

Conservatorship: A Safety Net for Your Adult Special-Needs Child

By Cicily Corbett

It's a natural instinct for parents to protect and care for their children. All humans are born helpless, and need adults to look after them for many years. But what happens when a child reaches the age of majority—18 in most cases, but 19 or even 21 in some states—and is not ready to make adult decisions? He or she is nevertheless considered an adult under the law. Parents may find, to their dismay, that they are no longer allowed to handle their child's money, gain access to their child's health records, or make important medical decisions. It may be appropriate in these cases to consider a conservatorship.

What Is a Conservatorship?

Conservatorship (known as **guardianship** in some states) is the legal right given to one person to protect and manage the personal care, or finances, or both, of another person. The person needing help is called the **conservatee**; the person who helps is called the **conservator**. A judge has to decide that the conservatee is unable to make decisions independently.

In some states, the term “guardianship” is used in reference to personal care, and “conservatorship” limited to finances. Or the terms may be “conservatorship of the person” and “conservatorship of the estate.” It's important to understand that laws and terminology vary from state to state, and that legal assistance is always necessary to set up these arrangements.

Who may serve as a conservator? A parent may be the best choice, or another relative or a friend. Conservatorship is a big responsibility, so it's important to choose a person who's willing and able. A special-needs child may have a loving brother or sister, but if that person is far away, or overburdened with other responsibilities, he or she may not be a good choice. It's never wise to pressure anyone into undertaking such an important position as conservatorship or guardianship.

Sometimes, the responsibilities may be shared by two people. One person may be appointed to take care of the personal needs, and another person, the finances. If a friend or relative is willing to serve, but is uncertain about having the financial expertise to do so, he or she may be appointed jointly with a bank or other institution. If no friend or relative can be found, a private professional conservator or a public agency may be appointed.

When to Start Thinking About It?

Parents may be willing and able to help their adult special-needs child if it's necessary, but what if something happens to them? Everybody should have a will, but it's especially important for the parents of a special-needs child. In the will, they can name a conservator or guardian. Naturally, that person would still have to take all the steps to be approved by a judge.

“We’re seeing more and more situations where special-needs children are outliving both parents,” says Jerry Hulick, a MassMutual Special Care Planner. He stresses the importance of mapping out a strategy in advance. “I view this as successor management. One of the first issues is, who’s available? Parents don’t know how to approach other family members. They’ve thought about the possibility of a common disaster, but haven’t solidified anything.”

“I have quite a few clients who have made the transition without problems because they started planning when their child was about fifteen,” explains Thomas E. Murphy, a Special Care Planner, accredited estate planner and certified financial planner with TEMAA Financial in Dallas, Texas, who contracts with MassMutual. “It can take about two or three years...it’s somewhat analogous to planning for college for a non-special-needs child.”

A Multi-Step Process

The process does take time, because it involves several steps. A person wishing to be a conservator must first study a handbook describing all the duties and liabilities of the office, and sign an acknowledgement to that effect. Next, the person signs an oath that he or she will perform the duties according to law, and obtains a bond, if necessary. All these papers are filed with the court clerk. If approved, the judge appoints the conservator. Finally, **Letters of Conservatorship** must be obtained from the court clerk to prove the appointment and spell out the specific powers which the judge has authorized. Certified copies of these Letters will often need to be shown or provided whenever someone needs proof of the conservator’s authority to act.

The powers and duties of a conservator will depend on individual circumstances. Personal care might involve deciding where the conservatee will live, and arranging for meals, transportation, clothing, personal care, recreation, and health care. Financial care might involve making a budget, paying bills, investing money, collecting income, and protecting assets. Some adult children may be able to take care of their personal needs, but have difficulty managing money. Or they might need help making medical decisions. The Letters of Conservatorship will explain what the conservator has the authority to do.

The conservatee does retain some rights. He or she has the right to ask questions, to express concerns and complaints, to ask the court to review the handling of the conservatorship, to ask a judge to change the conservator or end the conservatorship. The conservatee generally keeps the right to marry, vote, receive personal mail and visits, make or change a will, and engage in other activities, unless a judge has specifically ordered otherwise or imposed restrictions.

A conservatee gets off conservatorship when he or she dies, when a judge determines that a conservatee is able to handle his or her own affairs, or when the conservatee doesn’t have any more assets to manage. In this last case, only the conservatorship of the estate needs to be terminated—the conservatorship of the person will continue.

