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PAGE 12

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Legal Guardianship: The Pros and Cons for Your Adult Disabled Child



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What happens when your special needs child turns age 18? It's a crucial question faced by every affected parent and family. The answer to the question, and special needs planning, means different things depending upon your state's laws. How can you make certain you've done all you legally can to protect your special needs adult child?

The first step, in general, is for special needs planning to begin with preparation of your own will (or trust) which includes what is called an 'inherited special needs trust' to benefit and protect your disabled family member's eligibility for government benefits like SSI and Medicaid, provide for future management of the inheritance, and specifically to carry out your wishes for the future care and security of your loved one.

Most states have some type of legal proceeding to appoint a family guardian of an adult who cannot manage health care decisions and/or their financial assets. Some states have more than one type of guardianship proceeding. In New York, for example, one guardian proceeding is based upon your adult child's medically certified diagnosis of either mental retardation or developmental disability, called the "17A" proceeding. Another guardian proceeding requires proof, without specific diagnosis, for a judge to declare your adult child as incapacitated, called an "Article 81" proceeding. "Incapacity" means proof that your adult child is unable to arrange for his or her basic needs, such as food, clothing and shelter, cannot make health care decisions or manage their finances, and that personal or financial harm will result if no guardian is appointed. A few states still use the term "incompetent" rather than "incapacity" for civil proceedings when a guardian is appointed.

The decision to be appointed your adult child's legal guardian can be as difficult as it is essential.

What significance will a guardian appointment have on your adult disabled child?

In most states, including New York, the law presumes every adult age 18 and older is competent to make their own health care decisions. While a medical professional may allow you to participate in or make health care decisions for your adult child, it is not the law. Privacy laws, such as the Health Insurance Portability and Accountability Act (HIPAA), often bar parents from communicating with health care professionals. If surgery or emergency care is needed, you may not be permitted to make decisions nor have input if you have not been appointed as the legal guardian. However, some states, including New York, have adopted laws which permit family members who are not legal guardians to make health care decisions in hospitals as "surrogates." In New York, this is called the Family Health Care Decisions Act.

Still, for health care decisions outside of a hospital setting, it's a good idea to speak to a qualified attorney and to your adult disabled child's medical team to determine if your adult child can understand and sign an advance directive for health care decisions. In New York, this is called a Health Care Proxy; in other states, it may be called a Health Care Power of Attorney. If your adult disabled child has the legal capacity to sign this advance directive, a legal guardianship proceeding may not be needed for health care decisions and management.

If you become the legal guardian for your adult disabled child, will this impact his or her civil rights?

Can your child vote, marry, or obtain a license to drive? Can he or she get a credit card?

There are generally no laws which prevent persons with guardians (or disabled adults without a guardian) from entering into a marriage. In many states, the right to marry depends upon the individual's ability to understand the nature, effect, and responsibilities of marriage and its ceremony. The real question for parents and their adult disabled child is whether he or she is capable of consenting to marriage. Usually, the marrying couple does not have to provide proof of their legal capacity to obtain a marriage license. Sadly, some states still refer to "imbeciles," "lunatics," "weak minded," and "insane" in laws about marriage. But these terms are usually associated with dissolving a marriage and whether a marriage contract can be annulled or voided when one person (or their guardian) wants to end the marriage. In most situations, however, the guardian's role will include determining what services will need to be in place, if any, for the couple to live together safely and happily after the marriage.

The opportunity to have a driver's license and operate a vehicle will also depend upon passing a written test and driving test as required by state law. Whether it is appropriate for your adult disabled child to have a driver's license should be discussed with your adult child and his or her medical, psychological, or other treatment professionals.

The right to vote also depends upon local (and Federal) laws. In New York, a person determined by a court to be "incompetent" is not permitted to vote. All the same, in many states, including New York, the standard for appointing a guardian is not incompetence but rather a determination of incapacity or certification of a diagnosis of mental retardation or developmental disability. It's important to note, however, that as of 2013, there is no legal test for registering and voting but your adult disabled child individual must understand the nature of voting and decisions to be made. For an excellent state-by-state chart of voting rights for persons with disabilities, go to www.bazelon.org and click "Self-Determination > Voting > Voting Policy Documents > Vote 2012 It's Your Right."

And credit cards or credit? There is no legal barrier to obtaining a credit card or other credit, such as a car loan or mortgage, whether a person is disabled due to mental illness, developmental disability, or other

incapacity. If credit can be used responsibly, there is no legal reason why your adult disabled child, including one with a court-appointed guardian, might not obtain credit. Many parents worry and wonder if their adult child (disabled or not) has the legal capacity to enter into a contract for credit and even understand credit terms. It's important to keep in mind that access to credit and protection from creditors is complex, and consumer legal rights are layered between state and federal fair lending laws and credit standards. If your adult disabled child is drowning in credit difficulties, you may need to be appointed as guardian to dispute, negotiate, or compromise creditors' claims with a court's assistance or supervision. Still, even without a guardian, many state laws protect certain income (including Social Security) and limited resources of your adult disabled child from creditor claims. And, no guardian is needed to enroll a disabled adult on a state's do-not-call registry.

Finally, take time to review your own estate planning if your adult disabled child is receiving, or may need government benefits, such as Medicaid or SSI. In the past, many families believed that the federal and state governments would always be there for their disabled adult child's needs. Gone are those days when the government will fund each and every program for persons with disabilities. Cuts are expected in housing services and supports for persons with disabilities. A Special Needs Trust (SNT), written in consultation with a qualified attorney, is an important source of supplemental support for your adult disabled child throughout their life after you are gone. The decision to become your adult disabled child's legal guardian is a significant step. It offers protections for your adult disabled child, and, it is a decision which should be made together with your adult disabled child, if he or she is capable, and his or her medical, social, and psychological treatment team. All the ramifications – both positive and negative – for your adult disabled child should be considered, including his or her personal goals and ambitions. The goal is to protect your child, now and for the rest of his or her life.

Beth Polner Abrahams is admitted to practice law in New York State, with an office on Long Island. For more information about her law practice go to [www. bpanslaw.com](http://www.bpanslaw.com).

To receive updates in special needs and elder law, at no charge, visit her law blog at www.bpalegalupdateblog.wordpress.com or register at the website to receive the updates.

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