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Special Needs Advocate

By: Misty A. Watson

Powers of Attorney v. Guardianships

When your child turns eighteen years old, he or she is considered a legal adult. As an eighteen year old, he or she has the ability to contract, to make decisions such as whether he or she wants to continue to go to school, and whether a parent can be present in an IEP meeting. Further, because of HIPAA privacy rules, a doctor can no longer communicate with the parent regarding that child's health issues. For families with a child who has special needs, they must make some critical decisions in order to protect their child who is turning eighteen. Two options for these families are seeking guardianship through the court or having the child sign a power of attorney, if appropriate.

Guardianships are a process through the court by which persons are declared incapacitated to the extent that they are unable to make their own decisions regarding medical care and placement, and an individual is appointed by the court to act in their stead. Since the court regulates the guardian, this process can become a costly affair and is a much longer undertaking than a power of attorney, especially if the appointment of a particular guardian is contested.

Conservatorships are formed whenever persons are declared unable to handle their own assets. If a guardianship is granted, a conservatorship will also typically be granted. If the person who was declared incompetent by the court has assets, the court will monitor the appointed conservator and will require annual reports regarding the use of the assets by the conservator to be filed by an attorney. In order for a guardianship or conservatorship to be set aside, the incapacitated person must petition the court to have his or her legal rights restored and must demonstrate the previously incapacitated person is no longer in need of a guardian or conservator.

A power of attorney, on the other hand, is a legal document created by an individual of sound mind to grant certain powers to their agent. The grantor of the power of attorney tailors his or her needs within this document to deal with specific financial issues or medical decisions. Additionally, the grantor can choose whether the powers take effect upon the signing of the document or at some future date.

One of the most frequently asked questions I receive regarding guardianships is when should the guardianship process be started. The process seems to run the most smoothly whenever it is initiated three months before the child who is in need of a guardian turns eighteen. This allows time for the child's physician

or psychiatrist to complete the necessary paperwork that must be submitted to the court. The physician must be recommending that the child is in need of a guardian and unable to make the necessary daily decisions to function without a guardian. If after the evaluation, a physician or psychiatrist does not feel that a guardianship is necessary, then execution of powers of attorney may be appropriate.

Whether a guardianship is appropriate or execution of a power of attorney is possible, a family should explore both options.

Competency Level Required to Execute a Power of Attorney

When should a Power of Attorney be applied?

Powers of attorney often address two distinct areas: healthcare and financial decisions. Financial powers of attorney may either be immediately effective or come into effect if the person who signed the document is no longer able to make decisions for himself or herself. Healthcare powers of attorney only become effective whenever a physician certifies that the person who granted the power is no longer able to make healthcare decisions for himself or herself.

In order for someone to sign a power of attorney, he or she must be at least eighteen years of age and able to understand the nature of the document he or she is signing.

Durable Power of Attorney

All powers of attorney should be made durable, or to remain in effect after the incapacity of the principal, unless the purpose of the document is for the agent to act for specific limited transactions. In order to enforce a power of attorney document, in essence a contract, the principal must be competent at the time the document is signed. While there is no clear dividing line between the competency and incompetency level, cases have repeatedly stated the principal must have a sufficient mental capacity to appreciate the effects of what they are agreeing to within the contract.

Revocation of Power of Attorney

It is important to understand that powers of attorney may be revoked at any time by the person who signed the document. Therefore, if an adult child does not agree with a decision that the attorney-in-fact has made, he or she may revoke the power of attorney making the document ineffective. There are many benefits

of the powers of attorney because the court is not involved in the process and the documents are relatively inexpensive to have prepared by counsel; however, they are not appropriate in all cases.

Physical Conditions

An individual possessing a debilitating physical impairment which does not adversely affect their mental competency can still validly enter into a contract. Courts have stated that the physical condition of the principal is immaterial as to whether the contract is valid. Neither age, sickness, extreme distress, nor debility of body will affect the capacity to make a contract if sufficient intelligence remains to understand the transaction.

