
CHAPTER 3

ALTERNATIVES TO GUARDIANSHIP

Sometimes it is absolutely necessary to seek a guardian for a person who is incompetent. In those cases, guardianship is a welcome solution to a difficult problem.

In other cases, however, there may be alternative ways to solve the problem. These alternatives may not be the easiest course, or the least expensive, but they should be tried. This chapter discusses the reasons to search for alternatives and describes some solutions to common problems which prompt guardianship filings.

WHY CONSIDER ALTERNATIVES TO GUARDIANSHIP?

- ◆ First, the appointment of a guardian is a drastic measure. Guardianship will deprive a person of the right to make virtually all personal and financial decisions for herself. Some people are too disabled to understand the extent of this loss, and guardianship will have no practical effect on their lives. Others, however, will be humiliated and angry that control of their lives has been taken from them.
- ◆ Second, the law requires that a guardian of the person be appointed *only if there is no less restrictive alternative*. This means that guardianship must be a last resort to solve a problem that person

faces. There must be no other answer except to appoint a guardian.

- ◆ Third, filing for guardianship is costly and time consuming. Two attorneys, one representing the petitioner and one representing the alleged disabled person, must be paid. In some parts of Maryland, it will take several months for a guardian to be appointed. Once appointed, the guardian will have an obligation to file annual reports with the court. At the end of the guardianship, the guardian must return to court and file a petition to close the guardianship estate.
- ◆ Fourth, a guardian of the person may have less authority to make decisions about life threatening medical treatment than does a close relative who is not a guardian. Unless the original court order specifically gives the guardian the authority to make decisions about life threatening treatment, a guardian will have to return to court for approval to withhold treatment when the person is close to death, for example. If the same person were only a close relative or friend, and not a guardian, she could make the same decision without court involvement, after consulting with the disabled person's doctors.



Filing for guardianship can be costly, time consuming and complicated, so it is best to try other solutions first.

For these reasons, one should think creatively to find ways to take care of the needs of the disabled person before filing for guardianship. If there is no other solution, then guardianship is appropriate.

WHAT ARE ALTERNATIVES TO GUARDIANSHIP?

“Alternatives to guardianship” consist of a variety of legal tools, government benefit programs, social service programs, volunteer services, financial planning tools, and housing options which help the person with mental impairments solve problems relating to her person and property.

In searching for alternatives, start by identifying the exact problem or problems which have prompted the idea of filing for guardianship. From there, start to think about ways to solve the problem.

✓For example, perhaps the person can no longer safely live at home because she is careless with the stove. Perhaps she wanders at night. Perhaps she is living safely with relatives, but she needs an operation and she cannot understand the doctor’s explanation of it, and cannot give informed consent to the operation. Perhaps the doctor tells the family to file for guardianship because the patient

cannot remember to take her medication. Perhaps the person must enter a nursing home and someone must sign the nursing home admission contract or apply for Medical Assistance.

In none of these situations is it absolutely necessary for a guardian to be appointed. In the rest of this chapter, we will discuss different ways to address these and other problems.

WHAT ARE ALTERNATIVES FOR A PERSON LIVING IN AN UNSAFE ENVIRONMENT?

If a family member or friend can convince the disabled person to voluntarily make a change, there is no need to file for guardianship. This is perhaps the easiest of the alternatives to guardianship.

✓For example, if the person living alone who is at risk to start a cooking fire will voluntarily leave her home and go live with relatives, there is no need to file for guardianship.

If the disabled person does not protest the change, or willingly accepts the services which someone arranges for her, the problem is solved. It is not necessary to have the court’s approval to make this change, unless the person protests or resists.



PERSUASION

If the person can be persuaded to accept services or to make a change which will protect her, there is no need to file for guardianship.



Alternatives to guardianship:

- *social services,*
- *housing options,*
- *benefit programs,*
and
- *financial tools.*

It is possible to admit a person to a nursing home and to apply for Medical Assistance and other benefits on her behalf without being a guardian or even an agent under a power of attorney. The person may be moved to live with others or into one of the alternative housing options outlined below without a guardian's approval.

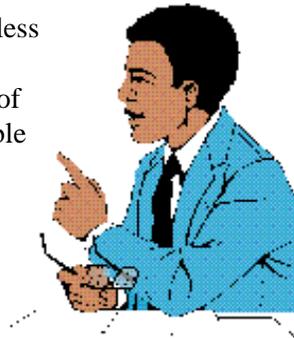
medical treatment for a person who cannot understand or consent to the treatment herself.

If a person is mentally incompetent and cannot understand the doctor's explanation, the doctor must obtain informed consent from someone else. That person may be a guardian, but there is another alternative for consenting to medical treatment.

