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GUARDIANSHIP

A Guardian is a person or institution appointed by the Court to manage the personal or financial affairs of an incompetent person. Guardianship begins with a court petition alleging that the proposed ward is not capable of handling his or her own affairs. It is generally accompanied by a doctor's report.

After the petition is filed, the Probate Court sends an investigator to interview the proposed ward and advise him or her of his or her legal rights. The ward's many protective rights include the right to a lawyer.

The court then schedules a public hearing to consider the doctor's report, the investigator's report and evidence brought by any interested person. If the Probate Court determines that the ward is incompetent, it must appoint a state resident as Guardian and set the terms of the guardianship.

The many types of guardianships fall into two basic categories: Guardianships of the Person and Guardianships of the Estate.

The many types of guardianships fall into two basic categories: Guardianships of the Person and Guardianships of the Estate. Guardians of the Person manage personal matters such as medical treatment and living arrangements. Guardians of the Estate manage financial matters. The Guardian of the Person and the Guardian of the Estate may be the same person.

The Guardian must take an oath in Probate Court. Guardians of the Estate must post a protective bond and must file an inventory within three months. A full accounting of income and expenses must be filed every two years. With each accounting, the Guardian of the Estate must prove that he or she is in actual possession of the remaining assets. Guardians can only make expenditures of the ward's funds with the prior approval of the Court.

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SPECIAL TYPES OF GUARDIANSHIP

Generally, Ohio Court appointed Guardians are given a moderate range of authority to act on behalf of the Ward. However, Probate Judges may limit the powers of a Guardian, called a Limited Guardianship. A Limited Guardianship may be appropriate to obtain consent for a specific medical procedure or to manage a specific asset or problem. Ohio law also provides for an Emergency Guardian who can be temporarily appointed where it is reasonably certain that there will be immediate injury to the person or estate of the incompetent. The appointment of an emergency Guardian is a confidential proceeding but the accountings are part of the public record.

Ohio law now permits a "voluntary guardianship, called a Conservatorship.

In addition, Ohio law now permits a "voluntary" guardianship, called a Conservatorship. This device permits a mentally competent, but physically infirm adult to establish a court appointed Conservator whose powers and duties are much like those of a Guardian. The Conservatorship will terminate at the ward's request.

While effective and safe, all Guardianships are cumbersome and expensive. Significant costs are incurred through legal and Guardian's fees, court costs, and bond premiums. Also, the Court will often not approve the transfer of assets which would be advantageous from a Medicaid or estate planning perspective because it would have the effect of depleting the ward's estate. Therefore, Guardianships are often used when a less intrusive alternative is not available.

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Power of Attorney for Healthcare

Ohio, Kentucky and Indiana permit individuals to execute Durable Powers of Attorney for Health Care to designate a person to make health care decisions for them if they are unable to speak for themselves. A person signing the Power of Attorney must be competent. The decision maker may not be the attending physician or the administrator of any health care institution involved in the patient's care. This type of Power of Attorney must also contain a durability clause.

Generally, the decision maker will have the authority to give informed consent, refuse to give informed consent, and to withdraw consent for any medical treatment. However, the person holding the Power of Attorney will NOT be able to refuse or withdraw consent to health care needed to maintain life, except in very limited circumstances. For example, the Attorney-in-Fact would NOT be able to discontinue care for a patient who is expected to recover after heart surgery. Also, the attorney-in-fact may not refuse or withdraw food or water, unless two doctors agree that the patient is terminally ill.

A person signing a Power of Attorney must be legally competent.

In the case of a permanently unconscious patient who is not terminally ill, food and water may never be withheld unless special language is included in the Health Care Power of Attorney. HIPPA language is also an important component in these documents.

State approved forms can be found at www.proseniors.org in their Law Library.

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Living Wills

Living Wills contain instructions regarding medical treatment in the event of terminal illness or permanent unconsciousness. They must be signed in the presence of two witnesses OR a notary. The signer must be mentally competent.

Under no circumstance may an Ohioan be denied comfort care. Comfort care is defined as the minimum amount of care administered to alleviate pain and suffering but not to prolong life.

Perhaps equally important, Ohio law creates a list of persons who have the highest priority in making health care decisions in the absence of a Living Will. If there is no guardian, the decision may be made by a spouse. If there is no spouse, the majority of the adult children may decide. If there are no children, then the decision falls to the patient's parents. If there are no parents, the majority of adult siblings may direct the healthcare.

Under no circumstance may an Ohioan be denied comfort care.

