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Aging: Taking Care of Business 2008

Maine Aging and Disability Services

Maine Department of Health and Human Services

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Office of Elder Services

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John E. Baldacci, Governor

Brenda M. Harvey, Commissioner

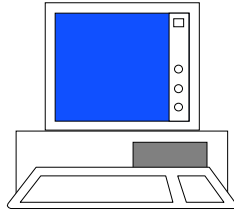
AGING: TAKING CARE OF BUSINESS

A Guide for Older People,
Families and Friends Regarding:

- √ Health Care Advance Directives
- √ Durable Powers of Attorney for Finances
- √ Guardianship/Conservatorship
- √ Other Related Information

Office of Elder Services
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PREFACE

Many people are able to stay independent and take care of business by themselves as they age. For some people, however, there may come a time when they are unable to make or communicate their decisions about health care or finances. This book discusses how adults can protect their right to choose by making decisions ahead of time. This book is intended for two audiences:

- People who want information on how to plan for the future using a Health Care Advance Directive, a Durable Power of Attorney for Finances, a Joint Bank Account or a Revocable Living Trust;
- Families and friends who want information about how to take care of business for someone they know under these arrangements or under Guardianship, Conservatorship or Representative Payeeship.

This book is intended to give readers a general understanding of the subject and information on where to go for help. It is not intended as legal advice for people to follow in specific cases. Readers should consult an attorney or the Register of Probate with questions about their own situations.

CHAPTER 1

PLANNING AHEAD

The Time for You to Plan Is Now

You are probably aware of the need to plan for the future by making a will or some other arrangement to handle your affairs after your death. It is just as important to plan for the time in your life when you may be unable to communicate or make responsible decisions about your living arrangements, care and finances.

The law states that a person is *incompetent* or *incapacitated* when the person is *unable to make or communicate responsible decisions* about his or her person or property because of a physical or mental illness or disability.

An illness or disability does not by itself mean that an individual is not able to manage his or her affairs. Even people with mental impairments, such as the effect of a stroke or early Alzheimer's disease, may still be able to make many of their own decisions.

The time may come, however, when you are no longer competent to make decisions on your own about your life. *The time to plan for that possibility is now while you are competent* and can still make responsible decisions about what you want in the event you become incapacitated. *These arrangements will not be legally valid if you sign legal papers after you become incapacitated.*

If you become incapacitated without planning ahead, these things may happen:

- A family member or friend may have to go to Probate Court to get appointed as your Guardian or Conservator in order to make decisions for you. You may have little say over who is appointed and what kinds of decisions the Guardian or Conservator can make for you.
- If you are dying or in a coma, the hospital may not know your wishes about how and when you want to die.
- Your bank may not allow your family access to your money to pay for your care and support.

By planning ahead *before* you become incapacitated, you can determine how your money, property and health care are handled:

- You can choose the person or persons whom you want to take care of your business.

- You can give directions as to what kinds of decisions should be made about your health care, living arrangements, money and property.
- You can continue to handle your own affairs until you become incapacitated and can change the arrangements for any reason prior to that time.

Taking Care of Business for Family or Friends

Even if an individual needs some help managing their affairs, his or her problems may not be serious enough to require legal arrangements. For example, if the person is simply forgetful a helping hand may be all that is needed: helping to sort through bills and insurance forms, balancing a checkbook, filling out a tax return, applying for benefits, keeping a doctor's appointment or giving reminders to take medication.

Decisions may be difficult and you can help a person think through problems. Sometimes that may be listing the pros and cons of undergoing surgery or helping that person hire someone to do housework or home repairs. In these situations, it may not be necessary to use any formal legal arrangement.

However, a helping hand may not be enough when a person's problems become more serious and he or she is unable to make important life decisions. A person may neglect financial obligations or a serious health condition and a crisis may result.

If this is the situation, you may now need to make decisions and take care of business for your friend or relative. You may only do so, however, if you have the proper legal authority to act on that person's behalf. Under Maine law, except in certain circumstances, you do not automatically have the legal right to make decisions for another adult, not even for a spouse.

The following chapters describe the various legal arrangements which enable people who are still of sound mind to plan for incapacity and which enable family members and friends to take care of business for someone who is having difficulty doing so. Remember: these arrangements will not be legally valid if the person signs the documents after he or she becomes incapacitated.

Legal Tools for Taking Care of Business

Chapter 2 describes *Health Care Advance Directives*. These are legal papers signed by a person while still competent which give directions as to how health care decisions should be made for him or her after

incapacity. Often, the Health Care Advance Directive names a relative or friend as a decision maker responsible for carrying out the instructions.

Chapter 3 describes *Joint Bank Accounts*, which allow family and friends access to an older person's money in order to pay for the person's needs. Joint ownership of other kinds of property is also discussed.

Chapter 4 describes the *Durable Power of Attorney (DPOA) for Finances*. In signing this form, a competent person appoints a decision maker to handle financial affairs in the event of incapacity.

Chapter 5 explains the use of a *Revocable Living Trust*, which allows a person to direct the management and distribution of his or her property when he or she becomes incapacitated or dies.

Many families find that an older person, now incapacitated, did not plan ahead. These family members may need to apply to a Court or government agency to become appointed *Representative Payee, Guardian or Conservator*. These arrangements are described in Chapters 6 and 7.

Finally, Chapter 8, "Resources," is a list of places you can go to for help and information.

CHAPTER 2

HEALTH CARE ADVANCE DIRECTIVES

Health Care Advance Directives

When you need medical care, you have the right to make choices about that care. But there may come a time when you are too ill to make those choices known. You can protect your right to choose by making decisions ahead of time about the medical care you may want in the future. This is called giving an *advance directive*. Advance directives not only protect your right to make medical decisions that affect your life but also help your family and physician by providing guidelines for your care.

There are two common types of advance directives: a *Power of Attorney for Health Care* and *instructions regarding end-of-life care* (these instructions are often referred to as a “*Living Will*”). A Power of Attorney for Health Care is a written document in which you can name a person, called an *Agent*, to act on your behalf and make decisions for you if you become unable to do so yourself. A “*Living Will*” refers to a set of written instructions that explain your wishes regarding end-of-life decisions in the event that you are unable to communicate with your doctor.

In thinking about these decisions, you may wish to speak to close family members and friends, your physician and to clergy if you choose.

Maine Health Care Advance Directive Form

You may write your own advance directive or you may use a pre-printed form. One form often used in Maine is called the *Maine Health Care Advance Directive Form* which is a pre-printed form from the Maine Hospital Association. This form is available at most hospitals. You may also get a copy of the Maine Health Care Advance Directive Form from the Department of Health and Human Services’ Office of Elder Services. This section describes that form and also gives general information about powers of attorney for health care and special instructions for end-of-life care. Since there are other pre-printed forms available, your form may look a little different from what is described in this book. It is important that any form you use be properly signed and witnessed, as described below.

The Maine Health Care Advance Directive Form allows you to do one or all of the following: create a Power of Attorney for Health Care; create special instructions for end-of-life care (commonly known as a “Living Will”); name your primary doctor; state your wishes about organ donation; and state your wishes about funeral and burial arrangements regarding funeral and burial arrangements. You may choose to fill out all parts of the form or only some of them. The Maine Health Care Advance Directive Form must be signed by you and witnessed by two competent adults.

The Form also includes a Do-Not-Resuscitate (DNR) directive and has instructions on how to complete that form. The DNR directive is described in more detail below. The DNR directive must be signed by you and a physician, physician assistant or nurse practitioner in order to be effective.

Power of Attorney for Health Care

A Power of Attorney for Health Care lets you choose another person to make health care decisions for you right away or when you are too ill to make decisions about your own care. Whether you write your own Power of Attorney for Health Care or use of the Maine Health Care Advance Directive Form, you must sign the document and have it witnessed by two competent adults.

The person you choose to make your health care decisions is called your Agent. You should also name a Successor Agent in case the first person you choose is unavailable. (Do not be confused by the use of the word “attorney.” Neither you nor your Agent needs to be a lawyer.) Maine law does not allow an owner, operator or employee of a residential long-term health-care facility in which a person is living to be an Agent for that person under a Power of Attorney for Health Care unless he or she is a family member.

The Agent must make decisions according to any instructions you have given and wishes you have made known while competent and must consider your personal values. For example, you can state that you are opposed on religious or personal grounds to a particular form of medical care. Your Agent must abide by your wishes.

You may limit the kinds of decisions your Agent can make. If you do not place any limits on your Agent’s authority, the Agent will have authority to make any and all health care decisions for you including the authority to: consent or withhold consent to any care and treatment; choose your physician; place you in an institution such as a nursing home; and decide whether you should be kept alive by artificial means if you are terminally ill.

