

Booster Session: Guardianship and Alternatives

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**Disability
Rights** OHIO

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 system to protect and advocate for the rights of people with disabilities in Ohio

DRO: Who and What



- Mission: To advocate for the human, civil, and legal rights of people with disabilities in Ohio.

Activities

- Legal advocacy
- Investigations
- Monitoring
- Policy
- Representative payee reviews

Teams

- Community Integration
- Education / Employment
- Abuse/Neglect, VOCA
- Representative payee
- WIPA
- Short term assistance
- Policy/ Advancement

THE BIG QUESTION

The Big Question



Do I have to file for
guardianship when
my child turns 18?

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 is based on the person's "competence"
- Competence is a legal term

Basic Principles



- The real question is what is the person's ability to make and communicate decisions
- That is referred to as "capacity"
- **EVERYONE** needs some help to make decisions

Basic Principles



- Interplay with the ADA, accommodations, and “effective communication”

Basic Principles



- 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 / restore competency
- Court involvement, costs of lawyer, bond if guardian of the estate

Why Consider Alternatives?



- Many alternatives offer necessary support with less intrusion
- Research shows better health, safety, independence, and integration for people with greater self-determination
- Lack of supports is neglect, not incompetence!

Defining Terms



- Capacity
 - Legal capacity is presumed. All people have the right to be self determined
 - Functional capacity is a factual inquiry: Ability to make and communicate a particular decision at a particular time
 - This may change over time (even day to day or within the same day)

Defining Terms

- Incompetency
 - Legal determination relevant to guardianship
 - An “incompetent” is someone “so mentally impaired . . . that the person is incapable of taking proper care of the person’s self or property”

Assessing Capacity



- Begin with understanding that not all decisions are rational, but may be based on emotion or influence, e.g. “capacity to vote”
- May be counter-intuitive, e.g. sexual activity in seniors with dementia
- Not an easy concept even for professionals
- Implicit biases of tester, e.g. dietary or religious preferences

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
- PRACTICAL Tool

Guardianship and Alternatives

CONTINUUM OF SUPPORTS

Continuum of Supports



- There are many options to support decision-making
- Consider from least restrictive to most restrictive

Continuum of Supports: Daily Decisions



- Informal support/assistance
- Supported decision-making
- Release of information (HIPAA or FERPA)
- 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

How to: Informal Support



- EVERYONE needs some support
- Provide understandable information
- Use assistive technology
- Automate when possible
 - Direct deposit
 - Scheduled payments

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, neglected, or exploited
- Statutory reporting for all individuals
- Protectorship and court involvement available for people 18 or over
- Similar protection for those over 60
- Contact local DD board; prosecutor; victim advocate, or law enforcement

How to: Trusts

- Can be used to protect assets and/or direct spending
- Consult with an attorney who specializes in trusts
- Special needs trusts must be used to protect Medicaid eligibility
- STABLE trusts provide additional opportunity

How to: Powers of Attorney



- Two main types
 - Financial Power of Attorney
 - Health Care Power of Attorney
- Also consider Education 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 who is “physical infirm” 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

How to: Conservatorship (cont.)



- 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 (cont.)



- Guardian of the estate: finances and property
- Guardian of the person: everything else
- Query: can the guardian of the person sign a lease in order to rent an apartment under the HCBS waiver program?
- Query: can the guardian of the person apply for Medicaid benefits?

How to: Guardianship (cont.)



- Emergency guardian
- Interim guardian
- Co-guardians
- Limited guardianship
- Note: Cannot be a service provider, unless exempted by court (family members only)

How to: Guardianship (cont.)



- Person who wants to be guardian applies to probate court
 - Application packet
 - Background check
 - Filing fee
 - Statement of Expert Evaluation (physician or psychologist)

How to: Guardianship (cont.)



- Court schedules hearing
- Investigator meets with proposed ward
 - Provides notice
 - Reports to court on necessity of guardianship
- Court must appoint attorney and independent evaluator if requested by proposed ward

How to: Guardianship (cont.)



- Notice to next of kin
- Court holds hearing
 - Is individual an “incompetent?”
 - Is applicant suitable to be guardian?
 - Is guardianship “necessary”?
 - Must consider evidence of less restrictive alternatives
- Person with a disability may appeal if guardian rules against them; guardian may in some cases

How to: Guardianship (cont.)



- Court appoints guardian
 - Issues letters of guardianship
 - Court is superior guardian
- Guardian files inventory (estate only)

How to: Guardianship (cont.)



- 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
- Superintendence Rule 66 significantly affects ward's interests

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 (capacity to marry is different standard)
- 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
- Codified at Rule 66 of the Ohio Supreme Court Rules of Superintendence

Guardian's Responsibilities



- 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

TRANSITION PLANNING OPPORTUNITIES

School

- School staff often advise parents to apply for guardianship at age 18
- But transfer of rights ≠ guardianship
- Use IEP process to help
 - IEP goals can include development of “daily living skills” like decision-making
 - Student-led IEPs promote self-determination

Vocational Rehabilitation



- Daily living skills are often employment-related skills
- Use vocational rehabilitation services (BVR/BVSI/OOD) to build these skills
- WIOA: focus on transition services
- Embedded VR counselors in some areas
- Parents/guardians required to sign off on services for minors/wards
- Contact DRO about problems with VR services

Assistive Technology



- Use technology to support needs
 - Communication
 - Mobility, dexterity
 - Memory
- Explore all potential sources
 - School
 - Vocational rehabilitation
 - Medicaid/waiver
 - Community resources

Resources



- Disability Rights Ohio
 - www.disabilityrightsohio.org
- Legal Services
 - <http://www.ohiolegalservices.org/public/legal-problem/wills-and-probate>
- Pro Seniors
 - <http://www.proseniors.org/>

Resources



- Ohio State Bar Association
 - www.ohiobar.org/ForPublic/Resources/Pages/PublicResources.aspx
- Rule 66
[http://www.supremecourtofohio.gov/ruleamendments/documents/Adult%20Guardianships%20\(FINAL\).pdf](http://www.supremecourtofohio.gov/ruleamendments/documents/Adult%20Guardianships%20(FINAL).pdf)
- DD Council Guide - <https://ddc.ohio.gov/Resource-Library/Publications/Publications-Listed-by-Topic/Guardianship-Estate-Planning/Estate-and-Future-Planning>

Resources on Supported Decision-Making



- National Resource Center on Supported Decision-Making
 - www.supporteddecisionmaking.org
- Jenny Hatch Justice Project on Supported Decision-Making
 - www.jennyhatchjusticeproject.info
- American Bar Association PRACTICAL Tool
 - http://www.americanbar.org/groups/law_aging/resources/guardianship_law_practice/practical_tool.html
- Missouri Guide (Stoplight Tool)
 - <http://moddcouncil.org/uploaded/MO%20Guardianship%20RESOURCE%20GUIDE%20rev%20Dec%202010.pdf>

Questions?



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Speaker Bio



Michael Kirkman is the Executive Director of DRO. The author of *Ohio Mental Health Law (2d Ed.)*, he has litigated hundreds of cases impacting the rights of people with disabilities in both state and federal court, including the United States Supreme Court. He was appointed by the Chief Justice of the Ohio Supreme Court as a charter member of the Adult Guardianship Subcommittee and played a major role in drafting the Standards for Ohio Guardians, adopted in modified form by the Ohio Supreme Court as Superintendence Rule 66. He has recently consulted with and provided expert testimony to the Ohio Constitutional Modernization Commission on issues related to capacity to vote, cognitive disabilities, and federal law.