



Money Follows the Person

Legal Issues



University of Illinois at Chicago



Purpose

- To define legal terms, documents and processes.
- To identify implications of these processes within the MFP Demonstration project.
- Assist Transition Coordinators to utilize this information when transitioning MFP participants.
- Locate legal assistance services in your community

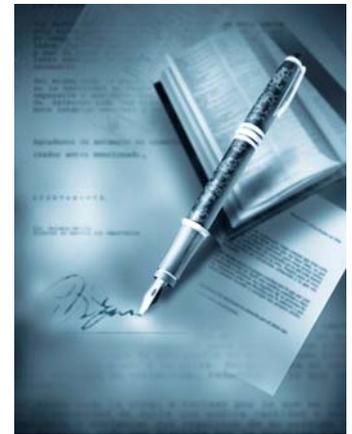


Legal Topics



- Informed Consent
- Guardianship
- Conservatorship
- Advance Directives
 - » Durable Power of Attorney for Property
 - » Durable Power of Attorney for Health Care
 - » Living Will

Informed Consent



Definition

Informed consent means the voluntary written agreement by the MFP participant (or that of a surrogate decision maker) to participate in the MFP demonstration project. Once consent is provided it may be revoked by the participant at any time.

Informed Consent under MFP

- Consent includes the acceptance of MFP services and the consent to participate in the evaluation component of the MFP project.
- Consent to participate in MFP is voluntary and the participant may withdraw at any time without penalty.
- Individuals who wish to participate in MFP and have a surrogate decision maker may do so with the consent of the surrogate decision maker.



Informed Consent under MFP

- Illinois will require that all individuals participating in the MFP Demonstration or their legally authorized surrogate decision maker—i.e., parent, guardian, or managing conservator of a minor individual, or a guardian of an adult—be informed of all their rights and options for care services and supports. These MFP services and supports are available for one year, and the participant's existing Medicaid eligible services will continue after the MFP Demonstration period.
- The MFP Informed Consent form will be signed only by the individual being transitioned or those who have legal authorization to act on the individual's behalf. Transition Coordinators will secure the appropriate signatures on the Informed Consent form which indicates they have been informed and are voluntarily choosing to participate in the MFP Demonstration without coercion.



Informed Consent



- **Procedure**

Written Informed Consent must be obtained when participant is enrolled. Enrollment Form B and Informed Consent should be completed on same date. Follow your training manual instructions for obtaining informed consent.

- **Procedure for informed consent with a surrogate decision maker**

If the participant has a surrogate decision maker, that person must provide informed consent for the participant to enroll in the MFP project. If the participant is a child, the person who has legal custody is the surrogate decision maker. If the participant is an adult, in most cases the surrogate decision maker is a guardian. The surrogate decision maker's participation in and cooperation with the transition process is imperative, and active involvement is expected.

Guardianship



Definition

- Guardianship is the legal process of determining an individual's capacity to make decisions for himself/herself regarding personal affairs such as where she/he lives or the care he/she requires.
- Guardianships are established to protect those individuals who have a disability of any kind that prevents them from making decisions about their health and safety.
- Assessing the need for guardianship is the responsibility of the Probate Division of the county where the individual resides.
- A person shall be considered to be 'incompetent' if and while the person is a minor or an adjudicated incompetent or disabled person, or the person is unable to give prompt and intelligent consideration to health care matters, as certified by a licensed physician.
- When a person has been determined to be legally incapacitated the Probate Court is responsible for appointing a guardian. A guardian may be appointed in full or on a limited basis depending on the needs and capabilities of the individual.

What is a Guardian?



- A guardian is a person appointed by a court to be responsible for the personal affairs of an “incapacitated person” including responsibility for making decisions regarding the individual’s support, care, health, safety, habilitation, education, therapeutic treatment, and residence.
- Guardianship in Illinois is governed by statute, 755ILCS 5/11a-1 et seq. of the Code of Illinois. These statutes provide limits to guardianship to assure that individuals retain as much decision-making authority as possible, and provide that guardians have a duty to determine and follow the wishes of the individual to the extent possible.

The Guardian



- For most individuals, family members act as guardians. When a family member is unavailable and guardianship is necessary, a public guardian is appointed.
- The State requires that Guardians have a known relationship with the person and that the person must interact with the guardian.
- Area Agencies on Aging (AAAs) and the Department of Human Resources (DHR) serve as public guardians for many people including those currently living in nursing facilities.