INFORMED CONSENT

Doctors and other health professionals must have a patient's informed consent before giving medical treatment. Informed consent means that before a physician can treat a patient:

1. The doctor must explain the pros and cons and the alternatives to the treatment.
2. The patient must agree to be treated, unless the situation is an emergency.
3. The patient must understand the nature of the treatment, the dangers and the possible side effects.
4. The patient must give consent freely, without pressure to do so.



The **Maryland Health Care Decisions Act**, passed in 1993, provides two ways that someone else can consent to medical treatment for an incompetent person:

◆ **Advance Directive**

When she was competent, the person could have written and signed, or orally dictated, an **advance directive** for medical care. An advance directive may appoint someone else to make decisions in the event that she becomes unable to do so. The advance directive is sometimes called a **living will** or a **health care power of attorney**. The person making an advance directive must be mentally competent to make one.

WHAT IF THE PERSON CANNOT CONSENT TO NEEDED MEDICAL CARE?

One of the most common reasons that people file for guardianship is to authorize

◆ **Surrogate Decision Making**

If the person did not appoint a health care agent, a surrogate decision maker can consent to her medical care. A **surrogate** is a substitute, or a proxy,

who acts for the person. The Health Care Decisions Act sets out the circumstances under which someone else can make medical decisions for a person who is unable to understand the issues.

Either of these methods would allow someone else to make a medical decision for an incompetent person without having to file for guardianship. The two are described in more detail below.

a. Advance Directives

An advance directive is a document in which a person states her wishes about future health care. The advance directive may

- ◆ appoint another person to make decisions for the person,
- ◆ state what type of care the person would want in certain situations, or
- ◆ do both.

It may be made in writing or orally. A form Advance Directive is at Appendix A.

Appointment of health care agent: The person making the advance directive, who is called the **principal**, can appoint a person, called the **agent**, to make health care decisions for her. Unless the advance directive states otherwise, the agent's power becomes effective when the attending physician and a second physician certify in writing that the person is unable to make an informed decision. (If the person is uncon-

scious or unable to communicate, a second certificate is not necessary.)

Once the document takes effect, the agent has primary authority to make decisions about the person's care. The agent must base his or her decisions on what the patient would have wanted in the situation.

Health care instructions: The person may also state in an advance directive exactly what

care she would want in a given situation. Usually the person says whether she would want life sustaining treatment, such as a respirator or tube feeding if she is near death or if there is no hope of her recovery.

Oral Directives:

Under certain circumstances, a person can orally appoint a health care agent and give instructions regarding treatment. To make an oral advance directive,

- ◆ the person must be mentally competent (See Chapter 2);
- ◆ the person must give the instructions in the presence of the attending doctor and one witness; and

ADVANCE DIRECTIVES

A person must be mentally competent to make an advance directive.

- ◆ the doctor must write the person's instructions or statement in her medical record. Then the doctor and the witness must date and sign the notation.

b. Surrogate Decision Making

If a person does not have an advance directive, and is unable to consent to treatment, a **surrogate decision maker** can make health care decisions for her. A surrogate is a substitute or a proxy, a person who makes a decision for the incompetent person, based on what that person would have wanted. If a surrogate decision maker can be found, it may not be necessary to appoint a guardian of the person.

Surrogate decision makers: The law allows these individuals to be surrogate decision makers, in the following order of priority:

- ◆ a guardian previously appointed by the court;
- ◆ a spouse;
- ◆ an adult child;
- ◆ a parent;
- ◆ an adult brother or sister; or
- ◆ a close friend or relative.

A surrogate from the last category (relative or close friend), must sign a statement confirming that the patient's wishes are well known to the surrogate. In the statement, the surrogate should state that he or she is a relative or close friend of the patient, and give specific information showing that the surrogate is familiar with the patient's activities, health and personal beliefs. The statement should include such facts as how long he or she has known the

patient, how frequently they had contact, and what he or she knows about the patient's beliefs and wishes. The statement is given to the doctor and is placed in the person's medical record. A sample statement for a surrogate in this category is at Appendix B.

Surrogates vs. Guardians: A surrogate acting under the Health Care Decisions Act may have *more* authority than a guardian to make serious medical decisions.

SURROGATES

If there is a surrogate to make medical decisions, there may be no need for a guardian of the person.

The guardianship law states that a guardian must get the court's approval of a medical decision which poses a risk to the life of the person, except under two conditions. If the court is appointing a spouse, a parent, an adult child, or an adult brother or sister as guardian, the court may state in the initial guardianship order that the guardian can make decisions about life threatening treatment without the court's permission. Or if the person has appointed the guardian as an agent in an advance directive, the guardian does not have to seek the court's permission to make such a decision. Any other guardian, however, will have to get the court's approval before making a decision about life threatening care.



