

# **Legal Matters**



Artist: Dylan



# Legal Matters

## Contents

- Coming of Age: The Age of Majority – the age when a person acquires all the rights and responsibilities of being an adult
- Wills and Trusts
- Developmental Disabilities Life Opportunities Trust Fund
- OBRA 1993 Trusts – A financial planning device for persons with disabilities
- Guardianship
- Durable Power of Attorney
- Washington Protection and Advocacy System (WPAS)



## Coming of Age

The Age of Majority - the age when a person acquires all the rights and responsibilities of being an adult.

Age 18 marks the transfer of legal rights from parent to child in Washington State. This happens for all young people including those with disabilities unless a court limits those rights. The rights that transfer include making all school decisions, making medical decisions, deciding where to live, entering legal contracts, marriage, obtaining credit cards, and voting in elections.

Transition is an emotional time for students and parents.

Parents want their children to have all the skills they need in adult life. During the time of transition, many parents realize that their son or daughter may face adulthood without all the skills that they may need. Some parents have expressed that transition renewed the reality of adult milestones and responsibilities their child may never be able to participate in fully. For some parents this sadness can paralyze them into postponing the decisions and preparations during the latter childhood and teenage years. Many parents fail to realize that they may not be able to make legal decisions for their adult-aged sons or daughters.

For youth, reaching the age of majority (adulthood) can be an exciting time full of many new choices and decisions. At 18 the student could decide to continue on in school for transition services such as job experiences, to graduate with his friends, or to leave school entirely. Parents often are concerned about the risks that these choices involve. Parents want their son or daughter to always be safe and happy but life is not without risk for anyone. Youth with disabilities face challenges making these decisions and need to be actively involved in making choices and planning their future life before they reach the age of majority. It is important to support and assist youth with disabilities and parents in exploring all aspects of these decisions.

### Making School Decisions

The Individuals with Disabilities Education Act (IDEA) requires the local School District to notify parents and students one year prior to the transfer of decision making from parent to the young adult. In Washington State the transfer of decision making takes place at age 18, so the district must notify the parent and youth at age 17 of the upcoming changes. Unless a court has determined that a guardian is necessary, at age 18 the student would become responsible for the development of the special education plan, decisions about graduation, change

of placement, and any dispute resolution. These decisions could affect the life of the student long after school has ended.

Educational rights that transfer at age 18 in the State of Washington are: the right to receive notice of and attend individual education program IEP meetings; consent to reevaluation; consent to change in placement; request for mediation or a due process hearing to resolve disputes. Students can include other people with information to help them at the IEP.

Helping students to advocate for their needs in the IEP process is an excellent way to prepare for adult decision-making. A resource for this is "A Student's guide to the IEP," available from: **NICHCY 1-800-695-0285, or on the web at <http://www.nichcy.org/pubs/stuguide/st1book.htm>**

## Deciding Life Circumstances

When the person reaches the age of majority, the parent may no longer make many decisions for their son or daughter alone. They can't force the young adult to live in a place of the parents' choosing or many of the other decisions about daily life. A parent may make these kinds of decisions only when a court has appointed the parent as Guardian to make specific decisions for their son or daughter with limited decision-making abilities. A Guardian must file a care plan that identifies the needs of the person and how the needs will be met within three months of the appointment. This must include physical, mental and emotional needs including any need for assistance in activities of daily living and the guardian must file an annual report. Without a court order, not even a guardian can force a person to live in a place against their will. (This would require a commitment under the Involuntary Commitment Act). Guardianship places limits on specific freedoms and very important rights and should be a last resort. Every adult who has the legal ability to take care of his own business has the legal right to do so.

Every adult who has the legal right to make decisions also has the right to make decisions that others may not see as wise. Some issues such as determining friends or roommates, make decisions about issues such as excessive alcohol use, or unsafe sexual activities are not freedoms that can be fixed by guardianship. Guardianship should never be used to force someone to do what another person thinks they should. There are other simpler ways to help an adult manage problems of business and making some decisions such as a protective payee or automatic bill-payer to assist in money management. Parents can help their son or daughter learn how to rely on a select circle of people when making difficult decisions.

