Choosing the Best Path to Decision Making

Less Restrictive Alternatives to Guardianship
By Lynne Clay, Esq.

If parents are considering guardianship when their child turns 18, they may also want to consider other less restrictive alternatives.

Full Guardianship
Guardianship, which requires a determination by the court, removes the ability of a person with a disability to make certain decisions and gives that authority to another person or entity called the guardian. The guardian can make legally binding decisions on behalf of the person with a disability in order to protect and advance the person’s well-being and safeguard their property.

New Hampshire’s Guardianship law requires that before appointing a guardian, the court must consider whether there are less restrictive alternatives. This is because guardianship can result in a significant loss of civil rights and liberties including the right to decide where to live, to marry, to vote, to bring legal action, how to spend money, and whether to accept or refuse medical treatment. The person loses the right to make decisions about their own life. In looking to protect the interests of a vulnerable person, guardianship is the most restrictive choice. Other less restrictive options include Supported Decision-Making, limited guardianships, using a representative payee, and assigning a power of attorney.

Supported Decision-Making
In Supported Decision-Making (SDM) the person with a disability uses one or more trusted people to support them in making their own decisions. SDM can be informal, but it can also be a formal written plan that describes who will provide support, when that support will be offered, and how goals will be achieved. Through the process of SDM the individual is helped to understand their choices, weigh their options, and make an informed choice.

Limited Guardianship
Limited guardianship is an option when an individual is able to make certain decisions on their own, or with support, but requires the assistance of a guardian in specific areas such as complex medical decisions. Instead of imposing a full guardianship, courts can limit the guardianship to only those areas where the individual is unable to exercise decision making. Under a limited guardianship, the individual retains the right to make choices in all other areas of their life.

Representative Payee
A representative payee may be a less restrictive alternative for an individual who only needs assistance managing the payments they receive from the Social Security Administration (SSA). The representative payee receives the Social Security payments and must use that money for the individual’s needs. The representative payee can be a family member, friend, or a professional who is paid a fee to pay the bills of the person with a disability. There is also a process where the individual with a disability can notify SSA of any concerns they have with their representative payee and ask that a different payee be appointed.*

Power of Attorney
If the individual has the ability to make decisions but wants a parent or other trusted person’s assistance, a less restrictive alternative may be signing releases of information to allow the individual’s trusted person to have access to their educational or health care information. Similarly, the individual with a disability could consider signing a power of attorney for medical or educational decisions. A power of attorney authorizes a trusted person to make decisions for the individual in areas such as finances, education, or health care.

A Mixture of Resources
One or more of these less restrictive alternatives can be combined to meet the needs of the individual. For example, a person might have a representative payee to manage their Social Security benefits and a durable power of attorney for health decisions but maintain all other decision-making rights such as the right to vote, marry, and choose where to live. Another person might sign releases so a family member can help them make medical decisions and sign a power of attorney for educational decisions. The alternatives selected can be individually tailored while allowing the individual to retain basic civil rights and the right to make choices about their own life.

Finally, if you are already a guardian – or a person under guardianship – and you think less restrictive alternatives would be more appropriate, you can go to the court that appointed the guardian and request termination of or limitation to the guardianship in favor of a less restrictive alternative.

For more information on guardianship and alternatives visit drchenh.org/issue-areas/guardianship/.

*Disability Rights Center-NH, as NH’s Protection and Advocacy agency, has been awarded a federal grant to review representative payees to ensure proper management of payee’s benefits.