

POWER OF ATTORNEY OR LEGAL GUARDIANSHIP

What Is The Difference, and Which One Do I Need?

Although they are used for similar reasons, a **Power of Attorney (POA)** and **Legal Guardianship** are two very different legal avenues. In both cases, someone would be legally authorized to act on behalf of another person for certain matters, such as handling banking or challenging unclear account charges. However, the processes for getting a POA or guardianship are significantly different – and so is your ability to participate in choosing the person who will act for you. If prepared in time, a POA is the simpler and preferred option for most people.

When considering the two choices, a key question is whether it is you that wants to name someone to act on your behalf, or if you want to the authority to act on behalf of someone else that you believe is struggling to handle their affairs, for instance, remembering to pay their bills.

If you have no cognitive problems - such as difficulties with memory, processing information or making decisions - preparing a POA may be a good option for you. If your aim is to take over handling the affairs of someone who is unable to do so for themselves, a POA may not be an option and you may need to obtain legal guardianship.



BASIC DIFFERENCES BETWEEN A

Power of Attorney

Legal Guardianship

If you are the person who will receive the assistance - the 'Principal'

If you need to act on behalf of someone else who can no longer sign a POA

- To prepare a POA, you must have the 'legal capacity' to understand the purpose and consequences of signing the document.
- If you do not (e.g. you have a cognitive impairment such as dementia or Alzheimer's) you will probably not be able to sign a POA, and guardianship may be required.

- If the person that you want to assist does not have the required 'legal capacity' to sign a POA (usually because of dementia or Alzheimer's), petitioning for legal guardianship may be the best option.

- You choose who to appoint as your "agent." For example, you could appoint your adult son or daughter, other family member, or a close friend.
- You decide how much power you will allow your agent to have.

- A legal guardian must be appointed by a court.
- If you are seeking to act on behalf of someone who cannot handle their own affairs (the Alleged 'Incapacitated Person' or 'IP') you can petition the court for guardianship.
- If you are appointed, the court will decide the scope of your powers when acting for the IP.



BASIC DIFFERENCES BETWEEN A

Power of Attorney

- Under a POA, your agent can only handle your financial (not medical) matters.
- You can keep the scope narrow by restricting it to actions such as routine banking, dealing with utilities companies and your landlord, or it can be very broad, such as allowing your agent to set up a trust in your name or to sell your house. You make that decision.

- It is generally safer to appoint a POA agent to handle your banking rather than adding that person to your bank account as a joint owner.
- A POA agent has no ownership rights to your account so if they are sued or get into debt, your money will not be at risk of being included in funds available to settle the claim or debt.
- A POA agent must use your funds as you direct them to, or for your benefit (such as paying your rent or utilities bills from your account). They must not use it for their own purposes.

Legal Guardianship

- The court may appoint you as 'Guardian of the Property' - allowing you to handle only the IP's financial matters - similar to a POA agent, or as their 'Guardian of the Person' - allowing you to handle their personal and medical matters only, similar to a Health Care Proxy agent, or as Guardian of the Property and Person - with authority to handle both.

- Unlike a POA, guardianship requires you, as the guardian, to keep a record of any actions taken on the IP's behalf and to submit it to the court periodically for review.
- For example, if you are handling a person's financial matters, you must submit a report of all the transactions you have carried out on their behalf.



BASIC DIFFERENCES BETWEEN A

Power of Attorney

- Someone else CANNOT get a POA on your behalf – only you can sign a POA allowing someone to act on your behalf.
- For instance, your son or daughter cannot go to an attorney, even with your approval, to get a POA without your participation and signature; the attorney can only work with you to prepare the document.

- If you change your mind about having a POA, you can revoke (cancel) the document.
- If you change your mind about your choice of agent and want to name someone else, you should revoke the old POA and prepare a new one naming your preferred person. When you revoke a POA, the person it names as your agent can no longer use it.
- You must revoke a POA in writing and notify anyone that may have a copy of it (like your bank) that it is no longer valid. If you later decide that you want another POA, you will need to prepare a new one.

Legal Guardianship

- When considering who to appoint as a guardian in New York State, there is an order of preference among the IP's relatives that the court can follow to help identify the most appropriate person for that role.



- Legal guardianship can only be terminated by a court. Neither you, nor the person you are acting on behalf of can terminate the appointment without the consent of the court.
- If the court terminates the guardianship, but later decides that the IP once more needs assistance, the person wishing to serve as guardian must petition the court and go through the process of obtaining legal guardianship again. As before, the court would make the decision and there is no guarantee that the same person would be reappointed as guardian.



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NEED HELP?

For advice or assistance with **legal guardianship** issues, please contact the following organizations:

- New York Legal Assistance Group - (212) 613-5000
- Volunteers of Legal Service - (347) 521-5704

For advice or assistance with a **Power Of Attorney**, please contact the Elderlaw Project at [212-382-6658](tel:212-382-6658) or fill out [this intake form](#).

Sammuel Kim, 2022 Pro Bono Scholar of the Cancer Advocacy and Elderlaw Projects, is the author of this publication. This communication is for the general education and knowledge of our readers. Because all legal problems involve their own specific set of facts, this informational resource is not and should not be used as a substitute for independent legal advice. This informational resource also is not intended to create, and its receipt does not constitute, an attorney-client relationship. Please contact competent, independent legal counsel for an assessment of your particular legal concerns, or contact our Legal Hotline (212-626-7383 or <https://www.citybarjusticecenter.org/legal-hotline/>) to determine whether you qualify for assistance from the City Bar Justice Center.