Alternatives to Guardianship -- for Aging Magazine

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One of the most troubling concerns of older persons is the spector of disability and the resultant need for others to take over the management of their personal and/or financial affairs. Too few of us plan for this contingency. Some don't even want to think about it. The result is guardianship -- the most restrictive and instrusive form of intervention that can be imposed upon an aged individual. Unfortunately, it is also the most common intervention in such situations.

The term "guardianship" refers to the appointment by a court of a third party (the guardian) to assume decisionmaking and handle the affairs of an individual (the ward) whom the court has found to be "incompetent" or "incapacitated." Terminology varies, but there are essentially two forms of guardianship: (1) guardianship of the person, which gives another the power to determine where the ward will live, what treatment (s)he may receive, and other lifestyle matters; and (2) guardianship of the estate which gives another power to manage property, invest it, pay bills, etc.

While there are some differences among the states guardianship generally represents a drastic loss of the ward's fundamental civil rights. Depending upon the state, this may include loss of the right to contract (including entering into a marriage contract); to sue and be sued; to hold licenses (such as drivers license); to decide where to live; and in some jurisdictions, the right to vote. Overall the most important and basic right lost is the right to self-determination -- to make choices about one's life and determine where one's own interests lie.

In addition to the loss of rights accompanying guardianship, there are inadequacies in states' systems for determining legal incompetence; the process is cumbersome and expensive; and there is mounting evidence that some individuals

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under guardianship are being poorly served, and even victimized and exploited by those appointed to protect them.

Given the drastic nature and consequences of guardianship, it is important to explore use of less intrusive alternatives which may help preserve older persons' autonomy. Thus, this article will outline various tools for personal and property management both planned and unplanned -- with the objective of encouraging planning in advance whenever possible so that surrogate decisions will be made according to the person's own directives if (s)he later becomes incapacitated.

A caveat is also in order, however. The legal alternatives are fairly recent developments; and they have yet to be refined. While the potential benefits are substantial, there are also potential dangers inherent in their use. The major limitation with most of the alternatives is that courts have no oversight responsibility. They are based on trust, and are dependent solely on the honesty and integrity of the surrogate decisionmaker. An example may help to frame the costs and benefits of each decisionmaking tool:

> *Sylvia Smith, age 90, is a retired professor who lives alone in a suburban apartment. She prides herself on her independence, but is physically frail. She relies on her younger friends, Emil and Stephanie, to take her to the doctor, podiatrist, hairdresser, to church, to concerts, and to get her groceries -- including the chocolate ice cream she loves. She lives on Social Security and a modest pension. Her dining room table is covered with bills, insurance papers and tax forms. Over bowls of ice cream, she spends hours going through them and usually manages to sort things out. Her nephew Tom lives 60 miles away and comes every so often to help with her finances, but has never been close. While returning from a concert, Sylvia suffers a stroke, falls, and is injured. In the ensuing*

hospital examination, a malignant tumor is discovered, and doctors want to begin treatment immediately. But the stroke and the sudden trauma have left Sylvia completely disoriented and unable to communicate.

UNPLANNED ALTERNATIVES

Sylvia, like most Americans, has not planned for the likelihood of disability. While many of us plan for the transfer of property upon death, we do not address the possibility of functional impairment before death. We tend to believe that crises will only happen to other people or that someone will be there to take care of us. Or we are concerned about the possibility of someone else managing our affairs, but, like Scarlett O'Hara, we "will think about it tomorrow."

When attorneys speaking at senior centers ask how many in the audience have executed a durable power of attorney, typically very few hands go up. And the same is true when they speak to fellow attorneys. A 1982 survey by Louis Harris and Associates found that, regarding health care, only about one-third of the population had given instructions to someone concerning how they would like to be treated in the event they are unable to make their own decisions -- and of that group, only about one-fourth (or one-twelfth of the population) had put their instructions in writing. Thus most people, like Sylvia, are at risk of guardianship, with its attendant loss of fundamental rights. There are, however, a number of legal and social service options that are less intrusive and cumbersome, and that should be thoroughly examined before going to court. Advocates should encourage their use; and judges should consider their appropriateness prior to signing any guardianship order.

Representative Payee. After Sylvia's calamitous stroke and fall, someone is needed to manage her finances, at least on a temporary basis. One possibility is for either her nephew or her friends to apply to the Social Security Administration to become her "representative payee."