A surrogate is an agent or a substitute. A surrogate can make a medical decision for someone else.

On the other hand, a surrogate decision maker who is *not* a guardian, does not have to ask the court's permission before making such a decision. The surrogate only will have to consult with the person's doctors, and make a decision based on what he or she knows the person would have wanted (see next section).

It is simpler for a person to act as a surrogate than as a guardian when making end of life decisions for another. This is another reason to carefully consider whether guardianship of the person is absolutely necessary.

Standards for Surrogates: Surrogate decision makers must follow certain guidelines. The surrogate's decisions must be guided by what the person would have wanted, unless the person's wishes are unknown or unclear. In deciding what the person would have wanted, the surrogate should consider the following factors:

- ◆ the person's current diagnosis and prognosis;
- ◆ the person's expressed preference regarding the treatment at issue;
- ◆ the person's relevant religious or personal beliefs;
- ◆ the person's behavior and attitude toward medical treatment;
- ◆ the person's attitude toward a similar treatment for another individual; and
- ◆ the person's expressed concerns about the effects of her illness and treatment on family or friends.

Sometimes the person's wishes are totally unknown or unclear, as in the case of someone who has had profound mental retardation all of her life, or in the case of a person who is unconscious and unidentified when brought to the hospital. A surrogate must then decide based on the person's **best interest**. "Best interest" means that the benefits of treating or not treating the person outweigh the burdens of doing so. In deciding what is in the best interest of the person, the surrogate must consider:

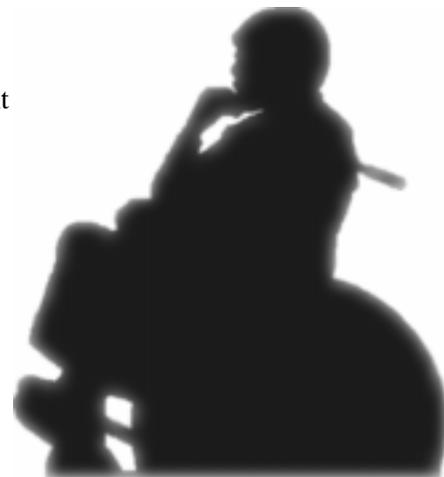
- ◆ the effects of the treatment on the physical, emotional and mental functions of the person;
- ◆ the physical pain that the person would suffer from the treatment or from the withholding or withdrawal of the treatment;
- ◆ the humiliation, loss of dignity, and dependency the person is suffering as a result of the condition or as a result of the treatment;



A surrogate's decision should be based on what the person would have wanted.

WHAT WOULD YOU WANT?

Since so much depends on what kind of care the patient would want, everyone should express their wishes about medical care to those close to them. This is especially important for older persons and those diagnosed with the early stages of serious diseases, such as Alzheimer's disease.





If surrogates disagree, guardianship may be necessary.

- ◆ the effect the treatment would have on the life expectancy of the person;
- ◆ the person’s potential for recovery, with the treatment and without the treatment;
- ◆ the risks, side effects and benefits of the treatment; and
- ◆ the religious beliefs and basic values of the person.

Disputes among surrogates: In many cases, more than one individual may qualify as a surrogate decision maker with equal decision making authority.

- ✓ For example, suppose the person has a son and a daughter. Both children have equal status as surrogate decision makers, yet they may have conflicting ideas about their parent’s care.

If surrogates disagree about a person’s health care, and the person is in a hospital or a nursing home, the doctor must refer the case to the **patient care advisory committee** to try to resolve it. Each hospital and nursing home in Maryland must have one of these committees, made up of staff from the institution, people from the community, and clergy. The patient care advisory committee will investigate, negotiate, and advise the surrogates and the doctors. If there is still disagreement, guardianship may be the only answer. Any of the parties can file to be named guardian so that necessary medical decisions can be made. It may be possible to file for emergency guardianship in order to make decisions quickly. (See Chapter 7.)

If the person is not in a hospital or a nursing home, and surrogates of equal priority disagree about withholding or withdrawing life sustaining procedures, the doctor may not withhold or withdraw treatment without a court order. In this case also, someone may have to file quickly for guardianship in order to make a medical decision.

LIMITATIONS ON SURROGATES

A surrogate *may not* authorize treatment:

- ◆ when the patient, even if incompetent, is actively refusing treatment. When the patient is refusing treatment, it is necessary to ask that a guardian be appointed in order to consent to treatment. (For example, this sometimes happens when those with mental retardation refuse to allow a dentist to work on their teeth.)
- ◆ when the treatment is sterilization, or treatment for a mental disorder.



WHAT IF THE PERSON CANNOT LIVE ALONE IN THE COMMUNITY?

