

GUARDIAN, CONSERVATOR, POWER OF ATTORNEY

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A legal representative, meaning a guardian, conservator, or person with power of attorney has authority to exercise privacy rights on behalf of another person under the Minnesota Government Data Practices Act depends upon the wording of the legal documents that grant the legal representative their authority. Agencies involved with the legal representative should request copies of the legal documents which confer this authority in order to verify the scope of the legal representative's authority to act.

The powers granted by the court to guardians to act for wards, or for conservators to act for conservatees, are specified in two different documents, either of which are sufficient to determine their authority. These include the court order making the appointment and the Letters of Guardianship or Conservatorship issued to them by the court following appointment. A guardian or conservator may be appointed by the person and/or of the estate; this means the guardian or conservator has been granted authority to make decisions regarding personal matters. A guardian or conservator of the estate has authority over financial matters.

For persons with Power of Attorney, their authorities are specified within the Power of Attorney document itself. A person with Power of Attorney is referred to as the attorney-in-fact or the agent. They acts on behalf of the competent adult who initiates the Power of Attorney and who is referred to as the principal. The attorney in fact has authority to act only in the areas and to the degree as specified in a validly executed Power of Attorney document.

For the purpose of the Act, a guardian is and a conservator or attorney in fact may be, depending on his or her specific authorities as described below, included in the definition of "individual".

A. GUARDIAN - The court may appoint a competent adult to act as guardian of another adult whom the court has found to be legally incompetent to make or communicate reasonable decisions. The person is referred to as the ward. The ward loses a majority of his or her civil rights and personal freedoms and the guardian is granted broad authorities over most areas of the ward's life; a guardian may also be appointed by the court on behalf of a dependent and neglected child. A guardian of the person would exercise the individual's privacy rights on behalf of the ward. If an individual has a guardian of the estate but not of the person, it is assumed that the individual still retains the authority to exercise their privacy rights under the Act. However, this may vary and the court order should be consulted.

B. CONSERVATOR - The court may appoint a competent adult to act as a conservator for another adult that the court has found to be incapacitated to make or communicate decisions in specific areas. This person is referred to as a conservatee. The conservatee retains many more of their civil rights and personal freedoms. As a result a conservator's authority is much more limited than that of a guardian. Because of the limited nature of conservatorships, agencies that must deal with a conservator has the authority to exercise the individual's privacy rights on behalf of the conservatee.

C. POWER OF ATTORNEY - "Power of Attorney" is an arrangement in which a competent adult, referred to as the "principal," appoints another person to act as his or her attorney in fact or agent for financial matters. The attorney in fact has the authority to act for the principal in data privacy matters only if the appointment specifically delegates those rights. The attorney in fact is not required, but may, act for the principal.

The agency dealing with the attorney in fact should request a copy of the power of attorney document in order to ascertain whether the person has authority to act for the principal, what authority the principal has granted to the attorney in fact, and if the document was validly executed. A power of attorney does not require court review or approval so there are no court documents to consult. The agency should consult with their attorney to determine the specific authorities granted and if the document has been validly executed.

A nondurable Power of Attorney becomes void upon the principal becoming incompetent. A durable power of attorney remains valid even if the principal becomes incompetent. A power of attorney may be revoked at any time by the principal if competent.

D. DURABLE POWER OF ATTORNEY FOR HEALTH CARE - This document is a form of a Powers of Attorney by a competent adult, the principal, who authorizes an attorney in fact to make decisions regarding health care on the principal's behalf when the principal is not able to communicate. The attorney in fact may request relevant private data or release private data on the principal in order to exercise his or her authority.

E. ADVANCE PSYCHIATRIC DIRECTIVE OR POWER OF ATTORNEY FOR INTRUSIVE MENTAL HEALTH TREATMENT - In this document a competent adult, the declarant, makes a declaration of preferences or instructions which authorizes another person, the proxy, to make decisions regarding the use of intrusive mental health treatment such as electro-convulsive therapy or of neuroleptic medication, a sub-class of psychotropic medications (this does not include treatment of mental retardation, or the use of psychotropic medications which are not in the sub-class of neuroleptic medications) which are consistent with any of the declarant's expressed desires. The proxy exercises his or her authority at the time the declarant becomes incompetent due to mental health issues. The proxy may request relevant private data or release private data on the declarant in order to exercise their authority.

F. GUARDIAN AD LITEM - A guardian ad litem (GAL) is a person appointed by the court to represent the best interests of a child during court proceeding. GALs are officers of the court who report directly to the presiding judge regarding what is the best interest of the child. These appointments are limited and generally the GAL has no decision making authority, meaning they do not act as court appointed guardians of the minor. All agency staff should consult their agency attorney before responding to a request based on such an order or providing the requested data. The attorney can then ask the court to consider the agency's responsibilities under the Data Practices Act and bring to the attention of the court the fact that the documents sought by the guardian ad litem contains private or confidential data.