Under federal law, the Social Security Administration (as well as the Veteran's Administration, Department of Defense, Railroad Retirement Board and Office of Personnel Management) may appoint a substitute person to receive federal benefits on a recipient's behalf. The procedure for establishing a representative payeeship is informal. There must be evidence that the beneficiary is unable to handle the funds herself, and that appointment of a substitute payee will be in her best interest.

Once appointed, Sylvia's representative payee would receive her Social Security check and have the authority and duty to manage those funds for her benefit, giving primary consideration to basic living expenses including food, shelter, clothing and personal needs. The payee's authority would not extend to any other income or assets -- an advantage in that Sylvia's capacity may return and she will be in full control of her pension and her few other resources; but a disadvantage over time as her uncashed pension checks accumulate.

This payee arrangement is much simpler than petitioning for guardianship. Moreover, it does not label Sylvia as incapacitated, and leaves her rights intact with the exception of the right to receive and manage her Social Security income. It is quick and inexpensive.

A crucial question in establishing a representative payeeship is who would a better payee -- nephew Tom or friends Emil and Stephanie? A payee need not be a relative. In selection, the Social Security Administration weighs a range of factors including relationship with the beneficiary, concern for her welfare, custody, and capability of the proposed payee to handle the duties. Tom perhaps has more experience with Sylvia's finances, but her friends may have her interests more at heart. Whoever is appointed must make annual reports to Social Security, but the Administration does not closely monitor the payee's practices. Thus if Tom turns out to be an untrustworthy payee, Sylvia may be at peril of financial abuse.

Health Care Consent Laws. Sitting in the hospital with Sylvia, Tom realizes she is unable to make or communicate decisions about her medical treatment, and wonders whether, without a durable power of attorney or living will, he will have to seek a guardianship. The answer depends on state law, and on the practice of the hospital. Traditionally, hospitals have relied upon family members to make decisions for disabled adults like Sylvia; and where no dispute existed, the system worked well and respected family values. But with increasing concern over liability, almost half the states have enacted statutes providing clear legal authority for family members to make such decisions -- although some are limited authorizations requiring that the patient be terminally ill. In a few additional states, courts have validated the right of family members to decide.

The legislative challenge in drafting these laws has been to make the procedure simple and timely, yet protective of patients' rights. A threshold question is: how will Sylvia's capacity be determined? Many statutes include a definition of incapacity and require written certification in the patient's medical record -- sometimes by two physicians. Some advocates object that leaving this determination in the hands of medical personnel provides insufficient safeguards.

A second question is: who should be able to give or withhold consent to treatment? Tom? Sylvia's friends? What if they disagree? Several state statutes contain a priority list of decisionmakers -- including for example any court-appointed guardian, spouse, adult child, parent, sibling and nearest living relative. A few extend to friends or other persons. Thus, Tom would probably have priority to make the treatment decision, but if Sylvia's friends disagree, then resort to guardianship might be necessary.

Court Authorization. There is yet another option short of guardianship if dispute over Sylvia's treatment arises. The disagreeing parties could petition the court solely for authorization for treatment. This type of single court determination is often

overooked as an alternative, yet the general equity jurisdiction of the court may be considered broad enough to encompass it. If Sylvia's capacity returns, all her rights will remain.

Limited Guardianship. Failing other options, guardianship would be a last resort for Sylvia. But even then, she need not give up all her rights. Either Tom or her friends could petition for a limited guardianship, transferring only those duties and powers she is incapable of exercising. The order could be drawn as narrowly as possible, and closely tailored to her needs. For instance, it could be for a limited period, and it could be solely for the purpose of making treatment decisions at hand. If the prognosis is that Sylvia's mental capacity may soon return, it could specifically exclude decisions about placement in a nursing home and control of assets.

The concept of limited guardianship is much discussed but little practiced. Over 40 state statutes now provide for it specifically; and in the other states, judges can use their inherent equity powers to restrict their orders. But studies have found the limited approach rarely used:

> Practitioners and courts feel comfortable with what they know. Lacking an appreciation of the advantages to the ward of limited guardianship, they tend to automatically request the appointment of a plenary [full] guardian . . . a plenary guardian eliminates the effort of tailoring the powers . . . to fit the particular needs . . . In short, plenary guardianship is familiar, uncomplicated, and saves time and effort. (Larry Frolik, Arizona Law Review 1981)

Thus, we must seek to reshape the perspectives of the court and the bar, so that limited guardianship is a real, rather than academic, alternative.