Before naming someone as Agent, you should first find out if they are willing and able to act as your Agent. Be sure to tell that individual you are naming them in the document as your Agent. You should also discuss your expectations with that person to be sure that your wishes will be carried out. Some of the factors you should consider in choosing an Agent are:

- Do I trust this person?
- Does this person understand my feelings and my point of view? Will he or she follow my wishes if I am incapacitated?
- Is this person willing to spend the time needed to be available when I am ill and give directions to the doctors and nurses?

As long as you are still competent to tell the doctors and nurses what you want, they will listen to you and follow your instructions about what care you want to be given. The doctors and nurses will seek out your Agent under the advance directive only when you are no longer competent or able to express yourself unless you have indicated otherwise.

Instructions for End-of-Life Care

This document is commonly called a “Living Will” and it allows you to express your wishes about end-of-life decisions in the event that you can no longer communicate with your doctor. You may write your own document or you can use Part 2 of the Maine Health Care Advance Directive Form which is titled “Special Instructions”.

While some people may want to prolong life regardless of recovery, others may want to refuse medical measures that would prolong life if the chances of recovery are not good. A “Living Will” allows you to decide whether you would like to receive or refuse life prolonging measures. Among other things, you may indicate whether you would like to receive or refuse artificial nutrition and hydration and whether you would like to receive treatment for the relief of pain and discomfort.

Designation of Primary Doctor

It is important that you have a doctor who understands your wishes, will honor them, and will work with the Agent named in your Power of Attorney for Health Care. Your physician is obligated to notify you if he or she is unwilling or unable to comply with your instructions. You may name your primary doctor in Part 3 of the Maine Health Care Advance Directive Form.

Organ Donation

You may also wish to say whether or not you want to have your body, organs or tissue donated at death, either for transplant or as therapy for another person, or for purposes of research and education. You should discuss your wishes with members of your family so that they are comfortable with your decision and do not object to your wishes after you die. Organ donation is covered in Part 4 of the Maine Health Care Directive Form.

Funeral and Burial Arrangements

The Maine Health Care Directive Form includes a section where you may state your wishes and any preferences you have about funeral and burial arrangements. If you would like to make any of these wishes known, you should fill out Part 5 of the Form.

How to Complete the Health Care Advance Directive

You may write your Power of Attorney for Health Care or Living Will or you may use the Maine Health Care Advance Directive Form. Whether you write your own or use a form, it must be signed by you and witnessed by two competent adults, preferably not your heirs. Do not have the person you name as Agent sign as a witness. People who travel out of state may want to have the document witnessed by a notary public since some other states have this requirement. Part 6 is the Signature Section of the Maine Advance Directive Form.

You should give a copy of the completed document to your doctor, to any other health care providers you have, to any place where you get health care and to any Agents you have named. Again, you should make sure that your Agent understands your wishes and is willing to carry them out. You may also want to give copies of the advance directive to a relative or friend who is likely to be notified in an emergency and to your lawyer if you have one.

Information About Do Not Resuscitate (“DNR”) Orders

If you do not wish to receive cardiopulmonary resuscitation (known as “CPR”) by ambulance crews if your heart or breathing suddenly stops, you need to complete a special form called a Do-Not -Resuscitate (DNR) Directive which provides instruction to ambulance crews about your wishes. This form is now included as Part 7 of the Maine Advance Directive Form. Part 7 includes instructions for completing the DNR Directive and also has information about health alert jewelry.

In order to be effective and have ambulance crews follow your wishes not to be resuscitated, the DNR Directive must be signed by you and a physician, physician assistant or nurse practitioner and shown to the ambulance crews. This form lets ambulance crews know that you do not want drugs, machines or CPR to be used to restart your breathing or heart beat.

If you are in a hospital and do not wish to be resuscitated, your doctor must write an order called a “Do Not Resuscitate” order or DNR. That order is placed in your medical record at the hospital. If you have concerns or questions about CPR, discuss them with your doctor while you are well.

If You Change Your Mind: Revoking the Health Care Advance Directive

You have the right to cancel or change the advance directive at any time as long as you are still able to make decisions by writing on the form, on another piece of paper or completing a new form. Sign and date any of the changes that you make. Notify your doctor, your Agents and anyone else who got the first advance directive that you have changed or canceled it and give them a copy of the changed or canceled form and a copy of any new form you may fill out.

Information for Family Members and Friends Acting as Agents under a Power of Attorney for Health Care

When you make health care decisions for a friend or relative under an advance directive, you must follow his or her directions and wishes. These include wishes and directions written down in the advance directive as well as directions and wishes expressed in other ways. You must also consider the person’s values, such as the values of his or her religion or culture. You should talk to the older friend or relative while that person is still competent to be sure that you understand his or her wishes. If you feel that you cannot carry out that person’s instructions, then you should notify that person if he or she is still competent and withdraw as Agent.

You may decide at some point that you no longer wish to serve as the Agent under a Power of Attorney for Health Care, either because you are moving from the area or for some other reason. You are not required to obtain approval for withdrawing as the Agent or go through any formal process. You should, however, let your friend or relative know that you will no longer serve as the Agent if he or she is still competent so that he or she can make new arrangements. You should also notify the Successor Agent named in the form.

If your older friend or relative is no longer competent and there is no Successor Agent available or willing to take over, you should make sure that someone else is available to look after the person's needs such as a family member or the State agency which provides adult protective services. (See [Chapter 8, "Resources."](#))

What Happens If You Do Not Have a Health Care Advance Directive: Surrogate Decision-Making

Even if you do not sign a Living Will or Health Care Power of Attorney, it may be possible for someone else, usually a family member, to make health care decisions on your behalf. This person is called a "surrogate". In Maine, a surrogate may make health care decisions for an adult who does not have an Agent or Guardian (see [Chapter 7](#) for a discussion of Guardianship) if that person has been determined by the primary physician to lack capacity.

Among other things, the law lists in order of priority the people who can act as your surrogate for health care decisions. First, the physician must consult your spouse or an adult who shares an emotional, physical and financial relationship similar to a spouse. If there is no such person available, the doctor will consult your adult children. If you have no adult children, or none are available, then the doctor will go down the list seeking out any parents who are available, then sisters and brothers, adult grandchildren or more distant relatives. If there is no family whatsoever, the doctor may consult with a concerned adult outside your family who knows your wishes and values.

Similar to an Agent, a surrogate must follow any directions or wishes expressed by the family member or friend for whom they are now making health care decisions. If no instructions or wishes are known, the surrogate must in good faith make decisions based on the person's best interests. In determining a person's best interests, the surrogate must consider the person's personal values.

Although families in these situations usually try to make good decisions for a loved one, you should still consider putting your wishes in writing in a Power of Attorney for Health Care and a Living Will. This way you can choose the person or persons in whom you have the greatest trust to make health care decisions for you. You can also avoid the possibility that members of your family will disagree over your care, causing friction for them at a difficult time and possibly requiring them to go to court. It will also enable your family to know for certain how you want to be cared for, rather than have to guess your wishes.

CHAPTER 3

JOINT BANK ACCOUNTS

Deciding About Joint Bank Accounts

A Joint Bank Account is a common arrangement that people use to allow more than one person to access money in an account. However, before you decide to create a Joint Bank Account, it is important that you understand the risks and consequences of having a Joint Bank Account. *It is important for you to realize that both you and the other person will be considered joint owners of the money in that account, regardless of whose money it may actually be. This means that the person you add on your account as the joint owner has the right to withdraw funds from that account without notifying you. Therefore, if you have a Joint Bank Account it is very important that the joint owner of your bank account be someone whom you trust.*

Before creating a Joint Bank Account, you should carefully weigh the advantages and disadvantages of having this type of arrangement and depending on your situation consider whether there are other arrangements that suit your needs better, especially if your only purpose in creating a Joint Bank Account is for financial management in case you become incapacitated. If you decide to create a Joint Bank Account, you may want to talk to your financial institution to see if there are any appropriate safeguards or protections for your account that might be available.

Consequences of a Joint Bank Account

Another aspect of a Joint Account you should be aware of is what happens to the money in the account after one of the joint owners dies: the money in a Joint Bank Account will go directly to the other joint owner of the account and not to the people named in your will or heirs. Some people consider this an advantage of having a Joint Bank Account since the money will not have to go through procedures in Probate Court. However, this may be an unintended consequence if what you really wanted was to have the cash included in your estate and shared with other people who are not named on the Joint Bank Account.

In addition, as mentioned above, Joint Bank Accounts also carry the following risks:

- *Either one of the joint owners to a Joint Bank Account can make unlimited withdrawals from the account without obtaining the other's approval. In fact, either joint owner acting alone can empty the account.*

- If your relative or friend does take money for his or her personal use rather than for your benefit as originally agreed, it may be very difficult to get that money back. You may need to bring legal action against that individual.

