



# Things to Think About!

## Guardianship and Declaration of Incapacitation

By Linda Jorgensen

Age 18 is considered the "age of majority" in most states. It is assumed that an individual will be able to make their own decisions regarding their health, their finances and their future. They should be able to advocate for themselves, take care of bills and a bank account, decide where they will continue their education and begin looking for ways to improve their independence. Many children this age are beginning to make plans to move away from home. Or so we hope. Children with disabilities often fall short in their quest for total independence. Many will never reach that goal.

Parents who have a child with a disability often assume that they can continue to be the legal guardian throughout their child's lifetime. Although it may be obvious to a parent that their child does not have the capacity to make informed decisions, legally an adult is presumed competent unless otherwise deemed incompetent after a competency proceeding (generally a court hearing). In other words, once the child reaches the age of 18, the parent is no longer the child's legal guardian regardless of a disability.

Once your child reaches age 18 you, the parent, will have no control over financial, educational, or health related decisions your child may make. They are considered a legally competent adult in the eyes of the law with all the rights and responsibilities of adulthood. Regardless of the individual's level of disabling condition or functional abilities, that person is considered a legally competent adult until proven otherwise by a court of law. If your child's decision-making capacity is severely affected or they are unable to communicate, based on a chronic or severe condition, it may be necessary for them to have a guardian appointed for them. This appointed guardian

may not necessarily be the parent, depending upon the circumstances.

Whether to seek a guardianship or an incapacitation order is obviously a complicated issue. A petition for guardianship should not be filed automatically just because a child has reached the age of 18. Parents or other potential guardians must carefully consider the disabled person's individual circumstances, including strengths and weaknesses, needs and best interests, before deciding to seek guardianship. If the person is disabled but capable of making some but not all decisions, one or more alternatives to guardianship should be considered.

### What Is It?

A legal guardian is a person who has the legal authority and responsibility to care for the personal and property interests of another person, assigned by court order. Guardianship is a legal means of protecting children and adults who cannot take care of themselves, make decisions that are in their own best interest, or handle their assets. When the court determines that a person is incapable of handling either their personal and/or financial affairs and appoints a guardian, the person who is disabled is referred to as the guardian's "ward." If the person is disabled but capable of making some but not all decisions, one or more alternatives to complete guardianship should be considered. These options should be discussed with a legal advocate skilled in this area of law.

Once the decision to seek a guardianship determination is made it is important to begin this process BEFORE your child turns 18 if at all possible. The legal process can be much more difficult to navigate AFTER your child has passed age 18. We suggest most parents begin this process approximately 6 months prior to the child's 18<sup>th</sup> birthday.

It is also recommended at this time to consider an alternate guardian should the main guardian (or guardians) become incapacitated themselves. This process can take a great deal of time and consideration for those being considered as a "back up" guardian. It is most important that the backup guardian:

- Maintain sufficient contact with the Incapacitated Adult to know of his or her capabilities, limitations, needs and opportunities.
- Visit the Incapacitated Adult on a regular basis.
- Follow court directives and assisting the Incapacitated Adult with their wishes where possible.

A guardian **MUST** understand the individual's needs and wants as well as the full responsibilities guardianship may entail. They must be willing to take full responsibility for your child in the event something happens to you, the primary guardian. Parents may also be able to designate who shall become the child's legal guardian in the event of death.

## Who to Contact

Due to the complex nature of guardianships and/or conservatorships of Incapacitated Adults we **strongly recommend that you consult with an attorney specializing in disability/family law** for legal advice. Many states have a specific legal process in place with specific requirements for potential guardians filing for Guardianship of an Incapacitated Adult. Not all court requirements are the same. It is important for potential guardians to follow all the legal requirements for this process deemed necessary by the court district where they reside. [\(To find a legal representative in your state contact your state's Disability Law Center listed under Legal Advocacy/Information in the Resource Links of your state of residence.\)](#)

## Military Members and Guardianship Determinations

Be aware the Age of Majority for most states is age 18. If you are an Active Duty (AD) member currently stationed in a state where the Age of Majority is 21, you have NOT obtained legal documentation and you are then transferred to a state with a younger legal Age of Majority you will be behind the proverbial eight ball, legally. You may be unable to assist your child

with any of their legal needs until AFTER you have completed the local court's determination process. This can take several months, creating a real financial, educational and medical mess for families to deal with. We recommend families obtain Guardianship or a Declaration of Incapacitation at age 18 to prevent any difficulties created by PCS moves to other states.

It is also important for Military Members to consider a back up guardian who can step in during times of deployment away from the family, during short term separations or in the event the primary guardian becomes incapacitated themselves. **This is especially important for members of Guard or Reserve units.** Many families name a third family member or other responsible individual as a "backup guardian" to act in their stead during absences (Military or otherwise). This individual should be a trusted person who is in close contact with the child at all times. This "back up" guardian must be fully aware of the responsibilities and detail involved in the child's daily care. It is also absolutely essential that that same individual be listed by the courts as guardian and listed on the court order itself. Otherwise they will NOT be able to represent your child in medical emergencies, assist with medical record or billing questions, education decisions or other decisions while the main guardian(s) are away. **Make sure your backup guardian has an original copy of the court order in their possession!**

Parents making guardianship decisions for their child in a timely manner will ensure a smoother transition into young adulthood and help their child maintain needed benefits and services.

If there is anything that is not discussed in our newsletters and you would like to see it discussed, or you would like to be added to our newsletter mailing list, please contact us at [snrproject@hotmail.com](mailto:snrproject@hotmail.com)