Many public and private services provide the help an incompetent person needs to stay in her home and community. It is not necessary for the person to have a guardian in order to take advantage of these. Someone else can investigate and apply for these services for the person. Not all services are available in all communities, and some may have long waiting lists. Some charge a full fee, others have a sliding fee scale, and some are covered by Medicare or Medical Assistance. Some are geared toward one group or another, such as the elderly, or those with physical disabilities.

Some of these services are listed below:

Case Management

The local Department of Social Services, the area agency on aging, the Department of Health and Mental Hygiene, and private organizations provide case management services to the elderly and those with disabilities. A case manager assesses the individual's needs and coordinates services to the person so that she can remain at her

highest possible level of self-sufficiency. This service may be provided free, on a sliding scale, or for a fee.

To find out about case management services, call the number listed in Chapter 8

for the area agency on aging, the Department of Health and Mental Hygiene, or the Department of Social Services in your county. Call Geriatric Care Managers for referral to private case management services, at (520) 881-8008.

Home Health Services

Numerous home health care services are available for seniors and persons with disabilities. They may be delivered on a monthly, weekly or daily basis. Home and community based services may be cheaper than care in a

nursing home. Medicare, Medical Assistance, or private insurance may pay for some or all of the costs for medical services. Other funding may be available for services such as shopping and house cleaning. Listed below are some of the types of help provided:

- ◆ Home health aides and skilled nurses oversee the person's care, administer medication, assist with wound dressing



WHO TO CALL

To find out exactly what community services are offered in your area, call the local Department of Social Services, the area agency on aging, the Maryland Office on Aging or the Maryland Department of Health and Mental Hygiene. See the listings in Chapter 8 to find the appropriate number. You can also call the Eldercare Locator, at (800) 677-1116, which will identify services elsewhere in the country.



Case management includes:

1. A complete assessment of a person's needs.
2. Coordination of services to meet those needs.



Alternatives to guardianship seek to protect a person from harm without intruding excessively on her autonomy.

and catheter care, and help with washing, dressing, feeding and exercising.

- ◆ Nutritionists help plan diets for patients with special needs.
- ◆ Therapists provide physical, occupational, speech and respiratory therapy.
- ◆ Homemaker and chore service workers help with shopping, meal preparation, cleaning, household management, and transportation to the doctor, pharmacy, or shopping center.

To find out about home health care services, call the number listed in Chapter 8 for the area agency on aging, the Department of Social Services in your county, or the Department of Health and Mental Hygiene.

Senior Care

Senior Care is a statewide system which coordinates community based services to individuals according to individual needs. The person must be 65 or over, at risk of entering a nursing home or institution, and have a limited income. The program provides a comprehensive assessment of the individual's needs and a case manager to secure and coordinate services. Additionally, the program has a pool of money for necessary services, durable medical supplies, or equipment which is not available through traditional resources.

To find out about Senior Care, call the number listed in Chapter 8 for the area agency on aging or the Department of Social Services in your county.

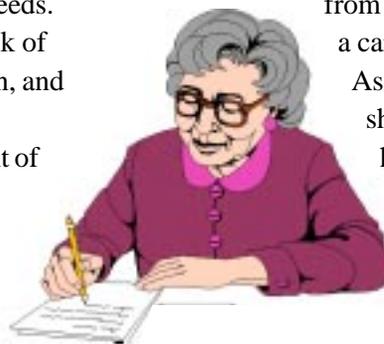
Adult Day Care

Adult day care centers provide the elderly or persons with disabilities a safe place to stay during the day, companionship, limited health care, and activities. Some provide transportation to and from the day care center. Many have special care programs for those with Alzheimer's Disease. Some costs may be covered by Medical Assistance.

To find out about adult day care in your area, call the number listed in Chapter 8 for the area agency on aging or the Department of Social Services in your county.

Respite Care Programs

Respite care programs provide funding to pay a trained person to stay for short periods with a person with disabilities in order to give the family care giver time off from the stressful job of being a care giver. Medical Assistance may pay for a short stay in a nursing home for respite care as well.



To find out about respite care programs, call the number listed in Chapter 8 for the area agency on aging or the Department of Social Services in your county.

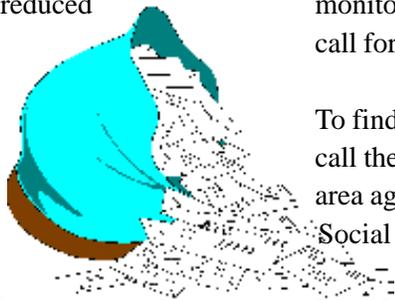
Meals on Wheels

This volunteer agency delivers free or reduced price meals to those who are homebound and unable to cook for themselves. This service is especially useful to those who cannot use the stove safely.

To find out about Meals on Wheels, call the number listed in Chapter 8 for the area agency on aging or the Department of Social Services in your county, or look in the telephone book for "Meals on Wheels."

