SPECIAL REPORT #2

HOW TO MAINTAIN CONTROL OVER YOUR ASSETS AND AVOID THE GUARDIANSHIP COURT IF YOU ARE DISABLED

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Did you ever consider what would happen to your assets if you became disabled from an injury, stroke, Alzheimers or some other reason? Who would manage your affairs? No one--- not even your spouse or your kids, have the legal authority to sell your house, transfer your stock, close your mutual fund, file your income tax return or withdraw money from your IRA, unless the proper documents have been created in advance. Most people never consider this possibility. If you were too ill to communicate with your doctor, who would make medical decisions for you, consent to medical procedures, give medication, admit you to a hospital or care facility, etc.? This report is intended to tell you how the legal system operates in the event of your disability and how you can plan to effectively manage your medical and financial affairs **without court intervention**.

Who would make decisions about your financial affairs and your personal health, if you were disabled and the appropriate documents had not yet been drafted? The answer is, **GUARDIANSHIP----Court supervised GUARDIANSHIP!!**

WHAT IS A COURT SUPERVISED GUARDIANSHIP?

If you are disabled and you own bank accounts, investments, real estate, retirement accounts and other assets, or if you are unable to make necessary medical decisions, a lawsuit, called a Guardianship, must be filed in the local circuit court. After your family retains the services of an attorney, and the necessary documents are prepared and filing fees are paid, a "Petition for Appointment of Guardian for a Disabled Person" is heard by the Guardianship Court. The judge will review the Petition which requests that a certain individual (usually a family member) be appointed as your legal guardian. The judge will then review the evidence from your physician, (usually a sworn statement), that you are suffering from a condition that causes you to be unable to manage your affairs or make your own health care decisions.

GUARDIANSHIP CAN BE A HUMILIATING PROCESS

In some cases, a person suffering from a mental illness doesn't realize they are ill and they hire their own physician to "contest" the guardianship. This could lead to what might be a humiliating examination by an attorney in open court, in front of a room full of strangers!

YOU WILL NEED TWO LAWYERS, NOT JUST ONE

The judge must then select and appoint an attorney (from a list which has been pre-approved) to act as your personal lawyer, (called the *guardian ad litem*). The *guardian ad litem*'s job is to protect your legal rights and make sure that your legal guardian will act in your best interests. Your family is now **spending your assets on legal fees for <u>two</u> law firms**. The case will then be "continued" for 30 to 60 days to provide your *guardian ad litem* with the opportunity to investigate such issues as your medical condition, the value and type of assets you own, your financial and medical needs, and to evaluate the abilities and qualifications of the person who is requesting to be appointed as your legal guardian.

The *guardian ad litem* must prepare a written report which will be presented to the judge at the next court date. Assuming that the *guardian ad litem*'s report is favorable and the report is approved by the court, the person who has requested to be appointed as your legal guardian, will be approved by the Court. Once approved, **your legal guardian <u>must</u> post a surety bond** with an insurance company to protect your assets from possible loss (mismanagement, theft, etc.) The surety bond in Illinois is controlled by state statute. That bond must be 1.5 times the value of your assets ($200,000 of assets would require a $300,000 bond.) The bond fee charged by the insurance company is approximately ½ of one percent of the face value of the bond and that premium is usually paid annually.

YOU AND YOUR FAMILY LOSE <u>CONTROL</u> OVER YOUR AFFAIRS

Your legal guardian must file a written report regarding your health and an audited report regarding your finances and investments. These two reports must be filed and heard by the court on an annual basis **at an open court hearing**. The reports must be approved by the Judge and the *guardian ad litem*. Additional court hearings may be required for significant transactions, such as the sale of a home or transferring the disabled person to a new nursing home. This court hearing will be attended by the attorney hired by your legal guardian and by the *guardian ad litem*. This means that <u>two</u> different lawyers will be generating legal fees.

The entire guardianship process is designed to protect the disabled person's rights, however, it is costly invasion of your privacy, can be humiliating, and causes the family to give up **control** of your assets to the legal system.

THERE IS A SOLUTION TO THE GUARDIANSHIP PROBLEM

After you understand how the Guardianship system operates, your probably asking, "Can my assets be preserved and managed if I become disabled, without going through the Guardianship Court?" The answer is, **YES!** With the preparation of the appropriate estate planning documents **you and your family can completely bypass Guardianship**. A family dealing with the anguish and expense of a disabled loved one, doesn't need the further complications and costs of losing control to courts and attorneys.

There are **two** documents that will provide insulation from Guardianship in the event of disability. The first is a **Living Trust**.

