

Power of Attorney and Conservatorship for Your Loved One

Summarized by Thomas T. Thomas

Baron Miller, JD, author of [*Laws We Need to Know: Understanding Rules and Programs for Persons with Mental Illness*](#), spoke at NAMI East Bay's January 24 meeting about how to acquire the authority to assist a loved one through a power of attorney or a conservatorship. Miller maintains an office in San Francisco and has been in private practice for fifty years. He also has a 48-year-old daughter with schizophrenia; so he had to learn about laws pertaining to mental illness. They became a big part of his practice.

"We sometimes need some form of legal authority to speak to someone about our mentally ill loved one or to take care of their finances," he said. This can arise when dealing with hospitals, schools, banks, landlords, Social Security and Medi-Cal officials, county offices, and jails.

The first choice is a **power of attorney (POA)**, which is a document signed by the person in question giving someone else the power to speak and act for them. A power of attorney is something anyone can draw up. You can download samples from a [website](#) or have an attorney draft one. The powers are granted in two forms.

A **financial POA** designates another person to handle financial matters and business relationships for them. It can be made effective immediately or be intended to take effect when the person lacks capacity—although Miller advised it is best to have immediate effect. The POA can also designate one or more persons as agents, sometimes called "fiduciaries," and name successor agents—often with the last agent in line designated to name a further successor. These agents can be a family member or a paid fiduciary. The financial POA can be revoked by the person signing it, unless they are deemed to lack the capacity to revoke it.

A **medical decision POA** works in the same way, and again it can be made immediately effective or become effective when the person no longer has capacity. This type of POA is often coupled with a medical directive, which states the person's wishes for future treatment. There are guidelines on this in the downloadable documents, and you can add to the powers. This type of POA is also revocable.

A financial POA can help in dealing with Social Security and Medi-Cal requirements. The medical POA can help with doctors and hospitals—but most of them have their own authorization forms, and if your loved one refuses to sign that, it's not likely the doctor or hospital will honor your own power of attorney.

The alternative to a POA is a court-ordered **conservatorship**, which is a legal action under which everything done with the person must be agreed to by the court. Conservatorships come in two types, one of which the county must apply for, the other is available to individuals.

An **LPS conservatorship**¹ is required when someone needs involuntary treatment in a locked facility. While the Welfare and Institutions Code 5150 and subsequent provisions allow a person to be held involuntarily for 72 hours and 14 days, up to 28 days, all with intermittent hearings, the LPS conservatorship lasts for a year and can be renewed annually. Under the LPS conservatorship, the court can mandate that the patient receive medication.

Only the county can apply for an LPS conservatorship—not an individual or family member. An individual has the right to apply to become the conservator if the court agrees, but most counties handle the process on their own.

The problem with the LPS conservatorship is limited facilities: not enough hospital beds, doctors and staff, or case managers. So this form of conservatorship is not used as often as needed.

Alternatively, a family member or other person can petition the court to grant a **probate conservatorship**. This gives us the power of attorney over finances and medical care, but the court still needs to approve everything that is done to the person being conserved.

A probate conservatorship is expensive, labor intensive, and time consuming. The person applying to become the conservator must hire an attorney and gather facts, including witness statements and declarations. The court will investigate and may appoint an attorney to represent the person being conserved, in which case the issue goes to trial. If you win the conservatorship, you will be required every two years to account for every penny spent. You may also be required to obtain a bond covering your actions.

Miller's advice was to avoid a conservatorship if you can and work through powers of attorney. "But some of us," he said, "can go through our lives without either of these measures. It all depends on the nature of the relationship with our loved one."

Q. Must the power of attorney be notarized? My brother is paranoid and refuses to get identification, although he has a good relationship with the local bank manager. Can that person help?

A. Yes, the document must be notarized. And the statutes allow, in lieu of personal identification, for the notary to take the word of a credible witness. The bank might also have its own notary, who could facilitate this.

Q. Is the doctor or hospital always required to honor a medical power of attorney?

A. If the doctor or hospital asks your loved one, and he or she says they don't agree, then the doctor or hospital may consider the power of attorney revoked. That is, of course, unless the individual is in a locked facility and incapable of understanding what is happening.

Q. What happens if, in applying for an LPS conservatorship, the court and the hospital are not in synch?

A. Usually, the person is already in a locked facility under a 5150 and the county petitions to continue the hold.

¹ LPS stands for the Lanterman Petris Short Act of 1969 as written into the California Welfare and Institutions Code to eliminate inappropriate and indefinite involuntary commitment of persons with serious mental illness.

Q. Can you comment on the recently enacted [Community Assistance, Recovery and Empowerment \(CARE\) Court](#)?

A. The county still needs to act in this case. We as family members can be heard in CARE Court, but the law doesn't require them to respond to us.

Q. What do you think about using a professional payee for SSI benefits, who might have a better relationship?

A. That sounds good.

Q. If you are the conservator and the person goes into credit card debt, are you liable to pay those debts?

A. If you oversee finances and are holding money for that purpose, then you are liable. But how did the person being conserved have the capacity to accrue the debt in the first place? If the bank or card issuer was just sending out forms and signing up any applicant, then you can force them to establish their right to collect the debt.

Q. With a financial power of attorney, do you have to take control of all the money at once?

A. The POA is something you can use when needed, such as when the person becomes incapacitated.

Q. Is there a legal standard or a test to demonstrate lack of capacity?

A. There are legal definitions, but they are not necessarily based on a psychiatric disorder.

Q. My brother isn't willing to sign a power of attorney, how can I lay the foundation for a probate conservatorship?

A. You should keep an ongoing history, like a diary, recording the things that happen, with dates and witnesses. A place to start is a family history form, [AB1424](#), available from Alameda County Behavioral Health Care Services..

Q. I have guardianship of my mother at a nursing home in Georgia. If I move her to California, will that Georgia document still be in effect?

A. I don't know. But assuming it's valid in California, the hospital will still depend on her cooperation. She will still be able to refuse therapy and medication.

Q. What training is required of a conservator?

A. If assigned publicly by the county under an LPS conservatorship, then the conservator must meet county criteria. If privately hired under a probate conservatorship, then they must meet state laws. I don't know the exact requirements when dealing with mental illness.