7. ALTERNATIVES TO ADULT GUARDIANSHIP

➲ When circumstances warrant an individual impaired, there are least restrictive avenues available to the individual before seeking adult guardianship. Pursuant to Sup.R. 66 and R.C. 2111.02, a probate court must explore the least restrictive alternatives before appointing a guardian.

Power of Attorney

A properly executed power of attorney can be a less restrictive alternative to guardianship of the estate and person.[1] A Power of Attorney (POA) is generally defined as written authorization for an appointed person to act as an agent on behalf of another known as a principal. It can be used for financial or healthcare purposes. A POA can be executed by an elder authorizing an individual to make decisions on his/her behalf in the event he/she can no longer do so. An agent has a fiduciary duty to exercise the power of attorney in the best interest of the principal, although there are few safeguards against abuse or protections from misuse.

The statute governing powers of attorney is found in R.C. Chapter 1337. As related to the care of a person, there are two kinds of powers of attorney: health care and financial. There is a standard form for a power of attorney located in R.C. 1337.60, and the form includes a checklist of powers to be granted to the agent.

The authority granted in a power of attorney can be effective immediately (non-springing) or be made effective upon the principal's incapacity or some other triggering event (springing).[2] A power of attorney is presumed to be durable and continues to be effective upon the incapacity of the principal unless the document says otherwise.[3] A power of attorney can be filed with the county recorder, and any power of attorney regarding an interest in real property must be recorded.

A power of attorney may not always be an effective alternative to guardianship. R.C. 1337.14(A) states that a power of attorney for health care may be revoked at any time and in any manner. Institutions, such as banks, hospitals and nursing homes, may not honor a power of attorney because of concerns regarding revocation. Furthermore, institutions may not honor springing powers of attorney, as they may not be inclined to determine whether the events necessary to spring the power have been satisfied. Additionally, institutions may not honor any powers of attorney in high conflict situations.

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1 See R.C. 2111.02(C)(5) and R.C. 2111.02(C)(6).

2 R.C. 1337.29.

3 Per R.C. 1337.24.

7. ALTERNATIVES TO ADULT GUARDIANSHIP - *cont.*

In order to execute a valid power of attorney, the principal must appear to be of sound mind and not under or subject to duress, fraud, or undue influence at the time of execution.[4] If the power of attorney is durable, the authority given to the agent survives the later incapacity or incompetence of the principal. However, questions surrounding the principal's competency to execute the power of attorney will limit the use of the power of attorney as an alternative to guardianship.

Furthermore, guardianship is often sought when the agent named in a power of attorney is unable or unwilling to act in the principal's best interest.[5] Evidence of misconduct on the part of the agent is relevant to the probate court's decision to appoint a guardian even though a power of attorney has been executed.[6] In these cases, guardianship will often be pursued, and a probate court must consider the power of attorney as a less restrictive alternative to guardianship to ensure the alleged incompetent's best interest.[7] When the agent under a power of attorney has failed to utilize the power granted for the alleged incompetent's best interest, the instrument can be revoked by the probate court and the power can be held null and void.[8]

Additionally, court consideration for a person named as a guardian under a power of attorney remains subject to the suitability standards that all guardians must meet and considerations regarding the proposed ward's best interest. R.C. 2111.[9]

Trusts

A trust is another mechanism that may be used to avoid guardianship of the estate. Generally, a trust is a legal arrangement by which one person, the grantor, gives property to another, the trustee, to hold for the benefit of a beneficiary. With the exception of the special needs trust, the grantor/funder of the trust must have legal capacity to create a trust.[10]

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4 R.C. 1337.12.

5 See *In re Guaridanship of Thomas,* 148 Ohio App.3d 11, 771 N.E.2d 882 (Tenth Dist, Franklin County, 2002).

6 *Id.*

7 R.C. 2111.02.

8 See R.C. 2111.50 and R.C. 2101.24.

9 See *In re: Brenda Myers,* 85 N.E.3d 217, No. 2016 AP 050028 (Fifth Dist., Tuscarawas County, Feb. 9, 2017).

10 In the case of a special needs trust, the trust can be funded with an incompetent adult's funds with the approval of the probate court. R.C. 5163.21 and R.C. 5815. Trustees of court-created trusts are, generally, required to seek approval for expenditures and account to the probate court.

Elders can create a trust with a trustee of their choice. In contentious situations, a neutral third party, such as a bank or person who everyone agrees to can serve as trustee. Banks often require a minimum trust amount and this alternative is used less widely for that reason.

