

GUARDIANSHIP IN OHIO

Foreword

This booklet offers a brief but comprehensive, non-legalistic 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 Author

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About the Ohio DD Council

The Ohio Developmental Disabilities Council 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 to create visions, influence public policy, pilot new approaches, empower individuals and families and advocate for systems change.

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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, fill out and submit an application for guardianship.

Who needs a Guardian?

Two prerequisites should exist before a court appoints a guardian. The first is that the individual must be incompetent in at least one important area of his/her life. That decision is often easy to determine as a result of real-life experiences. Can the person take care of himself and his property, or is he at risk if left on his own?

Second, there must also be a present need for the guardianship. A person may have significant deficits in his life, but his support network – families, friends, service providers, etc. – 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 later point in the individual's life, it can be sought at that time.

There are some situations where guardianship may be an asset to protecting someone's health and safety, to asserting their rights, and even to helping someone express himself. An individual who is nonverbal and who has profound mental retardation, may well need a guardian, especially if he resides in an institutional setting without family support and monitoring. An individual may well need a guardian if his mental capacity is in doubt and if he at the same time 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 person needs a guardian – to evaluate the extent to which the individual can participate in the decisions that affect his own life.

Types of Guardianship

There are several types of guardianship in Ohio:

Guardianship of the Estate – Gives the guardian the ability to make all financial decisions for the subject of the guardianship (i.e., the ward).

Guardianship of the Person – Gives the guardian the ability to make all decisions of a more personal nature (i.e., all decisions except financial decisions) on behalf of the ward. Such decisions would include such things as medical consents, consents to IHPs (individual habilitation plans), consent to participate in Special Olympics, to have a photo of the individual used, etc.

Plenary Guardianship, or Guardianship of Person and Estate – Gives the guardian the ability to make nearly all decisions for the individual, and combines the authority of Guardianship of Person and Guardianship of Estate.

Emergency guardianship – allows a court to intervene to appoint someone on short notice. Probate courts are often reluctant to appoint emergency guardians.

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 – is a different type of guardianship where 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 – is where 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 a situation where there is animosity between the potential co-guardians.

Less restrictive forms of Guardianship

Finally, there is limited guardianship that allows a probate court to appoint someone as guardian over only the portion of a person's life where he is both incompetent and has a need. Thus, you might have a limited guardian for medical purposes only (i.e., to provide consent for medical procedures), or 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 utilized 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 (i.e., 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 his behalf. The person 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 only to be taken as a matter of 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 to be preferred if guardianship is necessary. That is also why the alternatives to guardianship listed below should be considered before guardianship.

Although it is a serious thing to take one individual's rights away and give them to someone else to exercise, we need to recognize that many parents and other guardians end up doing this for their children/wards not to punish or control them, but to speak and advocate for/with them, to

protect their health and safety, and to help them exercise rights they never could have exercised on their own. Often the Guardian is the person who knows the individual the best, and is best situated to speak for and advocate for him – 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/her minor children when the parent has a mental disability if the court believes it is necessary to do so 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 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 he has a Plenary Guardian.

Alternatives to Guardianship

1) Representative Payeeship – If the only significant income an individual receives is his monthly SSI 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 is to 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, VA 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.

3) Conservatorship – If an individual is mentally competent but has a physical disability, he can ask the Probate Court to appoint a Conservator for him. He can select the Conservator, discharge the Conservator if he is unhappy with him or if his physical disability decreases; and he can specify to the Court just what authority he 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. (See Revised Code Section 5126.30 et seq.)

If the individual who needs assistance is over age 60, he 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 him or threatening to hurt him to stay away from him and not have any contact with him. Why take away an individual's rights through a guardianship in order to keep him safe, when it might be possible to accomplish the same thing with a Court order of protection.

6) Powers of Attorney – 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 himself in order to give valid authority to act to someone else in a legal document known as a Power of Attorney.

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 at a later time if he becomes unable to make decisions for himself as a result of an accident, aging, etc., through a Durable Power of Attorney for Health Care.

