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■ Guardianship in New Jersey for Adults with Developmental Disabilities

Many adults with developmental disabilities are able to make decisions for themselves, but when the person lacks capacity, he or she may need a surrogate decision-maker. This article answers common questions about the different ways available to legally empower one person to make decisions for someone who cannot make decisions for him or herself, including:

- full guardianships;
- limited guardianships;
- durable powers of attorney;
- living wills; and,
- living (*inter vivos*) trusts.

Q: As a parent, am I automatically the guardian for my adult son or daughter with a disability?

No. At the age of majority – 18 in New Jersey – the law considers a child emancipated, regardless of the severity of the disability. Only a judge can appoint a guardian for a person over the age of majority.

Q: How do I know if my child needs a guardian?

The legal test for guardianship of an adult is whether one lacks the ability to govern oneself and manage one’s own affairs. The cornerstone of any legal discussion of guardianship is the concept of *informed consent*. Informed consent means that before agreeing to something major, the person understands what is being proposed and the consequences of the proposal – both pro and con – as well as the alternatives available. The consent must be free from coercion. If a person lacks the

capacity to give informed consent, he or she may need a guardian. If there is no legal guardian, then a legal vacuum exists and true consent cannot be obtained.

Q: How do I become guardian?

To obtain legal guardianship, an individual must make an application to the court which demonstrates that the person with a disability meets this test. The application must be supported by the certifications of two physicians or one physician and one psychologist. The court will assign a lawyer to represent the interest of the person with a disability over whom guardianship is sought. In most cases, once the papers are filed with the court, the process takes about 8 weeks, and in most New Jersey counties a court appearance is usually not required.

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Q: What does a guardian do?

A guardian makes all decisions about the care and treatment of the person under guardianship. For example, the guardian may decide whether to consent to surgery, or to a change of placement, such as from an institution to a group home. The guardian often attends the IEP or IHP meetings and decides whether to consent to the plan of services. The guardian may also decide on the best way to protect the legal rights of the person under guardianship. For instance, if the guardian is dissatisfied with the services an agency provides, he or she has authority to challenge the agency's decision.

The guardian may also make decisions about the property and assets of the person under guardianship, unless that property is in trust or consists of social security benefits. In these cases, it is the trustee and representative payee respectively who will decide what to do with this property.

Q: Is a guardian financially responsible for the person under guardianship?

No. A guardian has no financial responsibility for a person under guardianship.

Q: What if my child needs a guardian for some decisions, but not others?

New Jersey law allows for limited guardianship.

This allows a guardian to make decisions in some, but not all, areas of an individual's life. For instance, parents may be appointed limited guardians of their son with respect to financial and medical issues. In such a case, personal decisions such as where to work or live remain with the individual. As a result, limited guardianship can take on many forms and can be tailored to match an individual's

strengths and weaknesses. While many people with very severe cognitive disabilities may still require a full guardian, a limited guardian may be appropriate for someone who is higher functioning or who has a very mild cognitive impairment. Experienced attorneys and psychologists can help families decide which form of guardianship may be appropriate.

Limited guardianship is a useful way to preserve the ability to make minor or routine decisions. Yet, even with full guardianship, a guardian cannot make all decisions. For instance, sterilization, or the elimination of voting rights, require a specific court finding because these are fundamental Constitutional rights. Although not fully settled by the courts, deprivation of the right to marry, also a fundamental Constitutional right, likely requires a specific court finding.

Full guardianship is favorable in most cases. The guardian can and should take the preferences of the person under guardianship into consideration and even allow the person to make certain decisions.

Moreover, limited guardianship can be difficult to implement in practice. Consider this real life example: If the person under guardianship is allowed to make minor medical decisions and refuses a flu shot, can the guardian override this decision?

Q: Who should serve as guardian?

Typically both parents serve as co-guardians. As parents age, siblings are sometimes added.

A guardian is the person's chief advocate, so he or she should have an interest in the person with a disability and be willing to take the time to learn about the person's needs. Ideally, the guardian should live close to the ward, but this certainly is

not required. The guardian should also know where to turn for professional help in making decisions. Most often, parents become guardians when a person with a disability reaches the age of majority. Parents also need to consider a successor guardian who can serve as guardian when they are no longer able to do so.

Q: Can a parent designate a successor guardian through a Will?

Yes. Parents should name a successor guardian in their Will.

It is a good idea to designate a primary successor guardian, and one or two other people to serve in the event that the primary successor guardian is unable to complete his or her duties.

The individual named in a Will must still petition the court to be appointed the successor guardian.

Q: What if there is no one who can serve as a successor guardian?

The State may become a person's guardian if no one is available, however, this should be used only as a last resort. Community trusts can serve when family members are not an option. Such services can be funded from a properly established Special Needs Trust for the benefit of the individual with disabilities.

Q: Is it expensive to obtain guardianship?

Guardianship is relatively inexpensive and easy to obtain privately with the assistance of an experienced attorney. Procedures vary by county, and this may affect the cost. Generally, however, courts try to streamline the process in cases in which the individual's disability is clear.

Q: What are the alternatives to guardianship?

Conservatorship is a voluntary, judicially supervised arrangement for people who need assistance, but who are capable of giving informed consent.

Durable powers of attorney, medical directives and living wills are documents signed by one person ("principal") giving another person ("agent") authorization to act. It is not sufficient that the principal signs his or her name. The principal must have sufficient capacity to give informed consent, and the arrangement can be terminated by the principal at any time. If, for example, a person has a lifelong disability and lacks capacity, medical personnel will not honor the power of attorney.

Person-centered planning is an arrangement that involves a "circle" of family and friends who assist the person with a disability in making decisions. There are some advantages to this, but it is useless in the context of informed consent and will lead to chaos in the event of disagreement.

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New Jersey guardianship laws detail some of the requirements for a guardian:

- A guardian is required to encourage the individual's participation in decision-making.
- A guardian must visit the individual every three months and keep abreast of the individual's condition.
- A guardian may plan for the individual's future, including applying for public assistance (such as SSI, Medicaid and Medicare benefits).
- A guardian must file brief annual reports with the court about the individual's condition.
- A guardian is shielded from liability for injury.

A guardian, who obtains guardianship over an individual and later moves outside of New Jersey with that individual, can transfer the guardianship to another state. Also, if a guardian appointed in another state moves to New Jersey, the law provides that the guardian can ask a court to transfer the guardianship to New Jersey.

Hinkle Prior & Fischer is a multi-state law practice with offices in Lawrenceville, Cherry Hill, Florham Park, Paramus, and Wall, New Jersey. The attorneys lecture and write frequently on topics of elder law, estate planning, special needs trusts, guardianship, special education, Medicaid and accessing adult services. The attorneys are available to speak to groups in New Jersey and Pennsylvania at no charge.

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