GUARDIANSHIP IN OHIO

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Ohio Developmental Disabilities Council

Foreword

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

About the Ohio DD Council

The Ohio Developmental Disabilities Council (ODDC) is a planning and advocacy group of 35 members appointed by the Governor. ODDC receives and disseminates federal funds in the form of grant projects in order to create visions, influence public policy, pilot new approaches, empower individuals and families, and advocate for systems change.

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Table of Contents

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, and fill out and submit an application for guardianship.

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 strong 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 from protecting a person's health and safety to asserting a person's rights, and even 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.

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.

Types of Guardianship

There are several types of guardianship in Ohio:

Guardianship of the Estate
Guardianship of the estate gives the guardian the authority to make all financial decisions for the subject of the guardianship (that is, 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.

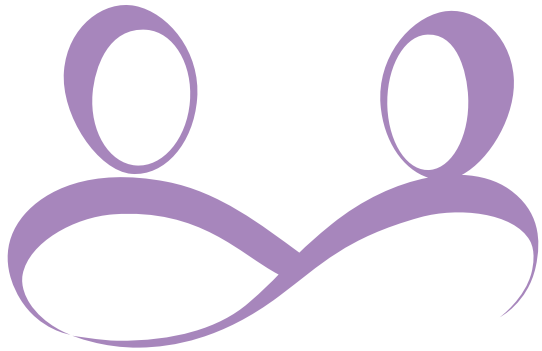
Plenary Guardianship
or Guardianship of Person and Estate
Plenary guardianship or guardianship of person and estate gives the guardian the authority to make nearly all decisions for the individual and ***combines*** the authority of **guardianship of person** and **guardianship of estate**.

Emergency Guardianship
Emergency guardianship allows a court to intervene to appoint someone for a short and definite period of time. After someone files a petition for emergency guardianship with the probate court, 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.

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 is 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 probably not a good idea in a divorce situation or in a situation in which there is animosity between the potential co-guardians.



Less Restrictive Guardianship

Finally, there is **limited guardianship** that allows a probate court to appoint someone as guardian only over the portion of a person's life when 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. This is the least restrictive form of guardianship and should be used whenever possible. (See O.R.C. Section 2111.02.)

What Rights Are Taken Away When A Guardian Is Appointed?

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.

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 guardianship is needed.

That is also why the alternatives to guardianship listed on pages 8-10 should be considered before guardianship.

It is serious 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, and help them exercise rights they never could have exercised on their own. 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. 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, sterilization or sex change. However, despite some reluctance, courts may terminate the natural guardianship of a parent over his or her minor children when the parent has a mental disability 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.

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**.

Alternatives to Guardianship

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 **guardianship of the estate** involves a lot of "red tape" and should be avoided, if possible.

   A **representative payeeship** or **authorized representative** 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.

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

3. ***Conservatorship*** - If an individual is mentally competent but has a physical disability, the person can:
   - Ask the probate court to appoint a **conservator**;
   - 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.

4. ***Adult Protective Services*** - A court may order a county board of MR/DD 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 Revised Code Section 5126.30 et seq.)

   If the individual who needs assistance is over age 60, the individual might also be eligible for other protective services available to the elderly.

5. ***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 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**.

6. ***Powers of Attorney*** - A **power of attorney** is a legal document that gives someone else valid authority to act on an individual's behalf. In theory, a **power of attorney** is of limited usefulness when given by a person with an ongoing mental disability, such as mental retardation. A person must be competent when he or she gives someone else the valid authority.

   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**. Such claims would probably 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 at a later time through a **durable power of attorney for health care**. Then the document may provide reassurance to the person if he or she becomes unable to make decisions for himself or herself as a result of an accident, aging and so on.

To sum up, a **power of attorney** is clearly an alternative to guardianship if made by individuals when they are competent. It is much less valuable as an alternative if the competency of the maker of the **power of attorney** has always been in doubt, such as when the maker is a person who has always had mental retardation.

7. ***Circle of Support*** - Volunteer Advocate and Good Programs & Services - 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.

8. ***Microboard*** - A new concept that originated in Canada and is in use in a few states such as Tennessee, Maryland and Missouri, is for an individual's circle of support to formalize its involvement by incorporating with the individual as the chairman of the board. Such a legal entity can be of benefit in our complex Medicaid world, including in the hiring and firing of staff and negotiating with the service delivery system. **Microboards** are being explored in several Ohio counties at the present time.

