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# Managing Property for the Elderly

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Leo E. Lucas, Director

EC 78-870

# Managing Property For The Elderly

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**Come grow old with me, The best is yet to be, The last of life for which the first was made.**
**--Robert Browning**

There comes a time, as people grow older, when they may no longer wish to, or be able to, care for their property.

Several legal devices are available to help them manage their property: conservatorship, guardianship, trust, power of attorney, joint bank account, and social security payee representative.

This publication presents a general overview of considerations relating to selection and use of each of these. An attorney can best advise regarding advantages and disadvantages of the various legal devices.

## CONSERVATORSHIP

The appointment of a conservator should not be confused with the appointment of a guardian. *A guardian is appointed to provide only for the physical care of a person while a conservator's responsibility is largely confined to the management of a person's property and business affairs.* The same or different persons may be appointed to serve as guardian and/or conservator.

With advancing age, a person may find that managing his property is becoming too burdensome, or that he can no longer adequately make decisions regarding the conduct of his business. Unfortunately, it may also be a time when a person is particularly susceptible to manipulation by those inclined to take unfair

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advantage of him. In such circumstances, it may be advantageous to have a court appoint a conservator on behalf of the individual.

A person need not be declared incompetent in order for a conservator to be appointed. Hence, there is no need to fear that the appointment of a conservator is a step toward commitment to an institution or being declared insane. The appointment of a conservator is simply to relieve the concerned individual of the responsibilities of caring for his property.

The person to be protected, anyone interested in his welfare (including a parent or guardian), or anyone who would be adversely affected by lack of effective management of the person's property and affairs may request appointment of a conservator. The protected person may choose the person he wants to be his conservator. Frequently, a spouse, adult child, or close relative will be chosen. The conservatorship can be terminated at any time if the person being helped is mentally capable and wishes to resume responsibility for managing his affairs and property.

The law provides safeguards against over-zealous relatives and others who might demand the appointment of a conservator when one is not wanted or needed. In such situations, a court hearing can be held at the request of an interested individual to determine whether it is necessary to appoint a conservator. The person to be protected and his spouse must be served personally with legal notice of any conservatorship proceeding at least 14 days before the hearing date. If the person does not have his own attorney, the court must appoint one to represent him. The court may also request that a physician examine the person to be protected. At the hearing, the court determines whether an adequate basis exists for the appointment of a conservator. If necessary, a conservator will then be appointed.

The judge before whom the hearing is held determines who shall stand the expenses of the hearing. If he feels there is a valid reason for requesting a hearing, the estate of the person under consideration stands the expense. On the other hand, if he feels there is no basis for requesting the hearing, the person who made the request must stand the cost.

Once a conservator is appointed, he has legal title to all of the protected person's property with ample statutory authority for management without court intervention. He has the power to buy and sell estate assets and to use the income from the property or the property itself for the support, education, care, or benefit of both the protected person and his dependents. If income from the property is sufficient, the conservator has some limited power to make gifts on behalf of the protected person.

There are several requirements imposed by law on the conservator to insure that he properly performs his duties:

1. The court may request the conservator to post a bond. The amount of the bond is based upon the value of the *personal* property involved (the value of real estate is not considered). The court may, however, in its discretion, increase or reduce the amount, or waive the bond requirement entirely.

2. The conservator, within 90 days after his appointment, must file with the court a complete inventory of the estate. In addition, the conservator must keep suitable records of his administration, and upon request, show them to any interested party.

3. A conservator must account to the court for his administration of the property upon his resignation, removal, or at any other time the court may direct. In reporting to the court, the conservator may be required to submit to a physical inventory of the estate in his control. Furthermore, a court hearing may be held before the conservator's termination or to make sure that he has not mismanaged the property. The costs for the bonds, inventory, and other related administration expenses will be paid from the income or principal of the protected person's estate.

4. Finally, the conservator will be held personally liable for damages to the protected person or other interested parties which are the result of his failure to properly perform his duties.

A conservator is entitled to a reasonable amount of compensation (as determined by the court) for administering the financial and business affairs of the person being helped.

## GUARDIANSHIP

There are two types of guardianships under Nebraska law: one for a minor child and one for an adult who is unable to care for himself. The appointment, duties, and responsibilities of a guardian for an adult are different from those of a guardian for a minor.

