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Our law practice is limited to "special needs legal and future planning" for our fellow Illinois families of individuals with special needs, including, but not limited to, intellectual disabilities, developmental disabilities, and/or mental illness.
(Attorney memberships include the Special Needs Alliance and the Academy of Special Needs Planners)

Some helpful information in regards to Powers of Attorney and Guardianship for our fellow families of children and adults with special needs…

Introduction

When a child with special needs turns 18, they become an adult in the eyes of the law. At that moment, all rights that a parent ordinarily has to make decisions for their children end. While this is part of the normal course of affairs for most children as they often leave their home to attend college at this age, and thus it makes sense that the law presumes them capable of handling their own affairs, for those with special needs the loss of these parental rights may be a frightening possibility. To forestall the imminent loss of their decision-making rights with regard to their special needs child, parents have a number of options.

I. Doing Nothing (Health Care Surrogate Act)

First, they can choose to do nothing. Under the Illinois Health Care Surrogate Act, if an individual's attending physician or hospital determines that the patient is unable to make his or her own medical decisions, and there is no applicable health care power of attorney, no court appointed guardian, no spouse, and the

child does not have their own adult son or daughter, then either parent can make medical decisions, including the Living Will decision for their child.

II. POWERS OF ATTORNEY

The Illinois Health Care Surrogate Act, however, only applies to medical decisions, thus when a special needs child turns 18, if the parents fail to take any other action, they will lose all rights to make decisions regarding, or even to talk to, the school, State and Federal agencies regarding Medicaid and SSI, employers, or any other organization providing residential services or day programs, etc. In order to prevent this from happening, the first, and least restrictive step that a parent of a special needs child can take, is to have their child sign several different powers of attorney to ensure that the parents have the right to talk to and make decisions regarding all of the abovementioned subjects.

These powers of attorney should include the Special Education Power of Attorney which has been in existence under Illinois law since August 2007, the Power of Attorney for the Social Security Administration, which handles SSI (which requires its own form), the Power of Attorney for the Illinois Department of Human Services which handles Medicaid (which requires its own form), as well as the Illinois Statutory Power of Attorney for Property (financial), a form just revised in July 2011, to allow the parents to handle their child with special needs' financial affairs. This financial power of attorney needs to include several additional provisions to the standard statutory form in order to permit the parent to handle matters pertaining to the IRS, speaking to organizations providing residential services and day programs, etc. Parents should also have their child with special needs sign an Illinois Statutory Power of Attorney for Health Care, also recently revised as of July 2011, to ensure they can make healthcare decisions for their child without recourse to the Health Care Surrogate Act which is dependent on the doctor or hospital determining that

their patient is not competent to make his or her own medical decisions. In addition there is a Mental Health Treatment form, which, if signed, can permit involuntary admission into a psychiatric hospital (a power even guardianship does not include in Illinois).

III. GUARDIANSHIP

While Powers of Attorney may be all that is appropriate for many individuals with special needs, they do not terminate the rights of the individual with special needs. Thus, if the individual signs a contract, it is binding. If the school convinces him or her that they do not want their parents to come to the next IEP, then the parents may never find out about it. Powers of attorney only work if the child lets them work and no one tries to take advantage of the situation. If more protection is needed, the next step is to go into court and obtain a Guardianship over the individual with special needs. Guardianships come in two main forms: a Limited Guardianship and a Plenary (full) Guardianship.

a. LIMITED GUARDIANSHIP

A Limited Guardianship basically says that the individual needs help in making decisions in a few areas listed in the court order. For instance, the Limited Guardianship might be for just medical and financial decisions. Once the list on the court order becomes longer than a few items, however, the court will likely require a Plenary (full) Guardianship instead. Families will often pursue this version of a Guardianship where the individual with special needs wants to maintain the ability to drive, as under a Plenary Guardianship, it is against Illinois State law to maintain a driver's license. This type of Guardianship is also often used where the individual is very "high functioning" and the court process of getting a Plenary Guardianship might be deemed too difficult emotionally for the child with special

needs. Finally, this type of Guardianship may be obtained to avoid the risk of liability that accompanies a Plenary (full) Guardianship, as discussed below.

b. PLENARY (FULL) GUARDIANSHIP

Plenary Guardianship is the most protective action that can be taken when a child with special needs becomes an adult. Under Plenary Guardianship the child is, for all intents and purposes, 17 again. The parent is thus able to act, this time in the role of "guardian of an adult disabled person," as they were able to before the child became an adult. Under this form of Guardianship, when a serious incident occurs while the individual with special needs is living in a CILA, at school, at a work shop or DT program, the staff must contact the guardians as they would a parent of a minor child.

