



**Guardianship:
Spectrum of
Alternatives and
Rights**

**Disability
Rights OHIO**

We have the
legal right of way.

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DRO: Who and What



- Mission: To advocate for human, civil, and legal rights of people with disabilities in Ohio.

Activities

- Information
- Resources
- Legal advocacy
- Investigations
- Monitoring
- Policy

Teams

- Community Integration
- Education
- Employment
- Abuse/Neglect
- WIPA
- Intake/Short Term
- Policy/Outreach
- Rep Payee Reviews

Why are we here?



- How do you help an adult who has trouble making decisions for themselves?
- What if something happens to my kid? Can I step in to help fix it?
- Will doctors, landlords, banks, and other organizations still talk to me after my child turns 18?
 - It's true: if you do *nothing*, they might not. But...

The Big Question



Is guardianship the only way to help?

The Answer



- In most cases, NO!
- Many people with disabilities do not have or need guardians
- Alternatives to guardianship are less restrictive and may be easier.
- Some organizations (schools, hospitals, etc) will suggest guardianship even when it's not needed



Capacity, Competency, and What it Means to Make a Decision

DECISION-MAKING PROCESSES

Basic Principles



- EVERYONE needs help to make some decisions
- Before choosing guardianship or alternatives, assess the areas in which the person needs support to make decisions

Continuum of Supports



- There are many options to support decision-making
- **Start with the least restrictive options before moving to more restrictive ones**
- The assessment is different for every person—not one-size-fits-all
- Also consider different ways of providing support

Why Consider Alternatives to guardianship?



- Should consider less restrictive options first. Guardianship is the most restrictive option.
- Can be difficult to terminate
- Court involvement and required reporting
- Many alternatives offer necessary support with less intrusion
- Research shows better health, safety, independence, integration, employment, wages, and even longevity for people with greater self-determination

Recommended Step 1



Make an individualized assessment of the person's ability to make various decisions.

How to Assess Capacity: Stoplight Tool



	If the answer is "YES" place a ✓ in the box. If the answer is "NO" go to next column.	If the answer is "YES" write what support is needed/available. If the answer is "NO" go to next column.	If the answer is "YES" place a ✓ in the box.
HEALTH & NUTRITION			
Does the person make decisions about where, when & what to eat?			
Can the person follow a prescribed diet and/or take medicines as directed?			
Does the person understand the need to maintain personal hygiene and dental care?			
Can the person make and communicate decisions regarding medical treatment, including understanding the consequences of not accepting treatment?			
Does the person understand health consequences associated with high-risk behaviors (substance abuse, overeating, high-risk sexual activities, etc.)?			
Can the person alert others and seek medical help for serious health problems?			
RELATIONSHIPS			
Does the person understand and practice appropriate relationship behaviors with family, friends, co-workers, intimate partners, etc. (how we talk to and touch others)?			
Is the person able to make appropriate decisions concerning marriage and intimate relationships?			
Does the person understand consent and permission in regards to sexual relationships?			
PERSONAL SAFETY			
Does the person understand and avoid common			

How to Assess Capacity?



- Stoplight Tool
 - Discrete areas of decision-making
 - Recognizes differences in capacity
 - Can get multiple perspectives
 - Individual, family, professionals, other supporters
 - Start by considering abilities
 - Then consider supports
 - Identify narrow areas of need
 - Guardianship/alternatives can be limited to these areas