There are several different trusts that may constitute a less restrictive alternative to guardianship: inter vivos trusts; special needs trusts; and testamentary trusts that are created through the will of grantor for the benefit of an incompetent adult.[11, 12] Trusts can be revocable or irrevocable. A revocable trust is of limited use as an alternative for guardianship, as the trust's assets can be withdrawn. The terms of the trust must be written with specificity, as government benefits may be impacted by the beneficiary's access to trust funds.

A benefit of holding funds in trust is the flexibility for the use of funds. A grantor is able to list specific uses for trust property and to state their wishes with specificity.

The elder can create a trust with a neutral third party, such as a bank or person that everyone agrees to, to serve as trustee in contentious situations. A fiduciary relationship is created between the trustee and the beneficiary. However, trusts are not impervious to misappropriation by the trustee.[13] The probate court can require bond for trusts that are overseen by the court.[14] This alternative also avoids guardianship, and also requires follow up by the Eldercaring Coordinator or Adult Protective Services to insure that there is no abuse or exploitation.

Joint Ownership

Joint ownership, which allows a co-owner to manage money or property, may be used to avoid guardianship of the estate. If an elder has arranged for joint ownership of his or her property with another, that individual has the authority to make decisions regarding the use of the jointly owned property for the benefit of the proposed ward or the benefit of joint owner. An advantage of joint ownership is the retention of substantial rights for the alleged incompetent, as well as the reduction in annual accounting for a guardian of the estate.

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11 See R.C. 5163, R.C. 2111.02(A) and *In re Guaridanship of Thomas,* 148 Ohio App.3d 11, 771 N.E.2d 882 (Tenth Dist, Franklin County, 2002).

12 STABLE accounts also are a trust-like alternative to guardianship and are managed through the Ohio Secretary of State.

13 See *In re Guaridanship of Thomas,* 148 Ohio App.3d 11, 771 N.E.2d 882 (Tenth Dist, Franklin County, 2002).

14 R.C. Chapter 2109.

7. ALTERNATIVES TO ADULT GUARDIANSHIP - *cont.*

Joint ownership must be completed while the property owner is still competent, and joint ownership can extend to nearly all kinds of property. For example, R.C. 5302.20 provides for survivorship tenancy of real property; R.C. 2131.12 provides for joint ownership with right of survivorship of motor vehicle, watercraft, or outboard motor; and R.C. 1109.07 provides for deposits in the name of two or more persons; deposits payable on death.

R.C. 5302.20:
Survivorship Tenancy of Real Property

R.C. 2131.12:
Right of Survivorship of Motor Vehicle, Watercraft, or Outboard Motor

R.C. 1109.07:
Deposits in the Name of Two or More Persons; Deposits Payable on Death

Joint ownership gives rise to a rebuttable presumption of equal ownership.[15]

Joint ownership is useful in situations where the elder remains competent to review expenditures made from an account, but the elder is too physically impaired to go to the bank or spend money in the community. Joint ownership is also useful in situations where the elder's only asset is government benefits for which a payee is established, and no one has access to the elder's account because of the elder's incompetence or physical disability.

Typically, transfers of jointly owned property do not require the consent of all owners. The potential for abuse in joint ownership is very high, as there is no fiduciary duty imposed upon joint owners. There is little practical recourse for a joint owner's employment of undue influence or misuse of jointly held funds, even though a determination of incompetence effectively terminates a joint and survivorship account.[16]

In addition to the risk of abuse, adding a person's name to an account will be viewed by government entities as giving that person an ownership interest in the property. The addition of a joint owner may be seen as providing a prohibited gift and prevent the owner from obtaining certain government benefits.

Moreover, tax consequences should be considered prior to the joint titling of property. For example, a real property owner may have a tax exemption that will cease to apply if the property becomes jointly owned. Furthermore, the creditors of the joint owner may be able to attach to the jointly owned property, jointly owned accounts may become subject to the divorce of the joint owner[17], or the jointly owned assets could become a part of the joint owner's estate upon the death of the joint owner.

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15 See *In re Mayforth's Guardianship,* 1 Ohio Supp. 87 (1985) and *Abrams v. Nickel,* 50 Ohio App. 500, 198 N.E. 887 (1935).

16 See *Abrams v. Nickel,* 50 Ohio App. 500, 198 N.E. 887 (1935) and *Webb v. Webb,* 18 Oho App.3d 287, 249 N.E.2d 83 (Eighth Dist., Cuyahoga County, 1969).

17 R.C. 5815.34 states that the divorce of a party will impact joint ownership and financial institutions are not liable for damages in distribution in accordance with jointly held accounts.

While this alternative avoids guardianship of the estate, routine follow up by the Eldercaring Coordinator or APS should be conducted to ensure that there is no abuse or exploitation.

A less risky alternative to joint ownership is additional signatory for an account. A signatory has no ownership interest in the funds of an account, but the signatory is able to sign for withdrawals.

