

GUARDIANSHIP IN OHIO

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Foreword

This booklet offers a brief but comprehensive and nonlegalistic overview of guardianship and its alternatives in Ohio, especially for families who have a child with a developmental disability. Much of the information is also relevant concerning someone with mental illness or someone who has lost competency as the result of injury, stroke or the effects of aging.

About the Ohio DD Council

The Ohio Developmental Disabilities Council (ODDC) is a planning and advocacy group of over 30 members appointed by the Governor. ODDC receives and disseminates federal funds in the form of grant projects in order to create visions, pilot new approaches, empower individuals and families, and advocate for systems change to more fully include people with disabilities in their communities.

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Table of Contents

Parents as Guardians.....	4
Who Needs a Guardian?.....	5
Why Families Seek Guardianship.....	6
What does Guardianship do to a Person? What Rights Are Taken Away When a Guardian Is Appointed?.....	6-7
Using Guardianship as a Means to Get Information.....	8
Decision-making is a Learned Skill.....	9
Guardianship is Not the Only Option and Should Be the Last Resort.....	9
Types of Guardianship in Ohio.....	10-11
Alternatives to Guardianship for Financial Matters.....	12-13
Alternatives to Guardianship for Personal, Non-Financial Matters.....	14-15
Powers of Attorney Generally.....	16
Decision-making in the DD System.....	17-19
Powers, Duties, Rights and Responsibilities of Guardians; What is Meant by “Best Interest”?.....	20-22



Table of Contents continued

Choosing or Nominating a Guardian.....	22-23
The Application Process and Fees.....	24
What Happens at the Hearing.....	25
Do I Need an Attorney to Apply for Guardianship?.....	26
Reporting Requirements.....	26
What if a Guardian is not Doing a Good Job? What if the Ward wants a new Guardian?.....	27
Terminating Guardianship.....	28
Role of a County Boards of DD.....	29
Conflict of Interest Concerning Providers of Services	29
Residency Requirements.....	30
Immunity for Ohio Guardians.....	31
Final Considerations.....	31-32
Conclusion.....	33
Additional Resources.....	34

GUARDIANSHIP IN OHIO



Parents As Guardians

The natural guardianship of parents - that is their parental rights and control over their child - ends when their children reach the age of 18 in Ohio. At that point, they no longer have the legal ability to make decisions and sign consent forms for their child, and they may be excluded from participating in decisions their child makes. Many parents who have a child with a disability struggle to decide if they need to remain the decision-makers in their child's life. If they decide to seek guardianship when their child turns 18, they must go to their local probate court to fill out and submit an application for guardianship.

Without the appointment of a guardian by a probate court, Ohio law assumes that persons over the age of 18 are competent and able to make their own decisions. This is sometimes referred to as the “presumption of competency.”



Who Needs A Guardian?

Two prerequisites should exist before a court appoints a guardian:

1. The individuals must be incompetent in at least one important area of their lives. That decision is often easy to determine as a result of real-life experiences. Can they take care of themselves and their property, or are they at risk if left on their own?
2. There must also be a present need for the guardianship. A person may have significant deficits in life, but the support network - families, friends, service providers, and others - may be so effective that guardianship is not necessary. The expression: "If it ain't broke, don't fix it" may be applicable. If guardianship does become necessary at a point later in the individual's life, it can be sought at that time.

There are some situations in which guardianship may be an asset for protecting a person's health and safety or for asserting a person's rights, and even for helping a person express himself or herself. An individual who is nonverbal and who has profound mental retardation may need a guardian, especially if he or she resides in an institutional setting without family support and monitoring. An individual may need a guardian if his or her mental capacity is in doubt and if, at the same time, the person has significant medical issues that require frequent consent to medical procedures. The standard of proof as to whether someone needs a guardian is "clear and convincing evidence."

In accord with the principle of self-determination, it may also be useful - in assessing whether or not a person needs a guardian - to evaluate the extent to which the individual can participate in the decisions that affect his or her own life.

Why Families Seek Guardianship

It is a serious matter to take an individual's rights away and give them to someone else to exercise. However, many parents and other guardians do this for their children or wards - not to punish or control them - but to speak and advocate for or with them, protect their health and safety, help them secure needed services, help them handle their money, and help them exercise rights they never could have exercised on their own. Sometimes parents seek guardianship because someone else told them to, or because they think it is the only solution. Often the guardian knows the individual best, and is most qualified to speak for and advocate for the individual - even more so if the guardian is a parent or sibling. In addition, the guardian may be the one person who is a constant in the ward's life as direct care staff and professionals come and go.

What Does Guardianship do to a Person? What Rights are Taken Away?

