

ESTATE PLANNING TO AVOID GUARDIANSHIP

December, 2014

By: James W. Mallonee

Consider the following situation, the children come to visit over the holidays and they begin to remark about your confusion or failing to manage your day-to-day activities. They also begin assisting you frequently and state that you seem to be having difficulty with your vision and remembering things. Moreover the children begin asking questions about what estate planning tools you have in place and ask to see them. If you have not thought about considering an estate plan then consider the concerns stated by your children as warning signs that you might want too. The children return to their home and your next visit is from an attorney who announces to you that he or she has been appointed by the Court to protect your interest in a guardianship proceeding. The question that faces most persons in this situation is “what are my options?”

Surprisingly, you have many but it will require you to pre-plan with the lawyer of your choice.

Florida’s Guardianship Laws provide that no removal of ones rights may be implemented on an individual if there are alternatives available to prevent such loss of rights. In the situation given above, one of the least restrictive alternatives to the loss of your rights are a set of estate planning documents, namely, Revocable Trust, Durable Power of Attorney and Healthcare Surrogate coupled with a Living Will (sometimes called advanced directive).

Generally speaking, if you have a trust that is funded, your vulnerability to having your property placed into the control of a guardian appointed by the Court can be protected by the appointment of a successor trustee. The successor trustee takes control of the trust property making it virtually impossible for you to convey property to others who do not have your best interest at heart. Most trust documents provide a mechanism for a succession of trustees which is accomplished by certification from a physician of a person’s incompetence or direct resignation by the serving trustee.

In addition, any property that is not titled in the name of the trust can be controlled by the agent named in a Durable Power of Attorney. The agent is known as an Attorney-in-Fact, who generally possesses the same powers as you regarding the management of your property. Florida law updated its Durable Power of Attorney authority in 2011 providing significant powers that can be scaled to fit anyone’s needs.

A Healthcare Surrogate complements a Trust and Durable Power of Attorney. A Healthcare Surrogate gives your named agent(s) the ability to make consensual health decisions for you in the event you cannot.

The combination of the three estate planning documents makes the likelihood of a successful guardianship proceeding an uphill battle. The reason for this is that your financial

affairs will be managed by a successor trustee and Attorney-in-Fact along with the management of your health decisions by the appointment of the Healthcare Surrogate of your choice. However, simply possessing the combination of the estate planning documents is not foolproof.

Be aware that there is always the danger that the person acting in the role of your successor trustee and agent is not well suited for such role. Keep in mind that an Attorney-in-Fact may have the power to wipe out your property that is not titled in the name of the trust. Of course there are fiduciary responsibilities that are attached to the Attorney-in-Fact and successor trustee, but if your entire savings is lost, the fiduciary duties imposed may not be very comforting when your lost savings cannot be recovered. Thus, take notice that a Durable Power of Attorney and Trust instrument is a very powerful set of documents and should not be taken lightly.

So how do estate planning documents help? By having the combination of a Durable Power of Attorney, Trust and Healthcare Surrogate in place, the argument becomes that your property and health are being managed and protected by third parties which acts as a least restrictive alternative to the need for the appointment of a guardian to control your person and property.

One of the hardest decisions to make is deciding who is the most protective and trustworthy person to entrust your health and financial decisions to. Just remember, if no estate planning is put in place, it is possible that the next attorney you see will be the one appointed by the Court to represent you in a guardianship proceeding.