



*Helping Older Persons With  
Legal & Long-Term Care  
Problems*

# ***Alternatives to Guardianship: Representative Payeeships, Joint Accounts and Living Trusts***

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## ***1. Why should alternatives be explored before a guardianship is considered?***

A guardianship is established by probate court to preserve the assets and assure the physical well-being of a person who, as a result of mental or physical sickness, disability, mental retardation or chronic substance abuse, is incapable of taking proper care of him or herself or his or her property.

It restricts the right to self-determination. The person subject to the guardianship (the ward) loses possession and control of his or her property, the right to enter into contracts and to determine where to live.

## ***2. What determines whether a guardianship or an alternative is better?***

The need for guardianship depends on the extent to which the ward's needs can be met through community resources and less restrictive means. Physical needs of older persons can be met through services such as Meals on Wheels, home health aides, homemaker services and adult day care. To meet financial needs, representative payeeships, joint accounts and living trusts are less restrictive.

## ***3. What is a representative payeeship?***

Established by the Social Security Administration (SSA), this appoints a third party (representative payee) to receive and manage the Social Security recipient's monthly benefit check.

## ***4. How is a representative payeeship created?***

Any person, agency, organization or institution can file an application with the SSA to be a representative payee. A representative payee must submit a doctor's statement based on a recent examination that states the Social Security recipient cannot manage his or her check, and show his or her relationship to and responsibility for the care of the recipient. The recipient or individual acting on his or her behalf must be notified, and have an opportunity to object before the representative payee is appointed.

## *5. What are the responsibilities of the representative payee?*

He or she must spend the Social Security checks only for the benefit of the recipient to meet (a) current maintenance (food, shelter, clothing, medical care and personal comfort items); (b) if current maintenance needs are met, support of a dependent spouse, child or parent; and (c) debts, but only if the current and reasonably foreseeable maintenance needs of the recipient are met. The payee must report to the SSA any circumstances that affect entitlement to the check amount and provide a written accounting, if requested.

## *6. How is a representative payeeship terminated?*

It is terminated if the recipient shows SSA that he or she is mentally and physically able to manage or direct the management of benefit payments.

## *7. What are joint accounts?*

This guardianship alternative provides for joint ownership of funds in a financial institution in the names of two or more persons. The most common joint account is the joint and survivorship account. Any person named on the account, or survivor, is entitled to the funds on demand. These accounts can be useful because they let the older person handle his or her finances independently, yet ensure someone else can write checks to pay bills if the older person cannot. Care must be taken, however, in choosing the person(s) to be named on these accounts. These accounts give all owners full access to the funds, and creditors of any owner may attach the account through collection proceedings.

## *8. How do joint accounts affect Medicaid eligibility?*

Medicaid presumes that all funds in a joint account belong to applicant, and are resources which can affect Medicaid eligibility. If a co-owner can provide documentation that he or she deposited his or her own money into the account, then Medicaid will not consider those funds as resources.

## *9. What is a living trust?*

This is an agreement under which the owner of property (the settlor) transfers that property to another (the trustee), who then holds legal title and manages the property for the benefit of someone else (the beneficiary). The trustee may be a person, a bank or both. The settlor may also be a trustee. There is no limit to the number of beneficiaries. The settlor can also be a beneficiary. The settlor may reserve the right to change the terms of the trust or make it irrevocable, which means it cannot be changed. Virtually any property may be transferred into a trust: money, land, CDs, stocks, insurance policies and retirement plans.

## *10. What are the advantages and disadvantages of a living trust?*

If a person becomes incompetent, and if a guardianship is obtained, usually the individual has no voice in either his or her care or the management of his or her assets. A living trust can be an excellent method to provide for care and protect the settlor's assets in the event of incapacity. A living trust also avoids probate. Avoiding probate does not mean the individual will not have to file and pay estate taxes. While some irrevocable trusts avoid probate and estate taxes, they are extremely limited in their nature. Most irrevocable trusts are not recommended because events may occur which make it necessary to change the trust during the life of the settlor. Most living trusts do not have all of the person's property transferred into them.

There are certain assets most people do not want to put into a trust, such as an automobile or personal property such as jewelry. As a result, even with a trust, there will often be some probate to deal with these assets at the time of death. Trusts can also be used to protect minors, disabled persons and, if appropriate, can protect assets from claims of future creditors. The major disadvantage to living trusts is their expense. Attorney fees to draft and set up a living trust range from less than a thousand dollars to several thousand dollars, depending on the assets involved. Management of trust assets by banks or other professional trustees can be expensive, with a typical 1% charge of the trust assets per year. While nonprofessional trustees, such as family members, save management expenses, they may lack expertise. Trusts enjoy certain tax advantages, but also tax consequences. If assets are transferred into an irrevocable trust, gift taxes must be paid.

## *11. Do I need a living trust?*

This depends on a number of factors, including your assets, your income, your purpose in setting up the trust and your estate plan. A living trust should be made only as a part of estate financial planning including discussion about wills, income, gift and estate taxes. As a rule of thumb, you should generally not consider a living trust if your assets are below the Federal Estate and Gift Tax exemption (\$1,000,000 for decedents dying in 2003). No federal estate taxes are required for any estate under that amount.

In addition, if you are married, Ohio and federal law permits an unlimited estate tax exemption to your surviving spouse. If your assets are set up with your spouse in joint and survivorship names, your property will pass to your surviving spouse upon your death. You will not avoid probate, but most costs, including attorney fees, will be minimal. To determine whether you need a living trust, you should consult with an attorney who is knowledgeable in trust law, estate planning, taxes and Medicaid law, since living trusts often affect Medicaid eligibility.

## *12. How do living trusts affect Medicaid eligibility?*

Although there are some exceptions, a living trust will often be considered an asset for Medicaid purposes, especially if it was established by the Medicaid applicant. The rules regarding whether or not the corpus of a trust is "countable" for Medicaid purposes are very technical, and it is strongly suggested that you consult an attorney versed in Medicaid law to

make this determination. Note, also, that payments into and out of living trusts are also subject to transfer rules which restrict Medicaid eligibility.

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In southwest Ohio, Pro Seniors' staff attorneys and long-term care ombudsmen handle matters that private attorneys do not, such as nursing facility, adult care facility, home care, Medicare, Medicaid, Social Security, protective services, insurance and landlord/tenant problems.

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