Transportation to Medical and Other Appointments

Rides to medical appointments and shopping are often difficult to arrange for someone who has disabilities. Many counties have a free or reduced price van service. Others provide reduced price taxi vouchers.



To find out about transportation services, call the number listed in Chapter 8 for the area agency on aging or the Department of Social Services in your county.

Food and Prescription Drug Deliveries

Deliveries of groceries and prescription drugs to the home of the patient can often be arranged with local stores and pharmacies. Call several to find the ones that deliver.

Telephone Reassurance Programs

Volunteers make daily calls to those who have disabilities or are homebound to make sure they are well and safe. This service may be part of a larger package of services to the person with disabilities.



To find out if a telephone reassurance program is available, call the number listed in Chapter 8 for the area agency on aging or the Department of Social Services in your county.

Home Visitors and Pets on Wheels

Volunteers or volunteers with their pets visit those in nursing homes or those who cannot leave their homes to provide companionship and much needed stimulation. For those who live alone, these volunteers can also monitor how the person is faring and can call for help if it is needed.

To find out if these programs are available, call the number listed in Chapter 8 for the area agency on aging or the Department of Social Services in your county.

Postal Service Checks

The U.S. Postal Service will arrange to have a letter carrier check on a person periodically when delivering mail. Call your local Post Office to find out if this service is available.

Unpaid Utility Bills

Some Maryland utility companies will notify a third party if a person does not pay her utility bill. This acts as a check on someone who forgets or who is not physically able to write her monthly checks. Call the power or telephone company in your area to find out about this service.



Home and community based services help a person "age in place."

WHAT IF THE PERSON NEEDS SUPERVISION?

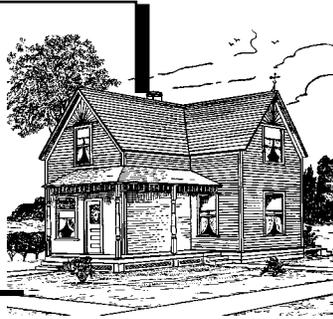
Housing Options

Sometimes a new and supportive housing arrangement can take care of problems such as a person's unsafe cooking habits or

keeping. They are for those who cannot live alone, but who do not need the level of nursing care provided by a nursing home. Most are rental units. Residents live in a private or semi-private room. The staff provides three meals a day, and help with activities of daily living, depending on the person's individual needs. There are a number of assisted living programs which provide rental assistance, and some are covered by Medical Assistance.

ALTERNATIVE HOUSING

If a person will move to supportive housing willingly, there may be no need to file for guardianship to keep her safe.



wandering outside at night. Alternative housing options provide varying degrees of assistance. Some simply provide housing plus one or two meals a day; others provide full care for all the activities of daily living. They range widely in cost. There may be some public funds available to help pay for them.

◆ Assisted Living—Multi-Family Model

Under this program, the resident lives in his or her own apartment in an apartment building designed for senior citizens or those with disabilities. To be eligible to receive the service, the individual must be elderly or have disabilities, need assistance with activities of daily living, and be unable to live independently. The program usually provides 2-3 meals a day,

personal assistance, housekeeping, and general supervision. Rent assistance may be available for low income persons who might otherwise be in a nursing home.

◆ Group Homes

In a group home, four to fifteen residents share a single household. The home may be a private dwelling or it may be a specially designed facility. Group



The Maryland Office on Aging publishes The Housing Directory, a state wide listing of alternative housing options for seniors. Call (800) 243-3425 to ask for a copy.

These housing options can help a person maintain her independence as long as possible and provide a more homelike setting than does a nursing home.

Assisted Living Facilities

Assisted living facilities generally provide help with bathing, dressing, meals and house-

CAUTION!

Assisted living facilities are not as strictly regulated as are nursing homes. When selecting an assisted living facility, carefully investigate to find out exactly what services will be provided. A checklist for evaluating an assisted living facility is available from the Consumer Consortium on Assisted Living, (703) 228-5243.

homes offer a family-like environment while providing assistance to those who cannot be totally independent. The residents have private or semi-private bedrooms and share other common areas of the home. The staff provides 24 hour supervision, 3 meals a day, personal assistance and may provide activities for residents. Some assistance with the cost may be available from the state for low income individuals who might otherwise be in a nursing home.

◆ **Adult Foster Care**

A family shares its home with and provides meals to an adult who is unable to live alone. These homes have fewer residents than group homes.

◆ **Domiciliary Care**

The staff of a domiciliary home provides only custodial care to residents. This model is more like a nursing home, but residents do not need the level of nursing care that is provided in a nursing home.

