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Guardianships, Conservatorships, and Power of Attorneys
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Materials by
Paige Thorson, J.D.,
Legal Services Developer
Iowa Department on Aging
510 E 12 Street, 2nd Floor
Des Moines, Iowa 50319
Phone: (515) 725-2051
IOWA GUARDIANSHIP, CONSERVATORSHIP
AND POWERS OF APPOINTMENT

Paige Thorson, J.D.
Iowa Department on Aging
510 E. 12th Street, Suite 2
Des Moines, Iowa 50319
(515) 725-3333
Paige.Thorson@iowa.gov

Prepared by Deanna Clingan-Fischer, J.D.,
Updated by Paige Thorson, J.D. for:
The Iowa Basic Skills Course

September, 2014
# Iowa Guardianship, Conservatorship and Powers of Appointment

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I. Overview of Substitute Decision Making

A. Substitute Decision Maker is defined in Iowa Code 231E. 3(21) and means a guardian, conservator, representative payee, attorney-in-fact under a power of attorney, or personal representative.

B. Substitute Decision Making is the act of providing assistance to someone who needs help making financial management or personal care decisions. (Per Iowa Code 231E.3 (22)—means the provision of services of a guardian, conservator, representative payee, attorney-in-fact under a power of attorney, or a personal representative.)

C. Least Restrictive Decision Making. According to Iowa Code 231E, “the general assembly finds that a process should exist to assist individuals in finding alternatives to intrusive means of assistance before an individual’s independence or rights are terminated.” The court must consider the interest of the ward in retaining as broad a power of self-determination as is consistent with the reason for appointing the guardian of the person. Matter of Guardianship of Hedin, 528 N.W.2d 567, 577 (Iowa 1995). The “court must consider the availability of third-party assistance to meet a ward’s or proposed ward’s need for such necessities, if credible evidence of such assistance is adduced from any source.” Id at 579. “Many states operate under an “all or nothing” guardianship law, meaning that a person either is fully competent or is not fully competent to handle his or her own affairs. In these states a determination that an individual is incompetent results in a plenary guardianship over the individual’s person and property. The modern view is that such a law “does not comport with reality” because the abilities of mentally disabled persons to manage their personal and financial affairs are diverse and amendable to growth and development. Moreover, the view is that the vast majority of even the most severely handicapped persons can manage their every day affairs.” Id at 573.

In determining whether a guardianship is to be established, modified, or terminated, the district court must consider whether a limited guardianship is appropriate. Id at 582

D. Office of Substitute Decision Maker—Iowa Code 231E

1. Iowa Code 231E establishes a state office of substitute decision maker and authorizes the establishment of local offices to provide substitute decision making services to adults and their estates after their deaths, when no private substitute decision maker is available. Iowa Code 231E.2 (a)
2. The office of substitute decision maker will provide assistance to both public and private substitute decision makers throughout the state in securing necessary services for their wards, principals, clients, and decedents and to assist substitute decision makers, wards, principals, clients, courts, and attorneys in the orderly and expeditious handling of substitute decision making proceedings. Iowa Code 231E 2(b)

3. Implementation of this chapter is subject to availability of funding as determined by the department. Iowa Code 231E.13

4. House File 2463, the Health and Human Services Budget, included $288,666 to fund the initial reestablishment of the office of substitute decision maker pursuant to chapter 231E.

E. Iowa Code

1. Conservatorship, Iowa Code 633; 135C.24(1); 217.13(2)(a) & (3); 217.40; 633A.1102(5)
2. Dependent Adult Abuse--community, Iowa Code 235B
3. Dependent Adult Abuse-facility, Iowa Code 235E
4. Durable Power of Attorney for Health Care, Iowa Code 144B; 142C
5. Final Disposition Act, Iowa Code 144C
6. Guardianship, Iowa Code 633; 135C.24(1); 142C; 217.13(2)(a) & (3); 217.40; 222.34; 633A.1102(8); 232.2(21); 600A.2(8)
7. Hospitalization of Persons with Mental Illness, Iowa Code 229.23, 27
9. Life Sustaining Procedures Act, Iowa Code 144A
10. Out of Hospital Do-Not Resuscitate Order, Iowa Code 144A.7A
11. Persons with an Intellectual Disability, Iowa Code 222.16
12. Physician Orders for Scope of Treatment, Iowa Code 144D
13. Power of Appointment, Iowa Code 559
15. Revised Uniform Anatomical Gift Act, Iowa Code 142C
17. Termination of Parental Rights, Iowa Code 600A.2
II. Terminology

1. Advance Directives: Legal documents that state a person’s wishes for medical treatment in case he or she is not able to make his or her own decision. In Iowa, these are durable power of attorney for health care, living will, and out of hospital do-not-resuscitate order.

2. Agent: A person granted authority to act for a principal under a power of attorney, whether denominated an agent, attorney in fact, or otherwise. The term includes an original agent, coagent, successor agent, and a person to which an agent’s authority is delegated. Iowa Code 633B.

3. Attorney-in-fact: An individual who is designated by a power of attorney as an agent to make decisions on behalf of a principal and has consented to act in that capacity. Iowa Code 144B

4. Capacity: The ability to understand the nature and effects of one’s acts.
   a. Diminished Capacity: An impaired mental condition, short of insanity, that is caused by intoxication, trauma, or disease. See Black’s Law Dictionary, 220 (9th ed. 2009)
   b. Criminal Capacity: The mental ability that a person must possess to be held accountable for a crime, the ability to understand right from wrong. See Black’s Law Dictionary 220 (9th ed. 2009)

5. Competency: A legal finding determined by a review of medical capacity, functional limitations, cognitive and functional abilities. Iowa Code 633; 222.16; 229.27. Competency as defined by the Iowa Trust Code 633A.1102(4)(a) & (b) means any of the following:
   a. In the case of a revocable transfer, “competency” means the degree of understanding required to execute a will.
   b. In the case of an irrevocable transfer, “competency” means the ability to understand the effect the gift may have on the future financial security of the donor and anyone who may be dependent on the donor.

6. Conservator: A person appointed by the court to have the custody and control of the property of a ward under the provisions of the probate code. Iowa Code 633.3(7); 633A.1102(5)
7. Custodian: Means a stepparent or a relative within the fourth degree of consanguinity to a child who has assumed responsibility for that child, a person who has accepted a release of custody, or a person appointed by a court or juvenile court having jurisdiction over a child. The rights and duties of the custodian with respect to a child are as follows: To maintain or transfer to another the physical possession of the child; to protect, train, and discipline that child; to provide food, clothing, housing, and medical care for that child; to consent to emergency medical care, including surgery; to sign a release of medical information to a health professional. All rights and duties of a custodian shall be subject to any residual rights and duties remaining in a parent or guardian. Iowa Code 600A.2(6); 600A.2A; 232.2(11)(a) & (b)

8. Declarant: Means a competent adult who executes a declaration pursuant to Iowa Code 144C.2(7)

9. Declaration: Means a written instrument, contained in or attached to a durable power of attorney for health care, that is executed by a declarant and that names a designee who shall have the sole responsibility and discretion for making decisions concerning the final disposition of the declarant’s remains and the ceremonies planned after the declarant’s death. Iowa Code 144C.2(8)

10. Dependent adult: Means a person eighteen years of age or older who is unable to protect the person’s own interests or unable to adequately perform or obtain services necessary to meet essential human needs, as a result of a physical or mental condition which requires assistance from another, or as defined by departmental rule. Iowa Code 235B.2 (4). A dependent adult is also defined in Iowa Code 235E.1 (4) and applies to persons in facilities and programs. Under this law, a dependent adult means a person eighteen years of age or older whose ability to perform the normal activities of daily living or to provide for the person’s own care or protection is impaired, either temporarily or permanently.

11. Designee: Means a competent adult designated under a declaration who shall have the sole responsibility and discretion for making decisions concerning the final disposition of the declarant’s remains and the ceremonies planned after the declarant’s death. Iowa Code 144C.2(9)

12. Durable: A document that becomes effective or remains effective upon the disability of the principal. Iowa Code 144B; 633B.1
13. Durable Power of Attorney for Health Care: A document authorizing the attorney-in-fact to make health care decisions for the principal if the principal is unable, in the judgment of an attending physician. Iowa Code 144B

14. Elder Abuse: Means any of the following: (1) physical injury to, or injury which is at a variance with the history given of the injury, or unreasonable confinement, unreasonable punishment, or assault of a vulnerable elder by a person not otherwise governed by chapter 235E. (2) The commission of a sexual offense under chapter 709 or section 726.2 with or against a vulnerable elder. (3) Neglect which is the deprivation of the minimum food, shelter, clothing, supervision, or physical or mental health care, or other care necessary to maintain a vulnerable elder’s life or health by a caretaker. (4) Financial exploitation.

Elder abuse does not include any of the following: (1) Circumstances in which the vulnerable elder declines medical treatment if the vulnerable elder holds a belief or is an adherent of a religion whose tenets and practices call for reliance on spiritual means in place of reliance on medical treatment. (2) Circumstances in which the vulnerable elder’s caretaker, acting in accordance with the vulnerable elder’s stated or implied consent, declines medical treatment if the vulnerable elder holds a belief or is an adherent of a religion whose tenets and practices call for reliance on spiritual means in place of reliance on medical treatment. (3) The withholding or withdrawing of health care from a vulnerable elder who is terminally ill in the opinion of a licensed physician, when the withholding or withdrawing of health care is done at the request of the vulnerable elder or at the request of the vulnerable elder’s next of kin, attorney in fact, or guardian pursuant to the applicable procedures under chapter 125, 144A, 144B, 222, 229, or 633. (4) Good faith assistance by a family or household member or other person in managing the financial affairs of a vulnerable elder at the request of the vulnerable elder or at the request of a family member, guardian, or conservator of the vulnerable elder.

15. Estate: The real and personal property of a decedent, a ward, or a trust. Iowa Code 633.3(15)

16. Fiduciary: The responsibility of acting in confidence and trust includes personal representative, executor, administrator, guardian, conservator, attorney-in-fact, and the trustee of any trust. Iowa Code 633.3(17); 633.63-.89; 633A.1102(7)
17. Financial Exploitation: Relative to a vulnerable elder means when a person stands in a position of trust or confidence with the vulnerable elder and knowingly and by undue influence, deception, coercion, fraud, or extortion, obtains control over or otherwise uses or diverts the benefits, property, resources, belongings, or assets of the vulnerable elder. Iowa Code 235F.1(8)

18. Financial Power of Attorney: A written document in which one person (the principal) gives another person (attorney-in-fact) the authority to act on the first person’s behalf in financial matters. (Also known as general power of attorney). Iowa Code 633B; 558.36; 597.5

19. Functional Capacity: A person’s ability to take action to meet personal needs or demonstrate behavior which indicates he or she can take appropriate and necessary action to have needs met.

20. Functional Limitations: The behavior(s) or condition(s) of a person which impairs the person’s ability to care for his or her personal safety or to attend to or provide for necessities. Iowa Code 633.3(19)

21. Guardian: The person appointed by the court to have custody of the person of the ward under the provisions of the probate code. Iowa Code 633; 600A; 225C.35(4); 232.2(21); 633A.1102(8)

22. Guardian Ad Litem: The person appointed to provide independent advice to the Court to bring balance to the decision-making process. Iowa Code 600A; 633.244; 232.2(22)

23. Health Care: Any care, treatment, service, or procedure to maintain, diagnose, or treat an individual’s physical or mental condition. Iowa Code 144B


25. Incapacity: The inability of an individual to manage property or business affairs because the individual is any of the following: a. an individual whose decision-
making capacity is so impaired that the individual is unable to make, communicate, or carry out important decisions concerning the individual’s financial affairs. b. Detained or incarcerated in a penal system. c. outside the United States and unable to return. Iowa Code 633B.102(7)

26. Incompetent: Means the condition of any person who has been adjudicated by a court to meet at least one of the following conditions: a. To have a decision-making capacity which is so impaired that the person is unable to care for the person’s personal safety or to attend to or provide for necessities for the person such as food, shelter, clothing, or medical care, without which physical injury or illness may occur. b. To have a decision-making capacity which is so impaired that the person is unable to make, communicate, or carry out important decisions concerning the person’s financial affairs. C. To have a decision-making capacity which is so impaired that both paragraphs “a” and “b” are applicable to the person. Iowa Code 633.3(23)

27. Least Restrictive Decision Making: The process of assisting individuals to find alternative substitute decision making services and less intrusive means of assistance before an individual’s independence or rights are terminated. Iowa Code 231E

28. Living Will: A document directing the principal’s doctor to withhold or withdraw certain treatment that could prolong the dying process. Iowa Code 144A

29. Out of Hospital Do-Not-Resuscitate Order: A written order signed by a doctor that directs withholding and withdrawal of resuscitation when an adult patient in a terminal condition is outside the hospital setting. Iowa Code 144A.7A

30. Patient Self Determination Act-1990: A federal law which requires all Medicare and Medicaid provider organizations to provide written information on advance directives to patients at the time of admission and then document the file. Omnibus Budget Reconciliation Act of 1990 (or OBRA-90), Pub.L. 101-508, 14206,4751 codified at 42 U.S.C. 1395cc(a)(1)(Q), 1395cc(f), 1395mm(c)(8), 1996a(a)(7), 1396a(w)

31. Personal Representative: An individual appointed by the court to administer the estate of a deceased person. (Under Hipaa law, the personal representative is the attorney-in-fact or guardian and acts during life to make health care decisions). Iowa Code 633
32. Physician Orders for Scope of Treatment: A document containing medical orders which may be relied upon across medical settings that consolidates and summarizes a patient’s preferences for life-sustaining treatment and interventions and acts as a complement to and does not supersede any valid advance directive. Iowa Code 144D

33. Power of Appointment: As used in Iowa Code 559, shall mean and include all powers which are in substance and effect powers of appointment, regardless of the language used in creating them and whether they are (1) general, special or otherwise, (2) vested, contingent or conditional, (3) in gross, appendant, simply collateral, in trust or in the nature of a trust or otherwise, (4) exercisable by an instrument amending, revoking, altering or terminating a trust or an estate, or an interest thereunder or otherwise, (5) exercisable presently or in the future, (6) exercisable in an individual or a fiduciary capacity whether alone or in conjunction with one or more other persons or corporations, (7) powers to invade or consume property, or (8) powers remaining after one or more partial releases have heretofore or hereafter been made with respect to a power to appoint.