Before a guardian is appointed by a probate court, the court makes a finding that a person is "incompetent," that is so mentally impaired that the person is incapable of taking proper care of himself or his property, or of his family and dependents. As a result of this finding, some or all decision-making authority is taken from a person and given to a third party called a guardian who is an agent of the court. Thus, the appointment of a guardian limits a person's rights and freedoms, the rights and freedoms we all take for granted. The person for whom a guardian has been appointed is known as the "ward."

The rights taken away depend upon the type of guardian who is appointed. If a **plenary guardian** (that is, guardian of person and estate) is appointed, then nearly all of an individual's rights are taken away and given to a guardian to exercise on the individual's behalf. The individual has, in essence, been determined by a court to be totally incompetent in the eyes of the law.

It is also important to recognize that some rights are personal to the individual and cannot be exercised by a guardian. A guardian cannot make a **will** or execute a **power of attorney** for his or her ward. In addition, voting is a fundamental right. Unless a court specifically rules that a person is incompetent for purposes of voting, an individual retains the right to vote - even if the individual has a **plenary guardian**.

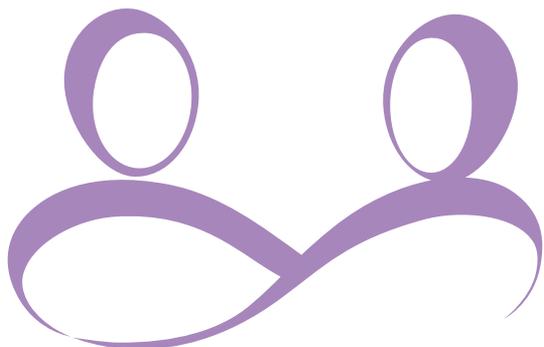
Other areas of the individual's life may touch upon fundamental rights or a right of privacy. There may be certain medical procedures that a probate court will not allow a guardian to give consent to, such as abortion or sterilization. However, despite some reluctance, courts may terminate the natural guardianship of a parent with a mental disability over his or her minor children if the court believes it is needed for the welfare of the child. Likewise, courts may prevent or nullify the marriage of a ward, especially if the marriage takes place without the guardian's consent.

The loss of personal rights is why guardianship is a very serious step and one to be taken only as a last resort. That is why a **limited guardianship**, that identifies and limits a specific area in an individual's life and does not affect any other rights, is much preferred if some type of guardianship is needed. That is also why the alternatives to guardianship listed below should be considered before guardianship.

Using Guardianship as a Means to Get Information

Sometimes schools, programs and providers refuse to provide information to a family or caregiver that is important to make sure the person is getting the care they need. They may do it in the name of the person's right to privacy or confidentiality, oftentimes because they misunderstand what laws such as HIPAA require. Health care providers can share or discuss health information with a person's family, friends or others involved in their care or payment for care. This is true even if the person is unconscious and unable to give consent. If the person is conscious, the consent does not have to be in writing. In any case, only the information the family, friend or caregiver needs to know should be given.

Consider a situation where a service provider refuses to share medical information with family members who are not guardians, perhaps at the request of the person. Or consider the situation where a 19-year old who is still in school refuses to allow his parents to participate in his IEP meeting. It is foreseeable that parents might choose guardianship as a way to continue to be involved in those parts of their child's life.



Decision-making is a Learned Skill

We all need opportunities, experiences and support to learn to make good decisions. If someone appears to be having a hard time either making a decision -- or having made a decision -- sticking to it, we need to ask some questions. Has the person ever made a decision like that before? Has the person been helped to understand the pros and cons, risks and benefits of the decision? How important is this decision? Will the result of this decision be permanent? Can the decision be undone if it doesn't work out? Sometimes allowing persons to make decisions for themselves adds meaning to their lives, and perhaps even a sense of purpose and control. Personal growth occurs through the dignity of risk.

Guardianship is Not the Only Option and Should Be the Last Resort

Before guardianship is granted by a probate court, the court is required to make a finding that the guardianship for the proposed ward is necessary. The court may also consider whether there is a less restrictive alternative to guardianship available. There are several other ways to help people with decision-making that do not limit or take away their rights. These alternatives should be explored before applying for guardianship. Thus, it is important to ask what is the least restrictive type of support that is available for the person; and would that support protect him from harm. There is a tension between self-determination and protection, and between rights and needs.

Types of Guardianship

There are several types of guardianship in Ohio:

Limited Guardianship (Least Restrictive Form)

Limited guardianship allows a probate court to appoint someone as guardian over just the portion of a person's life where he or she is both incompetent and has a need. Thus, you might have a limited guardian for medical purposes only (that is, to provide consent for medical procedures), for placement purposes only, or for the limited purpose of approving behavior plans and/or psychotropic medications. Because this is the least restrictive form of guardianship, it should be used whenever possible when some form of guardianship is necessary. See O.R.C. Section 2111.02. A limited guardianship may also be limited as to time (e.g., one year) instead of purpose.