When a patient with no Living Will becomes terminally ill or permanently unconscious, the wishes of the patient must be followed. If his or her wishes are not known, the decision must be consistent with the patient's wishes as inferred from his or her character and lifestyle. The decision maker may even elect to withhold or withdraw food and water under very specific circumstances.

State approved forms can be found at www.proseniors.org in their Law Library.

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Declaration for Mental Health Treatment

While the Ohio Durable Power of Attorney for Health Care ("DPOAHC") covers both mental and physical health issues, the standard DPOAHC does not address mental health issues in significant detail. For those with a mental illness, a Declaration for Mental Health Treatment may be an appropriate addition to the DPOAHC.

A Declaration for Mental Health Treatment gives mental health care providers direction regarding treatment in the event a patient cannot make his or her own decisions. The law also allows the declarant to name a person who can make mental health decisions for him/her, called a "proxy". A proxy is required to follow the instructions in the Declaration or to do what the declarant has told him/her to do. The proxy will be able to view all mental health medical records. The proxy must accept his/her appointment in writing by signing the Declaration and may withdraw from the appointment with written notice at any time. When selecting a proxy, choose someone who is well suited for this serious responsibility.

A Declaration for Mental Health Treatment is an addition to the DPOAHC

Anyone may draft his/her own Declaration for Mental Health Treatment. However, most people obtain a form from an attorney or download it from the internet at http://olrs.ohio.gov/other/MHDeclare.pdf.

The Declaration for Mental Health Treatment is good for three years, unless revoked.

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Durable Power of Attorney

The most common device used to privately manage the assets of a person is a Power of Attorney. A Power of Attorney must be signed while the signor is still competent.

There are many types of Powers of Attorney, but, in all cases, the person granting the Power retains the right to personally manage his or her own affairs. Whenever possible, he or she should also retain the right to revoke the Power of Attorney. The document must be carefully drawn to include all powers which may be needed. In order to be most effective, the Power of Attorney should contain a durability clause which is language that states the Power will survive the disability of the signor. In addition, it should be signed and notarized.

There are several advantages in using a Power of Attorney:

--they are inexpensive;

--they can grant complete legal authority to act on behalf of the Grantor;

--they are revocable (unless stated otherwise);

--there is no accounting to the Probate Court; and

--the Grantor retains ownership of and the ability to manage his or her own property.

The most common device used to privately manage the assets of a person is a Power of Attorney

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Trusts

A Trust is a legal document that creates a "fund" to manage assets. There are two basic types of Trusts: Living Trusts and Testamentary Trusts. There are dozens of variations of these two types of Trusts.

There are two basic types of Trusts: Living Trusts (Inter Vivos Trusts) and Testamentary Trusts

Assets held in a Trust are managed by a Trustee. A Trustee can be an individual or an institution such as a Bank or Trust Company. Assets held in a Trust are managed and distributed in the manner set forth in the document creating the Trust. In this sense, each Trust is different.

A Living Trust can be useful in several ways. If established while still competent, a person may transfer all of his or her property into a trust for his or her own benefit. Upon death, those assets can be distributed free of Probate administration. This saves families both time and money. Trusts can also be used to set up funds for the benefit of a minor or someone who needs assistance or is poor with money. Trusts can be used in conjunction with a Power of Attorney to avoid guardianship and its attendant publicity and costs. After, trusts are designed to accomplish two or more of these objectives in a single document.

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Long Term Care Insurance

Long term care insurance is only available to persons in relatively good health and therefore must be purchased before serious illness.

In late 2007, Ohio adopted a Long Term Care Partnership Program. This program significantly adds to the value of having long term care insurance. This new program increases the amount of money one can retain when applying for Medicaid. For example, if you exhaust $100,000 from your policy, you can keep $100,000 more in assets when you apply for Medicaid.

Long term care insurance must be purchased before serious illness.

When selecting a policy, keep these points in mind:

--The insurance company should be financially sound and reasonable to deal with.
--What is covered? For extra premium, you can buy valuable coverage for "in-home" care.
--How much is the daily benefit? When combined with your income, is it enough to cover most of the nursing home costs?
--How long does the coverage last? Three or four years is usually sufficient.
--Do the premiums increase dramatically as the policyholder ages?
--How long do you have to be in the nursing home before the policy begins to pay? Sixty to ninety days is common. However, a longer "waiting period" will reduce the annual premium.
--Avoid policies that require a prior hospital stay before paying out benefits.

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Veterans' Benefits for Nursing Home Residents

The V.A. provides two types of programs for veterans and their surviving spouses: V.A. Nursing Homes and payments to private nursing facilities, called payments in Aid and Attendance.