34. Power of Attorney: A legal instrument authorizing one to act as the attorney-in-fact or agent of the principal. Iowa Code 144B

Power of Attorney: A writing that grants authority to an agent to act in the place of the principal, whether or not the term “power of attorney” is used. Iowa Code 633B.101(9)

35. Principal: An individual who authorizes a person to act on his or her behalf through a power of attorney. Iowa Code 144B

36. Probate Code: Chapter 633 of the Iowa Code has jurisdiction chiefly over the probate of wills and administration of a deceased person’s estate, guardianship and conservatorship. Iowa Code 633.10(3)

37. Probate Court: A court that has jurisdiction chiefly over the probate of wills and administration of deceased persons’ estates, guardianship, conservatorship, and trusts. Iowa Code 633
38. Representative Payee: An individual appointed by a federal government entity to receive funds on behalf of a beneficiary and meet basic needs.


40. Vulnerable Adults: A person sixty years of age or older who is unable to protect himself or herself from elder abuse as a result of age or mental or physical condition. Iowa Code 235F.1(17)

41. Ward: The individual for whom a guardianship or conservatorship is established. Iowa Code 633

**III. Personal Care**

1. **Least Restrictive Alternatives.** Alternatives to guardianship and conservatorship are legal tools and social services that may delay or prevent the appointment of a guardian or conservatorship for a person who lacks some or all capacity to make decisions on his or her behalf. Nevertheless, alternatives may not always be preferable to guardianship or conservatorship. If impairments are severe, no advance planning has been done, and/or court supervision is clearly needed, guardianship and/or conservatorship may be the best course of action. What is important is that alternatives have been explored and their potential exhausted.

2. **Self-Direction.** An individual should make his or her own decisions when possible. That fact that someone does not agree with those decisions, does not mean a decision maker is needed. Following the least restrictive alternatives concept allows a person to keep as much autonomy and self-determination as possible.

3. **Third Party Assistance.** In making a determination as to whether a guardianship should be established, modified, or terminated, the court must consider the availability of third-party assistance to meet a ward’s or proposed ward’s need for such necessities, if credible evidence of such assistance is adduced from any source. *Matter of Guardianship of Hedin*, 528 N.W. 2d 567, 579 (Iowa 1995). However, neither party shall have the burden to produce such evidence. Id at 579. Iowa Code 633.551(4)
4. **Durable Powers of Attorney for Health Care—Iowa Code 144B**

A. A “durable power of attorney for health care” is a document authorizing an attorney-in-fact to make health care decisions for the principal if the principal is unable, in the judgment of the attending physician, to make health care decisions.

B. “Health Care” means any care, treatment, service, or procedure to maintain, diagnose, or treat an individual’s physical or mental conditions. Health care does not include the provision of nutrition or hydration except when they are required to be provided parenterally or through intubation.

C. “Health Care Decision” means the consent, refusal to consent, or withdrawal of consent to health care.

D. Executing the Durable Power of Attorney for Health Care

1. If the principal is determined to have diminished capacity at the time of signature, the document may be nullified.

2. If future capacity is a concern, a durable power of attorney for health care is a suitable alternative.

3. If capacity is questioned, a durable power of attorney for health care cannot be signed.

4. Any actions taken by the principal must be voluntary and he or she must understand the effects of the legal document being signed.

5. The document must be in writing, either handwritten, typed, or in an already established form.

6. To be valid, the document must:

   a. Contain the name of the person authorized to act as the attorney-in-fact and any alternate(s). The health care provider attending the principal on the date the document is signed and an employee of that health care provider cannot serve as attorney-in-fact, unless the individual is related to the principal.

   b. Contain the powers and responsibilities given to the attorney-in-fact.
c. Contain the signature of the principal.

d. Contain the date signed by the principal.

e. Be signed by the principal in the presence of two witnesses or a notary. The following individuals shall not witness the document: A health care provider attending the principal on the date of signing; an employee of the health care provider; the attorney-in-fact; someone who is less than 18 years old; and at least one witness should be a non-relative.

E. Responsibilities of the Health Care Attorney-in-Fact

1. An attorney-in-fact agrees to act consistently with the desires as stated in the document or otherwise made known by the principal. The attorney-in-fact should respect and carry out the principal’s health care wishes. If wishes are not known, act in best interests, taking into account the principals’ overall medical condition and prognosis.

2. A health care power of attorney can be broad and general and allow the attorney-in-fact to make most health care decisions. It can also be limited and allow only very specific decisions to be made by the attorney-in-fact.

3. A health care attorney-in-fact has the authority to access the principal’s health care information as a personal representative under the Health Insurance Portability and Accountability Act of 1996 (HIPAA). The standard Iowa State Bar Association form contains language to this effect.

4. Anatomical gifts. Gifts of the body or part may be made during the life of the donor by an attorney-in-fact, unless the power of attorney documents state otherwise. Iowa Code 142C.3 (1) (b); 142C.12B

F. Attorney-in-fact priority to make decisions—144B.6

1. Unless the district court sitting in equity specifically finds that the attorney-in-fact is acting in a manner contrary to the wishes of the principal or the durable power of attorney for health care provides otherwise, an attorney-in-fact who is known to the health care provider to be available and willing to make health care decisions has priority over any other person, including a guardian appointed pursuant to chapter 633, to act for the principal in all matters of health care decisions. The attorney-in-fact has the
authority to make a particular health care decision only if the principal is unable, in the judgment of the attending physician, to make the health care decision. If the principal objects to a decision to withhold or withdraw health care, the principal shall be presumed to be able to make a decision.

2. In exercising the authority under the durable power of attorney for health care, the attorney-in-fact has a duty to act in accordance with the decisions of the principal as expressed in the durable power of attorney for health care or otherwise made known to the attorney-in-fact at any time.

3. A declaration executed by the principal pursuant to chapter 144A, shall not be interpreted to prohibit the withdrawal of hydration or nutrition when required to be provided parenterally or through intubation and shall not otherwise restrict the authority of the attorney-in-fact unless either the declaration or the durable power of attorney for health care expressly provides otherwise.

G. Terms of a Durable Power of Attorney for Health Care

1. To have the document be “durable”, the document shall contain the words, “this power of attorney shall not be affected by disability of the principal” or “This power of attorney shall become effective upon the disability of the principal”, or similar words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding the principal’s disability. Iowa Code 633B.1. See Iowa State Bar Association Form 121

2. There is no court oversight of a power of attorney document.

3. An attorney-in-fact shall not be subject to criminal prosecution or civil liability for any health care decision made in good faith pursuant to a durable power of attorney for health care. It shall be presumed that an attorney in fact, and a health care provider acting pursuant to the direction of an attorney in fact, are acting in good faith and in the best interests of the principal absent clear and convincing evidence to the contrary. For these purposes, acting in “good faith” means acting consistent with the desires of the principal as expressed in the durable power of attorney for health care or otherwise made known to the attorney in fact, or where those desires are unknown, acting in the best
interests of the principal, taking into account the principal’s overall medical condition and prognosis.

4. A health care power of attorney can be broad and general and allow the attorney-in-fact to make most health care decisions. It can also be limited and allow only very specific decision to be made by the attorney-in-fact.

5. A durable power of attorney for health care executed in another state or jurisdiction in compliance with the law of that state or jurisdiction shall be deemed valid and enforceable in this state, to the extent the document is consistent with the laws of this state. A durable power of attorney or similar document executed by a veteran of the armed forces which is in compliance with the federal department of veterans affairs advance directive requirements shall be deemed valid and enforceable.

H. Revocation, Modification or Termination

1. A durable power of attorney for health care may be revoked at any time and in any manner by which the principal is able to communicate the intent to revoke, without regard to mental or physical condition. The principal is presumed to have the capacity to revoke a durable power of attorney for health care.

2. The revocation can be made by notifying the attorney-in-fact orally or in writing or by notifying the health care provider orally or in writing while that provider is engaged in providing health care to the principal.

3. A revocation is only effective as to a health care provider upon its communication to the provider by the principal or by another to whom the principal has communicated revocation.

4. A power of attorney document and the attorney-in-fact’s authority to act ceases upon the death of the principal.

5. If after executing a durable power of attorney for health care designating a spouse as attorney-in-fact, the marriage between the
principal and the attorney-in-fact is dissolved, the power is thereby revoked. Iowa Code 144B.12 (3)

5. **Living Will—Life Sustaining Procedures Act—Iowa Code 144A**

A. A competent adult may execute a declaration at any time directing that life-sustaining procedures be withheld or withdrawn.

B. The declaration shall only take effect if the declarant’s condition is determined to be terminal and the declarant is not able to make treatment decisions.

C. Life Sustaining Procedures are defined as any medical procedure, treatment, or intervention, including resuscitation, which meets both the following requirements:

   1. Utilizes mechanical or artificial means to sustain, restore, or supplant a spontaneous vital function.

   2. When applied to a patient in a terminal condition, would serve only to prolong the dying process.

   Life sustaining procedure does not include the provision of nutrition or hydration except when required to be provided parenterally or through intubation or the administration of medication or performance of any medical procedure deemed necessary to provide comfort care or to alleviate pain.

D. Terminal condition means an incurable or irreversible condition that, without the administration of life-sustaining procedures, will, in the opinion of the attending physician, result in death within a relatively short period of time or a state of permanent unconsciousness from which, to a reasonable degree of medical certainty, there can be no recovery. When an attending physician who has been provided with a declaration determines that the declarant is in a terminal condition, this decision must be confirmed by another physician. The attending physician must record that determination in the declarant’s medical record.

E. To be valid the document must:

   1. Be signed by the declarant or another person acting on behalf of the declarant at the direction of the declarant,
2. Contain the date of the declaration’s execution, and

3. Be witnessed or acknowledged by one of the following methods:
   a. Signed by at least two individuals who, in the presence of each other and the declarant, witnessed the signing of the declaration by the declarant or by another person acting on behalf of the declarant at the declarant’s direction. At least one of the witnesses shall be an individual who is not a relative of the declarant by blood, marriage, or adoption within the third degree of consanguinity. The following persons shall not be witnesses: a health care provider attending the declarant on the date of execution of the declaration; an employee of a health care provider attending the declarant on the date of execution of the declaration; an individual who is less than eighteen years of age.
   b. Acknowledged before a notarial officer within the state.

F. The declarant shall provide to the attending physician or health care provider.

G. An attending physician who is unwilling to comply with the declaration of a qualified patient shall take all reasonable steps to effect the transfer of the patient to another physician.

H. A declaration or similar document executed in another state or jurisdiction in compliance with the law of that state or jurisdiction shall be deemed valid and enforceable in this state, to the extent the declaration is consistent with the laws of this state. A declaration executed by a veteran of the armed forces which is in compliance with the federal department of veteran’s affairs advance directives requirements shall be deemed valid and enforceable.

I. Procedure in absence of declaration. (Family Consent Law) Iowa Code 144A.7 Life sustaining procedures may be withheld or withdrawn from a patient who is in a terminal condition and who is comatose, incompetent, or otherwise physically or mentally incapable of communication and has not made a declaration under this chapter, if there is consultation and written agreement for the withholding and withdrawal of life sustaining procedures between the attending physician and any of the following individuals, who shall be guided by the express or implied intention of the patient, in the following order of priority if no individual in a prior class is reasonably available, willing, and competent to act:
1. The attorney-in-fact, if the designation is in writing and complies with law (144B) and is durable.

2. The guardian, provided court approval is obtained. This does not require the appointment of a guardian in order for a treatment decision to be made.

3. The patient’s spouse.

4. An adult child of the patient or, if the patient has more than one adult child, a majority of the adult children who are reasonably available for consultation.

5. A parent of the patient, or parents, if both are reasonably available.

6. An adult sibling.

When a decision is made pursuant to this section, there shall be a witness present at the time of the consultation. See Iowa State Bar Association Form 122

6. Physician Orders for Scope of Treatment--Iowa Code 144D

   a. Iowa Code 144D—enacted July 1, 2012 relates to physician orders for scope of treatment. The legislature recognized that the physician orders for scope of treatment form complements advance directives by converting individual wishes contained in advance directives or as otherwise expressed, into medical orders that may be recognized and acted upon across medical settings.

   b. Creates a standard Iowa physician order for scope of treatment intended for individuals who are frail and elderly or who have a chronic, critical medical condition or a terminal illness.

   c. Physicians Order for Scope of Treatment shall not alter the rights of the individuals who do not execute a physician order. The order does not supersede a living will. If a durable power of attorney for health care exists, the attorney-in-fact controls health care decision making.

A. If an attending physician issues an out-of-hospital do-not-resuscitate order for an adult patient under this section, the physician shall use the form prescribed in the law, include a copy of the order in the patient’s medical record, and provide a copy to the patient or an individual authorized to act on the patient’s behalf.

B. The out-of-hospital do-not-resuscitate order form shall include all the following:

1. The patient’s name.
2. The patient’s date of birth.
3. The name of the individual authorized to act on the patient’s behalf, if applicable.
4. A statement that the patient is in a terminal condition.
5. The physician’s signature.
6. The date the form is signed.
7. A concise statement of the nature and scope of the order.
8. Any other information necessary to provide clear and reliable instructions to the health care provider.

C. A health care provider may withhold or withdraw resuscitation outside a hospital consistent with an out-of-hospital do-not-resuscitate order issued under this chapter and the rules or protocols adopted by the Iowa Department of Public Health. The provider can continue appropriate comfort care and pain relief.

D. An out-of-hospital do-not-resuscitate order shall not apply when a patient is in need of emergency medical services due to a sudden accident or injury resulting from a motor vehicle collision, fire, mass casualty, or other cause of a sudden accident or injury which is outside the scope of the patient’s terminal condition.
E. The personal wishes of family members or other individuals who are not authorized in the order to act on the patient’s behalf shall not supersede a valid out-of-hospital do-not-resuscitate order.