◆ **Community Residential Services**

The Department of Health and Mental Hygiene provides a limited community residential program for those with mental illness or developmental disabilities. Individuals live in supervised homes or apartments, usually with others with the same disabilities.

To find out which of these several assisted living options are available in your area, call the area agency on aging, the Maryland

Office on Aging, the Department of Social Services, or the Department of Health and Mental Hygiene. Numbers are listed in Chapter 8.

Continuing Care Retirement Communities

Some retirement communities offer a range of housing and health care services in one place. They are called continuing care retirement communities. Residents may enter the facility able to live independently in their own apartment with cooking facilities, and later move to an assisted living arrangement or a skilled nursing unit as their health declines. These communities agree to provide a secure and protected environment, and access to medical, nursing home and other health-related benefits for as long as the resident lives. The number and scope of prepaid services vary. Some require residents to be older than a certain age.

Residents in a continuing care retirement community pay an entrance fee and sign a residence contract for a period of more than one year. The resident may have to transfer assets to the community, and to pay monthly fees in addition to the entrance fee. The cost for this type of facility is substantial.

To find out more about continuing care retirement communities, call the Maryland Office on Aging, listed in Chapter 8.



Assisted living options are more available than they were in the past.

WHAT IF THE PERSON CANNOT HANDLE HER MONEY OR PROPERTY?

There are several ways to manage money or property without going through the guardianship process. Some arrangements must be made *before* the person becomes incompetent, and others can be put in place *after* the person becomes incompetent. Some of them are listed below.

Durable Power of Attorney

A **Durable Power of Attorney** is a legal document in which one person, called the **principal**, appoints another person, called the **agent**, to act on his or her behalf.

Durable simply means that the document stays in effect even after the principal becomes incompetent.

A guardian of the property may not be necessary if the person writes or has written a durable power of attorney. An agent appointed in a power of attorney usually is given the same authority a guardian would

have to handle all financial matters for the principal. Generally, if there is a valid power of attorney, there will be no need for a guardian of the property.

A power of attorney *must* be written when the person is mentally competent. For some persons with dementia, it may be too late to write a power of attorney. However, others affected by confusion or mental retardation may be able to adequately express what they want. Even a person who has been diagnosed as being in the early stages of Alzheimer's disease may be able to write a power of attorney. The person must be able to understand what property she has and the consequences of appointing an agent, and be able to clearly communicate her wishes, stating that she wants a certain person to handle her financial affairs. In cases involving Alzheimer's disease, it is important to act as soon as possible, before the disease progresses. See Chapter 2 for a further discussion of the level of competency required to make certain decisions.

Durable powers of attorney usually state that the agent may act in all financial and business matters for the principal. Under this type of document, the agent will have the authority to collect the person's money and income, deposit funds in banking accounts, write checks on the person's accounts, and pay the person's bills. The agent may also have the right to buy and

CHOOSE YOUR AGENT CAREFULLY

Since the agent usually has broad power over the person's finances, it is important to select a trustworthy agent who is experienced in business matters. A power of attorney is not an option for someone who does not have a trusted friend or relative willing to take on the duties. There are many stories of people losing their savings or property to a dishonest agent appointed through a power of attorney. The principal must be very careful in selecting an agent.



sell property and stock. But the power of attorney can also be written to limit the agent's authority to just a few specific items.

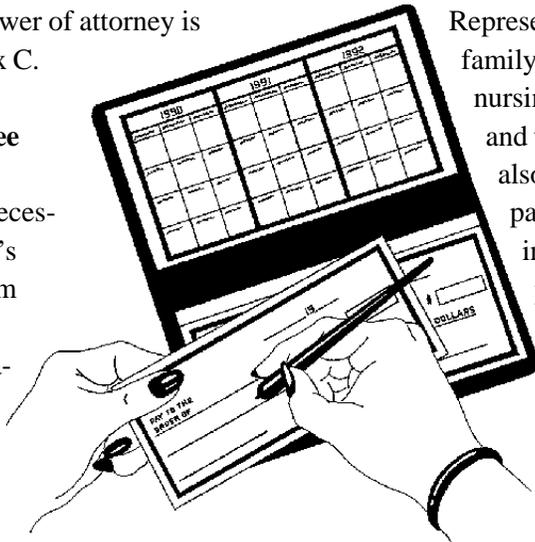
Many people write powers of attorney as part of their estate planning, along with a will and advance directive for health care. It is wise for anyone who has money or property in his or her own name, regardless of age, to write a power of attorney in case a sudden injury or illness leaves that person unable to act.

It is not necessary to have a lawyer write a power of attorney, though it is a good idea, especially if the person has substantial income or assets. If the situation is very simple, however, a simple form may work. These forms are sold in office supply stores and are printed in self-help legal books in the public libraries. Be sure the form has language which makes it "durable." And remember that the principal must understand the meaning of the document and sign it willingly and knowingly.