Generally, these benefits are available to Veterans and the spouses of Veterans who served during time of war, those who have service related disabilities and career Veterans.

Veterans who served during time of war and those who have service related disabilities can qualify.

The number of V.A. nursing home beds is EXTREMELY limited, and in some cases, the nursing facilities with available beds are not close to the veteran's home. The Aid and Attendance program is more flexible and provides cash payments which assist with care in a private nursing home. Eligibility for these programs should be reviewed with the V.A. in all cases where the Veteran or his spouse requires nursing home care. Eligibility for this program is subject to income and asset limitations. However, transferring assets in order to qualify is permitted.

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Medicaid

Medicaid will pay for long term care in a skilled or assisted care facility. In fact, Medicaid pays for most of the long term care in this country. To obtain Medicaid benefits in a nursing home, the nursing home placement must be medically justified and the individual must pass two tests: a resource test and an income test. To qualify for Medicaid, an individual must have no more $1,500.00 in "countable resources" which includes just about anything owned by or legally accessible to the Medicaid applicant. In addition, an applicant's income must be less than his/her monthly nursing home bill.

Medicaid pays for most of the long term care in this country.

Medicaid is funded jointly by federal and state governments. It is administered in Ohio by the County Departments of Job and Family Services and in Kentucky by the Cabinet for Health and Family Services. The eligibility rules and procedures are constantly being revised and when faced with long term care, obtain advice immediately from a qualified Medicaid planner.

For a FREE copy of Mark Reckman's Estate and Medicaid Handbook visit www.WoodLamping.com or call (513) 852-6000

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Treatment of Gifts By Medicaid

Any asset transferred within 60 months before filing a Medicaid application must be reported to the caseworker. The Dept. of Job and Family Services will presume that the asset was transferred for the purpose of qualifying for Medicaid. The applicant DOES have the right to try to prove that the transfer was for non-Medicaid reasons, but this is difficult. Assets transferred before

Certain transfers are permissible and will not be penalized:

--The transfer of a home to a spouse or minor dependent child.

--The transfer of real estate to a sibling with an equity interest who resided in the home for 1 year immediately preceding institutionalization.

--The transfer of a home to a child who resided in the home for 2 years immediately preceding institutionalization where the child provided care which kept the parent out of the nursing home. This exception requires supporting documentation.

Any asset transferred for less than full value within 60 months before a Medicaid application date must be reported to a caseworker.

--The transfer of any resource to or for the benefit of a spouse or a blind or disabled child.

--Cases of undue hardship.

All other transfers should be reviewed by a Medicaid attorney before applying for benefits.

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Probate Assets

Probate assets are 1.) assets owned exclusively by the person at his or her death and 2.) assets owned as "tenants in common" with another person. Probate assets are subject to Probate Court administration and are handled by a personal representative appointed by the Probate Court. The Probate estate is administered in the county of the decedent's last residence.

It is often wiser to avoid Probate all together. This can be done by using non-probate ownership.

When a person dies with a Will, the probate assets generally pass to the persons designated in his or her Will. HOWEVER, a surviving spouse has the right to take either the amount left under the Will or a statutory "forced" share of the Probate assets.

If a person dies without a Will, the probate assets pass to his or her heirs as determined by state law. Generally, this state law provides that intestate assets pass to a spouse and/or children, and their lineal decedents (i.e. grandchildren, etc). If there is no spouse or lineal decedent, then the assets pass to the decedent's parents or to the surviving parent. If the parents have predeceased the decedent, then the property passes to the brothers and sisters and their lineal decedents, regardless of whether the siblings are of whole or half blood.

It is better to execute a Will to direct the distribution of assets. However, it is often even wiser to avoid Probate all together. This can be done by using non-probate ownership.

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Probate Court Administration

At death, probate assets are subject to probate administration. The basic function of Probate administration is to:

--Appoint the Executor or Administrator;
--Inventory and value the Probate assets;
--Identify and pay the debts and taxes of the decedent, including Medicaid Estate Recovery;
--Use the assets of the estate to pay the costs of administration and all debts;
--Identify the decedent's heirs;
--Distribute the remaining balance of the estate to the heirs in the proper proportions; and
--File an accounting showing the payments and distributions.

In Ohio, there are two procedures for administering Probate assets. The first is an abbreviated procedure known as Relief from Administration. It is used for estates with total Probate assets of $35,000 or less (where the estate passes to a surviving spouse, this maximum has been raised to $100,000). This procedure is shorter and less expensive than a full administration.

