Be Informed About Guardianship: Alternatives and Rights

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We have the legal right of way.
Overview

• Disability Rights Ohio
• The Big Question
• Decision-Making Processes
• Continuum of Supports
  – Guardianship and Alternatives
  – How to Establish and Maintain
• Rights and Responsibilities
• Transition Planning Opportunities
• Resources
• Questions
Who we are and What we do

DISABILITY RIGHTS OHIO
DRO: Who and What

• Federally-mandated, state-designated protection and advocacy system for people with disabilities in Ohio

• Formerly Ohio Legal Rights Service
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
- Policy/Outreach
THE BIG QUESTION
The Big Question

Does a person with a mental illness need a guardian?
The Answer

• No, guardianship is not mandatory!
  • Many people with disabilities do not have or need guardians
  • There are many alternatives to guardianship that are less restrictive and often easier.
Capacity, Competency, and What it Means to Make a Decision

DECISION-MAKING PROCESSES
Basic Principles

• Guardianship and alternatives are based on the person’s competence and capacity to make decisions
• EVERYONE needs some help to make decisions
• Before choosing guardianship or alternatives, assess the areas in which the person needs support to make decisions
Why Consider Alternatives?

- Guardianship is most restrictive option
- Difficult to terminate
- Court involvement
- 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
Defining Terms

• Capacity
  – Ability to make a particular decision at a particular time
  – May change over time (even day to day or within the same day)

• Competency
  – Legal determination relevant to guardianship
  – “so mentally impaired . . . that the person is incapable of taking proper care of the person’s self or property”
Assessing 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
Assessing 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
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
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

- Informal support/assistance
  - Direct deposits/payments
  - Joint accounts
- 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 legal process in Ohio – opportunity for advocacy!

• 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
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 even when the person does not have capacity

• Forms available online
How to: Representative Payee

• Need determined by Social Security
• Requirements for management, documentation, and reporting
• Does not allow control over non-Social Security funds
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
How to: Guardianship

• Guardian of the estate: finances and property
• Guardian of the person: everything else
• Emergency guardian
• Interim 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
  – Background check
  – Filing fee
  – Expert evaluation (physician or psychologist)

• Court schedules hearing

• Investigator meets with proposed ward
  – Provides notice
  – Reports to 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
Rights Retained by Ward

- Guardianship does not remove all rights from the ward
- House Bill 50 requires guardians to receive Ohio Attorney General’s Guardianship Guide or similar publication
  - Includes extensive list of rights
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, if legally able
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
  – Least intrusive
  – Most normalizing
  – Least restrictive
  – Appropriate to needs
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
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 must be used on qualified disability expenses
Resources

- Disability Rights Ohio
  - www.disabilityrightsohio.org
- Ohio Attorney General’s Guardianship Guide
- Legal Services
- Pro Seniors
  - http://www.proseniors.org/
- Ohio State Bar Association
  - www.ohiobar.org/ForPublic/Resources/Pages/PublicResources.aspx
Resources on Supported Decision-Making

• National Resource Center on Supported Decision-Making
  – [www.supporteddecisionmaking.org](http://www.supporteddecisionmaking.org)

• Jenny Hatch Justice Project on Supported Decision-Making
  – [www.jennyhatchjusticeproject.info](http://www.jennyhatchjusticeproject.info)

• American Bar Association PRACTICAL Tool

• Missouri Guide (Stoplight Tool)

• Ohio ABLE/STABLE Accounts
Questions?

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