Clearly, when a Joint Bank Account is used it is very easy for an untrustworthy friend or relative to take another person's money. If you have had money taken from your account for purposes you have not agreed to, contact a lawyer immediately. Friends and family members who promised to help have a moral and legal obligation to fulfill their promises.

Joint Bank Accounts and MaineCare

If you are living in a nursing home or expect to have to go to a nursing home in the coming years, you should consider the effect that having a Joint Bank Account will have on your eligibility for MaineCare. MaineCare coverage is very complex and the rules change often. You should consult the Department of Health and Human Services' Office of Integrated Access and Support, Legal Services for the Elderly or a private elder law attorney for information and advice about your own situation.

Tax Concerns with Joint Bank Accounts

There may also be tax issues to consider in using a Joint Bank Account depending on the amount of money in the Joint Bank Account. You may need to consult a financial advisor or attorney to determine if there will be any income or gift tax implications to your being a joint owner of the account.

Joint Ownership of Real Estate and Other Property

Most married couples own houses, cars, stocks, bonds and other property jointly. However, the rules of joint ownership of these other types of property differ from those of Joint Bank Accounts. For example, if two people are named as joint owners of a house, the law will not allow either of them to sell the house without the permission of the other joint owner.

Consequently, if you become incapacitated your spouse (or whoever else is named as joint owner) would be unable to dispose of the property to get money for your care and support. In order to do so, that person would need to have authority under a Durable Power of Attorney for Finances, a Trust document or be appointed as your Conservator.

Using a Joint Bank Account in Connection with a Durable Power of Attorney for Finances

Even if you do have a Joint Bank Account, it may be advisable to also have a Durable Power of Attorney for Finances. The Joint Bank Account will allow another person to access the money in that particular account. However, it will not enable that person to make other transactions for you that may be necessary involving real estate, personal property, stocks and bonds, pensions, insurance policies and health benefits. Durable Powers of Attorney for Finances are discussed in the next chapter.

CHAPTER 4

DURABLE POWER OF ATTORNEY FOR FINANCES

What is a Durable Power of Attorney for Finances?

The *Durable Power of Attorney (DPOA) for Finances* allows a trusted person to spend money on your behalf and manage your property. Like the Power of Attorney for Health Care, discussed in Chapter 2, it requires you to name another person to act as your proxy and make decisions for you: in this case about your money and property rather than about health care.

In signing a DPOA for Finances, you are called the *Principal*. The person to whom you give these powers is called an *Agent* or *Attorney-In-Fact*. (As is true of the Power of Attorney for Health Care, neither the Principal nor the Agent needs to be a lawyer in order to use this legal arrangement.)

In taking care of business under a DPOA for Finances, your Agent is supposed to do what is in your best interest and use your money and property only for your benefit. By giving someone a DPOA for Finances, you are giving that person some or all of the following powers:

- To spend your money, cash checks and withdraw money from your bank accounts.
- To sell your property, including real estate and personal property.
- To enter into contracts on your behalf.

One of the few powers *not* granted is the power to write your *Last Will and Testament*. Only you personally can write your own Will. The Agent is also not authorized to make gifts to himself or to others unless the DPOA for Finances explicitly authorizes such gifts.

Also, your Agent will not have any authority with respect to your property when you die. (At that point the “Personal Representative” or “Executor” named in your Will or appointed by the Court will take control of your assets and their distribution.)

An advantage of the DPOA for Finances is that in signing it *you do not lose any of your power to make your own decisions as long as you remain competent*. Rather, you are simply *sharing* your power over your finances with someone else.

Another advantage of using the DPOA for Finances is that you can change your mind. You are entitled to *revoke* the power you gave to your relative or friend at any time as long as you are still of sound mind.

Limited DPOA for Finances

You may not want to share all of your powers with your relative or friend. For example, you may want to give your Agent the power to pay your bills and sign checks but not the power to sell your house. The DPOA for Finances can be as broad or as restricted as you want it to be.

When the DPOA For Finances Takes Effect

Ordinarily a DPOA for Finances takes effect as soon as you sign it. This means that your Agent has authority to write checks, pay bills, make withdrawals from your accounts and sign off (on your behalf) on the sale of real estate and other property. You will still have the authority to do these things as well. In signing the DPOA for Finances you make the decision to *share* power over your finances.

This may be exactly what you want if you expect to be temporarily incapacitated by surgery or medication or have a medical condition which causes you to be competent some of the time and incompetent at other times.

“Springing” DPOA for Finances

You can also choose to have the DPOA for Finances take effect only in the event you later become incapacitated. Some people choose to sign a *Springing* DPOA for Finances because they are not comfortable with the idea of someone else having the power to write checks on their accounts and spend their money while they are still in good health and capable of managing their own affairs. Under the terms of the Springing DPOA for Finances, the Agent’s powers “spring” into effect when a health professional (usually the person’s attending physician) certifies that the person who signed the form is now incapacitated. Until that happens, the Agent has no power to act.

The disadvantage in using a Springing DPOA for Finances is that there may be a delay in getting the doctor or health professional to certify incapacity. This can prevent the Agent from taking prompt action with

respect to the incapacitated person's affairs and finances. Most people choose the non-springing form of the DPOA for Finances for the sake of simplicity.

How to Choose an Agent Under a DPOA for Finances

If you decide that you want to plan ahead using a DPOA for Finances, you must first consider who is the most suitable person to act as your Agent. In choosing an Agent, you should look for the following:

- Someone you trust with your money.
- Someone willing to spend the time to pay your bills, do your banking, take care of your property, maintain insurance, pay taxes and deal with investments if you have them. This can involve many hours of paperwork every month.
- Someone who is knowledgeable about finances or who knows when to seek the help of experts.

It is also important that you talk to the person you have in mind before actually naming them as your Agent to be sure that the person understands your wishes and expectations and is willing and able to act as your Agent under the DPOA for Finances.

You may choose one person to make both financial and health care decisions or you can separate these functions. You should also choose a *Successor Agent* to act as a replacement in case the first person you chose is unable to fulfill the duties under the DPOA for Finances because of illness, death, relocation or other reason.

Caution About Using a DPOA for Finances

The disadvantage of using a DPOA for Finances is that there is ordinarily *no formal supervision* of the person acting as your Agent. Since no court is involved in the signing of a DPOA for Finances, no court or agency will be watching to see that the job is done right. Although your Agent is supposed to make decisions in your best interest and use your money and property only for your benefit, the fact is that this person may have great freedom to do as he or she pleases. Therefore it is important that you choose someone you trust when you sign a DPOA for Finances.

Specific Language Requirements for a DPOA for Finances

The word “*Durable*” in Durable Power of Attorney means that your Agent can continue to make decisions for you even after you become incapacitated. If it is not durable, the power of attorney will be valid only for a limited period of time and will be useless once you become incapacitated. In order to be durable, the form must contain language similar to the following:

- “This Power of Attorney shall not be affected by subsequent disability or incapacity of the principal.” or, for a Springing DPOA for Finances,
- “This Power of Attorney shall become effective upon the disability of the principal.”

Under Maine law, any DPOA for Finances must also contain specific statutory language clearly explaining the rights and responsibilities of both the Principal and Agent. If you are the Principal, this language reminds you that you are giving your Agent broad powers over your finances, including the power to sell property and spend your money without your prior consent or approval. If you are an Agent, it warns you that you are under a legal duty to use the Principal’s money and property only on the Principal’s behalf and that you may be liable for damages or subject to criminal liability if you fail to do so.

You should also know that your Agent is not authorized to make gifts to anyone, including to the Agent himself, unless the DPOA for Finances explicitly authorizes such gifts. If you want your Agent to have this power, then you should include specific language in your DPOA for Finances.

How to Execute a DPOA for Finances

When you sign a DPOA for Finances, you must have your signature notarized by a notary public or an attorney at law.

After filling out and signing the DPOA for Finances, you should give a copy to the person or persons named in the document. If your relative or friend is going to start making transactions for you immediately, you should give copies of the document to any person, business or organization with whom your Agent will be dealing, especially your banks. A telephone call or a visit to these places will help your bank, your insurance agent and others know that this arrangement is what you want and that they can transact business with your Agent on your behalf.

If the DPOA for Finances deals with the power to sell, lease or otherwise dispose of your *real estate*, you should have the Power of Attorney recorded in the *Registry of Deeds*, located in the county courthouse for the county in which the land is located. There is a small filing fee charged for that service.

Whether to Seek a Lawyer's Help

The DPOA for Finances may involve complex financial and legal issues. Even if your estate is small, there may be issues concerning MaineCare eligibility and taxes. For larger estates the issues are even more complex. Although it may be possible to obtain ready-made forms, it is advisable to seek the help of a lawyer in executing the form to be sure that the document fits your needs and that it meets the requirements of Maine law.

