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Guardianship & Consent Issues

The subject of guardianship for an adult child who is disabled is of concern to most parents. Parents of children challenged with mental retardation often assume that they continue to be their child's legal guardian during their entire lifetime. Although one's child may not have the capacity to make informed decisions, legally, the adult individual is presumed competent unless otherwise adjudicated in an incompetency proceeding. In other words, once your child reaches the age of 18, you, the parent, are no longer his/her legal guardian.

The act of giving reasoned and well informed consent when making a decision may be beyond your child's ability. Although your child may not have the actual capacity to understand a legal contract, unless s/he has been adjudicated incompetent, there is a legal presumption that s/he is competent. In order to protect one's child from unscrupulous individuals who may exploit your child's inability to make informed choices, it is necessary for families to familiarize themselves with the various options of legal protection for their disabled adult child. Following is a brief description of guardianship and alternatives to consider.

GUARDIANSHIP is a legal process by which a guardian is appointed to make decisions on behalf of an individual who is deemed to be incapable of making decisions for him/herself. This transfer of decision making right is made only after a court determines that the individual (WARD) truly needs a guardian to make decisions on their behalf. There are generally two types of guardianship: GUARDIANSHIP OF THE PERSON and GUARDIANSHIP OF THE ESTATE. The guardian of the PERSON is appointed by the court to make all personal decisions for the person. This includes decisions regarding medical care, placement in a residential facility and all other decisions that the disabled individual would make if s/he were capable. The guardian of the ESTATE is responsible for managing all the financial affairs on behalf of the individual. The same individual can be both guardian of the person and the estate but it is not unusual to have two separate guardians named, especially where there is a conflict of interest or when a large estate is involved. Parents can also ask the court to be appointed co-guardians of their child's estate and person. This is beneficial in that upon the death of one parent, the decision making authority transfers automatically to the surviving parent.

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In considering guardianship, it is important to remember that the guardian IS NOT PERSONALLY FINANCIALLY RESPONSIBLE FOR ANY EXPENSES INCURRED BY THEIR WARD. A guardian is only expected to use the funds and assets of the WARD to pay the debts and obligations of the WARD. Also, a guardian IS NOT RESPONSIBLE FOR PROVIDING THE WARD A HOME IN THE RESIDENCE OF THE GUARDIAN. I stress this because many caring siblings and individuals fear serving as guardians for fear of being financially responsible and/or of having to take the WARD into their own home.

It is important for parents to realize that guardianship should not be automatically applied for when their child turns 18. The parent needs to consider their child's strengths and weaknesses before deciding to seek guardianship. Where an individual is capable of making some, but not all, decisions, a parent can obtain what is called LIMITED OR PARTIAL GUARDIANSHIP rather than FULL OR PLENARY GUARDIANSHIP. A limited guardianship recognizes direct consent in areas where s/he is capable. A plenary or full guardianship recognizes total and unlimited authority in making all decisions on behalf of the disabled individual. A guardianship should be custom made for each individual and one's abilities rather than one's disabilities. For example, you can give your adult child the power to make contracts for up to a certain dollar amount so that s/he has some control over his/her resources while still protecting him/her.

ALTERNATIVES to guardianship include: 1) TRUSTS (one needs to be careful in regard to trust funds to insure that a trust does not jeopardize your child's ability to receive government benefits); 2) REPRESENTATIVE PAYEE to cash an individual's SSI or SSDI check; and 3) DURABLE POWER OF ATTORNEY -- the individual with a disability can authorize an individual to act on his/her behalf. This is usually only valid when the individual is capable of some decision making ability. Illinois has a statute and short forms that make this process extremely easy. This option is often the least costly and least intrusive method of protecting your child's interest.

The subject of guardianship is obviously a complicated issue that needs careful thought and consideration before one enters into an incompetency proceeding. Parents who wish more information can refer to the following publication: DISABILITY AND THE FAMILY by H. Turnball, or they can call our office for further information.

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GUARDIANSHIP AND ALTERNATIVES TO GUARDIANSHIP IN ILLINOIS

The subject of guardianship for an adult child who is disabled is of concern to most parents. Parents of children who have a severe disability often assume that they can continue to be their adult child's legal guardian during the child's entire life. Although one's child may not have the capacity to make informed decisions, legally, an adult is presumed competent unless otherwise adjudicated incompetent after a competency proceeding. Once the child reaches the age of 18, the parent is no longer the child's legal guardian.