It is often wiser to avoid Probate all together. This can be done by using non-probate ownership

The second procedure is a full administration. This procedure is used for estates in excess of $35,000. However, there are situations where a full administration may be appropriate for estates of less than $35,000.

A full administration involves the appointment of a fiduciary (usually called the Executor or Administrator). There are detailed timetables and legal requirements for each step of the administration procedure. A full administration will usually take six to ten months to complete. However, settling estate taxes and any disputed claims will add several months to this process.

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Non-probate Assets

Non-Probate assets pass directly to another person upon the death of the decedent. They are NOT governed by the Will or the state law governing descent. They are also not subject to the surviving spouse's statutory "forced" share or to Probate Court administration.

Non-Probate assets fall into several categories including:

--Assets held in a Living Trust.

--Joint and survivorship assets.

--Assets with a named beneficiary such as life insurance policies, annuities, I.R.A., KEOGH, 401(k), profit sharing and pension accounts.

--Savings accounts, checking accounts, certificates of deposit, brokerage accounts, securities or savings bonds in the name of the decedent which are designated "Payable on Death" (P.O.D.) to a named beneficiary. This takes a special signature card at the financial institution.

Non-Probate assets are NOT governed by the Will or the state law governing descent.

The use of Non-Probate assets is often recommended because they are easy and quick to transfer upon death. But you must BE CAREFUL because the careless use of Non-Probate assets can destroy a carefully constructed estate plan.

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Trusts to Avoid Probate

In recent years, there has been a growing interest in saving money by minimizing or avoiding probate. "Living Trusts" are the preferred vehicle and are endorsed by consumer advocates such as AARP and Consumer Reports.

A living trust is established during one's life. Assets transferred to a trust before death will avoid probate (assets not placed in the trust prior to death do not enjoy this benefit). The control and final disposition of the assets are spelled out in the trust document. Although these assets are usually still taxable, there is no executor's fee at death and the attorney fees for settling the estate are substantially lower. This can reduce the total administrative expenses by up to 50%.

In recent years, there has been a growing interest in saving money by minimizing or avoiding probate.

In addition to avoiding guardianship and probate, trusts are used to:

--education funds;
--money for grandchildren;
--Protect assets from a loved one with poor judgment;
--Reduce estate taxes;
--Supplement someone's income;
--charitable gifts;
--Protection from creditors;
--Maintain eligibility for Medicaid or other benefits.

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Joint Trusts

Over the last several years, the federal estate tax threshold has been increased. Fewer and fewer estates are subject to Federal Estate Taxes. However, "middle sized" estates (between $338,000 and $2,000,000) are still subject to Ohio Estate Taxes. Joint trusts have risen in popularity for these "middle sized" estates. Joint trusts are designed both to avoid probate and to maximize the State Death Tax Credit.

Joint trusts are designed both to avoid probate and to maximize the State Death Tax Credit.

In a Joint Trust, the amount that can pass free of Ohio Estate Tax (currently $338,000) is set aside in a separate fund for the benefit of the spouse and children. This "set aside" is not included in the taxable estate of the second spouse. This saves approximately $13,000 in Ohio Estate Taxes.

Assets placed in a joint trust prior to death will also avoid probate administration. The savings can exceed $10,000 in these "middle sized" estates. The savings are even higher in cases where people own real estate outside the state of Ohio.

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Estate Taxes

Unfortunately, state and federal estate taxes apply to both probate and non-probate assets. Both types of assets are included in the taxable estate.

In Ohio, taxes are calculated by first adding the assets owned at death to any assets transferred in contemplation of death (within 3 years prior to death). Next, the assets left to the spouse and the deceased's final expenses and charitable gifts are deducted. Then, the following table is applied:

Net Taxable Estate	Tax Rate
Over $338,333 but not over $500,000	$13,900 + 6% of excess over $338,333
Over $500,000	$23,600 + 7% of excess over $500,000

Federal estate taxes work similarly with three major exceptions. First, the federal tax credit (called the Unified Credit) is much larger and effectively permits the first $3,500,000 of taxable assets to pass tax free. Second, the tax rates are much higher, currently ranging from 45% to 48%. This means that larger estates can pay a very substantial federal estate tax.

State and Federal estate taxes apply to both probate and non-probate assets.