Mental Conditions

Similar to physical impairments, mental conditions due to disease does not immediately deprive an individual of the capacity to dispose of his or her property by contract until their mental illness has progressed to the point where intelligence has been lost. In other words, a person may still be capable of contracting despite such a condition as eccentricity, or old age.

Evaluating Mental Capacity at Time of Transaction

Mental capacity must be assessed at the time of the transaction, although a party's capacity before or after the execution of a contract is the critical period of time to be considered in the inquiry as to whether the individual has met the mental capacity requirement. Hence, a contract is binding if it is entered into in a lucid interval of a person with some form of dementia. On the other hand, a contract entered into by one who is temporarily insane may be avoided.

If a person has Alzheimer's disease or other similar dementia, this disease does not immediately render him or her wholly incompetent, and instead, it must be demonstrated that, because of the affliction, the individual was in fact incompetent at the time of the challenged transaction.

Conclusion

For an individual to execute a power of attorney, they must possess a sufficient capacity to understand the contract they are entering into. Further, powers of attorney are at all times revocable, unlike a guardianship. Nevertheless, a power of attorney can be a great resource for some individuals who have turned 18, so that family members can act on their behalf.

Toy-Lending Library for Children With Developmental Delays

St. Louis Arc developed a new program, Capable Kids and Families, designed to promote early intervention by providing children (ages 0-6) and families with developmentally appropriate toys and therapeutic equipment free of charge. This program allows parents to meet the needs of their children at home by borrowing toys that may be otherwise inaccessible, and then returning them for another family to use.

The Capable Kids and Families' catalog contains more than 1,700 toys and pieces of equipment to choose from and once a

month, a staff member visits each family's home to observe the children with the toys and provide suggestions for the parents about when it would be helpful to swap toys so that the child can move forward in his or her therapy. While some of these toys are specialized, others can be found at Toys "Я" Us®. The toys and equipment can be kept indefinitely until they are no longer useful for the children's development.

The St. Louis Arc, a nonprofit agency that supports people with developmental delays launched this program in December 2009 to help parents check out educational and therapeutic toys and equipment that may be otherwise too costly for them. With enough state funding to support 50 local families, a waitlist has started for families waiting to join the program. Eligible families must live in St. Louis and have a child younger than 7 with a delay in their physical, speech, sensory, or intellectual development.

For more information about the Equipment Lending Program, please contact Jean Darnell, the Director of Capable Kids and Families at jean.darnell@thecommunitypartnership.org or by phone at 573-368-2849.

Missouri Closing St. Louis Psychiatric Center

The state of Missouri closed the short-term acute care psychiatric unit at Metropolitan St. Louis Psychiatric Center., which is a 112-bed acute care inpatient hospital led by chief operating officer Anthony Cuneo that opened in 1996.

The reorganization is part of the state's efforts to save costs. The Department of Mental Health estimates the closures of acute care units in St. Louis, Fulton, and the Southeast Missouri Mental Health Center will save the state \$1.5 million in its next fiscal year. Mark Utterback, president and chief executive of Mental Health America of Eastern Missouri said the changes will eliminate an essential service to mental health-care patients who rely on this access to immediate care where they can stay long enough to stabilize. No future plans on alternative facilities are currently being discussed.

St. Peters Program Help Police ID People with Alzheimer's, Other Conditions

A new free program in St. Peters could shorten the amount of time it takes for police to return a loved one with autism or dementia to his or her family. Families of people with a variety of health conditions, such as Alzheimer's disease can provide information voluntarily that could help if their loved ones wander away.

Lt. Tim Snavelly said the idea began with Alzheimer's in mind, but it is open to people with a variety of conditions such as autism, geriatric diabetes, Huntington's disease, cerebral palsy and geriatric dementia, all of which may make communication difficult.

