

Is a Guardianship Over a Child with Special Needs Required?

BY SAIRA HASEEBULLAH, ESQ AND ROCK ROCHELEAU, ESQ.

A guardianship is commonly used to help with an elderly parent or a relative who has become disabled. The guardianship allows the guardian to make personal and/or financial decisions for the person, called a Protected Person (formerly called a “ward”). Guardianships are also useful (and sometimes necessary) for a child with special needs.

The Need for Guardianship

Parenting is a fundamental right established under the U.S. Constitution and Nevada Revised Statute (NRS) 126.036. A parent is given the liberty to handle the care, custody, and management of a child. With this right comes federal- and state-mandated obligations to financially support a child. These rights

and obligations normally stop when a child turns 18. However, there are times when a parent’s responsibility, including financial obligations, do not stop, even after emancipation.

In many situations, simply exercising custody over a minor child with special needs is insufficient, as it does not safeguard any estate over the child, particularly any disability benefits paid on the minor child’s behalf. As a child approaches the age of emancipation, a custodial order extinguishes, meaning a vulnerable person, whom is now barely an adult, could be left without protection. Establishing a role as a guardian prior to a child’s emancipation may assist in transitioning that guardianship over the minor to a guardianship over the adult. (NRS 159A.055(2)(e))

In most cases, there is no dispute when a nearly emancipated child requires such significant assistance that a guardianship becomes necessary. However, when that guardianship is in dispute, the court looks to see what least-restrictive alternatives are available. The guardianship addresses any public benefits received, but there is also a legal basis to pursue child support after

a child’s emancipation when that child is unable to become self-supporting.

Under Nevada law, the obligation for child support stops when the child turns 18 and graduates from high school, or turns 19, whichever is later. Support can be extended beyond this age when a child is handicapped, as defined below, and unable to support themselves. The handicap of the child must have occurred before the age of majority for this duty to apply.

“Handicap” means an inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment that can be expected to result in death, or that has lasted or can be expected to last for a continuous period of not less than 12 months.

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For information about alternatives to guardianship, see page 24.

impairment” that prevents an adult from “work activity that is both substantial and gainful” is reason to award additional support. *Edgington v. Edgington*, 119 Nev. 577, 585, 80 P.3d 1282, 1288 (2003). Work activity is defined as “activities which can be done for pay or profit.” *Id.* In addition, the court noted that “activities like taking care of [oneself], household tasks, hobbies, therapy, school attendance, club activities, or social programs” are generally not considered to be substantial gainful activities. *Id.*

If the parent caring for the child is seeking child support past the age of

emancipation, they must make a request under NRS 125B.110, which provides for support of child with handicap beyond age of majority. Family Court can exercise jurisdiction over this issue, setting forth orders for support; however, a custodial parent of an emancipated child may pursue a guardianship as well, quintessentially allowing them to continue acting as a custodial parent despite the child’s emancipation.

Guardianship of a minor allows a finding that the child has a

handicap/special need prior to the age of majority, which is a required element to pursue post-emancipation child

support. This is a benefit of establishing guardianship over a minor (person and estate) rather than simply relying on a custodial order.

What if a parent opposes post-emancipation support? If a parent opposes, they have some options for recourse. They could request a vocational assessment to determine if employment of any sort is a viable option, even when considering a handicap. The parent can also argue that the child with the disability should be receiving disability benefits, and then based on those benefits, consider whether additional child support would be appropriate.

If a child has been diagnosed with a disability, do they “automatically” qualify for guardianship upon emancipation? No!

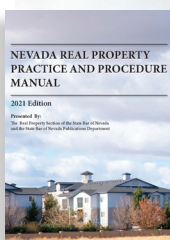
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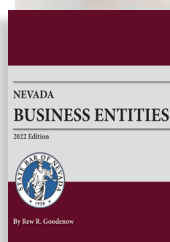
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A disability or handicap is not automatic grounds to be granted a guardianship over a child turning 18. To be granted a guardianship, the court requires evidence not of a disability, but that said disability impacts the proposed Protected Person’s ability to function in their day-to-day living. The court may first consider whether there are alternatives to a guardianship that are less restrictive, such as supported decision-making agreements, special needs trusts, or power of attorneys.

Establishing Need for a Guardianship

Guardianship of a minor is controlled by NRS 159A. The requesting parent has the burden of proving, by clear and convincing evidence, that the appointment of a guardian of the person is necessary. In requesting that guardianship, the parent will most likely request control of the person, making medical, financial, and education decisions, and the estate, controlling any assets, income, or benefits the child may have.

Nevada courts require a petitioner to show that a person is “incapacitated” in order to grant a guardianship. The legal definition of incapacitated being “a person who is unable to receive and evaluate information or make or communicate decisions to such an extent that the person lacks the ability to meet essential requirements for physical health, safety or self-care without appropriate assistance.”

Showing that the emancipated child is incapacitated is done with the inclusion of a physician’s affidavit. For purposes of a guardianship, these affidavits can include or reference historical medical records; education records; evidence of ability to care for one’s daily needs (hygiene, nutrition, medical care); any vocational assessments; or findings made by social security in conjunction with an application for disability.

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