

Assisting a Person with a Developmental Disability in Making Medical Decisions

Things to Think About

Provided by The Dale Law Firm, PC, Attorneys and Counselors at Law
127 Aspen Dr., Suite 100
Pacheco, Ca 94553
(925) 826-5585 (925) 826-5585 (fax)
© 2014 The Dale Law Firm, PC

SHOULD YOU CONSERVE YOUR DEVELOPMENTALLY DISABLED CHILD?

One of the many difficult decisions that a parent of a developmentally disabled child must make is whether or not to conserve their child when the child turns 18. You may find it hard to achieve balance between allowing your child to express their choice, and authorizing someone to make decisions for your child. This booklet cannot give you the answer—but can help you in the decision-making process.

WHY IS 18 SUCH AN IMPORTANT AGE?

When any child, disabled or not, turns 18, their parents' authority to make decisions for them ends. Parents can no longer demand medical records for their children, nor do they have the legal authority to make medical decisions on their child's behalf. However, despite the legal formality, medical providers often continue to look to the parents of a developmentally disabled person during any treatment process.

MATTERS OF LIFE AND DEATH

Parents want to know whether their developmentally disabled child is in danger of not being medically treated in life and death situations. In most situations, a physician is likely to provide care even if there is no person able to authorize treatment. As will be discussed later—if your developmentally disabled child lacks the capacity to make decisions for himself or herself, the executive director of the Regional Center or the director's designee has the power to authorize treatment if there is no other person or entity empowered to act on behalf of your child.

CAPACITY TO MAKE MEDICAL DECISIONS

If the developmentally disabled person is an adult and has no conservator, consent to treatment may be given by someone other than the person on the person's behalf only if the developmentally disabled person is mentally incapable of giving his own consent.

California law presumes a person has capacity to give or refuse to give informed consent to a particular medical treatment if that person can do all of the following:

- Respond knowingly and intelligently to queries about that medical treatment;
- Participate in that treatment decision by means of a rational thought process;
- Understand all of the following with respect to that treatment;
- The nature and seriousness of the illness, disorder, or defect that the person has;

- The nature of the medical treatment that is being recommended by the person’s health care providers;
- The probable degree and duration of any benefits and risks of any medical treatment that is being recommended by the person’s health care providers, and the consequences of lack of treatment;

DEVELOPMENTAL DISABILITY ALONE IS NOT ENOUGH TO ESTABLISH INCOMPETENCE

A diagnosis of a developmental disability alone is not enough to overcome the “rebuttable presumption...that all persons have the capacity to make decisions and to be responsible for their acts or decisions.” The “mere diagnosis of a mental or physical disorder” is not enough to establish “unsound mind” or “lack of capacity” to make medical decisions.

California law requires that a finding of incompetence be “based on evidence of a deficit in one or more of the person’s mental functions rather than on a diagnosis of a person’s mental or physical disorder.” In any hearing to establish a person’s competence or incompetence, the court must find evidence of a deficit in a least one area of mental functioning, including alertness and attention, information processing, thought processes, and the ability to modulate mood and affect. There must also be a correlation between the person’s deficit in mental functions and that person’s decisions or acts. This deficit in mental functions must significantly impair the person’s ability to understand and appreciate the consequences of his or her actions, with regard to the type of act or decision in question.

Finally, the court must consider the frequency, severity, and duration of periods of impairment.

ROLE OF THE REGIONAL CENTER DIRECTOR

The Lanterman Act provides that the director of a regional center, or her or his designee*, may give consent to medical, dental, and surgical treatment of a regional center client, and provide for such treatment to be given, if the developmentally disabled person has no parent, guardian, or conservator legally authorized to consent .

Therefore, for a regional center client who lacks the competency to make medical decisions, the director of the regional center may be the only person authorized to make medical decisions in situations that are not considered matters of life and death.

