LIVING TRUST

A competent adult may also create an inter vivos, or "Living", trust which provides for the handling of all or certain financial affairs by a designated trustee. Like a power of attorney, it allows one to specify the person or entity (i.e. a trust department) to handle the affairs and manage the trust property and may define the exact manner of property management. It is also beneficial in that it designates the trustee with whom third parties may deal regarding financial and other matters within the scope of the trust.

PLACEMENT PROCEDURES

Placement in a personal care home or nursing home often can be accomplished without a guardian, as long as the resident is either (a) cooperative or (b) incapable of objecting. A competent adult has the right to determine his own residence, and a facility is without authority to restrain an adult absent consent, unless the authority to determine residence has been placed in another (a guardian). At times it may be difficult to gauge whether a new resident will ultimately "object," since he may be resistent at first but may adjust after a period of time. Basically, it comes down to whether the administrator of the facility feels it can safely keep the resident and prevent him from harming himself. Of course, it is also necessary to make the financial arrangements for the care of the resident, which may be done by the resident (if competent), an attorney-in-fact, or by anyone accepting the obligation and guaranteeing payment.

REPRESENTATIVE PAYEE STATUS

If a resident receives Social Security or VA benefits, nursing and personal care home administrators can apply to become the representative payee of the resident's benefits, relieving family members of this monthly concern. This is a procedure with which most skilled nursing and personal care home administrators are familiar, and many will file the necessary applications for the family. If the resident qualifies for Medicare or Medicaid, an assignment of benefits may satisfy any balance of monthly care charges in excess of Social Security or VA benefits.

GUARDIANSHIP

Of course, there are times when a guardianship is needed and necessary. In those cases, the law provides appropriate protections for the adult, and guardians appointed by the Court are monitored by the Court and must file with the Court written, periodic reports on the condition of the ward and the ward's property.

WILLIAM J. SELF, II is Judge of the Probate Court of Bibb County, Georgia. He received his B.B.A. and J.D. degrees from the University of Georgia.

DIANNE BRANNEN is the Ombudsman for the Probate Court of Bibb County, Georgia. She received a B.M. degree from Wesleyan College, an M.B.A. degree from California State University, Los Angeles, and a J.D. degree from Mercer University.

ALTERNATIVES TO GUARDIANSHIP

William J. Self, II
Dianne Brannen

PRESENTED BY

GOLDEN OPPORTUNITIES
SENIORS HELPING SENIORS
A Service of The Medical Center of Central Georgia

ALTERNATIVES TO GUARDIANSHIP

William J. Self, II
Dianne Brannen

When an adult, especially the elderly, becomes incapacitated or disabled, is the formal appointment of a guardian by the Probate Court necessary to care for or conduct the affairs of the adult? The answer to this very important question, asked often by not only the family and friends of the adult but also by the adult, depends on the circumstances of each individual case. Posing the question is both appropriate and prudent, because adult guardianship proceedings are fairly complicated and time-consuming, as well as relatively expensive, primarily as a result of the due process protections afforded the proposed ward in such proceedings. This is not to say that guardianship proceedings are overly complex; the due process protections help assure that the Court receives clear and convincing evidence of incapacity before removing the rights of an adult citizen and that the order issued in every case is "fashioned" to the particular circumstances.

However, there are often alternatives to guardianship which may accomplish the needed ends in any particular case. These alternatives should be considered, where applicable, and should be utilized in every case where doing so will accomplish the underlying purpose AND provide any needed protection for the adult.

It is important to distinguish physical disability or incapacity from mental disability or incapacity. One can be physically incapacitated yet retain full mental competence. On the other hand, one might be mentally incapacitated but be physically quite fit and well. The availability and/or effectiveness of any of these alternatives will likely be dependent upon the type and extent of incapacity.