In the state of Washington four steps must be taken before a court can make a decision regarding the need for a legal guardian: 1.) Notice of the guardianship petition must be given to the person identified by the petition. 2.) The court must appoint a person (called a “guardian ad litem”) to make an investigation and report to the court. 3.) The guardian ad litem must obtain a statement from a physician or psychologist. 4.) A hearing must be held. Limited Guardianship can be set up by the court to appoint a guardian to make decisions in each areas identified by the court, allowing the person with a disability to retain all other rights.

## Making Medical Decisions

Once youth reach the age of majority many medical providers will continue to allow parents to accompany their adult aged son or daughter to appointments, pick up medical supplies and participate in gathering information with their son or daughter. However, parents many not make decisions, request medical records or give consent for medical procedures such as surgery without a guardianship (or limited guardianship) that identifies the parent as the party able to make medical decisions. A Power of Attorney is not available unless the person first had the ability to give informed legal consent prior to the disability becoming incapacitating.

## Entering into Contracts

All adults are able to enter into contracts and financial agreements including credit, credit cards and to accumulate debt. They are able to buy, sell, own or lease property, marry and divorce, make or revise a wills, or give a power of attorney. Only a court can remove these rights from an adult citizen in the U.S.

## Voting in Elections

Each adult who is a citizen, not a felon who is incarcerated or a person judged to be incompetent, is eligible to vote in all elections once they have registered to vote. If special accommodations or voting assistance is necessary to vote, check with the county voting registrar.

**It is important** that parents assist their son or daughter in speaking for themselves, while letting go of the dreams they had for them as children. In transition, it is time to help youth form and reach their own dreams. Adults need to help youth become comfortable making decisions and asking for help as needed from trusted people. All people have learned some life lessons from making mistakes and it is important for youth to practice making choices throughout childhood and adolescence, before the stakes become high. In order

for youth to become strong self-advocates, parents must often step aside, so youth learn to advocate for themselves while parents continue to provide encouragement and support.

Transition is the time to help youth form and reach their own dreams.

Source: The Core Project Bulletin

<http://www.projectcore.org>

Date: May 2003

## Wills and Trusts

A Will is a written legal document that provides for the distribution of property at death. A Will can also name a guardian for a minor child and designate a Trustee to handle an estate on behalf of minor children or others. Because of this function, every parent should have a Will. For parents of children or adults with developmental disabilities, the ability to appoint a Trustee and establish a Trust in a Will is especially important.

If an individual dies without a Will, his or her estate will be divided and distributed according to the state's laws of intestacy. Under Washington law, if a parent dies, survived only by his or her children, the parent's estate will be divided equally among his or her children. For a family with a disabled member, this equal division of property could be a grave mistake.

For individuals with disabilities, the direct inheritance of even a small amount of money may disqualify those individuals for Supplemental Security Income (SSI) or other state or federal financial or service benefits that would otherwise be available to them. In addition, inheritance of property by disabled individuals incapable of handling money or property may leave those individuals vulnerable to exploitation by others.

To prevent this from happening, parents of handicapped or incapacitated children or adults should have a Will which includes a Trust for the disabled individual. The disabled child or adult should receive no direct bequests in the Will, but his or her share should be directed into a carefully drafted Special Needs Trust established in the Will. Even a well-drafted Trust cannot guarantee that an individual with disabilities will not be disqualified from receipt of government benefits, but it is one of the best ways to prevent disqualification.

A Special Needs Trust in a Will can provide some funds for items not covered by government benefits such as extra clothes, vacations, treats and gifts, but does not pass an ownership interest to the disabled beneficiary. Legal ownership remains with the Trustee.

