

Transition Booster Session: Guardianship & Alternatives Questions from the Zoom Chat

August 13, 2020

NOTE: These are brief, basic answers to some of the questions asked during a live presentation about guardianship and alternatives. The answers are not intended to be legal advice. Please call Disability Rights Ohio or speak with a private attorney if you want more detailed or individualized advice.

Question: Are people considered an adult to make own decisions at 18 or 21?

Answer: People are considered adults and reach the age of majority at age 18.

Question: When you should start assessments and planning?

Answer: There's no set date, but earlier is better, especially if your family has a complicated situation. "What happens when my kid turns 18" can be a topic of conversation at your school IEP meetings and your DD board ISP meetings.

Question: Does the expert evaluation have to be dated on or after the 18th birthday or can they be done 90 days prior?

Answer: I believe most county probate courts would allow the expert evaluation to be done up to 90 days before their 18th birthday. Hamilton County allows it. If you are unsure, call your local probate court and ask them.

Question: Is there legal liability under guardianship?

Answer: When you are a guardian, you usually want to keep your judge happy and satisfied with the job you're doing. My interpretation of the law is this: if the guardian acts (1) in good faith (i.e., sincere motives without any desire to harm or defraud others) and (2) with ordinary prudence, care, and diligence (i.e., does their research, takes their responsibility seriously, and gives the guardianship the attention and care it needs)...then they should not be held accountable for losses happening to/from their ward. Other attorneys may interpret this question differently. If you are a guardian and find yourself in a position where your ward might be at serious risk or financial loss, quickly notify the court and ask for help, or hire an attorney.

Question: What if the individual isn't capable to give consent? Or not capable of understanding what people explain to them?

Answer: Ability to give consent/understand varies depending on the decision. Some people are only able to understand or give consent for very simple decisions

(e.g., what clothes they want to wear); others can understand or give consent for much more complex decisions (e.g, where they'll live, medical treatments, how they'll spend their money).

A person can also be **supported** to gain increased ability to understand or give consent for a given decision: if other people explain the decision to them in a way they can understand, then they can give consent.

Finally, a person can also voluntarily give authority to someone else to make certain decisions for them. For example, they might recognize that they can't handle money very well, but they CAN understand and make the decision that they want their mom and dad to *help* them with money. So, they could give financial power of attorney to their parents and let their parents make decisions about complicated money matters they couldn't understand themselves.

However:

- if a person is unable to understand or give consent for an important decision
- even with support/explanations/help
- *and* they are not able to understand or give permission to someone else to make that decision for them

...then a guardianship may be necessary.

Question: What happens when a person wants to make a very harmful decision due to being incapable of understanding or due to a mental condition?

Answer: This is a tough question, and not something that can be easily answered. It may involve multiple conversations with the individual, their loved ones and caregivers, doctors, maybe even a lawyer, to consider what options are available and what might work/not work. You'd have to weigh how serious the risk is compared to how harmful restrictions on the person's autonomy could be.

On the one hand, you might want to help your loved one stay safe and healthy and try to protect them. But on the other hand, there's also a concept known as "dignity of risk"—which is about respecting an individual's autonomy and self-determination to make choices for themselves. The concept means that adults should have the right to make their own choices about their life, even if others believe these choices are unwise or risky. It also gives people with disabilities the opportunity to learn from their mistakes.

If the person truly can't understand the decision or its consequences, then see the previous question/answer.

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Question: How much is the filing fee for a guardianship application?
Answer: This varies depending on your county's probate court. Hamilton County's filing fee is \$221 for a Guardian of the Person, or \$237 for Guardianship of Estate or Person and Estate. If you are unable to afford this, you can file forms asking the court to waive the filing fee. If you are unsure the filing fee in your county, just call the probate court and ask, "What is the filing fee for an application for guardianship of an adult?"

Question: Which county probate court do I use?
Answer: The location is based on where the prospective WARD is residing.

Question: Do I have to do this right when my child turns 18? Is it easier/harder to do it later? Does it need to be done at a certain time?
Answer: You have to turn in an application for guardianship after a person turns 18. After 18, it's the same court process whether the adult is 18, 40, or 90. It's not any easier or harder to do it later. I suppose if you waited until they were 25, the court could ask, "Well, haven't they been doing fine without a guardian so far? Why do they need one now?" An acceptable answer could be, "We tried to put off guardianship as long as we could, to see if our child could manage with less restrictive alternatives. However, it didn't work out for these reasons, so now we think guardianship is necessary."

