

"In it For the Long Run" Alternatives to Guardianship

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Estate Planning for Everyone.

What We Will Cover

- What are Guardianships/Conservatorships
- What are the Alternatives
 - Powers of Attorney
 - Advance Health Care Directives and other medical decision-making options
 - Asset management options
 - Trusts
 - Private Sector Solutions
 - Law Reform

Note: This presentation contains GENERAL information only and NOT legal Advice. This presentation does NOT establish an attorney-client relationship

Guardianship/Conservatorship

- Guardianships and conservatorships have been around a LONG time.
- Court Proceedings to appoint someone to make personal decisions for an “incapacitated” adult (called a “Guardian”) or to make financial decisions for a person who is unable to manage finances (called a “Conservator”)
- Guardianship usually not necessary until age 18
 - Parents are “natural” guardians for their minor children
- Conservatorships only needed when a person needs assistance managing finances and business affairs

What does a Guardian do?

- HRS 560:5-314, 315 and 316.
- Guardian makes decisions concerning a ward's support, care, education, health, and welfare.
- Apply for and receive money payable to the ward
- Take custody of the ward and establish the ward's place of custodial dwelling
- Consent to medical or other care for the ward;
- Consent to the marriage or divorce of the ward; and
- If reasonable under all of the circumstances, delegate to the ward certain responsibilities for decisions affecting the ward's well being.

What can a Guardian NOT do

- Duties of a Conservator (e.g. borrow money; sell/convey property, substantial investments; loan money, etc.)
- Actions not consistent or in the best interest of the Ward
- Make medical decisions that are inconsistent with the Ward's individual instructions on healthcare directives, etc.
- Standard limitations of fiduciary – no lying, cheating, stealing, etc.
- NOTE: Guardian CANNOT commit Ward without a hearing.

Who needs a Guardian?

- Only an “incapacitated person” needs a guardian.
- Incapacity is not required for conservatorship
- Alternatives may be available

Incapacitated

- An “Incapacitated Person” is “an individual who, for reasons other than being a minor, is unable to receive and evaluate information or make or communicate decisions to such an extent that the individual lacks the ability to meet essential requirements for physical health, safety, or self-care, even with appropriate and reasonably available technological assistance.” HRS 560:5-102.

Who needs a conservator?

- Person who has money
- Person who is unable to manage that money

Why don't we like Guardianships/Conservatorships?

- These are really old tools derived from the ancient legal concept “*Parens patriae*”
- Replaces the rights of an individual by giving someone else the power of “substituted judgment”, or discretion to act in the individual’s “best interests”
- Time consuming, costly and daunting court procedures.
- It’s also difficult for the guardian/conservator
 - Accounting, reporting, duties/responsibilities

Free Britney!

- While guardianships may be helpful in many cases, there is always a potential for abuse, over-use, or other unintended consequences.
- These are “one-size-fits-all” proceedings. Same rules apply to each case.

Alternatives

- Powers of Attorney
- Advance Health Care Directives
- Trusts
- Note: The person signing these documents must be at least 18 years of age and have capacity to understand what he/she is signing

Powers of Attorney

- “New Law” as of 2014.
- “Principal” designates an “Agent” to act on behalf of the Principal
- Can be broad or limited
- Primarily for financial actions only

Powers of Attorney

- Benefits include:
 - Quick
 - Easy
 - Economical
 - Statutory forms exist
- Risks
 - Sometimes proceeding without advice can cause problems
 - Maybe be abused or miss used
 - May not be honored
 - May carry civil liability if inappropriately used

Advance Health Care Directive

- Around in Hawaii since about 1999.
- Old term was “living will”
- Multi-part document including
 - Power of attorney for health care decisions
 - Individual instructions
 - Other health-related matters

Important Note!

- Power of Attorney and Advance Health Care Directives do NOT limit an individual's ability to make decisions or act independently.
 - That's good because it honors a person's self-determination
 - BUT it comes with risk that the individual may need assistance, not seek assistance, and act in a way that results in unintended consequences

Health Care Decisions (Surrogates)

- Hawaii law provides for “surrogates” (HRS 327E-5)
- Surrogates can be designated by the patient (who has capacity)
- If patient does not designate a surrogate, the “primary physician, or the physician’s designee” can appoint a surrogate from “interested persons”
 - What if interested persons are NOT the people the patient would select?
 - Does physician have sufficient information?
 - If contested, it leads to guardianship
- Non-designated surrogate cannot deny artificial nutrition or hydration.
- Surrogate can only make decisions that “patient could make on patient’s own behalf.”

Asset management options

- Remember: Financial management is generally the duty of a CONSERVATOR, not a guardian.
- There are tools to use to help an individual manage finances, though. These include:
 - Joint Accounts/Signature Authority Accounts
 - Representative Payees

Bank Accounts

- Establishment of a bank account requires the legal capacity to manage the account
- Joint account – two or more OWNERS, each with the right of survivorship but also access to the funds presently.
 - Does not stop a person from making own financial transactions/decisions
 - Can be risky
 - Tax issues?
- Signature authority
 - Only gives another person authority to SIGN while owner is still alive. Does not prevent owner from transacting

Trusts

- Settlor/Grantor = Person who owns property and makes instructions for its management
- Trustee = Manager of the property for the benefit of the Beneficiaries
- Beneficiaries = end-users. Could be the Settlor during life
- Manage assets during life and distributes them after death
- Avoids Probate
- Can also “exempt” income/assets from means-testing

Special Needs Trusts

- Type of trust designed to preserve a beneficiary's Public Benefits and improve quality of life.
 - Assets owned by the trust do not count against a beneficiary's eligibility (if administered properly)
 - The ability to shelter resources to benefit a family member with disabilities
 - The ability to help the beneficiary live more comfortably and productively than is usually possible on public benefits
 - The ability to provide financial management

Two Types of SNTs

- Two types
 - First- Party (Self-Settled)
 - Third-Party (Created by someone else)
 - “Pooled Trusts” could be either First Party or Third Party
 - NEW to Hawaii

The “pooled special needs trust”

- 42 USC 1396p(d)(4)(C)
- Pooled special needs trusts are a type of first party trust that is managed by a nonprofit agency
- Assets in the trust are exempt for Medicaid purposes, and transfer of asset penalties do not apply to funds transferred into this trust.
- Assets remaining in the trust upon the death of the beneficiary may remain in the trust or may be used to pay back Medicaid
- d4C trust in Hawaii – the Hawaii Caregivers Trust.