To sum up, a Power of Attorney is clearly an alternative to guardianship if made by a person when they were 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/Good Programs & Services – An alternative to guardianship might be to rally those people important to an individual around him to make sure he has a support system that meets all his needs and advocates in his 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 their 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 requirement for Ohio Guardians

Guardians are not required to live in the same state to be appointed as guardian for minor children pursuant to a parent's Will. However, in order for one person to serve as guardian for an adult in Ohio, he must live in the same state. A reason for that requirement is that it is difficult for a guardian to carry out his duties if the guardian does not have frequent face-to-face contact with his ward (i.e., the subject of the guardianship). [See O.R.C. Section 2109.21(C) which states that "A guardian ... shall be removed on proof that he is no longer a resident of this state."] This

requirement may not make sense when the proposed guardian lives just across the state line. Some probate courts appear to interpret this 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.

Immunity for Ohio Guardians

Ohio law also provides personal immunity for a person while he is acting as guardian, as long as he does not act negligently or outside the scope of his authority as guardian. To have protection under this section of the law, it is only necessary that the person make it clear that he is acting in his official capacity as guardian. (See O.R.C. 2111.151.) For example, he should sign all documents with his name, and write "as guardian" immediately after his name. As a result of this provision, a person should not have to worry about exposing his personal assets when he considers becoming a guardian.

Conflict of interest provision concerning providers of services

A recently enacted provision prohibits someone who is providing services to an individual from also serving as his 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 also be an effective advocate against the service provider (himself). There is an exception to this prohibition where 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 (i.e., 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. When possible, a family member who knows the individual well and is interested in his 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 he handles matters professionally, the attorney doesn't have the personal interest to prompt him 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 as 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 3-deep – a primary and 2 backups. The individual with the disability may outlive his parents by 30 – 40 years, and it is really hard to anticipate who will be around during his lifetime. At least one of those nominated should be the same age or younger than the individual. Even in situations where the parents did not serve as guardians, they may wish to nominate guardians in case guardianship would ever become necessary.

The 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 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, and to make a recommendation to the probate court as to whether the guardianship is necessary.

What happens at the hearing?

Finally the Court will set the matter for hearing, often before a magistrate instead of the judge himself. If everyone is in agreement that the guardianship is necessary, or if no one appears to object, then a letter of guardianship is awarded. If anyone objects, including the individual himself, then the hearing becomes more like a trial where witnesses will be examined and cross-examined.

The subject of the application has the right to object to having a guardian appointed for him, and has several other due process rights, including the right:

To have an attorney represent him, even if he cannot afford one himself;

To be present during the hearing;

To prevent his personal physician and certain other parties from testifying against him, and

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 where 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. He/she 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 2 years, but some courts require the Guardian's Report on an annual basis. Not only will guardians be required to state whether or not there is a 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 are required to report on an annual basis as to how they spent the funds of the ward on his behalf during the prior year. (Guardians of the Estate are required to get permission from the Probate Court prior to 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 of Guardians

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 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 as to his 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 that given to him in his 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 with 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. (Revised Code Section 2111.02)

What if a Guardian does not appear to be doing a good job?

Anyone may question whether or not a person is carrying out his duties as guardian, either by contacting the Judge, the Probate Court Investigator or the Clerk of the court. However, it may be necessary to bring the matter to the Judge's attention formally 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 they consider to be a legally responsible party. If Medicaid officials doubt the competence of someone with mental retardation, for example, to speak for himself, they may insist that the person be represented by a guardian. Medical providers, too, often will refuse to accept consent from someone with a disability.

Terminating Guardianships

Sometimes it becomes apparent that a guardianship never should have been granted for a certain individual, even for some individuals with mental retardation. 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 where the ward may submit a motion to the Court asking that the guardianship be terminated. However, a Court may be reluctant to terminate a guardianship where the underlying condition that justified the guardianship (e.g., mental retardation) has not been cured.

When a guardian resigns, moves out of state or dies, the ward is left in legal limbo – still determined incompetent by a probate court in at least some areas of his life, but with no one who can legally act for him. 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 that, "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 in case an individual would want information about his legal rights in a guardianship matter, he might contact the Ohio Legal Rights Service at 1-800-282-9181.