

Fall August 2012

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Repository Citation

Brusky, Andrew P. (2012) "The Alternatives to Guardianship," *Marquette Elder's Advisor*. Vol. 1: Iss. 2, Article 14.

Available at: <https://scholarship.law.marquette.edu/elders/vol1/iss2/14>

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WARD AND GUARDIAN

The Alternatives to Guardianship

Many alternatives are available to the incapacitated client other than the frequently undesirable guardianship: living wills, powers of attorney, dual-signature bank accounts, direct deposit/payment plans, revocable living trusts, and conservatorships. This column examines the legal and financial advantages of each, and when, where, and how clients can avail themselves of each of them.

By Andrew P. Brusky

This column is the first in a series addressing the issues surrounding guardianship. I felt it appropriate in this first column to cover alternatives to guardianship, since most clients prefer to avoid court intervention if at all possible. Equally important, guardianship represents an abrogation of a person's individual rights and freedoms and should only be instituted when less formal arrangements prove ineffective.

As is true with most estate planning, surrogate decision making works best if dealt with in advance of incapacity. Clients must be strongly encouraged to execute advance directives for both financial and health care decisions. For most attorneys,

advance directives are standard documents accompanying a will or trust estate plan. However, careful consideration by the client in choosing an appropriate agent, and shared communication of desires and beliefs with one's chosen agent, will go a long way to ensure that the fiduciary relationship is successful.

In my experience, clients have a strong desire to keep private issues regarding their financial and health care. Clients often expect family members to accept these responsibilities and wish unfettered discretion on behalf of those entrusted with decision making. Court involvement is viewed with skepticism as time consuming and both emotionally and financially draining. Fortunately, there are numerous nonjudicial alternatives to guardianship that can be quickly instituted and inexpensively administered.

Powers of Attorney and Living Wills

The importance of powers of attorney cannot be overstated. Most clients have persons they wish to designate to make deci-

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sions for them at a point when they are no longer capable of handling decision making. Many states have separate statutory forms for the appointment of both a health care and financial agent. These documents must be signed before a person becomes incapacitated. It is important that the financial power of attorney be "durable" and remain effective even if the person later becomes incapacitated. Issues such as choice of agent, authority granted to an agent, and the effective date of an agent's authority should be discussed with the client to avert potential abuse or future conflict. Copies of the document should be given to the agent and any alternate agent named in the document. A copy of the health care power of attorney should also be given to the person's treating physician to become part of that person's medical record.

Even in situations in which an individual feels uncomfortable appointing another person to make future health care decisions, a living will should at least be considered. A living will indicates in writing a person's wishes regarding the use of life-sustaining medical procedures in the event of terminal illness or a persistent vegetative state. A copy of the living will should be given to the person's treating physician to become part of the person's medical record.

Joint Bank Account

At some point an older person may no longer be able to do routine banking and bill paying. Faced with this situation, bank officers will frequently recommend that a depositor add the

name of a child or trusted individual to an account, thus creating a joint bank account. The joint tenant can write checks on the account and deposit income. Unfortunately, there are some disadvantages to a joint account that must be considered. Typically, joint accounts are owned by all parties, allowing any party to legally withdraw unlimited amounts from the account regardless of individual contribution. Furthermore, the account is susceptible to the creditors of either party, and ownership of the account will automatically pass to the surviving joint tenant. This may not be what the person intended when setting up the account.

Durable Power of Attorney Bank Account

Most banks will allow a person to set up a durable power of attorney (DPOA) bank account. Similar to a joint account, the power of attorney allows routine banking without the signature of an incapacitated adult. However, unlike the joint account, the DPOA remains the asset of the individual, and the agent named on the account has a fiduciary responsibility to administer the account for the benefit of the individual. At the individual's death, the asset is administered identically to a solely owned account rather than passing entirely to the survivor as under a joint account.

Dual-Signature Bank Accounts

Dual-signature accounts are useful when a person needs assistance with bill paying but wants

to continue management of the account. The account requires two signatures to transact business on the account. This type of account does not provide agency authority should one of the account owners become unable to sign. In this case, it is important that a financial power of attorney be in place. It is also important to consider what happens to the account at the death of one of the account owners.

Representative Payee for Governmental Benefits

For older individuals with limited resources and income, a representative payee arrangement may work very effectively. Social Security, Supplemental Security Income, Veterans Administration, and Railroad Retirement funds can be issued to a person other than the beneficiary to be held in a separate account. The representative payee administers the account for the benefit of the beneficiary. The arrangement can be set up after the person becomes incapacitated if the person's physician certifies that the person is no longer able to manage his or her income and resources. There is minimal supervision of the representative payee; however, the Social Security Administration can demand an accounting from the representative payee and can investigate allegations of abuse.

Direct Deposit/Payment Plans

When a person or family member is concerned that Social Security or other checks mailed to a residence may be misplaced or even intercepted by a third

party, direct deposit of income into a bank account may be a solution. Similarly, most utility companies and routine billing agencies offer direct payment plans. The financial representative is able to monitor activity through bank statements to ensure accuracy. These programs cut out most of the work involved with monthly bill payment at little or no cost to the individual.

Revocable Living Trusts

Similar to a financial power of attorney, but in a manner more precise legally, a living trust can provide asset management in the event of incapacity. Assets transferred to a living trust prior to incapacity, or at the time of incapacity through the use of a financial power of attorney, are administered by a successor trustee named under the trust document. The successor trustee is typically a spouse or adult child. A client may want to con-

sider utilizing the services of a corporate trustee for professional management of trust assets. A corporate trustee provides a neutral third party to eliminate family disagreements and burdensome accounting responsibilities.

Conservatorship

In situations where the value of assets does not justify a corporate fiduciary, and the client does not trust family members to exercise a power of attorney, a conservatorship should be considered. Court supervision may be advisable or unavoidable in situations in which, for example, one child obtains financial power of attorney that is then later superseded by a subsequent power of attorney appointing another child. The parent becomes susceptible to influence by each party and is caught in the middle.

In situations in which family members distrust one another and wish greater accountability

regarding financial matters than afforded under a durable power of attorney, a conservatorship may be the answer. A conservatorship is a voluntary court-supervised administration without a judicial determination of incompetence. The individual nominates the person to serve as conservator, and the court confirms the selection. Annual accounts are filed with the court similar to a guardianship of the estate.

Conclusion

Declining health is stressful enough for a family without having to add the burden of court involvement. Setting up workable court alternatives prior to incapacity is certainly preferable. Careful consideration of both the family dynamic and the asset management needs of the client is instrumental in crafting a solution that fits the needs of the client, and will avoid future controversy.