Benefits of the Pooled Trust

- Cost-Efficient
 - Trust already exists, so reduced legal fees to establish an account
 - Custom trusts are about \$2K - \$5K
 - Pooled Trust are about \$500 to join.
- Time Efficient
 - Trust already exists, so no waiting to join
 - Appointments to see an attorney could be a 90 day process
 - Pooled trust has “immediate” application
- Professional administration
- Investment performance depends on the market.

Private Sector Solutions

- Sometimes law reform is best done outside of the legal profession.
- Some important private sector solutions include:
 - ABLER Accounts
 - Truelink Cards

ABLE Accounts

- Achieving a Better Life Experience Act (IRC 529A)
- Allows beneficiary to save funds that are not countable against their SSI/Medicaid asset test
- Funds in account can grow tax free if used for disability related expenses.
- Beneficiary must be a resident of either the state that maintains the program or of a contracting state

ABLE Accounts

- Beneficiary must be the owner of the account
- Beneficiary must be “disabled” prior to reaching the age of 26
- Contributions to an ABLE Act Account may be made by any individual, including the account Beneficiary
- Contributions to the account may not exceed a total of the annual gift tax exclusion for the tax year (\$17,000 for 2023, adjusted for inflation periodically)

ABLE Accounts

- Distributions from an ABLE Act account must be for “qualified disability expenses”, which include food and shelter
- ABLE Act accounts may be rolled over into other ABLE Act accounts
- Upon the death of the beneficiary, any amounts remaining in the account must be used to re-pay Medicaid benefits received by the beneficiary and remaining amounts may be distributed to the deceased’s estate or designated beneficiary, subject to income tax on investment earnings.

ABLE Accounts

- ABLE Act accounts will be exempt for Medicaid purposes, but amounts in ABLE Act accounts in excess of \$100,000 are considered resources for SSI purposes.
- *See* IRC Se. 529A(c)(1)(B)(i) stating that Qualified Disability Expenses are any expenses related to the individual's blindness or disability and include education, housing, transportation, employment training and support, assistive technology and personal support services, health, prevention and wellness, financial management, legal fees, expenses for oversight and monitoring, funeral and burial expenses and other expenses as approved by the Internal Revenue Service. Amount of distributions that are not for such expenses may be included in an individual's gross income for tax purposes. Further, it is possible that certain distributions may impact an individual's benefits in other public benefit programs (*e.g.* payments for housing would be subject to the PMV test for SSI purposes).

Hawaii ABLE Savings Program

- \$25 minimum deposit; \$10 minimum addition/withdrawal after that.
- 3 investment options, including conservative, moderate and aggressive
- \$35 fee per account, and investment administrative fee of between .3% to .38%.
- Source: Hawaii Able Savings Program Website at hawaiiablesavings.com

True Link Cards

- Developed by True Link Financial and the cards have been approved by the Social Security Administration.
www.truelinkfinancial.com
- One party owns funds and uses those funds to be available on a debit card
- Restrictions on the debit card are made by the owner (e.g., no alcohol, or no airplane tickets)
- Holder of the card uses the card like any debit card, maintaining appropriate degree of autonomy

Promising legal reform

- As our population ages and we gain experience assisting people with differing degrees of “legal capacity”, we may see law reforms.
- Some reforms include changes to guardianship/conservatorship rules, such as those inspired by Britney Spears and other cases.
- One of the most interesting movements is for Supported Decision-Making (“SDM”)

Jenny Hatch Case

- Ms. Hatch is a young lady who challenged the appointment of a guardian.
- Basic argument is that she could make her own decisions, especially when she had the right support
- <https://jennyhatchjusticeproject.org/>

Supported Decision Making

- This is what WE ALL DO.
- Philosophy and belief that individuals with disabilities have the right to make choices about their own lives and recognizes that these decisions may need support from one or more people
- It is not “Best Interests” or “Substituted Judgment”, it is the individual’s own, personal decisions, which may be formulated with the assistance of “supporters” instead of guardians.

SDM

- 2006 United Nations Convention on the Rights of Persons with Disabilities recognized the right to “legal capacity” as a “human right” and that individuals should be provided the support they need to exercise this right.
- Ratified by 185 countries, although this does NOT include the United States.
- American Bar Association supports it (2017)
- As of March 2023, 16 states and D.C. have enacted legislation recognizing SDM (Not Hawaii).

Putting it together

- Every case, every individual, every situation will be unique
- The toolbox merely contains tools that you could use, but you have to select the right tools for the job
- These do not necessarily have to work separate and apart, but can be used in connection with other options

General Considerations

- Anticipate transitions – most planning needs to start BEFORE age 18 (but not TOO early).
- Consider alternatives and maybe try them out
 - This means including the individual!
- Develop networks of family members, family networks, professionals
- Learn from others
 - www.thecaregiverfoundation.org
 - www.specialneedsalliance.org

Questions?

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