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FAMILY



Protecting Your Loved One Through a Guardianship

By Marcie G. Roth, Esq.

her general responsiveness and decided to address this with Danielle and then speak with her parents. It became clear that Danielle was totally unaware of the "resentment" part of her internal experience. Love, responsibility, duty, and "being a good girl" were much more comfortable feelings for her. Although initially embarrassed by her teacher's invitation to this conversation, Danielle was relieved to know that somebody had noticed that she was having a hard time. In her conversations with her teacher and parents, she was able to realize the combination of love and resentment that she was experiencing. What she also realized was how guilty her resentment made her feel. She was so afraid that any negative feeling would be a betrayal to her family that she tried to keep those feelings hidden. As Danielle discovered that she didn't have to keep all of her mixed feelings to herself, she realized that she could allow herself to have visions for her own future without having to worry about whether she would still be a good sister. ■

Marsha Winokur, PhD, is the Founding Director of Learning Resource Network, a program of the Jewish Board of Family and Children's Services. The Learning Resource Network offers a wide range of consultation and support services to help parents concerned with child development and learning issues. If you have any questions of concerns about your child, please feel free to contact us at (212) 632-4499 or email lm@jbfcs.org.

When you have a child or family member with a disability that prevents them from fully participating in the management of their finances, healthcare decisions or other things we all generally do every day, there are steps you can take to ensure that he or she is well cared for now, and even after you are gone. Guardianship is a key tool that can help you address and manage the issues that your loved one will face. New York State offers a great deal of flexibility in how guardianships can be structured to meet the individual's needs, as well as the needs of that person's family. In this article we will explore the two principal paths to guardianship, along with the benefits and drawbacks of each approach.

Why Consider a Guardianship?

A guardianship is a very effective way to safeguard the person, rights, property – and even the preferences – of a family member who has a disability that prevents them from effectively communicating their wishes on their own. This can be useful as primary caregivers age, to ensure that the family member is still cared for properly. It can also be useful as the family member with the disability becomes a legal adult. Imagine, for example, that a family mem-

ber is enrolled in a day program and changes in the program or its staff suddenly make it less congenial for the family member. Another example is when a child ages out of his or her educational facility and needs to move to a suitable adult residence. In both cases, chances are good that your family member will not be able to effectively advocate for himself or herself. Unless you have the standing of a legal guardian, you might not be able to do so, either.

What Does a Guardian Do?

The law recognizes two types of guardians – one of an individual's person and one of an individual's property. A guardian of someone's person makes essential basic decisions, such as where that person will live, which doctors he or she will see, what medical treatments will be administered and what day programs or supervised work experiences he or she might participate in. A guardian of someone's property oversees investment and allocation of their assets within the guidelines laid down by the court that awarded the guardianship. Sometimes these guardians are the same person, but they can be different; particularly when the person with a disability has substantial assets, it can be important to have a professional with fiduciary and investment expertise

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as guardian of his or her property.

How Do I Obtain a Guardianship?

Because a guardianship involves legally altering a person's rights over themselves and their property, all types of guardianship require some sort of court order. Note that courts are very careful when awarding guardianships; they do not wish to take rights away from a person unless it is clear that person cannot make decisions for himself or herself nor do they allow a guardian to compel an individual to seek treatment to which he or she is resistant. For this reason, guardianship is rarely – if ever – granted over someone whose disability is purely physical in nature or who suffers from an eating disorder or mental illness.

New York State law has established two paths to obtain a guardianship for a person with a disability.

The first path to guardianship, established by **Section 17-A** of the New York Surrogate's Court Procedure Act, is through the Surrogate's Court. This option is available for individuals who are diagnosed as developmentally disabled or mentally retarded before they reach the age of twenty-two. In either situation the impairment is permanent in

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nature or likely to continue indefinitely. This type of guardianship can be obtained by completing papers which can be obtained from the local Surrogate's Court. The Surrogate may dispense with a personal appearance by the disabled person. The procedure is fairly straightforward and it is possible to obtain a 17-A guardianship without legal representation. The costs are comparatively low. However, the court typically directs a very conservative investment strategy, often limited to government-guaranteed instruments, and retains the right to review and approve any allocation of assets and expenditures. The court may also retain the right to review other decisions concerning the subject's life, so there will be subsequent applications to the court. A Section 17-A guardianship can be the right choice if the individual with the disability does not have any substantial assets and the goal is simply to protect his or her person.

An **Article 81** guardianship is granted by the

county Supreme Court after a very involved process that includes a formal written petition and at least one full courtroom hearing at which the person to be subject to guardianship must be present. Originally designed for those who have lost capacity, Article 81 guardianships incorporate comprehensive protections for the allegedly incapacitated person. Although both courts require an annual accounting of the assets, once an Article 81 guardianship is obtained the guardian has more freedom to direct asset allocation, subject only to the prudent investor law. In addition, a properly constructed Section 81 petition can invest the guardian with specific powers and authorities to make the subject's life easier. You will need to work with an attorney – preferably one with experience in this area, so your petition is properly thought through the first time. You will also need to be prepared to invest significant time and money in this process, but it can pay off in the long run.

Conclusion

Guardianship can be an important tool in protecting your loved one's quality of life. For most families, though, it is only a beginning. Talk to an attorney with expertise in this area, meet with someone at a social service agency or confer with a social worker you trust to see if a guardianship makes sense for your family member. At the same time, you will also want to consider setting up a special needs trust to protect your family member's assets while preserving his or her eligibility for various government-sponsored programs. ■