

## Substitute Decisions by and for Older Adults and Their Families

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*Marie is 85 years old and has lived her entire life in the same town. She loves her home and has often said that she wants to stay there and die in her own bed. She married a miner who was killed more than 50 years ago in a mine explosion. Marie worked as a housekeeper until she was 68 years old. She never remarried and she and her husband had no children. Marie has a sister who phones her each week, but her sister lives more than 200 miles away and is unable to travel.*

*In recent years it has been difficult for Marie to keep up with routine maintenance on her car and house. She no longer plants a vegetable garden and must rely on others to mow the yard. Marie has a great deal of trouble remembering people; she forgets names of people who come to her house and she does not always remember the date. She regards everyone as her friend. Neighbors come by to help Marie from time to time, but no one is able to help her out on a regular basis. Marie is thin and has very little food in the house. She has arthritis in her knees so badly that sometimes she sits for a whole day at a time.*

Marie may need someone to help her make decisions because she is no longer able to take care of her own needs. She is not unlike many adults who also may need assistance in decision making: adults with developmental disabilities who outlive their parents, persons with terminal illnesses, and adults living in the community with serious mental health issues. These life situations coupled with increased life expectancy and life-prolonging medical interventions are some of the reasons we need to understand issues of substitute decision making.

### Decision Making Basics

This publication provides information about basic concepts and approaches used in making decisions on behalf of others or planning for one's own future needs. Read on to understand important concepts about decision making and strategies, including representative payees, powers of attorney, trusts, and guardianship.

### Basic Concepts to Consider

**Self-determination** – The right to make decisions for oneself is protected by law and cannot be removed without a legal hearing. The court will not restrict an individual's right to make decisions until it becomes quite clear that their decision-making abilities place them at risk and medical intervention will not improve their ability to understand the consequences of their actions. While this may be frustrating for family members and friends, an individual who appears to be incoherent and unable to make sense of a situation one day and demonstrate complete understanding the next day is more likely to benefit from informal guidance and suggestions from others rather than losing the right to make decisions.

**Least Restrictive Alternative** – This legal doctrine means that you must consider a choice that gives the most options to a person whose freedoms might be restricted. Adults want to live in environments that allow them maximum freedom, or the least restrictive alternative. Keep this concept in mind when making decisions for someone concerning where and how he or she will live.

*What is the least restrictive place for Marie to live?  
How would you make this assessment?*

## How to Approach Making Decisions for Others

When making decisions for someone else, one of two approaches is used depending on the known wishes or decisional preferences of the individual.

**Substituted Judgment** – The substituted judgment standard is used when the decision maker is aware of the individual’s preferences in a particular situation. In essence, the substitute decision maker acts in accordance with the individual’s values and preferences. Regardless of whether or not the substitute decision maker agrees with the choices made, they are acting on behalf of the individual and the action he or she would have chosen if they were able.

**Best Interests** – When an individual is functionally impaired and does not understand the consequences of an action or has not made known any decisional preference, the best interest standard is used (Molumphy and Shivers, 1998). The decision maker makes the decision based on what he or she perceives to be in the best interest of the individual. Decisions use more of the decision maker’s values and preferences and fewer of those for whom the decision is being made. Not surprisingly, the substituted judgment standard is preferred over the best interests standard because it honors the wishes of the individual by making decisions according to his or her point of view.

*What decision making standard best fits Marie’s circumstances? Why?*

Sometimes, older adults need help with making decisions for themselves or as decision makers for others. Informal strategies for providing assistance are less restrictive than formal methods, which give more legal authority. The following tools for substitute decision making are presented in order from the least to most restrictive.

## Informal Tools for Substitute Decision Making

Many individuals rely on family members or close friends to provide assistance and guidance on managing daily affairs. Those actions are informal strategies that help the individual maintain their quality of life. More specific examples may include arranging for direct deposit of monthly pension checks so that monies do not get lost or stolen, or including two or more names

on a checking account so that more than one person can pay the bills. While informal strategies may be helpful and appreciated, it should be noted that individuals assuming responsibilities lack legal authority to make decisions on behalf of the older adult.

## Formal Tools for Substitute Decision Making

Legal authority to act on behalf of an individual must be carried out through formal tools for substitute decision making. Some common strategies include the following.

**Representative Payee** – If someone is unable to manage his or her resources or benefits properly due to mental or physical disabilities or problems with drugs or alcohol, a representative payee may be appropriate. In most instances, a payee is designated by the Social Security Administration to receive an individual’s check for the sole purpose of paying the bills. Relatives, friends, or an agency may ask to become the payee. If a suitable person is not found, the Social Security Administration or designated agency may help locate someone.

To initiate payeeship, contact the local Social Security Administration office. A field representative will investigate and may require a prospective payee to go to Social Security to fill out other forms. The older adult’s medical practitioner will be notified and asked his or her opinion about the ability of an individual to handle financial affairs. The appointment process takes approximately 90 days. Once approved, representative payees usually make an annual accounting to the Social Security office for the duration of their appointment (Quinn and Tomita, 1997).

