

Guardianship and other Legal Solutions for Individuals with Disabilities

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My Daughter
Kate, who is
17!



REACH OUT AND HELP THOSE IN YOUR COMMUNITIES

We are blessed to have children with disabilities in
our lives.



Your child can attend college

University of Utah: Tanner Dance/Fine Arts
(lifelong) LEADD and Elevate:

<https://tannerdance.utah.edu/dwd-classes/>

The Curtis Center—Lehi Hives Program (lifelong)

<http://thecurtiscenter.org>



LET ME LIVE ONE MOMENT LONGER THAN MY KATE



Lisa and Kate

Lisa understands the joy and challenges of life with a special needs child. Her daughter Kate was born with Prader-Willi syndrome.

Guardianship



If your child will need extra help at age 18 and older, consider the legal process of securing guardianship.

Legally protect an adult with disabilities by securing guardianship

- An 18 year-old adult with disabilities is considered an adult and presumed competent unless a court determines otherwise.
- Without guardianship, parents may not be able to help with medical or financial decisions for their child.
- Without guardianship, parents may not be able to help with education decision, with decisions of where the child will live, or end of life decisions.

What is Guardianship?



- Guardianship is the legal process where a petitioner, usually parents, receive the legal right to continue caring and advocating for their adult child with disabilities. That legal right occurs when the court issues “Letters of Guardianship.”

Is Guardianship Necessary?

Seek Guardianship if ...

- The Adult cannot handle their money
- The Adult cannot make reasoned decisions about medical care
- The Adult cannot provide own necessities such as food, shelter, health care, and safety



If adult is not incapacitated but still needs help consider:

- Durable Power of Attorney to manage financial affairs
- Mental Health Declaration
- HIPPA Release
- Advance Health Care Directive
- Supplemental Security Income Designated Payee
- Special Needs Trust with named Trustee
- Make sure adult has his own will, living will, and health care directive
- Consider an ABLE Account only using money of person with disabilities.

Is the Adult with Disabilities Incapacitated?

In order to grant guardianship, the district court judge in Utah must determine that the adult with disabilities is incapacitated. This generally means that the adult lacks understanding to provide for their own necessities such as food, shelter, clothes, health care, safety and cannot make and communicate decisions well.

Is the Adult with Disabilities Incapacitated (statute definition)?

- “Incapacity” is measured by functional limitations and means a judicial determination after proof by clear and convincing evidence that an adult's ability to do the following is impaired to the extent that the individual lacks the ability, even with appropriate technological assistance, to meet the essential requirements for financial protection or physical health, safety, or self-care:
 - (a) receive and evaluate information;
 - (b) make and communicate decisions; or
 - (c) provide for necessities such as food, shelter, clothing, health care, or safety.
- See Utah Code Annotated 75-1-201(22).

Who can serve as guardian?

- Parents typically serve as guardians.
- Older siblings often want to help and agree to be a co-guardian with parents. This is a good idea in case something happens to the parents.
- If the sibling is a DSPD employee, however, do not name them as a guardian or they cannot be paid. We are working to change this at the legislature and with DSPD.



Who can serve as guardian if someone objects?

Parents typically serve as guardians but if someone objects, the court sets the priority in this order:

- A person nominated by the person with disability
- The spouse, adult child, parent, any relative with whom the ward has been residing for more than six months
- A person nominated by the current caregiver
- Professional Guardian
- Any competent person

The Guardianship Process: Do you want an attorney to help you?

Start 3-4 months before 18:

- Decide if you want to represent yourself or have an attorney help you.
- You can represent yourself by using the court generated forms where you input information and the court site generates the forms for you. Go this site: <https://www.utcourts.gov/ocap/> Click on Guardianship of an Adult Child. Create an account and follow the instructions. The site will generate the forms you need to file.



The Guardianship Process: Do you need an attorney to represent your child?

Start 3-4 months before 18:

- You NOT need an attorney for your child if (1) the value of his estate does not exceed \$20,000, (2) he is your child, and (3) counsel is not necessary to protect his interests. Utah Code Annotated 75-5-303 (5)(d). You need an affidavit from both parents saying the above three items.
- All courts where I do guardianships freely allow no attorney for the child with disabilities if the above three factors are met. They do not require a court visitor or have you wait for an attorney to volunteer, despite what the statute says.
- You DO need an attorney for the child if you are the grandparent or sibling seeking guardianship (and no parent is seeking guardianship) or if your child has more than \$20,000 in their name.