Guardianship of the Estate

Guardianship of the estate gives the guardian the authority to make all financial decisions for the ward. This includes the ability to enter into contracts on behalf of the ward.

Guardianship of the Person

Guardianship of the person gives the guardian the authority to make all day-to-day decisions of a more personal nature (that is, all decisions except financial decisions) on behalf of the ward. Such decisions would include arrangements for food, clothing, residence, medical care, recreation, education and other concerns. It includes medical consents, consents to IHPs (individual habilitation plans), consents to participate in Special Olympics, to have a photo of the individual used, and so on.

Plenary Guardianship (Guardianship of Person & Estate)

Plenary guardianship, or guardianship of person and estate, gives the guardian the authority to make nearly all decisions for the individual, and combines the authority of **guardianship of**

person and **guardianship of estate**. It also sweeps away more personal rights than any other form of guardianship.

Emergency Guardianship

Emergency guardianship allows a court to intervene to appoint someone for a short and definite period of time. The emergency guardianship lasts for only 72 hours. Emergency guardianship can be extended by the probate court for an additional 30 days after a hearing.

Interim Guardianship

Interim guardianship allows a court to appoint someone on a temporary or interim basis because the former guardian is no longer available. An interim guardian can be initially appointed for a period of 15 days, and for good cause the interim guardianship may be extended another 30 days.

Guardian ad litem

Guardian **ad litem** is a different type of guardianship in which a guardian is appointed for the very specific purpose of representing a minor or someone who is allegedly incompetent during the course of a particular type of litigation. A guardian **ad litem's** authority ends when the litigation ends.

Co-Guardianship

Co-guardianship occurs when two people are appointed to act as guardian for someone at the same time. In other words, two people share the guardianship responsibilities. Co-guardianship is not a good idea in a divorce situation or in a situation in which there is animosity between the potential co-guardians. Co-guardianship may also require both guardians to sign every form, creating additional logistical problems in completing paperwork on time. Co-guardianship is not recognized in every county.

Alternatives to Guardianship for Financial Matters

1. **Representative Payeeship** - If the only significant income an individual receives is his or her monthly SSI (Supplemental Security Income) check, it may not be necessary for a person to have a **guardian of the estate** or a **plenary guardian**. A **representative payee** may be able to handle all relevant financial matters. A **guardian of the person** (perhaps the type of guardian most commonly appointed by probate courts) or a **limited guardian** could handle all other matters.

A **representative payeeship** or **authorized representative** or **designated advocate** may also be available for other state and federal benefit or entitlement programs, including but not limited to regular Social Security, SSDI (Social Security Disability Insurance), VA (Veterans Administration) benefits, Railroad Retirement benefits, welfare benefits and Black Lung benefits. These agencies sometimes allow individuals to authorize someone else to act on their behalf with that agency, even if that person is not an attorney. It is important to fill out a specific form and to follow the instructions of the agency, especially with respect to paying the representative for his services.

2. **Trust** - A **trust** might be used instead of a **guardianship of the estate** to handle funds for the individual. A **special needs trust** may be an available option to help distribute money for the ward's benefit while minimizing the impact on the eligibility of the ward for various public assistance benefits, including Medicaid.

3. *Financial Power of Attorney* - See the discussion of Powers of Attorney generally below. A person may give someone else the legal authority to handle his financial affairs if he becomes incapacitated. This document is often used by a person as they get older to give financial authority to a spouse or child to pay bills, etc. instead of requiring that spouse or child to seek guardianship of the estate.
4. *Direct Deposits and Automatic Bill Pay* - Having funds from employment or Social Security directly deposited into a bank account keeps the actual cash from going to the person. Automatic payments can be set up to take care of regular expenses such as utilities. In addition, if the account is a **Joint Account** with a trusted person where 2 signatures are required for withdrawals, that person can manage the funds. Joint accounts may cause eligibility questions, however, when it comes to determining whose assets are in the account.
5. *Direct Payments to Provider of Service* - In order to assist an individual who may have trouble managing his own funds, payments could be made by a Representative Payee, Trustee, or Attorney in Fact directly to the person or entity providing a service.
6. *Conservatorship* - See next section.