Proper language in a Special Needs Trust is especially important and legal counsel should be consulted. Just as important in a Special Needs Trust is the choice of a Trustee. The Trustee is the individual who will manage the assets of the Trust and decide when and if a distribution should be made for the beneficiary with disabilities. As the Trust may continue for the entire life of the disabled beneficiary, the Trustee chosen should be roughly the same age as the beneficiary and an alternative Trustee should be designated, if possible, to

provide continuity. The Trustee should also be familiar with the disabled beneficiary, so he or she will have some idea of the needs of the person.

If a Will with a Special Needs Trust is signed by an individual, it is important to remember to change all bank account, life insurance policy and retirement benefit beneficiary designations as well, to name the Trust as the beneficiary. Relatives and friends who may consider naming your child or adult in their Wills should be advised that such a bequest, if not done properly, may not be in the best interests of that person and will make your careful estate planning less effective. Any such bequest should also be made to a Special Needs Trust.

*The above is intended to provide general information that may be useful to caregivers and family members of persons with developmental disabilities who are incapacitated. It is not intended to substitute for specific legal advice in individual cases.*

Prepared by Karen M. Thompson and Suzanne Howel  
Attorneys at Law, 1250 Bank of California  
Seattle, Washington 98164 206-682-2333

*Source: Karen M. Thompson and Suzanne Howel*

# Developmental Disabilities Life Opportunities Trust Fund

In 1999, the State of Washington made it easy for families and individuals with developmental disabilities to prepare for their future financial stability. The Legislature passed a bill establishing the Developmental Disabilities Endowment Trust Fund.

Now called the Life Opportunities Trust, this public-private partnership creates a stable resource to enhance the quality of life for citizens with developmental disabilities. The Developmental Disabilities Life Opportunities Trust is described in State Law 43.330.200.

As a special needs trust, the Life Opportunities Trust shelters and preserves assets that would otherwise disqualify someone from government benefits, such as Supplemental Security Income and Medicaid. The trust also allows for families and individuals to save for important services that may not otherwise be provided by the government, such as work training, assistive technology, respite care and more. Most importantly, the State of Washington will match funds through June 2007, further increasing the value of your trust account by as much as 25 percent. (Matching funds are subject to annual and lifetime limits.)

## Special Features of the Trust Fund

- Protects and Preserves Assets
- Invests in the Future
- Receives Matching Funds
- Saves for Important Services
- Requires \$25 a Month Minimum Investment
- Avoids Costly Legal Fees to Set Up a Private Fund

## Incentives to Participate

- The state will pay up to \$7,750 in matching funds per beneficiary, by providing a 25 percent match on private contributions.
- Any individual or group can establish a trust account on behalf of a person with development disability.
- Families can tailor contribution and disbursement plans to meet the individual needs of their family member.

- A minimum contribution of \$25.00 each month will qualify the account for matching funds.
- The Washington State Investment Board invests the trust funds along with over \$53 billion from other fund sources. The State Investment Board offers a twenty three-year track record of successful investments, and a diverse range of investment vehicles at a very low cost.
- Fees are very competitive with privately managed trusts.

## Eligibility

Individuals are eligible to be beneficiaries if they meet two conditions at the time of enrollment: (1) beneficiaries must reside in Washington State, and (2) must meet the state definition of developmental disabilities as determined by a representative of the Department of Social and Health Services.

To verify eligibility, contact the office in your region to request a letter indicating that the prospective beneficiary meets the state definition of developmental disability. You will need this determination letter to enroll.

## Management

- Policy is established by a seven-member governing board appointed by the Governor, including four members who are parents of people with developmental disabilities.
- The Arc of Washington, a leader for more than 65 years in the development of services and programs for people with developmental disabilities, provides enrollment and management of the individual trust accounts.
- The state Department of Community, Trade and Economic Development provides support to the governing board and manages the contracts and program development.

## Types of Individual Trust Accounts

- Trust I: "Third Party Trust," anyone other than the beneficiary may contribute.
- Trust II: "Self Settled Trust," can only accept contributions from the beneficiary.

