ALTERNATIVES TO FULL GUARDIANSHIP FOR ADULTS

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There are a number of ways through which a person gains the legal right to make decisions for another individual. In some instances an individual voluntarily gives another person the right to make decisions; other times a court takes the right away. Some alternatives focus on decisions about health care, others about financial matters.

State law requires the court give each individual who intends to file a petition for guardianship information on alternatives to appointment of a full guardian. It is important to learn the differences among these procedures, and to know when each is appropriate. An alternative might be less stressful and time consuming, or more respectful of the individual's independence and dignity.

Please read the pamphlet carefully before deciding to file a petition and paying the filing fee of $150.00 or more. If you have questions, you may wish to seek the advice of a lawyer familiar with this area of the law.

WHAT IS GUARDIANSHIP?

Guardianship is a court procedure through which a person or organization is given the responsibility to make decisions about the care of another individual.

WHAT POWERS CAN A COURT GRANT A GUARDIAN?

The Court can grant a guardian power to make health care decisions, to determine the appropriate residence of the individual, to arrange for services, to receive money belonging to the individual and to use it for the individual's care. A guardian does not have total control over an individual; the individual ordinarily retains rights to communicate, to associate with friends and relatives, and to practice his or her religion.

HOW DOES A GUARDIAN DIFFER FROM A CONSERVATOR?

A conservator is appointed by the court to handle investments and other assets of an individual who cannot effectively manage them. Unlike a guardian, a conservator does not have the right to make medical decisions or determine where the individual lives. An individual can have both a guardian and a conservator, the same or different persons.

WHAT ARE REQUIREMENTS FOR A COURT TO APPOINT A GUARDIAN?

The judge must make two findings. First, the individual must be unable to make informed decisions independently, which may be due to a stroke, dementia, a closed head injury or other condition. Second, and equally important, guardianship must be necessary to provide continuing care and supervision of the individual. Guardianship is not a planning tool. If an individual can make informed decisions now, guardianship is not appropriate now.

WHAT IS AN INFORMED DECISION?

An individual can make an informed decision if he or she is aware of choices he or she faces, understands risks and benefits of each option, and is able to communicate his or her wishes. An informed decision is not necessarily one which family or physician believe is the best choice.

WHEN MIGHT GUARDIANSHIP BE UNNECESSARY?

When the individual has signed a patient advocate designation. State law provides a court cannot grant a guardian any powers held by a patient advocate, unless the patient advocate is not fulfilling his or her duties. A patient advocate designation, also known as a durable power of attorney for health care or a health care proxy, is discussed further herein.

When an individual is enrolled in Medicaid. State law provides the individual's nearest relative may consent to medical treatment when an individual who is enrolled in Medicaid is not in a condition to make decisions for him or herself. Many hospitals have a similar policy for all patients.

When the petitioner is seeking a power a guardian cannot have. An example is when the petitioner is seeking to arrange for inpatient mental health treatment if the individual objects.

When there is no need for legal authority to make decisions. There are no decisions pending, or the petitioner is already making decisions informally and no one objects.

When a petitioner does not recognize practical limits in exercising a guardian's powers. Even if the guardian makes the appointment, an individual may still not willingly go to the doctor.

WHEN MIGHT CONSERVATORSHIP BE UNNECESSARY?

When the individual does not own a home and other assets are of quite modest value.

When the individual has a representative payee appointed by the Social Security Administration or a custodian by the Veterans Administration.

When there already exists a plan for incapacity through a durable power of attorney for finances, a living trust, or joint bank accounts.

When services such as money management or automatic bill paying are available.

When a protective order through the court can rearrange assets.

WHAT IS A LIMITED GUARDIAN?

The law quires a court grant a guardian only those powers and only for that period of time necessary to provide for the specific needs of that individual. A guardian granted less than full powers is a limited guardian. Only if the court finds an individual is totally without capacity to care for himself or herself can the court appoint a full guardian.

WHAT ARE THE DUTIES OF A GUARDIAN AND A CONSERVATOR?

Duties of a guardian include arranging for the individual's care and comfort, protecting his or her possessions, and securing services to help the individual return to self-care. It is a position of great responsibility. Detailed information on duties owed the court and the individual is available in *Handbook for Guardians of Adults* and *Handbook for Conservators of Adults*. These publications are available for free on the internet at www.michbar.org/elderlaw.