LIVING WILL

The Georgia Code defines a living will as a written directive instructing a physician to withhold or withdraw life-sustaining procedures in the event of a terminal condition, a coma, or a persistent vegetative state. Its basic purpose is to protect a patient's dignity and prevent unnecessary pain and suffering at the end of life. Any person who is of sound mind may execute a living will. (Physical condition is irrelevant, as long as the individual is of sound mind and capable of understanding the document.)

There are a number of specific requirements in the law concerning the formalities to protect the individual. There are very precise and detailed provisions governing the execution of a living will, the types of witnesses required and a person's right to revoke the living will. [O.C.G.A. § 31-32-5.]

Those who already have living wills should be aware that there have been some recent changes in the law. Since April 1992, it has become possible to request the withholding of food and water, as well as medical procedures, for a comatose, terminal patient. Additionally, under then existing law, living wills made before March 28, 1986 expired seven years from the date of execution, and a new living will may be needed. [Living Will form: O.C.G.A. 31-32-3]

DURABLE POWER OF ATTORNEY FOR HEALTH CARE

The durable power of attorney for health care is quite different from the living will. It names an agent to make health care decisions in accordance with specific instructions set forth in the document. It covers many more situations than does a living will and applies any time a person becomes incapable of making or expressing health care decisions, not just at the end of life. It also allows for the authority to make anatomical gifts (organ and tissue donations).

As with living wills, execution and completion of the durable power must comply with statutory requirements of formality. If the named agent is available, the durable health care power of attorney will supersede the living will. However, to cover the possibility of the unavailability of the agent, many attorneys recommend the execution of both a living will and a durable power. [Form: O.C.G.A. 31-36-10]

GEORGIA MEDICAL CONSENT LAW

It is also important to recognize that, in an emergency, the law allows physicians to treat anyone who is incapable of consenting [O.C.G.A. § 31-9-3(b)], and in non-emergency situations, the next of kin may consent if the patient is unable to do so. [O.C.G.A. § 31-9-2(b)] The Georgia Medical Consent Law lists the persons who may consent to medical care for another, and authorizes physicians to act in emergency situations. Guardianship may not be necessary to consent to medical treatment, unless there is a dispute among those persons having equal voice under the law. [O.C.G.A. § 31-9-1, et seq.]

GENERAL POWER OF ATTORNEY

In addition to a health care power of attorney, one may also execute a general power of attorney, which may be combined with or executed separately from the health care power. A power of attorney names an agent to act in the place of the individual, primarily in monetary and property matters, and defines the extent of or limitation on the authority given. The authority granted may be very specific or quite broad and may include the authority to: write checks and make deposits in accounts; buy and sell real estate or other property or investments; negotiate and settle debts and claims; etc. Powers of attorney (both general and health care), executed while the adult is mentally competent, often allow for the conduct of all business and personal affairs of the adult once incapacitated without the necessity of guardianship.

attorney and the amount, if any, of the filing costs. Usually, the petition must be filed with a report of incapacity from a physician or psychologist who has examined the proposed ward within ten days of filing. If a further evaluation report presents probable cause of incapacity, the judge will then schedule a hearing to determine if a guardianship will be created

Duties And Powers Of The Guardian The guardian has the rights and powers reasonably necessary to **provide adequately** for the support, care, education and well-being of the ward. A guardian of the person must make arrangements for such provision from the ward's funds, even to the extent of participation in legal proceedings. One reading of the Americans with Disabilities Act requires that a ward receive care in the least restrictive setting. Subject to certain restrictions, the guardian may give medical consents for the ward and, generally, may establish a ward's abode.

A guardian of the person shall respect and maintain the individual **rights and dignity of the ward** at all times. The guardian shall be reasonably accessible to the ward and shall maintain regular communication with the ward. A status report describing the ward's general condition, living situation, progress, development and needs as well as recommendations for change must be filed four months after appointment and thereafter annually on the anniversary of appointment.

A guardian of the property may sell, lease, encumber or exchange property of the ward for payment of the ward's debts, for support and education of the ward or dependents of the ward, or for reinvestment upon order of the court. The guardian of the property must file both an annual report and inventory with the court. The guardian of the property is entitled to commissions for what he or she has received and paid out. All guardians must file a petition in court to obtain permission to perform any act not specifically authorized.