## Contact

The Life Opportunities Trust is a partnership of public and private organizations. These partners are:

1. The **Washington State Governing Board** establishes Trust Fund policy. The 7-member, Governor-appointed board includes four members who are parents of a child with a developmental disability.
2. The **Washington State Investment Board** invests the Trust's funds along with more than \$53 billion from other fund sources.
3. The **Washington State Developmental Disabilities Council** staff provides support to the Governing Board and manages the Trust Fund Program.
4. The **Arc of Washington State** is contracted to conduct outreach, enrollment and disbursements.

If you have questions or need more information about the Life Opportunities Trust Program contact Ed Holen, DDLOT Director by phone at 800-634-4473 or by e-mail.

For information about enrolling or requesting disbursements, please call Patti Bell, Trust Fund Manager, at the Arc of Washington at 888-754-8798 or contact her by e-mail at [patti@arcwa.org](mailto:patti@arcwa.org).

Source: Life Opportunities Trust website  
<http://www.ddlot.org/>  
Accessed June 2006



# OBRA 1993 Trusts

(42 USC 1396p(d)(4)(A))

A financial planning device for persons with disabilities

## I. Summary of program criteria

Some government disability program have financial eligibility criteria. SSI Medicaid/medical coupons, and "CAP housing" have limits of \$2000 in assets and limits on income. 401-Ks, IRAs and other retirement funds do count toward the \$2000 limit, to the extent that they can be withdrawn by the disabled person. (This is true even if a penalty must be paid; however, many programs will not penalize a withdrawal on account of disability.)

## II. The prior problem

If, through wages, inheritance, back Social Security, or other assets accumulated in excess of expenditures, a person is at or over the \$2,000 limit, the excess funds must be spent, even if in an unwise fashion, or the person will be dropped from benefits. In addition, under the prior statute, a person with disabilities could not accumulate funds for a down-payment on a house, an emergency, a vacation, etc.

## III. OBRA 1993

A section in the federal statute governing Medicaid (42 USC 1396 p (d)(4)(A)) provides that a person can maintain eligibility if he or she places excess funds in an eligible trust. See WAC 388-505-0595(12).

### Trust requirements

1. person is disabled by SSA standards
2. person is under 65
3. trust is established by guardian, parent, grandparent, or court
4. trust is established for the benefit of that person
5. repay State at death

Funds can be added to the trust at any time before the person's 65<sup>th</sup> birthday. The trustee can spend trust principal or interest on anything for the person. Ordinarily, it will be a special needs trust and may forbid payments for basic food, shelter, and clothing. This language will assist the trustee in retaining SSI. The remainder can go to any person or organization, if the disabled person can make a will.

#### IV. What is a trust

Like a corporation, a trust is a fictitious legal person and taxpayer. It must register with IRS and pay taxes on earnings. Rates are higher than personal rates. The trust gets a deduction for payments made for on behalf of the beneficiary, but the beneficiary pays taxes on those funds.

#### V. Result

Persons with disabilities can accumulate funds for a trust which can assist them in emergencies, vacations, home purchases, retirement, etc., while preserving eligibility for benefits and the ability of the trustee to make day-to-day purchases.

*Source: Law Office of Larry A. Jones*  
*206-405-3240*

# Guardianship

A guardianship is the process by which an individual or qualified entity obtains court authority to protect the rights or the property of an individual who has been determined by the court to be unable to provide for his person or to manage his property or financial affairs.

Guardianships are useful in many circumstances. For the parent or relative of a person over eighteen (18) years of age and having a developmental disability, a guardianship will allow the parent or relative to gain control, authority and protection over that individual. This is especially important with regard to medical issues and the guardian's ability to give informed consent for medical treatment for the disabled person.

A guardianship can be established for the person only, the estate only, or the person and estate of the incapacitated person. A guardianship of the person covers personal services of the incapacitated individual such as living arrangements, transportation, medical services and informed consent for necessary medical procedures. Guardianship of the estate generally covers financial and contractual matters. The court also has the option of appointing a limited guardian of the person only, estate only, or a limited guardian of the person and estate for an individual. A limited guardianship acknowledges that the incapacitated individual has some decision-making abilities and specifically limits the powers of the limited guardian to assist the incapacitated individual only in those areas where he or she needs help.