Alternatives to Guardianship for Personal, Non-Financial Matters

- 1. General Powers of Attorney, and Powers of Attorney for Health Care and Mental Health Care* - See the discussion of Powers of Attorney generally below. A person may give someone else the legal authority to handle their personal, non-financial affairs if he becomes incapacitated. A different document would allow the agent to intervene on behalf of a person with mental illness during a time of crisis.
- 2. Protective Services* - A court may order a county board of developmental disabilities to provide protective services for a short time to an adult with mental retardation or other developmental disability who is being abused or neglected if that adult lacks the capacity to make decisions to protect himself or herself. See O.R.C. Section 5126.30 et seq. If the individual who needs assistance is over age 60, the individual might also be eligible for other services available to the elderly through Adult Protective Services.
- 3. Protection Orders* - An individual may also be able to ask that a court order someone who is hurting or threatening to hurt him or her to stay away and not have any contact. It would be overly restrictive to take away an individual's rights through a guardianship in order to keep the individual safe when it might be possible to accomplish the same with a **court order of protection**.
- 4. Circle of Support* - An alternative to guardianship might be to rally those people important to an individual around him or her to make sure the individual has a support system that meets all of his or her needs and advocates on the individual's behalf. An individual's circle of support -- i.e., family, friends, staff, volunteers, advocates -- can step in to ensure the person is receiving the quality programs and services he needs.

- 5. *Support Broker*** - The Developmental Disabilities (hereinafter, DD) system in Ohio has a new SELF Waiver, a Home and Community-Based Medicaid Waiver, that utilizes the services of a Support Broker to assist the individual on the waiver.
- 6. *Release of Information*** - A person may sign a form that allows personal information to be given to a third party. Such releases are often used by providers to accommodate the requests from family members or care givers for information. A HIPAA Waiver is essentially a release of information form.
- 7. *Conservatorship*** - If an individual is mentally competent but has a physical disability, the person can:
- Ask the probate court to appoint a **conservator** of either person or estate or both;
 - Select the **conservator**;
 - Discharge the **conservator** if he or she is unhappy with the person or if his or her physical disability decreases; and
 - Specify to the court just what authority he or she wants the **conservator** to have.

A conservatorship looks and feels like a guardianship; but most importantly, it does not involve any finding of incompetence.

- 8. *Chosen Representative*** - A person receiving services in the DD system can now authorize an adult to make decisions for him about DD programs and services if he does not have a guardian and is not comfortable making those decisions himself. See the discussion about decision-makers in the DD system below.

Powers of Attorney Generally

A **power of attorney** is a legal document that gives someone else, an agent, the authority to act on an individual's behalf. A person must be competent ("of sound mind") when he or she gives someone else the authority.

In theory, a **power of attorney** is of limited usefulness when given by a person with an ongoing mental disability, such as mental retardation, when that person's ability to make a decision is in doubt, or when their capacity to execute a power of attorney is in doubt. The person with the disability retains the right to speak for himself and can, in effect, overrule the agent.

In reality, however, many people, including parents of adult children with mental retardation, often claim authority to represent the individual through a **power of attorney**. In many instances, such claims would not withstand a legal challenge.

An example of a more appropriate use of a **power of attorney** would be when a competent, healthy person gives someone else the power to make health care decisions for him or her through a durable **power of attorney for health care** at a later time when he can no longer speak for himself. The document may provide reassurance to the person that he will be taken care of if he becomes unable to make decisions for himself as a result of an accident, aging, etc.

To sum up, a **power of attorney** is clearly an alternative to guardianship if made by individuals when they are competent. Powers of attorney may be general or specific. Health Care Powers of Attorney and Financial Powers of Attorney are standard estate planning documents. Too often powers of attorney are abused either to claim unwarranted authority for the agent, or for the purposes of financial exploitation.

Decision-making in the DD System

New Law

Effective September 10, 2012, Ohio law (O.R.C. Section 5126.043) sets out a new three-tier approach to decision-making in the DD system -- that is, in the services and programs offered through County Boards of Developmental Disabilities and the Ohio Department of Developmental Disabilities (DoDD).

Strengthened Presumption of Competency

First, if there is no guardian then -- in light of the “presumption of competency” -- the individual himself “shall be permitted to make the decision.” The individual may seek and obtain advice, support and guidance from an adult family member or another person without giving up the right to make the decision himself. Although this is not a change in the law, it is the first time the law has so clearly stated that individuals can make their own decisions.

Choosing a Substitute Decision-Maker

Second, an individual may now choose someone else to make a decision on his behalf. This is a major change to Ohio law; but it must be remembered that it only applies in situations involving DD services and programs. It does not change the law in Ohio dealing with guardianships or any services and programs provided by agencies outside the DD System.

This authorization must be in writing. Although the DODD has developed a form for such authorizations -- which will have the advantage of being easily recognized -- the law does not limit a written authorization to this form. If the individual expresses an intent to revoke the authorization, it should be considered to be revoked.



A “Chosen Representative” appointed pursuant to this written authorization must be an adult. He or she cannot have any financial interest in the decision relating to the service or program. For example, a provider cannot serve as an authorized representative and sign the person up to receive services from the agency he works for. Also, chosen representatives may not admit the person they represent into Developmental Centers. It is expected that in many cases, the Chosen Representative will be a parent or other family member, even if they also provide services or natural supports.