Guardianship under MFP



- Two types of Guardians

- *Guardian of Person*

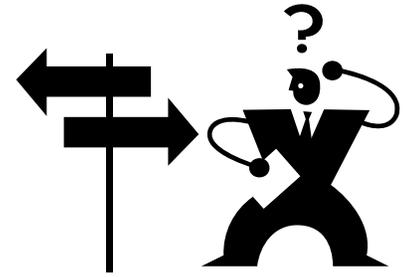
- A Guardian of Person makes decisions about medical and personal care and decides where the person will live. As this type of guardian has the authority to make decisions about place of residence, Guardians of the Person will be able to sign the informed consent form for the MFP participant.

- *Guardian of the Estate*

- The Guardian of Estate (property) manages the money, assets and property for another. The Guardian of the Estate would ordinarily be in charge of switching between institutional long term care and a waiver program. The Guardian would be asked to sign the MFP application form along with the resident.



Guardianship and MFP



- Approval of the guardian is required for transition, and the guardian's continuous participation in decision-making is necessary.
- In making decisions, the guardian must consider the participant's expressed desires and personal values and must act in his/her best interest and exercise reasonable care, diligence and prudence.

Guardianship and MFP



The Transition Coordinator should:

- Determine whether the participant has a guardian. This information may be found on the face sheet (first sheet) of the participant's chart.
- If so, contact the guardian immediately and request the guardian participate to the fullest extent possible in the MFP process.
- Arrange a meeting with the participant and guardian prior to enrollment.
- Educate the guardian about MFP and what it means for the participant.
- Obtain written Informed Consent from the guardian at time of enrollment.
- Discuss the guardian's role in the transition process.
- Schedule additional participant and guardian meetings as needed.
- Be aware of potential difficulties in contacting and collaborating with public assigned guardians. Contact the Illinois Guardianship & Advocacy Commission (<http://gac.state.il.us/>) with problems with guardians.

Conservatorship



- Conservatorship is similar to guardianship, but differs in that it deals only with the financial affairs of an individual.
- The court appoints a conservator after it is found that an individual doesn't have the capacity to manage his/her finances.
- A conservator has no authority to make decisions regarding an individual's other personal affairs. Only a guardian has such power. A conservator may also be appointed on a full or limited basis.

Conservatorship

- Conservatorships are established to protect those individuals who have a disability of any kind that prevents them from making decisions about their finances.
- Assessing the need for conservatorship is the responsibility of the Probate Division of the county where the individual resides.



Advance Directives

- Durable Power of Attorney for Property
- Durable Power of Attorney for Health Care
- Living Will



Powers of Attorney



- Powers of attorney (POA) are authorized by the State. In Illinois, all powers of attorney are “durable” (by law) unless the document specifically states that the power of attorney is not meant to be durable.
 - Non-durable powers of attorney are usually done for a specific transaction, like a real estate closing, and do not need to be “durable”. “Durable” powers of attorney continue to be valid even after the principal is incapacitated.
- A durable power of attorney allows a competent person (the “principal”) to appoint an agent to make decisions for the principal when the principal is incapacitated and unable to make decisions.
 - This period of incapacity may be caused by a medical situation, such as a coma, or a period of mental incapacity, such as mental illness.

2 Types of Power of Attorney



- Power of Attorney for Health Care. The principal delegates power to an agent (trusted friend or family member) for health care and personal care issues decisions.
- Power of Attorney for Property. The principal delegates power to an agent for financial and property management issue decisions.
 - *These two separate documents are powerful tools that can be used to assist and protect an older or disabled person, or be misused to exploit that person.*

Power of Attorney - Agents

- The person whom the principal designates as the ‘agent’ must be age 18 or over and cannot be his/her doctor or someone who is paid to provide health care services to the principal.
- The same person may serve as both the health care agent and the financial agent, or different individuals may be appointed.
- The extent of the powers which the principal delegates to the agent may be very broad, or narrow and specific. These are matters at the discretion of the principal.
- The powers the principal gives to the agent, his/her right to revoke those powers and the penalties for violating the law are explained more fully in Section 4-5, 4-6, 4-9. and 4-10(b) of the Illinois “Powers of Attorney for Health Care Law”.