The Guardianship Process

Start 3-4 months before 18

- Get a psychological evaluation (states the IQ) from your school or psychologist. If you do not have one, the court will usually just accept the doctor letter.
- Get a letter from doctor, PhD, or Nurse Practitioner. The letter should have a statement of the diagnosis and state need for guardianship. It should be on letterhead with signature.

The Guardianship Process

Drafting and filing the Petition

- Draft the Petition, include the estate value worksheet, the psychological evaluation and the doctor letter as exhibits to the petition.
- File Petition 5-6 weeks before child turns 18
- Pay the \$35 filing fee (used to be \$360!)
- Schedule hearing for right after your child's 18th birthday.
SLC: Every Wednesday morning at 9:30
Provo: Every Monday afternoon at 2:30

The Guardianship Process

Other required Documents:

- Notice of Petition and Hearing
- Return of Service
- Declaration of Testing by each guardian
- Private Record Information Sheet for each guardian
- Acceptance of Appointment signed by each guardian
- Notarized Affidavit from parents stating no assets over \$20,000, person is child of the guardian, and person will appear in court (if no attorney for child)
- Findings of Fact and Conclusions of Law
- Order of Appointment
- Letters of Guardianship

The Guardianship Process

Other Assignments:

- Parents/guardians will need to take an online open book test outlining responsibilities of a guardian.
https://www.utcourts.gov/howto/seniors/g_and_c.asp
- Parents will need to get someone 18 or older to “serve” or hand the Petition and Notice of Petition and Hearing to the adult child and then sign a Return of Service in front of a notary.



The Guardianship Process

The Court Hearing



- You (or your attorney) will schedule a hearing with the court. Bring the adult with disabilities to the hearing along with those asking to be guardians.
- Note, with Covid-19 restrictions, the current hearings are being held via webex and not in person. This is an easy time to get the hearing completed as some with disabilities find the court hearing to be stressful!

The Guardianship Process

After the Hearing

- You (or your attorney) will want to get a copy of the certified order. I like to include in the orders I prepare a court mandate that you are allowed to charge your child rent, making the process easier when you apply for Supplemental Security Income for your child.
- You (or your attorney) will also want to get at least four certified Letters of Guardianship after the hearing. (\$5 each) This is the document that will prove you are the legal guardian.

The Guardianship Process

Annual Reports

- Unless you are a parent, Court-appointed guardians must file an initial inventory, annual status reports, and financial accountings. Utah Code Annotated Section 75-5-312
- Remember, parents are not required to file annual reports for their child and if siblings are co-guardians with a living parent, most courts do not require the siblings to file the annual report.
- If no parent is a guardian, you need to file an annual report with the court annually. This will be done online and is much easier after the first report is filed.

Objections to Guardianship



If there are objections to the guardianship or choice of guardians, the case will be reassigned and there will be a full court process with testimony and hearing. The judge will make the final determination as to whether a guardian should be appointed and who that guardian should be.

Limited versus Full Guardianship

- Utah law favors a limited guardianship. Make sure you include all areas needed: medical, habilitation, education, residential, financial, end-of-life, and other care services.
- I ask for full guardianships for most of my cases and I will for my daughter.
- 90% of guardianships are full guardianships per clerk of court



Limited Guardianship

- When a guardianship is limited, the areas over which the guardian has control are listed in the court documents. These areas of control may include decisions regarding custody, medical, educational, residential, care and comfort, clothing, furniture, vehicles, financial, habilitative (meaning such things as therapy, training, and treatment), and end of life care.