Rights Of The Ward Georgia recognizes that making personal decisions is the most basic of rights. By law, no person is presumed to be incapacitated and, out of respect for a person's dignity, the right to make any decision cannot be casually removed. Hence, a ward **retains those rights not removed** by statute as well as those rights the court specifically exempts because it finds their removal unnecessary.

In all cases, a ward cannot be denied any civil, political, personal or property right without due process of law. The ward has the right to communicate freely and privately with others. His property must be used for his support, care, education and well-being. The ward also has a right to petition to have the guardianship modified or terminated or to claim that a right or privilege is unjustly denied.

Summary If less intrusive means are unavailable, a guardianship can be an appropriate device to provide for substituted decision-making on behalf of an incapacitated adult. Georgia law recognizes the dignity of all human persons by authorizing the removal of decision-making abilities only to the extent necessitated by the limitations of the ward. Guardians, accordingly, have special duties to the ward and to the court. For his or her part, the ward retains all rights not removed and can petition the court to have his or her right to make decisions restored. When the law and its spirit are followed, guardianship can be a relationship which can help fulfill and educate the ward and the guardian as well.

GUARDIANSHIP OF ADULTS IN GEORGIA

Rights and Duties

----------◊----------

Prepared by the
GEORGIA ADVOCACY OFFICE
999 Peachtree Street, N.E.
Suite 870
Atlanta, GA 30309
(404) 885-1234
(800) 537-2329

The personal right to make decisions about living one's own life is taken for granted by most adults. Yet, inevitably, mental illness, mental retardation, and physical illness or disability may render some adults incapacitated during the course of their lives and thereby prevent them from making some or all of the necessary decisions concerning life or property. When this occurs, **guardianship** is one means of substituting the judgment of other people for the decisions of incapacitated individuals.

Forms Of Substituted Decision-Making Before guardianship is sought for an adult who is incapacitated, a number of less intrusive means of substituted decision-making should be examined. Some forms of substituted decision-making allow an individual to plan for his or her incapacity. These fall into several categories:

- **general power of attorney** allows a competent individual to grant another person (the agent) the authority to make decisions in specified areas (such as financial).

- **health care power of attorney** grants authority for health care decisions.

- a **living will** sets forth a person's desires about medical procedures used to prolong life.

- a **living trust** is a legal plan for placing property with a trustee for the benefit of another person, a beneficiary.

- **joint property** allows two or more persons to own property together.

There are other means to respond to an existing incompetency:

- a **representative payeeship** exists where the Veterans Administration or Social Security Administration appoints someone to handle benefits checks for a person determined incapable of doing so.

- **money management** is an informal device wherein third persons act in a paid professional capacity to assist individuals in managing their financial affairs.

Nevertheless, sometimes none of the above alternatives is available and the only means of substituted decision-making for an incapacitated person is guardianship.

Types of Guardianship A guardianship is a legal relationship in which a court appoints a person (a guardian) to make certain decisions for another person proven to be incapacitated (a ward).

There are two main types of guardianship - of the person and of the property. A guardianship of the person may remove from the incapacitated person the powers to contract marriage, to make other contracts, to consent to medical treatment, to establish a residence, and to bring or defend an action in court. A guardianship of the property may remove from the ward the powers to bring or defend actions in court, to make contracts, to buy and sell property, and to enter into business and commercial transactions. Often, a court appoints one person both guardian of the person and of the property.

