



*Helping Older Persons with Legal &
Long-Term Care Problems*

Alternatives to Guardianship – Representative Payeeships Joint Accounts & Living Trusts

1. 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 is so mentally impaired that she is incapable of taking proper care of herself or her property as a result of a mental or physical illness or disability, of intellectual disability or of chronic substance abuse. [\[1\]](#)

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. [\[2\]](#)

2. 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. [\[3\]](#)

3. 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 want to have their AIF 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, and taking possession of any real estate or personal property, including the power to sell any real estate or personal 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. [4] Similarly, a Health Care Power of Attorney is a less restrictive alternative to a court appointing a guardian of the person.

4. 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. [5] 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.

5. How Is A Representative Payeeship Established?

Any person, agency, organization or institution can file an application with SSA to be a representative payee. [6] An applicant must participate in a face-to-face interview, provide personal identification and establish a relationship with the Social Security recipient. SSA will examine the situation to be sure that the Social Security recipient cannot manage her check, but a guardianship order is not required. The recipient, or individual acting on her behalf, must be notified of the appointment and if the recipient protests the appointment or files an appeal within ten days, SSA will delay appointing the payee until it decides the appeal. [7]

6. What Are A Representative Payee's Responsibilities?

The payee may only spend the Social Security income for the benefit of the recipient [8] and may only spend it on:

- 1) Current maintenance costs such as food, shelter, clothing, medical care and personal comfort items;
- 2) Support of a dependent spouse, child, or parent, if current maintenance needs are already met; and
- 3) Recipient's debts, but only if the recipient's current and reasonably foreseeable maintenance needs are met. [9]

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. [10]

7. How Is A Representative Payeeship Terminated?

It is terminated if the recipient shows SSA that she is mentally and physically able to manage or direct the management of benefit payments. Competence can be demonstrated by providing a physician's statement declaring the recipient is able to manage her funds, 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. [\[11\]](#)

8. 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. [\[12\]](#) 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 through collection proceedings. [\[13\]](#)

9. How Do Joint Accounts Affect Medicaid Eligibility?

When a Medicaid applicant and a non-Medicaid applicant 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 that he deposited only his own money into the account, then Medicaid will not consider those funds to be owned by the Medicaid applicant. [\[14\]](#)

10. 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 trustee may be a person or a bank. 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. [\[15\]](#)

11. What Are The 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 an excellent 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. [\[16\]](#)

However, avoiding probate is not the same as avoiding federal estate taxes. Since the IRS considers the assets of a revocable trust to be your property for tax purposes, an IRS filing is required for estates, including living trusts, with combined gross assets and prior taxable gifts exceeding \$11.2 million in 2018. [\[17\]](#) Note that Ohio repealed the Ohio Estate Tax for the estates of individuals dying after December 31, 2012 regardless of the amount of gross estate assets. [\[18\]](#) While some irrevocable trusts avoid both probate and estate taxes, they are extremely limited in their nature. Most irrevocable trusts are not recommended because events may occur that make it necessary to change the trust during the life of the settlor.

There are always some assets not put into a trust, such as an automobile or jewelry. As a result, even with a trust, there will often be some assets to probate at death, which means you still need a will. Trusts can also be used to protect assets for minors and disabled persons. 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 can be expensive, with a typical charge of 1% of the trust assets per year. While nonprofessional trustees, such as family members, save management expenses, they usually lack expertise. [\[19\]](#)

12. Do I Need A Living Trust?

This depends on a number of factors, including your assets, your income, your purpose in setting up the trust and your estate plan. A living trust should be created only as a part of a comprehensive estate financial plan which includes a discussion about wills, income, trusts and gift and estate taxes. Because living trusts affect Medicaid eligibility, your attorney should also be knowledgeable in Medicaid law.