To begin guardianship proceedings, a Petition for Guardianship must be prepared and filed with the court of the county where the incapacitated individual resides. If the individual is living in a state residential school, the Petition may also be filed in the county of the incapacitated person's parents' residence.

The Petition for Guardianship contains general information regarding the alleged incapacitated person, such as age, address and Social Security number. Information regarding the nature of the incapacity, the reason for guardianship, an estimate of the incapacitated individual's property, the names and addresses of the proposed guardian and the alleged incapacitated person's relatives is also included in the Petition.

After a Petition for Guardianship is filed and presented to the court, the court must appoint a guardian ad litem to temporarily represent the best interests of the alleged incapacitated person. The guardian ad litem has the duty of investigating both the need for a guardian and whether the proposed guardian is appropriate. A written report is made to the court by the guardian ad litem

regarding the investigation. The guardian ad litem determines upon his or her visit with the alleged incapacitated person whether an attorney is needed to represent the alleged incapacitated person. If the incapacitated person requests an attorney or the guardian ad litem determines that an attorney is needed, the guardian ad litem must so advise the court within five days of his or her meeting with the alleged incapacitated person. The court will then appoint an attorney for the alleged incapacitated person.

At the hearing on the Petition for Guardianship, the alleged incapacitated person must be present unless good cause for his or her absence is shown. The proposed Guardian is also usually present. At the hearing, the court will review the report of the guardian ad litem and a medical report obtained by the guardian ad litem, both of which are strongly relied upon as evidence of the incapacity. The court will also listen to the testimony of any witnesses and the alleged incapacitated person. If the court determines that a guardianship is warranted, an order is so entered. The court may also determine that a limited guardianship rather than a full guardianship is warranted.

Upon appointment, the guardian files an oath. A bond may also be required of a guardian if the amount of the incapacitated person's assets warrant a bond (usually if the estate exceeds \$3,000). The guardian must also file a listing of the incapacitated person's assets on an inventory of assets to be filed within three months after appointment. After appointment, the guardian is expected to report to the court on an annual or tri-annual basis, depending on the size of the estate. The annual or tri-annual report to the court details, among other things, the income received and expenditures made during the reporting period, the incapacitated person's mental and medical status, any change in functional ability, residential changes and activities of the guardian.

The court has the power to make a guardianship last indefinitely. A guardianship will continue until terminated by court order. This happens when a determination is made by the court that the incapacitated person is no longer incapacitated, the guardianship is no longer necessary because a minor has reached 18 years of age, or if the incapacitated person dies. Anyone, including the incapacitated person, may petition the court at any time to modify or terminate the guardianship.

*The above is intended to provide general information that may be useful to caregivers and family members of persons with developmental disabilities who are incapacitated. It is not intended to substitute for specific legal advice in individual cases.*

*Source: Karen M. Thompson and Suzanne Howel*

## Durable Power of Attorney

A Durable Power of Attorney is a document that an individual (called the principal) signs while competent to give another person (called the attorney-in-fact) the authority to handle the principal's financial matters and to make health care decisions for the principal.

A Durable Power of Attorney can be drafted to become effective immediately when signed by the principal or effective only if the principal becomes disabled. If the Durable Power of Attorney is effective upon the principal's disability, the document should include a statement of how the disability is to be determined. Disability is commonly determined by a statement from the principal's physician. However, the principal does not lose his or her ability to continue making decisions even if a Durable Power of Attorney is in place and even if the principal has been determined incompetent by his or her physician. Obviously, that could lead to conflict between the principal and attorney-in-fact if opposing decisions are made.

The purpose of a Durable Power of Attorney is to appoint an attorney-in-fact who can handle the affairs of the principal if and when the principal cannot do so. A principal's Durable Power of Attorney may be helpful in avoiding guardianship procedures for that principal if he or she becomes incapacitated.