There are places in Maine where you can go to get free and low-cost legal help with the preparation of a DPOA for Finances. ([See Chapter 8, "Resources."](#))

Revoking the DPOA for Finances

Whatever the reason: If you no longer want your relative or friend to handle your affairs, *you have the right to revoke (take back) the DPOA for Finances at any time as long as you are still of sound mind.*

In order to revoke a DPOA for Finances, you should write or type a statement which includes the following:

- Your name and the date.
- That you are of sound mind.
- That you wish to revoke the DPOA for Finances.
- Specify the date of the original DPOA for Finances.
- Specify the person or persons named as your Agents.
- Your signature, which should be notarized by a notary public or an attorney at law.

If the DPOA for Finances deals with real estate and was recorded in the Registry of Deeds, you should have the new form revoking the DPOA for Finances recorded in the Registry as well.

You should then distribute copies of this "revoking" form to your Agent(s) and to banks and all others who received a copy of the original DPOA for Finances. Again, a call or visit to each of these people and places will help to explain the situation and to show them that you are of sound mind.

If you are in good health, then you are not likely to encounter any trouble in revoking the DPOA for Finances. It will be obvious to everyone you deal with that you are competent to revoke the DPOA for Finances and to manage your own affairs.

However, if for some reason there is doubt about whether you are competent, people who have relied on the DPOA for Finances may be uncertain as to what to do. They may or may not follow your directions in revoking the DPOA for Finances.

If this is the situation, you should get a lawyer to help you to protect your rights. Legal Services for the Elderly, located in several offices throughout the State, provides lawyers who are experts in this area of law. Their services are available free of charge or at low cost to people 60 years of age or older. (See Chapter 8, “Resources.”)

After you revoke the DPOA for Finances, you may either:

- Execute a new DPOA for Finances naming someone else as your Agent to handle your affairs,
- or
- Handle your affairs on your own.

Information for Families and Friends

It is not appropriate to pressure a friend or relative into signing a DPOA for Finances. In order to ensure that your friend or relative is acting voluntarily, you should encourage him or her to consult a lawyer in private about the advantages and disadvantages of signing a DPOA for Finances.

Remember: The DPOA for Finances will not be effective unless the person is still competent when he or she signs it. If your older relative or friend is uncertain or unwilling to sign a DPOA for Finances, you should not try to talk him or her into doing so. Moreover, legal problems may arise later if it appears that you put pressure on the other person to sign the document.

Caution to Relatives and Friends Who Act as Agents Under a DPOA for Finances

In handling money and property as an Agent under the DPOA for Finances, you are acting as a *fiduciary*. This means that you are required to use money or property only for that person’s benefit in a way that he or she would want it used. You are not supposed to use it for your own benefit. If you do, you could be sued or prosecuted criminally. In addition:

- You may not “commingle” the person’s funds with your own funds but must keep those funds in a separate account.
- You may not make gifts of the person’s money to yourself or others unless the DPOA for Finances explicitly says that you may.
- You are supposed to save or invest money left over after the older person’s needs are taken care of. You must keep it secure in a place where it will earn interest or yield a return of some kind.
- You must take good care of real estate and personal property although you are not required to use any of your own money in doing so.

When your friend or relative dies, your authority as Agent under the DPOA for Finances will end. You will not have authority with respect to the money and property the person leaves behind unless you are also named as *Personal Representative* in that person’s Will or appointed by the court.

A Personal Representative (also called an “*Executor*” or “*Administrator*”) is a person, usually a relative of the deceased, who handles the administration of the Will and the distribution of money and property. For more information on the responsibilities of the Personal Representative, consult an attorney or the Register of Probate.

CHAPTER 5

REVOCABLE LIVING TRUSTS

What is a “Trust”?

A *Trust*, like a Durable Power of Attorney for Finances, is a document which gives authority to another to manage one’s money and property. Under a typical Trust, one person (called a “*Trustor*” or “*Settlor*”) allows someone (called a “*Trustee*”) to control his property and to make it available for the benefit of himself or others (called “*Beneficiaries*”). Unlike a DPOA, a Trust is usually a very long and very detailed document in which the Trustee must follow specific instructions as to how the money and property should be handled. Another difference is that the Trust may continue in effect after the death of the person who created it, unlike the DPOA. The individual named in the Trust to control the property (the Trustee) may be yourself, a friend or family member. Or the Trustee may be a professional such as a bank official, attorney or financial advisor who brings financial or legal expertise to the management of a large or complex estate and who is paid for doing so.

The use of a Trust may be worthwhile for people who have substantial estates. It may also be useful for people of modest means who have a complex family issue requiring detailed estate planning, such as the need to plan for the care and support of a disabled adult child or other dependent.

Trusts are used for a variety of purposes, including: to save on estate and income taxes; to provide support for a dependent after one dies or becomes incapacitated; to distribute property after death; to protect land from development; and to make gifts to charity. To explain all these different types of Trusts would be beyond the scope of this book. If you are interested in learning more about any of the above, it is advisable to speak to a lawyer.

It is, however, useful to explain one particular type of Trust which may be used in planning for incapacity and which has recently received a lot of attention: the *Revocable Living Trust*

The Revocable Living Trust

A Revocable Living Trust (also called a “Living Trust”) is a Trust which is set up and takes effect during a person’s lifetime (unlike some other Trusts which may not take effect *until* a person’s death). The Living Trust remains under the person’s control until he or she becomes incapacitated or dies.

One of the reasons some people choose to execute a Living Trust is that it does “double duty”:

- It can be used like the Durable Power of Attorney for Finances to designate a person to make financial decisions for you when you become incapacitated, and
- It can also be used in place of a Will to distribute your property after death.

The Living Trust should not be confused with the Living Will. The Living Trust deals *only* with property; it does *not* provide for decisions regarding your health care as the Living Will does.

Forming a Living Trust is very much like forming your own company with you as the only employee.

This is how it works:

- You transfer ownership of your property from your individual name to a "Trust."
- In the Trust papers, you name yourself as Trustee, the person who will control the money and property, for as long as you are competent to manage your own affairs. Spouses usually create the Trust together and are "Co-Trustees."
- You name a "Successor Trustee" to take over management of the money and property in the Trust when either you become incapacitated or die.
- You give specific directions in the Trust document as to exactly how your money should be spent and your property managed by the Successor Trustee if you become incapacitated.
- In addition, you give instructions as to how the Successor Trustee should distribute your property when you die.

Once the Living Trust is in place and you transfer your property into it, the Trust is the legal owner of the property. As the Trustee, however, you continue to control your property and spend your money just as you did before. You have the right to revoke the Trust or change its terms, including the names of the Beneficiaries or the Successor Trustee.

How the Living Trust Works When You Become Incapacitated

Typically, the Living Trust document directs that control of the money and property goes to the Successor Trustee if a health professional (usually your attending physician) certifies that you are mentally incapacitated, The Successor Trustee manages the money and property according to the details in the Trust document. The Successor Trustee will use it to meet your needs. At that point you will be a Beneficiary of the Trust. The Trust may also spell out what the Successor Trustee is supposed to do with the rest of the money such as providing support to other relatives, giving to charity or making investments.

How the Living Trust Works When You Die

When you die, the Successor Trustee will distribute your property according to your instructions. The property does not go through the Probate Court as it would if you used a Will to pass on your property. By avoiding the probate process you may avoid the delays which sometimes occur as well as some costs. You can also keep your affairs private since the Living Trust, unlike a Will, is not filed with the Court or open to public inspection.

Preparation of a Living Trust

As stated earlier, the Living Trust is most useful for people who have substantial estates. Because a Living Trust must be carefully written by a lawyer and tailored to your own situation, the preparation of it is costly. A typical fee may be several thousand dollars for the attorney to write the Trust and transfer the titled property that you designate into the Trust. This will include your home, other real estate, motor vehicles, bank accounts, stocks, bonds and so forth. In the case of your home and any other real estate, you must have new deeds prepared and recorded in the Registry of Deeds. If the house is under mortgage, you will have to get the bank or other holder of the mortgage to agree to this transfer.

When executing a Living Trust, it is also wise to execute a “back-up” Will. This will serve to pass on any property which did not get transferred into the Trust either because you overlooked it or acquired it after you became incapacitated.

Advantages of the Revocable Living Trust

Many of the advantages of a Living Trust are referred to above. They are:

- Until you are considered incompetent by your physician or other health professional, you have complete control over your money and property.
- You can revoke the Living Trust whenever you want as long as you are still competent. There may be some costs involved in this, however, since you will need to transfer title of property from the Trust back into your own name.
- You can change the person named as Successor Trustee, the named Beneficiaries and other terms of the Trust.