The act of giving reasoned and well informed consent when making a decision may be beyond the adult child's ability. In order to protect one's child from unscrupulous individuals who may exploit the child's inability to make informed choices, it is necessary for families to familiarize themselves with the various legal options available to protect a disabled adult child. Following is a brief description of guardianship and various alternatives to guardianship, which should be considered.

Guardianship is a legal means of protecting children and incompetent adults who cannot take care of themselves, make decisions that are in their own best interest, or handle their assets due to a physical or mental disability. When the court determines that a person is incapable of handling either their personal and/or financial affairs and appoints a guardian, the person who is disabled is referred to as the guardian's "ward."

Whether to seek appointment of a guardian is obviously a complicated issue. A petition for guardianship should not be filed automatically simply because a child has reached the age of eighteen. Parents, or other potential guardians, must carefully consider the disabled person's individual circumstances, including strengths and weaknesses, needs, and best interests, before beginning a competency proceeding. If the person is disabled but capable of making some but not all decisions, one or more of the alternatives to guardianship discussed below should be considered.

Guardianship is just one means of protecting an adult who is not fully competent. Less intrusive alternatives include:

1. A **joint bank account** can be created to prevent rash expenditures. Arrangements can be made with most banks for a disabled person's benefits check, such as Social Security or SSI payments, to be sent directly to the bank for deposit. In addition, a permanent withdrawal rider can be arranged with the bank authorizing the bank to send certain sums of money on a regular basis to a specified party, such as the landlord, or the person who is disabled, for pocket money, thus providing structure to allow for budgeting and money management.

2. A **Representative Payee** can be named to manage the funds of a disabled person who receives benefits checks from Social Security, Railroad Retirement or the Veteran's Administration, for example. Benefits checks are sent to the representative payee who manages the funds and spends them for the benefit of the individual with the disability. The representative payee has authority only over income from the particular check(s) for which s/he is payee. The person who is disabled would still make *personal* decisions.

3. A **Durable Power of Attorney for Property** is useful for persons who are mildly or moderately incapacitated and capable of choosing another person to handle their money. The power of attorney (P.O.A.) is a legal document that grants one person the legal authority to handle the financial affairs of another. If executed before incapacity, a "durable" P.O.A. continues the authority in the event the individual becomes disabled or incapacitated. There are both drawbacks as well as advantages to use of a P.O.A. The incapacitated person still has the legal authority to make decisions. For example, they can commit to a contract which is not in their best interest and can be held to that contract. Also the person can withdraw the P.O.A. at anytime and can remove the agent verbally or by the physical act of destroying the P.O.A. A person with a history of mental illness may, therefore, remove his/her agent at a time when an agent is most needed.

4. A **Durable Power of Attorney for Health Care** should be considered for individuals who are presently capable of making decisions about their health care, but wish to anticipate possible future incompetency. A Durable Power of Attorney for Health Care is a legal document that enables a competent individual (the "Principal") to designate a health care agent to make health care decisions should the individual become incompetent to make them or need assistance in making or voicing such decisions. The health care agent is authorized to make all health care decisions, including decisions about life-sustaining treatment. In many ways, designating an agent to make such decisions eliminates the need for a guardian of the person. The P.O.A. for Health Care must be a written document, signed by the Principal who must be age 18 or older, and properly witnessed. The Principal may revoke the P.O.A. at any time and in any manner that demonstrates specific intent to terminate the power. The P.O.A. for Health Care goes into effect at the time the power is signed, continues until the death of the principal and under some circumstances thereafter, unless the P.O.A. expressly provides for a limitation on the beginning date or duration. Given the recent publicity surrounding the Terri Schiavo case in

Florida, many nondisabled individuals, over the age of 18, are signing durable powers of attorney for healthcare to avoid the need for a guardianship of the person should illness or injury render a previously healthy and able bodied individual incapable of handling personal medical decisions.