The Durable Power of Attorney can give a number of powers to the attorney-in-fact including the power to provide for the principal's support, maintenance and health, including the power to provide informed consent for health care or medical treatment if the principal cannot do so. Because of the important powers given to the attorney-in-fact, the choice of an attorney-in-fact is an important one. There is not court supervision of the actions of the attorney-in-fact, making it a position of absolute trust, which should not be granted unless such trust is justified. Likewise, an incapacitated principal is unlikely to be able to revoke a durable power of attorney if such trust proves to be misplaced.

Unless the Durable Power of Attorney specifically gives the attorney-in-fact the following powers, the Washington statutes do not allow the attorney-in-fact to have the power to: amend, alter or rewrite the principal's Will, estate planning or testamentary documents, or make gifts of the principal's property. Gifting of the principal's property to qualify the principal for Medicaid may be allowed in certain circumstances despite any prohibition against gifts written in the Durable Power of Attorney (pursuant to Medicaid's rules and regulations for gifts).

A Durable Power of Attorney differs from a General Power of Attorney. With a General Power of Attorney, the attorney-in-fact terminates if the principal is no

longer competent. Under the Durable Power of Attorney, the attorney-in-fact can continue to act on behalf of the principal even when the principal becomes incompetent. This feature of the Durable Power of Attorney makes it an effective planning device for future incompetency or incapacity. However, if the principal does not understand his or her impairment and continues making decisions which contradict the decisions of the attorney-in-fact, conflict between the principal and attorney-in-fact may result. In such circumstances, a guardianship may be the only legal alternative to protect the incapacitated principal.

*The above is intended to provide general information that may be useful to caregivers and family members of handicapped or incapacitated persons. It is not intended to substitute for legal advice in individual cases.*

*Source: Karen M. Thompson and Suzanne Howel  
Attorneys at Law, Seattle, Washington*

# Washington Protection and Advocacy System (WPAS)

The Washington Protection and Advocacy System (WPAS) is a private, non-profit organization that has been protecting the rights of people with disabilities in the state of Washington since 1972. Every state and territory of the United States has an organization like WPAS, designated to provide independent protection and advocacy services to eligible people. WPAS' services are free.

## What is WPAS?

Washington Protection and Advocacy System is a private non-profit organization that protects the rights of people with disabilities statewide. Our mission is to advance the dignity, equality, and self-determination of people with disabilities. We work to pursue justice on matters related to human and legal rights.

We provide free advocacy services to people with disabilities. Contact us for:

- Disability rights information and referrals
- Problem solving strategies for disability issues
- Community education and training
- Legal services for disability discrimination or violation of rights. We focus our legal resources on major cases which will improve service systems for people with disabilities.

We exist because society and service systems are not always fair or responsive to people with disabilities. We work for change in policies, laws, and systems that promote:

- freedom from abuse and neglect
- legal rights and responsibilities
- adequately funded supports and services
- communities that involve everyone

WPAS is governed by a Board of Directors with help from our Advisory Councils. These groups are made up of people with disabilities, family members and others who have an interest in disability rights.

## Who is eligible for WPAS services?

WPAS provides free services to people with disabilities in Washington State who qualify for our services, under our federal mandates. The mandates include:

- Protection & Advocacy for individuals with Developmental Disabilities (PADD)
- Protection & Advocacy for Individuals with Mental Illness (PAIMI)
- Protection & Advocacy for Individual Rights (PAIR)
- Protection & Advocacy for Assistive Technology (PAAT)
- Protection & Advocacy for individuals with Traumatic Brain Injuries (PATBI)
- Protection & Advocacy for Beneficiaries of Social Security (PABSS)

## Contact:

Washington Protection and Advocacy System  
315 - Fifth Avenue South, Suite 850  
Seattle, WA 98104  
Phone: (206) 324-1521 or in Washington State (800) 562-2702  
TTY: (206) 957-0728 or in Washington State (800) 905-0209  
Fax: (206) 957-0729  
E-mail: [wpas@wpas-rights.org](mailto:wpas@wpas-rights.org)

*Source: WPAS website  
<http://wpas-rights.org>  
Accessed June 2006*