- The Living Trust enables people with substantial estates to arrange for a professional with financial expertise to serve as Successor Trustee for the purpose of dealing with complex financial, tax and legal issues.
- Banks and other professionals may be more comfortable managing money under a Trust document than under a Durable Power of Attorney for Finances.
- The Living Trust document allows you to give detailed instructions as to how your money is spent and your property managed.
- You can use the same document to plan for incapacity and for the distribution of property after death.
- By using a Living Trust instead of a Will, you can maintain privacy about how much property you have and to whom you are leaving it. (A Will, filed with the Probate Court after death, is a public document open to anyone who wants to see it.)
- The Living Trust may prevent delays in the distribution of your property after your death because your money and property will not have to go through the probate process.
- The Living Trust may also save your estate money leaving more money for Beneficiaries. This depends on the size of your estate and the complexity of your estate plan. When a Will is probated, fees must be paid to the Court and to attorneys. These costs are avoided when you use a Living Trust to distribute your property after your death. These savings, however, may be offset by expenses associated with the preparation of the Living Trust which are likely to be several thousand dollars.

Disadvantages of a Revocable Living Trust

- A Living Trust may not be necessary for people whose estates are modest and uncomplicated.
- The fees for preparing a Living Trust may be higher than the costs associated with having a Will prepared and administered.
- The probate process may move along fairly quickly for small estates which do not involve disputes between heirs or creditors. Consequently, a Will may be a simpler and less expensive way to pass on your property than a Living Trust.
- Similarly, the Durable Power of Attorney for Finances may be less expensive and more appropriate for smaller estates than the Living Trust in planning for incapacity.

CHAPTER 6

BECOMING A REPRESENTATIVE PAYEE

What Is a Representative Payee?

Most older people, retired or disabled, receive a check of some kind from a federal agency, such as Social Security or the Veterans' Administration. If the recipient is unable to manage the money appropriately because of a disability, family members or friends may want to help by taking control of the money to spend it on that older person's needs. To do so, they must apply to the agency paying the benefits to be appointed *Representative Payee*.

As a Representative Payee you are responsible for receiving the older person's check and spending it on his or her care and support. The older person (called the *Beneficiary*) may request that a Representative Payee be appointed if he or she realizes that failing health may soon make it difficult to manage money. However, usually it is a concerned relative or friend, or perhaps a nursing or boarding home concerned about getting paid, who seeks to have a Representative Payee appointed.

How to Become a Representative Payee

To become a Representative Payee it is not necessary for the older person to be competent or to agree to the arrangement. (This differs from the Joint Bank Account, Durable Power of Attorney and Trust: in all of those arrangements, it is necessary for the older person to agree to the arrangement and sign papers while still competent.)

In order to become a Representative Payee, you must first contact the federal agency and ask for the necessary papers. The papers will require you to describe your older friend's or relative's disability and incapacity and include a supporting statement from a doctor or other health professional. You will also be required to provide information about yourself.

Once the agency receives your letter, it will notify the older person that you are seeking to become Representative Payee. The incapacitated person is then given the opportunity to object and to present evidence of his or her ability to manage the money.

The agency will appoint you Representative Payee if it finds that the person is indeed unable to manage his or her own benefits and if you appear to be capable of doing so on that person's behalf. The agency will start sending the person's benefit check directly to you.

On the other hand, if the agency finds that the person is still able to manage his or her own money or that you are not capable of doing so, then it will deny the application and continue sending the money to your older friend or relative.

The Social Security Administration, the Veterans Administration and other federal agencies each have their own processes for appointing Representative Payees. These agencies insist that people follow their procedures even if they have authority under another type of legal arrangement. Therefore, even if you have already been appointed as a Guardian or Conservator or hold a Durable Power of Attorney, you must still apply to each of the federal agencies involved to become Representative Payee.

Responsibilities of a Representative Payee

You may spend the check only for the Beneficiary's benefit. The agencies' regulations require that you spend the money in the following manner:

- First, on current maintenance: food, shelter, clothes, medical care, institutional care and personal comfort.
- Second, for the support of the person's legal dependents: his or her spouse and minor children.
- Third, as payment of the person's debts.
- Fourth, as investments, preferably in interest-bearing accounts in federally insured financial institutions and United States Savings Bonds.

The federal agency is responsible for seeing that you do a good job as Representative Payee and may require you to submit an account showing how you have spent the person's benefits. Therefore, it is important that you keep records of all expenditures, recording all deposits, withdrawals and checks that you write. You should also keep all receipts, bills of sale and canceled checks showing purchases and payments made on the Beneficiary's behalf. If a question ever arises about whether you are fulfilling your responsibilities as Representative Payee, it is important to be able to show that you have acted in good faith and have used the money appropriately and on behalf of the Beneficiary.

If the agency decides that you have taken some of the Beneficiary's money yourself or have managed it negligently, you may be terminated as Representative Payee. The agency may require you to repay the money and could possibly bring criminal charges against you.

CHAPTER 7

BECOMING A GUARDIAN OR CONSERVATOR

The purpose of a Guardianship or Conservatorship is to ensure that continuing care is provided for individuals who are unable to take care of themselves or their property because of incapacity. A Guardianship or Conservatorship is generally only considered after other alternatives have been explored. Whether a person needs a Guardian or Conservator is decided by a Probate Court.

A Guardianship or Conservatorship differs from the Durable Power of Attorney for Finances and Health Care Advance Directives because in the latter an older person *agrees* to have someone else take care of business and personal affairs and *shares* decision-making powers with that person. In the former, the Probate Court makes the decision about whether a Guardian or Conservator is needed and who the Guardian or Conservator should be. The Court may also appoint a Guardian or Conservator over the objection of the incapacitated person. The Court may also appoint a Guardian or Conservator with full powers or it may appoint a Limited Guardian or Conservator depending on what the Court feels is appropriate.

Reasons for Becoming Guardian or Conservator

When is it necessary to apply for Guardianship or Conservatorship for an incapacitated friend or relative? You may need to do so when:

- The incapacitated person when competent never executed an advance directive such as a Power of Attorney for Health Care, a DPOA for Finances, a Joint Bank Account or Trust; or
- The incapacitated person did enter into one of these arrangements but the arrangements turn out to be inadequate. For example, the person executed a Power of Attorney for Health Care which grants you authority to make health care decisions but which does not grant you authority to make financial decisions.

What is a Guardian?

A *Guardian* is a person who is appointed by the Probate Court to make decisions for someone who is *incapacitated*. The incapacitated person is called a "*Ward*." A Guardian has the authority to make decisions about the Ward's *person*, such as:

- Where the Ward will live.
- Whether the Ward will go into a facility such as a nursing or boarding home.
- What medical treatment the Ward will receive.

When the Ward has little money or property the Guardian has authority to manage the Ward's money and property. If the Ward receives a check from Social Security, the Veterans Administration or another federal agency, the Guardian will also need to apply to become Representative Payee, as described in [Chapter 6](#). However, the Guardian does not have power to sell real estate. The Guardian also does not have the power to write a Will for the Ward.

If the Ward owns real estate or has a substantial amount of money or property which he or she cannot manage effectively, the Judge may appoint a Conservator in addition to a Guardian or the Judge may appoint one person to do the job of both the Guardian and the Conservator.

Powers and Duties of a Full Guardian

If there are no limitations placed on the Guardian by the Court, then the Guardian is considered a *full Guardian*. If you are appointed full Guardian for a Ward, you will have most of the powers and duties that a parent has toward a minor child, including the following:

- You are entitled to have custody of the Ward. You may have him or her live with you; however, you are *not* required to have the Ward live with you.
- You may decide where the Ward will live, either in or out of state.
- You are entitled to put the Ward in a hospital, nursing home, boarding home or other institution. However, you are not allowed to commit the Ward against his or her will to a mental health institution (such as Riverview Psychiatric Center or Dorothea Dix Psychiatric Center) without going through the District Court procedure for involuntary commitment.
- You must see to it that the Ward is cared for and kept comfortable. You may do this yourself or make sure that others are available to care for the Ward.

- You must see to it that the Ward receives “appropriate training and education.” (While this part of the law is primarily for younger Wards, it is important for older adults to receive stimulation as well through social and recreational activities.)
- You must take care of the Ward's clothing, furniture, vehicles and other personal effects.
- You must make decisions about the Ward's medical and personal care, seeing that he or she receives appropriate care from doctors, nurses, dentists and mental health professionals. In the decisions you make, you must follow any directions given or wishes expressed by the Ward when he or she was still of sound mind. This includes directions and wishes the Ward talked about but never wrote down.
- You may not revoke a Ward's Advance Health Care Directive unless the Court expressly authorizes the revocation. In addition, if the Ward executed a Power of Attorney for Health Care while competent and named someone else as Agent, the health care decisions of the Agent under the Power of Attorney for Health Care take precedence over those of a Guardian absent a court order.
- The Court may require that you report on the Ward's condition.

In a Limited Guardianship, you will not have all the powers and duties listed above. You will have only the powers and duties which the Court specifically gives you. Limited Guardianship is discussed later in this Chapter.