A sample durable power of attorney is included at Appendix C.

Representative Payee

Guardianship of the property may be unnecessary if the individual's income is mainly from Social Security, Veteran's Administration or other government benefits, and the person has no assets or very limited assets.



These agencies will appoint another person or agency to receive benefit checks for a person who is unable to handle benefits alone. The person appointed is called the **representative payee**. Once appointed, the representative payee can collect the person's monthly income and use it to pay her bills.

There are many advantages to the representative payee program. The representative payee serves the same simple money management function as a guardian of the property, but it is not necessary to file in court. The process is much simpler and less expensive than a guardianship. Since a court does not find the person incompetent, the person retains a sense of independence and autonomy.

The agency paying the benefits will oversee the representative payee in much the same way that the court supervises a guardian of the property. The representative payee must file an annual report with the agency, verifying that the person's funds have been spent on her needs.

Representative payees are usually family members or friends, but nursing homes, public agencies and volunteer organizations can also serve as representative payee. However, a conflict of interest could arise if the person serving as representative payee also cares for the person and takes a fee from the funds for that care.



Signing a durable power of attorney for finances is the best way to prevent the need for guardianship in the future.

HOW TO BECOME A REPRESENTATIVE PAYEE

To be named a representative payee, apply to the agency paying the benefits. A doctor must sign and file with the agency a medical form which certifies that the person is not able to handle her own money. The agency will ask if it is in the best interest of the person for a representative payee to be appointed. The agency will notify the person that someone has applied to be her representative payee. If the person does not object, the agency will send the monthly check to the representative payee, for the use of the beneficiary. The representative payee can open a bank account in both names and can pay the person's bills and buy necessities for her from the monthly income. The representative payee must always act in the best interest of the person.

To apply to be a representative payee, call your local Social Security office or the agency which pays benefits to the person. To find out about volunteer representative payee programs, call the Department of Social Services for your county or the area agency on aging listed in Chapter 8.

◆Direct Payment:

The bank can make direct payments from the individual's account for routine bills such as rent, mortgage payments, nursing home payments, and monthly utility bills. With the bank automatically paying these bills, the person is relieved of having to remember to write checks for them each month.

◆Personal Money

Managers: If the person has substantial funds, she can hire a personal

money manager to receive funds and pay bills.

◆**Power of Attorney Accounts:** Banks have form powers of attorney which allow an agent to act for the owner of the account only in banking matters at that bank. Contact your bank to ask about these alternatives.

Joint Ownership of Bank Accounts

Many older persons establish joint bank accounts with their spouses, children or other trusted relatives to make sure that the funds in the account go to the other person when the first one dies. But joint bank accounts have another use: they can also prevent the need for a guardian of the property.

If the individual's income comes from a source other than the government, such as a private pension, contact the company's retirement program and inquire if that program has a representative payee plan.

Banking Services

Banks can provide some money management services for those who have accounts. It may be possible to arrange for the following services:

◆**Direct Deposit:** A person's regular income, such as pension or Social Security checks, can be directly deposited into the individual's account, saving her a trip to the bank.



A representative payee may make a guardian of the property unnecessary.

If two or more persons own a checking or savings account, all owners usually can deposit and withdraw money from that account.

✓For example, if a mother and daughter both have their names on the mother's checking account, the daughter can write checks on the account, even if the mother becomes incompetent. Joint ownership would prevent the situation in which no one can withdraw funds from the mother's account because she has become incompetent and unable to sign checks.

A joint account must be established when the joint owners are mentally competent. However, as with a power of attorney, a person who has limited understanding may be able to willingly and knowingly sign a bank's signature card to establish a joint account. See Chapter 2 for a description of how to decide when a person may have the competence to open a joint account.

There are some disadvantages to joint bank accounts. Since adding a person's name to a bank account gives that person an interest in the funds in the account, government benefit programs, such as Medical Assistance, may see this as making a prohibited gift. Medical Assistance may attribute ownership of all the funds in a joint account to the person applying for benefits, regardless of original ownership of the account. It may change the person's

estate plan, so that the money goes to someone other than the person named in a will. And the funds in a joint account may be attached by the co-owner's creditors.

Authorization of a Specific Transaction

Maryland law provides for a one time transaction to transfer a specific piece of property without the appointment of a guardian of the property. This procedure is useful when there is only one relatively simple financial matter to be handled, such as a car to be sold, or an insurance policy to be cashed. A petition is filed in the court asking for permission to perform the one transaction without the permanent appointment of a guardian.



Joint ownership of a bank account can solve money management problems.