Guardianship Unchanged

Third, if there is a guardian, then the guardian shall make the decision. This is not a change in the law. It is important to note there is no requirement that a guardian be appointed. Further, not all guardians have the authority to make decisions about programs and services for their wards. For example, a limited guardian for medical purposes only, can only make decisions about DD services and programs that are medically-related.

Motivation: Values and Philosophy Behind the Changes

The final paragraph of Section 5126.043 includes two powerful statements that reflect important beliefs about people with disabilities as well as values embodied in the Ohio DD Bill of Rights (O.R.C. Section 5123.62), especially subsections (A), (Q) and (R).

The first statement, found in existing law, states that individuals with developmental disabilities, including those who have guardians, “have the right to participate in decisions that affect their lives and to have their needs, desires and preferences considered.”

The second statement (new) indicates that the Chosen Representative or guardian who makes a decision about DD services and programs for someone with a developmental disability “shall make a decision that is in the best interests of the individual on whose behalf the decision is made AND that it is consistent with the needs, desires and preferences of that individual.”





Powers, Duties, Rights & Responsibilities of Guardians; What is “Best Interest”

Guardians owe a fiduciary duty - a special duty of care - to act in the “best interest” of their wards. That means that the guardian should make the decision that would be made by a reasonable person standing in the ward’s shoes. Keep in mind, however, that reasonable persons often disagree!

Guardians have an obligation to follow all orders of the probate court, which is their Superior Guardian and the source of their authority. When in doubt as to what to do on behalf of the ward, guardians may seek direction from the probate court. It may be necessary for the guardian to submit a motion to the court for direction, and to request a hearing, in order to get such direction. At a minimum, the court will expect a guardian of the person to keep the ward safe, nourished and healthy, and a guardian of the estate to protect the ward’s assets.

Thus, guardians are expected to obey the recommendations of physicians concerning the health of their wards.

Guardians may have to negotiate with service providers and the individuals’ teams when those parties appear to support the wards’ rights (e.g., to eat what they want, when they want it, even when they have Prader Willis Syndrome or diabetes) instead of their health. In some cases, guardians may have to seek to put behavior management plans in place for their wards, or to subpoena service providers and team members to explain to the court why they resist the directions of the physician and the guardian.

Guardians generally have access to records and any information the person himself would have had access to except for the guardianship. That access might be restricted by the type of guardianship involved for a particular person.



The authority of a guardian is limited to that given in his or her Letter of Guardianship from the probate court. If the guardianship awarded is a **plenary guardianship** (guardianship of person and estate), the authority of the guardian has very few limits but is as complete as allowed by Ohio law and the probate court that has jurisdiction of the guardianship.

Guardians also have an obligation to file either annual or biannual reports with the probate court to enable the court to monitor the condition of the ward and to determine whether or not there is a need for the guardianship to continue.

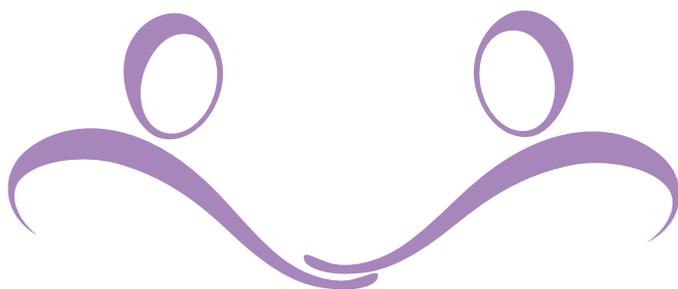
In addition, in the DD system, as we mentioned above, guardians are required not only to act in the best interests of their wards, but also in a manner consistent with their needs, desires and preferences.

Ohio law also indicates that a guardian “shall be the guardian of the minor children of his ward” unless the court appoints someone else. See O.R.C. Section 2111.02.

Guardians have the authority to create special needs trusts for their wards. See O.R.C. Section 5111.151 (F)(1) & (3). Nor does the law limit this authority to a guardian of the estate.

In an ideal world (as written in minimum standard proposed by a subcommittee of the Ohio Supreme Court), the Guardian would follow the wishes and preferences of the ward, unless to do so would either cause harm or be contrary to an order of the court. In order to do that, guardians should see their wards often and ask the wards what they want in given situations.

Sometimes acting in the best interest of their wards means that guardians will have to speak up and advocate for them. Guardians cannot delegate their authority through a power of attorney or otherwise. However, a guardian who is going to be absent for a time, might show their **Letter of Guardianship** to the family physician and let the physician know in whose care the ward will be in during their absence. The guardian might also complete a form that gives the temporary custodial party permission to seek medical attention for their wards in their absence.



