

GUARDIANSHIP
&
ALTERNATIVES

Introduction

- Ways to Avoid Guardianship
- If Guardianship is Necessary
 - How does it work
 - What does it mean



Why Plan?



The image shows a hand holding a black marker, crossing out the word 'UNPREPARED' which is written in capital letters on a white surface. The word is written in a simple, sans-serif font. The hand is positioned to the left of the word, with the pen tip touching the 'U'.

IS GUARDIANSHIP NECESSARY?

- Less Restrictive Alternatives = Sound Mind
- Guardianship = Incompetent + Need

Planning for life

- Financial Power of Attorney
- Health Care Power of Attorney
- Living Will
- Mental Health Advanced Directive
- Assisted Decision-Maker
- Payee

Financial Power of attorney

- Designate Agent to make financial decisions
- Agent handles day to day financial affairs
- Amendable/Revocable
- Ohio does not require 3rd parties to recognize POAs
- Important to pick appropriate Agent—Ripe for abuse
- Limitations on Agent's power
- Specific Powers: Create Trusts/Stable Accounts

Health Care Power of Attorney

- Designates Agent to make health care decisions
- Only effective when Principal unable to make decisions
- Amendable/Revocable
- Principal can insert limitations
- Agent makes end-of-life decisions unless Living Will in place
- Beware of HIPAA

Living Will

- Effective once individual cannot communicate
- Must be permanently unconscious or terminally ill
 - Determined by 2 physicians
- Can be changed/revoked

Mental Health Advanced Directive

- Designates a Proxy
- May designate specific treatment plan (expires after 3 years)
- Becomes irrevocable if incapacitated due to mental health
- Two doctors must determine if you are incapacitated
- These directives have limitations and do not always work smoothly.

Who Can Sign These?

- Standard is "Sound Mind"
- Ohio Courts apply a functional test to determining "Sound Mind"
- Do you have the capacity to make informed health care decisions
- You understand the basic purpose and consequence of signing the document
- Guardianship itself does not automatically bar execution

REPRESENTATIVE PAYEES

- SSI, SSA, SSDI
- Less restrictive alternative to guardianship of estate
- Accounts directly to Social Security Administration

PAYEE BANK ACCOUNTS

- Checking / Savings Account must reflect the beneficiary's ownership of the money.
- Rep Payee nor any third party can have ownership interest in the account.
 - No joint accounts allowed (with exception of spouses)
- Beneficiary not allowed to have direct access.
- Correct way to title account:
 - "(Beneficiary's Name) by (your name), Representative Payee"
 - "(Your Name), representative payee for (beneficiary's name)"

HOW TO USE THE MONEY

- Make sure beneficiary's day-to-day needs are met
 - Order of Priority in Use of Funds
 - FIRST: Food and Shelter
 - SECOND: Medical/Dental not otherwise covered
 - THIRD: Personal Needs (clothing and recreation)

PAYEE REPORTING

- File an annual accounting
 - "Representative Payee Report"
 - Now submitted online
- Not scrutinized or reviewed consistently or appropriately
 - Unfortunately there is a lot of exploitation and abuse of these funds

CHANGING PAYEE

- Not always as easy as it should be
- Very inefficient process
- Most effective way is to do it in person at SS office

Assisted decision-maker

- ORC 5126.043
- Individual receiving services from DD can nominate assistant decision-maker
- Decision-maker cannot have financial interest
- Individual can revoke or change decision-maker authority
- Must be in writing

GUARDIANSHIP

- Last resort – look for alternatives!
- Individual must be Incompetent:
Any person who is so mentally impaired as a result of a mental or physical illness or disability, as a result of intellectual disability, or as a result of chronic substance abuse, that the person is incapable of taking proper care of the person's self or property
- Must be a Need for guardianship:
What is going on in the person's life that makes guardianship necessary?