If no Conservator has been appointed for the Ward, you may also have limited responsibility for the Ward's money and property:

- You must use the Ward's money for his support and care.
- You must save whatever money is left over for the Ward's future needs.
- You must make sure that those who are obligated to give financial support to the Ward do so. This may mean applying for support to a former employer, the Social Security Administration, the Veterans Administration, payers of private disability and pension benefits, insurance companies, Medicare, MaineCare or others.
- If the Ward receives regular payments either from Social Security, the Veterans Administration or other federal agency, you will need to follow the federal agency's procedures to become a Representative Payee, allowing you to receive the check and use it for the Ward's needs.

If as Guardian you are providing room and board for the Ward, or if your spouse, parent, or child is providing the room and board, you must obtain the Probate Court's approval before you can charge the Ward for the cost of that room and board.

As Guardian you are not allowed to sell real estate belonging to the Ward or make any financial transactions other than spending money for the Ward's needs and keeping leftover amounts in bank accounts. If you discover that the Ward has a significant amount of money or property in excess of his or her needs, you should ask the Probate Court if you or someone else should be appointed as Conservator.

You are *not allowed* to make a Will for the Ward. Only a Will made by the Ward while still competent will be valid.

The Ward's Loss of Rights

A Guardian has the same power over a Ward that a parent has over a child under the age of 18. However, the Guardian does not have to use his or her own money to support the Ward and cannot be made to pay others for damage caused by the Ward unless the Guardian was reckless or negligent.

A person who becomes a Ward loses the following rights:

- A Ward under full Guardianship cannot make choices about his or her own life, such as where to live, whether to get medical treatment, how to spend money and whether to marry.
- The Ward may have no choice about whether a Guardian is appointed. Even if the Ward objects, the Court may still decide to appoint a Guardian if it appears that the Ward needs one.
- The Ward is not allowed to revoke a Guardianship without requesting a Court hearing. The Ward must then show the Court that the Guardianship is not needed or that the Guardian is doing a poor job.

What is a Conservator?

A *Conservator* is a person appointed by the Probate Court to protect and manage the *money and property* of any person who is unable to manage his or her own property because of a mental or physical illness or disability. The person under Conservatorship is called a "*Protected Person.*" The Conservator can do such things as:

- Pay the Protected Person's bills.
- Sell, mortgage, rent out or manage the person's real estate.

- Invest the person's money.

The Conservator is *not* allowed to make decisions about the Protected Person's personal life unless he or she is also appointed as the Guardian. Nor can the Conservator write a Will for the Protected Person.

Powers and Duties of a Conservator

If you are appointed Conservator, you will have the following powers and duties:

- You must make money available for the care and support of the Protected Person. The Court may require either that you make the payments or, if a separate Guardian has been appointed, that you give funds to the Guardian so that he or she can make the payments.
- If you are the Conservator and a separate Guardian has been appointed, you must listen to the Guardian's recommendations as to what the Ward's needs are and how money should be spent for the Ward's care and support.
- You may have to spend money for the care and support of the Protected Person's dependents: his or her spouse and any child under 18 years of age. You may also have to spend money for the care and support of members of the Protected Person's household who are not legally dependent but are unable to support themselves: for example, disabled relatives who have lived with the Protected Person for a long time.
- As Conservator, you are *not allowed* to make a Will for the Protected Person.

As Conservator, you must manage and invest excess property and money so as to provide a reasonable return. In doing so, you have broad powers as long as you act in the best interests of the Protected Person:

- You may invest the Protected Person's money and property.
- You may operate the Protected Person's business.
- You may buy and sell property either for cash or on credit.
- You may maintain, change or repair buildings belonging to the Protected Person.
- You may rent out property belonging to the Protected Person.
- You may buy and sell stocks, bonds and securities.
- You may buy insurance to protect the Protected Person's property.
- You may bring a claim or law suit against anyone who owes the Protected Person money.

- If someone sues the Protected Person, you may hire a lawyer to defend or settle the law suit.
- You may borrow money for the Protected Person.
- You must file tax returns and pay the Protected Person's taxes from his or her funds.
- You may hire people to help you do your job as Conservator, such as lawyers, accountants and investment advisors, and pay them from the Protected Person's funds.
- You may make gifts to charity and to the Protected Person's friends and relatives, if he or she clearly would have made such gifts if still competent and if the gifts are no more than 20 percent of the Protected Person's annual income. You must seek the Court's permission before making larger gifts and should ask before making gifts of any size to yourself or members of your family.

Limited Guardianship or Conservatorship

Sometimes a Ward or Protected Person is incapacitated only in some areas of her life yet can still take care of herself in other areas. The law requires that the Probate Court help the Ward or Protected Person stay as self-reliant as possible. To accomplish this, the Judge may give the Guardian or Conservator only certain limited powers and leave the incapacitated person still in charge of other aspects of her life. This is called *Limited Guardianship* and *Limited Conservatorship*.

Under a *Limited Guardianship*, the Guardian has the power only to make certain decisions for the Ward. An example of a Limited Guardianship is where a Guardian has the authority to make health care decisions but not decisions about the Ward's living arrangements. The Judge might do this where a Ward with mental illness has developed a life-threatening medical condition for which he is refusing care. At the same time, the Ward is managing well in other areas of his life and taking care of other needs. The appointment of a Guardian with limited powers over the Ward's medical treatment alone will get the Ward the necessary treatment without taking away his other rights.

Under a *Limited Conservatorship*, the Conservator would have control over some but not all of the incapacitated person's money and property. An example of a Limited Conservatorship is the appointment of a Conservator who is to protect and manage the money and property of the Protected Person but who is not given the authority to sell the house of the Protected Person. This may be because there is an expectation that the Protected Person, although perhaps not living there at the time, may at some point in the future return to his or her home.

Single Transaction Authority and Appointment of Special Conservator

The most limited form of Conservatorship is called *Single Transaction Authority*. The Court directs or approves a single act or transaction which is needed in order for the Protected Person to get appropriate care and protection.

Single Transactions may include:

- The payment of a bill, such as a mortgage payment or large debt to prevent foreclosure on a house or loss of a major asset.
- Setting aside certain money or property to keep the Protected Person from spending, selling or giving it all away.
- The sale, lease or mortgage of property to provide funds for the Protected Person's support.
- Entering into a contract for care and services for the Protected Person.
- The creation of a Trust to support the Protected Person.

The Probate Court will either carry out the transaction itself or appoint a friend or relative as the *Special Conservator* to do it. Either way, there is no Conservator with continuing power over the Protected Person.

Managing Money and Property as a Fiduciary

In handling a person's money or property as either a Guardian or Conservator, you are acting as a *fiduciary*. This means that you are required to use the money or property for the benefit of the Ward or Protected Person in a way that he or she would want it used. *You may not use the money or property of the Ward or Protected Person for your own benefit.* If you do so, you could be sued or prosecuted criminally.

Procedures for Becoming a Guardian or Conservator

In order to become a Guardian or Conservator, you must file a petition and other papers in the Probate Court in the county where the person lives. Every county has a Probate Court. You must also attend a hearing before the Probate Judge for that county. Before appointing you as Guardian or Conservator, the Judge must be persuaded that:

- The person is incapacitated;

- The person needs someone to make personal decisions for him or her and/or manage his or her affairs; and
- You will be a suitable Guardian or Conservator.

Several steps are involved in becoming a Guardian or Conservator. They are intended to provide the Court with information and protect the rights of everyone involved.

Filing the Petition and Other Papers

Anyone who is concerned about the incapacitated person or the estate may file a petition and other papers asking the Court to appoint a Guardian or Conservator. Forms are available from the Register and clerks of Probate. When you file the petition, you may nominate yourself to serve as the Guardian or Conservator or you may nominate someone else.

You will also need to provide the Court with these other papers in addition to the petition:

- A Guardianship or Conservatorship Plan, stating how the person’s medical, social, financial and other needs will be met or how the estate will be managed.
- A Physician’s or Psychologist’s Report providing a diagnosis and a statement regarding the person’s capacity to make personal and medical decisions or manage financial affairs.
- An Acceptance of Appointment signed by the proposed Guardian or Conservator.

Notice to the Individual and Interested Parties

The individual for whom someone is seeking a Guardianship or Conservatorship must receive a copy of the petition and a notice of the hearing in Probate Court at least 14 days before the hearing. The law requires that the court visitor or a deputy sheriff “serve” these papers on that individual. The law also requires that “interested parties” receive these materials by certified mail. These interested parties include relatives, caregivers and payers of benefits.

There is a Probate Court in each county. Some will send out the notices. In others, the person who filed the petition for Guardianship or Conservatorship will be expected to send out the notices. You should check with the Court to see how the notices should be handled.

Who May Serve as Guardian or Conservator?