F. An attorney-in-fact cannot revoke an out-of-hospital do-not-resuscitate order. Exception: The attorney-in-fact is listed on the order as a person authorized to revoke. Attorney General’s Opinion -June 22, 2005. (Smith to Eichhorn, State Representative, 6-22-05 #05-6-1)

G. An out-of-hospital do-not-resuscitate order is deemed revoked at any time that a patient, or an individual authorized to act on the patient’s behalf as designated on the order, is able to communicate in any manner the intent that the order be revoked, without regard to the mental or physical condition of the patient.

8. Revised Uniform Anatomical Gift Act—Iowa Code 142C

A. Anatomical gift means a donation of all or part of the human body effective after the donor’s death, for the purposes of transplantation, therapy, research, or education.

B. Persons who may make the gift: 142C.3 (1)
   1. Donor.
   2. An agent of the donor, unless the durable power of attorney for health care or other record prohibits the agent from making the anatomical gift.
   3. Parent of the donor, if the donor is an unemancipated minor.
   4. The guardian of the donor.

C. An anatomical gift of a decedent’s body or part for purposes of transplantation, therapy, research, or education may be made by any member of the following classes of persons who is reasonably available, in the order of priority listed: (Iowa Code 142C.4)
   1. An agent of the decedent at the time of death who could have made an anatomical gift under 142C.3 (1) immediately before the decedent’s death.
   2. The spouse of the decedent.
3. Adult children of the decedent.
4. Parents of the decedent.
5. Adult siblings of the decedent.
6. Adult grandchildren of the decedent.
7. Grandparents of the decedent.
8. An adult who exhibited special care and concern for the decedent.
9. Any persons who were acting as guardian of the decedent at the time of death.
10. Any other person having the authority to dispose of the decedent's body.

9. Final Dispositions Act—Iowa Code 144C

A. Allows a competent adult (declarant) to execute a written instrument (declaration) designating a person (designee) to have sole responsibility and discretion concerning final disposition of that adult’s remains. See Iowa State Bar Association Form 363

B. A declaration means a written instrument, contained in or attached to a durable power of attorney for health care under chapter 144B, that is executed by the declarant and that names a designee who shall have the sole responsibility and discretion for making decisions concerning the final disposition of the declarant’s remains and the ceremonies planned after the declarant’s death.

C. The declaration may name one or more alternate designees.

D. The right to control final disposition of a decedent’s remains or to make arrangements for the ceremony after a decedent’s death vests in and devolves upon the following persons who are competent adults at the time of the decedent’s death, in the following order:

1. A designee, or alternate designee, acting pursuant to the decedent’s declaration.
2. The surviving spouse of the decedent, if not legally separated from the decedent, whose whereabouts are reasonably ascertainable.

3. A surviving child of the decedent, or if there is more than one, a majority of the surviving children whose whereabouts are ascertainable.

4. The surviving parents of the decedent.

5. A surviving grandchild of the decedent, or, if there is more than one, a majority of the surviving grandchildren.

6. A surviving sibling of the decedent, or, if there is more than one, a majority of the surviving siblings.

7. A surviving grandparent of the decedent, or, if there is more than one, a majority of the surviving grandparents.

8. A person in the next degree of kinship to the decedent in the order named by law to inherit the estate of the decedent or, if there is more than one, a majority of such surviving persons.

9. A person who represents that the person knows the identity of the decedent and who signs an affidavit warranting the identity of the decedent and assuming the right to control final disposition of the decedent’s remains and responsibility to pay any expenses attendant to such final disposition.

10. The county medical examiner, if responsible for the decedent’s remains.

E. The declaration form requirements

1. Language is found in 144C.6

2. Shall be in a written form that substantially complies with the form in the code. Is properly completed, is contained in or attached to a durable power of attorney for health care under chapter 144B, and is dated and signed by the declarant or another person acting on the declarant’s behalf at the direction of and in the presence of the declarant.
3. The declaration shall be signed by at least two individuals who are not named therein and who, in the presence of each other and the declarant, witnessed the signing of the declaration by the declarant, or another person acting on the declarant’s behalf at the direction of and in the presence of the declarant, and witnessed the signing of the declaration by each other OR acknowledged before a notarial officer.

4. A funeral director, an attorney, or an agent, owner, or employee of a funeral establishment, cremation establishment, cemetery, elder group home, assisted living program, adult day services program, or licensed hospice program shall not serve as a designee unless related to declarant within the third degree of consanguinity.

5. A declaration may include the location of an agreement for prearranged funeral services or funeral merchandise, cemetery lots owned by or reserved for the declarant, and special instructions regarding organ donation.

6. A declaration is revocable by a declarant in writing signed and dated by the declarant.

See In Re Whalen, No.12-1927 (Iowa 2013)

10. Guardianship—Iowa Code 633.3(20); 232.2(21); 600A.2 (8); 633A.1102 (8); 225C.35 (4)

A. A “guardianship” is a court-authorized relationship established under the provisions of the Iowa Probate Code in which one person, the guardian, assumes responsibility for the physical custody of another person, the ward.

B. A “guardian” is the person appointed by the court to have custody of the person of the ward under the provisions of the probate code. Iowa Code 633.3(20)

C. A “guardian” under Iowa Code 232 means a person who is not the parent of a child, but who has been appointed by a court or juvenile court having jurisdiction over the child, to have a permanent self-sustaining relationship with the child and to make important decisions which have a permanent effect on the life and development of that child and to promote the general welfare of the child. A guardian may be a court or a juvenile court.
D. A “guardian” under Iowa Code 600A means a person who is not the parent of a minor child, but who has been appointed by a court or juvenile court having jurisdiction over the minor child to make important decisions which have permanent effect on the life and development of that child and to promote the general welfare of that child. The guardian may be a court or juvenile court.

E. Parents are the natural guardians of their children during their children’s minority and are prima facie entitled to the care, custody, and control of them. *In re Guardianship of Lehr*, 249 Iowa 625, 87 N.W. 2d 909 (1958); *Leaf v. Iowa Methodist Medical Center*, 460 N.W.2d 892, 893 (Iowa App. 1990). If both parents of a child are deceased, grandparents are the natural guardians of a child. *Id* at 909. In determining who should be appointed the guardian of the child, the paramount question is the welfare of the child. *Id*.

F. The natural guardianship ends, however, once the child reaches the “age of majority”, or adulthood (age 18 years). At that age, all children become legal adults with the right to make their own decisions. If the “adult” lacks capacity to make decisions, he or she may need a substitute decision maker. However, just because a parent disagrees with the decisions made by an adult child, does not mean a guardianship is needed.

G. Least Restrictive Alternatives for guardianship are third party assistance, power of attorney for health care and limited guardianship.

H. Who can be served by guardianship? Iowa Code 633.552 specifies that the proposed ward is in either of the following categories:

1. Is a person whose decision-making capacity is so impaired that the person is unable to care for the person’s personal safety or to attend to or provide for necessities for the person, such as food, shelter, clothing, or medical care, without which physical injury or illness might occur. (*Hedin* standard) OR

2. Is a minor
I. Types of Guardianship

1. General or Full (Plenary). The guardian has the authority to make all personal care decisions on behalf of the ward, except those that require prior court approval. Iowa Code 633.635

2. Limited. The guardian only has those specific powers that are set out in the court order. Iowa Code 633.551(3), 633.556(2); 633.557(2); 633.635(4)

3. Standby. The person may be currently able to handle his or her affairs but anticipates a time where a guardian may be necessary, and appoints a specific person to serve as guardian if the need arises. It only takes effect upon the occurrence of an event specified in the petition. Iowa Code 633.560. See Iowa State Bar Association Form P-238.

4. Temporary. The terms of guardianship are specific to time or purpose. Iowa Code 633.558

J. The Hedin Case

1. In the Matter of the Guardianship of Hedin, 528 N.W.2d 567 (Iowa 1995), the Iowa Supreme Court greatly modified Iowa’s guardianship law. Hedin involved an adult with mild retardation who was the subject of a voluntary guardianship. His sister served as his guardian. The ward attempted to remove his guardian and terminate the guardianship. The ward claimed that the Iowa guardianship statute was unconstitutional under both the United States and Iowa Constitutions because it denied him due process, and was vague and overbroad.

   a. Liberty: Guardianship involves such a significant loss of liberty that we now hold that the ward is entitled to the full panoply of procedural due process rights comparable to those present in involuntary civil commitment proceedings. Id at 574

   b. Standard: In proceeding to establish, modify, or terminate a guardianship, the district court may make a finding of incompetency only if the ward’s or proposed ward’s decision making capacity is so impaired that the ward is unable to care for his or her personal safety or to attend to and provide for such necessities as food, shelter, clothing, and medical care, without
which physical injury or illness may occur. Credible evidence of third-party assistance produced from any source must be considered in this determination. \textit{Id} at 579

c. **Limited Guardianship:** To insure that a ward’s or proposed ward’s procedural due process rights are protected, we direct the district court to make a determination in all cases—original application, application for modification, and application for termination—whether limited guardianship as authorized ...is appropriate. \textit{Id} at 580

d. **Evidence standard:** Because the liberty interest of the individual is at state in civil commitment and guardianship proceedings, we think the clear and convincing evidence standard is the appropriate one to apply in guardianship proceedings, whether those proceedings involve appointment, applications to modify, or applications to terminate. \textit{Id} at 581 \textit{In re Guardianship and Conservatorship of Hunter,} 2003 WL 011225 (Iowa App. 2003)

e. **Burden of Persuasion:** Where the ward petitions to terminate the guardianship, the ward must make a prima facie showing that the ward has some decision making capacity. Once this prima facie showing is made, the guardian has the burden to go forward and prove by clear and convincing evidence the ward’s incompetency, if any. This burden of persuasion is on the party petitioning for guardianship, and always remains with the guardian when the proceeding is one to modify or terminate the guardianship. \textit{Id} at 581

K. **Guardianship Process**

1. Determine need and rule out less restrictive alternatives.

   a. Iowa guardianship law uses the standard of least restrictive alternatives. \textit{Hedin} at 583 and Iowa Code 633.551. This means the court must consider the interest of the ward in retaining as broad a power of self-determination as is consistent with the reason for appointing the guardian of the person. \textit{Id.} at 577 (citing \textit{In re Boyer}, 636 P.2d 1085, 1091 (Utah 1981)).
In determining whether a guardianship should be established, modified, or terminated, the district court shall consider if a limited guardianship is appropriate. In making the determination, the court shall make findings of fact to support the powers conferred on the guardian. Iowa Code 633.551(3)

b. In all proceedings to appoint a guardian, the court shall consider the functional limitations of the proposed ward and whether a limited guardianship is appropriate. Iowa Code 633.556(2); 633.557(2)

2. What filing procedure should be utilized?

a. Voluntary petition. Occurs when a person agrees there is a need for assistance with personal care affairs. The proposed ward must have the capacity to sign and understand the document. Iowa Code 633.557. See Iowa State Bar Association Form P-236 and P-241

1. A guardian may be appointed by the court upon the verified petition of the proposed ward, without further notice, if the proposed ward is other than a minor under the age of fourteen years provided the court determines that such an appointment will inure to the best interest of the applicant. Iowa Code 633.557(1)

2. If an involuntary petition is pending, the court shall be governed by section 633.634. The petition shall provide the proposed ward notice of a guardian’s powers as provided in section 633.562.

3. In all proceedings to appoint a guardian, the court shall consider whether a limited guardianship is appropriate. Iowa Code 633.557(2)

4. Voluntary Petition for appointment of Guardian—Standby basis, Iowa Code 633.560. A petition for the appointment of a guardian on a standby basis may be filed by any person under the same procedure and requirements as provided in 633.591 to 633.597. See Iowa State Bar Association Form P-238 and P-242
b. Involuntary petition. Occurs when the proposed ward does not agree that there is a need for this help or is incapable of understanding that there is a need for this help. See Iowa State Bar Association Form P-237 and P-240

3. Petition for Guardianship

a. Type of petition to file?–general, limited, standby or temporary

b. Type of filing procedure?—voluntary or involuntary

c. Has standard been met? See 3d (2) (a) or (b) below

d. File with the court. Any person may file with the clerk a verified petition for the appointment of a guardian. The petition shall state the following information so far as known to the petitioner. Iowa Code 633.552:

1. The name, age, and post office address of the proposed ward.

2. That the proposed ward is in either of the following categories:

   a. Is a person whose decision making capacity is so impaired that the person is unable to care for the person’s personal safety or to attend to or provide for necessities for the person such as food, shelter, clothing, or medical care, without which physical injury or illness might occur.

   b. Is a minor

3. The name and post office address of the proposed guardian, and that such person is qualified to serve in that capacity.

4. That the proposed ward is a resident of the state of Iowa or is present in the state, and that the ward’s best interests require the appointment of a guardian in this state.
5. The name and address of the person or institution, if any, having the care, custody or control of the proposed ward.

General note: Questions to ask: Should a petition be combined to include conservatorship? Should the same person serve as both? Iowa Code 633.627-628

e. What notice provisions apply? See Iowa Code 633.554, 633.562

1. If the proposed ward is an adult, notice of the filing of the petition shall be served upon the proposed ward in the manner of an original notice and the content of the notice is governed by the rules of civil procedure governing original notice. Iowa Code 633.554(1) (a)

2. Except where the proposed ward is the petitioner, notice shall be served upon the ward’s spouse. If the proposed ward has no spouse, notice shall be served upon the proposed ward’s adult children, if any. Iowa Code 633.554(1) (b)

3. Where the proposed ward is a minor or if the proposed ward is an adult under a standby petition and the court determines pursuant to section 633.561, subsection 1, paragraph “b”, that the proposed ward is entitled to representation, notice in the manner of original notice, or another form of notice ordered by the court, given to the attorney appointed to represent the ward is notice to the proposed ward.