How to Assess Capacity: PRACTICAL Tool



<p>PRESUME guardianship is not needed.</p> <ul style="list-style-type: none"> <input type="checkbox"/> Consider less restrictive options like financial or health care power of attorney, advance directive, trust, or supported decision-making <input type="checkbox"/> Review state statute for requirements about considering such options 		Observations and Notes:		
<p>REASON. Clearly identify the reasons for concern.</p> <p>Consider whether the individual can meet some or all of the following needs:*</p> <table border="0"> <tr> <td> <p>Money Management:</p> <ul style="list-style-type: none"> <input type="checkbox"/> Managing accounts, assets, and benefits <input type="checkbox"/> Recognizing exploitation <p>Health Care:</p> <ul style="list-style-type: none"> <input type="checkbox"/> Making decisions about medical treatment <input type="checkbox"/> Taking medications as needed <input type="checkbox"/> Maintaining hygiene and diet <input type="checkbox"/> Avoiding high-risk behaviors </td> <td> <p>Personal Decision-Making:</p> <ul style="list-style-type: none"> <input type="checkbox"/> Understanding legal documents (contracts, lease, powers of attorney) <input type="checkbox"/> Communicating wishes <input type="checkbox"/> Understanding legal consequences of behavior <p>Employment:</p> <ul style="list-style-type: none"> <input type="checkbox"/> Looking for, gaining, and retaining employment <p>Personal Safety:</p> </td> </tr> </table>		<p>Money Management:</p> <ul style="list-style-type: none"> <input type="checkbox"/> Managing accounts, assets, and benefits <input type="checkbox"/> Recognizing exploitation <p>Health Care:</p> <ul style="list-style-type: none"> <input type="checkbox"/> Making decisions about medical treatment <input type="checkbox"/> Taking medications as needed <input type="checkbox"/> Maintaining hygiene and diet <input type="checkbox"/> Avoiding high-risk behaviors 	<p>Personal Decision-Making:</p> <ul style="list-style-type: none"> <input type="checkbox"/> Understanding legal documents (contracts, lease, powers of attorney) <input type="checkbox"/> Communicating wishes <input type="checkbox"/> Understanding legal consequences of behavior <p>Employment:</p> <ul style="list-style-type: none"> <input type="checkbox"/> Looking for, gaining, and retaining employment <p>Personal Safety:</p>	Observations and Notes (List supports needed.):
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How to Assess Capacity?



- PRACTICAL Tool
 - **PRESUME** guardianship is not needed
 - Clearly identify the **REASONS** for concern
 - **ASK** if condition may be temporary/reversible
 - Determine if **COMMUNITY** resource or accommodations can address concerns
 - Consider whether a **TEAM** could help the person make decisions
 - **IDENTIFY** abilities – both strengths and limitations
 - Address potential **CHALLENGES** for identified supports
 - **APPOINT** supporter/surrogate consistent with person's values
 - **LIMIT** any necessary guardianship order

http://www.americanbar.org/groups/law_aging/resources/guardianship_law_practice/practical_tool.html

When to start?



- Start planning early what method you will use to support your child when they turn 18.
- Assess which areas your child needs help, and then consider which methods are best for your family to provide that support.
- Can call Disability Rights Ohio to discuss options (we'll need permission from the person with a disability)



HOW TO: GUARDIANSHIP

Guardianship Terms



- Guardian of the estate: finances and property
- Guardian of the person: medical, housing, food, clothing, shopping, safety
- Emergency guardian
- Co-guardians
- Limited guardianship
- Note: Cannot be a service provider, unless exempted by court (family members only)

How to: Guardianship



- Person who wants to be guardian applies to probate court
 - Application packet
 - Guardian Background check
 - Filing fee
 - Expert evaluation (physician or psychologist) (recent—e.g., within 90 days)
- Court schedules hearing
- Investigator meets with proposed ward
 - Provides notice to ward
 - Reports back to the court on necessity of guardianship

How to: Guardianship (cont.)



- Contested or uncontested?
 - Court must appoint attorney and independent evaluator if requested by proposed ward
- Notice to next of kin
- Court holds hearing
 - Is individual incompetent?
 - Is applicant suitable to be guardian?
 - Must consider evidence of less restrictive alternatives

How to: Guardianship (cont.)



- Court appoints guardian
 - Issues letters of guardianship
 - New education requirements for guardians
 - Court is superior guardian
- Guardian files inventory (estate only)
- Annual reports and plan
- Ward can request annual review
 - Court must appoint counsel and independent evaluator if requested



RIGHTS AND RESPONSIBILITIES IN GUARDIANSHIP

Rights Retained by Ward

- Guardianship does not remove all rights from the ward

Ward's Rights



- Treated with dignity and respect
- Privacy
 - Privacy of the body
 - Private, uncensored communication
 - Mail, telephone, in-person
- Control over aspects not subject to guardianship
- Appropriate services
- Safe, sanitary, humane living conditions in the least restrictive environment
- Marry, if legally able
- Procreate, or consent/object to sterilization

Ward's Rights (cont.)



- Equal treatment and non-discrimination
- Explanations of medical procedures or treatment
- Confidentiality of personal information
- Review personal records
- Private communication with attorney, ombudsman, or other advocate
- Drive, if legally able
- Vote

Ward's Rights (cont.)