5. The **Mental Health Treatment Preference Declaration Act** is useful for individuals with a history of mental illness. The Act authorizes an adult, 18 years or older, or a legally emancipated minor (the "Principal"), to execute a **Declaration** in order to provide instructions about mental health treatment if, in the future, the person is not able to make those decisions. The instructions can include whether the Principal agrees, or refuses, to have psychotropic medication, electroconvulsive treatment, or admission to a mental health facility used in his or her treatment. The Principal can designate an "attorney-in-fact" to either make mental health treatment decisions on his or her behalf, and/or make sure the treatment instructions in the Declaration are followed. The "attorney-in-fact" need not be a lawyer. The Declaration must be in writing, signed by the Principal, and by two witnesses. The Declaration cannot be canceled unless: (1) the Principal makes a written statement that s/he is canceling the Declaration; (2) the statement is signed by a Doctor; and (3) the statement is given to the person's attending Physician. The Declaration becomes *effective* if the Principal is found incapable of making his/her own mental health treatment decisions by two doctors or by a judge. Doctors and other health care providers must follow the instructions in the Declaration, except in cases of emergency or unless other treatment is ordered by a Court. The Declaration remains in effect until the Principal is found capable of making his or her own treatment decisions after evaluation by a physician, and upon agreement by both the physician and Principal. A Declaration can, however, expressly limit the time frame during which the Declaration remains in effect, even if the Principal is still found incapable of making his or her own treatment decisions.

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 treatment decisions or to end life-sustaining treatment under certain conditions on behalf of patients lacking decisional capacity and without judicial involvement of any kind. If a guardianship is in effect, however, some jurisdictions do require court notification and/or permission to make these decisions despite the Act. Further, the Illinois Living Will Act authorizes an adult or an emancipated minor, of sound mind to execute a document directing that if s/he is suffering from a terminal condition, then death delaying procedures shall not be used to prolong his/her life.

7. **Trusts** may be an appropriate alternative to appointment of a Guardian in some circumstances. A trust is a legal plan for placing funds and other assets in the control of a trustee for the benefit of an individual with a disability. Creating a trust will be less expensive than a guardianship, in that no bond is required; it will keep the courts, and their associated costs, out of one's life (in most cases permission of a court is not needed to make disbursements from the

trust or to make investments); and, it protects the beneficiary's assets without requiring that a disabled person be declared incompetent by a court. A trust, also called a special needs trust, may also make it possible for the beneficiary to receive the benefit of extra income without losing valuable state and federal benefits. Trusts for the benefit of a person who is disabled should be established with the help of a lawyer experienced in wills and trusts and familiar with the law relating to government disability benefits. A trust set up without regard to the eligibility laws may disqualify a person who is disabled from SSI, Medicaid, and other important benefits.

8. **Guardianship** is an 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/or are unable to manage their financial affairs. Guardianships are supervised by the Court.

a. A **Guardian of the Person** is responsible for monitoring the care of the ward. The guardian need not use his/her own money for the ward's expenses, provide daily supervision of the ward, or even live with the ward. However, the guardian must attempt to ensure that the ward is receiving proper care and supervision, and the guardian is responsible for decisions regarding most medical care, education, and vocational issues. For highly unusual decisions which were not anticipated at the time of the original guardianship hearing, the guardian ask the court for instructions. Decisions involving intrusive forms of treatment, such as administration of antipsychotic medication, sterilization, and the withdrawal of life-prolonging treatment, must be made by the court. Generally, the guardian will be required to report annually on the status of the ward.

b. A **Guardian of the Estate** should be considered for persons with disabilities who are unable to manage their finances, and who have income from sources other than benefit checks, or have other assets and/or property. Appointment of a Guardian of the Estate is not required by law unless the value of the Ward's assets exceed \$10,000. In some circumstances, however, a Guardian of the Estate may be appointed even if the value of ward's assets is less than \$10,000. Government benefits payments are generally not considered income/assets for this purpose. The guardian is responsible for handling the ward's financial resources but is not personally financially responsible for the ward from his or her own resources. The guardian must file an annual accounting of the ward's funds with the court.

c. A **Guardianship may be limited** to certain areas of decision making, such as decisions about medical treatment, or the guardian may be granted narrowly defined authority over certain issues such as the ward's finances, in order to allow the ward to continue making his/her own decisions in all other areas. The benefit of a limited guardianship is that the specific duties and responsibilities of the guardian can be tailored to fit the ward's special needs in the least restrictive manner. Further, under a limited guardianship, the ward has not been declared incompetent.

