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THE TRUTH ABOUT GUARDIANSHIPS

By: Peggy R. Hoyt, J.D., M.B.A.

Have you ever wondered who will take care of and provide for your child's needs after you are gone? How can you leave an inheritance without affecting hard won governmental benefits?

The issue of guardianship is often overlooked or misunderstood by family members, and especially parents. There are a number of misconceptions surrounding guardianships. Many parents believe that because they are the parents of a child, and therefore the natural guardian, they don't need a formal guardianship. Others believe a guardianship may increase or impose an obligation to pay for the needs and expenses of their child or that the State may gain some control or advantage and be able to move the child to another living arrangement or interrupt benefits. All of these concerns are unfounded.

Parents provide and care for their children from birth. However, when a child turns eighteen, even a special child, a parent does not retain the same legal authority they had the day before. The law considers a person over the age of 18 as an emancipated adult - one capable of making all of their own personal and legal decisions - one able to vote, marry and enter into binding contracts. In order to retain the personal and legal authority enjoyed by the parent prior to the child's 18th birthday, a parent is required to petition the court to be appointed as legal guardian.

A guardianship should be considered for your special person if they lack the ability to care for themselves and to manage their affairs. In its simplest terms, a guardianship provides a legal basis for parents to do for their child, as an adult, essentially the same things they have been doing for the child as a minor, with the exception that they are no longer financially liable for the debts of the child. Generally, the role of a guardian is to provide the special person (or ward) with a champion who is legally empowered to protect them from harm, promote their best interests and safeguard their human and civil rights. A guardian is not liable for the acts of their ward. However, a guardian can be liable for their own acts that may have contributed to the opportunity for the acts of the ward that result in injury to a third party.

The role of guardian is a very special role. The guardian must be able to use their discretion for the best interests of the ward. They must understand public benefit rules and utilize them for the ward's benefit. They are required to conform to the legal requirements for fiduciaries in their state. They need to be able to invest assets wisely and prudently and be able to recognize improper advice from other professionals. They need to be able to keep accurate accounting records. The guardian should be able to be bonded

whereby a bonding company would be willing to issue an insurance policy covering their financial misdeeds. Ideal candidates for guardians can be parents, family members, friends, professional guardians, trust companies or bank trust departments, certified public accountants, social workers, case managers or some combination of these individuals. However, this is not a position to be undertaken without thoughtful consideration. There is a lot of responsibility and liability.

When parents desire to be a child's guardian, generally both parents should apply for the appointment. Sometimes, however, parents are advised that it would be appropriate for only one parent to apply as guardian in order to "avoid family disputes." Family dispute can be healthy when the best interests of a special person are at stake. Parents must work together when children are minor to set goals, boundaries and make decisions regarding the best interests of their children, therefore, it stands to reason they will work together when their special person is an adult.

Guardianship proceedings and their requirements will vary from state to state. It is important to obtain the counsel of a competent legal professional for guidance in beginning the guardianship process in your state. In some states, the State Attorney General can initiate the action and in other states you may be required to initiate the guardianship proceeding personally. Depending on your state and the process available to you, the time to complete the guardianship will vary, as will the costs and other requirements of the court. Your legal counsel should be able to provide you with a complete explanation of the various options available in your state and assist you in determining which process will best suit your individual family needs.

A guardianship is a powerful tool to insure the welfare of your special person. The guardian should not do for the special person that which the special person can do for themselves. If this basic precept is followed, guardianship should not result in the loss by the special person of any rights or abilities they were capable of prior to the guardianship.