

## Myth Busting Surrogate Decision Making

### Separating the Law from the Lore

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Legal Services for the Elderly  
No fee civil legal services for Maine residents 60  
and older

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### DEFINITIONS

- **Power** – A document granting legal authorization
- **Power of Attorney** – An instrument granting someone authority to act as agent for grantor
- **Attorney** - One who acts for another (also, “attorney in fact”)
- **Principal** – The person who signs the POA empowering agent
- **Agent** – The Person the Principal selects to act on their behalf
- **Guardian** – One who has legal authority and duty to care for another’s person
- **AIP** – Allegedly Incapacitated Person
- **PP-505** –Physician/Psychologist report on capacity of AIP to probate court in guardianship proceedings
- **Ward** – Person who is under a guardian’s care and supervision
- **Conservator** – Person who is appointed by a probate court to manage the income and assets of a protected person

### Private Tools

(Created by the Principal and the Agent – with help from  
advocate/doctor/lawyer)

- **POWER OF ATTORNEY** (archaic language, modern tool)
- **HEALTH CARE ADVANCED DIRECTIVE\* AND POWER OF ATTORNEY FOR HEALTH CARE** (“living will” plus option for agent for health care)
- **POLST - Physician Orders for Life Sustaining Treatment\*** (canned orders)
- **DNR – Do Not Resuscitate\***

\* Not true surrogate tools

### Why surrogate decision-making tools?

- In 1900 a U.S. female life expectancy was 48 years  
- 2012 expectancy is 81 years
- Karen Ann Quinlan case and the mechanization of death
- 1957 Black’s Dictionary had three definitions of death. The 1999 Black’s has eleven definitions
- More than 5 Million Americans with Alzheimer’s
- 1 in 3 U.S. seniors dies with dementia

### Public Tools

(Available from the Probate Courts)

- **GUARDIANSHIP\*** (it is about the body)
- **CONSERVATORSHIP** (it is about the money)
- \* “A guardian of an incapacitated person has the same powers, rights and duties respecting his ward that a parent has respecting his unemancipated minor child.” 18-A § 5-312.

### Power of Attorney Myths

- **“I am the Power of Attorney”!**
- Not true unless you are a piece of paper.
- **“I want to go to Florida this winter but I can’t because my daughter who has power of attorney *over me* says I can’t go.”**
- Nobody has power of attorney *over* any competent person.

## More POA Myths

- **“I’m am second (alternate) on the power of attorney so my opinion also matters.”**
- Except for joint/several POA, agents serve one at a time.
- **“Dad died and I am POA, so I’m in charge.”**
- Powers of attorney expire at death of principal
- **Powers of attorney are manifestly not licenses to steal – See, 18-A M.R.S.A. 5-914**

## Advanced Directives

- **Her advanced directive (or living will) is too old to be effective.”**
- Although it is a very good idea to update these tools they remain in effect until revoked.
- **“They have to pull the plug – no matter what he wants, he signed the form.”**
- Advanced directives are always immediately revocable/changeable by the signatory, orally, expressly or in any way he or she can manifest intent.

## Joint Bank Accounts

- While not a true surrogate tool they are often used as such.
- Nobody is “second” on the joint account. Joint means joint. Each owner can withdraw 100%.
- “Adding” someone to an account functionally gives them the entire account.
- A joint account can be a gift in the eyes of Medicaid (to extent the new joint owner withdraws assets it completes a gift)

## Capacity

- **“His doctor declared him incapacitated.”**
- Only judges can declare persons incapacitated – notwithstanding emergency commitment pursuant to 34-B M.R.S.A § 3863 (blue papering)
- **“Her memory is shot, she is incapacitated.”**
- Memory is one component of capacity
- **“He is mentally ill – he is incapacitated.”**
- Mental illness may not mean incapacity
- **All persons with capacity have a window of capacity – for some it does not close until death.**

## Guardianship & Conservatorship

- **“Guardianship is no big thing.”**
- Outside incarceration, military service or jury duty there is no other comparable legal tool that can remove your autonomy against your will.
- **“Guardianship and Conservatorship are pretty much the same thing.”**
- They are very different tools that are sometimes combined. Guardianship is about the person. Conservatorship is about money.

