



GUARDIANSHIP AND ALTERNATIVES TO IT

(INFORMATION ABOUT GUARDIANSHIP THAT YOU WANT BUT ARE AFRAID TO ASK FOR)

Presenter:

Disability Rights South Dakota



What happens when a child turns 18 years old?

- Upon turning age 18, all children – including children with disabilities - legally are considered an “adult.” For children with disabilities, this also means that there is a transfer of rights from parent to child.
- All parental rights, and responsibilities, that are part of the IEP (Individualized Education Program) process transfer from parent to child, including right to notice, right to procedural safeguards under IDEA (Individuals with Disabilities Education Act), and advocating for their educational needs.
- The school district, through the IEP Team, is to notify both the child/individual and the parents of the transfer of rights. In South Dakota, this is to occur no later than one year prior to reaching the age of majority, or on or before the 17th birthday.

What options are available in South Dakota?

- Guardianship
- Conservatorship
- Supported Decision Making (through informal processes)
- Power of Attorney

Guardianship and Conservatorship

Guardianship

- Legal relationship (established by the court)
- Full: May encompass all personal affairs of the individual
- Limited: Guardian has authority only over selected areas of the individual's affairs
- Temporary: Guardianship is established for a limited time frame
- Joint: More than one person is appointed to be guardian

Conservatorship

- Legal relationship (established by the court)
- Limited to management of property and financial affairs
- Can be Full, Limited, Temporary, or Joint

Duties of Guardian or Conservator

- Must maintain contact with the protected person to become familiar with their needs and limitations, and only exercise their decision-making authority to the extent required by those limitations.
- Must respect the fact that their relationship with the protected person is a confidential one and should encourage the person's participation in decision-making to the extent possible.
- Provide required information to the court, including information pertaining to the protected person's finances and personal inventory, as well as an annual personal status report.

What are alternatives to Guardianship?

Power of Attorney

- Power of attorney (POA) can be considered as an option if the person has the ability to understand and sign contracts but needs assistance in certain areas of decision making and may need someone to be able to sign documents on their behalf for those purposes.
- Most common powers of attorney are for financial affairs or health care matters.
- Individual must be at least 18 years of age to enter a POA agreement.

Types of Power of Attorney

Durable

- Remains valid and in effect even if individual becomes incapacitated and unable to make decisions for themselves
- Sets in writing a person's authority to make decisions on an individual's behalf even if they are incapacitated
- Can take effect immediately or upon individual becoming incapacitated
- Should be drafted by an attorney

Non-Durable

- Authorizes a person or persons to act on behalf of an individual
- Can be granted verbally but better if it is in writing
- Ends if individual who granted POA becomes incapacitated

Revoking Power of Attorney

- Both durable and non-durable power of attorney can be revoked.
- Durable power of attorney must be revoked before individual becomes incapacitated (unable to make decisions on their own).
- Non-durable power of attorney can be revoked at any time by individual who granted it, and it is automatically revoked if individual becomes incapacitated.
- Both durable and non-durable power of attorney are terminated if either the individual giving, or person given power of attorney pass away.

Supported Decision Making

- The process of assisting a person with a disability to make their own decisions.
- Allows them to develop and pursue their own goals, make choices about their life, and exercise some control over the things that are important to them.
- Can be used in both the educational context and for adults with disabilities.
- Provides for a team approach to decision making.
- Allows the person with a disability to choose who he or she wants on his or her Supported Decision Making team.
- In addition to the person being supported, the team may be one person or several, based on the needs and desires of the individual. Each team member might have a specific area where they provide support.

Is Supported Decision Making recognized by the State of South Dakota?

- At this time South Dakota does not formally recognize Supported Decision Making (SDM) in the statutes.
- However, South Dakota does recognize power of attorney agreements, which can be used as part of the SDM process.

Margaret Jean "Jenny" Hatch

- In 2012, Margaret Jean “Jenny” Hatch was a 28-year-old woman with Down Syndrome, with an IQ of approximately 50.
- She had been living independently and working at a local thrift shop. Jenny was immobilized after being hit by a car while on her bicycle and required surgery. She had revoked her parents’ power of attorney over her for they wanted her placed in a group home.
- In August of 2012, her parents filed a Petition seeking to place Jenny in a full guardianship, including the authority to decide where she would live and whether to give or withhold medical treatment. Shortly thereafter, the Court held a hearing and put Jenny in a temporary guardianship, taking away her right to make any decisions about her life. As a result, Jenny was placed in a group home – where they took away her cell phone and laptop and wouldn’t let her see her friends.

Jenny Hatch cont.

- Attorney Jonathan Martinis and his legal team entered Jenny's case in February of 2013.
- On August 2, 2013, after a year of litigation and six days of trial, Jenny Hatch won the right to make decisions for herself, using Supported Decision Making: to direct her life to the maximum of her abilities and choose where to live, what to do and who to see. The Court recognized the requirement to give deference to Jenny's preferences.
- Jenny Hatch's case was the first time a court in the United States recognized Supported Decision Making, which was previously introduced in Canada.

Credits, Sources, and Resources

- 34 CFR 300.520(a) (Transfer of Rights – Federal)
- Administrative Rules of South Dakota (ARSD) 24:05:30:16.01 (Transfer of Rights – South Dakota)
- ARSD 24:05:27:01.03 (Timing of the Notice of Transfer of Rights – South Dakota)
- “Technical Assistance Guide for Transfer in the IEP,” updated July 2016, <https://doe.sd.gov/sped/documents/TA-Guide.doc>
- <https://doe.sd.gov/sped/IEP.aspx>
- <http://jennyhatchjusticeproject.org/>
- <http://www.wavy.com/news/special-report-justice-for-jenny>

Credits, Sources, and Resources, cont.

- South Dakota Guardianship and Conservatorship Act, South Dakota Codified Law (SDCL) 29A-5-101 et al.
- <http://dhs.sd.gov/guardianship/guardianshipandconservatorshipfaqs.aspx>
- <http://dhs.sd.gov/guardianship/>
- <http://uj.s.sd.gov/Forms/guardianship.aspx>
- <http://ujslawhelp.sd.gov/guardianship.aspx>
- <https://southdakota.tylerhost.net/SRL/SRL/ExecuteInterview>
- Agency Act (for Power of Attorney), SDCL Title 59

Credits, Sources, and Resources, cont.

- “Supported Decision-Making – An Alternative to Guardianship” by John Hamilton, Legal Affairs Director, Disability Rights South Dakota (DRSD), <http://dhs.sd.gov/docs/Supported%20Decision-Making%20Article,%20SDR%20March%202018.pdf>
- <https://www.aclu.org/>
- <https://www.aclu.org/other/supported-decision-making-resource-library>
- https://www.aclu.org/sites/default/files/field_document/aclu_supported_decision-making_agreement.pdf
- <http://supporteddecisionmaking.org/>
- <http://supporteddecisionmaking.org/content/resource-library>
- <http://supporteddecisionmaking.org/sites/default/files/aclu-qt-sdm-agreement.pdf>

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