In appointing a Guardian or Conservator, the Judge will look for a person who knows the individual well, who will make good decisions for him or her, and who will spend the time needed to do a good job. The Court prefers to appoint close relatives or someone chosen by the individual while he or she was still competent. The law does not allow an owner, administrator or employee of the nursing home or other facility in which the person is living to serve as Guardian or Conservator unless he or she is a relative.

In some cases, there are incapacitated people who have no relatives or friends available to serve as Guardian or Conservator. In these cases, the Court may appoint a State agency (either the Department of Health and Human Services' Office of Elder Services or the Office of Cognitive and Physical Disability Services) as the person's Guardian or Conservator. If this happens, a caseworker from one of these agencies assumes the same responsibilities as a friend or relative appointed Guardian or Conservator.

Appointment of a Visitor, Guardian ad Litem or Attorney

After you file the petition, the Judge will usually appoint a neutral person called a *Visitor* or *Guardian ad Litem* to investigate the situation and to make a report to the Court. The Visitor or Guardian ad Litem will do the following:

- Visit the individual's home as well as the place he or she will live if a Guardian is appointed.
- Explain to the individual in plain language what the petition for Guardianship or Conservatorship involves.
- Talk to the individual and find out how he or she thinks and feels about having a Guardian or Conservator.
- Find out whether the individual wants to attend the hearing and be represented by an attorney.
- Interview the proposed Guardian or Conservator

A Visitor is usually a person trained in social work, nursing or related field. A Guardian ad Litem is usually an attorney. *Ad Litem* means "for the law suit." The Guardian ad Litem will assist the individual during the Court proceeding but will not be involved any longer once the proceeding is over.

If the individual makes it clear that he or she does *not* want a Guardian or Conservator, the Judge will appoint an *attorney* if the person does not already have one to represent that individual in opposing the Guardianship or Conservatorship.

The Hearing

If the individual does not object to having a Guardian, the hearing before the Probate Judge is likely to be informal. You and the others present tell the Judge what you feel the best arrangement will be for your incapacitated friend or relative. The Judge will also want to hear from that individual. He or she should be encouraged to attend the hearing and be involved in the process to the extent that he or she is able to do so.

If the individual or someone else opposes the Guardianship or Conservatorship, or if there is any kind of disagreement, the hearing will be more formal. The individual at issue has the right to attend the hearing, to see and hear all of the evidence regarding his or her condition, to be represented by a lawyer (even if the he or she does not have money to pay for one), to present evidence to the Judge and to cross-examine witnesses or have the lawyer do so.

The individual or his or her attorney may request a closed hearing to protect that individual's privacy. This means that the only people allowed to attend will be the individual, the petitioner, the proposed Guardian or Conservator and their attorneys. Members of the public and observers will not be allowed in the courtroom.

The Judge's Order

The Judge may issue a decision at the end of the hearing or he or she may choose to review the evidence and issue a decision later. The Judge will either appoint a Guardian or Conservator or decide not to appoint anyone if it appears that the older person can still take care of his or her own affairs.

Appointment of Temporary Guardian or Conservator in an Emergency

Sometimes an emergency will exist and you may want to be appointed immediately as Temporary Guardian or Temporary Conservator to protect a friend or relative: for example, in a case where the older person is being physically abused, refuses to be treated for a life-threatening illness or is having money or property stolen from him. In such a situation you may not want to wait the several weeks to several months that it usually takes to become Guardian or Conservator. Instead, you need to act immediately to get the individual out of danger. Except in limited circumstances, you must notify the incapacitated person and certain other family members prior to filing the petition. Prior notice is not required if the giving of notice places the individual at substantial risk of abuse, neglect or exploitation.

You must make a special request for Temporary Guardianship or Conservatorship on the form provided by the Court. You will have to file an affidavit (a statement, witnessed by a notary public) explaining the facts of the emergency and showing the appointment is necessary to prevent serious, immediate and irreparable harm to the health or financial interests of the individual. The Court may also require that you provide a doctor's or psychologist's statement that the person is incapacitated. A hearing will be scheduled promptly at which you will have to appear. If the Judge is convinced of the seriousness and urgency of the situation, you will be appointed Temporary Guardian or Temporary Conservator. You will be allowed to take action to address the emergency: for example, by removing your friend or relative from the custody of the person abusing her, by authorizing lifesaving medical treatment or preventing access to the incapacitated person's finances.

As Temporary Guardian or Temporary Conservator, you are limited by your appointment in what you can do and you can serve no longer than six months without going through the procedure to become a Guardian or Conservator with ongoing powers. Also, a Court Visitor will visit the incapacitated person shortly after you are appointed to explain the proceeding. If the incapacitated person does not want you to serve as his or her Guardian or Conservator, he or she can request that a hearing be held within 40 days.

Consulting an Attorney

It may be helpful to have the assistance of an attorney in the Guardianship or Conservatorship process, especially in the following circumstances:

- If the individual or someone else opposes the Guardianship or Conservatorship and is represented by an attorney; or
- If the individual has a complex estate.

If the individual has money in his or her estate, you may seek the permission of the Court to have the attorneys' fees paid from the estate at the end of the proceeding as long as they are reasonable. You may have to pay from your own pocket and get reimbursed from the estate later on unless your attorney agrees to wait until the end of the proceeding for payment. Either way, you should discuss fee arrangements, including the attorney's hourly fee, the number of hours estimated to be spent on your case and any other arrangements for payment, before hiring an attorney.

If you decide *not* to hire an attorney, you can still ask the Register and clerks of Probate for help in filling out the papers and meeting all the legal requirements. The Register and the clerks, however, will not give you legal advice.

Filing of Inventory and Accounts by a Conservator

If you are appointed Conservator, you must give the Court an inventory of all the Protected Person's money and property within 90 days after being appointed. The inventory should include the location, value and description of each item. Appraisers may have to be consulted. The Conservator also must provide a copy of the inventory to the Protected Person and to the Protected Person's Guardian if a separate Guardian has been appointed.

As Conservator you will be required to report to the Probate Judge on the estate of the Protected Person when the Conservatorship ends. In addition, private conservators appointed after January 1, 2008 are required to file an account annually with the Court for approval. If the Conservator is a spouse or domestic partner of the Protected Person, the Court may waive this requirement for good cause. The Judge may also require you to report to the Court from time to time; therefore, you should always keep complete and accurate records.

Costs and Fees in Guardianship and Conservatorship

There are a number of costs involved in filing for Guardianship or Conservatorship. These costs include:

- Fees to the Probate Court for filing the petition.
- Fees charged by the doctor or psychologist for evaluating the individual's capacity, writing the report required by the Court and testifying.
- Fees charged by the attorney whom you hired.
- The fees paid to the Visitor or Guardian ad Litem.
- If the individual opposes the Guardianship or Conservatorship, the fees charged by his or her attorney

If the fees and costs are reasonable, you may make a request to the court that they be paid out of the estate of the Ward or Protected Person at the end of the proceeding. If the court allows reimbursement you should take no more than what you actually spent and have records of the expenditures you made, including receipts and canceled checks. You should also record these payments in the running account you keep of the

Ward's or Protected Person's finances. You may have to pay many of these costs yourself and get reimbursed from the funds of the Ward or Protected Person at the end of the proceeding.

If you are a Guardian and a separate Conservator has been appointed, you should ask the Conservator to reimburse you for these costs.

If there is not enough money in the estate to pay the fees of the Visitor, the Guardian ad Litem or the court-appointed attorney for the Ward or Protected Person, the fees may be paid from state or county funds. Public funds will not pay your own attorney's fees or the filing fee.

The Financial Responsibility of the Guardian or Conservator

By the time you are appointed Guardian or Conservator for an older relative, he or she may not have enough money to pay the bills or be self-supporting. If the older person is in a nursing home, his or her funds are likely to run out at some point.

As Guardian or Conservator, your duty is to pay for the Ward's or Protected Person's support and expenses *only out of the Ward's or Protected Person's own money and property*. You are not obligated to use any of your own money or property to pay off his or her debts even if his or her money runs out. Creditors of the Ward or of the Protected Person will not be able to sue you personally or attach or seize your property in order to get what they are owed.

In the case of medical, nursing home, home health and similar costs, the MaineCare program may cover the costs after your relative runs out of money. Other benefit programs such as Supplemental Security Income (SSI), food stamps and heat assistance should also be explored.

A word of caution for Conservators: whenever you enter into a transaction for your older relative you must make it clear that you are acting as Conservator on behalf of another person rather than on your own behalf. If you lead the other party to believe that you are acting on your own behalf, the other party will be able to hold you personally liable. When signing papers, you should sign "Ethel Jones, *as Conservator for Jane Doe*."

Obtaining a Conservator's Bond or Surety

If you have been appointed Conservator for an estate of \$25,000 or more, the Court will require you to furnish a *bond* to prevent the Protected Person from losing his or her money or property. The amount of the bond is based on the value of the money and property under your control. It is up to the Court to decide whether a bond will be required for estates less than \$25,000.

