



# GUARDIANSHIP AND ITS ALTERNATIVES

PRESENTED BY:

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# PRIMARY OBJECTIVES OF FUTURE PLANNING FOR INDIVIDUALS WITH DISABILITIES OF ANY AGE

- Preserving government benefit eligibility
- Identifying and empowering advocates and caregivers
- Educating your advocates to carry on in your absence

# EMPOWERING ADVOCATES AND CAREGIVERS

- The terms “special needs” and “disabled” are overused and misused, and can create resistance to being proactive in planning for the future
- This type of planning involves disabilities across the cognitive/functional spectrum
- Ask the question: is my family member *fully independent*? If not, then you must wrestle with these issues...

# AGENTS AND GUARDIANS

Key concepts:

- Legal / decision making capacity
- Adult rights versus “Mom and Dad” rights

# IF YOU HAVE CAPACITY, YOU DON'T NEED A GUARDIAN...

You choose who helps you when you need it:

- Power of Attorney – relates to property
- Health Care Proxy – relates to medical and other health-care decisions
- Living Will – statement of end of life intentions

If a person lacks capacity, then guardianship may be necessary...

# WHAT IS A GUARDIAN?

- Appointed by a court to make decisions for those determined to be unable to make decisions for themselves
- Person and Property
- Guardian of the Minor vs. Guardian of a Person with a Disability
- New York has three types of guardianship proceedings:

Article 17:	Surrogate's Court
Article 17A :	Surrogate's Court
Article 81 :	Supreme Court

# ARTICLE 17 GUARDIANSHIP

- For children under the age of 18
- Primarily utilized when parents have passed away or the child receives significant assets
- Article 17 Guardians can be named in a Will or appointed in a Surrogate Court Proceeding
- Article 17 Guardianship expires automatically when a child reaches the age of 18

# ARTICLE 17-A GUARDIANSHIP

- Primarily for persons over the age of 18 with an “intellectual disability” and/or a developmental disability with an onset prior to the child attaining the age of 22
- Typically designated by Court Order in a Surrogate Court Proceeding
- Guardianship continues during the duration of the disability



# ARTICLE 17-A GUARDIANSHIP

- The 17A statute was the subject of a lawsuit involving its constitutionality
- Some advocates argue that the 17A proceeding operates under an older concept of disability which does not recognize the functional capabilities of many individuals with disabilities
- The lawsuit was dismissed on procedural grounds, but the issues raised in the lawsuit remain. Courts are looking much more closely at the 17A petitions as a result

# ARTICLE 81 GUARDIANSHIP

- Can be used for anyone with a disability
- Generally used in instances where persons were competent but have an unexpected change in capacity (age, accident, etc) and they do not have a Power of Attorney or Health Care Proxy in place
- Designated by a Court Order in a Supreme Court Proceeding
- Guardianship continues as long as the Court Order directs

# ADVANTAGES TO GUARDIANSHIP

- Permanent appointment – Guardian's authority continues until further Court Order
- Court supervision over and review of Guardian's actions
- Practically universal acceptance by third parties

# DISADVANTAGES TO GUARDIANSHIP

- The disadvantages to Guardianship vary depending on the nature and extent of the disability
- For those individuals with severe cognitive limitations, there is very little downside
- For those individuals who are higher functioning, the issues are more delicate

# DISADVANTAGES TO GUARDIANSHIP (CON'T).

- Article 17A is a “plenary” guardianship – the rights of the beneficiary are significantly restricted
- Article 81 requires a “least restrictive” approach, but is significantly more cumbersome and expensive to initiate and maintain

# WHICH ROUTE DO I CHOOSE?

- Often the most challenging decision for families
- For “higher functioning” individuals with intellectual disabilities, this means weighing the risks and benefits
  - How much property is at issue?
  - Are friends and family close by?
  - How would the person react to having a court-appointed Guardian?

Whichever route you choose, the key is to ensure that someone is given legal authority to help

# COMMENCING AN ARTICLE 17-A GUARDIANSHIP

- Article 17–A proceedings are designed to be “user-friendly” so that many parents are able to seek Guardianship without the need to hire an attorney
- Contact the Surrogate’s Court in the County where the individual with the disability resides
- The New York State Unified Court System has forms and instructions available on its website:

<http://nycourts.gov/courthelp/diy/guardianship17A.shtml>

# WHO SHOULD BE APPOINTED AS GUARDIAN OR AGENT?

- Consider the appointment of a parent and a sibling as co-Guardians or co-Agents to serve simultaneously. This makes the transition of responsibility to the sibling easier.
- This is an important responsibility and can represent a significant time commitment depending on the individual's level of need. Frank and open communication with the proposed Guardian or Agent is always best.