4. Notice shall also be served upon: (for minor or standby petition)

   a. The parents of the proposed ward, if the proposed ward is a minor. Iowa Code 633.554(2) (b) (1). In Re Guardianship of Brown, 789 N.W.2d 436, 2010 WL 3324962 (Iowa App.)

   b. The spouse of the proposed ward, if the proposed ward is an adult. If the proposed ward
has no spouse, notice shall be served upon the proposed ward’s adult children, if any. Iowa Code 633.554(2) (b) (2)

c. Service of notice under this section upon persons other than the proposed ward shall be made upon such persons whose identities are reasonably ascertainable pursuant to section 633.40, subsection 5. Proof of service shall be made by affidavit, to which copies of all documents served shall be attached. Iowa Code 633.554(3)

f. Hearing? What evidence is considered?

1. Voluntary—no hearing unless requested

2. Involuntary—hearing

3. Evidence—if the allegations in the petition are proved by clear and convincing evidence, the court may appoint a guardian. Iowa Code 633.556

In proceedings to establish, modify, or terminate a guardianship, in determining if the proposed ward or ward is incompetent, the court shall consider credible evidence from any source to the effect of third-party assistance in meeting the needs of the proposed ward or ward. However, neither party to the action shall have the burden to produce such evidence relating to third party assistance. Iowa Code 633.551(4)

In all proceedings to appoint a guardian, the courts shall consider the functional limitations of the proposed ward and whether a limited guardianship is appropriate. Iowa Code 633.556(2)

g. What is the burden of persuasion?

1. The determination of incompetency of the proposed ward or ward and the determination of the need for the
appointment of a guardian or of the modification or termination of a guardianship shall be supported by clear and convincing evidence. Iowa Code 633.551(1)

2. The burden of persuasion is on the petitioner in an initial proceeding to appoint a guardian. In a proceeding to modify or terminate a guardianship, the burden of persuasion remains with the guardian. In a proceeding to terminate a guardianship, if the ward is the petitioner, the ward shall make a prima facie showing of some decision making capacity. Once a prima facie showing is made, the burden of persuasion is on the guardian to show by clear and convincing evidence that the ward is incompetent. Iowa Code 633.551(2)

h. Scope of Review. Iowa Code 633.33 provides that actions to set aside or contest wills, for the involuntary appointment of guardians or conservators, and for the establishment of contested claims shall be triable in probate as law actions, and all other matters triable in probate shall be tried by the probate court as a proceeding in equity. The *Hedin* court noted that a petition to terminate a guardianship is not included in those actions triable in probate as law actions. *Hedin*, 528 N.W.2d at 581. Iowa Code 633.555. See also, *In re Guardianship of Murphy*, 397 N.W.2d 686, 688 (Iowa 1986); *In re Brown*, 789 N.W.2d 436, 2010 WL 3324962 (Iowa App.); *In re Guardianship of M.D.*, 797 N.W.2d 121 (Iowa Ct. App. 2011), *In re Guardianship of G.G.*, 799 N.W.2d 549 (Iowa Ct. App. 2011)

Review in equity cases shall be de novo. In all other cases the appellate courts shall constitute courts for correction of errors at law, and finding of fact in jury-waived cases shall have the effect of a special verdict. Iowa R. App. P. 6.907

L. Role of Guardian

1. The guardian serves for the life-time of the ward, unless the guardianship is terminated or a successor guardian is appointed.
2. The guardian is supervised by the court and must submit reports to the court.

3. Rights and duties of the guardian—Iowa Code 600A.2B and 232.2(21)
   Unless otherwise enlarged or circumscribed by a court or juvenile court having jurisdiction over the child or by operation of law, the rights and duties of a guardian with respect to a child shall be as follows:

   a. To consent to marriage, enlistment in the armed forces of the United States, or medical, psychiatric, or surgical treatment.

   b. To serve as guardian ad litem, unless the interests of the guardian conflict with the interests of the child or unless another person has been appointed guardian ad litem.

   c. To serve as custodian, unless another person has been appointed custodian.

   d. To make reasonable/periodic visitations if the guardian does not have physical possession or custody of the child.

   e. To consent to adoption and to make any other decision that the parents could have made when the parent child relationship existed.

   f. To make other decisions involving protection, education, and care and control of the child.

4. Responsibilities of the guardian—without prior court approval—Iowa Code 633.635(1) and 633.562. Based on the evidence produced at the hearing, the court may grant a guardian the following powers and duties which may be exercised without prior court approval:

   a. Providing for the care, comfort and maintenance of the ward, including the appropriate training and education to maximize the ward’s potential;
b. Taking reasonable care of the ward’s clothing, furniture, vehicle and other personal effects;

c. Assisting the ward in developing maximum self-reliance and independence;

d. Ensuring the ward receives necessary emergency medical service;

e. Ensuring the ward receives professional care, counseling, treatment, or services as needed. If necessitated by the physical or mental disability of the ward, the provision of professional care, counseling, treatment, or services limited to the provision of routine physical and dental examinations and procedures under anesthesia is included, if the anesthesia is provided within the scope of the health care practitioners scope of practice;

f. Any other powers or duties the court may specify.

5. Responsibilities of the Guardian—with court approval—Iowa Code 633.635(2); 633.562. A guardian may be granted the following powers which may only be exercised upon court approval:

a. Changing, at the guardian’s requests, the ward’s permanent residence if the proposed new residence is more restrictive of the ward’s liberties than the current residence;

b. Arranging the provision of major elective surgery or any other nonemergency major medical procedure;

c. Consent to the withholding or withdrawal of life-sustaining procedures in accordance with chapter 144A.

M. Liability of the Guardian—Iowa Code 633.633A

1. The guardian shall not be held personally liable for actions or omissions taken or made in the official discharge of the guardian’s duties, except for any of the following:

a. A breach of fiduciary duty imposed by the probate code
b. Willful or wanton misconduct in the official discharge of the guardian’s duties

2. The fact that a person is a guardian shall not in itself make the person personally liable for damages or the acts of the ward. Iowa Code 633.633B

N. Reports

1. A guardian shall file with the court the following written verified reports:--Iowa Code 633.669

   a. An initial report within sixty days of the guardian’s appointment. Iowa Ct. R. 7.11, Form 2. See Iowa State Bar Association Form P-250

   b. An annual report, within ninety days of the close of the reporting period, unless the court otherwise orders on good cause shown. Iowa Ct. R. 7.11, Form 2. See Iowa State Bar Association Form P-250

   c. A final report within thirty days of the termination of the guardianship under 633.675 unless that time is extended by the court. Iowa Ct. R. 7.11, Form 2. See Iowa State Bar Association Form P-250

2. Reports required by this section must include:

   a. The current mental and physical condition of the ward.

   b. The present living arrangement of the ward, including a description of each residence where the ward has resided during the reporting period.

   c. A summary of the medical, educational, vocational and other professional services provided for the ward.
d. A description of the guardian’s visits with and activities on behalf of the ward.

e. A recommendation as to the need for continued guardianship.

f. Other information requested by the court or useful in the opinion of the guardian.

3. Reports of guardians shall be reviewed and approved by a district court judge or referee. Reports, if requested, shall be served on the attorney appointed to represent the ward in the guardianship proceeding and all other parties appearing in the proceeding. Iowa Code 633.669(5) & (6)

4. Delinquent reports, Iowa Code 633.32 and Iowa Ct. R. 7.6. On June 1 and December 1 of each year, the clerk shall notify the fiduciary and the fiduciary’s attorney of any delinquent reports due by law in any pending guardianship, and that unless such delinquent report is filed within sixty days thereafter, the matter shall be reported to the presiding judge. If the delinquent report is not filed within the time so specified, the fiduciary will be subject to removal under 633.65 of this Code.

O. Rights of the Ward or Proposed Ward

1. To representation. Iowa Code 633.561 states that the ward has the right to legal representation. Representation under this section is separate from the representation by a guardian ad litem. In re Johnson, 2009 WL 249735 (Iowa App. 2009), citing Estate of Leonard v. Swift, 656 N.W.2d 132, 141 (Iowa 2003). An attorney appointed in a proceeding for the appointment of a guardian shall:

   a. Ensure that the proposed ward has been properly advised of the nature and purpose of the proceeding,

   b. Ensure that the proposed ward has been properly advised of the ward’s rights,

   c. Personally interview the proposed ward,
d. File a written report,

e. Represent the proposed ward, and

f. Ensure that the guardianship procedures conform to due process and Iowa law.

In the event that an order of appointment is entered, the attorney appointed, to the extent possible, shall: (Iowa Code 633.561(5))

a. Inform the proposed ward of the effects of the order entered for appointment of guardian.

b. Advise the ward of the ward’s rights to petition for modification or termination of the guardianship.

c. Advise the ward of the rights retained by the ward.

New Section 2012—633.561(7). If the court determines upon application that it is appropriate or necessary, the court may order that the attorney appointed pursuant to this section be given copies of and access to the proposed ward’s information to be disclosed or accessed, for the purpose of fulfilling the attorney’s responsibilities pursuant to this section.

Note: The guardian ad litem role is to provide independent advice to the Court to bring balance to the decision-making process. This is in contrast with the attorney for the ward or attorney for a third party petitioner who advocates for one side or the other. Estate of Leonard v. Swift, 656 N.W.2d 132, 139 (2003). A guardian ad litem is a person appointed by the court to protect the interests of the ward in specific litigation. Id at 139. See also In re Guardianship of Griesinger, 2011 Iowa App. No. 1-327/10-1058.

Although the Leonard case involved conservatorship, there is a relevant discussion on the roles of the guardian ad litem and attorney for the ward. Notwithstanding similarities in their duties, a guardian ad litem and an attorney serve different
functions. *Id* at 142. A guardian ad litem serves the court, advising the court, after an impartial investigation. The attorney represents the ward and must advise the ward of his rights and ensure that those rights are protected. *Id* at 142. As officer of the court, a guardian ad litem advocates for the best interest of ward, whereas an attorney advances the wishes of the ward. *Id* at 133, 142. See also *In re Guardianship of Griesinger*, 2011 Iowa App. No. 1-327/10-1058.

“At a minimum, it appears a guardian ad litem must make an investigation and advise the court of any legitimate and proper defense” to the action against the ward, *Stephens v. Wood*, 195 N.W. 239, 241-42 (1923), and must be present at the trial if the matter proceeds to that stage, *Garcia v Wibholm*, 461 N.W.2d 166, 170 (Iowa 1990). In performing this function, however a guardian ad litem acts as an officer of the court, not as the ward’s attorney. *In re Marriage of McGonigle*, 533 N.W.2d 524, 525 (Iowa 1995)

Iowa Code 232.2(22)—Guardian ad litem for a child. A guardian ad litem means a person appointed by the court to represent the interests of a child in any judicial proceedings to which the child is a party, and includes a court appointed special advocate.

Iowa Code 598.12 Attorney or guardian ad litem for minor child—investigation. This code provision provides authority to the court to appoint an attorney to represent the legal interests of the minor child under subsection (1), and a guardian ad litem to represent the best interests of the minor child under subsection (2). The same person may serve as both. *In re Marriage of Loftin*, 2011 WL 5394445 (Iowa App.)

Iowa Code 600A.2(9)—A guardian ad litem means a person appointed by a court or juvenile court having jurisdiction over a minor child to represent that child in a legal action. A guardian ad litem appointed under this chapter shall be a practicing attorney.

Iowa R. Civ. P. 1.212—Guardian ad litem. If a party served with original notice appears to be subject to rules 1.211, the court may
appoint a guardian ad litem for the party, or substitute another, in the ward’s interest. Application for such appointment or substitution may be by the ward, if competent, or a minor over 14 years old; otherwise by the party’s conservator or guardian or, if none, by any friend or any party to the action.

Incapacity pending action. If, during pendency of an action, a party is adjudged incompetent or confined in any state hospital for the mentally ill or if the party’s physician certifies to the court that the party appears to be mentally incapable of acting in the party’s own behalf, the conservator or guardian shall be joined or if there is none, the court shall appoint a guardian ad litem for the party. Iowa R. Civ. P. 1.223

In the Interest of A.T, 744 N.W.2d 657, 665 (Iowa App. 2007), the same person may serve both as the child’s counsel and as guardian ad litem. However, the court may appoint a separate guardian ad litem, if the same person cannot properly represent the legal interests of the child as legal counsel and also represent the best interest of the child as guardian ad litem. See Iowa Code 232.89.

2. To request termination or challenge the guardianship proceedings.

3. To be present at all proceedings.

4. To vote. Commitment of a person pursuant to Iowa Code 222.31 does not constitute a finding or raise a presumption that the person is incompetent to vote. The court shall make a separate determination as to the person’s competency to vote. The court shall find a person incompetent to vote only upon determining that the person lacks sufficient mental capacity to comprehend and exercise the right to vote. Iowa Code 222.16

The court shall find a ward incompetent to vote only upon determining that the person lacks sufficient mental capacity to comprehend and exercised the right to vote. Iowa Code 633.556
Under Iowa Code 633.679, at any time after the appointment of a guardian, the person under guardianship may apply to the court by petition, alleging that the person is no longer a proper subject thereof, and asking that the guardianship be terminated. A person under an order appointing a guardian which order found the person incompetent to vote may include a request for reinstatement of the person’s voting rights in a petition to terminate the guardianship or by filing a separate petition for modification of this determination.

5. To marry. Marriage is a civil contract, requiring the consent of the parties capable of entering into other contracts. Iowa Code 595.1A. A license must not be granted in the situation where either party is disqualified from making any civil contract. Iowa Code 595.3(3). This code provision also states that a license must not be granted where either party is a ward under a guardianship and the court has made a finding that the ward lacks the capacity to contract a valid marriage. Iowa Code 595.3(5)

6. The appointment of a guardian shall not constitute an adjudication that the ward is of unsound mind. Iowa Code 633.636

P. Termination. Iowa Code 633.675 states that a guardianship shall terminate, upon the occurrence of any of the following circumstances:

1. If the ward is a minor, when the ward reaches full age.

2. The death of the ward.

3. A determination by the court that the ward is no longer a person whose decision-making capacity is so impaired as to bring the ward within the categories of section 633.552, subsection 2, paragraph “a”. In a proceeding to terminate the guardianship, the ward shall make a prima facie showing that the ward has some decision-making capacity. Once the ward has made that showing, the guardian has the burden to prove by clear and convincing evidence that the ward’s decision-making capacity is so impaired as provided in section 633.552, subsection 2, paragraph “a”, that the guardianship should not be terminated. See In re Guardianship of Sluyter, No. 2-029/11-0937 (Iowa App. 2012)
4. Upon determination by the court that the guardianship is no longer necessary for any other reason.

