Alternatives to Guardianship and Conservatorship

Why Not Guardianship or Conservatorship?
Guardianship and conservatorship may take away all of someone’s decision making authority. Also, they can be ended only by a court order. For these two reasons, guardianships and conservatorships are very restrictive kinds of substitute decision making tools. They can also be more costly than alternative methods, since court review is required and regular reports must be filed.

American society values independence, freedom, and the right of an individual to make his or her own decisions. Because of these values, the “least restrictive alternative” should always be considered before a guardianship or conservatorship. A guardianship or conservatorship should not be required, or used, simply because a person makes a decision that other people do not understand or like. The fact that a person has a disability or a certain diagnosis does not mean a guardianship or conservatorship is needed.

What Does “Least Restrictive Alternative” Mean?
A least restrictive alternative is one that allows a person to make as many decisions and be as independent as possible. Some examples of alternatives are: representative payees for government benefits, joint bank accounts, advance directives for health care, or financial powers of attorney.

Can Alternatives Be Planned Ahead?
There are a number of formal and informal ways to make sure that a person’s own wishes about the future are followed. No adult is too young or healthy to plan for “incapacity.” Incapacity means being unable to do one or more things we normally take for granted, such as paying our bills or making our own health care decisions. Even when a plan has not been established for meeting the future needs of a person, alternatives that are less restrictive than guardianship or conservatorship should be considered. Some people may have difficulty talking about these things. However, people who are facing incapacity are often relieved to learn that there are ways for them to retain some control over their lives and to ensure their wishes will be followed.

What Alternative Planning Tools are Available?
The alternative tools include voluntary, where the person facing incapacity agrees to the arrangement. There are also involuntary tools, where another person makes the
arrangements on behalf of the person with the incapacity.

The voluntary and involuntary planning tools discussed on the following pages are generally considered to be less restrictive alternatives to a guardianship or conservatorship. If they are put in place, a guardianship or conservatorship may not be needed at all. Of course, the best choice of alternatives, including a guardianship or conservatorship, depends on individual needs and preferences.

How Are The Tools Used?
It is wise to thoroughly understand a tool before trying to use it. The descriptions below provide a general summary of the tools. They are not a substitute for legal advice. An attorney should be consulted before making any decisions.

Voluntary Alternatives For Personal Needs

Community Based Services
A person may be eligible for a wide variety of community based services that would permit the person to continue meeting personal needs. The services include home nursing, home health aides, homemakers, “Meals on Wheels” (home-delivered meals), “Lifeline” (telephone service assistance), mental health services, transportation, work activity, and many others.

Case Management
Case management can be used to assess needs, and to coordinate and monitor services for persons with many needs. Case management is available for some people with disabilities, including persons with mental retardation or mental illness and some elderly persons. Through the use of case management services, persons with more complex needs may be able to stay in their own homes. For information on case management programs for older Iowans, contact the Iowa Department of Elder Affairs at 1-800-532-3213 or www.state.ia.us/elderaffairs. For information on case management for others (for example, persons with brain injuries, mental retardation or chronic mental illness), contact the Iowa Department of Human Services.

Health Care Facility
Sometimes a person’s needs can only be met by moving to a nursing home, residential care facility, or similar place. If a person voluntarily decides to move, a guardianship may not be needed.

Living Will
A competent adult may sign a “living will” directing that life-sustaining procedures be withheld or withdrawn. The living will is only effective if the signer’s condition becomes terminal and if the signer is not able to make treatment decisions.

Durable Power of Attorney for Health Care
A person can name another person (called the attorney-in-fact) to make health care decisions using a durable power of attorney for health care. This paper gives the attorney-in-fact the authority to make decisions regarding care, treatment, and health care services. A living will is limited to situations of terminal illness. A durable power of attorney for health care covers a broad range of future medical decisions.

A person appointed to act under a durable power of attorney for health care has priority over any other person, including a court appointed guardian, to make health care decisions. The attorney-in-fact has authority to make decisions only if the person is unable to make health care decisions (in the judgment of the attending physician).

Standby Guardianship
The Iowa Code sets out a procedure for a competent adult to plan for a court-supervised guardianship. In a written petition, the person can specify that a guardian shall be appointed when certain conditions have been met. These could include particular events or the occurrence of a physical or mental condition. The petition also says how the occurrence of these events or conditions must be proven.
Voluntary Alternatives for Financial Needs

Banking Options
There are some simple banking options that, in some cases, can be used as alternatives to conservatorships. A person may be able to control his or her own affairs with the help of automatic payments to creditors (utilities, mortgages, and others can be routinely paid in this manner), direct deposits, or banking by mail, phone, or the Internet.

These may be useful and appropriate for some people. The person should have the ability to understand what is being done each month. This would not work for people who may become confused when their Social Security no longer arrives in the mail or who think they still have to pay creditors even though the bills are paid automatically.

Another method often used is joint bank accounts where the name of a trusted friend or family member is added to the account. Trustworthiness is very important because the joint owner has control over the money in the bank. Care must also be taken in establishing the account so that it is clear who will get the money if one person dies.

These informal options provide some useful means to handle financial needs, but provide little in the way of third-party supervision.

Financial Powers of Attorney
This kind of power of attorney deals only with finances. A power of attorney is signed voluntarily by a competent adult (the principal) authorizing another person (the attorney-in-fact or agent) to act on his or her behalf.

A financial power of attorney can be a general document used for all authorized transactions and affairs related to property owned by the principal. It can also be limited, for example, to only cover transactions at one bank or even a single transaction. The document should also specify how long it lasts.