If your assets are set up with your spouse in joint and survivorship names, payable on death accounts and transfer on death affidavits for real estate, this property will not be included in your probate estate. You may not avoid probate entirely, but most costs, including attorney fees, will be minimal. For most people, this is easier and less complicated and costly than a living trust. See, [Avoiding Probate](#), Pro Seniors Pamphlet.

13. How Do Living Trusts Affect Medicaid Eligibility?

Although there are some exceptions, a living trust will be considered an asset for Medicaid eligibility purposes, especially if it was established by the Medicaid applicant. [20] The rules regarding whether or not the corpus of a trust is “countable” for Medicaid purposes are very technical and it is strongly recommended that you consult an attorney well versed in Medicaid law to help with your Medicaid application if you have a living trust

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In southwest Ohio, Pro Seniors' staff attorneys and long-term care ombudsmen handle matters that private attorneys do not, such as nursing facility, adult care facility, home care, Medicare, Medicaid, Social Security, protective services, insurance and landlord/tenant problems.

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Endnotes: [Click the endnote number “[1]” to return to the text]

- [1] [O.R.C. § 2111.01\(D\)](#) Guardian and conservatorship definitions
- [2] [O.R.C. § 2111.50\(B\)](#) Probate court is superior guardian of wards
- [3] [O.R.C. § 2111.02\(C\)\(6\)](#) Appointment of guardian - limited, interim, emergency, or standby guardian – nomination (“The court may deny a guardianship based upon a finding that a less restrictive alternative to guardianship exists.”)
- [4] [O.R.C. Chapter 1337](#): Power Of Attorney
- [5] [20 C.F.R. § 404.2001 et seq.](#) Explanation of representative payment; See also [SSA’s Frequently Asked Questions \(FAQs\) for Representative Payees](#) and [Justice in Aging’s Representative Payee Toolkit](#)
- [6] [Social Security Administration, Program Operations Manual System \(POMS\)](#) The [SSA-11-BK](#) form (pdf), Request to be Selected as Payee.
- [7] [20 C.F.R. § 404.2024](#) How do we investigate a representative payee applicant?; [20 C.F.R. § 404.2030](#) How will we notify you when we decide you need a representative payee?
- [8] [20 C.F.R. § 404.2035](#) What are the responsibilities of your representative payee?
- [9] [20 C.F.R. § 404.2040\(a\)](#) Use of benefit payments
- [10] [20 C.F.R. § 404.2035](#) What are the responsibilities of your representative payee?
- [11] [20 C.F.R. § 404.2055](#) When representative payment will be stopped
- [12] [O.R.C. § 1109.07](#) Deposits payable to survivor – deposits payable on death (Joint and survivorship accounts); Payable on Death (POD) accounts, on the other hand, have no joint ownership of funds. Rather, the non-account holder will merely inherit the account upon the account-holder’s death. See [O.R.C. § 2131.10](#) (Payable on death accounts)
- [13] [O.R.C. § 2716.13](#) Hearing on motion for garnishment of property, other than personal earnings of judgment debtor
- [14] [O.A.C. § 5160:1-3-05.4\(C\)\(4\)](#) Medicaid: cash and checking and savings accounts and time deposits
- [15] [Law Facts: Revocable Trusts](#), aka Living Trusts, The Ohio State Bar Association (2015)

- [16] [The Truth About Living Trusts](#), The Motley Fool (From its founding in 1993, The Motley Fool has been fighting on the side of the individual investor. Our mission is to help the world invest better. And we take that seriously, one member at a time.)
- [17] [IRS Website, Estate Tax](#)
- [18] See, [Ohio Department of Taxation, FAQ 19](#) and Ohio Department of Taxation, [Tax Alert, December 19, 2012](#) (pdf)
- [19] [Law Facts: Revocable Trusts](#), aka Living Trusts, The Ohio State Bar Association (2015)
- [20] [O.A.C. § 5160:1-3-05.2\(2\)\(b\)\(i\)](#) Medicaid: trusts