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GUARDIANSHIP OR ADVOCACY

Guardianship or Advocacy – Who will assist the Person with the Disability in the Future?

One of the key concerns of most families is who will look after my child or sibling when I am no longer able to do so. The vast majority of persons with disability can function quite well in society and make their own legal decisions. For these individuals, the family may want to provide funds, so that there will always be an advocate to serve as a friend and confidante. The advocate is not legally appointed by the court; however, the trustee may be instructed in the trust agreement to hire one to visit the person with the disability on a regular basis to make sure his or her basic needs are being met. The advocate can advise the trustee on how to disburse the trust funds.

For some families with children or siblings who have very severe disabilities which render them unable to make decisions for themselves, they may wish to seek court appointment of a guardian to provide the same types of basic services as the advocate; however, they can also make legal decisions on behalf of the person. In some states, the courts may even grant partial/limited guardianship, so that the person with the disability can make some decisions. Few courts will grant guardianship for a person with mild or moderate disability or one who has mental illness. In these cases, the use of an advocate is the best alternative.

What is Guardianship? Guardianship is a court-approved legal relationship between a competent adult (known as a guardian, limited guardian, conservator) and a minor child or an adult who has been declared legally incompetent, which gives the guardian a defined degree of authority and duty to act on behalf of the person in making decisions affecting the person's life. The concept and functions of a guardian are established by law in each state. Currently, there is no uniform national guardianship law. It is important for families to understand that they are the legal guardians of their children until they turn 19 years of age in Nebraska (18 in most states) at which time they legally become an adult with all attendant rights of an adult, whether or not they have a disability. It takes a formal court proceeding to change this status.

When considering guardianship, parents should ask themselves and others the following questions:

- * ***Why guardianship?***
- * ***Is it really necessary now?***
- * ***Is it being suggested only for the convenience of a service provider?***
- * ***Is there some other alternative to a court-appointed and court-supervised guardianship?***

during their lives or how can their children without disabilities, other relatives or interested the death of the parents, best continue to help make decisions on behalf of the child who, by

virtue of some degree of functional disability, is unable to make or implement those decisions for himself or herself?

Is there some compelling reason for guardianship, and will guardianship solve an apparent problem? For example: How much risk is there that the adult child will leave home without knowing how to obtain food, clothing and shelter? Inflict injury or death on himself or on others? Be physically abused should he or she select inappropriate living arrangements? Become involved in ongoing criminal activity? Be subject to the exploitation of others in a sexual, personal or financial situation? Be subject to arbitrary action by state or federal funding, benefit or service providers?

Under the laws and practices in the state regulating the provision of health care, by hospitals or physicians, will the person be able to obtain routine or emergency services, treatment or therapy if outside providers doubt that this adult is capable of giving consent for such services?

Under the laws of the state, can an adult who is perceived to be mentally retarded and who expresses a desire to be sterilized secure this operation without the appointment of a guardian and/or a court order?

In short, is it really in the best interests of a son or daughter to have a guardian? If so, who should carry out this responsibility now and in the future?

Parents need to be aware that guardianship is not a total solution to managing the problems faced by a person with severe disabilities. Guardianship is a tool that can be used to provide differing degrees of assistance and protection. Like any tool, it can be measured.

Guardianship varies both in kind and degree. Determining the need for guardianship and its scope in a particular case involves court procedures that are designed to protect the interests of the person. "Due Process" takes time.

In most states, the family can nominate or recommend guardians in their Last Will and Testaments. The executor will then approach the courts for approval. Some parents have already obtained guardianship of the adult person and, in some states, they can receive approval for successor guardians as part of the approval process. In this way, the person will automatically have a court-appointed guardian (pre-approved) if something should happen to the parents.

We would like a Guardian/Conservator _____ or an Advocate _____.

Please list in priority order your proposed Successor Guardians/Conservator/Advocate. We realize most of your successors will be human beings subject to death so unless the first Successor Guardians/Conservators/Advocates is a charitable organization, please list one as your last choice.

- 1. _____
- 2. _____
- 3. _____
- 4. _____
- 5. _____ **Charitable Organization**