



Changing Attitudes Towards Guardianship

By [Scott Suzuki, Esq.](#)

Laws have to apply to everyone and this rigid standard can cause problems when dealing with the issue of “legal capacity,” because capacity can’t be measured by a single standard. Someone may be perfectly capable of managing some daily tasks but may need assistance with others. For example, a person may have an easy time remembering to take prescription medications but not understand the implications of major medical decisions.

Capacity is often framed by the situation. In Hawaii, where I practice law, we have several legally defined situational capacity standards. For example, *testamentary* capacity means that someone is able to establish a will. *Contractual* capacity means that they’re able to enter legal agreements. Capacity for other situations becomes, admittedly, ambiguous. I’d argue that more nuanced categories should be established.

One of the important challenges we embrace in special needs planning is finding a balance between respecting an individual’s autonomy and simultaneously offering sufficient protection from potential harm. The traditional method of assisting someone has been through guardianship proceedings. Since guardianship has the potential to strip a ward of many decision-making rights, it can be too extreme. Instead, advocacy groups are pushing for systemic change and a mindset that presumes competence and encourages self-determination.

Legal Reform

There are many ways in which state law—which governs guardianship— could be reformed in order to better protect the rights of individuals with disabilities.

- **Prioritize limited guardianships** – Training attorneys and judges could help them to [explore less restrictive alternatives to plenary or unlimited guardianships](#), which grant general authority. Can a guardian’s powers be customized to precisely meet the needs of the ward? Customization can allow a ward to continue to be involved in making decisions.
- **Due Process** – It’s legally required that all affected parties have an opportunity to present their points of view during the guardianship hearing. This presents special challenges to someone with serious disabilities. Guidelines for providing notice of the hearing can be archaic – publication in a newspaper or delivery of the document

by a sheriff. Even when notice is sufficient, respondents may not realize what their rights are and may be intimidated or embarrassed in a public hearing at a courthouse. Proceedings could be moved to the individual's residence or handled through readily available technology. Finding a less formidable third option could go a long way toward encouraging a potential ward to speak up for themselves. This virtually never happens.

- **Standards and Monitoring** – Well-meaning individuals may not have the experience and training to adequately fulfill the role of guardian. Organizations such as the [National Guardianship Association](#) provide such education, which could be required by the courts. The legal system should strengthen ongoing monitoring to ensure that wards are being properly cared for. And consumers of legal services should also have access to attorneys who have proper experience in these particular types of proceedings. The Special Needs Alliance offers several free resources and contact information about attorneys throughout the U.S.
- **Periodic Review and Termination** – A person's capacity may change over the course of their lifetime. If periodic review were standard in guardianship agreements, it could encourage more precise matchup with the ward's evolving needs. Part of a guardian's responsibility should be to encourage the individual in their care to increasingly manage their own affairs, and there should be a clear process for a ward to seek restoration of their rights.

Alternatives

[Traditional alternatives to guardianship have included powers of attorneys \(POAs\) and healthcare proxies](#), which do not restrict an individual's rights in any way. They simply authorize one or more *additional* persons to make legal, financial or medical choices on someone's behalf. Decision-making authority can be strictly limited and these agreements can be dissolved at any time.

POAs could be even more useful if they were couched in language that's easy to understand. Legal documents are famously difficult for non-attorneys to interpret—often even more so for someone with special needs. I realize that there are huge obstacles to this frankly aspirational goal. If certain details are missing from a document, the drafting attorney could be open to legal malpractice. But making sure that someone truly understands what they're signing should be more than a nice-to-have.

There are also other alternatives that could be considered...

[ABLE accounts](#) are savings options that won't interfere with a beneficiary's means-tested government benefits. They are only available to individuals with a qualified disability that

appeared prior to the age of 26, and there are regulations to be aware of. They can be an important means of encouraging independence.

Restricted **debit cards**, which limit available funds and the ways in which they can be spent, can also help balance protection with autonomy.

Fiduciary contracts can be created without court involvement, are simple to change and don't affect an individual's rights. In this way, someone can be employed to perform precisely identified tasks—anything from paying bills to driving to performing more personal daily assistance.

Medical surrogacy enables someone to designate another individual, on the spot, to make health decisions on their behalf by simply informing the health care provider. They can also refuse to allow someone to represent their interests. While this has the advantage of respecting patient wishes in real-time, without legal costs, there are opportunities for abuse. If at all possible, a healthcare proxy is preferable.

Slow Going

Although there is increasing interest in reforming the guardianship system, progress is slow. Legal change takes time, and much education must take place in order to eradicate stereotypes. Families must be made aware that there are more flexible options to guardianship. A legal, medical and financial service professional must be trained to recognize and respect the choices of individuals with special needs, who must be trained to become self-advocates.

It's important that families, as they grapple with such deeply personal decisions, get the information they require. Special needs attorneys, who are steeped in these issues, can help explain the alternatives.

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