

Options for When Your Child With Special Needs Turns 18

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Once your child turns 18 years of age, they are presumed capable of making sound judgments for themselves, and they become legally responsible for their own decisions. Some individuals with Autism Spectrum Disorder (ASD), however, may not be able to make all decisions for themselves, or they may need assistance to do so. So what should parents do when they have a child with ASD who is about to turn 18? As with most things, there is no hard and fast rule or simple answer.

When discussing this topic with clients, we consider both the cognitive capability of the child and the parent's perceived need to continue involvement in the child's financial life and medical affairs. Other relevant factors include an analysis of the pros and cons of guardianship, conservatorship, agency under a financial power of attorney, and agency under a health care proxy.

There are a number of possible reasons for pursuing guardianship or conservatorship – access to medical information and doctors, ensuring educational obligations are met by school districts (which can extend beyond age 18), access to funds or income sources, and protection against improper contracts or purchases, to name a few. The main reasons against pursuing guardianship or conservatorship are the desire to foster a sense of independence and self-determination, the reluctance to publicly take away the child's rights, and of course, the costs and stress of going through both an initial and annual court process.

It is important to think about your child's ability to care for him or herself long before he or she turns 18. If your child has an Individualized Education Program (IEP), a transition plan may be put into place as early as age 14. As your child gets closer to 18, you will have a better understanding of your child's future ability to make important decisions that can affect his or her health and welfare. Beginning at age 17, you should consider the possibilities of a power of attorney and health care proxy vs conservatorship and guardianship.

Guardianship and Conservatorship

Guardians and conservators are appointed by the probate court to manage financial (conservatorship) and personal (guardianship) matters for the protected person. A guardian makes decisions for living arrangements, schooling, medical treatment, and all other authority for the individual's well-being into the hands of a third party, often a parent or other family member. It is akin to the same authority that a parent would have over a child before reaching majority age. Certain medical decisions may be restricted under a guardianship by the court, such as the prescription of antipsychotic medications or institutionalization.

A conservatorship only controls the property of the disabled child. The two procedures can both be allowed by the court for the child, or the child may only need one or the other. Different or multiple individuals may serve as guardians or conservators. For parents who are seeking guardianship when their special needs child turns 18, ordinarily a conservatorship is not necessary, because the child has no assets.

To obtain guardianship or conservatorship over your child, a formal legal proceeding will take place, and the court may appoint someone to represent your child to make sure his or her interests are protected and may require that other family members be notified of the guardianship or conservatorship petition. When appropriate, courts favor a limited appointment, which means the guardianship or conservatorship is limited to only those specific needs of the individual so the child would not lose all of his or her rights and could potentially maintain a greater sense of independence. Further, guardianship and conservatorship need not be permanent and if the child doesn't require the guardianship or

conservatorship in the future, it can be modified or terminated through a formal court proceeding. Both the guardian and conservator (who can be the same person) must file annual reports on their activities to the probate court.

Alternatives: Power of Attorney and Health Care Proxy

Similar to competent adults who are not disabled, an adult disabled child can grant authority for medical decisions to a parent under a health care proxy. The adult child can also grant authority for financial and property related decisions under a power of attorney. These documents may be limited or expansive depending upon the situation. The key to their use is that the child adequately knows and understands what he or she is granting at the time that the document is signed. That determination is often left to a combined legal and medical determination by experts skilled in this area of law and medicine.

The big advantage to the use of these documents is that their creation is relatively simple and inexpensive. There is no public notice of incapacity or annual filing of report as is required with the probate court procedures, which are discussed in more detail below. As the child matures, the parental oversight can be increased or cut down without the court's involvement depending upon situational needs and the ups and downs of the child's growth and development. Moreover, the documents remain in effect regardless of the individual's progressive deteriorating condition.

The downside with relying on a health care proxy and durable power of attorney is that these may be revoked instantaneously by the child if the child has the capacity to know what he or she is doing. This could occur at a time when the authority is most needed, such as when an important event occurs like a hospitalization or receipt of a large amount of funds.

Parents need to weigh all of these advantages and disadvantages along with considering their child's specific abilities and needs for assistance. If parents do not see specific risks for their child, then there are less restrictive alternatives to pursue. But if parents do, then certainly the guardianship or conservatorship process is essential and well worth it.