

SPAIN, SPAIN & VARNET P.C.

ATTORNEYS AT LAW

SUITE 2220

33 NORTH DEARBORN STREET
CHICAGO, ILLINOIS 60602

RICHARD C. SPAIN^{1,3}
NANCY M. SPAIN¹

SHERI L. WILLARD
KEVIN P. MITRICK
PRISCILLA SINGER
ANDREW D. BELL⁴
MAUREEN E. LOUGHRAN

TELEPHONE (312) 220-9112
FACSIMILE (312) 220-9261
www.ssvlegal.com

SUBURBAN OFFICE
(BY APPOINTMENT ONLY)

KENILWORTH, ILLINOIS
ROLLING MEADOWS, ILLINOIS
TELEPHONE (847) 434-1162

OF COUNSEL
THERESA M. VARNET²
tvarnet@ssvlegal.com

REAL ESTATE PARALEGALS
ALICIA MOSBY
ELIZABETH ZINANNI

¹ALSO ADMITTED IN OHIO

²ALSO LICENSED IN MASSACHUSETTS

³ALSO ADMITTED IN MASSACHUSETTS

⁴ALSO LICENSED IN MICHIGAN

GUARDIANSHIP AND ALTERNATIVES TO GUARDIANSHIP

The subject of guardianship for an adult child who is disabled is of concern to most parents. Parents of children who have a severe disability often assume that they can continue to be their adult child's legal guardian during the child's entire life. It may be obvious to a parent of a severely disabled child that one's child does not have the capacity to make informed decisions. However, legally, an adult is presumed competent unless otherwise adjudicated incompetent after a competency proceeding. Once the child reaches the age of 18, the parent is no longer the child's legal guardian.

The act of giving reasoned and well informed consent, when making a decision, may be beyond the adult child's ability. In order to protect one's child from unscrupulous individuals who may exploit the child's inability to make informed choices, it is necessary for families to familiarize themselves with the various legal options available to protect a disabled adult child. Following is a brief description of guardianship and various alternatives to guardianship that are generally available.

Guardianship is a legal means of protecting children and incompetent adults who cannot take care of themselves, make decisions that are in their own best interest, or handle their assets due to a physical or mental disability. When the court determines that a person is incapable of handling either their personal and/or financial affairs and appoints a guardian, the person who is disabled is referred to as the guardian's "ward."

Whether to seek appointment of a guardian is obviously a complicated issue. A petition for guardianship should not be filed automatically simply because a child has reached the age of eighteen. Parents, or other potential guardians, must carefully consider the disabled person's individual circumstances, including strengths and weaknesses, needs, and best interests, before deciding to seek guardianship. If the person is disabled but capable of making some, but not all decisions, one or more of the alternatives to guardianship discussed below should be considered.

Less intrusive alternatives to guardianship include:

1. A **joint bank account** can be created to prevent rash expenditures. Arrangements can be made with most banks for a disabled person's benefits check, such as Social Security or SSI payments, to be sent directly to the bank for deposit. In addition, a permanent withdrawal rider can be arranged with the bank authorizing the bank to send certain sums of money on a regular basis to a specified party, such as the landlord, or the person who is disabled, for pocket money, thus providing structure to allow for budgeting and money management.

2. A **Representative Payee** can be named to manage the funds of a person who is disabled who receives benefits checks from Social Security, Railroad Retirement or the Veterans Administration. Benefits checks are sent to the representative payee who manages the funds and spends them for the benefit of the individual with the disability. The representative payee has authority only over income from the particular check(s) for which s/he is payee. The person, who is disabled, would still make *personal* decisions.

3. A **Durable Power of Attorney for Property** is useful for persons who are mildly or moderately incapacitated and capable of choosing another person to handle their money. The power of attorney (P.O.A.) is a legal document that grants one person the legal authority to handle the financial affairs of another. If executed before incapacity, a "durable" P.O.A. continues the authority in the event the individual becomes disabled or incapacitated. There are both drawbacks as well as advantages to use of a P.O.A. The incapacitated person still has the legal authority to make decisions. For example, they can commit to a contract which is not in their best interest and can be held to that contract. Also the person can withdraw the P.O.A. at anytime and can remove the agent verbally or by the physical act of destroying the P.O.A. A person with a history of mental illness may, therefore, remove his/her agent at a time when an agent is most needed.

