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Decision-making for an Adult Special Needs Child

Parents of children with special needs must be concerned with ensuring that medical and financial decisions will continue to be made in the child's best interest once the child reaches age 21 – the age of legal capacity (or “age of majority”) in Mississippi. In most states, once a child reaches the age of majority, he is presumed to have full decision-making capacity and the parents' legal authority ends. Once the child is an adult, privacy laws will likely prevent the parents from getting access to medical and financial information about the child. Parents of children with special needs have various options, each with advantages and disadvantages depending on the situation, to establish a new legal authority to continue making important decisions for the child.

If the child is incapable of making personal or financial decisions once she reaches the age of majority, a parent -- or anyone else who is an adult, is not incapacitated, and does not have a significant conflict of interest -- can petition the court to be appointed the adult child's **conservator**. This process ideally should be completed before the child reaches the age of majority, so that there will be no lapse of authority by the parents. However, this can be done after the child has become an adult. Establishment of a conservatorship requires a court process, which may be emotionally intimidating for the person with special needs and her family. In order to protect against abuse, the court may appoint an independent attorney for the individual who is the object of the conservatorship proceeding (the "ward"), and the court must determine if the disabled ward is incapable of managing her own personal and/or financial affairs.

In cases where someone is appointed as conservator to make financial decisions, the court may require that person to be bonded, file annual financial statements and request the court's permission before dealing with the property of the person with special needs. This is meant to increase oversight and protection, but it also decreases family control.

In some cases, the parent of a child with a disability may have been appointed as the child's legal **guardian** by a Chancery court. A “guardian” is appointed for a person with a particular legal disability (such as being a child without legal capacity), whereas a “conservator” is appointed for a person of any age who is found to be unable to manage his or her personal or financial affairs. By Mississippi law, a guardianship ends when the ward reaches age 21. If the parent has been appointed by a court as guardian for the child, the parent should therefore obtain a court order prior to the child's age of majority establishing that the guardianship will extend beyond the age of majority.

There are ways to avoid the time and expense of a guardianship or conservatorship process while accomplishing the same basic goals. If the person with special needs has sufficient capacity to understand, he can appoint an agent to manage his affairs by signing a “**durable general power of attorney**” for financial matters or an “**advance health-care directive**” for medical and health-care matters. Depending on the type of power of attorney, the agent will have the authority to make financial and property decisions or medical and personal decisions on behalf of the adult child, all without court intervention or direct oversight. It should be noted that a durable general power of attorney or an advance health-care directive can be revoked by the child if he chooses later to do so.

If the adult child receives either Supplemental Security Income (SSI) or Social Security Disability Insurance (SSDI) and cannot manage the income, the Social Security Administration allows another person to become “**Representative Payee**” and to receive the funds to use on the child’s behalf. However, this option also requires the filing of an annual report showing how the money was used.

Another option for parents to consider is establishing a special needs trust. The trust allows a person with special needs to shield her own assets or assets contributed by others to meet the care needs of that individual while maintaining eligibility to receive SSI and Medicaid benefits. The trustee invests and manages the trust assets, usually avoiding the need for a financial guardian or conservator.

The Elder Law, Estate and Special Needs Planning Group of Frascogna Courtney, PLLC handles conservatorships, guardianships and all types of powers of attorney. Contact us at 866-ELDERLAW or by email at rcourtney@frascourtlaw.com for help with deciding whether any or a combination of these approaches best fits your particular situation. Factors to consider include the nature of the child's special needs, the source and type of the child's assets and the parents’ assets, any family dynamics or conflicts, and whether the child has sufficient capacity to understand her choices.