

ALTERNATIVES TO GUARDIANSHIP AND CONSERVATORSHIP OF ADULTS IN GEORGIA

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"Caring for the needs and affairs of those incapable of caring for themselves@

INTRODUCTION

Is the formal appointment of a guardian or conservator by the Probate Court necessary to care for or conduct the affairs of an adult who has become incapacitated? The answer to this very important question depends on the circumstances of each individual case. Asking it is both appropriate and prudent, because adult guardianship and conservatorship proceedings are fairly complicated and time-consuming, primarily as a result of the due process protections afforded the proposed ward. They can also be expensive. This is not to say that the proceedings are overly complex; the legal protections help assure that the Court receives clear and convincing evidence of incapacity before removing the rights of an adult citizen and that the order issued in every case is "fashioned" to the particular circumstances.

However, there are often available alternatives to guardianship/conservatorship which may accomplish the needed ends in any particular case. These alternatives should be considered and should be utilized in every case when doing so would accomplish the underlying purpose AND provide any needed protection for the adult.

It is important to distinguish physical disability or incapacity from mental disability or incapacity. One can be physically incapacitated yet retain full mental competence. On the other hand, one might be mentally incapacitated but be physically quite fit and well.

The availability and/or effectiveness of any of these alternatives will likely be dependent upon the type and extent of incapacity. To be legally effective, any documents discussed herein requiring the signature of the adult must be signed while the adult is capable and competent to understand the nature and purpose of the documents. Proper preparation of the alternatives reviewed in this pamphlet may require the services of an attorney experienced in this field.

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LIVING WILLS and DURABLE POWERS OF ATTORNEY FOR HEALTH CARE:

The provisions of Georgia law establishing Living Wills and Durable Powers of Attorney for Health care were repealed by effective July 1, 2007, except that all Living Wills and Durable Powers of Attorney for Health Care executed prior to July 1, 2007.

GEORGIA ADVANCE DIRECTIVE FOR HEALTH CARE

Georgia's new Advance Directive for Health Care essentially combines into one document the elements of both the Living Will and the Durable Power of Attorney for Health Care. An ADFHC not only contains certain declarations but also names an agent to make health care decisions in accordance with the instructions and to enforce the person's stated intentions. It contains four parts: the designation of health care agents; a statement of treatment preferences; the nomination of a guardian in the event of incapacity; and the effective date and

signatures. The appointment of a guardian for the adult does not revoke an ADFHC unless the court directs otherwise. The Georgia Code also contains the form for the ADFHC and sets forth the requirements of formality of completion and execution.

FINANCIAL POWER OF ATTORNEY

In addition to a health care power of attorney, one may also execute a financial or general power of attorney, which may be combined with or executed separately from the health care power. A financial power of attorney names an agent to act in the place of the individual, primarily in monetary and property matters, and defines the extent of or limitation on the authority given. The authority granted may be very limited and specific or be quite broad and include the authority to: write checks and make deposits; buy and sell real estate or other property or investments; negotiate and settle debts and claims; etc. Powers of attorney (both general and health care), executed while the adult is mentally competent, often allow for the conduct of all business and management of all personal affairs of the adult once incapacitated without the necessity of guardianship or conservatorship. However, the appointment of a conservator for the adult revokes a financial power of attorney unless the court directs otherwise. The Georgia Code contains a form for a Financial Power of Attorney and an explanation of the nature of the power.

LIVING TRUST

A competent adult may also create an inter vivos, or "Living", trust which provides for the handling of all or certain financial affairs by a designated trustee over property transferred into the trust. It allows one to specify the person or entity (e.g., a trust department) to handle the affairs and manage the trust property and may define the exact manner of property management. It designates a trustee with whom third parties may deal regarding financial and other matters within the scope of the trust in the event of incapacity.

REPRESENTATIVE PAYEE STATUS

When a person receiving Social Security, Supplemental Security Income or VA benefits becomes incapable of managing those benefits, the Social Security Administration or Veterans' Administration can appoint a representative payee for such benefits without the necessity of conservatorship. If the person is a resident of a nursing or personal care home, the benefits may also be made payable directly to the care facility.

GEORGIA MEDICAL CONSENT LAW

It is also important to recognize that, in an emergency, the law allows physicians to treat anyone who is incapable of giving informed consent. In all non-emergency situations, the next of kin may consent if the patient is unable to do so. The Georgia Medical Consent Law lists the persons who may consent to medical care for another. Guardianship may not be necessary to consent to medical treatment, unless there is a dispute among those persons having equal voice under the law.

PLACEMENT DECISIONS AND PROCEDURES

Placement in a personal care home, assisted living facility, or nursing home often can be accomplished without a guardian, as long as the resident is either (a) cooperative or (b) incapable of objecting. A competent adult has the right to determine his own residence, and a facility is without authority to restrain an adult absent consent, unless the authority to determine residence has been placed in another (a guardian). At times it may be difficult to gauge whether a new resident will ultimately "object," since he may be resistant at first but may adjust after a

period of time and voluntarily remain resident. Of course, it is also necessary to make the financial arrangements for the care of the resident, which may be done by the resident (if competent), an attorney-in-fact, or by anyone accepting the obligation and guaranteeing payment.

In 1999, the Georgia Legislature passed the "Temporary Health Care Placement Decision Maker for an Adult Act." Under the Act, upon certification by an attending physician that an adult in a hospital, institution, medical center, or other health care institution is incapable of giving consent to a discharge from such facility and a transfer or admission to an alternative facility or placement (including nursing facilities, personal care homes, rehabilitation facilities and home or community based programs) is considered to be in the adult's best interest, authority to grant such limited consent is given to a list of persons similar to that in the Georgia Medical Consent Law. If no one authorized by such law is available or if all who are available waive the authority to consent or dissent, a petition may be filed in the probate court seeking an order solely authorizing such discharge, transfer or admission. The order will be limited in time to those purposes and does NOT result in the appointment of a guardian.

GUARDIANSHIP PROCEEDINGS

Of course, there are times when legal guardianship or conservatorship is needed and necessary. A Guardian is granted authority over the person of another, and a Conservator is granted authority over the property (including money) of another. The law provides appropriate protections for the adult, and guardians and conservators are monitored by and must file written, periodic reports on the condition of the ward and the ward's property with the probate court by which appointed. The proceedings should probably be pursued as a "last resort" but certainly should be pursued when appropriate.

NOTE: This pamphlet is provided as a public service for information only. It is NOT intended as a complete statement of the law applicable to every circumstance. If you have any questions about the alternatives discussed herein and their appropriateness to a particular situation or circumstance or if you need assistance in determining whether formal guardianship or conservatorship is necessary, please consult an attorney.

WILLIAM J, SELF, II, Judge of the Probate Court of Bibb County, Georgia since April, 1989, holds a B.B.A. ('71) and a J.D. ('74) from the University of Georgia. He is active in the American, Georgia and Macon Bar Associations, is a member of the National College of Probate Judges and the National Conference of Specialized Court Judges, and a frequent lecturer and teacher at continuing education seminars for probate judges, probate court clerks, attorneys, paralegal professionals and legal secretaries and at in-service training sessions for adult protective.