5. When a guardianship ceases for any reason, any action or proceeding then pending shall not abate. The guardian’s successor, the former ward, or the personal representative of the ward’s estate shall be substituted or joined as a party. If no application is made for substitution, the court on its own motion may appoint a personal representative to represent the deceased party in the action. Iowa R. Civ. P. 1.224


Q. Uniform Guardianship Act. Iowa Code 633.700

1. This division of the probate code will be known and may be cited as the “Iowa Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act.”

2. Seeks to clarify jurisdiction and provide a procedural roadmap for addressing dilemmas where more than one state is involved, and to enhance communication between courts in different states.

3. Effective date is July 1, 2010, and applies to guardianship and protective proceedings in existence on or after that date.

11. Abuse of Powers

A. It is the responsibility of the guardian to act in the best interest of the ward. Physical abuse, sexual abuse, financial exploitation, or denial of critical care (neglect) are inappropriate and considered dependent adult abuse.

B. Iowa Code 235B defines physical abuse as physical injury, or unreasonable confinement, or unreasonable punishment or assault. Sexual abuse is the commission of a sexual offense. This also includes sexual exploitation.
C. Exploitation is the act or process of taking unfair advantage of a dependent adult or the adult’s physical or financial resources for one’s own personal or pecuniary profit, without the informed consent of the dependent adult, including theft, by the use of undue influence, harassment, duress, deception, false representation, or false pretenses. Iowa Code 235B

D. Exploitation under Iowa Code 235E is when a caretaker knowingly obtains, uses, endeavors to obtain to use, or who misappropriates, a dependent adult’s funds, assets, medications, or property with the intent to temporarily or permanently deprive a dependent adult of the use, benefit or possession of the funds, medication, or property for the benefit of someone other than the dependent adult.

E. Financial exploitation under Iowa Code 235F is when a person stands in a position of trust or confidence with the vulnerable elder and knowingly and by undue influence, deception, coercion, fraud, or extortion, obtains control over or otherwise uses or diverts the benefits, property, resources, belongings, or assets of the vulnerable elder.

A person stands in a position of trust or confidence if they have any of the following relationships relative to the vulnerable elder: a. Is a parent, spouse, adult child, or other relative by consanguinity or affinity of the vulnerable elder. b. Is a caretaker for the vulnerable elder. c. Is a person who is in a confidential relationship with the vulnerable elder. Iowa Code 235F.1(14).

F. Denial of critical care (neglect) includes the deprivation of food, shelter, clothing, supervision, physical or mental health care, and other care necessary to maintain the dependent adult’s life or health.

G. Wards are dependent adults and guardians are caretakers.

H. To report abuse, exploitation or neglect contact:

   a. Department of Human Services 1-800-362-2178
   b. Department of Inspections & Appeals 1-877-686-0027
   c. Law enforcement
   d. Elder Abuse System Coordinator 1-800-532-3213
A guardian can be held personally liable for actions or omissions taken or made in the official discharge of duties when there is a breach of fiduciary duty as imposed by the probate code or there is willful or wanton misconduct in the official discharge of duties. Iowa Code 633.633A.

IV. Financial Management

1. **Least Restrictive Alternatives.** Alternatives to conservatorship are legal tools and social services that may delay or prevent the appointment of a conservator for a person who lacks some or all capacity to make decision on his/her own behalf. Nevertheless, alternatives may not always be preferable to conservatorship. If impairments are severe, no advance planning has been done, and/or court supervision is clearly needed, conservatorship may be the best course of action. What is important is that alternatives have been explored and their potential exhausted.

2. **Self-Direction.** An individual should make his or her own decisions when possible. That fact that someone does not agree with those decisions, does not mean a decision maker is needed. Following the least restrictive alternatives concept allows a person to keep as much autonomy and self-determination as possible.

3. **Third Party Assistance.** In making a determination as to whether a conservatorship should be established, modified, or terminated, the court must consider the availability of third-party assistance to meet a ward’s or proposed ward’s need for such necessities, if credible evidence of such assistance is adduced from any source. However, neither party shall have the burden to produce such evidence. Iowa Code 633.551(4)

4. **Representative Payee.** A “payee” is appointed to manage Social Security or other federal benefit funds for a beneficiary determined incapable of managing his or her benefits. The need is determined by the federal agency through an interview with the beneficiary and/or a physician’s statement. A payee has no legal authority to manage non-federal benefit income or medical matters.
Examples of benefits that can be handled by a “payee” are: Social Security, Supplemental Security Income (SSI), Railroad Retirement, Office of Personal Management (OPM), and the Department of Defense and Veteran’s Affairs. The Veteran’s Affairs department calls the Representative Payee a Federal Fiduciary.

5. **Trusts**—Iowa Code 633A

A. The right to the beneficial enjoyment of property to which another person hold the legal title. Creates a property interest held by one person (the trustee) at the request of another (the settlor) for the benefit of a third party (the beneficiary).

B. A trust is created only if all of the following elements are satisfied (Iowa Code 633A.2102):

1. Settlor was competent and indicated an intention to create a trust,
2. The same person is not the sole trustee and sole beneficiary
3. The trust has a definite beneficiary,
4. The trustee has duties to perform.

See *In Re Trust of Trimble, No. 11-1967 (Iowa 2013)*

6. **Financial Powers of Attorney**—Iowa Code 633B; 558.36 and 597.5

A. The Iowa Uniform Power of Attorney Act was signed into law on April 10, 2014. It strikes and replaces the current provisions in 633B.

B. A financial power of attorney authorizes another person (attorney-in-fact) to make financial decisions on another person’s behalf (principal).

C. Executing the Power of Attorney

1. The principal must have the capacity, be at least eighteen years of age, and be competent to put the power of attorney in place.
2. Any actions taken by the principal must be voluntary, and he or she must understand the effects of the legal document being signed.

3. The document must be in writing, either handwritten, typed or in an already established form.

4. The document must contain:
   a. The name of the person authorized to act as the attorney-in-fact and any alternates(s)
   b. The powers and responsibilities given to the attorney-in-fact
   c. The signature of the principal
   d. The date signed by the principal, and
   e. The signature of the principal and signed in the presence of a notary.

D. Date of Effect

1. As of July 1, 2014, a power of attorney is effective on the date of execution unless the principal provides otherwise in the power of attorney, either at a future date or upon the occurrence of a future event or contingency.

2. If the principal chooses for the power of attorney to become effective upon the occurrence of a future event or contingency, the principal may authorize one or more persons to make, in writing, the determination that the event or contingency has occurred.

3. If the principal chooses for the power of attorney to become effective upon the principal’s incapacity and the principal did not authorize a person to determine whether the principal is incapacitated, or the authorized person is unable or unwilling to make the determination, the following individuals may make a determination regarding the
preferences capacity: a licensed physician, a licensed psychologist, a
judge, or an appropriate governmental official.

4. The person authorized to make a determination that the principal is
incapacitated may act as the principal’s personal representative
pursuant to the Health Insurance Portability and Accountability Act.

Iowa Code 633B.109

E. Duties of an Agent under a Financial Power of Attorney

1. Notwithstanding provisions in the power of attorney, an agent that
has accepted appointment shall act in conformity with the following:

   a. In accordance with the principal’s reasonable expectations to
      the extent actually known by the agent and otherwise in the
      principal’s best interest

   b. In good faith.

   c. Only within the scope and authority granted in the power of
      attorney.

Iowa Code 633B.114

2. Except as otherwise provided in the power of attorney, an agent that
has accepted appointment shall do all of the following:

   a. Act loyally for the principal’s benefit.

   b. Act so as not to create a conflict of interest that impairs the
      agent’s ability to act impartially in the principal’s best interest.

   c. Act with the care, competence, and diligence ordinarily
      exercised by agents in similar circumstances.

   d. Keep a record of all receipts, disbursements, and transactions
      made on behalf of the principal.
e. Cooperate with a person that has authority to make health care decisions for the principal to carry out the principal’s reasonable expectations to the extent actually known by the agent and, otherwise, act in the principal’s best interest.

f. Attempt to preserve the principal’s estate plan, to the extent actually known by the agent, if preserving the plan is consistent with the principal’s best interest based upon all relevant factors, including:

   i. The value and nature of the principal’s property.

   ii. The principal’s foreseeable obligations and need for maintenance.

   iii. Minimization of the principal’s taxes, including income, estate, inheritance, generation-skipping transfer, and gift taxes.

   iv. The principal’s eligibility for a benefit, a program, or assistance under a statute or regulation or contract.

F. Authority of an Agent – Specific and General

1. An agent may do the following on behalf of a principal or with the principal’s property only if the power of attorney expressly grants the authority:

   a. Create, amend, revoke, or terminate an inter vivos trust.

   b. Make a gift.

   c. Create or change rights of survivorship.

   d. Create or change a beneficiary designation.

   e. Delegate authority granted under the power of attorney.
f. Waive the principal’s right to be a beneficiary of a joint and survivor annuity, including but not limited to a survivor benefit under a retirement plan.

g. Exercise fiduciary powers that the principal has authority to delegate.

h. Disclaim property, including but limited to a power of appointment.

Iowa Code 633B.201

2. Unless otherwise provided, by executing a power of attorney, an agent is given the general authority to act on the Principal's behalf with respect to:

   a. Real property. Iowa Code 633B.204
   b. Tangible personal property. Iowa Code 633B.205
   c. Stocks and bonds. Iowa Code 633B.206
   d. Commodities and options. Iowa Code 633B.207
   e. Banks and other financial institutions. Iowa Code 633B.208
   f. Operation of entity or business. Iowa Code 633B.209
   g. Insurance and annuities. Iowa Code 633B.210
   h. Estates, trusts, and other beneficial interests. Iowa Code 633B.211
   i. Claims and litigation. Iowa Code 633B.212
   j. Personal and family maintenance. Iowa Code 633B.213
   k. Benefits from governmental programs or civil or military service. Iowa Code 633B.214
   l. Retirement plans. Iowa Code 633B.215
G. Terms of the financial power of attorney

1. Durability: A power of attorney created under 633B is durable unless the power of attorney expressly provides that it is terminated by the incapacity of the principal. Iowa Code 633B.104

2. Validity: A power of attorney executed after July 1, 2014 is valid if the execution of the power of attorney complies with section 633.105. A power of attorney executed before July 1, 2014 is valid if the execution complied with the law as it existed at the time of execution. A power of attorney executed outside of Iowa is valid if the execution complied with: a. the law of the jurisdiction that determines the meaning and effect of the power of attorney. b. the requirements for a military power of attorney. Iowa Code 633B.106

   A photocopy or electronically transmitted copy of the original power of attorney has the same effect as the original. Iowa Code 633B.106

3. Nomination of conservator or guardian. Under the Iowa Uniform Power of Attorney Act, a principal may nominate a conservator or a guardian for consideration by the court. Except for good cause shown, the court shall make its appointment in accordance with the principal’s nomination. Iowa Code 633B.108(1)

4. Effect of court-appointed fiduciary. If a conservator or some other fiduciary charged with the management of the principal’s property is appointed for the principal, the power of attorney is suspended unless the power of attorney provides otherwise. Iowa Code 633B.108(2)

5. If the power of attorney continues, the agent is accountable to both the court-appointed fiduciary as well as to the principal. Iowa Code 633B.108(2)
6. The execution of any deed, mortgage, or other instrument in writing, executed by any attorney-in-fact may be acknowledged by the attorney executing the same. Iowa Code 558.36

7. A husband or wife may constitute the other spouse as the husband’s or wife’s attorney-in-fact, to control and dispose of the husband’s or wife’s property, including the relinquishment of homestead rights and surviving spouse’s statutory share in the homestead, as provided in section 561.13, for their mutual benefit, and may revoke the appointment, the same as other persons. Iowa Code 597.5; 559

H. Judicial Relief

1. Under the Iowa Uniform Power of Attorney Act, the following individuals may petition a court to construe a power of attorney or to review an agent’s conduct:
   a. The principal or agent.
   b. A guardian, conservator, or other fiduciary acting for the principal.
   c. A person authorized to make health care decisions for the principal.
   d. The principal’s spouse, parent, or descendant or an individual who would qualify as a presumptive heir of the principal.
   e. A person named as beneficiary to receive any property, benefit, or contractual right upon the principal’s death or as a beneficiary of a trust created by or for the principal that has a financial interest in the principal’s estate.
   f. A governmental agency having regulatory authority to protect the welfare of the principal.
   g. The principal’s caregiver, including but not limited to a caretaker as defined in section 235B.2 or 235E.1, or another
person that demonstrates sufficient interest in the principal’s welfare.

h. A person asked to accept the power of attorney.

i. A person designated by the principal in the power of attorney.

Iowa Code 633B.116

2. An agent that is found to have violated chapter 633B is liable to the principal or the principal’s successors in interest for the amount required to do both of the following: (1) restore the value of the principal’s property to what it would have been had the violation not occurred and (2) reimburse the principal or the principal’s successors in interest for attorney fees and costs paid on the agent’s behalf.

Iowa Code 633B.177

H. Termination

1. Termination of a power of attorney occurs when:

   a. The principal dies.

   b. The principal becomes incapacitated, if the power of attorney is not durable.

   c. The principal revokes the power of attorney.

   d. The power of attorney provides that it terminates.

   e. The purpose of the power of attorney is accomplished.

   f. The principal revokes the agent’s authority or the agent dies, becomes incapacitated, or resigns, and the power of attorney does not provide for another agent to act under the power of attorney.