Within these two main categories, there is further division. A guardianship can be either **permanent** or **temporary** (called "limited in duration"). A guardianship can be **total** (granting all powers) or the guardian's powers may be **limited** with the ward retaining some powers which could have been removed. (Although Georgia's statute fails to give a name to a guardianship removing fewer rights than allowed "limited" is the term most often used by courts nationwide.) Georgia law is progressive in this regard, recognizing that not all incapacitated persons are incapacitated in the same manner and to the same degree. The law specifically requires that guardianships shall be "designed to encourage the development of maximum self-reliance and independence in the ward and shall be ordered only to the extent necessitated by the person's actual and adaptive limitations." (O.C.G.A. 29-5-7(h)). For example, just because a person does not possess the judgment to make contracts does not mean that he or she cannot decide where to live. Finally, a guardianship can be created on an **emergency** basis.

Who Can Be A Guardian Any person who is not a minor, is not incapacitated or does not have a substantial conflict of interest can be a guardian. The law lists preferences starting with the person chosen by the ward prior to incapacitation. Yet a court may pass over someone with a preference, and if nobody is available, may appoint the director of the county Department of Family and Children Services.

Procedure For Appointment Of A Guardian Any interested person may **file a petition**, a blank copy of which is available from the county Probate Court. The court will advise whether or not the petitioner needs an

PENALTIES FOR FILING FRIVOLOUS PLEADINGS, ETC.

Caution is particularly given to persons representing themselves in court that there are provisions under Georgia law for the assessment of penalties against anyone who files false, frivolous, vexatious or groundless pleadings. These penalties may include the dismissal of such pleadings, the assessment of costs of court and attorney's fees against the offending party, and other remedies appropriate to the particular case. Additionally, there are similar penalties for the failure or refusal, without just cause, to respond to proper discovery requests.

Generally, one must have "legal grounds" for objecting to or for filing a caveat to a probate proceeding. Because of the penalty provisions briefly discussed above, it is especially recommended that legal advice be sought before the filing of an objection or caveat to a pending probate proceeding.

COURT COSTS

There is a cost set by law for the filing of every new probate proceeding, as well as for most pleadings filed after the initial filing, including objections, caveats and claims. There is a minimum deposit toward costs required for every new proceeding which must be paid in advance. Unless otherwise ordered or directed by the court, costs are the responsibility of the person filing the original proceeding, and full payment of any balance due may be required prior to issuance of a final order. A party filing an objection or caveat to a pending proceeding or a creditor filing a claim must pay the fee for the filing of same before the court is required to accept it for filing.

Court costs are considered an expense of administration under law, having a priority over other debts and claims, and must be paid by the

personal representative of the estate prior to the payment of other debts and prior to distribution to heirs or beneficiaries. The failure or refusal to pay court costs may result in the dismissal of proceedings, the removal of the personal representative or other actions by the court to assure and receive payment.

THANK YOU

While we want to be of service to the public, there are restrictions on and limits to what the staff and judge of the Probate Court may properly do. This brochure is intended to help the public understand these restrictions. It is never our intent to seem unhelpful or uncooperative. Within these restrictions and limitations, it is our desire to be of assistance to all who come into this office. We do hope that you will understand these limitations. With that in mind, please let us know if we may be of further service to you. Thank you.

The Judge and Staff
of the Probate Court

WILLIAM J, SELF, II, is Judge of the Probate Court of Bibb County, Georgia. He holds a B.B.A. and a J.D. from the University of Georgia, is active in the American, Georgia and Macon Bar Associations, is a member of the National College of Probate Judges, and is a frequent lecturer for the Institute for Continuing Judicial Education in Georgia.

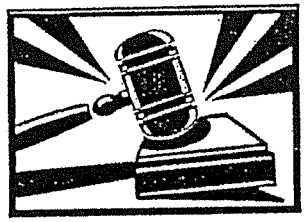
PROCEEDING *PRO SE* IN PROBATE COURT

Please read this brochure BEFORE

"Representing Yourself in Probate Court Without an Attorney"

PRESENTED AS A PUBLIC SERVICE BY

HOUSTON COUNTY
PROBATE COURT
201 N. PERRY PARKWAY
P.O. BOX 1801
PERRY, GA 31069
478-218-4710
web site: houstoncountyga.org



WILLIAM J. SELF, II, JUDGE

DOCUMENT PREPARED BY
WILLIAM J. SELF, II, JUDGE
BIBB COUNTY PROBATE COURT

NOTICE: Before proceeding without an attorney, you are required by this court to receive and review this brochure. Please read its contents carefully before asking the assistance of court staff with the filing of forms or pleadings.