Choosing or Nominating a Guardian

Parents of an individual with mental retardation should not automatically assume that one of the individual's siblings is willing to become guardian for the individual when they (that is, the parents) can no longer serve in that capacity. The willingness of the sibling to serve as guardian should be thoroughly discussed with the parents, and the wishes of the individual should be considered. The individual who may be subject to guardianship has the right to nominate someone



to serve as his guardian and have that nomination considered by the probate court. See O.R.C. Section 2111.121. When possible, a family member who knows the individual well and is interested in his or her welfare should be selected. For someone to be considered for **guardianship of the estate**, that person should have some skill in managing finances and business affairs. If a person needs a guardian and no family member is willing to serve, a court may appoint a local attorney to carry out that role. Sometimes, such an appointment can be a real disservice to the individual. Even if the attorney-guardian handles matters professionally, he or she doesn't have the personal interest to really get to know and get involved with the individual.

Guardianship Agency for Those Without Available Family

The Ohio Department of DD also provides the services of a nonprofit agency to act as guardian for those who need it and have no one else available in their lives. For more information, contact Advocacy and Protective Services, Inc. (APSI) at 1-800-282-9363.

Naming Guardians in a Will

Nominating someone in a **will** to serve as guardian doesn't make it happen automatically, unless the ward is a minor. The person nominated needs to go to probate court and file an application to be appointed guardian by the court.

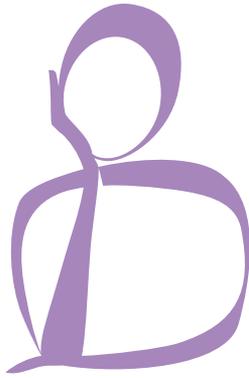
If you are going to nominate guardians in a **will** as a way of expressing your wishes, consider nominating the guardians three-deep: a primary and two backups. Individuals with disabilities may outlive their parents by 30 - 40 years, and it is really hard to anticipate who will be around during their lifetimes. At least one of those nominated should be the same age or younger than the individual. Even in situations when the parents did not serve as guardians, they may wish to nominate guardians in case guardianship would ever become needed.

Application Process and Fees

Each county probate court has its own set of application forms that must be completed to start the process. Included in those forms is a **Statement of Expert Evaluation** that must be filled out by a physician or a licensed clinical psychologist. The forms and fees vary somewhat from county to county. The application should be filed in the county in which the individual resides. Application forms can be picked up at the probate court or downloaded from the internet site for the respective county probate court.

If the applicant cannot pay the fees, the applicant can ask that the indigent guardianship fund be used to cover those expenses. In the alternative, the applicant might indicate that he cannot afford to pay the application fee and ask that it be waived. With either alternative, it may be helpful for the applicant to file an affidavit of indigency with the court - a notarized statement in which the applicant swears he or she does not have sufficient funds to pay the application fee.

The court will send notice that the guardianship application has been filed to all next of kin who live in the state, in case they wish to object to the guardianship. Notice will be sent to a parent who might live out of state, despite the wishes of an ex-spouse who may be the applicant. The court will also ask a probate court investigator to interview the prospective ward and people who know him or her and to make a recommendation to the probate court as to whether the guardianship is needed.



What Happens at the Hearing?

Finally, the court will set the matter for hearing, often before a magistrate instead of the judge. The hearing will normally take place 4 - 6 weeks after the application is filed, but a motion for an expedited hearing can also be filed. If everyone is in agreement that the guardianship is needed or if no one appears to object, then a **Letter of Guardianship** is awarded. If anyone objects, including the proposed ward, then the hearing becomes more like a trial where witnesses are examined and cross-examined. The subject of the application has the right to object to having a guardian appointed for him or her and has several other due process rights, including these:

- The right to have an attorney represent him or her, even if he or she cannot afford one;
- The right to be present during the hearing;
- The right to receive notice of the hearing;
- The right to request a record of the hearing;
- The right to have a friend or family member of his or her choice present;
- The right to prevent his or her personal physician and certain other parties from testifying against him or her; and
- The right to have an independent evaluation.

Do I Need an Attorney to Apply for Guardianship?

Whether you need an attorney to assist you depends upon the rules of the probate court for the county where the proposed ward lives, and the type of guardianship you are applying for. In some counties, it will be necessary to have an attorney to file the guardianship application in probate court. That is especially true when the application is for a guardianship of the estate where a bond will also have to be posted. It is often worthwhile to contact the clerk of the probate court to ask whether you can file the application yourself. The clerk knows what is going on and can be very helpful.