Residency Requirements

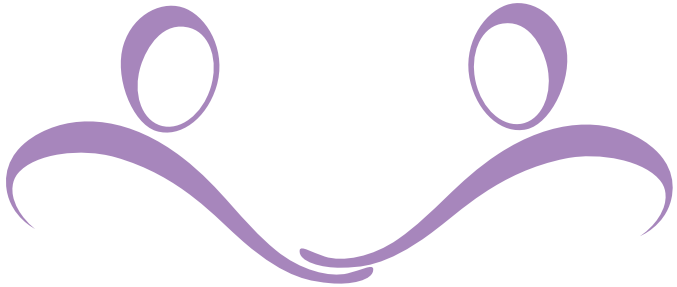
It is desirable for the guardian to live in the same county as his or her ward, and even more desirable that the guardian live in the same state. Ohio law makes state residency a requirement for most guardians, and also allows a court to make residency in the same county a requirement. A reason for this requirement is that it is difficult for a guardian to carry out duties if the guardian does not have frequent face-to-face contact with his or her ward. This requirement may not make sense when the proposed ward lives just across state or county lines. Some probate courts interpret the requirement more strictly than others. Some may even allow a local person to be appointed as a co-guardian with someone who lives out of state, such as a parent who has retired and moved to Florida.

There are also a number of instances where a person who is out-of-state may be allowed to become a guardian of a ward who lives in Ohio. 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. For many years, guardians have not been required to live in Ohio to be appointed as a guardian for minor children pursuant to a parent's legal will. Also, a minor over the age of 14 can select a suitable out-of-state guardian. (See O.R.C. Sections 2109.21(C) and 2111.12.) An out-of-state resident may also be appointed as guardian under a durable power of attorney or written nomination by the person who would be the subject of the guardianship.

Most recently (2008) Ohio law was amended to allow a parent to nominate a person to serve as guardian for a child who is an adult and who is also incompetent, even if that potential guardian lives out-of state. This nomination can take place in a "writing" or in a durable power of attorney. (See O.R.C. Sections 1337.09(D) 2111.121.) In addition, now when a guardian moves out of state, the court is no longer required to remove that person as guardian.

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. 2111.151.) For example, guardians should sign all documents with their name and write "as guardian" immediately after the name As a result of this provision, guardians should not have to worry about exposing their personal assets when they consider becoming a guardian.



Conflict of Interest Provision 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. 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.

Choosing 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 a person for guardianship 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 MR/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.

Letters of intent, also called letters of instruction, are a critical step in the planning process for a person with a disability when there is no longer a close family member involved. The document provides the support team of the individual with disabilities with a wealth of information about the individual and enables him or her to continue to live as normally as possible after the loss of a loved one and/or guardian. The document should be tailored to the specific needs of the individual and updated on a regular basis.

Application Process & 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.

It would not be unusual to have fees of $150 with $75 due when the application is submitted and the remaining $75 due when the guardianship is awarded. 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. It 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. 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 person who would receive the guardian, 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?

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 also true in some of the larger urban counties where it can be a formidable task to negotiate the probate court system. However, it is often worthwhile to contact the clerk of the probate court. 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 mental retardation team.

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 of the estate are required to get permission from the probate court before making such expenditures, unless such authority is specifically granted in their letter of guardianship or other order of the court.) Guardians are required to do an accounting and submit receipts for all such expenditures. **Guardianship of the estate** is enough of a hassle that it should be avoided when possible perhaps through use of a trust or a representative payee.

Rights, Duties & Responsibilities

Guardians owe a fiduciary duty - a special duty - to act in the best interest of their ward. In order to do that, they should see their ward often and ask the ward what he or she wants in a given situation.

A guardian's authority derives from the probate court, the superior guardian. As such, the guardian should be able to seek advice from the probate court about his or her duties. The guardian may need to submit a motion to ask the court what to do in a given situation.

The authority of a guardian is restricted to what is listed in his or her letter of guardianship. 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.

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 Revised Code Section 2111.02.)

What If A Guardian Does Not Appear To Be Doing A Good Job?

Some people, including the author, believe that anyone may question whether a person is carrying out his or her duties as guardian, either by contacting the judge, the probate court investigator or the clerk of the court. Other people believe that there are questions of privacy, governed by state law and federal Medicaid and HIPAA law, that may limit who can properly question a guardianship. For example, litigation before the Ohio Supreme Court may determine whether a County Board of Developmental Disabilities is a proper party to approach the court and raise issues about a guardianship.

In any event, it may be necessary for whoever is determined to be a proper party to formally bring the matter to the judge's attention with a motion to review the guardianship or a motion to instruct the guardian.

Guardianship In A Medicaid World

The MR/DD service delivery system is increasingly turning to Medicaid to pay for many services. Medicaid often likes to deal with someone considered to be a legally responsible party. For example, if Medicaid officials doubt the competence of someone with mental retardation to speak for himself or herself, they may insist that the person be represented by a guardian. Too often, medical providers will refuse to accept consent from someone with a disability.

Terminating Guardianships

Sometimes it becomes apparent that a guardianship should not have been granted or a particular level guardianship is no longer necessary for a certain individual. 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. There are also provisions in the law in which the ward may submit a motion to the court asking that the guardianship be ended. 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.

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 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.

Resource

In case an individual would need legal assistance in order to contest a guardianship or would want information about his or her legal rights in a guardianship matter, the individual may contact the Ohio Legal Rights Service at 1-800-282-9181 or visit http://olrs.ohio.gov/ASP/Guardianship.asp.

Notes

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