Iowa Code 633B.110(1)
2. Termination of an agent’s authorities occurs when:

   a. The principal revokes the authority.

   b. The agent dies, becomes incapacitated, or resigns.

   c. An action is filed for the dissolution or annulment of the agent’s marriage to the principal or for their legal separation, unless the power of attorney otherwise provides.

   d. The power of attorney terminates.

Iowa Code 633B.110(2)

3. The agent needs to be advised of the revocation. The revocation is not effective as to the agent or any other person that, without actual knowledge of the termination, acts in good faith under the power of attorney. Such actions, unless otherwise invalid or unenforceable, binds the principal and the principal’s successors in interest. Iowa Code 633B.110(4).

7. Conservatorship--Iowa Code 633.3(7); 633.551; 633A.1102(5)

   A. A “conservatorship” is a court-authorized relationship established under the provisions of the Iowa Probate Code in which one person, the conservator, assumes the responsibility for the custody and control of the property of another person, the ward.

   B. A “conservator” is the person appointed by the court to have custody and control of the property of a ward. Iowa Code 633.3(7)

   C. Least Restrictive Alternatives for conservatorship are third party assistance, Representative Payee, financial power of attorney, trusts, and limited conservatorship.

   D. Who can be served by conservatorship? Iowa Code 633.566 specifies that the proposed ward is in either of the following categories:
1. Is a person whose decision making capacity is so impaired that the person is unable to make, communicate, or carry out important decisions concerning the person’s financial affairs, OR

2. Is a minor

E. Types of Conservatorship

1. General or Full (Plenary). The conservator has the authority to make all financial management decisions on behalf of the ward, except those that require prior court approval. Iowa Code 633.646, 633.647

2. Limited. The conservator only has those specific powers that are set out in the court order. Iowa Code 633.551(3), 633.570(2), 633.572(2)

3. Standby. The person may be currently able to handle his or her affairs but anticipates a time where a conservator may be necessary, and appoints a specific person to serve as conservator if the need arises. It only takes effect upon the occurrence of an event specified in the petition. Iowa Code 633.591; 633.596. See Iowa State Bar Association Form P-244 & P-242

4. Temporary. The terms of conservatorship are specific to time or purpose. Iowa Code 633.573, 633.585

5. Foreign. Where there is no conservatorship, nor any application pending in this state, the duly qualified foreign conservator or guardian of a non resident ward may, upon application, be appointed conservator of the property of such person in this state. Iowa Code 633.603

Note: Iowa Code 633.574 allows for a procedure in lieu of conservatorship. If a conservator has not been appointed, money due a minor or other property to which a minor is entitled, not exceeding twenty-five thousand dollars in value, shall be paid or delivered to a custodian under any uniform transfers to minors Act.

F. The Teeter Case

In Matter of the Guardianship and Conservatorship of Teeter, 537 N.W.2d 808 (Iowa App. 1995), the court applied the Hedin holdings to a conservatorship case. In Teeter, a woman with a brain injury appealed
the district court’s decision granting her adult children’s petition for involuntary conservatorship. The court held there was no finding that the woman’s decision-making process was so impaired that she was unable to care for her own personal safety and unable to provide the necessities of life required by *Hedin*. Subsequently, in *Conservatorship of Leonard*, 563 N.W.2d 193 (Iowa 1997), the Iowa Supreme Court cited *Teeter* for the proposition that *Hedin* applies to conservatorships. In 1997, the Iowa legislature codified the Supreme Court rulings by amendments to the Iowa Code and applied the holdings from *Hedin* and *Teeter* to both guardianships and conservatorships.

G. Conservatorship Process

1. Determine need and rule out less restrictive alternatives.

   a. Iowa conservatorship law uses the standard of least restrictive alternatives. Iowa Code 633.551. This means the court must consider the interest of the ward in retaining as broad a power of self determination as is consistent with the reason for appointing the conservator of the person.

   In determining whether a conservatorship should be established, modified, or terminated, the district court shall consider if a limited conservatorship is appropriate. In making the determination, the court shall make findings of fact to support the powers conferred on the conservator. Iowa Code 633.551(3)

   b. In all proceedings to appoint a conservator, the courts shall consider the functional limitations of the proposed ward and whether a limited conservatorship is appropriate. Iowa Code 633.570(2); 633.572(2)

2. What filing procedure should be utilized?

   a. Voluntary petition. Occurs when a person agrees there is a need for assistance with financial management. The proposed ward must have the capacity to sign and understand the document. Iowa Code 633.572. See Iowa State Bar Association Form 243 & 241

   1. A conservator may be appointed by the court upon the verified petition of the proposed ward, without further
notice, if the proposed ward is other than a minor under the age of fourteen years provided the court determines that such an appointment will inure to the best interest of the applicant. Iowa Code 633.572(1)

2. If an involuntary petition is pending, the court shall be governed by 633.634. The petition shall provide the proposed ward notice of a conservator’s powers as provided in section 633.576.

3. In all proceedings to appoint a conservator, the court shall consider whether a limited conservatorship is appropriate. Iowa Code 633.572(2)

4. Voluntary petition for appointment of conservator—standby basis. (Iowa Code 633.591) Any person of full age and sound mind may execute a verified petition for the voluntary appointment of a conservator of the person’s property upon the express condition that such petition shall be acted upon by the court only upon the occurrence of an event specified or the existence of a described condition of the mental or physical health of the petitioner, the occurrence of which event, or the existence of which condition, shall be established in the manner directed in the petition. The petition, if executed on or after January 1, 1991, shall advise the proposed ward of a conservator’s powers as provided in section 633.576. See Iowa State Bar Association Form P-244 and 242

5. A person having physical or legal custody of a minor may execute a verified petition for the appointment of a standby conservator of the proposed ward’s property, upon the express condition that the petition shall be acted upon by the court only upon the occurrence of an event specified or the existence of a described condition of the mental or physical health of the petitioner, the occurrence of which event, or the existence of which condition shall be established in the manner directed in the petition. Iowa Code 633.591A.
6. Standby conservatorship petitions may request that the appointment be made without bond or with bond of a certain stated sum.

7. Standby petitions may be deposited with the clerk of the county in which the party resides, or with any person, firm, bank or trust company selected by the petitioner. Iowa Code 633.593. Such petition may be revoked by the petitioner at any time before appointment of a conservator by the court, provided that the petitioner is of sound mind. Revocation shall be accomplished by the destruction of the petition by the petitioner, or by the execution of an acknowledged instrument of revocation. If the petition has been deposited with the clerk, the revocation may likewise be deposited there. Iowa Code 633.594.

8. At any time after the deposit of the petition with the clerk, and before its revocation, it may be brought on for hearing by the filing of a verified statement to the effect that the occurrence of the event or the condition provided for in the petition has come to pass. If the petition has not been deposited with the clerk, then it may be brought on for hearing at any time by the filing of it and such a verified statement with the clerk of the county in which the person resides. Iowa Code 633.595.

9. At the time a standby petition is filed, the court shall consider whether a limited conservatorship is appropriate. Iowa Code 633.596

b. Involuntary petition. Occurs when the proposed ward does not agree that there is a need for this help or is incapable of understanding that there is a need for this help. See Iowa State Bar Association Form P-239 & 240

3. Petition for Conservatorship

a. Type of petition to file? general, limited, standby, temporary, or foreign
b. Type of filing procedure?—voluntary or involuntary

c. Has standard been met? See 3d (2) (a) or (b) below

d. File with the court. Any person may file with the clerk a verified petition for the appointment of a conservator. The petition shall state the following information so far as known to the petitioner. Iowa Code 633.566:

1. The name, age, and post office address of the proposed ward.

2. That the proposed ward is in either of the following categories:
   a. Is a person whose decision making capacity is so impaired that the person is unable to make, communicate, or carry out important decisions concerning the person’s financial affairs OR
   b. Is a minor

3. The name and post office address of the proposed conservator, and that such person is qualified to serve in that capacity.

4. The estimated present value of the real estate, the estimated value of the personal property, and the estimated gross annual income of the estate. If any money is payable, or to become payable to the proposed ward by the United States through the United States department of veterans affairs, the petition shall so state.

5. The name and address of the person or institution, if any, having the care, custody or control of the proposed ward.

6. That the proposed ward resides in the state of Iowa, is a nonresident, or that the proposed ward’s residence is unknown, and that the proposed ward’s best interests require the appointment of a conservator in the state of Iowa.
e. Petition for appointment of Conservator for Absentee—Iowa Code 633.580. When a person owns property located in the state of Iowa, the person’s whereabouts are unknown, and no provision for the care, control and supervision of such property has been made, with the result that such property is likely to be lost or damaged, or that the dependents of such owner are likely to be deprived of means of support, it shall be proper for any person to file this petition. The petition shall state, as far as known by the petitioner:

1. The name, age and last known post office address of the proposed ward.

2. The facts concerning the disappearance of the absentee.

3. The name and post office address of the proposed conservator, and that the proposed conservator is qualified to serve in that capacity.

4. A general description of the property of the proposed ward within this state and of the proposed ward’s right to receive property; also the estimated present value of the real estate, the estimated value of the personal property, and the estimated gross annual income of the estate. If any money is payable, or to become payable, to the proposed ward by the United States through the department of veterans affairs, the petition shall so state.

5. That the property of the absentee is likely to be lost or damaged, or that the absentee’s dependents are likely to be deprived of means of support because of the absence, and that no proper provision has been made for the care, control and supervision over such property.

General note: Questions to ask: Should a petition be combined to include guardianship? Should the same person serve as both? Iowa Code 633.627-628

1. If the proposed ward is an adult, notice of the filing of the petition shall be served upon the proposed ward in the manner of an original notice and the content of the notice is governed by the rules of civil procedure governing original notice. Iowa Code 633.568(1) (a)

2. Except where the ward is the petitioner, notice shall also be served upon the ward’s spouse. If the ward has no spouse, notice shall be served upon the ward’s adult children, if any. Iowa Code 633.568(1) (b)

3. Where the proposed ward is a minor or if the proposed ward is an adult under a standby petition and the court determines pursuant to section 633.575, subsection 1, paragraph “b”, that the proposed ward is entitled to representation, notice in the manner of original notice, or another form of notice ordered by the court, given to the attorney appointed to represent the ward is notice to the proposed ward.

4. Notice shall also be served upon: (minor or standby petition)

   a. The parents of the proposed ward, if the proposed ward is a minor. Iowa Code 633.568(2) (b) (1)

   b. The spouse of the proposed ward, if the proposed ward is an adult. If the proposed ward has no spouse, notice shall be served upon the proposed ward’s adult children, if any. Iowa Code 633.568(2) (b) (2)

   c. Service of notice under this section upon persons other than the proposed ward shall be made upon such persons whose identities are reasonably ascertainable pursuant to section 633.40, subsection 5. Proof of service shall be made by affidavit, to which copies of all documents served shall be attached. Iowa Code 633.568(3)
g. Hearing? What evidence is considered?

1. Voluntary—no hearing unless requested
2. Involuntary—hearing
3. Evidence—if the allegations in the petition are proved by clear and convincing evidence, the court may appoint a conservator. Iowa Code 633.570

In proceedings to establish, modify, or terminate a conservatorship, in determining if the proposed ward or ward is incompetent, the court shall consider credible evidence from any source to the effect of third-party assistance in meeting the needs of the proposed ward or ward. However, neither party to the action shall have the burden to produce such evidence relating to third party assistance. Iowa Code 633.551(4)

In all proceedings to appoint a conservator, the courts shall consider the functional limitations of the person and whether a limited conservatorship is appropriate. Iowa Code 633.570(2)

h. What is the burden of persuasion?

1. The determination of incompetency of the proposed ward or ward and the determination of the need for the appointment of a conservator or of the modification or termination of a conservatorship shall be supported by clear and convincing evidence. Iowa Code 633.551(1) and In re Guardianship and Conservatorship of Hunter, 2003 WL 021225 (Iowa App. 2003)

2. The burden of persuasion is on the petitioner in an initial proceeding to appoint a conservator. In a proceeding to modify or terminate a conservatorship, the burden of persuasion remains with the conservator. In a proceeding to terminate a conservatorship, if the ward is the petitioner, the ward shall make a prima facie showing of some decision making capacity. Once a prima facie
showing is made, the burden of persuasion is on the conservator to show by clear and convincing evidence that the ward is incompetent. Iowa Code 633.551(2)

3. Any modification of the powers of the ward that would be more restrictive of the ward’s control over the ward’s financial affairs shall be based upon clear and convincing evidence and the burden of persuasion is on the conservator. Any modification that would be less restrictive of the ward’s control over the ward’s financial affairs shall be based upon proof in accordance with requirements of section 633.675.

i. Scope of Review. Iowa Code 633.33 provides that actions to set aside or contest wills, for the involuntary appointment of guardians or conservators, and for the establishment of contested claims shall be triable in probate as law actions, and all other matters triable in probate shall be tried by the probate court as a proceeding in equity. In re Guardianship of Murphy, 397 N.W.2d 686, 687 (Iowa 1986)

Review in equity cases shall be de novo. In all other cases the appellate courts shall constitute courts for correction of errors at law, and finding of fact in jury-waived cases shall have the effect of a special verdict. Iowa R. App. P. 6.907

j. Conservatorships involving Veterans’—Iowa Code 633.614. Whenever moneys are paid or are payable pursuant to any law of the United States through the United States department of veterans’ affairs to a conservator or a guardian, the provisions in Iowa Code 633.615, 633.617 and 633.622 shall apply to the administration of said moneys. Such provisions shall be construed to be supplementary to the provisions for conservators, and shall not be exclusive of such provisions.

The secretary of veterans affairs of the United States, the secretary’s successor, or the designee of either, shall be a party in interest in any proceeding for the appointment or removal of a conservator, or for the termination of the conservatorship, and in
any suit or other proceeding including reports and accountings, affecting in any manner the administration of those assets that were derived in whole or in part from benefits paid by the United States department of veterans affairs. Not less than fifteen days prior to the time set for hearing notice, in writing, of the time and place thereof shall be given by mail to the office of the United States department of veterans affairs having jurisdiction over that area in which such matter is pending. Iowa Code 633.615

H. Role of Conservator

1. The conservator serves for the life-time of the ward, unless the conservatorship is terminated or a successor conservator is appointed.
2. The conservator is supervised by the court and must submit reports to the court.