A guardian can be appointed for any person who is found to be "incapacitated." An "incapacitated" person is one who is unable to care for himself due to advanced age, physical illness, mental illness, chronic intoxication, etc. The general procedures for appointing a guardian are basically the same as those for appointing a conservator.

A guardian may give any consents that may be necessary for the protected person to receive medical or other professional care, counsel, or treatment. A guardian also has limited authority to receive and apply money and tangible property for the support and care of the protected person.

The guardian's power over the protected person's property, however, is limited. For example, a guardian cannot: buy and sell stocks, bonds, or real estate; participate in the operation of the protected person's business; borrow money; or perform other administrative duties that may be necessary to manage the protected person's property. Only a conservator is given these broad powers of managing the protected person's property.

## WHICH SHOULD IT BE?

The appointment of a conservator should be adequate in most situations without the further appointment of a guardian. In addition to his broad management powers, a conservator can spend money for the care and support of the protected person. Consequently, a conservator could arrange for nursing home care when home care is no longer feasible. The only real need for a guardian arises when consent is required for medical treatment. Even this need may be avoided if hospital administrators will allow a spouse or adult child to sign consents for medical treatment.

Guardianship or conservatorship proceedings should not be confused with the involuntary commitment of a mentally ill person to an institution. The latter involves separate court proceedings initiated by the county attorney. Under current Nebraska law, a person cannot be committed involuntarily to an institution unless he is both mentally ill and dangerous to himself or others. A separate hearing is necessary to appoint a guardian or conservator to manage the property and affairs of a person who has been involuntarily committed to an institution.

The most serious disadvantages of a conservatorship or guardianship are the numerous costs involved—attorney fees, bond expenses, conservator's fees, a physician's examination, court costs, etc. Other management tools may provide adequate service and protection at less expense.

## TRUSTS

Trusts provide a useful and flexible method for managing property. Stated simply, a trust is an arrangement whereby a person, the grantor, transfers his assets to another person or corporate entity, called a trustee. The trustee manages the property for the benefit of the object of the trust, called the beneficiary. The trustee is given power to distribute both income and principal from the trust to beneficiaries named by the grantor. The grantor may name himself as the beneficiary of a "living" trust and he also may identify successor beneficiaries to receive the trust income and principal upon his death.

Banks, trust companies, or individuals may act as a trustee. Qualities to look for in selecting a trustee include: ability, continuity, integrity, experience, judgment, and understanding.

A corporate trustee (e.g., a bank or trust company) will generally have considerable experience and skill in managing property. It has the added advantage of being able to serve as a trustee for an indefinite period. Corporate trustees usually charge an acceptance fee, a termination fee, and some annual charge for managing trust property.

In contrast, individuals may or may not have the skills and ability needed to manage the property involved. But family members, as potential trustees, may have personal knowledge (which the corporate or unrelated individual trustee may lack) that would be useful in administering the trust property. In some instances, family members may be willing to act as the trustee without any compensation or for a smaller fee than might be charged by the corporate trustee. If an individual is used as the trustee, a successor trustee should be named in anticipation of the possible death or incapacity of the first named trustee.

In some instances, the higher fee which might have to be paid to the corporate trustee could be more than offset by the advantages of having the services of better trained, more experienced personnel. In other words, the choice of a trustee should not be determined solely on the basis of the size of the fee that would have to be paid.

More than one person can act as a trustee. An ideal arrangement might be for a corporate trustee and an individual to serve as co-trustees. The corporate trustee would provide the necessary skill in managing the property while the individual trustee would supply the personal touch and knowledge the corporate trustee might lack.

Successor trustees can also be named in the trust agreement. An alternative or successor trustee assumes the duties of the trustee upon the death, incapacity, or resignation of the primary trustee. If no successor trustee has been named, a court can appoint one to fill the vacancy. Naming a successor trustee in the trust instrument eliminates this extra court cost.

Trusts may either be revocable or irrevocable. A revocable trust may be terminated by the grantor at any time. Thus, if the grantor (person who established the trust) becomes dissatisfied with the trust arrangement, he can terminate the trust and reacquire legal title to the trust assets. In contrast, an irrevocable trust can only be terminated according to the express terms set forth in the trust agreement or by law.

The terms of the trust agreement or instrument can be quite flexible. It may provide that the trustee will pay the debts of the grantor as they become due in addition to managing property and

investing funds. For example, the trustee may be authorized to pay the beneficiary's utility, grocery, or medical bills. The trust instrument contains provisions for the disposition of the property when the trust is terminated or at the death of the grantor.