Reporting Requirements

The law requires a guardian to file a report with the probate court at least every two years, but some courts require the guardian's report annually. Not only will guardians be required to state whether there is need for the guardianship to continue, but they also have to submit another **Statement of Expert Evaluation** signed by either a physician, a licensed social worker, a licensed clinical psychologist or the person's developmental disabilities team. In some counties, the Statement of Expert Evaluation can be waived after the first report has been filed, if the ward's condition and the need for guardianship is not expected to change.

Guardians of the Estate are required to get permission from the probate court before making expenditures from the ward's estate, unless such authority is specifically granted in their letter of guardianship or other order of the court. **Guardians of the Estate** must report annually as to how they spent the funds of the ward on his or her behalf during the prior year. Guardians are required to do an accounting and submit receipts for all such expenditures. **Guardianship of the Estate** may be cumbersome. Unless it is absolutely necessary, consider the use of an alternative such as a trust or a representative payee.

If the Guardian is Not Doing a Good Job or the Ward Wants a New Guardian

If someone believes that a guardian is not doing a good job, he or she should bring the matter to the attention of the probate court. A general recommendation would be to bring it to the attention of the clerk of the probate court and not the judge. The court may set the matter for hearing, or it might ask its Investigator to review the ward's situation and the involvement of the guardian. Although there are questions about who can properly file a motion to review the guardianship, the Ohio Supreme Court recently clarified that once the probate court has notice, then it has the authority to investigate. *In re Spangler, 126 Ohio St. 3d 339, June 9, 2010.*

Likewise, if the ward wants a new guardian, the ward should bring that to the attention of the probate court. The court may hold a hearing on the matter. In an ideal situation, the current guardian would resign and a new person approved by the ward would apply to become the successor guardian.

Short of the ward suffering loss of assets, injury or ill health as a result of neglect by the guardian, probate courts are unlikely to remove a guardian who wants to continue to serve, especially a family member. Even motions by divorced spouses to take over guardianship of their child are unlikely to succeed without a real clear and persuasive reason to make a change.



Terminating Guardianship

Sometimes it becomes apparent that a guardianship should not have been created in the first place, or that a guardianship of a certain level of restrictiveness is no longer necessary. In such cases, it is appropriate to approach a probate court with a motion to terminate a guardianship or a motion to reduce a guardianship to a limited guardianship.

Ohio law indicates that a ward may submit a motion to the court 120 days after the guardianship becomes effective, asking that the guardianship be ended. The ward may renew his request once a year after that. See O.R.C. Section 2111.49 (C). If the ward alleges his competence, the burden of proving his incompetence by clear and convincing evidence is on the guardian.

However, a court may be reluctant to terminate a guardianship when the underlying condition that justified the guardianship (for example, mental retardation) has not changed. By way of contrast, a person for whom a guardian was appointed when he had a stroke, might recover from the stroke, allowing a court to terminate the guardianship.

When guardians resign, move out of state or die, wards are left in legal limbo - still determined incompetent by a probate court in at least some areas of their lives but with no one who can legally act or advocate for them. That is why it is important to notify a probate court, the superior guardian, when a guardian is no longer available.

Also, note Section 2111.45 of the Revised Code that indicates: "The marriage of a ward shall terminate the guardianship as to the person, but not as to the estate, of the ward." This law is based on the assumption that a spouse will now oversee the personal needs of the individual. However, if the guardian objects to the validity of the marriage, the court may annul the marriage on the grounds that it was a contract that the ward was incompetent to enter.

Role of County Boards of Developmental Disabilities

The role of a County Board in guardianship matters is limited as a result of a 2010 decision by the Ohio Supreme Court. Specifically, a county board of DD does not have the authority to file a motion to remove a guardian. *In re Spangler, 126 Ohio St. 3d 339, June 9, 2010.*

However, the county board can still convey its concerns to the probate court and rely upon the court's authority to investigate the guardianship. In the interim, county boards still have an obligation to arrange for the usual services for the individual. In addition, the county board may seek court authority to provide Protective Services for a limited period of time. See O.R.C. Sections 5126.30 to 5126.33.

Conflict of Interest Concerning Providers of Services

Ohio law prohibits someone who is providing services to an individual from also serving as his or her guardian. (See O.R.C. Section 5123.93 which states: "In no case shall the guardianship of a person with mental retardation be assigned to ... a person or agency who provides services to the person with mental retardation.") The rationale for this provision is that it would be impossible for a person who is providing services to be also an effective advocate against the service provider (himself or herself). There is an exception to this prohibition in which there is a relationship of blood or marriage between the proposed guardian and ward.

Note, however, that this provision of the law occurs within the chapter of the Revised Code dealing with people with developmental disabilities, and not in the chapters for guardians and fiduciaries. Note also that the term "ward of the state" no longer has any meaning in Ohio law.

Residency Requirements

It is desirable for the guardian to live near to his or her ward -- preferably in the same county and same state. It is difficult for a guardian to carry out duties if he or she does not have frequent face-to-face contact with his or her ward.

