

## GUARDIANSHIP and ALTERNATIVES to GUARDIANSHIP

Parents of an adult child with a disability often consult our office regarding guardianship. Most of them are not aware of other options that may be just as effective in assisting their adult child with the decisions and issues that arise in adult life.

There is no one size fits all answer to the question of should I get guardianship of my adult child. This is a decision that must be made taken into account the circumstances of the family, the disabled person's abilities and alternatives short of guardianship. The decision to seek guardianship requires considerable thought and should not be filed routinely without considering options just because the child has turned eighteen. Guardianship is also not appropriate simply because a young adult is making poor decisions.

Guardianship is simply one mechanism for protecting an adult with limited competency. Alternatives exist that may be less intrusive than a guardianship and may allow each family to tailor the solution to their unique situation and these are listed as follows:

1. A joint bank account can be established and this may allow you to monitor expenditures. This gives you an ability to participate in decisions and have some measure of control.
2. A Representative Payee can be named to manage the funds of the disabled adult who receives benefit checks from Social Security or another entity. The checks are sent to the representative payee who manages the funds for the individual. The disabled person still retains the autonomy of making personal decisions.
3. A Durable Power of Attorney for Health Care is one option for individuals who are capable of making decisions about health care but anticipate that at some future time they may need someone to step in and make decisions on their behalf.
  - a. The agent ( or person designated as having the P.O.A. ) can make all medical decisions including decisions about extending the person's life.
  - b. This gives parents or others a "seat at the table".
  - c. May avoid the need for a guardianship of the person.
  - d. The P.O.A. for health care is a written document that must be signed by the Principal ( the person granting the P.O.A. ( the person must be 18 years or older) and the document must be and witnessed.
  - e. The P.O.A. is revocable.
4. The Mental Health Treatment Preference Declaration Act is useful in planning for adults with a mental illness. The Act authorizes an adult, 18 years or older, or a legally emancipated minor ( " the Principal" ) to designate another person ( the

“Agent”) to execute a Declaration in order to provide instruction on mental health treatment in the future should the person not be able to make those decisions. The Declaration can authorize the Principal to make decisions regarding hospitalization, choice of a doctor, administration of medication or electroconvulsive therapy. The Declaration can be cancelled under certain circumstances.

5. A Durable Power of Attorney for Property is a tool that is useful for persons who are mildly or moderately disabled and able to select someone to manage their financial affairs. If the document is executed before incapacity a durable P.O.A. continues the authority should the person become disabled. The disabled person still has the legal authority to make decisions. For example, they can enter into a contract even if it is not advisable and be held to that contract. The P.O.A. can be withdrawn at any time.
6. If no guardianship is in effect, the Health Care Surrogate Act authorizes an adult with decisional capacity or a surrogate decision maker as defined, to decide whether to forgo life-sustaining, or any other form of medical treatment. A surrogate decision maker is authorized to make medical decisions or to end life sustaining treatment. If a guardianship is in effect, however, some courts require notification / and or permission to make these decisions. The Illinois Living Will Act authorizes an adult of sound mind to execute a document directing that if he/she is suffering from a terminal condition, then death delaying procedures shall not be utilized to prolong his/her life.
7. Trusts may be an alternative to appointment of a Guardian in some cases. A trust is a legal mechanism for placing funds and other assets in the control of a trustee for the benefit of an individual with a disability. Trusts for the benefit of a person with a disability should be set up with an attorney. Failure to set up a proper trust can result in the disqualification of the person from receiving government benefits.

## Guardianship

Guardianship is one option for persons, who, because of mental illness, developmental disability, or physical disability, lack sufficient understanding or capacity to make or communicate responsible decisions concerning their care, and are unable to manage their finances. Guardianships are monitored by the Court.

1. Guardianship of the Person. This guardian is responsible for monitoring the care of the ward. This person need not use their personal funds to care for

the disabled person or even reside with them. The guardian must attempt to ensure that the ward is receiving proper care and supervision, and is responsible for making most decisions regarding medical care, vocational planning or living arrangements. Decisions involving intrusive forms of medical care such as administration of antipsychotic drugs, sterilization, and the withdrawal of life prolonging treatment, must be made by the court. The Guardian is required to report to the court on the status of their ward on an annual basis.

2. Guardianship of the Estate. A guardian of the estate may be appropriate for disabled individuals who are unable to manage their finances. Appointment of a guardian of the estate is not required by law unless the value of the estate is in excess of \$10,000. The guardian is not required to use his or her own resources but is appointed for the purposes of managing the disabled person's finances. The guardian of the estate is required to file an annual report with the court.
3. Limited Guardianship. This form of guardianship carves out certain areas of decision making such as finances and allows the ward to make decisions in other areas. In a limited guardianship the ward is not declared incompetent.