

Your Child Has Turned 18... Now What?

Special Interest Articles:

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Guardianship

Now that your child with a disability is 18 years old...

Yesterday your child with a disability was seventeen years old, and your role as parent(s) was clear. Like the parent(s) of any child, you had the formal, legal authority to make important decisions such as those relating to residence, medical care, finances, employment,

purchases, Individual Education Plan, etc. Even if your child resides in a facility, such as an Adjustment Training Center, you were advised of daily activities and made an integral part of the process of making decisions in the best interest of your child with a disability.

Guardianship documents require precise language and strict timelines. Before your son or daughter turns eighteen years old it is recommended that the first step you take is to visit with your family attorney or someone who is knowledgeable about guardianships.

The Law

Everyone, regardless of the severity of their particular disability is presumed under the law to be a competent adult upon reaching age 18. In other words, the **law assumes that the individual turning eighteen years old is capable of making decisions that will impact his or her own life.**

Guardianship

As the parent(s) of an adult where there is a question of capacity to make these important life decisions, this can be a particularly worrisome time. But if you believe that it is in his or her best interest, you may wish to petition the Court in the County where the individual lives to act as **guardian** for your child with a disability. A guardian is appointed by the

Court and has, as necessary, the care, custody and control of the individual with a disability who is substantially incapable of managing property or caring for themselves by reason of developmental disabilities or other incapacities. In other words, a physical disability without mental incapacity is not sufficient to establish a need for guardianship.



Be an advocate for your son or daughter with a disability to help maintain a quality of life.

The Court

Only the Court can make the final decision relative to whether or not you will be appointed your son or daughter's guardian. The criteria the Court will use in making this determination for an adult is set out in State Statute at SDCL 29A-5-302.

Pros

As a Guardian, you will have legal "standing" to assist your son or daughter with a disability to avoid neglect or exploitation. This may be particularly important if they are unaware of their limitations, and would probably not seek assistance when needed.

As a Guardian, you

Pros and Cons of Guardianship

What to do?

There are, of course, alternatives to Guardianship. For example, sometimes a formal guardianship can be avoided through arrangements such as dual signature requirements on a checking account, a durable power of

attorney or a Representative Payee for receipt of Social Security or SSI benefits.

have the responsibility to act as an advocate for your son or daughter when he or she is dependant on medical, social or mental health services. For example, if the individual is not competent to consent to release his or her records, and there is no Guardian, there may be no way to obtain and to later monitor the quality

of the services provided. Likewise, if your son or daughter is institutionalized or in a facility such as an Adjustment Training Center, you as Guardian will be able to review the quality of his or her care, the need for continuing services at this level and to be an active member in the development of the services case plan.

Cons

Seeking an appointment as legal Guardian of your son or daughter with a disability is a serious matter. (Keep in mind that unless the Court orders that the adult with a disability retain

certain practical rights, a general finding of incompetence and a general Guardianship will eliminate such options as your son or daughter's ability to vote, consent to marriage, purchase

contracts, choose medical procedures or residential placement by themselves.) People maintain all rights not restricted by the court.

What a Guardian Is

Whether the Guardian is a parent or an unrelated individual, there are certain things a Guardian IS...

- A Guardian IS responsible for learning about what is available to provide for adequate living, medical care, vocational services and making certain that appropriate applications are filed and followed through on.
- A guardian IS responsible for advocating for the basic rights and interests of people with disabilities in their residential settings as well as the workplace.
- A Guardian IS responsible for understanding basic eligibility requirements of state and federal programs and what must occur in order to protect these valuable benefits for the individual.
- A Guardian IS responsible for assuring that the individual's freedom is not more restricted than it needs to be.
- A Guardian IS required to involve the individual in the decision-making process, giving him or her

as much as practicable, the opportunity to make choices.



Procedure for Appointment of a Guardian

Parent(s) seeking an appointment as Guardian of their son or daughter will need to file a Petition in Circuit Court of the county where the individual with a disability resides. If both parents wish to be named, they can become Co-Guardians.

The Court may appoint an attorney or Court Representative,

who will interview your son or daughter with a disability and provide an objective report to the Court. An additional written report will be provided with the application by a medical doctor or psychologist. The purpose of these reports are to provide the Court with an objective assessment of the individual's mental condition and

need for Guardianship.

As is the case in any legal proceeding, your son or daughter can contest the hearing and request a jury trial and independent attorney. Of course, this occurs in few cases.

"If both parents wish to be named, they can become Co-Guardians."

In the Event that Something Happens to You...

"The parent(s) of an adult with a disability are, however, able to give a measure of financial security to their child and still not jeopardize essential program benefits."

Cash assets in excess of \$2,000 will disqualify your son or daughter with a disability from such valuable programs as SSI and Medicaid. Medical Assistance, of course, will be crucial if something should happen to you

or you are no longer capable of caring for your loved one. In fact, parents of individuals with disabilities have traditionally been advised by lawyers and other estate planning and tax advisors to disinherit

their son or daughter and treat them as if he or she did not exist. The parent(s) of an adult with a disability are, however, able to give a measure of financial security to their child and still not jeopardize essential program benefits.

Estate Planning

Additional questions related to Estate Planning or the Special Needs Trust may be directed to
South Dakota
Advocacy Services
 1-800-658-4782
 or
 (605) 224-8294

Parent(s) of an adult with a disability can include him or her in their estate planning and still retain their son or daughter's qualification for government or public benefits by creating a *Special Needs Trust* for

them. A Special Needs Trust will permit assets to be placed into the trust. A written trust agreement will spell out how the funds are to be used to protect entitlements such as SSI and Medicaid. In other words, the Trust is

to supplement the public benefits. The parent(s) of an adult with a disability will need to consult a knowledgeable attorney to assist in the creation of the Special Needs Trust.

Appointment of a Guardian after Parents Die

"The Court's decision will be based upon what is determined to be in the best interests of the individual with a disability."

Although the actual appointment of a Guardian is the decision of the Court, the parent(s) may have influence on who the Guardian will be.

The parent(s) can nominate a Guardian of their son or daughter in their Will. Once again, the

Court's decision will be based upon what is determined to be in the best interests of the individual with a disability.

Guardianship can be a very helpful procedure for people to use in caring for their son or daughter with a disability. It does not, however,

serve all situations or perform all functions. Like any legal procedure, it should be evaluated carefully before it is used.

Additional questions regarding guardianship may be directed to:

South Dakota
Advocacy Services