The department is accepting voluntary information from caregivers and family members who can provide a physical description and current photograph, as well as contact information to call if a loved one is found.

Spotlight: Wendy Godwin, OTR/L, LMT



Frequently thought of as just a way to relax, massage therapy offers great benefits to adults and children with special needs. Massage can have positive effects on a number of conditions associated with special needs individuals. Needs such as high or low tone, poor circulation, constipation or digestive issues, sensory processing disorder, poor sleep patterns, anxiety, and others benefit from therapeutic massage.

With over 23 years of experience working as an occupational therapist, Wendy Godwin brings a unique perspective to her massage clients. She has worked in a variety of settings including psychiatry, chronic pain, hand therapy, and pediatrics. Licensed in massage therapy five years ago, she integrated this into her professional health services. Today she provides massage therapy to both adults and children, with an emphasis on special needs clients. To learn more, please contact Wendy at gwgodwin81@aol.com.

The Importance of Care Plans & Beyond

A care plan is written information about how to best care for your child's health needs. A care plan may include specific medication your child takes and the time they take it, particular foods your child should avoid, how often your child gets physical therapy, or what to do for your child in an emergency.

Care plans share information with others who take care of your child. This may include doctors, nurses, therapists, emergency medics, teachers, child care providers, respite providers, grandparents, friends, and neighbors.

An estate plan is much more than a will. An effective plan considers your personal circumstances and goals. The more important purposes of estate planning include protecting your assets during your life, planning for possible disabilities, and ensuring your wishes are carried out both during your life and after your death. Estate planning also includes planning for various health-related contingencies so your wishes are clear even

if you cannot make decisions for yourself in the future. Please see our website at www.dannamckitrick.com for a sample Care Plan for your child.

United States Court of Appeals Decision Favors Student Who Brought IDEA Claim

The United States Court of Appeals, in March 2010, voted in favor of specialized children in the case, *Compton Unified School District v. Addison*. This case upheld the Individuals with Disabilities Education Act (IDEA), which ensures children with disabilities have access to a free appropriate public education (FAPE).

In *Compton*, Addison, the student, received very poor grades and scored below the first percentile on standardized tests during her ninth-grade year in 2002-2003. The school counselor promoted her to tenth-grade, despite her low performance.

During the fall semester of her tenth-grade year, in 2003, Addison failed every academic subject. Addison's mother was reluctant to have her child tested, and the School District did not require it. Instead the School District referred Addison to a third-party counselor who recommended the School District assess Addison for learning disabilities. The School District ignored this directive and promoted Addison to the eleventh-grade.

In September 2004, Addison's mother explicitly requested an educational assessment and Individualized Education Program (IEP) meeting from the School District. The assessment took place and Addison was found eligible for special education services on January 26, 2005, which was during the spring of her eleventh-grade year.

Addison and her mother brought the claim against the school district seeking compensation for the School District's failure to identify her needs and provide her with a free appropriate public education.

The school district argued two issues: the first is that the IDEA's written notice procedures limit the jurisdictional scope of the due process complaint procedure and the second is that they did not receive "clear notice" of the availability of an administrative hearing in "child find" cases. The court rejected the school district's first argument contending that the Supreme Court has already addressed this issue. The Supreme Court has stated that a conservative reading of the IDEA would leave parents without an adequate remedy if a school district fails to identify a child with disabilities. Regarding the second issue, the court additionally struck down the school district's argument of "clear notice" finding the IDEA clearly allows complaint "with respect to *any matter relating to the identification, evaluation, or educational placement of the child.*"

The court's decision in this case provides fuel for other parents to seek compensation for a school district's failure to identify children with disabilities in the educational system.

Questions? Call 314.889.7155

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Misty A. Watson focuses her practice on estate planning and administration, including probate. She counsels individuals, families, and business owners in the creation of trusts, wills, financial and health care powers of attorney, guardianships, and conservatorships.