Guardianship: Spectrum of Alternatives and Rights

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

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

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

PRESUME guardianship is not needed.
- Consider less restrictive options like financial or health care power of attorney, advance directive, trust, or supported decision-making.
- Review state statute for requirements about considering such options.

REASON. Clearly identify the reasons for concern.
Consider whether the individual can meet some or all of the following needs:
- Money Management: • Managing accounts, assets, and benefits
• Recognizing exploitation
- Health Care: • Making decisions about medical treatment
• Taking medications as needed
• Maintaining hygiene and diet
• Avoiding high-risk behaviors
- Personal Decision-Making: • Understanding legal documents (contracts, lease, powers of attorney)
• Communicating wishes
• Understanding legal consequences of behavior
- Employment: • Looking for, gaining, and retaining employment
- Observations and Notes:

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

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
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
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

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

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.ohiobar.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
Questions?

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