- Request annual review hearing
- Petition court to modify or terminate guardianship
- Attorney and independent evaluator
 - At court expense, if indigent
- Grievance against guardian, including:
 - Court review of guardian's actions
 - Removal/replacement of guardian
 - Restoration of rights

Voting



- People with guardians still have the right to vote
- Guardians cannot vote on behalf of wards
- Anyone with a disability can receive assistance with voting
- Assistive technology is available at voting sites

Guardian's Responsibilities



- Follow all laws and court orders
 - Probate court is superior guardian
- Make decisions in the ward's best interests
 - The decision that a reasonable person would make in the ward's position
 - Maximize what is best for the ward, including:
 - Least intrusive
 - Most normalizing
 - Least restrictive
 - Appropriate to needs

Guardian's Job: The Best Interest Balance



SAFE
HEALTHY
FINANCIALLY SECURE

INDEPENDENT
LEAST RESTRICTIVE
WARD-CENTERED



Best Interest





OVERLY RESTRICTIVE!

SAFE
HEALTHY
FINANCIALLY SECURE

NO INDEPENDENCE
VERY RESTRICTED
WARD'S WANTS IGNORED

Guardian's Responsibilities (cont.)



- Professionalism, character, and integrity
 - Act above reproach, no financial/sexual exploitation or other acts not in best interest
- Exercise due diligence
 - Best interest, communicate with ward, be fully informed
- Least restrictive alternative
- Person-centered planning
 - Focus on ward's wishes, full potential, balance maximum independence and self-reliance with best interest

Guardian's Responsibilities (cont.)



- Foster positive relationships
 - Prepared to explain why relationships severed
- Communication with ward
 - Know ward's preferences and beliefs
 - Quarterly meetings
 - Private communication
 - Assess condition and needs
 - Notify court if level of care not met
 - Document complaints by ward

Guardian's Responsibilities (cont.)



- May not provide direct services unless authorized by court
- Monitor and coordinate services and benefits
- Extraordinary medical issues
 - Seek ethical, legal, and medical advice
 - Honor ward's preferences and belief systems
 - Also applies to end of life decisions
- Duty of confidentiality

Guardian Liability?



If something bad happens to/because of a ward, can the guardian be held responsible?

If the guardian acts:

- in good faith (i.e., sincere motive without any desire to harm or defraud others)
- With ordinary prudence, care, and diligence

...they should not be held accountable for losses happening to/from their ward

Medical Care without Medical POA or Guardianship?



Can parent listen/be in the room while doctors discuss?

- If the patient has enough capacity to say you can be there/not object to you, then yes. Patient could sign a HIPAA release form.
- If patient is unable to give consent, doctor's judgment to decide if you can listen or not

Can parent give consent/make treatment decisions?

- If the patient can give consent, patient can say they want (or don't want) parent's help with a decision
- If it's an urgent emergency, doctor treats under "implied consent" or "emergency exception rule"
- If the patient is unable to give consent, and it's not an urgent emergency, then parent would need either a durable or springing POA or guardianship to provide consent



Guardianship and Alternatives

CONTINUUM OF SUPPORTS

Continuum of Supports



- There are many options to support decision-making
- Consider from least restrictive to most restrictive
- Also consider different ways of providing support

Video on Different Options



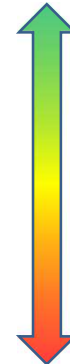
[Supported Decision-Making:
Your Support, My Decisions](#)

Continuum of Supports: Daily Decisions



- Informal support/assistance
- Supported decision-making
- Release of information
- Authorized representative
- Protection orders
- Powers of Attorney
- Conservatorship
- Limited guardianship
- Full guardianship of the person

Less Restrictive



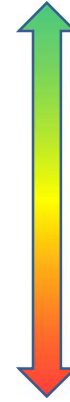
More Restrictive

Continuum of Supports: Financial Decisions



- Informal support/assistance
 - Direct deposits/payments
- Supported decision-making
- Release of information
- Trusts
- Power of attorney*
- Conservatorship
- Representative payee
- Limited guardianship
- Full guardianship of the estate

Less Restrictive



More Restrictive

How to: Informal Support



- EVERYONE needs some support
- Provide understandable information
- Use assistive technology
- Automate when possible
 - Direct deposit
 - Scheduled payments
 - Reminders

How to: Supported Decision-Making



- Examples in Texas and Massachusetts
 - No formal process in Ohio – but a committed team could figure it out.
- Formalized plan for support
- Identify supporters and areas of need
- Give plan to supporters and others who will be interacting with supporters
- Can evolve over time

