Does My Child Need Guardianship?

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As a child with cognitive disabilities nears his or her 18th birthday, parents often wonder whether they should seek a guardianship over their child. The short answer to this question is, "it depends." In most states, a parent is deemed to be the legal guardian of his or her child until the child turns 18. Until 18, parents have the legal authority to make decisions (medical, financial, etc.) for their child. Most providers of services, including physicians, dentists, and school personnel, do not question this authority when the parent is in charge of his or her minor child and the parent is making decisions, recommendations, and participating in all of the areas where a child needs to be represented. The minute the child turns 18 years of age that authority ceases. The parent must then decide whether to seek decision-making authority for the child, and if so how much authority. The person given the authority to make decisions is called a guardian.

A guardian is appointed by the probate or surrogate court for an incapacitated person (sometimes called a "ward" or "respondent") and the guardian can be in charge of some or all personal affairs of the incapacitated person. In some states however, the financial affairs of a person are dealt with separately by a person called a "conservator." Therefore, in a case where an incapacitated person has assets that need to be protected and invested, it may be that both a conservator and a guardian are appointed for the person. In most cases the guardian and conservator is the same person.

Not every child who has disabilities needs to have a guardian. If the child is able to make good decisions, then he or she may not require a guardian or conservator at all. In some cases, a limited guardianship may be appropriate where a person may have the capability to make some, but not all decisions. For instance, a person under guardianship may retain the right to vote and handle a limited sum of money, such as up to $5,000.00, with all assets above that amount being managed by a conservator. In many states the family and lawyer are required to explore the possibility of a limited guardianship as opposed to a full guardianship.

Who may be a guardian? Any person 18 years of age or older may be a guardian; the harder question is who should be the guardian. Often parents will petition the probate or surrogate court to be the guardians of their child and usually the petition is granted. Sometimes the court will appoint one parent as guardian, other times both parents will be appointed as co-guardians. In some cases where the parents of the child do not live together and cannot agree on who should be appointed as guardian, the proceedings may become contested, and the court will appoint an independent guardian. Likewise, if there are funds to be protected, the court may appoint an independent party to serve as the conservator if the family is unable to agree on the appointment. In some states, mediators are available to help the parents resolve the issues rather than having a contested hearing, which can be expensive and take a long time. With the court's priority being the best interests of the child, it will often choose an independent guardian or conservator if the parents cannot get along, which is sure to leave both parents disappointed.

Parents should also take steps to name a successor guardian to serve after the parents have both died or are no longer able to care for the child. Parents have the following options:

Figure out who to appoint.

The parent should figure out who he or she wants to nominate as the guardian and as the successor guardian, should the proposed guardian be unwilling or unable to serve. This person will be in charge of making all decisions for the child including social, educational, personal, and medical decisions. This guardian basically steps into the shoes of the deceased parent and is charged with making prudent decisions as required. Thus, great care should be taken in selecting a guardian.

Talk to prospective guardians:

The parent should talk to that person to make sure the person wants to serve. The parent should discuss all issues with the proposed guardian to determine whether he or she is willing to take on that responsibility and serve as the substitute parent. The proposed guardian should be informed of all of the issues and responsibilities the particular child requires. There is no significant benefit in taking on the role as the guardian, but rather it is a responsibility to be taken seriously. If the proposed guardian declines to serve, the parent should not be upset or dismayed, but should be pleased that a person who may not want to serve declined to serve now as opposed to later when the parent is dead and cannot nominate a successor guardian. That is why it is so important there should always be a substitute or backup guardian named.

There must be further discussion with the proposed guardian as to where the child will live. In some cases, the child may be living in a residence, at home, or may be directed to live in the home of the proposed guardian. In some instances, it may be appropriate for the stability of the child to have the guardian move into the child's home if and when the parent is no longer alive or otherwise unable to take care of the child.

Issues about where the child will live also present financial considerations, primarily, who will take care of and be in charge of finances. Normally, the child will have a special needs trust established for him or her, and there will be a trustee appointed to oversee the investment, income, asset distribution, tax filing, etc. One should always consider the interrelationship between the

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guardian and the trustee to be sure that conflicts between the two do not exist. The guardian will be requesting funds from the trustee to maintain the child's household, and pay for trips, vacations, clothing, etc. for the benefit of the child, and the trustee may unreasonably be reluctant to make some of these distributions if the guardian and trustee have a personality conflict. This is more likely to be a potential problem when two family members are named as guardian and trustee, but it should be less of an issue when the trustee is a professional trustee, like a bank, or an individual professional trustee, like a lawyer who serves as trustee for special needs trusts.

Put the nomination in writing:

Nominate a guardian in a will.
A parent may nominate someone to be guardian of his or her child (whether under 18 or, if disabled, 18 and over). This person will still have to be confirmed by the court after the parent's death, but is wise to include the nomination in the will so the parent's preference is known.

Designate a standby guardian.
Most states have a process by which a parent can designate a guardian to take care of a child in the event the parent is incapacitated or has died. If the parent believes his or her choice of guardian will be contested by the other parent or by family members, the guardianship designation can be confirmed by the surrogate or probate court before the parent dies. Not all states have this process, but if it is available in the state in which the child lives, the parent should both nominate a guardian in his or her will and designate a standby guardian.

Prepare a letter of intent as guidance for the guardian. (An upcoming Voice article will address letters of intent).

A guardian can also nominate a successor guardian and should do so to be sure that the child is cared for within the constellation of family to which the child is accustomed if the current guardian dies. In many states, guardians may also designate a standby guardian just like the parent can as explained above. In sum, the appointment of a guardian for a child with a disability is one of the more important estate planning decisions a parent can make. There should be considerable discussion within the family as to who should be the guardian, not based on which other child is the oldest or who is living closest, but more importantly, who is the most suitable person to serve, who will best attend to the care and protection of the child if the parent is not living. While there is no substitute for a parent, and there is no one who will take the job as seriously and diligently as a parent, one must nevertheless consider who will be the best possible substitute to serve.

These decisions-who will serve as guardian, who will serve as successor guardian, the instructions to be left for the guardian-should be discussed with your estate planning lawyer and reviewed often to be sure that if a change is necessary, it is attended to promptly.

Attorney, Hyman G. Darling is chairman of the estate planning and elder law department at Bacon Wilson, and he is recognized as the area's preeminent estate planner. His areas of expertise include all areas of estate planning, probate and elder law. Darling is past president of the Hampden County Estate Planning Council and also a Certified Elder Law Attorney. In addition, he is a past president of the Hampden County Bar Association, he teaches law at Bay Path College, and is an adjunct professor at Western New England University School of Law - LLM program, teaching Elder Law. He serves on the boards of many charitable entities, including the National Planned Giving Committee of the American Cancer Society and is former chair of the Baystate Health Systems Professional Advisors Committee. Darling is a frequent lecturer on various estate planning and elder law topics at both the local and national levels. He earned his J.D. from Western New England University School of Law and his A.B. from Boston University. Darling lives in Longmeadow.