Ohio law respects the right of parents to choose guardians for their children who are unable to take care of themselves, no matter where the guardian lives. Parents have been able to nominate out-of-state residents as guardians for their minor children for many years.

In 2008 Ohio law was amended to allow a parent to nominate a person to serve as a **standby guardian** for his/her child who is an adult and who is also incompetent, even if that potential guardian lives out-of state. See O.R.C. Section 2111.121. Keep in mind that parents may “nominate” a guardian, but only the probate court “appoints.” However, in this case, if the technical requirements of the law are followed, the person nominated by the parents “shall have a preference in appointment.” See O.R.C. Section 2111.02(D)(2).

In 2012 Ohio law was further amended to allow the court to appoint either a resident or nonresident of Ohio as guardian of the person. See O.R.C. Section 2109.21. However, the ability to appoint someone as a standby guardian of the estate is covered by the section above.



Immunity for Ohio Guardians

Ohio law also provides personal immunity for a person while he or she acts as guardian, as long as the person does not act negligently or outside the scope of authority as guardian. To have protection under this section of the law, it is necessary only that the person makes it clear that he or she is acting in the official capacity as guardian. See O.R.C. Section 2111.151. For example, guardians should sign all documents with their name and write “as guardian” immediately after their name. As a result of this provision, people should not have to worry about exposing their personal assets when they consider whether or not to become guardians.

Final Considerations

When considering guardianship in Ohio, a court finding of incompetence is decisive. In other states, and for other purposes in Ohio, the focus is on whether or not the person has the ability or the capacity to make decisions. In Ohio, a person might be determined incompetent and still have the necessary testamentary capacity to make a will. On the other hand, a person is specifically required to be “of sound mind” to complete an Advance Directive (i.e., Living Will, Durable Power of Attorney for Health Care) in Ohio. That means that a person who has been determined incompetent and for whom a guardian has been appointed cannot complete an Advance Directive in Ohio.

Once a court has made a decision in a guardianship matter, there is no way to change the result short of appealing the decision or asking the court to reconsider its decision. In the



latter case, the passage of time and new evidence might lead to a different result.

Although other states may use “substitute judgment” as the standard for decision-making for a ward, Ohio uses the best interest standard, discussed above.

Guardianships can be transferred from state-to-state and county-to-county. The probate court with jurisdiction will be the court for the county within which the ward resides. Individuals with guardianship papers from another state or county should transfer the guardianship to the current county of residence if the ward is expected to remain there for the foreseeable future. Otherwise, especially in the case of a guardianship from another state, providers may refuse to recognize the guardian’s authority.

In addition to informing courts about the death or incapacity of the guardian, it is very important to keep the courts informed of where the ward is residing, as well as the death of a ward.

Letters of Intent, also called **Letters of Instruction**, are a valuable step in the planning process for a person with a disability. These document can be created by families to pass along information to guardians, providers and others about the individuals so they can assist him or her to continue to live as normally as possible after the loss of a loved one and/or guardian. The documents should be tailored to the specific needs of the individuals and updated on a regular basis.



Conclusion

The DD system is increasingly turning to Medicaid to pay for many services and supports for people with disabilities. As a result, more forms are being generated that call for consent and the signature of a legally responsible party. It is not unusual for providers and others to refuse to accept the signature of someone whose competence may be in doubt. Thus, it is anticipated that the need for guardians will increase, especially as our population ages.

However, guardianship is not the only option when a person needs assistance in making a decision, especially in the DD system. Consider the alternatives to guardianship we have discussed above. In some cases the simplest solution may be to move the person to a more supportive environment where guardianship is no longer necessary.

If an alternative decision-maker is needed, such as a guardian or a Chosen Representative, then that decision-maker should learn as much as possible about the person's lifestyle and preferences and should use the person's values and beliefs to guide his decision. In short, the alternate decision-maker should make the decisions the person would have made if he/she were capable of making the decision. In addition, even when there is a Chosen Representative, the individual should still be attending and participating in meetings about programs and services for him. His providers and representatives of the county board should not interact only with the Chosen Representative, but should include the individual in all conversations, meetings, etc. about him.

Additional Resources

Additional resources on the subject of guardianship in Ohio include a book published from the perspective of the potential ward by Disability Rights Ohio called ***Take Charge of Your Life: Know About Guardianship***. See their website at <http://disabilityrightsohio.org> for further information. New guardians may also want to inquire of their Probate Court whether there are any training sessions or materials available through the Court. Finally, forms for Advance Directives in Ohio (Health Care Power of Attorney, Living Will) can be found at the website for the Midwest Care Alliance at www.midwestcarealliance.org. For a form for a Mental Health Advance Directive, see the website of Disability Rights Ohio, above.





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