*Would Marie benefit from having a representative payee? Why or why not?*

**Power of Attorney (POA)** – A power of attorney is a written notarized statement, drafted by an individual or a lawyer that allows one or more persons to act or represent another person. The person relinquishing his or her decision making rights must be competent prior to signing the document and the act of signing must be completely voluntary. By signing, an individual gives away some control over his or her life, either temporarily or permanently. The person who “has power of attorney” is generally a friend, relative, or financial advisor, someone who is aware of the individual’s needs and current life situation.

Powers of attorney may be limited, general, or durable. Limited powers are for a specific action on the behalf of another, such as the authority to cash a check or to sell a piece of property. Conversely, general powers of attorney grant authority to take any action on behalf of the individual, such as handling all financial affairs. A general power of attorney is usually used if a person has physical limitations. Durable powers of attorney may be for health care or for finances. The durable clause means that the document survives the individual's incompetence (ability to make reasoned decisions and understand their consequences). Usually, the POA for health care (medical decisions) and the POA for finances (manage property) are different documents. In some cases, having a durable power of attorney may preclude the need to identify a guardian or conservator in the future.

*Could Marie execute a power of attorney? Why or why not?*

**Trusts** – Trusts are usually created to assure financial security of individuals over a period of many years and may be revoked at any time. The beneficiary of the trust (the person receiving the money) is generally incapable of managing the monies set aside by the trustor (the person providing the money). In a trust arrangement a trustee oversees the management of the trust. The trustee may be any qualified person or bank. A trust may go into effect before or after the trustor's death and it may have several conditions attached to it. The trustee is legally bound to follow the conditions of the trust and understands that he or she must act in the best interests of the beneficiaries (Kapp, 1995).

*Is it likely that Marie is the beneficiary of money from a trust? Why or why not?*

**Guardianship** – Guardianships are granted if a judge decides that an individual is incompetent. It is the most restrictive tool in the decision making process and is considered as an action of last resort. The judge granting guardianship tries to preserve as much of the individual's independence as possible while granting decision-making responsibilities to a guardian. In an effort to promote self-determination, guardianships include different levels of appointment. A temporary guardian may be appointed to handle a specific emergency situation, such as arranging for medical care. A limited guardianship is designed to focus on specific issues and allows the older adult to make decisions in the other areas of their life. A standby guardian is appointed to

take over responsibilities when a current guardian is no longer capable or dies. Guardians may be either private citizens or public agencies or organizations. They must be bonded and file an annual report on their activity with the state Department of Social Services.

**Conservatorship** – Conservators handle financial decisions. They are responsible for maintaining an inventory of personal property and assets and managing it effectively by making sound financial decisions and investments which benefit the individual. Finances must be kept separate from the conservator's finances and an annual accounting must be made to the state Commissioner of Accounts. A conservator may also serve as guardian for the same individual (Molumphy and Shivers, 1998; Virginia Department for the Aging, 2004).

*What type of substitute decision-making tools would be best for Marie? Who could handle these responsibilities for her? Which one would meet her needs in the least restrictive manner? What needs for decision making might Marie have in the future?*

## **A Final Word ...**

Tools for substitute decision making are available to help people live their lives to their fullest potential, in spite of impairments. It is important for you to communicate your wishes long before some circumstance might make it hard for you to tell someone about your wishes. Preparing for the future will help those about whom you care make informed choices about what you really want for them, for others, and for yourself. For more information on guardianship and other substitute decision-making tools, visit the Virginia Department for the Aging website at [www.vda.virginia.gov/](http://www.vda.virginia.gov/).

If you have questions or are interested in other human development information on older adults and their families, contact your local Virginia Cooperative Extension Office. Family and Consumer Sciences agents offer a variety of educational programs related to family life, personal fitness, nutrition, and food safety.

If you would like further information on topics concerning older adults, please see:

Elder Abuse Alert - Considerations About a Hidden Problem, Virginia Cooperative Extension publication 350-251, <http://pubs.ext.vt.edu/350-251/>

Choosing Community-based Services for Older Adults and Their Families, Virginia Cooperative Extension publication 350-252, <http://pubs.ext.vt.edu/350-252/>

Living Options For Adults Needing Assistance, Virginia Cooperative Extension publication 350-254, <http://pubs.ext.vt.edu/350-254/>

## References

Kapp, M.B. (1995). *Key Words in Ethics, Law, and Aging: A guide to contemporary usage*. New York: Springer Publishing.

Molumphy, J.T., and Shivers, H.H. (1998). *Virginia handbook for guardians and conservators: A practical guide for court-appointed guardians and conservators of older adults*. (2nd ed.). Richmond, Va.: Virginia Guardianship Association.

Quinn, M.J., and Tomita, S.K. (1997). *Elder abuse and neglect: Causes, diagnosis, and intervention strategies* (2nd ed.). New York: Springer Publishing.

Virginia Department for the Aging. (2004). *Guardianship and Conservatorship in Virginia*. Richmond, Va.: Virginia Department for the Aging

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