SUMMARY OF THE LEGAL PROCESS FOR APPOINTMENT OF A GUARDIAN

1. A **Petition** has to be filed with the court in the county where the person with a disability resides. If the person is a non-resident of Illinois, the petition can be filed in the county where the person owns property.
2. The petition can be filed by the disabled person, or any other responsible person. The petitioner need not be the person who will act as guardian, however, a person willing to be appointed the guardian must be named in the petition. The proposed guardian must be 18 years of age, a resident of the United States, and cannot be a convicted felon. A public agency, or a not-for-profit agency, can be appointed guardian unless that agency is providing residential care to the ward. One person or agency can be appointed guardian of the person, and another guardian of the estate. A parent can designate whom they choose as successor guardian, but that person must be appointed by the court. If the disabled individual feels his/her guardian is not doing a good job, s/he can petition the court for the guardian's removal.
3. The person who is disabled ("respondent"), must be served with a **summons**, a copy of the petition, and a notice explaining the respondent's legal rights in the proceeding.
4. Close relatives of the respondent must receive **notice** of the filing of the petition, and of the hearing date, so that they have an opportunity to object. Once a petition is filed, it cannot be dismissed without a court order.
5. A **medical report** completed by a licensed physician who has seen the respondent within 3 months of the date petition is filed must be presented to the court. The physician must state an opinion regarding the necessity, and the appropriate scope of, the guardianship.
6. When the petition is filed, a hearing date is set and a **guardian ad litem** ("GAL") may be appointed. The GAL is responsible for protecting the respondent from being subjected to a guardianship unless s/he really wants it, or needs it. The GAL is entitled to compensation at reasonable rate for attorneys in the area. The GAL visits the respondent, consults with specialists as needed, advises the respondent regarding the right to be represented by counsel, and makes a recommendation to the court as to his or her observations and opinion regarding the need for a guardian.
7. A petitioner can ask the court to **waive appointment of a GAL** if the respondent is severely disabled, has no estate, and the need for guardianship is obvious. Waiver of a GAL's appointment eliminates the associated fees and costs which can double the total cost of the guardianship proceeding.

8. A **temporary guardian** may be appointed in an emergency situation when certain decisions must be made immediately. The judge must be convinced that a temporary guardianship is necessary for the immediate welfare and protection of the respondent. A petition for guardianship must have already been filed, or must be filed at the same time, as a petition for temporary guardianship. A temporary guardian is appointed for a maximum of 60 days.
9. A **hearing** will be held, and the judge will weigh the evidence regarding the need for a guardianship. The judge may appoint an attorney to represent the respondent in some cases, and will always appoint an attorney if the respondent requests one, or if the respondent disagrees with the recommendation of the GAL. The respondent can request a 6 person jury, and can testify and cross examine witnesses. The respondent or the GAL can ask for independent experts to look into the respondent's background.
10. If the court finds that the respondent completely lacks the capacity to make or communicate responsible decisions concerning his or her care, and/or is unable to manage his/her financial affairs, the court will appoint a **plenary guardian** for the respondent's person, estate or both. The guardian has full decision making authority but must seek court approval on major decisions. The guardian does not have power, for example, to authorize a sterilization, abortion, or experimental surgery without first receiving approval from the court.
11. If the court finds that the respondent is disabled and lacks some, but not all of the necessary capacity, and that a guardianship is necessary for the protection of the person, or his/her estate, or both, the court may appoint a **limited guardian**. The order appointing the guardian will specify the duties and powers of the guardian. One might think that with all the protection afforded the respondent when a petition for guardianship is filed, that courts favor not unduly restricting respondents. However, most appointments are for full/plenary, and not limited, guardians.
12. A guardian is required to swear, under **oath**, to faithfully perform the assigned duties and must post a **bond**. A guardian of the person does not have to secure the bond, but a guardian of the estate must obtain a surety bond. If the bond is obtained from a bonding company, the amount must be equal to one and one-half times the value of the ward's personal estate. If an individual acts as surety, the amount must be equal to two times the value of the ward's personal estate. The amount must also include the annual income, if any, from real estate. The bond premium can be paid for out of the ward's estate.
13. A guardian of the person must make an **annual report** to the court regarding the ward's condition, residence, current address, and any major changes that have occurred in the ward's life during the year. A guardian of the estate, or a conservator, must present an **annual accounting**.

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If you would like more information concerning guardianship or alternatives to guardianship, you may call our office and schedule an appointment to discuss these matters further.

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