GEORGIA PROBATE COURT STANDARD FORMS

Many of the usual and ordinary proceedings filed in probate court require the use of standard forms approved in accordance with the Uniform Probate Court Rules established by law.

The Probate Court gladly provides to citizens of this County and to others desiring to file proceedings in this Court copies of the Georgia Probate Court Standard Forms as required by law. These forms are printed or reproduced at taxpayers' expense; therefore, unless a true need is demonstrated, only one set of a requested form will be provided. Georgia Probate Court Standard Forms may be reproduced on copy machines, and exact reproductions are acceptable for filing in any probate court. The forms may also be re-created in computer word processors, but re-printed or re-created forms must contain a certificate that the content is identical in all material aspects to the standard form except for additions and deletions as noted.

The standard forms are primarily for use in the initial filing of new proceedings. There is not a standard form for every possible proceeding or pleading which may be filed in probate courts. In

particular, there are no standard forms for the filing of most objections, caveats, answers or responses or for the many motions and discovery pleadings which may be filed.

REPRESENTATION BY AN ATTORNEY AT LAW

While you are not generally required to have an attorney, you are encouraged to seek legal advice on all matters of legal importance. It is suggested that you seek advice in probate matters from an attorney who practices probate or estate law. The attorney can assist you in determining which proceeding is the most appropriate for your particular situation and can discuss fully with you the benefits, if any, in considering alternative proceedings. Very often, there are other matters related to probate proceedings (e.g., tax returns, preparation of deeds, title transfers, benefit claims, creditor notices, debtor demands, etc.) which may also make it appropriate or necessary to seek the services of an attorney.

PROCEEDING WITHOUT AN ATTORNEY "PROCEEDING *PRO SE*"

If you proceed without an attorney, i.e., *pro se* (a Latin phrase meaning "for one's self"), it will be your responsibility to determine or select the proceeding appropriate to your situation. The staff of the Probate Court may not make the determination or selection for you, since to do so may constitute the unauthorized practice of law, a misdemeanor crime under Georgia law. Neither the Court nor the County can accept responsibility for incorrect decisions made by the staff, and they have been directed to refrain from giving that kind of advice.

It will also be your responsibility to properly complete all forms, which must either be typed or legibly printed, and to assure the

sufficiency and accuracy of all required information. The staff are not permitted to perform clerical tasks for the public and cannot accept responsibility for determining the legal sufficiency of the information required for any proceeding or form. The staff will be able to answer any basic questions about the standard forms and about any deadlines for the filing of proceedings. They will also be able to schedule uncontested hearings and tell you how other matters are scheduled by the Court.

The Probate Judge is required by law to remain impartial to all parties. The Judge must treat every case as though it may become contested. Therefore, the Judge also may not advise you on which proceeding is the most appropriate to your case. The Judge is prohibited from discussing the facts or evidence in any contested case with one party unless all parties are present or represented. You should not ask to discuss your case privately with the Judge, and you should understand if the Judge stops any discussion which appears to require the presence of others.

Furthermore, if you proceed without an attorney, it will be your responsibility to make arrangements for personal service on all persons upon whom personal service is required, to assure the filing of a proper return of service on all such persons, to assure the publication of any notices not performed by the court or its staff, and to secure the presence of or interrogatories from any witnesses whose testimony is necessary under law or desired by you for the presentation of your case. If the matter is contested, it will be your further responsibility to prepare yourself and your case for trial, including the pursuit of and response to discovery.

It is the responsibility for all such matters which would be assumed by an attorney employed to represent you, and you are again encouraged to consult first with an attorney before deciding whether to proceed *pro se*.