*Although the Lanterman Act does not specify or limit who might be qualified to be designated to make medical decisions, the designee is almost always a regional center clinical staff member.

ADVANCED HEALTH CARE DIRECTIVE

An Advance Health Care Directive (which has replaced the Durable Power of Attorney for Health Care) allows that an agent can be appointed to make health care decisions for an individual (called a “principal” in legal terms) who can no longer do so. An Advanced Health Care Directive enables the principal to express his or her wishes about life-sustaining treatment, anatomical gifts, and other health care issues. It is also quick to fill out and inexpensive.

If a person with a developmental disability can make decisions for themselves, attach a letter from their physician to that person's Advance Health Care Directive stating that that person has capacity to execute the Advance Health Care Directive. The current California Medical Association form allows a person with developmental disabilities to designate the agent to act immediately, but keep in mind that this can easily be rescinded.

See www.cmanet.org

LIMITED CONSERVATORSHIPS

A limited conservatorship is a court proceeding whereby an individual or agency is appointed to be responsible for a developmentally disabled adult. These conservatorships are "limited" because the developmentally disabled adult retains the power to care for her or himself and/or manage her or his financial resources to the extent that the court finds that she or he is able to do so. The limited conservator cares for and controls those aspects of daily life that the court finds the developmentally disabled adult cannot competently handle.

Does Every Person with a Developmental Disability Need a Limited Conservatorship?

No. A limited conservatorship is not required merely because a person has a developmental disability. A limited conservatorship is appropriate only when necessary to protect the well-being of the individual and is designed to encourage the development of maximum self-reliance and independence of the individual.

What Alternatives Are There to a Limited Conservatorship?

If the main objective of the conservatorship is the management of the funds of a person with a developmental disability, a Special Needs Trust can often better meet those objectives.

Who Can Establish a Limited Conservatorship?

A petition for the appointment of a conservator may be filed by:

- The proposed conservatee;
- The spouse of the proposed conservatee;
- A relative of the proposed conservatee;
- Any interested public officer or employee of an interested public agency of California;
- Any other interested person or friend of the proposed conservatee

What are the Duties of a Limited Conservator?

The limited conservator is responsible for the limited conservatee's treatment, training, education, medical and psychological services, and social and vocational opportunity as appropriate. The limited conservator also assists the limited conservatee in the development of maximum self-reliance and independence.

What Powers May the Conservator Request?

A limited conservator may request the following powers or controls over the limited conservatee:

- To select the residence or specific dwelling of the limited conservatee;
- To access to the confidential records and papers of the limited conservatee;
- To consent or withhold consent to the marriage of the limited conservatee;
- The right of the limited conservatee to contract;
- The power of the limited conservatee to give or withhold medical consent;
- The right of the limited conservatee to control her or his own social and sexual contacts and relationships;
- Decisions concerning the education of the limited conservatee;

What Role Does a Regional Center Play?

Within 30 days after the filing of a petition for limited conservatorship, a proposed limited conservatee is assessed at a regional center, whose staff submits a written report of their findings and recommendations to the court. While the regional center report is not binding, it provides the court with guidance about the appropriateness of the conservatorship.

When Can Proceedings Begin for a Child?

If the proposed conservatee is a minor, the petition may be filed so that the conservatorship may be effective immediately upon the conservatee turning 18.

THE DALE LAW FIRM, PC practices exclusively in the area of estate planning with a special emphasis on the needs of persons with disabilities. The Dale Law Firm, PC offers free, no obligation workshops explaining Limited Conservatorships and Special Needs Trusts so that you can decide if this approach is right for you. Seating is limited so please contact our office in advance to reserve your seat. To attend a workshop or to schedule a free workshop for your organization, please call our office at (925) 826-5585

THE DALE LAW FIRM, PC
127 Aspen Dr., Suite 100, Pacheco, CA 94553
PACHECO, CA (925) 826-5585
© 2011 The Dale Law Firm
www.achievingindependence.com

(925) 818-4245