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Gifts to Save Estate and Income Taxes

During the last ten years, Congress has made it easier to pass money from one generation to the next. One of the simplest means of saving estate taxes is to give money away while you are still alive. Any individual can make gifts of up to $13,000 to as many donees as he or she chooses each year. A husband and wife can join together and give up to $26,000 to each donee. Therefore, a couple having two married children and four grandchildren could give away as much as $156,000 per year (more if in-laws are included) without incurring a gift tax and avoid Federal and state estate taxes on the money transferred. Gifts in excess of this annual "allowance," however, must be reported to the IRS and will reduce the estate tax (currently $3.5 million). Since Ohio does not have a gift tax, but does have an estate tax, lifetime gifts also save Ohio tax on the assets transferred from one generation to the next.

Any individual can make gifts of up to $13,000 each year.

One of the principal objections that parents and grandparents have to making substantial annual gifts is that they lose control over the funds. Through a trust, it is possible to make annual gifts yet maintain control over the use of the money. This can also protect the money from creditors and difficult spouses.

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Charitable Remainder Trusts

Charitable Remainder Trusts are irrevocable Living Trusts. The Grantor retains the right to receive income from the Trust for the rest of his or her life. At his or her death, the money remaining in the Trust goes to a specific charity. Because the Trust is irrevocable, the charitable donation is "locked in" when the assets are placed in the Trust. Therefore, the Grantor is immediately able to take a charitable deduction on his or her income tax return (based on a "present value" formula). These tax deductions can have very significant value.

Assets placed in a Charitable Remainder Trust can be sold without capital gains tax.

In addition, once an asset has been placed in the Trust, it may be sold and reinvested free of capital gains tax consequences. It is particularly effective to fund these Trusts with highly appreciated assets.

The real value of this device is best obtained if the tax savings from the charitable deductions are used to purchase a life insurance policy (owned by someone other than the parent). This replaces the money given to the charity. These types of Trusts are only used where there is an underlying charitable interest.

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Discretionary Trusts for the Disabled

Many families with a disabled family member face a challenge: if I leave money to my disabled family member, will it destroy their government benefits?

In Ohio, there are several trusts you can use to avoid destroying the government benefits of a disabled family member. They are called Special Needs Trusts. One type of Special Needs Trust is the Discretionary Trust. This trust has the greatest amount of freedom and flexibility of all Special Needs Trusts.

If I leave money to my disabled family member, will it destroy their governmental benefits?

A Discretionary Trust is a living trust. It must be set up by someone in the disabled person's family (not the disabled person). Money in the Discretionary Trust must come from someone other than the disabled person-like a parent or sibling. This makes it perfect for inheritance.

The key to a Discretionary Trust is that the trustee is given complete and unrestricted freedom about how to use the funds. As a result, it is crucial to appoint a trustee with good judgment, preferably someone who knows the disabled person.

Like most good estate planning, a discretionary trust must be set up in advance. If money is left directly to a disabled person, this type of Special Needs Trust is no longer available.

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Pooled Trusts

Many families with a disabled family member face a challenge: if I leave money to my disabled family member, will it destroy their government benefits?

There are several types of trusts that can be used to solve this problem. Collectively, they are called Special Needs Trusts. One type of Special Needs Trust is a Pooled Trust. Pooled Trusts are managed by a non-profit organization. The funds from several beneficiaries are "pooled" into a master trust and managed together. The trustee keeps track of each beneficiaries' share. The trustee then distributes the money to the beneficiary or for his/her benefit. Distributions may only be used for limited purposes.

If I leave money to my disabled family member, will it destroy their governmental benefits?

The money in Pooled Trusts is managed by professional money managers. Because the money is "pooled", the money managers can adopt a conservative and effective investment strategy.

Pooled Trusts are inexpensive. The set-up costs generally run less than $1,000. The management fees generally run less than 1%. As a result, pooled trusts are excellent for smaller contributions or in cases where there is not a reliable trustee. There are three Pooled Trusts currently operating in Ohio.

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Supplemental Services Trusts

Many families with a disabled family member face a challenge: if I leave money to my disabled family member, will it destroy their government benefits?

If I leave money to my disabled family member, will it destroy their governmental benefits?

There are several trusts that can be used to solve this problem. For Ohioans receiving benefits through Department of Mental Retardation and Developmental Disabilities ("MRDD-DD"), a Supplemental Services Trust is available. These are special trusts designed to supplement the essential services provided by the MRDD-DD. For a list of these services, go to www.WoodLamping.com and request a copy of the Estate and Medicaid Handbook.

A Supplemental Services Trust can be established in a will or as a living trust. A trust for supplemental services can only be funded with the maximum of $230,000.00 (in 2009).

For a FREE copy of Mark Reckman's Estate and Medicaid Handbook visit www.WoodLamping.com or call (513) 852-6000

“Legal Briefs” for Publication

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