Alternatives to Guardianship

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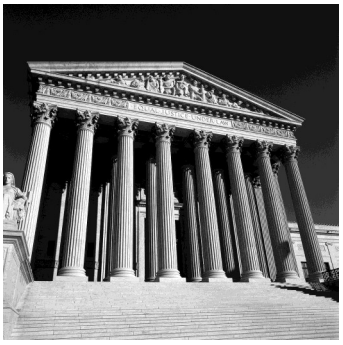

Least Restrictive Alternative Requirement F.S.§744.331(6)(b).

One of the major substantive changes to Florida Guardianship Law which was brought about by the October 1989 legislative revisions, was the requirement that there be no least restrictive available alternative to guardianship, before the court could appoint a guardian.

The obvious advantage was to allow the court to consider factors other than whether or not the alleged incompetent person was incompetent, in determining whether or not to appoint a guardian. Prior to the 1989 revisions, once a judge determined a person to be incompetent, the only remaining decision was who to appoint as guardian of the person and/or property.

Since the 1989 legislative revisions, the court must take testimony and other evidence as to whether any least restrictive alternatives to guardianship exist, and if so, whether they are, or will, adequately meet the ward's needs. If the court finds that there is a least restrictive alternative to guardianship which will sufficiently address some of the alleged incompetent person's problems, the court cannot delegate rights to a guardian for the areas covered by the least restrictive alternative.

Proper planning by attorneys and guardians requires the recommendation of any least restrictive alternative to clients who need assistance. Before making such a recommendation, however, it must be determined that said alternative is appropriate under the circumstances and in the client's best interests.

1. Joint Bank Accounts

Many individuals have their bank accounts and other investments titled "jointly" with another person or persons. (i.e. John Doe and Jane Doe, as joint tenants with rights of survivorship). The effect of a bank account titled in this manner, is that the financial institution will accept the signature of either of the persons named on said account, thus enabling either person to sign checks and make withdrawals from said account. In addition, assets owned in this manner automatically pass to the survivor upon the death of one of the joint owners.

In determining whether or not an alleged incompetent person with joint bank accounts should have a guardian appointed to manage their finances, it is necessary to determine whether or not the other joint owner of said account has been willing or able to manage said accounts to provide for the financial needs of the alleged incompetent person.

It is important to note that many elderly people create joint bank accounts as "convenience" accounts. A convenience account is created by the addition of the name of a family member, friend or other person, as a joint owner of a bank account to enable that person to pay the original owner's bills, etc., should they become ill or otherwise unable to manage their financial affairs. If the other joint owner has not actively assisted with the payment of the incompetent person's bills, and is unwilling or unable to do so in the future, then the joint bank account will not be found to be a least restrictive available alternative to guardianship for the alleged incompetent person.

Another consideration which must be made is whether or not the addition of the name of a joint owner to an existing bank account was initiated by the other person, rather than by the alleged incompetent person. It is not uncommon for this situation to occur, enabling the other joint owner to exploit the assets of the alleged incompetent person. If there are allegations of possible exploitation, or other evidence indicating that the other joint owner may not be managing the joint account for the benefit of the incompetent person, it may be necessary to appoint a guardian of the property.

The fact that the incompetent person has a joint bank account, should not preclude the court from appointing a guardian to manage the ward's property. While it may appear to be a least restrictive alternative to guardianship, evidence should be presented as to whether the incompetent person's assets are adequately protected by such an arrangement as well as whether the other joint owner is willing or able to manage the incompetent person's financial affairs. It should also be determined whether or not other assets exist

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which are not titled jointly, as a guardian would be needed to manage said assets.

2. Durable Power of Attorney - F.S.§709.2101 - §709.2402

A Power of Attorney is a written delegation of authority made by a mentally competent person to another person. A Power of Attorney is usually used to delegate the authority to manage a particular bank account; a particular piece of real estate; or to take a particular action on behalf of the Grantor. A Power of Attorney may also be used to grant broad authority to manage all of the property of the Grantor. The Grantee of a Power of Attorney is the "agent" of the Grantor and may only take those actions which are authorized by the Grantor. A Power of Attorney is valid until the Grantor dies, revokes the Power of Attorney, or becomes incompetent.

