

Disclaimer: This publication is intended to provide information only, and is not intended as legal advice. You should consult a lawyer if you need legal advice.

Document Publication Date October 2006; Updated May 2013

Disability Rights Ohio FACT SHEET:

Guardianship and Its Alternatives

Guardianship takes away a person's ability to make choices. Because the appointment of a guardian takes away a person's ability to make decisions about his or her life, other options which place fewer restrictions on the person with a disability should be considered first. One of these less restrictive options may be able to meet the person's needs without the appointment of a guardian.

Question: *What is a Guardian?*

Answer: A guardian is a person, corporation or an association appointed by a probate court to be legally responsible for another person and/or for another person's property (estate) when that person is unable to manage his or her personal needs or property because of a mental disability. Only a "natural person" (not a corporation) can be appointed as a guardian of the person. The only exception to this rule is that Advocacy and Protection Services, Inc. (APSI) can serve as guardian of the person.

Question: *What is a Ward?*

Answer: A ward is the person for whom a guardian has been appointed.

Question: *Why are Guardians Appointed?*

Answer: A probate court will appoint a guardian to direct the legal, financial affairs and/or the personal care of a person who is not able to manage his or her own affairs because of a mental disability. Family members or others can ask the court to act to protect someone who appears to be lacking ability to do so for him or herself and is therefore "incompetent." If the court finds that the person is incompetent and a guardianship is necessary, the court will appoint a guardian. Once appointed, a guardian is accountable to the probate court for providing proper care and

(continued on next page)

management of the ward's affairs in the ward's best interest.

Question: What are the General Powers and Duties of a Guardian?

Answer: The control that a guardian has over a ward is limited to the authority granted by Ohio statutes, decisions of Ohio courts, and orders and rules of the probate court. All guardians must obey the orders and judgments of the probate court which appointed them. The probate court may give broad and far-reaching powers to a guardian, or it may limit or deny any power granted under Ohio statutes or Ohio case law. Ohio law provides for different types of guardianships.

Question: What are the Types of Guardianship?

Answer: 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 ward.
- **Guardianship of the Person** - Guardianship of the person gives the guardian the authority to make day-to-day decisions of a personal nature, except financial decisions, on behalf of the ward. Such decisions would include such things as arrangements for food, clothing, living arrangements, medical care, recreation and education. It includes consent for medical care and other treatment or training programs such as individual habilitation plans (IHPs).
- **Guardianship of Person and Estate** - The court can appoint a guardianship of person and estate which 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 probate court to issue any order that it considers necessary to prevent injury to the person or the person's estate or may appoint someone as guardian without prior notice to the person and without a formal hearing when:
 - 1) an emergency exists, and
 - 2) a guardian is necessary to prevent injury to the person or estate of the person who is incompetent.

This initial appointment of an emergency guardian may last for a maximum of seventy-two hours. For good cause shown, after notice to the person who is incompetent and other interested parties, and after a hearing, the court may extend an emergency guardianship for a specified period of time, but not to exceed an additional thirty days.

- **Interim Guardianship** - An "interim guardian" is a guardian appointed after a former guardian has been removed or resigns when the welfare of the ward

(continued on next page)

requires immediate action.

- **Co-Guardianship** - Co-guardianship is when two people are appointed to act as guardian for someone at the same time.
- **Limited Guardianship** - Limited guardianship allows a probate court to appoint someone as guardian over only the portion of a person's life where he or she is both incompetent and has a need. Thus, there can be a limited guardian for medical purposes only (to provide consent for medical procedures), or for placement purposes only (admission to a group home), or for the limited purpose of approving behavior plans and/or psychotropic medications. This less restrictive form of guardianship should be used instead of full guardianship whenever possible. A ward for whom a limited guardian has been appointed retains all rights in all areas not covered by the court's order.

Question: What Rights are Taken Away When a Guardian Is Appointed?

Answer: The rights taken away depend upon the type of guardianship established by the probate court.

- If a guardian of the estate is appointed, the guardian's decisions can not be contested. However, even if the ward has a guardian of the estate, the ward can make contracts for necessary items.
- If a guardian of person is appointed, the ward may make any decision that is not contrary to the authority of guardian. Also, the ward can contest the presumption that he or she does not have the ability to make a decision.
- The loss of personal rights is why guardianship is a very serious step that should be taken as a matter of last resort. A limited guardianship that identifies and limits a specific area in a person's life, and does not affect any other rights, is preferred if guardianship is necessary. Less restrictive alternatives to guardianship should be considered before guardianship because these options allow the person to keep as many personal rights as possible while providing protection in those areas the person needs.

Question: Does the Ward Retain Any Rights?

Answer: Some areas of the person's life may involve fundamental rights or a right of privacy. There may be specific medical procedures, such as those that implicate reproductive rights, for example abortion or sterilization, that should be decided by the person whenever possible. If this is not possible, the law may require the guardian to ask the probate court to review the guardian's decision. In addition, voting is a fundamental right. Unless a court specifically rules, after a hearing, that a person is incompetent for purposes of voting, the person retains the right to vote even if the person has a guardian of the person and the estate.