While under powers of attorney, the child with special needs is free to make his or her own decisions, with a Plenary Guardianship, any contract or decision made by the individual is void, not merely voidable. Furthermore, the child with special needs may not obtain a driver's license and if he or she currently possesses one at the time of the Plenary Guardianship, it becomes void. The individual with special needs may still exercise his or her right to vote, however.

c. WHY DO SOME PARENTS/SIBLINGS DECLINE TO BECOME PLENARY (FULL) GUARDIANS?

The most common reason that parents decline to become legal guardian is fear of liability. Plenary Guardians may be liable in the event the child injures someone or damages property while under their supervision and they are deemed negligent in supervising the individual with special needs. However, the guardian's authority, and

thus liability, is delegated to the school district if the child is in school, to the organization running the CILA if the child is living in a group home, and to the organization running the day program while the child is there. If Parents or siblings are nonetheless hesitant to seek Plenary Guardianship due the risk of liability, a Limited Guardianship, discussed above, may be an appropriate alternative.

d. THE PROCESS OF BECOMING LEGAL GUARDIAN FOR AN ADULT WITH SPECIAL NEEDS

The process of obtaining a Guardianship has all the formalities of a court case. A Guardianship is a serious matter, it declares that the person is legally incompetent to handle their affairs, it strips them of all of the ordinary rights all other adults have. Because of the gravity of the action, the procedure includes several safeguards.

1. First, a lawsuit is filed by those seeking to become legal guardian. A report by a doctor (must be an Illinois licensed M.D., not a psychologist) who has examined the child within 90 days of the filing of the lawsuit must be submitted.
2. A sheriff summons must be issued (the individual with special needs must be served physically with the summons).
3. If the individual with special needs objects to having a guardian appointed, the judge will appoint a Guardian Ad Litem to represent the interests of the individual with special needs to determine whether he or she needs a guardian and whether those seeking to become guardian are the best suited for that role. The cost of the Guardian Ad Litem will be borne by those seeking the Guardianship.
4. Parents can be "co-guardians", as can siblings, but both signatures are required when acting as Guardians.

5. **If an individual with special needs has money in their name, a guardianship of the estate, in addition to the guardianship of the person, must be opened and the court will supervise the management and disbursement of all the individual's funds. Special Needs Trusts, however, are not considered assets of the person, the Trust beneficiary.**
6. **Once Guardianship is established, annual reports (a simple two page form) must be filled out and mailed into the court each year (some counties, every two years, some every three years, some never, but in the collar counties, every year). The only time that Guardians must commonly go back in to court is for residential placement. When the Guardians determine that it is time for the child to be placed in a residential setting such as a CILA, they must go back into court to get this approved.**
7. **The Guardian can move out of State without going to court, but if the individual with special needs moves out of state, then the Guardianship must either be transferred or closed and reopened in the new state. If the Guardian, the individual with special needs, or both, move out of the county the Guardianship is in, the court may choose to move it to the new county. However, Illinois state law does not require this so, as long as it is disclosed in the annual reports, no further action is required unless the court says otherwise.**

IV. WHEN TO SEEK GUARDIANSHIP

There is no rule about when to seek guardianship; in some cases it makes sense to do it at 18, in others to wait until the individual moves into a CILA, in still others powers of attorney will work just fine. It depends on the needs and circumstances of the individual with special needs.

V. NOMINATION OF SUCCESSOR GUARDIANS IN A WILL

In addition to nominating Guardians for minor children, parents of children with special needs must also nominate Guardians for an "Adult Disabled Person". This nomination is not an appointment and must be approved by a court, but it carries tremendous weight when a court is determining whom to appoint as guardian for the individual with special needs. When considering who to nominate for such an important position, consider who would be the best person in the next few years as well as "back-up" people who you would want to step in if those people are unable or unwilling to step-up. As Guardian, they will not be required to have the individual with special needs move in with them, but they will be responsible for where the individual lives as well as for making all kinds of decisions regarding their living arrangements, day programs, etc.

VI. SHORT-TERM/STAND-BY GUARDIAN DECLARATIONS

When the Guardians go on vacation, they may fill out a Short-Term Guardian Declaration which temporarily delegates their guardianship authority to someone else. If a Guardian becomes incapacitated he or she may designate a Stand-by Guardian to serve during his or her incapacity. The designation of a Stand-by Guardian is traditionally done at the same time and using the same individuals as are nominated in a will. A sample Short Term Guardian Declaration is attached.