Supportive/Protective Services. Legal intervention for Sylvia might be limited if there are sufficient voluntary social and financial services to help her through the crisis situation. She could, for example, benefit from a money management

program such as Support Services for Elders in San Francisco, which takes care of bill paying, insurance, tax forms, handles limited investments and serves as case manager. Other key services might include homemaker/home health aides, transportation, shopping, friendly visiting, information and referral, and respite care.

"Guardianship diversion" projects providing these services are proliferating throughout the country. The American Bar Association has identified over 100. Though they have a diversity of public and private funding sources, such projects would be exceptionally well-suited to Title III funding under the Older Americans Act, in that they target those "in greatest social. . . need," and in jeopardy of loss of basic human rights. In addition to providing supportive services, some guardianship diversion projects serve as attorney-in-fact under durable powers of attorney or as representative payee.

PLANNED ALTERNATIVES

If Sylvia had done some planning in advance of her stroke and fall, a number of additional alternatives could be in place that would alleviate the need to petition for guardianship.

Durable Powers of Attorney. One such alternative is a durable power of attorney. A power of attorney is a written document signed by a competent person (the "principal") giving another (the "agent" or "attorney-in-fact," though not necessarily an attorney) authority to handle some or all of the principal's affairs. The principal determines whether the power will be limited (e.g. to sell a piece of property) or very broad, giving the agent general decisionmaking powers over financial and personal affairs. An ordinary power of attorney terminates when the principal is no longer mentally capable. All states now provide, however, for a durable power of attorney which continues to operate even after incapacity. A durable power must clearly state

the principal's intention to have the power continue after incapacity; and to be valid, it must be executed while the principal is mentally competent.

Had Sylvia executed a durable power, she could have directed how her affairs would be handled and by whom. She could have specified either her nephew or her friends as her agents. She could have given the agent power over her Social Security and pension payments; instructed them to pay her bills, and so forth. She could also have had a "springing power" drafted, which specified that the agent's powers would begin only at the onset of her incapacity. This would have allowed her to retain complete control over all of her affairs unless and until incapacity occurred. If she had chosen a "springing power," however, the "trigger" clause would have to be drafted extremely carefully so control was not taken away from her too soon or too late. Whether the durable power is "springing" or not, the criteria for determining incapacity and the persons to make the determination must be clearly and carefully specified in the document. For all of these reasons, it would be wise for Sylvia to have a lawyer draw up a power of attorney, though this is not required.

Major advantages of a durable power of attorney can be summarized as follows:

- It is probably the simplest and least expensive way to avoid future need for guardianship or conservatorship.
- It offers the individual greatest flexibility and control over future decisions made in her behalf.
- The principal can choose the decisionmaker (agent) ahead of time, rather than have the court appoint a person, and can limit or broaden the scope of the agent's decisionmaking powers.
- The fact that the agent has a fiduciary duty to the principal limits the likelihood that (s)he will use resources for his/her own purposes. Also, because of the document's flexibility, it is possible to include provisions requiring accountings by the agent, bonding, and insurance
- As long as the principal is competent, she can change or revoke the power and can overrule any of the agent's decisions. (However, if a transaction has

already occurred, e.g. a stock certificate was sold, the principal cannot "undo" the transaction.)

There are also disadvantages to durable powers, including:

- Questions sometimes arise about the capacity of the principal. Thus it is important for the lawyer drawing it up to clearly document capacity at the time of signing, especially where the person may be lucid sometimes, but not others (as sometimes happens in early Alzheimer's Disease).

- Some banks will not recognize a power of attorney unless it is set out on their own forms. It is important to use the bank's form as well as the form of the lawyer, if the power is to include transaction of banking business.

- It is open to possible abuse by the agent. Although the agent owes the principal a fiduciary duty, that duty will not be put at issue unless questions are raised by the principal or a third party. And if the principal is incapacitated and in the care of the agent, there is always a danger that the agent may abuse the powers granted.

