

Planning Ahead For When Your Special Child Turns 18

BY NICOLE VANDIVER BRYAN

Planning ahead is wise for all. It is essential for the future of a child with special needs who is about to turn 18. In most states, a child's 18th birthday signifies the moment when that child is legally presumed to be competent to make his or her own medical, financial, and educational decisions. Unless parents take precautionary steps to overcome that legal presumption, their child - legally - could quit school, sign up to purchase expensive toys or leave home. If an 18-year-old child is ill, the parents technically lose the ability to be informed about the illness or to make medical decisions for their child.

What precautionary steps to consider, as that 18th birthday approaches, is the subject of this article.

BASIC QUESTIONS

The two most frequent concerns expressed by parents anticipating the milestone 18th birthday are:

- Is my child capable of making important decisions or should we seek court authority to make decisions for him or her?
- Is my child eligible for governmental income assistance and health care benefits?

I. DECISION MAKING ISSUES

Faced with the prospect of losing the authority to make decisions for their child who is about to turn 18, some parents believe they must immediately be appointed guardian (called a conservator in some states) with full authority to make all medical and financial decisions for their child. Guardianship may be the only option for families with a child who has severe cognitive impairments. For families with a physically disabled but cognitively able child, guardianship will probably not be the proper choice, though their child may need assistance managing his or her own affairs or making important health care or educational choices. Parents should consider the alternatives carefully with their medical and legal advisors.

The threshold question is: Does my special child have the capacity to make personal and financial decisions?

If a child has the judgment and ability to make personal and financial decisions, he or she will not need a guardian and may name his or her own agents to make decisions or to help with matters like bill paying, accessing medical information or educa-

tion planning. Legal capacity requirements vary from one document to another and, before preparing any documents for an adult disabled child, a special needs attorney will meet with the child to assess legal capacity and to determine the child's choice of agents. In close cases, the attorney may request a capacity assessment by an appropriate medical professional.

Powers of Attorney

Children with special needs who have the required level of capacity to sign documents naming agents to act for them retain all their own legal rights while enjoying the help of a trusted person to assist with certain tasks. From a parent's perspective, the only downside to an adult child naming agents is that a person who has the capacity to execute a power of attorney also has the ability to revoke the document.

A durable power of attorney (POA) for financial matters allows the named agent to handle the child's financial affairs. An education POA names an agent, usually a parent, to continue to advocate for the adult child in educational matters. A health care POA (also called an advance medical directive or health care proxy) allows the named agent to make health care decisions for the child. It can become effective immediately or in the future if the child is later unable to make or communicate his or her own choices. A HIPAA (Health Insurance Portability and Accountability Act) release form permits the agent to access the adult child's medical information and to discuss it with third parties such as medical providers and insurance carriers.

Legal Guardianship

When a child with special needs lacks the capacity to name agents, a guardianship may be necessary. A guardianship is a technical legal proceeding in which a court, after finding that the adult child lacks the capacity to make decisions, declares that child to be legally incompetent and names others to act for him or her. Guardianship proceedings and the words used to describe the court-appointed decision makers (Guardian of the Estate, General Guardian, Conservator, etc.) vary from state to state but a "limited" guardianship may be available and advisable when an adult child is capable of making some but not all decisions. For example, the

continued on page 58

Planning Ahead For When Your Special Child Turns 18

continued from page 57

child may retain the right to decide where to live and to manage small amounts of money while the guardian handles medical decisions and the remainder of the child's finances.

II. POSSIBLE GOVERNMENT BENEFITS

On reaching age 18, a child with special needs may be eligible for certain public benefits including SSI (Supplemental Security Income) or SSDI (Social Security Disability Income), both administered by the Social Security Administration (SSA).

To qualify for monthly SSI benefits, the child with special needs must have limited income and resources and be disabled or blind. Unlike SSDI benefits, SSI benefits are not based on the child's work record or that of the child's family member. The maximum federal monthly SSI benefit for 2010 is \$674. The SSI monthly benefit is higher in some states that contribute a state SSI supplement to the federal benefit amount.

The test of disability is different for adults and children. If a child is already receiving SSI payments, SSA will review the child's medical condition when he or she turns 18 to determine if a disability exists according to the adult rules. An adult is considered disabled if he or she has a medically determinable phys-

ical or mental impairment that results in the inability to engage in any substantial gainful activity and can be expected to result in death or has lasted or can be expected to last for a continuous period of not less than 12 months.

It is important to schedule an appointment immediately upon turning 18 with the child's doctor to document that the child continues to be eligible to receive SSI benefits under the adult rules. (A medical evaluation may also be important to establish the existence of the child's disability before the age of 22 in order to qualify as a disabled adult child (DAC) and be eligible to receive SSDI benefits, based upon a parent's work record, when the parent reaches age 62, becomes disabled or dies.)

SSI eligibility rules concerning income and assets also change when a child turns 18. At that age, SSA no longer counts income and resources of family members in determining whether a young adult meets SSI financial limits. It considers only the income and resources of the adult child. Even if a child did not receive SSI payments because of parents' income and resources, he or she may be eligible after turning 18.

A person on SSI can have no more than \$2000 in countable assets. Assets that are not counted in determining the \$2000 limit are a home, one vehicle, household goods and personal effects, a burial space and certain life insurance policies. In most states, people receiving SSI benefits automatically qualify for Medicaid to pay for medical care. Check your state's rule. In all states, people who receive SSDI become eligible for Medicare after 2 years.

Unlike SSI, there is no asset test for SSDI, but it is important to consider how income earned from employment can affect ongoing eligibility. For example, a wheelchair-bound investment banker would not be eligible for SSDI because eligibility turns on the amount of money earned rather than the severity of the disability. The SGA income limit for 2010 is \$1000.

Conclusion

Turning 18 is a significant milestone and an opportunity for the whole family to share and celebrate a new and adult phase of life. It is also a time to plan carefully - to take those precautionary steps that strike the right balance between protection and independence for your special child in the coming years. •

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