4. A **Durable Power of Attorney for Health Care**, also known as a **Health Care Proxy**, should be considered for individuals who presently are capable of making decisions about their health care and wish to anticipate possible future incompetency. This is a legal document that enables a competent individual, the "principal," to designate a health care agent to make health care decisions should the individual become incompetent to make them. The health care agent can be permitted to make all health care decisions, including decisions about life-sustaining treatment, and in many ways eliminates the need for a guardian. The proxy or power of attorney must be a written document that is signed by the principal, age 18 or older, and properly witnessed. The principal may revoke the document at any time and in any manner that demonstrates specific intent to terminate the power. Depending on state law, the document generally becomes effective according to the principal's wishes or upon a doctor's written certification of the principal's incapacity. Given the recent publicity surrounding the Terri Schiavo case in Florida, many nondisabled individuals, over the age of 18, are signing durable powers of attorney for healthcare to avoid the need for a guardianship of the person should

illness or injury render a previously healthy and able bodied individual incapable of handling personal medical decisions.

5. **A Durable Power of Attorney for Advocacy** allows a person who is disabled to designate an agent to advocate on his/her behalf with administrative agencies such as the Department of Mental Retardation, MA Rehabilitation, the Department of Human Services, Medicaid and local education authorities. The agent can be granted specific powers, such as access to rehabilitation and school records and the authority to release records, approve placement or services, attend meetings and generally advocate on behalf of the individual who is disabled. The document must be in writing, witnessed and, depending on state law, notarized.

6. **Trusts** may be an appropriate alternative to appointment of a Guardian in some circumstances. A trust is a legal plan for placing funds and other assets in the control of a trustee for the benefit of an individual with a disability. Creating a trust will be less expensive than a guardianship, in that no bond is required; it will keep the courts, and their associated costs, out of one's life (in most cases permission of a court is not needed to make disbursements from the trust or to make investments); and, it protects the beneficiary's assets without requiring that he/she be declared incompetent by a court. A trust, called a special needs trust, may also make it possible for the beneficiary to receive the benefit of extra income without losing valuable state and federal benefits. Trusts for the benefit of a person who is disabled should be established with the help of a lawyer experienced in wills and trusts and familiar with the law relating to government disability benefits. A trust set up without regard to the eligibility laws may disqualify a person who is disabled from SSI, Medicaid, and other important benefits.

7. **Guardianship** is an option for persons who, because of mental illness, developmental disability, or physical disability, lack sufficient understanding or capacity to make or communicate responsible decisions concerning their care, and/or are unable to manage their financial affairs. Guardianships are supervised by the Court.

a. A **Guardian of the Person** is responsible for monitoring the care of the ward. The guardian need not use his/her own money for the ward's expenses, provide daily supervision of the ward, or even live with the ward. However, the guardian must attempt to ensure that the ward is receiving proper care and supervision, and the guardian is responsible for decisions regarding most medical care, education, and vocational issues. For highly unusual decisions which were not anticipated at the time of the original guardianship hearing, the guardian should ask the court for instructions. Decisions involving intrusive forms of treatment, such as administration of antipsychotic medication, sterilization, and the withdrawal of life-prolonging treatment, must be made by the court. Generally, the guardian will be required to report annually on the status of the ward.

b. A **Guardian of the Estate** or **Conservatorship** should be considered for persons

with disabilities who are unable to manage their finances, and who have income from sources other than benefit checks, or have other assets and/or property. The guardian or conservator is responsible for handling the ward's financial resources but is not personally financially responsible for the ward from his or her own resources. In most jurisdictions, the guardian or conservator must file an annual accounting of the ward's funds with the court.

c. A Guardianship **may be limited** to certain areas of decision making, such as decisions about medical treatment, in order to allow the ward to continue making his/her own decisions in all other areas. The benefit of a limited guardianship is that the guardian's responsibilities can be tailored to fit the ward's special needs in the least restrictive manner. Further, under a limited guardianship, the ward has not been declared incompetent.

d. A **temporary guardian** or **conservator** may be appointed in an emergency situation when certain decisions must be made immediately. Generally a permanent guardianship or conservatorship must be requested along with the temporary appointment. The duration of a temporary appointment is dictated by state law.

This list of alternatives to guardianship is not exhaustive. Additional ones may be available depending on where the disabled person lives and the presence of his or her natural supports. If you would like more information concerning guardianship or alternatives to guardianship, you may call your local or state chapter of The Arc, NAMI, or other advocacy organization in your state.