A Durable Power of Attorney is the same as a general Power of Attorney except that a Durable Power of Attorney survives the later incapacity of the Grantor. A Durable Power of Attorney is valid until the Grantor dies, revokes the Power of Attorney, or is adjudicated incapacitated. A Durable Power of Attorney may delegate authority over financial matters just as a general Power of Attorney, but may also include the delegation of authority to arrange for and consent to medical, therapeutical, and surgical procedures, including the administration of drugs.

If an alleged incapacitated person has a Durable Power of Attorney by which the authority to manage financial and/or medical matters has been delegated to another person, the Durable Power of Attorney may be a least restrictive alternative to guardianship. A determination should be made as to whether or not the Grantee of said authority under a Durable Power of Attorney is able to manage all of the needs of the alleged incompetent person. If the Durable Power of Attorney is for medical purposes only, a guardianship may be needed to manage the alleged incompetent person's finances. A guardian may also be necessary if the Grantee of authority under the Durable Power of Attorney is no longer willing or able to adequately care for the alleged incompetent person's needs. If there are allegations of possible exploitation, or other evidence indicating that the Grantee of authority under the Durable Power of Attorney may not be managing the incompetent person's assets for the benefit of the alleged incompetent person, it may be necessary to appoint a guardian.

Please note that while the delegation of authority under a Durable Power of Attorney is legally binding, that many financial institutions require, in addition to the Durable Power of Attorney, a Power of Attorney and signature card which have been prepared by the bank. While this may not present much of a problem if encountered at the time that the Grantor signs the Durable Power of Attorney, it can be disastrous if not encountered until after the Grantor's incapacity. At that time the Grantor is incompetent and therefore cannot execute another Power of Attorney, as requested by the bank.

3. Living Trust

A Living trust is also a written delegation of authority. A Living Trust is similar to a Power of Attorney in that it may be very specific or very broad in its grant of authority. A Living Trust is limited to the management of financial matters only, and cannot delegate authority over any medical matters. A Living Trust may also be referred to as a "Revocable" Trust and/or and "Inter Vivos" Trust.

A Living Trust specifically outlines the powers and duties of the Trustee in the management of the trust assets for the benefit of the named beneficiary or beneficiaries. This is usually the Grantor and the Grantor's family. The trust document also makes provision for distribution of the trust assets after the Grantor's death, which does not require the probate of an estate as the assets are not titled in the name of the Grantor, but in the name of the trust. The Trustee of a Living Trust is usually the Grantor. The terms of the trust also make provision for the appointment of a Successor Trustee upon the death or incapacity of the Grantor/Trustee.

The Trustee of a Living Trust only has the legal authority over assets which are titled in the name of the Trust. If assets of an incompetent person exist which are not titled in the name of the Trust, then it may be necessary to appoint a guardian of the property for the management of said assets. Just as the Trustee cannot manage assets which are not titled in the name of the Trust, a guardian of the property cannot manage assets which are titled in the name of the Trust. A Trustee and a guardian of the property can co-exist, each responsible for the management of different assets of the incompetent person.

In most Living Trust Agreements the Grantor is also the first Trustee. The Trust Agreement should also provide for the circumstances under which a Successor Trustee can assume the duties of Trustee. Many Living Trust Agreements provide that the Successor Trustee can assume the duties of Trustee upon the incapacity of the Grantor/Trustee as determined in writing by two licensed physicians. Therefore, depending on the wording of the Living Trust Agreement, a Successor Trustee can assume the duties of Trustee upon the Grantor/Trustee's incapacity without the necessity of an adjudication on incapacity by the court.

A Living Trust will nearly always be a least restrictive alternative to guardianship over property rights relative to the Trust assets. However, since the Trustee or Successor Trustee has no authority to make medical decisions, it is often necessary to appoint a guardian of the person to make said medical decisions in the absence of a Durable Power of Attorney for medical purposes or the declaration of a Health Care Surrogate on behalf of the incompetent person.

4. Health Care Surrogate - F.S.§765

Any mentally competent adult may make a written designation of a person to serve as their Health Care Surrogate (HCS), enabling said HCS to make medical decisions and to provide informed consent on behalf of said person. The person who is designated HCS can make these decisions only during the Grantor's incapacity. Therefore, it does not take effect until the person becomes incompetent (i.e. unable to provide informed consent for medical treatment). This determination must be made by the attending physician. At that time the HCS must be notified and accept the designation as HCS in writing.