Advance Directives



- **Advance health care directives**, are instructions given by individuals specifying what actions should be taken for their health in the event that they are no longer able to make decisions due to illness or incapacity. A living will is one form of advance directive, leaving instructions for treatment. Another form of authorization is the power of attorney for health care described previously. People may have one or the other or a combination of both.

Living Will

- The **living will** is the oldest form of advance directive. It was first proposed by an Illinois attorney, Louis Kutner, in a law journal in 1969. Kutner drew from existing Illinois estate law, by which an individual can control property affairs after death (i.e., when no longer available to speak for themselves) and devised a way for an individual to speak to his or her health care desires when no longer able to express current health care wishes. Because this form of “will” was to be used while an individual was still alive (but no longer able to make decisions) it was dubbed the “living will.”



Living Will

- A living will usually provides specific directives about the course of treatment that is to be followed by health care providers and caregivers. In some cases a living will may forbid the use of various kinds of burdensome medical treatment. The living will is only used if the individual has become unable to give informed consent or refusal (i.e., "individual health care instruction") due to incapacity. A living will can be very specific or very general.



Living Wills and MFP



The Transition Coordinator should:

- Determine whether the participant has a living will through nursing home medical records and participant.
- If so, include this information in participant's MFP records.
- Educate the participant (and guardian if appropriate) about what a living will means for the participant in the community
- Share this information with all community health care providers of the participant.

Other Legal Issues/Advocacy

CIVIL RIGHTS for People with Disabilities:

- Illinois Department of Human Services (DHS)'s, Division of Rehabilitation Services (DORS) is the state's lead agency serving individuals with disabilities. DORS' Agency, *Access Living*, is unique among Centers for Independent Living in its "capacity to implement legal strategies that promote the rights of people with disabilities. The Access Living Civil Rights Team enforces federal, state and local civil rights laws, including the Americans with Disabilities Act, the Fair Housing Act, Section 504 of the Rehabilitation Act and related laws, which prohibit discrimination. Their attorneys and legal assistants regularly counsel people with disabilities about their civil rights and provide representation in cases implicating important disability rights issues".

Address & Contact Info

Access Living

115 West Chicago Avenue

Chicago, IL 60610

(312) 640-2100 voice

(800) 613-8549 toll free

(312) 640-2102 tty



Illinois resources

- The Illinois Department of Aging provides complimentary copies of the following forms:
 - » Power of Attorney for Health Care
 - » Power of Attorney for Property
 - » Living Will
- For copies, contact the Senior Helpline:
 - 1-800-252-8966
 - 1-888-206-1327 (TTY)
 - Email: ilsenior@aging.state.il.us



Illinois Aging Resources

- The Illinois Area Agencies on Aging fund local legal services for older people (60 years of age and older), and the Legal Services Developer oversees the program and provides technical assistance upon request. There are 21 senior legal assistance provider offices. Legal assistance providers help with simple estate planning, living wills and powers of attorney.
- For information on Advance Directives, such as the "Durable Power of Attorney for Property," "Durable Power of Attorney for Health Care," and "Living Will," link to the Illinois Department on Aging, [Advance Directives](#).
- To locate legal assistance services **in your community**, contact your local [Legal Services Office](#). See the list in the [Directory of Agencies and Organizations Serving Seniors](#); your local [Area Agency on Aging](#); or the [Senior HelpLine](#).



Illinois Resources for the disabled, mentally ill, or developmentally disabled

- The Illinois Guardianship and Advocacy Commission (<http://gac.state.il.us/>) handles legal matters for the disabled, mentally ill, or developmentally disabled. The Commission provides legal representation, investigates complaints of rights violations and provides state guardianship for Illinois' population with disabilities. The Commission's definition of disabled is broader than DHS's. Refer clients, as indicated, to the Commission for the following services.
- Legal Advocacy Service (LAS) Legal Advocacy - Legal counseling and representation is provided to eligible persons in matters associated with the Mental Health Code or related state and federal law. LAS represents persons with disabilities at commitment hearings, and makes counsel available to enforce the rights of those with disabilities under the Illinois Mental Health and Developmental Disabilities Code and other related laws.
- Office of State Guardian (OSG) Office of the State Guardian - Counseling is provided to persons who need a guardian. The State Guardian serves as "guardian of last resort" for persons for whom no other guardian is available.
- Human Rights Authority (HRA) Regional Human Rights Authority - Volunteers investigate complaints about violation of rights and make recommendations.