WHAT IS A PATIENT ADVOCATE DESIGNATION?

A patient advocate designation is a voluntary, private agreement by which an individual of sound mind chooses another individual to make care, custody, and medical treatment decisions for the individual making the designation. The document must be signed and witnessed to be legally binding. The individual can revoke the agreement at any time. The document is not filed with the court; the court is not involved unless a dispute arises.

CAN AN INDIVIDUAL INCLUDE A STATEMENT OF WISHES ABOUT MEDICAL TREATMENT IN THE DOCUMENT?

Yes.

DOES A PATIENT ADVOCATE HAVE THE SAME POWERS OF A GUARDIAN?

An individual may give a patient advocate at the least the powers over care, custody and medical decisions a full guardian has.

WHEN CAN A PATIENT ADVOCATE MAKE DECISIONS FOR THE INDIVIDUAL?

Before a patient advocate can act, two events must occur. The patient advocate must have signed an "acceptance". Then two doctors, or one doctor and one psychologist, must examine the individual and determine he or she is unable to participate in treatment decisions. An individual whose religious beliefs preclude an examination can set forth in the document a different means to determine inability to participate.

WHAT IS DO-NOT-RESUSCITATE DECLARATION?

An individual of sound mind may voluntarily sign a form if he or she does not wish to be resuscitated should his or her heart and breathing stop. The declaration is legally binding out a hospital or nursing home setting; it can be particularly useful for an individual who wishes to die peacefully at home. If an ambulance arrives at the home, and the medics are made aware of the document, they will check for signs of breathing and pulse. If there are no signs, no efforts will be made to resuscitate. An individual has an option to wear a bracelet as notice to the medics. A do-not-resuscitate order, or no-code, is different; it applies in a hospital or nursing home. A do-not-resuscitate order is a notation in an individual's medical record that resuscitation efforts are not to be undertaken in the hospital or nursing home.

ARE THERE STANDARD FORMS?

There are no standard forms for a patient advocate designation, except for the acceptance signed by the patient advocate. There are two standard forms for a do-not-resuscitate declaration. One form is to be co-signed by the physician. A second form is for use by those who rely for healing upon spiritual means through prayer alone.

Once completed, copies of the document should be shared with one's doctor and family. The document is not filed in court.

WHAT IS A DURABLE POWER OF ATTORNEY FOR FINANCES?

A durable power of attorney for finances is a voluntary, private agreement by which a competent individual gives another person (known as an agent) power to handle financial matters for the individual. The agreement should be signed, witnessed by at least two individuals, and notarized.

ARE ALL DURABLE POWERS OF ATTORNEY FOR FINANCES THE SAME?

No. An individual may choose to give an agent power over some but not all assets. The individual may direct the agent how to handle the property. One can choose to give an agent immediate power, or power to act only upon one's disability. Finally, some banks have their own forms.

IS THE DOCUMENT FILED WITH THE COURT?

No. There is no court oversight unless there is a dispute and the issue is brought before the court.

It is critical the individual choose someone whom he or she trusts, who will not be tempted to misuse the money, who can handle the task, and who is willing to serve. An individual can require in the document that the agent send quarterly or annual accounts to the individual and to another trusted person.

WHERE CAN I GET MORE INFORMATION ABOUT THESE TYPES OF LEGAL DOCUMENTS?

A number of organizations and state legislators provide free information and fill-in-the-blanks forms for some of these documents. Or at the internet side www.michbar.org/elderlaw click on *Advance Directives* for health care documents, or on *Durable Power of Attorney for Finances*. There is also information at the site on using mediation to settle disputes among relatives, and on using living trusts to plan for disability.

ARE THERE OTHER INTERNET SITES TO GET INFORMATION?

Yes. You can get the full text of Michigan laws by visiting www.michiganlegislature.org/law/isearch.asp. The patient advocacy law begins at MCL 700.5506; the do-not-resuscitate procedures act at MCL 333.1051. You can get information on representative payees by visiting the Social Security Administrations' site, www.ssa.gov/payee.