Sample Supported Decision-Making Plans



- <http://www.supporteddecisionmaking.org/sites/default/files/sample-supported-decision-making-model-agreements.pdf>

My supporter(s) are:

Supporter #1

Name: _____

Address: _____

Phone Number: _____

Email address: _____

I want this person to help me _____

(check as many boxes as you want)

Making choices about food, clothing, and where I live

Making choices about my health

Making choices about how I spend my time

Making choices about where I work

My Supporter does not make decisions for me. To help me make decisions, my Supporter may:

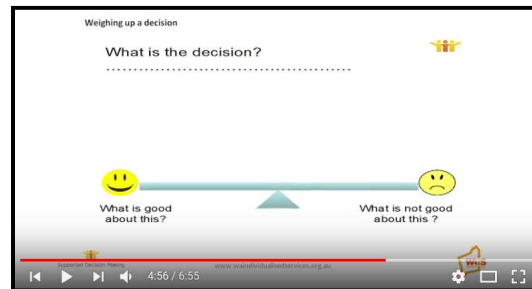
1. Help me get the information I need to make medical, psychological, financial, or educational decisions;
2. Help me understand my choices so I can make the best decision for me; or
3. Help me communicate my decision to the right people.

Yes ___ No ___ My Supporter may see my private health information under the Health Insurance Portability and Accountability Act of 1996. I will provide a signed release.

Yes ___ No ___ My Supporter may see my educational records under the Family Educational Rights and Privacy Act of 1974 (20 U.S.C. Section 1232g). I will provide a signed release.

This agreement starts when signed and will continue until _____ (date) or until my Supporter or I end the agreement or the agreement ends by law.

Video on Supported Decision-Making



How to: Releases and Authorized Representatives



- Person signs form to authorize other person's involvement
- Can be revoked or another person can be authorized
- Note: Durable Health Care Power of Attorney can be used as a release prior to transferring decision-making

How to: Protection Orders



- Can be used when person is being abused or exploited
- Contact local prosecutor, victim advocate, or court

How to: Trusts



- Can be used to protect assets and/or direct spending
- Consult with an attorney who specializes in trusts

How to: Powers of Attorney



- Two main types
 - Financial Power of Attorney
 - Health Care Power of Attorney
- “Durable” means effective now, and continues even if the person loses capacity
- “Springing” means not effective *until* the person loses capacity
- Individual must have "ability to understand" what they're signing (with support) which varies depending on how complicated the agreement is.
- Forms available online
 - E.g., <http://www.proseniors.org/advance-directives/>

How to: Representative Payee



- Need determined by Social Security
- Requirements for management, documentation, and reporting
- Does not allow control over non-Social Security funds
- DRO Rep Payee Review Program: Let us know if you hear about possible misuse!

How to: Conservatorship



- Option when competent adult voluntarily seeks help managing decisions
- Person seeking assistance files petition with probate court, naming conservator(s)
- Can be limited in any way, even after establishment
- Court holds hearing to confirm:
 - Voluntarily filed
 - Proposed conservator is suitable
- All guardianship rules and procedures apply
- May be terminated
 - By person, through written noticed filed with court and served on conservator
 - By court, through finding of incompetence

ABLE/STABLE Accounts



- Allows eligible individuals with disabilities to save/invest up to \$14,000/year without harming their SSI, SSDI, or Medicaid eligibility.
- No taxes on money while it's in the account, or upon withdrawal.
- Money taken out must be spent on qualified disability expenses



Resources



- Disability Rights Ohio
 - www.disabilityrightsohio.org
- Legal Services
 - <https://www.ohiolegalhelp.org/>
- Pro Seniors
 - <http://www.proseniors.org/>
- Ohio State Bar Association
 - www.ohioabar.org/ForPublic/Resources/Pages/PublicResources.aspx
- Ohio ABLE/STABLE Accounts
 - <http://www.stableaccount.com/>

Resources on Supported Decision-Making



- National Resource Center on Supported Decision-Making
 - www.supporteddecisionmaking.org
- Center for Public Representation Supported Decision-Making Page
 - <https://supporteddecisions.org/>
- Jenny Hatch Justice Project on Supported Decision-Making
 - www.jennyhatchjusticeproject.info
- American Bar Association PRACTICAL Tool
 - http://www.americanbar.org/groups/law_aging/resources/guardianship_law_practice/practical_tool.html

Questions?



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