A Living Trust is a written agreement which an attorney prepares for you that takes effect immediately (unlike a Will, which does not become effective until after death). If a Living Trust is properly drafted and you transfer your assets to your trust (a process called "funding" your trust) **it will work every time.** It will guarantee that the assets owned by your trust will not go through Guardianship.

But, **what is a Living Trust**? You've probably heard about it. Your friends and relatives may have even prepared one. Should you prepare one? If you want to avoid the expense, loss of control, and potential humiliation of Guardianship, a Living Trust will provide that protection. **A Living Trust can also avoid Probate** at the time of your death (See our Special Report #1 "How to Distribute your Estate to your Heirs Quickly, with the Least Possible Expense, and Make Sure your Wishes are Followed").

HOW DOES A LIVING TRUST WORK?

While you're still in good health, you retain an attorney and he or she will prepare a written agreement for you after conducting an analysis of your assets and determining what your wishes and objectives are. This agreement is **established by you** (the "Grantor" or "Settlor") and the assets in the Trust are **managed and distributed by you** as the "Trustee." You wear both "hats." Under Illinois law, this agreement, once signed and witnessed, creates a new legal entity that can hold title to and own your assets (house in Illinois, condominium in Florida, bank accounts, stocks, mutual funds, bonds, etc.). You can also name your trust as the beneficiary of your insurance policies, retirement plans, IRA's and annuities. You can always add additional assets to your trust. You simply provide the name of your trust to the bank, stock broker, mutual fund company, etc. and sign their form. To put your real estate (local or out-of state) the attorney prepares and records a new deed for you. The trust even uses your name. (a Trust created by John and Mary Smith would be called the "John and Mary Smith Living Trust"). **You (and your spouse) retain full control over the assets in your trust during your life.**

You decide what to buy and when to buy. **You decide** when to sell. You (and your spouse) are the only persons authorized to withdraw interest and dividends. You (and your spouse) are the only persons who can use the principal. **You don't give up any control!** You don't even change the way you file your income taxes.

WHY DOES A LIVING TRUST AVOID GUARDIANSHIP?

The answer is provided in the Trust document. It states that in the event that your physician issues a written statement indicating that you are no longer able to manage your affairs, then your spouse, child or another person you have named, can manage the trust for you. They act as the trust manager, not the beneficiary. That means that all the trust assets must still be used only for your benefit (and if your married, for your spouse's benefit, too). You may have a disability, but your trust doesn't. Since your trust owns your assets and not you, **the Guardianship Court does not step in.** Your financial affairs remain **private**; there are **no lawyers** to hire; no trips are being made to the courthouse; and your family has no legal fees or surety bond fees to pay. Your family remains in **control.**

POWERS OF ATTORNEY CAN AVOID GUARDIANSHIP, TOO

I mentioned before that there are two documents that can avoid Probate. The second document is called a Power of Attorney. A Powers of Attorney are a much more simplistic documents than a Living Trust. They're also very inexpensive to create. The Power of Attorney appoints a person (spouse, child, relative, or friend) that you trust, to sign your name for you if your physician states that you are too ill to do it yourself. In Illinois, that person is called your "agent". Lawyers recommend that you use a Power of Attorney for handling those financial affairs that can't be handled by your Living Trust. For example, your Living Trust cannot be the "owner" of your income tax return (Form 1040). But you still need to file and sign one each year. The person who is acting as the Trustee of your Living Trust has no authority to sign your Form 1040. But a Power of Attorney can name an agent who can legally sign your 1040. It also works for social security problems and Medicare documents. There are also a few assets that you own that cannot be owned by a Living Trust. You may have a retirement plan operated by an employer. It contains your money but it's not really in your name; it's in the employer's name. Because it's in your employer's control, that plan cannot be transferred into your Living Trust. But if you're disabled, you may need those funds. The Power of Attorney works well for that type of retirement plan. It allows your agent to withdraw funds from the retirement plan for your benefit. Since your Power of Attorney appoints someone to take control over financial management of your assets if you are disabled, **the need for a court supervised Guardianship disappears.**

You can also prepare another type of Power of Attorney that appoints an "agent" to make **health care** decisions for you. This type of Power of Attorney can be written so that it doesn't start to work until your doctor says that you are too ill to make your own health decisions. It provides your agent with the authority to give consent or withhold consent for medical procedures such as surgery, tests, rehabilitation, and medication. Detailed instructions can also be included regarding your wishes related to termination of artificial life support in the event of an irreversible coma or a permanent vegetative condition.

Our attorneys are available to prepare Living Trusts or Powers of Attorney that will work for you. Please contact us if you are concerned with avoiding Guardianship in the event of disability. Schedule a FREE initial consultation. (847) 670-8200

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