Guardianship Types

- Guardian of the Person Only(most common)
 - Responsible for day to day decisions
 - Consent for medical care
 - Residential Placement
- Guardian of Estate
 - Responsible for managing financial affairs
 - Responsible for litigation
 - Significantly more reporting requirements with court

Establishing guardianship

- Established through County Probate Court
- Takes 1-3 months to establish (plan ahead for child turning 18)
- Expert Evaluation must be completed by Physician or Psychiatrist
- Background Check
- Education
- Conflicts of Interest

Decision-Making

- **DECISION-MAKING IS A PROCESS**
 - No one size fits all approach
- **"Best Interest"** means the course of action that maximizes what is best for a ward, including consideration of the **least intrusive, most normalizing, and least restrictive course of action** possible given the needs of the ward.

Decision-Making Process

- **Due Diligence:** "...communicating with the ward and being fully informed..."
- **Least Restrictive Alternative:** "...imposing the least limitations on the ward's rights, freedom or ability to control the ward's environment."
- **Person-Centered Planning:** "A guardian shall strive to balance a ward's maximum independence and self-reliance with the ward's best interest."

RIGHTS UNDER GUARDIANSHIP

- Guardian is an advocate—not a sheriff!
- Dignity of Risk
 - Health and Safety Issue or Just a Bad Habit?
- Behavior Support Rule
 - DD Bill of Rights
- Voting / Driving / Dating / Friendships

Limited Guardianships

- Least Restrictive Type of Guardianship
 - Medical
 - Placement
 - Programming
 - Behavioral
 - Time/Duration

Court interaction

- Review Hearings
- Change of Residence
- Guardian Report / Annual Plan
- Statement of Expert Evaluation
- Reporting Abuse, Neglect and Exploitation
 - MUIs
- Continuing Education
- Complaints

Direct Services / Conflicts of Interest

"Direct services" means services typically provided by home and community-based care and institutionally-based care providers, including medical and nursing care, care or case management services, care coordination, speech therapy, occupational therapy, physical therapy, psychological services, counseling, residential, legal representation, job training, and any other similar services. The term "direct services" does not include services of a guardian.

TERMINATION

- Death
- Restoration
 - Need is resolved
 - Less restrictive alternative
 - Change in circumstance/maturity

Succession planning

- Guardianship
 - Parents can nominate a successor in writing
 - Others can still nominate a successor—just no official legal weight
- POAs / Alternatives
 - The written instrument should set forth a list of successors
 - Think ahead / include contingencies if necessary

LIFE PLANNING – Where to live?

- Moving out of the family home is a major life event
- Death of parent(s) is a major life event

DO YOU WANT THESE TO HAPPEN AT THE SAME TIME?
If not—plan ahead!

QUESTIONS?

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ESTATE PLANNING

DCBDD TRANSITIONS BOOTCAMP - 2018

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ESTATE PLANNING

Why Plan?

IF YOU FAIL TO PLAN, YOU ARE PLANNING TO FAIL

ESTATE PLAN

- Everyone has an Estate Plan!
 - The statutory estate plan (intestacy) will disqualify loved ones from government benefits such as Medicaid/SSI (depending on how much they inherit)
 - The statutory estate plan (intestacy) costs more in the long-run

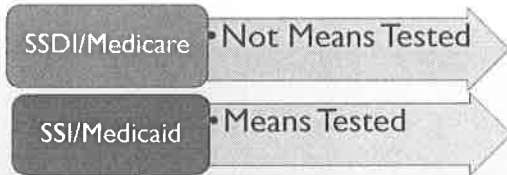
- Planning prevents disruption of benefits for loved ones

- Planning allows you to exert and exercise control

PLANNING OPTIONS FOR LOVED ONE WITH DS

- Dinherit (Risky)
- Last Will & Testament (Will disqualify loved one from benefits)
- Beneficiary Designation (Will disqualify loved one from benefits)
- Trust (Wholly Discretionary Trust) – Best Estate Planning Option for Parents

GOVERNMENT BENEFITS




MEDICAID / SSI

- Medicaid
 - Payer of last resort*
 - Funds approximately 60% of state/county programs
 - Standard asset limit of \$2,000
 - Exception is Medicaid buy-in program
 - Eligibility now tied to SSI eligibility
- Supplemental Security Income (SSI)
 - Support for Aged, Blind and Disabled

TRUST

• WHAT IS A TRUST?



