Sometimes Less is More – Alternatives to Plenary Guardianship

The Voice is the e-mail newsletter of The Special Needs Alliance. This installment was written by Special Needs Alliance member Timothy Rigby, Esq., who practices with Hart, Southworth & Witsman in Springfield, Illinois. The firm's focus is estate planning and transactional matters, and Tim concentrates his practice in the areas of estate planning and special needs planning.

October 2018 - Vol. 12, Issue 4

The day on which a person attains 18 years of age is generally recognized within our society as a significant milestone. On that day a person can legally vote in political elections, join the military, leave home and live independently, and marry the person of his or her choice.

The day on which a person with an intellectual or developmental disability (IDD) attains 18 years of age may be one of the more significant age-based milestones that the person will experience. An 18-year-old person with an IDD is considered under the law to be an emancipated adult, capable of making decisions for himself or herself, and whose parents no longer have the legal authority to make decisions on his or her behalf.

Many people with IDDs will have capacity to make responsible decisions, including decisions affecting health care and finances when they attain 18 years of age. However, many will not have that capacity and will require lifelong assistance in making decisions affecting health care and finances. For the parents of a person in the latter category, it will be necessary to consider the alternatives to having their adult child make all of his or her own decisions.

The parents of a person with an IDD who lacks capacity to make decisions, in full or in part, have several options. In evaluating their options, it is important for such parents to (i) consider, based upon their own experience and knowledge of their child's IDD, exactly what limitations, if any, their child may have as a result of the child's IDD, (ii) prior to their child attaining 18 years of age, discuss with their child's primary physician, or other medical expert familiar with their child's IDD, whether it may be appropriate to limit their child's decision making authority and, if so, to what extent, and (iii) consult with an attorney experienced in the area of special needs planning regarding the options available, as well as the procedure for implementing the appropriate option.

Plenary Guardianship

If, in the opinion of the child's parents, primary physician or other medical expert, and special needs lawyer, the child will be completely unable to make health care or financial decisions as a result of the child's IDD, then it may be in the best interest of the child that a "full" guardianship (referred to as "plenary" guardianship) be ordered by a court. A plenary guardian has full decision making authority with regard to the child, and conversely, the child retains no legal rights to make decisions on his or her own. Consequently, a determination that a plenary guardian is necessary should not be undertaken lightly, and alternatives to a plenary guardianship should be strongly considered.

A person for whom a plenary guardian is appointed is deemed by the court to lack legal decision making capacity, and the appointment of a plenary guardian removes from that person certain fundamental legal rights generally afforded to persons over the age of 18. For example, in many states, a person who has been adjudicated by the court to be an incapacitated adult for whom a plenary guardian is appointed, may lose some or all of the rights to vote, drive, marry (or divorce), enter into contracts with others, decide where he or she will live, and if the person is also determined to lack testamentary capacity, to make a will. Essentially, when a person is deemed by a court to be an incapacitated adult for whom a plenary guardian is appointed, many legal and civil rights enjoyed by citizens are removed from the person for his or her protection.

Due to the severity of a person's IDD, he or she may not be capable of safely exercising the rights which are removed upon the appointment of a plenary guardian. For such persons, the appointment of a plenary guardian may be entirely appropriate. Before making that decision, however, parents should ask themselves and their child's special needs lawyer whether their child could fully or partially enjoy such fundamental rights given some reasonable (or perhaps even extreme) accommodation. If the answer is "yes," or even "possibly," then the parents should explore less restrictive alternatives to a plenary guardianship.

Limited Guardianship as an Alternative to Plenary Guardianship

One alternative to a plenary guardianship may be a limited guardianship. If a person lacks some, but not all, capacity to make decisions, then it may not be necessary to have a plenary guardian appointed. Rather, if state law permits, a court could appoint a limited guardian to make only those decisions which the person, because of his or her IDD, is unable to make on his or her own. In such a case, the person could retain many (or most) of that person's fundamental rights.

With a limited guardianship, a court does not make a general finding that the person lacks all decision making capacity, but rather determines based upon the specific facts and

circumstances the limits of the person's capacity. Moreover, the appointment of a limited guardian does not also include a broad finding by the court that the person is an incapacitated adult. Consequently, courts overwhelmingly prefer the appointment of a limited guardian rather than a plenary guardian if that is an option under state law. If a court determines that a person does not lack all decision making capacity, the court can then appoint a guardian for the limited purpose of assisting the person with only those areas of responsibility for which the person lacks capacity. In doing so, the court will attempt to impose the least restrictive limitations.

For example, if a person is not physically capable of caring for himself or herself but has the ability to direct others to do so, or to manage his or her affairs with assistance, it would be unnecessary to have a plenary guardian appointed. In such a situation it may not even be necessary for that person to have a guardian over his or her person (i.e., health care). Rather, a court could appoint a limited guardian over that person's estate (i.e., finances) and specifically identify those areas in which the person requires assistance.

Powers of Attorney as an Alternative to Plenary or Limited Guardianship

In certain situations, it may not be necessary to appoint either a plenary or a limited guardian. If a person with an IDD has capacity, even if such capacity is diminished, and simply needs limited assistance with financial or health care matters, then the person could delegate authority to handle certain matters on that person's behalf to an agent appointed under duly executed financial power of attorney and a health care proxy. However, the level of capacity a person must have to execute a power of attorney varies state by state. It is generally recognized that in order to execute a valid power of attorney, a person must have the same capacity as that required to enter into a contract, which is the ability to transact ordinary business. In many states, contractual capacity in not necessary to execute a health care proxy, but rather only a basic understanding of the proposed risks, benefits and alternatives to health care decision making.

Conclusion

As the saying goes, "sometimes less is more." Parents and attorneys alike are often too quick to conclude that it is necessary to have a plenary guardian appointed when a person attains 18 years of age. In reality, many people with IDDs have decision making capacity to some degree. The removal of fundamental rights resulting from the appointment of a plenary guardian could have the unintended consequence of diminishing a person's quality of life. Before removing those fundamental rights, it is worth the time and effort to explore whether a less restrictive alternative may be available. In many cases, a plenary guardianship is in the best interest of the person. However, for a person with an IDD who

has some decision making capacity, implementation of a less restrictive alternative could greatly enhance that person's quality of life.

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