(continued on next page)

While a guardian can “voluntarily” admit the ward to a developmental center, or psychiatric hospital, without prior approval of court, the court may review the admission subsequently upon request for release by the Ohio Legal Rights Service or the person.

Also, some rights are personal to the ward and cannot be exercised by a guardian. A guardian cannot make a will or execute a power of attorney for the ward. The ward may be able to exercise these rights if he or she has the capacity to do so.

Question: What are Some Less Restrictive Alternatives to Guardianship?

Answer: A person may have significant deficits in life, but the person’s support network (for example, families, friends, service providers) may be so effective that guardianship is not necessary. Other options exist that can effectively address a person’s needs without the appointment of a guardian:

- **Representative Payeeship or Authorized Representative** - If the person’s only significant income comes from government benefits, it may not be necessary for the person to have a guardian of the estate or a plenary guardian. A representative payee may be able to manage all of the person’s financial needs. A representative payeeship or authorized representative may be available for 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. For more information about representative payeeships contact the appropriate government office [the Social Security Administration (SSA), Department of Veteran Affairs (VA), Office of Personnel Management (OPM), Railroad Retirement Board (RRB)].
- **Trust** - A trust could be used instead of a guardianship of the estate, to handle funds for the person.
- **Conservatorship** - A “conservator” is a person appointed by the probate court at the request of a mentally competent adult who is physically unable to manage certain aspects of his or her life. The person requesting the appointment of a conservator specifies the powers requested on the Petition for Conservatorship. If a person is mentally competent but has a physical disability that limits the ability to manage matters, the person can:
 - Ask the probate court to appoint a conservator.
 - Choose the person who will become the conservator.
 - Dismiss the conservator if the person wants to change to a different conservator.

(continued on next page)

- Specify to the court just what authority he or she wants the conservator to have.
- Ask the probate court to end the conservatorship because the person's physical disability has decreased and a conservatorship is no longer necessary.
- **Adult Protective Services for Adults with Mental Retardation or Developmental Disabilities** - A court may order a county Board of MR/DD to provide protective services for up to one year to an adult with mental retardation or other developmental disability who is being abused or neglected, if that adult lacks the capacity to protect him or herself.
- **Adult Protective Services for the Elderly** - If the person who needs protection from harm is over age 60, the person might be eligible for other protective services protective services available to the elderly. Ohio law requires county departments of Job and Family Services to receive and investigate reports of elder abuse of persons 60 years of age and older (some offices may investigate reports of abuse of vulnerable adults under 60). Elder abuse may include physical, sexual, emotional or financial abuse or neglect of an elder. A court can order these services for up to 14 days. If you suspect an elder is being abused, contact your county Department of Job and Family Services (refer to Resources for contact information).
- **Long-term Care Ombudsman** - If the person lives in a nursing home or adult care facility and has unmet needs or problems with care, the long-term care ombudsman can help. Ombudsmen take complaints about long-term care services, and voice the person's needs and concerns to nursing homes, home health agencies, and other providers of long-term care. The Ombudsman Office works with the long-term care provider, the person, the person's family, or other representatives to resolve problems and concerns about the quality of services. Ombudsmen link people with the services or agencies needed to live a more productive, fulfilling life, provide advice on selecting long-term care in Ohio, provide information about the rights of consumers, and provide information and assistance with benefits and insurance. If you have questions, concerns or complaints about any long-term care service, contact your regional Long-Term Care Ombudsman (refer to Resources for contact information).
- **Protection Orders** - It would be too restrictive to take away a person's rights through a guardianship in order to keep that person safe, when it might be possible to accomplish the same thing with a court order of protection. A person may also be able to ask that a court order someone who is hurting that person or threatening to hurt that person to stay away and not have any contact. There are two kinds of protection orders: a Civil Protection Order which can last up to 5 years or a Temporary Protection Order which is issued by a criminal court judge.
- **Powers of Attorney** - A power of attorney is a legal document that gives

(continued on next page)

someone else authority to act on a person's behalf. A person must be competent when he or she gives someone else this authority. Powers of attorney can be revoked at any time. If you are thinking about creating a power of attorney, you should consider that there is no oversight of the person acting with the power of attorney and, because of this, it can be used in ways contrary to your interests.

An example of one type of a power of attorney would be when a competent 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. For more information about *Powers of Attorney* or health care visit the Disability Rights Ohio web page at disabilityrightsohio.org.

- ***Circle of Support, Volunteer Advocate, and Good Programs and Services*** - An alternative to guardianship is to make sure the person has a support system that meets all of the person's needs and advocates in the person's behalf. Refer to Resources for a list of agencies to contact.

Question: *What is the conflict of interest provision concerning providers of services?*

Answer: Ohio law prohibits someone who is providing services to a person with mental retardation or developmental disabilities from also serving as the person's guardian. This provision is based on the assumption that it would be impossible for a person who is providing services to also be an effective advocate if problems arise with that service provider.