A conservatorship will necessarily mean a lot of involvement with the legal system. First of all, the conservator may have to account to the court periodically about the status of the special-needs individual and the management of the assets. Secondly, he or she may be legally responsible for some of the actions of the conservatee. For example, if the conservatee causes a car accident, the wisdom of the conservator in allowing the person to drive may be examined. Finally, every time the conservatorship is questioned or changed, it must be done through the courts.

An Important Decision

“Establishing a conservatorship has pros and cons,” warns Attorney Beebe Song, a Registered Investment Advisor and Special Care Planner with MassMutual’s Chicago-Molyneaux Agency. “It’s costly and a public issue—the family gives over a lot of power to the courts. If special-needs trusts and other types of financial planning are set up in advance, it may not be necessary. It’s a very important safety net, but knowing in advance what you want is best.”

Besides conservatorship, other legal means exist to help a special-needs individual. A **power of attorney** is a document that authorizes one person to legally act in place of another person in certain circumstances. If the special-needs individual is unable to sign his or her name to the document, however, a power of attorney may not be an option. A **Letter of Intent (LOI)** is a document giving instructions to future caregivers—trustees, guardians, and advocates. It’s not legally binding, but can serve as a guide for the courts as to how parents wish their child to be cared for after they’re gone. A **trust account** is a fund established for the benefit of someone else. A **trustee** can only make decisions about the funds in the trust, while a conservator may have a wider range of powers over a person’s finances.

Temporary conservatorships are set up when a person needs immediate help. This situation might arise when a parent dies or becomes incapacitated without having planned for the care of the special-needs child. It might be difficult on short notice to arrange for someone close to the child to assume the responsibility, in which case the court would have to appoint someone.

For medical management purposes, a conservatorship is good, explains Lisa Kline Goldstein, P.A., Probate and Estate Attorney in Fort Lauderdale, Florida. Regulations outlined in HIPAA [the federal government’s Health Insurance Portability and Accountability Act of 1996] are very stringent now. “If your child has the inability to communicate effectively, this is the only way to protect them, and the only way to insure that parents have access to information which is otherwise private,” she explains.

If a special-needs adult is receiving government benefits, such as Medicaid and SSI, and has no other assets to manage, a conservatorship of the estate should not be necessary. If family and friends want to give gifts to the child, they can be put in a **special-needs trust** which can be set up to pay for items and services beyond the bare necessities that government programs provide. No supervision by the court is necessary.

A Plan for the Future

“It just amazes me how many people are unaware that if as little as \$2000 is left in a conventional trust or left to a person, that person is disqualified for benefits until the money is exhausted,” says Joseph Eppy, President of Eppy Financial Group in Fort Lauderdale, Florida. Eppy’s caution underscores the importance of working with experienced professionals to plan the financial future of an adult special-needs child.

“We are a bunch of social workers underneath. We want to help people,” says Goldstein, referring to her associates at the National Academy of Elder Law Attorneys, who also work with special-needs clients. “There has to be a two-pronged approach: how to solve problems financially, and also legally.” A team approach is best, with family members, caregivers, teachers, social workers, lawyers, and financial planners all working together to create the best possible future for the special-needs child.

Goldstein has high praise for MassMutual’s SpecialCare program. “MassMutual has had a lot of foresight. [Director] Joanne Gruszkos has done an incredible job in terms of making families aware that there is hope, that there are solutions, if you just sit down and talk. It’s possible, with the right planning, for an adult child to have a color TV, a comfortable apartment, and an incredible level of care. Parents have to have something in place that’s eminently workable.”

Finding time to plan for the future is hard. Parents can be overwhelmed with caring for their special-needs child on a day-to-day basis. And just thinking about a conservatorship or a special-needs trust may be a difficult step. “Basically, you are declaring a child incompetent. That’s a big issue,” says Bruce Sham, Special Care Planner with MassMutual and himself the father of an adult special-needs child. “So many parents don’t want to classify or ‘brand’ their child. I, of all people, should know what I’m doing, and I have difficulty facing it. But the time to start planning is as soon as you identify the need.”

MassMutual’s SpecialCare Program

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<http://www.massmutual.com/mmfg/prepare/specialcare/index.html>

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