# SUPPORTED DECISION MAKING

- Considered either an alternative to guardianship or a supplement to guardianship
- Legislation enacting SDM in NY passed in 2022, but pending issuance of regulations from OPWDD
- In New York, decisions made by someone with an I/D disability pursuant to an SDM agreement developed through a State approved process would be considered a legally enforceable decision despite the disability
- Many questions and concerns remain: practicality, availability of 'supporters,' acceptance by third parties

# WHAT IS A TRUSTEE?

- Similar to Guardian in some respects:
  - Management of money for another person
  - Guardians are 'fiduciaries'
- Different from a Guardian in the following respects:
  - How a Trustee is appointed
  - How and to whom a Trustee reports
  - How assets held in a Trust are treated for SSI, Medicaid and other entitlement purposes
  - A Trust document will guide the actions of the Trustee

# SUPPLEMENTAL NEEDS TRUSTS

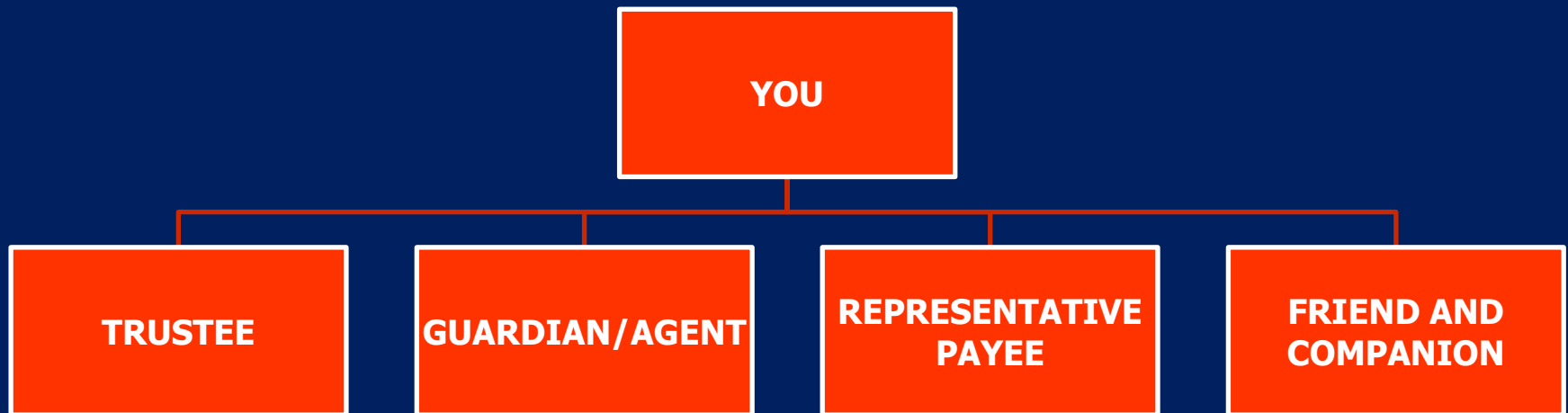
- Particular type of trust used to provide both money management and maintain (or obtain) benefit entitlement
- Designed to provide goods and services to *supplement* what might otherwise be available to the beneficiary...

Be sure to find an attorney with significant, relevant experience in estate planning for individuals with disabilities and their families....

# REPRESENTATIVE PAYEE

- Appointed by the Social Security Administration
- Receives SSI or Social Security payments on behalf of someone who cannot manage the funds him/herself
- Files an annual report (with some exceptions)
- Agencies will often serve as representative payee

# SOME OF US WILL PLAY MULTIPLE, SEPARATE ROLES...



Just remember to keep your roles separate.....

# WHAT CAN FAMILIES DO TO EDUCATE THE FUTURE GUARDIANS OR AGENTS?

- Discuss their intentions and be honest about it...
- Document information that will be important for them to carry out their responsibilities...



THANK YOU FOR LISTENING....

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