Unfortunately, the elderly are the prime target for those who would try to swindle them. The trustee is in a particularly advantageous position to guard against any such improprieties. Frequently, a trustee will be able to dissuade the grantor from making an unwise use of trust assets.

Although the trust may seem complex, it can be a very simple, efficient way of managing property. A major drawback is the cost involved. Fees will have to be paid an attorney for drafting the trust agreement. This is in addition to the fee which may have to be paid the trustee as compensation for managing the trust property. However, these costs may be more than offset by the advantages of having someone else manage the property.

## POWER OF ATTORNEY

A power of attorney is a written document in which a person, called a principal, appoints another as his agent. The power of attorney confers upon the agent the authority to act on the principal's behalf. The agent can be given broad powers to buy, sell, lease, or otherwise convey the property of the principal; or the power granted can be quite restrictive. Usually, a trusted individual or family member will act as the agent for a principal. The costs of paying someone to act for the principal can be eliminated or reduced by having a family member act as the agent.

In some instances, the establishment of a joint tenancy in property and bank accounts with an adult child or spouse and a grant of power of attorney to that family member may be sufficient for the management of the property. Where dissension exists within a family, however, the exercise of a power of attorney by a family member may not be desirable. Brothers and sisters, particularly those living a great distance away, may be suspicious of the way the estate is being handled by another brother or sister living close to the

parent. A grant of a power of attorney to a non-family member or the use of the more formal procedures of a conservatorship or trust may be more appropriate in such situations.

The power of attorney can also be useful to a person who wishes to manage his property as long as possible with the assurance that when he is no longer capable, the property would be turned over to a trust for management and distribution. For example, a property owner could set up a trust but transfer no assets to it. At the same time, he would grant a power of attorney to a person of his choice. When the property owner becomes incapacitated, the person holding the power of attorney transfers the owner's assets to the trust, thus providing a smooth transition from the owner to the trustee.

## JOINT BANK ACCOUNTS

A joint bank account is often used in connection with the management of an older person's money. The older person transfers his money into a bank account held jointly with a relative or other trusted person. The relative or other person is then able to draw checks and spend funds on behalf of the older person. A major drawback to the joint account is that each joint account holder may freely withdraw funds from the account. There is no guarantee that money withdrawn will be used in the manner intended.

The law provides some protection against the misuse of joint bank accounts. During the lifetime of the joint holders, the bank account belongs to each holder in proportion to his "net" contribution to the account. A holder who withdraws more than his contribution and uses the money improperly, may be liable to the other joint holder for the excess funds withdrawn. For example, suppose that a joint bank account was established between an older person and a close relative to provide for the older person's support. All the funds contributed to the account belonged to the older person. Instead of withdrawing the funds for the support of the older person, the relative used them for his own purposes. The relative may be held liable for the improper withdrawal.

Each joint holder is also protected from creditors of the other joint holders. Creditors can only reach the "net" contribution of the

respective joint holders. Thus, the older person who establishes a joint account all with his own money is protected from the creditors of the other joint holder, who made no contribution to the account.

Many of the potential problems with joint bank accounts can be avoided by carefully selecting the other joint holders and by explaining to them the nature and purpose of the account.

## SOCIAL SECURITY AND THE PAYEE REPRESENTATIVE

The Social Security Administration also offers some protective devices to aid the elderly in managing their affairs. On application, the Social Security Administration will issue the older person's checks to a "representative payee" who acts for the beneficiary. The payee will then be able to spend these funds for the older person. However, the payee is held accountable for the use of these funds and must submit periodic reports to the Social Security Administration. Typically, the payee will be a close friend, relative, attorney, or other trusted individual.

In addition, the Social Security Administration provides an option for the direct deposit of monthly social security checks into banks and other financial institutions to the account of the social security recipient. To obtain this service, a recipient having a bank account must sign an agreement with his financial institution and send a copy to the Social Security Administration. If the recipient has no bank account, he must open one to obtain this service. This direct deposit system should further aid the Social Security recipient who might lose or misplace checks.

## CONCLUSION

A number of legal devices are available to help the elderly manage their property and affairs. The choice of a particular device will depend on a number of factors: the family setting, the size of the estate, a person's health, and a person's own needs and preferences. Consult an attorney to determine the type of legal device most suitable to the particular situation of the older person.