

Guardianship

Imagine these scenarios...

Your son just turned 18 and you received a call that he slipped and fell while at the market and is in the hospital. **You rush to the hospital** to see him and ask the staff how he is...*what happens?*

Your daughter is 18, still in school, and has an IEP (Individualized Education Plan) meeting this morning. As you approach the counselor's office, she turns to you and says, "**Mom, I want to do this alone**"... *what happens?*

Your son who has autism just turned 18 and received credit card offers in the mail. **He applies for a credit card** but you don't think it's a good idea... *what happens?*

In most states, when someone turns 18 they are considered an adult and are expected to make all the right decisions about finances, medical, and life. They can vote, open bank accounts, enter into binding contracts, buy a car, and move out of the house...you may remember the feeling of independence when you turned 18. However, this may present a dilemma for some caregivers of dependents with special needs.

For some dependents, making day to day decisions can be challenging. Essentially there are two types of decisions that can be made; personal and financial. Some dependents may be able to make both, one or the other, or none at all. When this happens and help is needed, you may want to consider different forms of guardianship.

Guardianship (for adults) is a legal process during which a person (usually a family member) asks the court to find that a person is unable to make important decisions and/or manage their own affairs on a daily basis.

In most states, a guardian is responsible for personal decisions, ranging from day-to-day decisions to medical decisions, housing, food, etc. A conservator, in most states, is responsible for decisions regarding public benefits, such as Medicaid and Supplemental Security Income, property, income, and financial matters. The guardian and conservator can be the same person but does not have to be. Some caregivers feel

that a relative or family friend would be best suited as a guardian, as they would know the dependent's wishes and needs. And maybe an institution, such as a bank, would be better for handling the financial decisions because of their expertise and longevity, or a combination of bank and relative or family friend as co-conservators.

If the caregiver and their dependent feel guardianship is right for their circumstance and the dependent is over 18, then the caregiver must file for guardianship in family court. But if the dependent is under 18, the caregiver can name a guardian and conservator in your will. If a guardian is named in a will, the state has final approval but will give the choice in the will highest regard. If a guardian is not in the caregivers will, the court will make the decision and it may not be the person who would have been chosen.

Choosing a guardian is not easy. You want someone you can trust with your life. Make sure the person is willing to serve in this capacity. Should one caregiver pass away, generally the surviving caregiver is entitled to custody of their dependent. However, it is customary to name the other parent as the primary guardian. A successor guardian should also be chosen, in case the first guardian chosen is not willing to serve or dies.

If the caregivers are divorced and especially if there is a joint custody agreement, one caregiver may want to name themselves as the guardian. If not, the other caregiver may petition the court for custody.

If a caregiver is single, naming a guardian is even more critical because your loved one depends on the caregiver alone.

Some considerations when deciding if guardianship is the right path for your family:

- **Determining if guardianship is needed** ...A person under guardianship can lose the authority to make decisions about their personal life, as that authority is now with the guardian. Are there alternatives?
- **Family Guidance**... maybe there is a family member that can offer guidance and advice. However, the dependent may be easily influenced and could be taken advantage of by people with bad intentions.
- **Supportive or Group Housing**... if the dependent only needs a little guidance, there may be professionals or providers who can provide those services. Usually a case manager can help.
- **Special Needs Trust**... these may be helpful, but have restrictions. And there are several different types. How to choose which is best for your loved one?

- **Durable Power of Attorney**... naming a person to make decisions on your behalf.
- **Financial Representative**... may help with managing money.
- **Naming a Guardian**... states usually prefer a caregiver, but if none are available then another relative or family friend. If those are not an option, then the court may appoint someone. Guardians are accountable to the court, which helps ensure that finances are handled properly. Guardianship does not end when a guardian can no longer serve, but rather another guardian is appointed.
- **Obtaining Guardianship**... a guardian is appointed by the court. It has to be proven to the judge the need for guardianship, lack of capacity to make certain decisions, that the proposed guardian is fit to serve, and that there are no less restrictive alternatives available. Generally two attorneys are present; one for the person to be cared for, and another for the prospective appointee. Witnesses may also be called. The judge will determine that the dependent with special needs does or does not have capacity. This is important because the dependent may be able to make some decisions and not others.

The court will outline the duties of a guardian. Generally these will only be to provide for the need of the dependent. Sometimes a guardian will have to ask for special permission, such as for the sale of a piece of property or to change living circumstances. The guardian must file a report, usually annually to verify that the dependent's needs are met. If finances are involved, records must be kept and reconciled. If the guardian fails to satisfy the court, they may be removed or subject to civil penalties, or both.

Be aware that guardianship laws vary state to state. It is always best to consult with a legal professional experienced in these areas.

Most special needs providers and advocates would recommend the least restrictive form of guardianship or conservatorship, as independence, dignity, and integrity are in the person's best interest. If a person has capacity, it is important to involve them in the decision making process.

Due to the complexity of federal and state laws, you may need to seek advice from your own legal counsel who can work with your other advisors to help you plan for the future of your dependent with special needs.

Call Special Care Planner Bob Johnston at (262) 955-6636 for a confidential consultation.

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