Question: Are guardians typically the child's parents?
Answer: Guardians of young adults are often parents, yes. They could also be a sibling, relative, professional guardian organization, an attorney that does guardianships, APSI, or any other adult that the court decides is suitable.

Question: Is the guardian financially responsible for the house and provisions that the ward needs?
Answer: A guardian is responsible for making sure the ward's needs are met using the money *belonging to the ward*. Guardians don't have to use the guardian's own money to meet those needs unless they want to. If the ward doesn't have enough money of their own, the guardian would probably sign them up for public benefits (Medicaid, Social Security, food stamps, subsidized housing, etc.) The guardian can encourage (but not force) the ward to get a job if the ward is capable. If a guardian still felt unable to provide for the ward's needs, they should talk to the probate court and ask for help figuring out a way forward.

Question: Can you get a power of attorney before the age of 18?

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Answer: A minor cannot give consent for a power of attorney themselves until they are 18. But, while they're under 18, the parents are already their natural guardians, so the parents wouldn't need the child to sign anything for the parents to make decisions.

If the question is, who will take care of a child under 18 if something happens to both the parents, that's something you'd want to discuss with an estate planning attorney. If the parents become unable to take care of the child (e.g., death, incapacity, incarceration, etc), the probate court would have to appoint another person as guardian of the minor. A parent could nominate who they want to take over as guardian of their minor children if something happened to them in, for example, their Will, their POA, or a Nomination of Standby Guardian document (see [Ohio Revised Code § 2111.121](#)).

Question: What is a "durable" and "springing" power of attorney?

Answer: "Durable" means the POA can start making decisions now, and can continue to make decisions even if the person later loses capacity. "Springing" means the POA cannot make decisions *until/unless* the person loses capacity.

Question: If a person makes someone else their power of attorney, can they still make decisions themselves?

Answer: As long as they are mentally competent, Yes. The person giving the power of attorney to someone else is called the "principal" and the other person is sometimes called the "agent." The principal is appointing the agent in writing to act *on their behalf*. The principal can still make decisions themselves, and they can overrule decisions of their agent. They can also give directions/instructions to their agent about how they want the agent to act for them. Finally, the principal can revoke the power of attorney any time if they disagree with how their agent has been doing.

Question: I would like the links to your videos.

Answer: 1. "Supported Decision-Making: Your Support, My Decisions" - <https://www.youtube.com/watch?v=dGJe5KyflxM>
2. "Supporting Decisions" - <https://vimeo.com/328811610>

Question: Who can be on a supported decision-making team?

Answer: Anyone who the person with a disability chooses, and who is available and willing to help out. Family members, relatives, friends, their SSA or other staff at the DD board, their services providers, their employer/manager at work. For more information about supported decision-making and how to *actually do it*, I

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highly recommend the resources at <http://supporteddecisionmaking.com/content/resource-library>.

Question: My daughter is 19 and I don't have guardianship or anything over her. How good or bad is that?

Answer: Totally depends on your family's needs! Many parents don't have guardianship or anything else over their kids when they turn 19—your parents probably didn't have them over you either! If your child is doing fine without any formal legal support, good for them. On the "continuum of supports" described in the presentation, you are providing "informal support" to your child. If there are issues later with health, safety, or finances that need you to step in, though, you can talk to your daughter about other options on the continuum.

However, it's also not a bad idea for **anyone**—even people without disabilities—to consider getting powers of attorney, wills, and other advanced directives in place now. Misfortune could happen to **any** of us that could make us glad we told people what we wanted and appointed other people to be able to step in help us when we all inevitably can't help ourselves.

Question: What if my child can cognitively understand, but can't physically sign his/her name?

Answer: If a person has the understanding and *intent* to sign, that's the important thing. There's lots of different ways they can "sign"—just make a scribble on the paper, put the pen in their teeth, use a signature stamp, or even designate another person to sign on their behalf. Call Disability Rights Ohio if you want to discuss your situation.

Question: Is guardianship renewed with courts annually?

Answer: A guardian has to submit updated reports to the probate court every 1-2 years. This isn't really a "renewal," just the reporting requirements so courts have up-to-date information about the guardianship. There is no fee for a guardian to submit these reports.

Question: If not applying for full guardianship, do you still need to go through the probate court?

Answer: Guardianships and conservatorships happen in a probate court. All the other options we discussed do NOT require any court involvement.