3. Rights and duties of the conservator—Iowa Code 633.641

   a. It is the duty of the conservator of the estate to protect and preserve it, to invest it prudently, to account for it as herein provided, and to perform all other duties required of the conservator by law and at the termination of the conservatorship to deliver the assets of the ward to the person entitled thereto.

   b. The conservator shall report to the department of human services the assets and income of any ward receiving medical assistance under chapter 249A.

   c. When an instrument purporting to be the will of the ward comes into the hands of a conservator, the conservator shall immediately deliver to the court. Iowa Code 633.643

4. Powers of the conservator without order of the court—Iowa Code 633.646 and 633.576. The conservator shall have the full power, without prior order of the court, with relation to the estate of the ward:

   a. To collect, receive, receipt for any principal or income, and to enforce, defend against or prosecute any claim by or against the ward or the conservator; to sue on and defend claims in favor or against, the ward or the conservator;
b. To sell and transfer personal property of a perishable nature and personal property for which there is a regularly established market;

c. To vote at corporate meetings in person or by proxy;

d. To receive additional property from any source;

e. To continue to hold any investment or other property originally received by the conservator, and also any increase thereof, pending the timely filing of the first annual report, notwithstanding 633A, subchapter IV, part 3.

5. Powers of the conservator with order of the court—Iowa Code 633.647 and 633.576. Conservators shall have the following powers subject to the approval of the court after hearing on such notice, if any, as the court may prescribe:

a. To invest the funds belonging to the ward;

b. To execute leases;

c. To make payments to, or for the benefit of, the ward in any of the following ways:

1. Directly to the ward;

2. Directly for the maintenance, welfare, and education of the ward;

3. To the legal guardian of the person of the ward; or

4. To anyone who at the time shall have the custody and care of the person of the ward.

d. To apply any portion of the income or of the estate of the ward for the support of any person for whose support the ward is legally liable.

e. To compromise or settle any claim by or against the ward or the conservator; to adjust, arbitrate or compromise claims in favor of or against the ward or the conservator. Notwithstanding these provisions, the court may order an independent investigation by
an attorney other than the attorney for the conservator. Iowa Code 633.648

f. To make an election for the ward who is a surviving spouse as provided in sections 633.236 and 633.240.

g. To exercise the right to disclaim on behalf of the ward as provided in section 633E.5.

h. To do any other thing that the court determines to be to the best interests of the ward and the ward’s estate.

i. For good cause shown and under order of court, a conservator may make gifts on behalf of the ward out of the assets under a conservatorship to persons or religious, educational, scientific, charitable, or other nonprofit organizations to whom or to which such gifts were regularly made prior to the conservatorship or on a showing to the court that such gifts would benefit the ward or the ward’s estate from the standpoint of income, gift, estate or inheritances taxes. The making of gifts out of the assets must not foreseeably impair the ability to provide adequately for the best interest of the ward. Iowa Code 633.668. Daughton v. Parson, 423 N.W.2d 894 (Iowa App. 1988)

j. Under order of the court and for good cause shown, … a conservator shall have the power to breach contracts of the ward entered into by the ward prior to the appointment of the conservator, thereby incurring such liability of the ward’s estate for such breach as the ward would have incurred for such breach if the ward had been competent. Iowa Code 633.650

6. An action of a minor or any person adjudged incompetent shall be brought by the person’s conservator if there is one or, if not, by the persons’ guardian if there is one; otherwise the minor may sue by a next friend, and the incompetent by a conservator or guardian appointed by the court for that purpose. If it is in the person’s best interest the court may dismiss such action or substitute another conservator, guardian or next friend. Iowa R. Civ. P. 1.210

7. No judgment without a defense shall be entered against a party then a minor, or ….one adjudged incompetent, or whose physician certifies to
the court that the party appears to be mentally incapable of conducting a defense. Such defense shall be by guardian ad litem; but the conservator (and if there is no conservator, the guardian) of a ward or the attorney appearing for a competent party may defend unless the proceeding was brought by or on behalf of such fiduciary or unless the court supersedes such fiduciary by a guardian ad litem appointed in the ward’s interest.

Iowa R. Civ. P. 1.211

I. Liability of Conservator—Iowa Code 633.633A

1. The conservator shall not be held personally liable for actions or omissions taken or made in the official discharge of the conservator’s duties, except for any of the following:

   a. A breach of fiduciary duty imposed by the probate code

   b. Willful or wanton misconduct in the official discharge of the conservator’s duties.

2. The fact that a person is a conservator shall not in itself make the person personally liable for damage for the acts of the ward. Iowa Code 633.633B

J. Reports

1. A conservator shall file with the court—Iowa Code 633.670

   a. An inventory within sixty days of the conservator’s appointment. This inventory shall include all property of the ward that has come into the conservator’s possession or of which the conservator has knowledge. When additional property comes into the possession of the conservator or to the knowledge of the conservator, a supplemental inventory shall be filed within thirty days. Iowa Ct. R. 7.11—Form 3 and Iowa State Bar Association Form P-251

   b. Written verified reports and accountings as follows:

      1. Annually, within ninety days of the close of the reporting period, unless the court otherwise orders on good cause shown. Iowa Ct. R. 7.11—Form 4 and Iowa State Bar Association Form P-253 to 260
2. Within thirty days following the date of removal.

3. Upon filing resignation and before the resignation is accepted by the court.

4. Within sixty days following the date of termination. Iowa Ct. R. 7.11—Form 5 and Iowa State Bar Association Form P-254 to 260

5. At other times as the court may order.

2. The required reports must include: Iowa Code 633.671

   a. The balance of funds on hand at the close of the last previous accounting, and all amounts received from whatever source during the period covered by the accounting.

   b. All disbursements made during the period covered by the accounting.

   c. Any changes in investments since the last previous report, including a list of all assets, and recommendations of the conservator for the retention or disposition of any property held by the conservator.

   d. The amount of the bond and the name of the surety on it.

   e. The residence or physical location of the ward.

   f. The general physical and mental condition of the ward.

   g. Such other information as shall be necessary to show the condition of the affairs of the conservatorship.

3. Reports of conservators shall be reviewed and approved by a district court judge or referee. Iowa Code 633.670(3)

4. Reports to the department of human services for a ward receiving medical assistance shall be made upon establishment of a conservatorship, upon application for benefits on behalf of the ward, upon annual or semiannual review of continued medical assistance eligibility, when any significant change in principal or income occur in the conservatorship account, or as otherwise requested by the department.
of human services. Written reports shall be provided to the department of human services county office for the county in which the ward resides or the county office in which the ward’s medical assistance is administered. Iowa Code 644.641

5. Delinquent inventories and reports, Iowa Code 633.32. On June 1 and December 1 of each year, the clerk shall notify the fiduciary and the fiduciary’s attorney of any delinquent inventories or reports due by law in any pending conservatorship, and that unless such delinquent report is filed within sixty days thereafter, the matter shall be reported to the presiding judge. If the delinquent report is not filed within the time so specified, the fiduciary will be subject to removal under 633.65 of this Code. Iowa Ct. R. 7.6

K. Rights of the Ward or Proposed Ward

1. To representation. Iowa Code 633.575 states that a proposed ward is entitled to representation. Upon filing of the petition, the court shall appoint an attorney to represent the ward, set a hearing on the petition, and provide for notice of the appointment of counsel and the date of hearing.

   a. If the proposed ward is a minor or an adult under standby petition, the court shall determine whether, under the circumstances of the case, the proposed ward is entitled to representation.

   b. The court shall ensure that all proposed wards entitled to representation have been provided with notice of the right to representation and right to be personally present at all proceedings.

   c. An attorney appointed, to the extent possible, shall: (Iowa Code 633.575(4):

      1. Ensure that the proposed ward has been properly advised of the nature of the proceedings and purpose.

      2. Ensure that the proposed ward has been properly advised of the ward’s rights in a conservatorship proceeding.
3. Personally interview the proposed ward.

4. File a written report stating whether there is a return on file showing that proper service on the proposed ward was made and stating compliance with provisions 1-3 above or stating the inability to comply by reason of the proposed ward’s condition.

5. Represent the proposed ward.

6. Ensure that the conservatorship procedures conform to the statutory and due process requirements of Iowa law.

d. In the event that an order of appointment is entered, the attorney, to the extent possible, shall:

1. Inform the proposed ward of the effects of the order entered for appointment of conservator.

2. Advise the ward of the ward’s rights to petition for modification or termination of conservatorship.

3. Advise the ward of the rights retained by the ward.

Where interests of conservator and ward conflict, conservator’s attorney owes duty only to conservator. *Estate of Leonard v. Swift*, 656 N.W.2d 132, 146 (Iowa 2002).

2. A ward under conservatorship shall not have the power to convey, encumber, or dispose of property in any manner, other than by will if the ward possesses the requisite testamentary capacity; unless the court determines that the ward has a limited ability to handle the ward’s own funds. If the court makes such a finding, it shall specify to what extent the ward may possess and use the ward’s own funds. *Iowa Code 633.637*

3. The title to all property of the ward is in the ward and not the conservator subject, however, to the possession of the conservator and to the control of the court for the purposes of administration, sale or other disposition, under the provisions of the law. *Iowa Code 633.639*

4. The appointment of a conservator shall not constitute an adjudication that the ward is of unsound mind. *Iowa Code 633.636*
5. Upon receiving an instrument purporting to be the will of a living ward, the court may open said will and read it. The court with or without notice, may enter such orders in the conservatorship as it deems advisable for the proper administration of the conservatorship in light of the expressed testamentary intent of the ward. Iowa Code 633.644

6. To request termination or challenge the conservatorship proceedings.

7. To be present at all proceedings.

8. To vote. Commitment of a person pursuant to Iowa Code 222.31 does not constitute a finding or raise a presumption that the person is incompetent to vote. The court shall make a separate determination as to the person’s competency to vote. The court shall find a person incompetent to vote only upon determining that the person lacks sufficient mental capacity to comprehend and exercise the right to vote. Iowa Code 222.16

The court shall find a ward incompetent to vote only upon determining that the person lacks sufficient mental capacity to comprehend and exercised the right to vote. Iowa Code 633.556

Under Iowa Code 633.679, at any time after the appointment of a conservator, the person under conservatorship may apply to the court by petition, alleging that the person is no longer a proper subject thereof, and asking that the conservatorship be terminated. A person under an order appointing a conservator which order found the person incompetent to vote may include a request for reinstatement of the person’s voting rights in a petition to terminate the conservatorship or by filing a separate petition for modification of this determination.

9. To marry. Marriage is a civil contract, requiring the consent of the parties capable of entering into other contracts. Iowa Code 595.1A. A license must not be granted in the situation where either party is disqualified from making any civil contract. Iowa Code 595.3(3). This code provision also states that a license must not be granted where either party is a ward under a guardianship and the court has made a finding that the ward lacks the capacity to contract a valid marriage. Iowa Code 595.3(5)
L. Termination—Iowa Code 633.675 states that a conservatorship shall terminate, upon the occurrence of any of the following circumstances:

1. If the ward is a minor, when the ward reaches full age.

2. The death of the ward.

3. A determination by the court that the ward is no longer a person whose decision-making capacity is so impaired as to bring the ward within the categories of section 633.566, subsection 2, paragraph “a”. In a proceeding to terminate the conservatorship, the ward shall make a prima facie showing that the ward has some decision-making capacity. Once the ward has made that showing, the conservator has the burden to prove by clear and convincing evidence that the ward’s decision-making capacity is so impaired as provided in section 633.566, subsection 2, paragraph “a”, that the conservatorship should not be terminated. See In re Guardianship and Conservatorship of Sluyter, No. 2-029/11-0937 (Iowa App. 2012)

4. Upon determination by the court that the conservatorship is no longer necessary for any other reason.

5. At any time that the assets of the ward’s estate do not exceed the amount of the charges and claims against it, the court may direct the conservator to proceed to terminate the conservatorship. Iowa Code 633.676; 633.681

6. Upon the termination of a conservatorship, the conservator shall pay the costs of administration and shall render a full and complete accounting to the ward or the ward’s personal representative and to the court. Iowa Code 633.677

7. Upon termination of the conservatorship, all assets of the conservatorship shall be delivered, under direction of the court, to the person or persons entitled to them. If the fiduciary fails or refuses to comply with any proper order of the court, the fiduciary may be committed to the jail of the county until the fiduciary does. Iowa Code 633.70; 633.678
8. When a conservatorship ceases for any reason, any action or proceeding then pending shall not abate. The conservator’s successor, the former ward, or the personal representative of the ward's estate shall be substituted or joined as a party. If no application is made for substitution, the court on its own motion may appoint a personal representative to represent the deceased party in the action. Iowa R. Civ. P. 1.224

8. Abuse of Powers

A. It is the responsibility of the conservator to act in the best interest of the ward. Physical abuse, sexual abuse, financial exploitation, or denial of critical care (neglect) are inappropriate and considered dependent adult abuse.

B. Iowa Code 235B defines physical abuse as physical injury, or unreasonable confinement, or unreasonable punishment or assault. Sexual abuse is the commission of a sexual offense. This also includes sexual exploitation.

C. Exploitation is the act or process of taking unfair advantage of a dependent adult or the adult’s physical or financial resources for one’s own personal or pecuniary profit, without the informed consent of the dependent adult, including theft, by the use of undue influence, harassment, duress, deception, false representation, or false pretenses. Iowa Code 235B

D. Exploitation under Iowa Code 235E is when a caretaker knowingly obtains, uses, endeavors to obtain to use, or who misappropriates, a dependent adult’s funds, assets, medications, or property with the intent to temporarily or permanently deprive a dependent adult of the use, benefit or possession of the funds, medication, or property for the benefit of someone other than the dependent adult.

E. Denial of critical care (neglect) includes the deprivation of food, shelter, clothing, supervision, physical or mental health care, and other care necessary to maintain the dependent adult’s life or health.