Durable Powers of Attorney for Health Care Decisionmaking. Some states now have laws which specifically allow durable powers of attorney to be set up for making health care decisions. Even in states where medical powers of attorney are not recognized through a special statute, powers for medical decisionmaking can be included as a provision of a regular durable power of attorney. Had Sylvia set up such a medical power of attorney, she could have specified who she wanted to make her health care decisions and could have provided written guidance on how she wanted those decisions made. To assure that her desires were honored, it would also be wise for her to talk to her nephew, other family members, friends, and physicians who might be part of the decisionmaking process.

As in a regular durable power, powers may be limited or broad according to expressed wishes of the principal. Like a living will (discussed below) a medical power may contain instructions regarding how the principal wishes to be treated when terminally ill, i.e. whether life-sustaining procedures should be used. The advantages and disadvantages of durable medical powers are similar to those of regular durable powers. Also, if the agent under a medical power is the agent under a general durable

power, both property and personal decisions necessitated by the principal's medical condition can be handled in a unified fashion. One added disadvantage is that, because of fear of liability, physicians may be reluctant to honor decisions made by an agent pursuant to a medical power of attorney, especially in jurisdictions which have not yet authorized medical powers of attorney.

Living Wills. Another way Sylvia could have given some advance instructions regarding health care would have been to execute a "living will." A living will refers to written instructions concerning medical treatment in the event of terminal illness or irreversible condition. A living will often specifies that no extraordinary or heroic measures are to be used to prolong the act of dying.

Forty states plus the District of Columbia now have laws authorizing such a document. These laws generally provide that failure to follow a living will's directives constitutes unprofessional conduct on the part of a health care provider, and a physician who feels (s)he cannot comply with a living will, must find another who can. They also generally protect health care providers against liability due to withholding or removing life-sustaining treatment if so instructed in a living will. Many states provide a model form, but only California, Georgia, Idaho and Oregon require that it be strictly followed. The document must be in writing, signed by the individual and witnessed by two adults, with some states restricting who can be a witness. In several states it is binding only if signed after a diagnosis of terminal illness.

In states without living will laws, it is still advisable to draw one up, as doctors often look to familly members when a patient is incapable of making decisions. Their decisions are usually not questioned unless they refuse to authorize or ask that treatment be discontinued. If a health care provider goes to court, the court will rely heavily on wishes of the patient while competent, particularly if explicitly expressed in a written document.

In drawing up a living will it is always a good idea to discuss it with those who will be part of the decisionmaking process -- spouse, children, physician. If they understand, they are less likely to stand in the way of having wishes carried out. Also, hospital policies should be examined to determine if they are likely to comply with the living will.

After creating a living will, the individual must notify his/her physician and ask that it be included in the medical records. Some states require that it be revised or updated on a regular basis. In states without laws, updating is very important as the document is more likely to be honored if it clearly reflects the current desires of the individual. A living will can always be revoked, either by an oral declaration or by physical destruction of the written document. If copies have been made and distributed, they must also be destroyed.

The primary advantage of a living will is that it provides a measure of control which would otherwise not exist. The ability to retain this control relieves possible anxieties people may feel about the prospect of being overridden when old and sick. In addition, a living will relieves doctors, relatives and courts of the burden of making very difficult and often time-consuming and costly decisions.

The most serious disadvantage of a living will is that it is very limited. It generally may only be employed when the patient has a terminal (or sometimes irreversible) condition. Thus, a living will would not be immediately useful for Sylvia at all, since there is no indication her condition is terminal or irreversible. Given this limitation, and because the medical power of attorney can cover more routine decisions, it is advisable to have a living will and a medical power.

A second problem arises in interpreting and defining terms -- e.g., "no reasonable expectation of recovery," "artificial means," "heroic means" and "life-sustaining procedures." Almost half the states with laws exclude fluids and nourishment from the "life-sustaining procedures" that may be withheld.

Joint Property Arrangements and Joint Bank Accounts. Sylvia might have planned for some of her money and property management by setting up a joint bank account or perhaps joint ownership of her personal property with either her friends or her nephew.

