### Alternatives to Guardianship

Excerpts from ***Deciding What If?: A Legal Handbook For Hawaii's Caregivers, Families and Older Persons***. Although the information in this booklet is focused on the older person, but is just as relevant to those with developmental disabilities and their families.

A guardianship of the person or property involves time delays, costs, and loss of privacy. Appointment of the guardian and regular accounting proceedings normally take several months each time court approval is sought. Filing fees and attorneys' fees and costs are incurred with each proceeding. Also, guardianship documents and proceedings are matters of public record and, accordingly, the financial affairs of the ward may become public knowledge.

Less restrictive alternatives can serve the purpose of providing necessary assistance. Executing an advance directive, obtaining a power of attorney, establishing a trust, becoming a representative payee, or maintaining a joint account to pay bills are a few of the frequently used alternatives.

### Powers of Attorney

...A power of attorney is a written instrument through which a person indicates that he has named another person his or her agent (or attorney-in-fact) and grants that person authority to act on his or her behalf to perform certain acts. Powers of attorney can be drafted to take effect immediately or on a future date and can be made to last indefinitely until death or for a specific period...You should realize that there is generally no requirement for an individual or organization to accept your power of attorney. To be certain whether your power of attorney will be accepted, you should check this out in advance.

The two basic types of powers of attorney are the general power of attorney and the special power of attorney. A general power of attorney is a very broad and sweeping grant of authority and should be used with extreme caution. Unless prescribed by law or regulation, this instrument authorizes another person to do any legal act, which you, the "principal," might do for yourself. In contrast, a special power of attorney grants authority to an individual to act on your behalf in specific matters. Since it is limited in scope, the use of a special power of attorney reduces the risks involved in giving another person power.

Powers of attorney are important legal documents, which can affect the management of your property and your personal affairs. You should know and trust the person to whom you grant such power. Generally speaking, it is wise to limit the powers granted and the duration of those powers as much as possible. You have the right to revoke, terminate, or modify a power of attorney at any time. Remember, once an individual (your agent) acts on your behalf with permission (your power of attorney), it may be impossible to undo what he has done. You may wish to ask your lawyer to include a "self-executing revocation date" if you do not want your agent to have power indefinitely. Keep track of to whom you give your power of attorney and where it is. You can revoke (or cancel) a power of attorney orally or in writing. To be safe, you may wish to do it in writing and give the revocation to your agent and to any person or organization your agent may have had dealings with. Death usually terminates the power of attorney.

*Cautions:* Generally speaking, no person or organization must accept a power of attorney and may organizations have their own forms or required formats. For example, the Internal Revenue Service has its own Power of Attorney Form 2848, which contains information and authority the IRS requires in designating an agent. It is especially important for you to 'tailor' your power of attorney regarding rel estate. Not only is this a potentially dangerous area, but also a more detailed and formal way of describing the property may be necessary for the document to be legally sufficient. Powers of attorney can be dangerous in the wrong hands. There are increasing reports of financial abuse, exploitation and theft through the use of powers of attorney.

### Durable Power of Attorney

Mental disability of the principal terminates a power of attorney unless the instrument contains a provision that states that the power will not be affected by such disability. This provision creates a 'durable power of attorney.' For instance, if you had signed a 'durable power of attorney' and subsequently suffered a stroke and became mentally incapacitated, the power of attorney would still be valid.

Durable powers of attorney are being drafted more and more to grant power to take care of many potential needs of individuals to include health care decisions...One approach in planning for possible incapacity is to make a "springing" power of attorney, which "springs" into effect only upon certification by a doctor that an individual is incapacitated. You can "tailor" your documents to fit your own personal needs...

### Trusts

A trust is simply an arrangement you (the settlor) make to give your property to a trustee (it could be yourself), who holds it for you or your beneficiaries. Trusts are very useful as estate planning tools but can also be used in planning for incapacity. If a person should become incompetent or incapable of handling his or her own affairs the trust can be a very useful alternative to guardianship. The trust can be used to manage any property you place in it. This can include your home, rental properties, vehicles, bank and savings accounts, stocks, bonds, and virtually anything you can hold title to. Your trustee can use and manage your assets in accordance with your instructions and can be held fiduciarily responsible for his or her actions. Under this set up you can be a little more assured that your assets will be used for your care and for the payment of your bills in the event you are not able to do so.

### Representative Payees

When a person has memory loss, is incompetent, or does not understand the process of paying bills and computing numbers, a representative payee can be appointed to handle his or her benefit check. The representative payee then receives checks...and must use the money for the needs of the beneficiary. Different agencies have different procedures for designating a representative payee.

As a representative payee, you need to keep informed about the needs of the person you care for so that you can decide how benefits can best be usd for his or her personal care and well being. The Social Security Administration has made it clear that any money left after meeting the beneficiary's current and reasonably foreseeable needs must be saved and maintained in the beneficiary's behalf. Periodically, the Social Security Administration will ask you to complete a form to account for the funds you have received. Representative payees need to keep Social Security informed of changes that may affect the beneficiary's eligibility for benefits.

### Direct Deposit, Joint Accounts and Money Management

Direct deposit is a program, which allows you to have your incoming checks delivered directly to your personal checking, or savings account at whichever bank you designate. (Contact your bank, credit union, etc. to see whether your checks can be directly deposited).

A joint account can be useful for a person who needs help in writing checks and in depositing funds into an account since it permits another person to have complete access to the funds...it is very important to note that this alternative can be very risky since the person whose name is added to an account is generally considered a co-owner of the account and could withdraw all of the money!

Money management is a catch-all term for a wide range of services provided by individuals and organizations to help people manage their financial affairs. Money management includes such things as check writing, bill paying, depositing money, balancing check books, claims preparation and filing tax preparations, and financial counseling. Services can be provided for free or on a fee basis and are usually commenced by signing a contract for services. Either you or the service provider can terminate these services at any time. If you use these services, make sure that your money manager is insured and bonded to protect you from theft or loss of funds.