F. Wards are dependent adults and conservators are caretakers.

G. To report abuse, exploitation or neglect contact:
   a. Department of Human Services 1-800-362-2178
   b. Department of Inspections & Appeals 1-877-686-0027
   c. Law enforcement
d. Elder Abuse System Coordinator  1-800-532-3213  
e. Long-Term Care Ombudsman  1-866-236-1430

H. A conservator can be held personally liable for actions or omissions taken or made in the official discharge of duties when there is a breach of fiduciary duty as imposed by the probate code or there is willful or wanton misconduct in the official discharge of duties. Iowa Code 633.633A

V. Fiduciary Requirements

A. Qualification of Fiduciary—Resident, Iowa Code 633.63

1. Any natural person of full age, who is a resident of this state, is qualified to serve as a fiduciary, except the following:

   a. A person who is incompetent or

   b. Any other person whom the court determines to be unsuitable

2. Banks and trust companies organized under the laws of the United States or state banks.

3. A private nonprofit corporation organized under chapter 504, Code 1989, or current chapter 504, if the corporation does not possess a proprietary or legal interest in an organization which provides direct services to the individual.

4. The state or a local substitute decision maker as defined in section 231E.3.

B. Qualification of Fiduciary—Non-Resident, Iowa Code 633.64. The court may, upon application, appoint the following nonresidents as fiduciaries:

1. Natural persons: A natural person who is a nonresident of this state and who is otherwise qualified under the provisions of section 633.63 provided a resident fiduciary is appointed to serve with such nonresident fiduciary; and provided further that the court, for good cause shown, may
appoint such nonresident fiduciary to serve alone without the appointment of a resident fiduciary.

2. Banks and trust companies. Banks and trust companies organized under the laws of the United States or of another state and authorized to act in a fiduciary capacity in another state, if banks and trust companies of this state are permitted to act as fiduciary under similar conditions in the state where such bank or trust company is located.

A determination of the proper person to serve as a guardian is a proceeding in equity. *In re Guardianship of Seymour, No. 0-573/09-1484 (Iowa App. 2010).* See also *In re Guardianship of Knell, 537 N.W.2d 778, 780 (Iowa 1995).*

C. Removal of fiduciary---Iowa Code 633.65. When any fiduciary is, or becomes disqualified under sections 633.63 and 633.64, has mismanaged the estate, failed to perform any duty imposed by law, or by any lawful order of court, or ceases to be a resident of the state, then the court may remove the fiduciary.

D. Appointment of successor fiduciary, Iowa Code 633.66. When any fiduciary fails to qualify, dies, is removed by the court, or resigns, and such resignation is accepted by the court, the court may, and if the fiduciary were the sole or last surviving fiduciary, and the administration has not been completed, the court shall appoint another fiduciary in the former’s place.

E. Powers of surviving cofiduciary, Iowa Code 633.67. When the instrument creating the estate or trust requires two or more fiduciaries, and a vacancy occurs on account of the death, resignation, or removal of one of the fiduciaries, during the period of the vacancy thus created, the remaining fiduciary or fiduciaries shall have all the rights, titles and powers, whether discretionary or otherwise, of all the fiduciaries.

F. Powers of successor fiduciary, Iowa Code 633.68. When a successor fiduciary is appointed, the successor shall have all the rights, powers, titles and duties of the predecessor, except that the successor shall not exercise powers given in the instrument creating the powers that by its express terms are personal to the fiduciary therein designated.
G. Legal effect of appointment, Iowa Code 633.71. By qualifying as fiduciary any person, resident or nonresident, submits to the jurisdiction of the court making the appointment of the fiduciary.

H. Two or more fiduciaries—exercise of powers, Iowa Code 633.76. Where there are two or more fiduciaries, they shall all concur in the exercise of the powers conferred upon them, unless the instrument creating the estate provides to the contrary. In the event that the fiduciaries cannot concur upon the exercise of any power, any one of the fiduciaries may apply to the court for direction, and the court shall make such orders as it may deem to be to the best interests of the estate. Exception: for voting of publicly traded securities. Iowa Code 633.76A

I. Fiduciary of a Fiduciary, Iowa Code 633.80. A fiduciary has no authority to act in a matter wherein the fiduciary’s decedent or ward was merely a fiduciary, except that the fiduciary shall file a report and accounting on behalf of the decedent or ward in said matter.

J. Liability of fiduciary employing agents, Iowa Code 633.84; 633.85. The fiduciary shall not be personally liable for the acts or omissions of any such specialist, subordinate or agent, unless it can be shown that said acts or omissions would have been a breach of duty by the fiduciary had the fiduciary personally done it, and that:

1. The fiduciary directed or permitted the breach; or

2. The fiduciary did not select or retain the said specialist, subordinate or agent with reasonable care; or

3. The fiduciary did not properly supervise the specialist, subordinate or agent; or

4. The fiduciary approved, acquiesced or cooperated in the neglect, omission, misconduct or default by the specialist, subordinate or agent.
K. Liability of Fiduciary

1. 633.155—Self dealing. No fiduciary shall in any manner engage in self-dealing, except on order of court after notice to all interested persons, and shall derive no profit other than the fiduciary’s distributive share in the estate from the sale or liquidation of any property belonging to the estate.

2. 633.157—Property of estate. Every fiduciary shall be liable for, and chargeable in the fiduciary’s accounts with, all of the estate that comes into the fiduciary’s possession at any time, including all the income; but the fiduciary shall not be accountable for any debts due to the estate or other assets of the estate that remain uncollected without the fiduciary’s fault.

3. 633.158—Property not a part of estate. Every fiduciary shall be chargeable in the fiduciary’s accounts with property not a part of the estate that comes into the fiduciary’s hands at any time, and shall be liable to the persons entitled thereto, if:
   a. The property was received under a duty imposed upon the fiduciary by law in the capacity of the fiduciary; or
   b. The fiduciary has commingled such property with assets of the estate.

4. 633.159—Judgment. If judgment is rendered against a fiduciary for costs in any action, execution shall be awarded against the fiduciary as for the fiduciary’s own debt, if it appears to the court that such action was prosecuted or defended without reasonable cause.

5. 633.160—Breach of duty. Every fiduciary shall be liable and chargeable in the fiduciary’s accounts for neglect or unreasonable delay....for any loss to the estate arising from the fiduciary’s embezzlement or commingling of the assets of the estate with other property; for loss to the estate through self-dealing; for any loss to the estate arising from wrongful acts or omissions or any co-fiduciaries which the fiduciary could have prevented by the exercise of ordinary care, and
for any other negligent or willful act or nonfeasance in the fiduciary’s administration of the estate by which loss to the estate arises. *In the Matter of Conservatorship of Alessio v. First Community Trust*, No. 0-577/10-0096 (Iowa App. 2010); Also see *Iowa Supreme Court Attorney Disciplinary Board v. Laing & Railsback*, No. 13-0152 (June 14, 2013)

L. Oath and Bond of Fiduciary, Iowa Code 633.168, 633.169; 633.170; 633.174

1. Every fiduciary before entering upon the duties, shall subscribe an oath or certify under penalties of perjury that the fiduciary will faithfully discharge the duties imposed by law, according to the best of the fiduciary’s ability. Iowa Code 633.168

2. Bond. Except as otherwise provided, every fiduciary shall execute and file with the clerk a bond with sufficient surety or sureties. Iowa Code 633.169; 633.170

3. Guardians-bond, Iowa Code 633.174. When the guardian appointed for a person is not the conservator of the property of that person, no bond shall be required of the guardian, unless the court for good cause finds it proper to require one. If no bond is initially required, the court may, nevertheless, for good cause, at any subsequent time, require that a bond be given.

4. Conservators-bond waiver, Iowa Code 633.175. The court shall not exempt a conservator from giving bond in a conservatorship with total assets of more than twenty-five thousand dollars, excluding real property, unless it is a voluntary conservatorship in which, the petitioner is eighteen years of age or older and has waived bond in the petition.

5. In administering moneys paid by the veterans administration the conservator, unless it is a bank or trust company qualified to act as a fiduciary in this state, shall execute and file with the clerk a bond by a recognized surety company equal to such moneys and the annual income therefrom plus the expected annual veterans administration benefit payments. Iowa Code 633.622
VI. Assessment of Capacity, Competency and Dependency

A. Every person is presumed to be of sane mind until contrary appears. Ware v. Eckman, 224 Iowa 783, 277 N.W. 725, 727 (1938)

B. Incompetent is defined in 633.3(23) and means the condition of any person who has been adjudicated by a court to meet at least one of the following conditions:

1. To have a decision-making capacity which is so impaired that the person is unable to care for the person’s personal safety or to attend to or provide for necessities for the person such as food, shelter, clothing, or medical care, without which physical injury or illness may occur.

2. To have a decision-making capacity which is so impaired that the person is unable to make, communicate, or carry out important decisions concerning the person’s financial affairs.

3. To have a decision-making capacity which is so impaired that both paragraphs above are applicable to the person.

C. The appointment of a guardian or conservator is not an adjudication that the ward is of “unsound mind”. Iowa Code 633.636

D. Hospitalization not to equate with incompetency—procedure for finding incompetency due to mental illness. Iowa Code 229.27 Hospitalization of a person under this chapter does not constitute a finding of nor equate with nor raise a presumption of incompetency, nor cause the person so hospitalized to be deemed a person of unsound mind nor a person under legal disability for any purpose. See In Re B.B., No. 12-0158 (Iowa 2013)

E. Under an Iowa Code 229.27(2) mental health commitment, the applicant may also petition the court for a finding that the person is incompetent by reason of mental illness. The test of competence for the purpose of this section shall be whether the person possesses sufficient mind to understand in a reasonable manner the nature and effect of the act in which the person is engaged; the fact that a person is mentally ill and in need of treatment for that illness but because of the illness lacks sufficient judgment to make responsible decisions with respect to the person’s hospitalization or treatment does not necessarily mean that that person in incapable of transacting business on any subject.
F. Under Iowa Code 125, the Substance-Related Disorders law, incapacitated by a chemical substance means that a person as a result of the use of a chemical substance, is unconscious or has the person’s judgment otherwise so impaired that the person is incapable of realizing and making a rational decision with respect to the need for treatment. Iowa Code 125.2(8)

1. Incompetent person means a person who has been adjudged incompetent by a court of law. Iowa Code 125.2(9)

2. If the proposed patient is a minor or an incompetent person, a parent, a legal guardian or other legal representative may make application for treatment or discharge. Iowa Code 125.33(1) & (5)

G. Contractual Capacity. Higher degree of mental competence is required for transaction of ordinary business and making of contracts than is necessary for testamentary disposition of property; party alleging lack of mental capacity sufficient to execute deed has burden of proving by clear, convincing, and satisfactory evidence that grantor did not possess sufficient consciousness or mentality to understand import of her acts when deed was executed. Matter of Estate of Baessler, 561 N.W.2d 88, 92 (Iowa App. 1997).

A contract cannot be set aside on ground of a person’s incompetence to enter into it unless evidence shows that he lacked sufficient mental capacity to understand it. Guardianship of Collins, 327 N.W.2d 230, 231 (Iowa 1982)

H. Testamentary capacity. The court in In re Gruis, 207 N.W.2d 571, 575 (Iowa 1973) defined the elements needed for testamentary capacity:

1. Understand nature of instrument being executed;
2. Understand and know nature and extent of property;
3. Identify and recall natural objects of bounty; and
4. Realize and know the distribution of property

Daughton v. Parson, 423 N.W.2d 894, 896 (Iowa App. 1988) stated that a higher degree of mental competence is required for the transaction of ordinary business and the making of contracts than is necessary for testamentary capacity.

I. Competency for transfers can be found in the Iowa Trust Code at 633A.1102 (4) Competency under this section means any one of the following:
1. In the case of a revocable transfer, “competency” means the degree of understanding required to execute a will.

2. In the case of an irrevocable transfer, “competency” means the ability to understand the effect the gift may have on the future financial security of the donor and anyone who may be dependent on the donor.

J. Elements needed to sustain finding of undue influence are: grantor’s susceptibility to undue influence; opportunity to exercise such influence and effect the wrongful purpose; disposition of influence unduly for purpose of procuring improper favor; and result clearly the effect of undue influence. Fisher v. Estate of Welch, 534 N.W.2d 109 (Iowa App. 1995). Elements that grantee must prove to rebut presumption of undue influence in confidential relationship with grantor include: grantor’s lack of susceptibility to undue influence; want of opportunity to exercise such influence and effect wrongful purpose; lack of disposition to influence unduly for purpose of procuring improper favor; and result clearly unaffected by undue influence. Baessler at 92.

If a confidential fiduciary relationship is found to exist between the grantor and grantee, the burden of proof in an action to set aside the transfer shifts to the grantee to negate a presumption of undue influence by clear, convincing, and satisfactory evidence. Mendenhall v. Judy, 671 N.W.2d 452, 455 (Iowa 2003)

A transfer to a grantee standing in a confidential or a fiduciary relationship to the grantor is presumptively fraudulent and therefore presumptively the product of undue influence. Mendenhall at 454.

K. Dependency is defined in Iowa Code 235B & 235E

1. Dependency under Iowa Code 235B means a person eighteen years of age or older who is unable to protect the person’s own interests or unable to adequately perform or obtain services necessary to meet essential human needs, as a result of a physical or mental condition which requires assistance from another, or as defined by departmental rule. (DHS)

2. Dependency under Iowa Code 235E means a person eighteen years of age or older whose ability to perform the normal activities of daily living or to provide for the person’s own care or protection is impaired, either temporarily or permanently. (DIA)

L. Client with Diminished capacity: Iowa R. of Prof’l Conduct 32.1.14
1. When a client’s capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

2. When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial, or other harm unless action is taken, and cannot adequately act in the client’s own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator, or guardian.

3. Information relating to the representation of a client with diminished capacity is protected by rule 32.1.6. When taking protective action pursuant to paragraph 2 above, the lawyer is impliedly authorized under rule 32.1.6 to reveal information about the client, but only to the extent reasonably necessary to protect the client’s interests.

VII. Practice Materials and Resources


