



## Guardianship for Persons with Special Needs

Upon reaching the age of 18 years, a person in New York is legally considered an adult. A parent of an 18-year old adult no longer has the right to receive medical, financial, or personal information about such an adult without that adult's consent. To parents of children with special needs, this reality often sneaks up unexpectedly. Suddenly, the primary care physician who has been treating your son or daughter advises you that you have no legal authority to direct treatment. Or you request medical records from an insurance carrier for your child, and are unable to obtain them, without showing proof of legal authority. Although many doctors and facilities would not question the decision of an involved parent, in the case of end-of-life decisions, legal authority is all that really matters.

In addition, what will happen when you are gone and suddenly, a different family member contacts the doctor or facility that has been caring for your child? Will they be more reluctant to speak to a newcomer?

New York state law explicitly provides procedures for the appointment of a guardian of a person with mental retardation or developmental disability. That guardian can make health care decisions for such persons, including decisions regarding life-sustaining treatment.

Planning for your special needs child requires careful attention to these important issues that would provide the greatest quality of life for your child. In the same way you would plan for your own disability or death, a family with a special needs child must plan for his or her lifetime care. It is, in short, estate planning for families with special needs. One aspect of that plan is the need for a guardian. The time to start thinking about commencing a Guardianship Proceeding is when a child with special needs nears age eighteen.

Estate planning in the context of planning for special needs and guardianship involves the consideration of some of the following issues:

1. Who will receive my assets after my death?
2. Does my special needs child need a guardian now?
3. Who will be the guardian after my death and the death of my spouse?
4. How will I provide for financial support for my child with special needs for his or her lifetime?
5. How will my child receive all the government benefits he or she is entitled to?

There are two types of Guardianship proceedings—one is commenced in Supreme Court pursuant to Article 81 of the Mental Hygiene Law for incapacitated adults. This was traditionally known as a Conservatorship and is usually commenced for a person who becomes disabled later in life.

The second type of Guardianship is commenced pursuant to the Surrogate's Court Procedure Act under Article 17-A. This Statute governs the appointment, duties and authority of a mentally retarded or developmentally disabled person. For purposes of Article 17-A, it is a person who has been certified by two licensed professionals as being incapable of managing himself or herself and his/her affairs by reason of such mental retardation or developmental disability. There are proceedings for the naming of Guardian of the Person, the Property or both. In some cases, when the alleged disabled person has no property and there is no expectation that any property will be received in the future, a Guardian over the Person is enough. In other cases, where the Respondent might earn money in the future or receive gifts or inheritance from a relative, a Guardian over the Property is required. Finally, for a person who cannot manage his person or his property, a Guardian for both is necessary.

A guardianship proceeding is commenced in the Surrogate's Court by a Petition (usually brought by the parents of the child) and accompanying documents. The most important part of the proceeding is the Physician Certifications. Two Physicians (or a Psychologist and Physician) must conclude that the alleged disabled person is primarily either developmentally disabled or mentally retarded. In addition, the Certifications of the Physicians must conclude that such disability prevents the alleged disabled person from fully appreciating the nature and consequences of health care decisions, including the benefits and risks of and alternatives to any proposed health care, and of reaching an informed decision in order to promote his/her own well being. A health care decision may include a decision to withhold or withdraw life-sustaining treatment as defined in subdivision (e) of Section 81.29 of the Mental Hygiene Law.

If the court finds that it is in the best interest of the person with the mental retardation or developmental disability to have a guardian, then a Guardian will be named for the person. If a parent is petitioning for Guardianship, the general rule is that no hearing is required but it depends upon the county and the judge. In conclusion, a guardian appointment is critically important in planning for your child with special needs.

### *About the Author*

*Audra Dehan, Esq., practices estate planning and elder law. She often speaks at Cody Center family workshops concerning guardianship and special needs trusts, and is a member of the Cody Comedy Festival Committee.*

## Mission

The mission of the Matt and Debra Cody Center for Autism and Developmental Disabilities is to promote excellence in clinical treatment, research, community service, and education for those with Autism Spectrum and other developmental disorders.