CHOOSE JOINT OWNERS CAREFULLY

It is important to be sure that all joint bank account owners are trustworthy, since all joint owners will have the right to withdraw all the funds in such an account. As with powers of attorney, there are many sad stories of persons losing all their savings to an unscrupulous person who was named as a joint owner of a bank account.

The advantage is that, although a court proceeding must be filed, once the transaction is completed, the case is closed. There is no permanent guardian of the property,

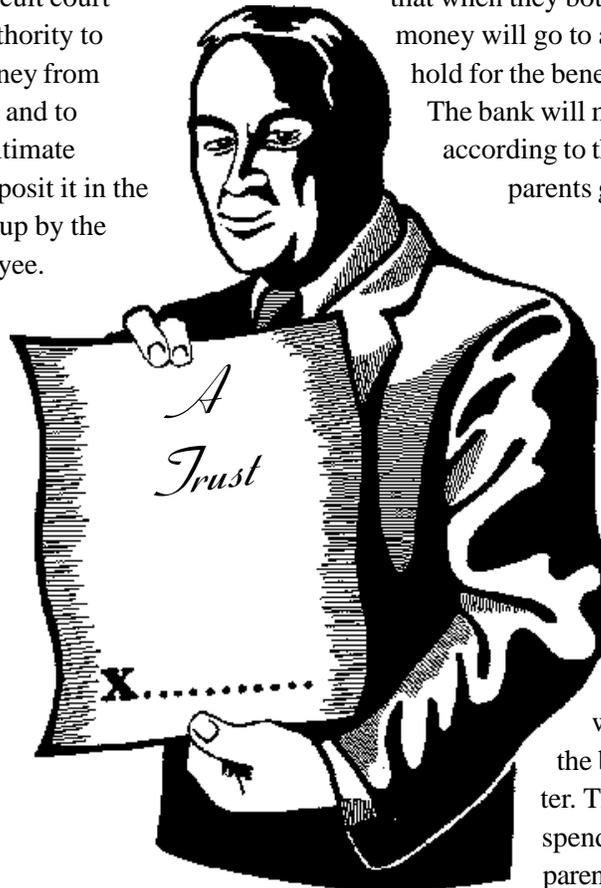


Planning for one's future incompetency makes things easier for family members.

there is no need to file a yearly accounting, and no need to file a petition to close the guardianship estate after the person dies. In addition, the person does not permanently lose her independence or broad based rights as in guardianship.

✓ For example, a person may become disabled who has only her monthly Social Security income and a small bank account. A representative payee (see page 27) could be appointed to manage the monthly Social Security checks, but no one can withdraw the money from the bank account because it is titled in the name of the incompetent person alone. A friend, family member or a public agency can file a petition in the circuit court asking for the authority to withdraw the money from the bank account and to spend it for a legitimate purpose, or to deposit it in the joint account set up by the representative payee.

Since it is the only asset that has to be administered, the court can order this one time transaction without appointing a permanent guardian of the property.



You will need the assistance of a lawyer to file a request for authorization of a specific transaction. See the listings in Chapter 8 for legal services in each county.

Trusts

A trust may be useful to avoid guardianship of the property. 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 third person, the **beneficiary**. Since there is a fee charged by the trustee, this device is usually only used if there are substantial assets.

✓ For example, the parents of an adult with mental retardation decide to set up a trust for their daughter. They direct that when they both have died, their money will go to a bank, the trustee, to hold for the benefit of their daughter.

The bank will manage the money according to the directions the parents give. They might

direct that only the interest on their money be paid periodically to the daughter, or that the money be spent only for the cost of her housing. The trustee would not actually have legal ownership of the property, but would only hold it for the benefit of the daughter. The trustee could spend the funds only as the parents have directed.

Since a trustee has the same authority as a guardian to collect funds and spend them for the benefit of a person who cannot act for herself, no guardian of the property would be necessary in the example given.

You should see a lawyer to set up a trust for the benefit of someone who is or may be incompetent. Trusts are complicated and flexible. Each one is written to satisfy the particular needs of the grantor and the beneficiary. It is important to set up the trust so that it does not jeopardize the person's eligibility for public benefits, such as Medical Assistance. Call the numbers listed in the legal services sections in Chapter 8 for referral to a trust attorney.



WHAT HAPPENS IF A GUARDIAN IS APPOINTED EVEN THOUGH THESE ALTERNATIVES ARE IN PLACE?

Since the guardian stands in the shoes of the disabled person, she can take any action that the disabled person could have taken. Thus, a guardian appointed by a court has the authority to revoke a power of attorney that the disabled person has made in the past, to close or open bank accounts, and to apply to change a representative payee. Generally, a guardian could not revoke a trust that someone else has established for a disabled person, although the guardian would have the authority to spend the income paid out by the trustee as the trust states.



The most frequent reason for appointing a guardian of the property is a person's inability to handle money.