
Care



Financial



Mental Health



General



Special/Specific



# *The Difference Between Powers of Attorney and Guardianships*

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With a Power of Attorney the person giving permission doesn't lose any rights, they continue to be able to manage their affairs until and if they are unable to do so. They retain the right to revoke the agent's authority at any time

With a Guardianship, a court action is necessary and if successful the individual is deemed incompetent and loses certain legal rights to manage their affairs. They can not get these rights back unless the court determines that they are no longer incompetent.



# Supported Decision Making

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- Alternative to Guardianship
- Individual retains their rights to make decisions for themselves, with the support of trusted friends and/or family members they choose
- Family/Friends can provide support on specific types of decisions (ex. Housing or healthcare) or can provide broader support
- Person Centered
- Model Agreements:  
[https://supporteddecisionmaking.org/resource\\_library/sdm-model-agreements/](https://supporteddecisionmaking.org/resource_library/sdm-model-agreements/)



# Guardian Overreach





# *When You Are Told Someone Has a POA or a Guardianship Over Someone Else*

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- ALWAYS, ALWAYS ask to see the document and ID
  - ALWAYS, ALWAYS read the document and if possible make a copy
  - Look for language indicating that it is durable or has springing language if it is a POA
  - If it is a guardianship check to see if it is a court order or whether letters have been issued by the Clerk of the Court's office. If it is a temporary order or temporary orders they expire after 6 months and it is necessary to get a permanent order





# *Terminating A Guardianship*

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- MCA 72-5-325 Petition for removal or resignation of guardian