Alternatives to Guardianship

Representative Payeeships, Joint Accounts & Living Trusts

Why Should Alternatives Be Explored Before Considering Guardianship?

A guardianship is established by probate court to preserve the assets (guardian of the estate) and assure the physical well-being of a person (guardian of the person), who, as a result of a mental or physical illness or disability, of intellectual disability or of chronic substance abuse, is so impaired that she is incapable of taking proper care of herself or her property. Guardianship restricts the right to self-determination. The person subjected to the guardianship (the ward) loses control of her property and her legal rights, including the right to contract and decide where to live, though she can still make or revoke a will.

What Determines Whether A Guardianship Or An Alternative Is Better?

The need for guardianship of the person or estate depends on the extent to which the ward's needs can be met through community resources and less restrictive means. Physical needs of older persons can be met through services such as Meals on Wheels, home health aides, homemaker services and adult day care. To meet financial needs, representative payeeships, joint accounts, financial powers of attorney and living trusts are less restrictive. These less restrictive alternatives are also less costly and may completely replace the need for a guardianship.

What Is A Financial Power Of Attorney (FPOA)?

An FPOA is a written document by which a competent adult, known as the principal, appoints and authorizes an agent, the attorney-in-fact (AIF), to act on the principal's behalf regarding financial matters. Generally, most individuals will want to authorize their AIF to exercise broad general powers over all their financial affairs, including receiving and depositing checks, signing their name to checks, paying all bills, handling all bank accounts, CDs, stocks and bonds. In addition, general powers can authorize the AIF to take possession of any real estate or personal property, including the power to sell the property. In other words, most principals want to give their AIF the power to perform any legal act which the principal could do for herself.

Such an AIF has virtually the same financial power as a guardian of the estate but lacks the court oversight associated with a guardianship. Therefore, completing a FPOA when competent is a less restrictive alternative to a court appointing a guardian of the estate after you become incompetent. Similarly, a Health Care Power of Attorney is a less restrictive alternative to a court appointing a guardian of the person.

What Is A Representative Payeeship?

The US Treasury Department does not recognize state financial power of attorney (FPOA) documents for handling federal payments, including Social Security and SSI checks. This means, even if you have a FPOA for someone who is incapable of managing her own benefits, you must still apply to the Social Security Administration (SSA) to be appointed her representative payee (agent) to receive and manage her monthly federal benefit check. If you are both attorney-in-fact and representative payee, you have the authority to handle all her finances and there is no need for the court to appoint a guardian of the estate.

How Is A Representative Payeeship Established?

Any person, agency, organization or institution can file an application with SSA to be a representative payee. Whenever practical, an applicant will participate in a face-to-face interview, provide personal identification and establish a relationship with the Social Security recipient. There are procedures for telephone or video interviews where there is undue hardship. SSA will determine if the Social Security recipient cannot manage her check, a guardianship is not required. The recipient, or individual acting on her behalf, must be notified of the appointment. If the recipient protests the appointment or files an appeal within ten days, SSA will delay appointing the payee until it decides the appeal.

What Are A Representative Payee's Responsibilities?

The payee may only spend the Social Security income for the benefit of the recipient and may only spend it on:

(a) Current maintenance costs such as food, shelter, clothing, medical care and personal comfort items;

(b) Support of a dependent spouse, child, or parent, if current maintenance needs are already met; and

(c) Recipient's debts, but only if the recipient's current and reasonably foreseeable maintenance needs are met.

The payee must report to SSA any circumstances that affect entitlement to the check amount, keep recipient's funds separate from payee's own personal funds, unless they are a parent or spouse, and provide a written accounting, if requested.

How Is A Representative Payeeship Terminated?

It is terminated if the recipient shows SSA that she is able to manage or direct the management of benefit payments. Competence can be shown by providing a physician's statement, a certified copy of a court order restoring the recipient's rights, or other evidence that establishes the recipient's ability to manage her SSA benefits.

What Are Joint Accounts?

This guardianship alternative provides for joint ownership of funds in an account in the names of two or more persons. The most common joint account is the joint and survivorship account. Any person named on a joint account is entitled to all the funds on demand. These accounts can be useful because they let the older person handle her finances independently yet ensure someone else can write checks to pay bills if the older person cannot. However, care must be taken in choosing the person(s) to be named on these accounts. These accounts give all owners full access to all funds, and creditors of any owner may attach the account.

How Do Joint Accounts Affect Medicaid Eligibility?

When a Medicaid applicant and another person jointly own a bank account, Medicaid presumes that all funds in the joint account belong to the Medicaid applicant, and such resources can affect Medicaid eligibility. But, if the non-applicant joint-owner provides documentation showing his funds he deposited into the account, then Medicaid will not consider those funds.

What Is A Living Trust? A living trust, also known as a revocable trust, is a revocable agreement under which the owner of property (the settlor) transfers that property to another (the trustee), who then holds legal title and manages the property for the benefit of someone else (the beneficiary).

The settlor may also be the trustee. There is no limit to the number of beneficiaries. The settlor can also be a beneficiary. The settlor may reserve the right to change the terms of the trust or make it irrevocable, which means it cannot be changed. Virtually any property may be transferred into a trust including money, land, cars, CDs, stocks, insurance policies and retirement plans.

What Are Advantages And Disadvantages Of A Living Trust?

If a person becomes incompetent, and if a guardianship is obtained, the individual has no voice in either her own care or the management of her assets. A living trust can be a method to provide for care and manage the settlor's assets in the event of incapacity. A living trust also avoids probate for the trust assets because the assets are owned by the trust and not by the deceased individual. The major disadvantage to living trusts is the creation cost, which can be several thousand dollars. Management of trust assets by banks or other professional trustees will incur a typical charge of 1% of the trust assets per year. See our Avoiding Probate fact sheet, for alternative ways to avoid probate.

Pro Seniors helps older Ohioans solve legal and long-term care problems and fight Medicare fraud. Our Legal Helpline provides free legal information and advice for Ohio residents aged 60 and older.

This fact sheet provides general information, not legal advice. The law is complex and changes frequently. Before you apply this information to a particular situation, call Pro Seniors' free Legal Helpline or consult an attorney in elder law.

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