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 necessary. The investigator will also give the prospective ward information about his or her rights in the process.

Question: *What happens at a guardianship hearing?*

Answer: 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 will be examined and cross-examined.

The proposed ward has the right to object to having a guardian appointed for him or her and has several other due process rights, including these:

(continued on next page)

- ▶ The right to be present during the hearing;
- ▶ The right to have an attorney represent him or her, even if he or she cannot afford one;
- ▶ The right to have the court appoint an attorney at no cost if he or she can not afford one;
- ▶ 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.

Question: *What If a Guardian Does Not Appear to Be Doing a Good Job?*

Answer: The probate judge is the superior guardian, and anyone can provide information to the court to help the judge determine if the guardian is doing his or her duties. The ward may always ask the judge to issue instructions to the guardian requiring the guardian to agree to specific things, such as allowing the ward to participate in a vocational program or to move to a community based setting.

If a guardian has consented to medical care, the ward or an “interested party” can object, and the court must hold a hearing to determine whether the medical care is in the best interests of the ward. An “interested party” can also seek periodic review of the need for guardianship.

The judge can also remove a guardian who has engaged in misconduct, such as stealing from the ward. In this case, another individual may be appointed to act as the person’s guardian.

Question: *How is a guardianship terminated?*

Answer: Sometimes it becomes apparent that a guardianship never should have been granted for the person with a disability. Also, that person may no longer need a guardian and has regained the ability to make some or all life decisions. In such cases, it is appropriate to approach the probate court with a motion to terminate a guardianship, or a motion to reduce a guardianship to a limited guardianship. There are provisions in the law where the ward may file a motion to the court asking that the guardianship be ended. The ward can request that the court appoint an attorney to represent him or her in the hearing.

The marriage of a ward terminates the guardianship of the person, but not of the estate.

(continued on next page)

Question: Where can I get help?

Answer: If you or someone close to you needs information about guardianship or alternatives to guardianship, contact the probate court in your county (refer to Resources for contact information).

Ask friends and family members for the name of an attorney who is knowledgeable about probate matters. If necessary, contact the lawyer referral service operated by your local bar association or one nearby. In Ohio, there is also a lawyer referral service in each metropolitan area, operated by the local bar association. (For a Web listing of lawyer referral services in Ohio, go to the “public” area of the Ohio State Bar Association (OSBA) Web site: <http://www.ohioabar.org>.) Also, you may refer to the Yellow Pages of your local telephone directory. Check the Yellow Pages under “associations” or “attorney referral services.”

You may also contact your local legal aid office to see if you qualify for free legal services. You can get a list of organizations in Ohio that provide free or low cost legal services or referrals in your county. To access your local legal services program, use the toll free number 1-866-LAWOHIO or visit the web directory at www.ohiolegalservices.org.

Resources

- For more information about the legal rights of people with disabilities in a guardianship matters, contact Intake by calling the Ohio Legal Rights Service at: 1-800-282-9181. See also the LRS publication *Take Charge of Your Life: Know About Guardianship: disabilityrightsohio.org/take-charge-guardianship*
- Elder Abuse: For a web directory of county Departments of Job and Family Services, go to this website: <http://jfs.ohio.gov/county/>
- Long-term Care Ombudsman: For a web directory of Ohio Long-Term Care Ombudsman Programs (L.T.C.O.P.), go to this website: <http://aging.ohio.gov/services/ombudsman/>
- Adult Protective Services for Adults with Mental Retardation or Developmental Disabilities: For a web directory of County Boards of Mental Retardation and Developmental Disabilities, go to this website: <https://doddportal.dodd.ohio.gov/INF/additionalservices/cnt/Pages/default.aspx>
- Mental Health Services and Supports: For a web directory by county, go to this website: <http://oacbha.org/about-oacbha/county-board-directory/>

(continued on next page)

- Probate Court: For a web directory of Ohio judges and probate courts, go to this website: <http://www.ohiojudges.org/>
- Guardianship Agency for People Who Have Mental Retardation or Developmental Disabilities: The Ohio Department of MR/DD 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.
- Social Security Representative Payeeships: Web publications for payees and beneficiaries, go to this website: <http://ssa.gov/payee/index.htm>.
- For an online Social Security Office locator, go to this website: <http://www.socialsecurity.gov/regions/> or call 1-800-772-1213.

Disability Rights Ohio is funded by the U.S. Dept. of Health & Human Services, the U.S. Dept. Of Education, & the Social Security Adm. The Ohio Legal Rights Service does not discriminate in provision of service or employment because of race, color, religion, sex, sexual orientation, national origin, handicap or age.

© 2006 Disability Rights Ohio. All rights reserved.

This work is protected by copyright under United States law and by international copyright laws and treaty provisions. You may copy and distribute the work, provided you: use the work for personal, noncommercial use; do not add the work to a collection or use it with any other text, photographs, artwork, etc; do not modify or alter the work in any way or delete or modify any copyright; and, do not publish or post all or any part of the work on any Internet site or in or on any other media without obtaining the prior written consent of Ohio Legal Rights Service.