A bond is a form of insurance for which you pay a premium using money from the Protected Person's estate. The bonding company promises to pay the Protected Person's estate if money or property is lost through wrongdoing, neglect or mismanagement.

Getting Paid for Activities as Guardian or Conservator

In acting as Guardian or Conservator, you may incur expenses. You may have to travel which can involve travel expenses or time off from work. You are entitled to *reasonable* compensation for the expenses you incur and for the time you spend acting as Guardian or Conservator. "Reasonable" means not excessive. The law does not allow you to make a living or make a profit from these activities. Nor will you be allowed to take payment for those visits to the Ward or Protected Person which you would make anyway as a concerned friend or family member.

If you are the Conservator for your older relative or friend, or a Guardian with control over a small estate, you must get the Judge's approval before you pay yourself for your time, services and expenses. The Judge will decide if what you request is reasonable. If you are a Guardian and there is a separate person appointed as Conservator, you should go to the Conservator and request payment.

Examples of activities for which Probate Courts have allowed reasonable compensation are: repairs to the house of the Ward or Protected Person, moving furniture and other effects of the Ward or Protected Person and time spent trying to sell the property of the Ward or Protected Person, especially when the Guardian or Conservator has had to take time off from a job to do the work.

In order to do your job as Guardian or Conservator well, you will probably have to consult professionals such as attorneys, bankers, investment advisors and physicians. You may pay these professionals fees out of the Ward's or Protected Person's money as long as the payments are reasonable.

Reports to Probate Court

As Guardian or Conservator you will be required to report back to the Probate Judge on the condition of the Ward or Protected Person as well as on the estate when the Guardianship or Conservatorship ends. This will happen under the following circumstances:

- The Ward or Protected Person dies;
- The Ward or Protected Person is again able to manage his or her own life and finances and no longer needs a Guardian or Conservator; or
- You resign or are removed as Guardian or Conservator.

The Judge may also require you to report from time to time while you are serving as Guardian or Conservator; therefore, you should always keep complete and accurate records of what you do on his or her behalf. You should keep copies of all papers relating to the Ward or Protected Person: medical records, insurance forms, canceled checks, deposit slips, receipts and bills of sale, deeds to land and buildings and expense receipts.

Arranging for Someone Else to Take Over as Guardian or Conservator

It is always possible that something could happen to you and that temporarily there would be no one available to take care of business for your Ward or Protected Person. You should plan for this possibility by writing a Durable Power of Attorney and by making provisions in a Will. In these documents, you will name someone to take over as Guardian or Conservator if you become incapacitated or die.

If you are going to be temporarily unavailable, such as when you go on vacation, you should write a Power of Attorney in which you name another relative or friend as the person to act as Guardian or Conservator in your absence. You should give a copy to the person named in the Power of Attorney and, if your Ward or Protected Person does not live with you, to the nursing home or to the person with whom he or she lives.

Resigning as Guardian or Conservator

At some point you may decide that you no longer have the time or energy to continue to take care of business for your Ward or Protected Person. You may be in poor health yourself, your job may become more demanding, or you may be moving away. Whatever the reason, you must get the Judge's permission to withdraw as Guardian or Conservator by filing a *Petition to Terminate* the Guardianship or Conservatorship. If you have been Conservator, you will be required to file an *Account* of the Protected Person's finances and

property and how they have been spent on the form provided by the Court. Until the Judge has issued an order allowing you to withdraw and appointing a new Guardian or Conservator, you must continue to fulfill your duties as Guardian or Conservator.

Sometimes incapacitated people under Guardianship or Conservatorship recover and are able once again to take care of their own business. If this happens, you should do the following:

- Have the Ward or Protected Person see a doctor or psychologist for the purpose of getting a new assessment of his or her capacity.
- Petition the Probate Court for a limitation or termination of the Guardianship or Conservatorship. The Ward or Protected Person may still need some help, in which case you will continue to be involved under a more limited Guardianship or Conservatorship.

When the Judge does issue an order allowing you to withdraw you must give the Ward's or Protected Person's money, property, papers and other items in your possession to the new Guardian or Conservator or to the Ward or Protected Person.

Removal of a Guardian or Conservator

A Guardian or Conservator who fails to act in the best interests of the Ward or Protected Person can be removed by the Probate Court. The Ward or Protected Person, his or her relatives or anyone interested in the welfare of that person may ask that the Guardian or Conservator be removed by filing a petition with the Court.

The Judge may appoint a Visitor to investigate the situation and write a report. A hearing is held, similar to the hearing in which the Guardian or Conservator was originally appointed. Notice must be given to all the people concerned and all parties are entitled to be represented by lawyers to present evidence and to cross-examine witnesses.

Death of the Ward or Protected Person

If the Ward or Protected Person dies, you should notify the Probate Court immediately. If he or she left a Will, you must deliver it to the Court. You may apply to become that person's *Personal Representative* if one is not named in the Will. A Personal Representative (also called an "executor" or "administrator") is a person, usually a relative of the deceased, who handles the administration of the Will and the distribution of money and property. For more information on the responsibilities of the Personal Representative, consult an attorney or the Register of Probate.

CHAPTER 8

RESOURCES FOR OLDER PEOPLE AND THEIR FRIENDS AND FAMILIES

State Agencies

Maine Department of Health and Human Services

Office of Elder Services

442 Civic Center Drive

11 State House Station

Augusta, ME 04333-0011

287-9200 in Augusta

Toll Free Nationwide: 1-800-262-2232

TTY: 1-800-606-0215

Office of Cognitive and Physical Disability Services

11 State House Station

Augusta, ME 04333-0040

287-4200

TTY 1-800-606-0215

Legal Services

Legal Services for the Elderly

Legal Hotline

623-1797 in Augusta

1-800-750-5353 (Toll Free and TTY)

Maine Bar Association Lawyer Referral Service

622-1460 in Augusta

1-800-860-1460 (Toll Free)

Area Agencies on Aging

Aroostook Agency on Aging

(Aroostook County)

P.O. Box 1288, 33 Davis Street

Presque Isle, ME 04769

TEL and TTY: 764-3396

1-800-439-1789 (Toll Free)

Eastern Agency on Aging

(Hancock, Penobscot, Piscataquis and Washington Counties)

450 Essex Street

Bangor, ME 04401-3937

TEL and TTY: 941-2865

1-800-432-7812 (Toll Free)

SeniorsPlus

(Androscoggin, Franklin and Oxford Counties)

P.O. Box 659, 8 Falcon Road

Lewiston, ME 04243-0659

795-4010

1-800-427-1241 (Toll Free)

TTY: 795-7232

Spectrum Generations

(Kennebec, Knox, Lincoln, Sagadahoc, Somerset and Waldo Counties, Brunswick and Harpswell)

P.O. Box 2589, One Weston Court

Augusta, ME 04338-2589

622-9212

1-800-639-1553 (Toll Free)

TTY: 623-0809 (Augusta)

TTY: 1-800-464-8703 (Toll Free)

Southern Maine Agency on Aging

(Cumberland, except Brunswick and Harpswell, and York Counties)

136 US Route 1

Scarborough, ME 04074

TEL and TTY: 396-6500

1-800-427-7411 (Toll Free)

Probate Courts**Androscoggin County Probate Court**

2 Turner Street

Auburn, ME 04210

782-0281

Aroostook County Probate Court

26 Court Street, Suite 103

Houlton, ME 04730

532-1502

Cumberland County Probate Court

142 Federal Street

Portland, ME 04101-4196

871-8382

Franklin County Probate Court

38 Main Street
Farmington, ME 04938
778-5888

Hancock County Probate Court

60 State Street
Ellsworth, ME 04605
667-8434

Kennebec County Probate Court

95 State Street
Augusta, ME 04330
622-7558

Knox County Probate Court

62 Union Street
Rockland, ME 04841
594-0427

Lincoln County Probate Court

High Street
P.O. Box 249
Wiscasset, ME 04578
882-7392

Oxford County Probate Court

26 Western Avenue
P.O. Box 179
South Paris, ME 04281
743-6671

Penobscot County Probate Court

97 Hammond Street
Bangor, ME 04401-4996
942-8769

Piscataquis County Probate Court

51 East Main Street
Dover-Foxcroft, ME 04426
564-2431

Sagadahoc County Probate Court

752 High Street
P.O. Box 246
Bath, ME 04530
443-8218

Somerset County Probate Court

Court Street

Skowhegan, ME 04976

474-3322

Waldo County Probate Court

172 High Street

P.O. Box 323

Belfast, ME 04915-0323

338-2780

Washington County Probate Court

P.O. Box 297

Machias, ME 04654

255-6591

York County Probate Court

P.O. Box 399

Alfred, ME 04002

324-1577

NOTES

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