TRUST

- Countless different types / varieties
 - Revocable / Irrevocable
 - Irrevocable does not mean it cannot be amended
 - First Party / Third Party
 - Asset trust / income trust
 - Creditor Protection Trusts
- Most families have a Revocable Living Trust for planning purposes

REVOCABLE LIVING TRUST

- Used to take care of spouses
- Avoids probate
- Designed to make distributions to children (other than child with disability)
- Possible creditor protection

WHOLLY DISCRETIONARY TRUST

- Wholly Discretionary Trust
 - Designates a Trustee (and successor Trustee)
 - Provides for a remainder beneficiary to inherit upon beneficiary's death
- Poison Pill
- Medicaid/SSI Eligibility
- Subject to Scrutiny
- Funds never belonged to individual with disability

POOLED TRUST

- Can be created by the individual
- Must be managed by a non-profit association
- Accounts are pooled for management and investment purposes
- Ohio Pooled Trust, CFMF or Dayton Foundation

IMPORTANT

- Last Will and Testament (include guardianship nomination)
- Financial Power of Attorney
- Health Care Power of Attorney
- Living Will
- Fund the Trust
 - Transfer on Death
 - Payable on Death
 - Beneficiary Designations

SUMMARY--WHAT DO I ACTUALLY NEED?

- Wholly Discretionary Trust
 - Possibly also a family trust for other children/beneficiaries
- Last Will & Testament
- Health Care Power of Attorney (and possibly a Living Will)
- Financial Power of Attorney
- Roadmap for Survivors
- **ROADMAP FOR AWESOME PERSON**
- Special Needs Trust/Pooled Trust (maybe)

PAYBACK TRUST ("SPECIAL NEEDS TRUST")

- TOOL FOR MEDICAID ELIGIBILITY
- Can be created by an individual or their Parent, Grandparent, Legal Guardian or Court
- First Party Trust—meaning it should only holds assets belonging to individual with disability
- Limitations on how the funds can be used
- Assets in this trust are not countable resources for Medicaid or SSI
- Medicaid payback required
- NOT AN ESTATE PLANNING TRUST!

ABLE ACT STABLE ACCOUNTS

- Eligibility
 - SSI / SSDI / Certification of Disability
- Contributions
 - Not ideal for estate planning
 - \$15,000.00 annually (anything more will be returned); \$12,000 additional income may be contributed
 - Lifetime limit of appx \$442,000.00 / SSI limit of \$100,000.00
- Subject to Medicaid Payback
- Create online at www.stableaccount.com

USE OF STABLE ACT ACCOUNTS

- Qualified Disability Expenses
 - Basic Living Expenses (Beware of SSI Issues)
 - Housing
 - Transportation
 - Education
 - Assistive Technology
 - Employment Training
 - Personal Support Services
 - Legal Fees
 - Health & Wellness
 - Financial Management

RED-FLAGS AND SPECIAL ISSUES WITH ESTATE PLANS & TRUSTS

- Person with disability has been disinherited
- Annuities (only appropriate in limited circumstances)
- Retirement accounts are problematic
- Unexpected inheritances
- When to fund trust

RED-FLAGS AND SPECIAL ISSUES WITH ESTATE PLANS

- Submitting Trust for review
 - SSI & Medicaid
- SSI / Rent / Tax Issues
- Legal Fees
- PLAN FOR LIFE AFTER PARENTS! (I know it is hard)

QUESTIONS?

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