A competent principal can revoke or end a power of attorney at any time. It should usually be revoked in writing. Any bank, brokerage firm, or other third party who may be relying on the power of attorney should be immediately notified of the revocation.

A financial power of attorney will usually end at the time the principal becomes incompetent unless it specifically states otherwise. A power of attorney that stays in effect even if the principal becomes incompetent is called a Durable Power of Attorney. If the power of attorney is supposed to last through a time when the principal is no longer able to make decisions, then a durable power of attorney is needed.

The drawback of a financial power of attorney is that it is not supervised by a court and there are no surety, bonding, or annual accounting requirements. This creates a risk of theft or mismanagement.

Trusts
A trust is a legal relationship in which one person (a “trustee”) holds property for the benefit of another (the “beneficiary”). The property can be any kind of real or personal property: money, real estate, stocks, bonds, collections, business interests, personal possessions, and other assets. Trusts can be useful planning tools for incapacity because they can be established and controlled by a competent person and later continue under the control of a successor trustee if the person who established the trust becomes unable to manage his/her affairs.

One person often establishes a trust for the benefit of another. This type of trust involves at least three people: the grantor or trustor (the person who creates the trust); the trustee (the person or financial institution who holds and manages the property); and the beneficiary or beneficiaries (the person(s) who receives the benefits from the trust). Trusts that can be changed or terminated at any time by the grantor are called revocable. Trusts that cannot be changed or terminated before the time specified in the trust itself are called irrevocable.
The trustee holds “legal title” to the property transferred to the trust and has the legal duty to use the property as provided in the trust agreement and as permitted by law. The beneficiaries have “equitable title,” which is the right to benefit from the property as specified in the trust.

There are several types of trusts that are used to plan for one’s own incapacity or the incapacity of another. There are also many other kinds of trusts that are used for different purposes. It is important to talk to a knowledgeable trust attorney.

Social Security Representative Payee
This alternative can be voluntary on the part of a person who gets Social Security. It can also be used without the person’s consent in some cases, making it involuntary. This is discussed below under non-voluntary alternatives.

Standby Conservatorship
The Iowa Code sets out a procedure for a court-supervised conservatorship. In a written petition, the person can specify that a conservator shall be appointed when certain conditions have been met. These could include particular events or the occurrence of a physical or mental condition. The petition also says how the occurrence of these events or conditions must be proved.

Minors
A person having physical and legal custody of a minor child may establish a standby conservatorship on behalf of the minor. The person can specify that a conservator shall be appointed when certain conditions have been met. These could include particular events or the occurrence of a physical or mental condition. The petition can also say how the occurrence of these events or conditions should be established.

If a conservator has not been appointed, up to $10,000 in money or property may be paid to a custodian under the Iowa Uniform Transfers to Minors Act (See Iowa Code Chapter 565B). If more money is involved, a conservatorship may need to be established.

Voluntary Conservatorship
An adult may ask the court to have a conservator appointed to make financial decisions. This results in a court-supervised process over some or all of that person’s financial affairs.

Non-voluntary Alternatives For Financial Needs
Social Security Representative Payee
Unlike the voluntary alternatives to conservatorship, a representative payee (for Social Security and SSI benefits) can be set up after the person becomes incapacitated. Representative payees might be an appropriate alternative to conservatorship if Social Security is a person’s only income and there is no need to protect other assets.

The Social Security Administration (SSA) has an application process to establish a representative payee. Even if a conservator has been appointed, the conservator must apply to become the representative payee in order to receive the checks directly.

A representative payee is appointed by the SSA for a recipient who is unable to receive and manage their own benefits due to mental or physical impairments. It can be done with or without the consent of the recipient. The recipient has several opportunities to challenge an unwanted payeeship. Once established, the payeeship can be terminated by showing that the beneficiary has regained the ability to manage the benefits.

Representative payees are to use the benefits in the recipient’s best interest. Representative payees are personally liable for misuse of funds. It may be quite difficult to prove misconduct or even locate a payee who misuses funds. Using caution in choosing a representative payee is important. It may be best to have a trustworthy relative, friend, or residential facility (nursing home or group home where the person resides) as payee. Some communities may have programs that provide volunteer representative payees through a program sponsored by AARP. These arrangements can be changed as needed.
The SSA may require periodic accountings for the benefits. The SSA may remove payees for a breach of their duties, but there is no careful oversight. A payee only has authority to handle matters relating to the Social Security benefits. The payee has no authority to handle property or income other than Social Security benefits.

Under other SSA requirements for representative payees, a payee must:
- keep records of how benefits were spent,
- submit a report of such expenditures at the request of SSA,
- report to SSA any event affecting eligibility for or amount of benefits,
- register bank accounts and investments in a manner clearly indicating that the funds belong to the beneficiary,
- monitor and report savings and investment income as countable income for SSI recipients,
- notify SSA of any change of address of the recipient,
- notify SSA if he or she is no longer able or willing to serve as payee, and
- disburse all accumulated funds and interest as directed by SSA at the termination of the payeeship.

**Arrangements for Veterans and Railroad Retirement Benefits**

For Railroad Retirement Benefits or Veterans Benefits, payees may be used, like those for Social Security. The process for substitute payment arrangements is established by each agency. The Veterans Administration or the Railroad Retirement Board should be contacted for details and procedures to follow. As with Social Security representative payees, these arrangements should be carefully considered based on individual needs and preferences.

**General Relief Benefits**

General relief benefits may be paid directly to a vendor (for example, rent to a landlord) if the county rules require. A person's ability to manage the grant may not matter in the county's decision.