Question: What happens when a guardian passes away without plans for the individual in their care?

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Answer: The probate court remains in control of the guardianship, and would do its best to select a replacement guardian. A guardian could nominate who they want to take over as guardian if something happened to them in, for example, their Will, their POA, or a Nomination of Standby Guardian document (see [Ohio Revised Code § 2111.121](#)). The court should also consider the ward's wishes for who should take over, if the ward has any preference.

Question: If a person applies for guardianship over someone else for bad reasons, how will a court know? How does the individual have a voice at the guardianship hearing?

Answer: The individual can speak up at the hearing and tell the court why this person should not be his/her guardian. The individual has the right to an attorney at the hearing, and if they can't afford the attorney, the court will pay for it. If other interested people have objections to a guardianship (other family members, friends, DD board, providers, etc.) they can also share information before or during the court hearing.

Question: An organization refused to let us do something for our adult child because we didn't have guardianship.

Answer: There are situations where you might need *some* legal document in order for people to work with you. However, guardianship should not be the *only* way to do that. If an organization says the only way they can work with you is through guardianship, call Disability Rights Ohio and we will help investigate what's going on and possibly put pressure on the organization to change that practice.

Question: if you don't apply for guardianship of your child at 18 can you still be involved with Social Security?

Answer: You don't need a guardianship to work with Social Security for someone else. The beneficiary (your child) can sign some papers to make you an "authorized representative" or "representative payee" to help. An authorized representative is just someone social security can talk to and share information with. A rep payee is someone that controls the benefits money for the person with a disability. A rep payee must follow rules about bank accounts and record keeping to prove they used the money correctly for the beneficiary's benefit.

Question: If you have guardianship and then move to another state does it transfer or does it have to be redone in a new state?

Answer: Anytime a guardian or a ward moves, the court must be notified of the new address. Which probate court is based on the county where the ward lives, not the guardian. If the ward moves out of state, or sometimes even to a distant county, the guardianship may need to be transferred to a different court.

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Usually it's not "re-doing" of the guardianship, just transferring all the paperwork to the other court. If only the guardian is moving away, they have to notify the court, and the court might decide whether the guardian can still do their job or if they live too far away from the ward.

Question: Should we have the POA's set up when our child turns 18 to cover until the guardianship is decided?

Answer: You could if you thought it was necessary. It might take a month or a few months to get the guardianship to go completely through. Or, if there's an emergency while you're waiting for the guardianship, you could notify the court and ask for an emergency guardianship right away.

Question: If parents disagree and one parent wants guardianship and the other is thinking supportive decision-making, how is that decided?

Answer: There's no way to prevent the one parent who wants it from applying for guardianship. But, if they did, the other parent could contest the guardianship: get a lawyer if they can afford it, and present evidence at the hearing demonstrating why guardianship is not necessary and what less restrictive options could work better. The court will hear all the evidence for and against guardianship and make a decision whether it's needed.

Question: What resource is the most broad to introduce parents to the wide range of options—the "continuum of supports" describing different ways to help with decisionmaking?

Answer: There's lots of good resources out there. If you did a Google search for "Alternatives to Guardianship" you'd find no shortage of publications.

- Disability Rights Ohio's website has a guardianship resources page, including a guide to alternatives to guardianship: <https://www.disabilityrightsohio.org/guardianship>.
- I also like the Stoplight Tool and Guide from <http://moguardianship.com/> (note: some legal terms might be a little different since it's based on Missouri law)
- And the PRACTICAL Tool and Guide from the American Bar Association: https://www.americanbar.org/groups/law_aging/resources/guardianship_law_practice/practical_tool/ (It says it's for lawyers, but I think it would be a good resource for anyone)

Question: Who can I talk to one on one about the different types of guardianship and alternatives to guardianship?

Answer: Disability Rights Ohio, of course! You can call our intake line at 1-800-282-9181 and ask to speak to someone about the alternatives to guardianship for your

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family (note: because we serve people with disabilities, we will ask to talk to the person with a disability too, to ask what they want and get permission to share info with you).

You can also discuss options with your county DD board. Or you can contact attorneys that have expertise with people with disabilities or probate law.

Disability Rights Ohio
200 Civic Center Dr., Suite 300
Columbus, Ohio 43215-4234

614-466-7264 or 800-282-9181
FAX 614-644-1888
disabilityrightsohio.org

**Ohio Disability Rights Law
and Policy Center, Inc.**

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