The HCS has the authority to make any and all health care decisions for the Grantor during this period of incapacity. The HCS must use the doctrine of substituted judgment in making said decisions. Effective July 1, 2001, if there is no indication of what the patient would have chosen, the HCS may consider the "best interest" of the patient in making decisions. In addition, the HCS may apply for public benefits,

such as Medicare and Medicaid, on behalf of the Grantor, however, cannot manage or receive any property or income on behalf of the Grantor.

However, if a HCS Designation exists, and the attending physician's written statement stating that the patient lacks the capacity to provide informed consent to medical treatment has not been made or documented in the patient's clinical record, even if the patient is clearly incompetent , then the HCS Designation has not been activated and the named HCS has no authority. Such a situation could require the appointment of a guardian of the person and/or property, unless the attending physician's written statement can be obtained and documented in the patient's clinical record.

The HCS statute also has broad implications in situations where there exists no prior HCS Designation. Said statute provides that the "health care facility" may appoint a "Proxy" to serve as the HCS in the absence of a HCS Designation. The statute outlines the priority of who may be appointed, which gives the patient's spouse first consideration, and follows the patient's bloodlines, giving consideration to the next of kin. There is even a provision for situations where no next of kin exist who are willing or able to serve as the Proxy, for the appointment of a "close personal friend" of the patient who has "special care and concern" for the patient, as the Proxy.

The authority of the Health Care Proxy is also derived by the determination by the patient's attending physician that the patient is incompetent (i.e. unable to provide informed consent for medical treatment).

If an HCS Designation exists or a Proxy is appointed, it may be considered a least restrictive alternative to guardianship of the person . However, since an HCS has no authority to manage property, it may still be necessary for the court to appoint a guardian of the property.

5. Voluntary Guardianship F.S.§744.341

A Voluntary Guardianship is available for those persons who, while mentally competent, are not capable of the care, custody and management of their estates due to age or physical infirmity, and who voluntarily petition for the appointment of a Voluntary Guardian. The person who is appointed as the Voluntary Guardian has authority to manage the financial affairs of said person only, and cannot make medical or residential decisions for said person. A Voluntary Guardianship terminates upon the death or incapacity of the ward, or upon the filing of a notice of termination by the ward. Once appointed, the Voluntary Guardian has the same responsibilities and duties as guardians, generally.

The court may appoint a Voluntary Guardian regardless of any other least restrictive alternatives which may be available. This is due to the fact that the person seeking the appointment of a Voluntary Guardian must be competent, and therefore, he is also competent to revoke or supersede any other alternatives available.

Since a Voluntary Guardianship is for the management of property only, it is more economical to also sign a Durable Power of Attorney for medical purposes or a HCS Designation. This will ensure that all of the ward's needs are met.

The main advantage to be derived through the appointment of a Voluntary Guardian is the requirement that a bond be posted by the guardian, conditioned upon the guardian's faithful performance of their duties, and the court's supervision of the guardian's actions. This protection is not available using a Durable Power of Attorney for the delegation of authority over property.

6. Preneed Guardian - F.S.§744.3045

A person may, while mentally competent, make a written declaration naming the person to serve as guardian in the event of the person's incapacity. Such a declaration should be filed with the Clerk of the Circuit Court in the County where the person resides, so that in the event that a petition to determine their capacity is filed with said court, that the Clerk will produce said declaration for the court's consideration as to the ward's preference in the appointment of a guardian. A Preneed Guardian Declaration does not guarantee the appointment of the person named therein, however, the court is required to "Consider the wishes expressed by an incompetent person as to who shall be appointed guardian;"

7. Standby Guardianship - F.S.§744.304

Upon the petition of both parents, if living, or by the surviving parent; or upon the petition of the currently serving guardian; a standby guardian of the person and/or property of a minor or incompetent person may be appointed. The standby guardian is empowered to assume the responsibilities of guardian immediately upon the death or adjudication of incapacity of the last surviving parent, or guardian. A standby guardian must petition to have his appointment confirmed by the court within 20 days after the death or adjudication of incapacity of the last surviving parent, or guardian.