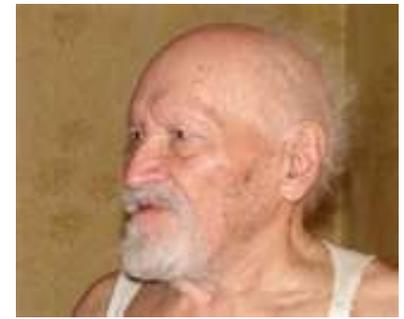
Case Study

Key concepts:

- Informed Consent
- Advance Directives
 - Power of attorney for health care decisions
 - Living will



Case Study



Scenario outline:

- Bill Collins resides at Sunnyside Nursing Home. Bill is a 82 year-old widower. His wife of fifty years, Josephine, died ten years ago. They had two children, one son and one daughter. Son, John and family (3 grandchildren) live nearby and visit regularly. His daughter, Patricia, lives with her husband and family in California and has not seen Bill for several years.
- Bill was admitted to the nursing home two years ago after a hospitalization related to his progressive Congestive Heart Failure (CHF). Bill has multiple health problems including: CHF Hypertension, high cholesterol, emphysema, mild Hearing Loss, Depression. Social history includes tobacco abuse with 51 pack years, quit 1988 (no current use). History of regular alcohol use most of his adulthood, discontinuing in 1988. His depression began after the loss of his wife.
- Social services and the nursing home physician are involved in his care. He is totally reliant on state/federal benefits for income and uses Medicaid for health care services. Bill has Advanced Directives. Bill has a living will and his son, John, has Durable Power of Attorney for Health Care.
- Bill is on your referral list for MFP.

Case Study



Questions

1. What do you already know about legal issues and documents that will inform your understanding of this scenario?
2. What factors should be taken into account when planning Bill Collins' transition?
3. In your professional capacity, how can you ensure Bill Collins' wishes will be followed when he transitions into the community?

Case Study Question #1:

What do you already know about legal issues and documents that will improve your understanding of this scenario?



- **Informed Consent**

- The Informed Consent form will be signed only by the individual being transitioned or those who have legal authorization to act on the individual's behalf. You have determined that Bill does not have a legal guardian therefore only Bill is required to sign the Informed Consent.
- Transition Coordinator secures the appropriate signature on the Informed Consent form which indicates the participant has been informed and is voluntarily choosing to participate in the MFP Demonstration without coercion.
- *Once consent is provided it may be revoked by the participant at any time.....*

Case Study Question #1 (continued):

What do you already know about legal issues and documents that will inform your understanding of this scenario?

Advance Directives:

- You have determined that Bill does not have a legal guardian. Bill gave his son **durable power of attorney for health care decisions** when he was hospitalized. The durable power of attorney allowed Bill, a competent person (the “principal”), to appoint an agent, (his Son), to make decisions for him when he was incapacitated and unable to make decisions. This period of incapacity was caused by a medical situation, Bill’s hospitalization. Bill is not incapacitated at this time, therefore Bill is able to make health care decisions himself.
- A **living will** provides specific directives about the course of treatment that is to be followed by health care providers and caregivers. The living will is only used if the individual has become unable to give informed consent or refusal (i.e., "individual health care instruction") due to incapacity.



Case Study Question #2:

What factors should be taken into account when planning Bill Collins' transition?



- Bill's current health status and capacity to make independent decisions and provide informed consent.
- Bill's current legal documents
- The implications of his legal issues within the MFP Demonstration project.

Case Study Question #3:

In your professional capacity, how can you ensure Bill Collins wishes will be followed when he transitions into the community?



- Discuss Bill's Advance Directives with him to confirm and understand his wishes.
- Arrange to educate the participant, Bill, about MFP and what it means for him. Include his son, Power of Attorney for Health Care decisions, if the participant wishes. Educate the participant and son about what a living will means for the participant in the community.
- Discuss the son's role in the transition process.
- Schedule additional participant and family meetings as needed. If so, include this information in participant's MFP records.
- Share Bill's advance directives information with all his community health care provider.

Questions?

- Contact your supervisor or MFP pod leader with other questions.