Conservatorship

Conservatorship is another device that may be used to avoid guardianship of the person and estate. Conservatorship is defined in R.C. 2111.01 and is governed by Sup.R. 50 through 82 and R.C. 2111.021. Under R.C. 2111.151, liability for a conservator is the same as the liability for a guardian. Standard probate forms for conservatorship can be found in Forms 20.0, 20.1, 20.2 and 20.5.

Conservatorship is a voluntary trust relationship using guardianship laws and procedures as the basis for one party, called the conservator, to act with Court supervision for a competent but physically infirm adult, called the conservatee.[18] In order to establish and maintain the conservatorship, the adult must remain competent and continue to consent.[19]

A conservatorship is based upon the consent of the conservatee, as the conservatee decides who will serve as conservator, what property and powers of the conservatee will be included in the conservatorship and the term of the conservatorship.[20] The powers granted to the conservatee can include powers that are akin to guardian of the person and/or guardian of the estate. In addition, the conservatee decides which of the statutory guardianship duties and procedures the conservator must follow.[21] Unless specifically excluded, all rules and authority granted through guardianship also apply to conservatorships, including the accounting requirement.[22] As a result, conservatorship can be as costly as guardianship.

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18 R.C. 2111.021.

19 See *In re Guardianship of Miller*, 187 Ohio App.3d 445, No. 8-09-20 (Third Dist. Logan Co., May 17, 2010).

20 If a probate court is named as the conservator, the conservatee may not limit the powers granted to the court or the probate court's order regarding bond. R.C. 2111.021.

21 *Id.*

22 R.C. 2111.021.

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In order to establish a conservatorship, the probate court must conduct a hearing with findings that the petition was voluntarily filed and that the proposed conservator is suitable.[23] Modifications to the conservatorship may be made by motion to the probate court.[24]

Conservatorship is terminated by judicial determination of incompetence, death of the conservatee, an order of the Probate Court, or the execution of a written termination notice by the conservatee. Termination of a conservatorship is immediately effective upon execution.[25] However, a termination for conservator of the estate is void if not filed within 14 days of execution.[26] Failure to date the termination and failure to file the termination with the probate court will void the termination.[27]

Conservatorship cannot be used as evidence of impairment. *Id.* Documents in the conservatorship can be made confidential. *Id.*

Conservatorship is not a viable alternative to guardianship after the incompetence of the conservatee, as the conservatee cannot be mentally incompetent. When an application for conservatorship and guardianship are filed concurrently, the determination regarding competence is the key factor.

This alternative also avoids guardianship, and also requires follow up by the Eldercaring Coordinator or APS to insure that there is no abuse or exploitation.

Representative-Custodial Payee

A Representative-Custodial Payee is yet another method for avoiding guardianship of the estate. A Representative-Custodial Payee is an individual authorized to receive and expend Veteran's benefits, Social Security, Supplemental Security Income, or other government benefits. A Representative-Custodial payee is put in place by a government agency, and the decision to appoint a payee is based upon a court

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23 *Id.*

24 *Id.*

25 *Id.*

26 *Id.*

27 See *In re Conservatorship of Ahmed*, Nos. 01-BA-13, 01-BA-48, 2003 WL 21442314 (Seventh Dist., Belmont County, June 16, 2003) not accepted for review by the Supreme Court of Ohio in *In re Conservatorship of Ahmed,* 100 Ohio St.3d 1433 (2003) or for reconsideration by the Supreme Court of Ohio in *In re Conservatorship of Ahmed,* 100 Ohio St.3d 1433, 2003-Ohio-5396, 797 N.E.2d 512 (2003).

finding of mental incompetence or on sufficient evidence which demonstrates that the recipient's physical or mental incapacity would impair fund management.

R.C. 2111.05 and Sup.R. 66.08(I), state that a guardian of the estate is unnecessary when the proposed ward's assets consist entirely of government benefits for which a representative-custodial payee exists. Representative-Custodial payees already provide an accounting to the respective government agency for expenditures. Additionally, the respective government agencies determine whether applicants are suitable payees and are able to address malfeasance committed by payees.[28]

Protective Services and Protective Orders

Protective services can be an effective alternative for guardianship for short-term problems. R.C. 5101.60 *et seq* provides for adult protective services. As an alternative to emergency guardianship, protective services ordered under R.C. 5101.69 works well. This is not a long-term solution to an elder's persistent state of incompetence.

For situations in which the adult is otherwise competent to handle his/her own affairs, a protection order provides another short-term alternative to guardianship.

28 See *In re Martin*, No. 09 MA 117, 2010 WL 2676486 (Seventh Dist., Mahoning County, June 29, 2010).