

Does My Child Need A Guardian?

BY RUTHANN P. LACEY, CELA

The question is always asked: "Do I need to ask the court to make me the legal guardian for my adult child with a disability?" The answer is nearly always the same: "it depends."

While a child is a minor, less than 18 in most states, the child does not have the legal capacity to manage money or to consent to many medical decisions. In that case the child's parents can act as the natural guardian of the minor child and can make financial and medical decisions for the child. The parent having custody of the child is the natural guardian if the parents are divorced.

At the child's 18th birthday he becomes a legal adult and is presumed to have the capacity to make financial and personal decisions for himself; the natural parent no longer has the legal authority to make these decisions for the child. It is important to consider then how these important decisions will continue to be made for the benefit of the adult child with a disability.

WHAT IS GUARDIANSHIP?

A guardianship or conservatorship is a legal relationship in which a court appoints a person (the guardian or conservator) to make certain decisions for another person who has proven to be incapacitated (the ward). The meanings

of the terms "guardian" and "conservator" vary depending on state law. For purposes of this article, a guardian is an individual appointed by a court to make medical and personal decisions for the ward, while a conservator is an individual appointed by a court to make finan-

cial decisions for the ward.

Any person who is not a minor, is not incapacitated, and does not have a substantial conflict of interest can be a guardian or conservator. Oftentimes a family member will act in these roles, though the court may also appoint a friend, social worker, or governmental agency to act as guardian, and may

appoint a financial institution or public conservator to act as conservator.

The proceedings are initiated when a petition is filed with the court. The court may also require a report from a physician who has examined the proposed ward. An attorney is appointed to represent the interests of the proposed ward, and a hearing is held at which time evidence is provided to the judge to demonstrate that the individual cannot make his own decisions. If satisfied, the judge then removes his legal rights to make his own personal decisions (by appointing a guardian) or engage in financial transactions (by appointing a conservator).

The conservator must be bonded and must file annual financial reports with the

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court. Court permission is required before the conservator can undertake action with regard to the ward's property; the conservator needs court permission to spend any principal of the ward's estate, to buy or sell stock or other investments, to enter into a contract on behalf of the ward, or to sell or lease the ward's property. While this oversight may decrease the likelihood of

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malfesance, it also decreases familial control at considerable emotional and financial expense.

OTHER OPTIONS

There are several less restrictive options that may be appropriate, depending on the circumstances.

- **Powers of Attorney** — In Power of Attorney documents the adult child designates someone he trusts to act as his "agent" in making financial and medical decisions on his behalf. A Durable Financial Power of Attorney (DFPOA) allows for the appointment of an agent (and a back-up) to make financial and property decisions, while a Durable Power of Attorney for Health Care (DPAHC) allows for the designation of an agent (and a back-up) to make medical or personal decisions on the child's behalf.

The authorities granted under a DPAHC can include the making of decisions such as the hiring and firing of physicians, admitting the patient to health care facilities, and consenting to surgery, unconventional treatment, and the use of life support. Also important is the Health Insurance Portability and Accountability Act (HIPAA), effective as of April 2003. The implementation and interpretation of this law by doctors, hospitals, insurance companies, and other health care providers has made it more

difficult for family members to obtain information or medical records, unless the provider has in hand a signed consent from the patient. A well drafted DPAHC will smooth the way for the agent to access this information.

If the child with the disability has the capacity to understand that if he signs these Power of Attorney documents then his agent can make financial decisions and medical decisions on his behalf, then decision making is kept within the family unit and the need for a conservatorship or guardianship may be averted. In most states an individual's signature is what the signor intended it to be, so it should not be a barrier if the child has difficulty signing his name.

- **Representative Payee** — If the child with the disability is eligible for Social Security Disability Insurance (SSDI) or Supplemental Security Income (SSI) benefits, and if the child is

incapable of managing these funds, then a representative payee may be named to accept and use the funds on his behalf. This is the Social Security Administration's (SSA) version of Financial Power of Attorney. The representative payee must file an annual report with the SSA documenting how the funds received during the previous year were used for the benefit of the child. As such, a conservator is not necessary to accept and spend these funds.

Funds received from Social Security should be direct deposited into a checking or savings account showing the child as the owner of the account and the representative payee as the individual having the authority to access the funds.

- **Special Needs Trust** — A Special Needs Trust (SNT) can be an important planning tool, particularly when the child with the disability is or needs to become eligible for SSI and/or Medicaid benefits. Because under the SSI and Medicaid eligibility criteria the child's resources cannot exceed \$2,000, a SNT may be established to hold assets of the child that would otherwise disqualify him from these public benefits. Parents or grandparents also have the option of establishing a SNT for the child and funding it with their own assets. Either way, after the SNT is in place the trustee will manage, invest, and spend the assets in the trust without need for a conservator.

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A COMBINATION SOLUTION

The solution is often a combination of these options. Depending on the nature of the disability, sometimes it is necessary for a family member to be appointed guardian of the child for purposes of medical decision making. This is true, of course, if the child does not have the capacity to sign a DPAHC, as well as if it

is likely that he would later revoke the DPAHC while manic or if his relationship with the agent later became acrimonious.

A conservator may not be necessary if the child can sign a DFPOA, or if his only resource is a checking account controlled by a representative payee; the balance of his resources may be held in a SNT managed by the trustee.

Conclusion

Legal planning is an important part of ensuring the future of an adult child with a disability. As with all matters of a legal nature, it is wise to consult with an attorney who is well versed in the issues involved before proceeding with any of these options. ¶

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