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GUARDIANSHIPS AND CONSERVATORSHIPS

Ideally, a person will have planned in advance for the event of incapacity by having executed advance directives concerning their health care and a financial power of attorney regarding the management of their affairs. By such advance planning, a person and his/her family can often avoid going to court to establish a guardianship and conservatorship. However, many persons who are disabled from time of birth do not have the capacity to engage in such advance planning, or, if they later become disabled, have not had the opportunity to do so.

Parents of children with a disability must plan for that child's transition into "adulthood" at age 18. The law presumes that, at such age, an individual is independent and capable of making decisions for himself/herself, as well as managing his/her own affairs. However, that is often not the case for a child with a disability. In such instances, the parents must contemplate what legal authority they will continue to have to make decisions on behalf of, as well as manage the affairs of, a child with a disability that renders him/her incapable of doing so him/herself.

Arizona law provides for a **surrogate** decision maker in the following priority for those individuals who are unable to make or communicate their own health care decisions:

1. Your husband or wife, unless you are legally separated.
2. Your adult child. If you have more than one child, a majority of those who are reasonably available.
3. Your mother or father.
4. Your domestic partner, unless someone else has financial responsibility for you.
5. Your brother or sister.
6. A close friend of yours, that is, someone who shows special concern for you and is familiar with your health care views.
7. Your doctor with the advice of an ethics committee or, if this is not possible, with the approval of another doctor.

Thus, the parents of a child who is disabled may continue to make health care decisions on his/her behalf beyond the age of 18. However, a surrogate decision maker is limited in his/her authority and cannot make decisions concerning the withdrawal of tubes that are providing you with food or fluids once instated. In addition, such a decision maker

may only consent to your admission for inpatient psychiatric or mental health treatment for up to forty-eight (48) hours before having to seek appointment as guardian with appropriate mental health authority. Moreover, a surrogate decision maker has no authority over the finances or property of an individual.

Thus, the appointment of a guardian and/or conservator may be necessary. A **Guardian** is someone who is appointed by the Court to make personal and health care decisions for a person who is **incapacitated**, that is, unable to make reasonable decisions concerning his/her person, due to a mental or physical disability, as well as chronic drug use or intoxication. A **Conservator** is someone who is appointed by the Court to manage the finances and property of a person who is determined to be **“in need of protection,”** that is, the person is unable to manage his/her affairs effectively for the reasons set forth above, the person has property which will be wasted or dissipated without proper management, or protection is necessary to make funds available for the person’s support, care, and welfare.

A physician or registered nurse must support the need for a guardianship in writing and, although such a statement is not required for a conservatorship, the Court, in its discretion, often requires it. To obtain the additional authority to consent to inpatient mental health or psychiatric treatment, the person seeking appointment as Guardian must demonstrate a **current**, or, at least, **foreseeable**, need for such treatment as supported by the report of a physician, psychologist, or psychiatrist.

The Court will appoint whomever is seeking the appointment as long as he/she has priority and the Court does not otherwise have good cause to appoint another person or entity. The person for whom the guardianship and/or conservatorship is being sought will be represented by an attorney appointed by the Court, and have an opportunity to express his/her wishes and position in the matter. A guardianship and/or conservatorship can be sought on a temporary basis if an emergency exists and until such time as a permanent appointment can be made.

A Guardian must report to the court annually, as well as submit an annual report of physician. In the case of a Guardian with the authority to consent to inpatient mental health or psychiatric treatment, the Guardian must include the report of a physician, psychologist, or psychiatrist supporting the continued need for such authority otherwise the power lapses. A Conservator must file an inventory of the assets of the estate, as well as an estate management plan, within ninety (90) days of appointment and an annual accounting. A Conservator will have to be bonded for the annual income of the protected person as well as any assets within the Conservator’s control, otherwise, the assets will be restricted, that is, the Conservator will be unable to make withdrawals, transfer, or encumber the asset without prior Court approval.

If the person for whom guardianship is sought has no income or assets of his/her own, then the appointment of a Conservator will not be necessary. Typically, parents seek guardianship of a child who is disabled and who is eligible for and receiving disability benefits through the Social Security Administration (hereinafter “SSA”) either Social

Security Disability Insurance or Supplemental Security Income, for which the parents serve as Representative Payee. As Representative Payee, the parents have legal authority to receive such benefits on behalf of their child, and will account to the SSA concerning their management of such benefits on an annual basis. Although such benefits must be disclosed to the Court when requesting appointment as Guardian, the Court generally will not require the appointment of a Conservator, or subject the Guardian to the requirements of posting bond or filing annual accountings with the Court.