There are several types of joint bank accounts. There is a joint account with right of survivorship, which means that upon the death of one joint owner, the other(s) automatically receive the funds. (Some states do not allow such automatic rights of survivorship.) Other joint accounts allow either owner (signer) to deposit or withdraw without limitation. Still others require the signature of all joint owners for any withdrawal; and some restrict the ability of one or the other parties to withdraw funds. Law and local bank practices determine which options are available. Most, however, allow either party to withdraw or add funds with no questions asked and without conferring with the other owner(s). Joint accounts are particularly useful for persons who retain their mental faculties but are physically unable to get to the bank. The individual can supervise transactions to insure that they are proper. When circumstances are right, the joint account is also useful for those mentally unable to handle their finances. But if the joint owner is untrustworthy or the original owner is improvident, the joint account is not a good idea.

Joint property arrangements are also common, e.g. joint ownership of a house or other real estate. Normally all that is required to transfer real estate into joint ownership is executing and recording a new deed with the county Register of Deeds. State laws differ as to conditions, consequences and the right of survivorship in joint property arrangements. Caution must be exercised in establishing joint ownership, as the individual risks loss of control over his/her property, and disputes over its management may arise. Joint ownership can give rise to unexpected and undesirable tax consequences. For example, an older person may lose property tax exemptions for property held jointly with a younger individual. Joint ownership might also have

drawbacks for Medicaid eligibility. Thus it is important to have a lawyer check to be sure that joint ownership will provide the desired results and benefits.

Trusts. Given Sylvia's limited income and assets, it is unlikely that she would have benefitted by setting up a trust. For persons of more substantial means, however, a trust can be a good way to plan for incapacity. A trust is an arrangement whereby property is transferred by one person (the grantor or settlor) for the benefit of himself or another. It is administered by a third party (the trustee) subject to whatever stipulations and limitations the grantor specifies in the trust instrument.

There are two kinds of trusts. One is testamentary (created within a will), and does not take effect until the grantor's death. The other is an *inter vivos* trust which becomes operative during the grantor's lifetime, and can be revocable (can be changed or cancelled by the grantor) or irrevocable (permanent and unchangeable). Revocable *inter vivos* trusts can be set up so they go into effect only if the grantor becomes incapacitated, and so the grantor maintains a large degree of control over the property in the trust until such a time. If the grantor does become incapacitated, the trustee can take over and use the trust funds to be sure the grantor is well cared for and that his/her finances and property are handled properly. The trust document should contain fairly explicit guidelines for the trustee's conduct during the period of incapacity, for the type of care to be provided for the grantor, and for disposal of the grantor's assets should incapacity be extended or permanent.

It is important that the trust document contain a provision that upon the incapacity of the grantor, the trust becomes irrevocable. Without such a provision, a subsequently appointed guardian of the estate could undo the entire plan. Such a trust document also requires the inclusion of a very clear and thoughtful definition of incapacity in order to avoid the need for a judicial determination, and to avoid premature assumption of power by the trustee. This definition of incapacity should not depend upon the decision of the trustee.

Major advantages of trusts include the following:

- Assets can be professionally managed, regardless of whether the grantor becomes ill, dies, or finds the problems of management too complex.
- Trusts can avoid the need for courts to be involved in determining incapacity.
- If a trust is revocable, it allows the grantor control as long as possible, while allowing smooth management when (s)he is no longer able.
- For the upper income person, there can be tax advantages to a trust.

The disadvantages of trusts include:

- The primary disadvantage is the cost. Stocks, real estate, etc. may entail a great deal of paperwork to be put into trust. Trust accounts have to be filed, and if there is a professional trustee (e.g. a bank), there will be fees.
- Most banks/financial institutions are reluctant to accept responsibility as professional trustee where the assets involved have a value of less than $50,000 to $100,000. A trust may thus not be feasible unless the grantor has friends or relatives willing to assume responsibility as trustee for little or no cost.
- Trusts require some expertise with estate and tax planning. There may be tax disadvantages if a large trust is not set up carefully.

CONCLUSION

A parallel can be drawn between guardianship and intestacy (distribution of property after death without a will): both result from failure to plan, and both involve massive intervention in individual affairs. But with guardianship, more than property is at stake: the fabric of later life, its potential creativity, and personal autonomy at its close hang in the balance. Advocates therefore must encourage the use of tools to plan ahead and restrictions on unnecessary intrusion. And legal tools will be of greatest use if accompanied by a solid array of support services. With persistence and imagination, we can scale back the inappropriate use of guardianship for older persons.