Powers and Duties of Guardian

- Have custody and establish residence
- Provide for care, comfort and maintenance
- Arrange for education and training
- Take care of clothing, furniture, vehicles
- Give consent to receive medical or other professional care
- Receive money for the adult child and apply that to his support, care and education
- Provide annual reporting (if not the parent)

Liability of Guardian

- A guardian is not liable to third persons for acts of the ward/child (Utah Code Ann. 75-5-312)
- Guardians are only liable if personally at fault (Utah Code Ann. 75-5-429)
- Guardians may have to pay a penalty, not exceeding \$5,000, if they willfully fail to file annual reports (not parents), are guilty of substantial mistakes on the filing of the annual reports, or for gross impropriety in handling the property of the ward (Utah Code Ann. 74-5-312)

Other Legal Protections for You and Your Child

Your family and your child need other legal protections. These next slides include information for you regarding these important steps. Contact Lisa Thornton if you would like more information or help.



Necessary legal documents to protect you and your child

- Letters of Guardianship
- Special Needs Trust, the earlier the better (Still needed even if ABLE Account in place)
- Power of Attorney for parents
- Advance Health Care Directive for parents
- Will for parents
- Revocable Trust for parents
- Life Care Plan/Letter of Intent

Special Needs Trust

A **special needs trust** will protect your child's potential benefits and allow the extra money she will need every month to make her life wonderful.



ABLE ACCOUNT: A Better Life Experience

Positives

- The ABLE account allows your child to earn money and deposit up to \$15,000 per year
- If the ABLE account stays \$100,000 or less, the child with disabilities will still remain eligible for benefits such as DSPD, SSI, and Medicaid
- ABLE account funds can be used for housing, education, doctor visits, legal fees, burial costs, assistive technology, etc.

Negatives

- After your child passes away, the state may be able to claim funds left in the ABLE account to pay for past Medicaid expenses (Medicaid payback provision)
- Parents can lose money they put in the ABLE account if it is not all spent
- Special Needs Trusts are still needed

Power of Attorney

Names those to act for the parents in financial matters if they become disabled or incapacitated



Medical Directive

The Utah Advance Health Care Directive names the people you want acting on your behalf when you are unable to communicate your desires for medical treatment

Google “advance health care directive” and Utah and you will be able to find the form to complete or go to:
http://aging.utah.edu/_documents/ut-ah-coa/directives/ad-6-9-09.pdf



Will

- Allows you (as parents) to direct the distribution of property and leave assets to your children, grandchildren, charities, or other heirs
- Allows you to name a guardian for your minor children
- If you die without a will, state law determines how to distribute your assets. A child with disabilities would likely receive assets of more than \$2,000 and become ineligible for SSI, Medicaid, and DSPD
- Make sure you include language in your will and/or revocable trust that says any distribution to your child with disabilities shall be distributed for her benefit to trustee of the [child's full name] Third Party Discretionary Special Needs Trust.

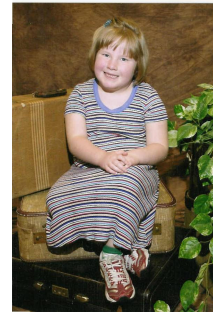
Revocable Trust



- The revocable trust allows your family to avoid probate and the accompanying delay, court costs, publicity, and attorney fees
- The revocable trust allows assets to pass automatically to your (the parents') heirs without delay and excessive costs.

Letter of Intent

While not a legal document, this provides future caregivers and guardians with a clear understanding the parents' visions and hopes for their child's future



Life Care Plan

- Outlines the child's particular needs and preferences
- This type of planning should address questions as to where the child will live, who will have a personal interest in the child, and how all of the child's financial, personal, physical, emotional and spiritual needs will be met.

Keep your documents updated

Laws and circumstances change. Your legal documents should be revisited and amended with each of life change.



SUPPLEMENTAL SECURITY INCOME

- SSI should be applied for when the child turns 18
- Maximum benefit is currently approximately \$780 a month
- Keep trying if denied on first try as success on appeal for adults with disabilities is common and back payments often awarded
- <http://www.ssa.gov/disabilityssi/ssi.html>



Medicaid

- Provides long-term medical care for children with disabilities
- Children who receive SSI are automatically eligible to receive insurance through Medicaid, but must apply
- <https://medicaid.utah.gov/apply-medicaid>



DSPD: Division of Services for People with Disabilities

- Apply for DSPD services as soon as possible.
<http://www.hsdspd.utah.gov>
- These services are not Income based and provide Respite care, long-term Living options, and a Medicaid card.



Contact Lisa Thornton for help
with guardianship or special needs
estate planning. (801) 556-8012
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