

Rights & Alternatives to Guardianship Proceedings



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We have the
legal right of way.

DRO: Who and What



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

Activities

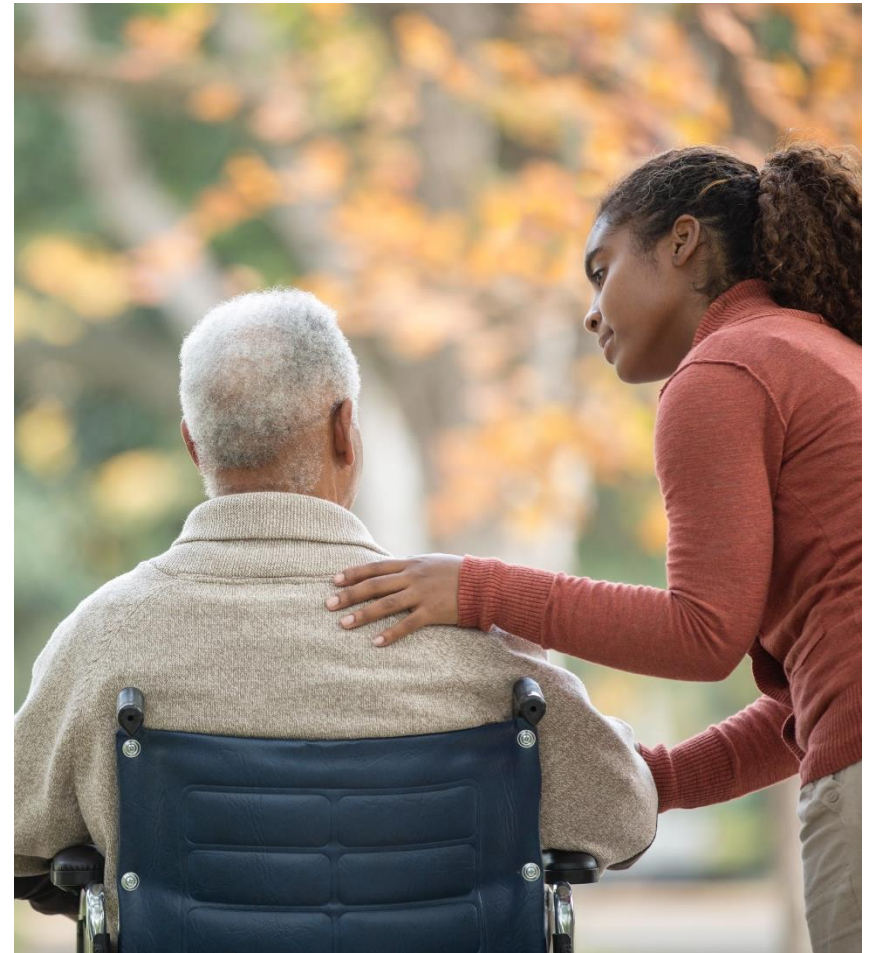
- Information
- Resources
- Legal advocacy
- Investigations
- Monitoring
- Policy

Teams

- Community Integration
- Education
- Employment
- Abuse/Neglect
- WIPA
- Intake /Short Term
- Policy/Outreach
- Rep Payee Reviews

Why are we here?

- Intro to DRO
- Guardianship & Social Work
- Decision Making Process
- Guardianship 101
- Alternatives to Guardianship
- Supported Decision Making
- Resources & Questions



Working at the Intersections

GUARDIANSHIP & SOCIAL WORK

Where is the Overlap?



- Educational Settings
- Discharge Planning
- Gerontological Social Work
- Long Term Care Settings
- Mental Health & Behavioral Health Settings
- Child & Adult Welfare Proceedings

The Big Question



Is guardianship the only
option?

The Answer



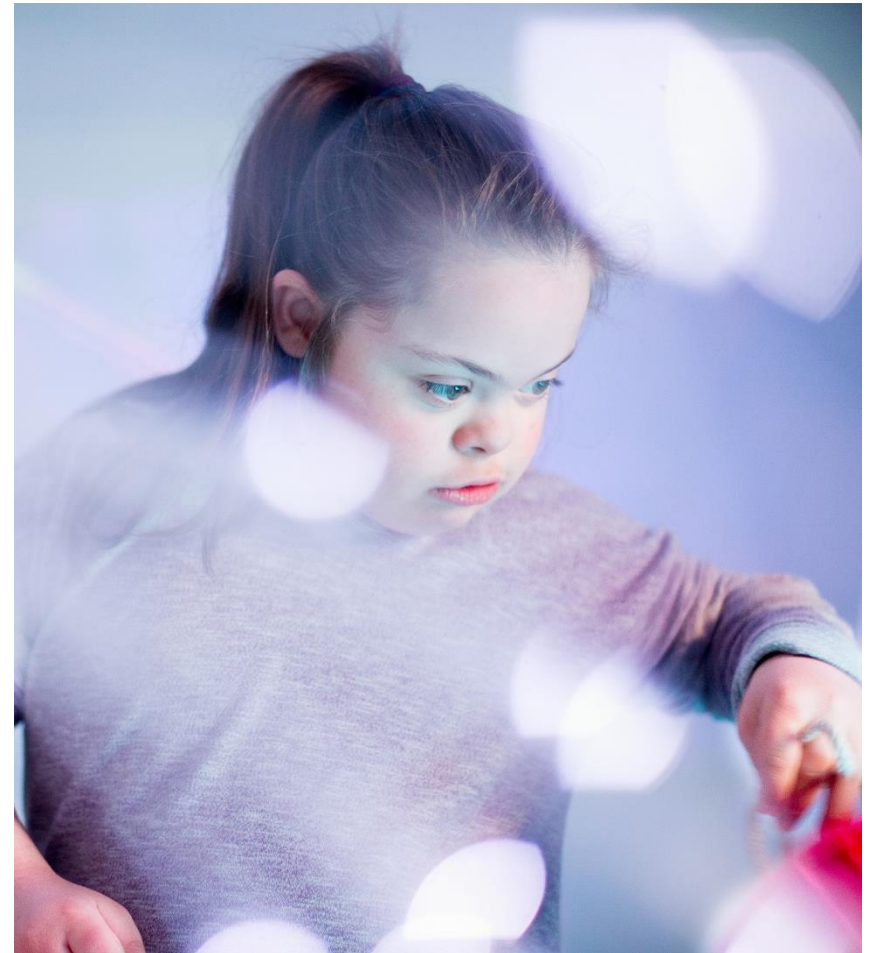
- In most cases, NO!
- Many people with disabilities do not have or need guardians
- Alternatives to guardianship are less restrictive and may be easier.
- Some organizations (schools, hospitals, etc) will suggest guardianship even when it's not needed

Capacity, Competency, and What it Means to Make a Decision

DECISION-MAKING PROCESSES

Social Model of Disability

- World & Social view developed by Disabled Self-Advocates
- Developed in opposition to the medical model of disability
- Focus on addressing barriers and how they impact folks with disabilities
- Barriers can be physical or social



Basic Principles



- EVERYONE needs help to make some decisions
- Dignity of Risk*
- Before choosing guardianship or alternatives, assess the areas in which the person needs support to make decisions
- There are many options to support decision-making
- The process is different for every person—not one-size-fits-all. Creativity is a strength.
- Also consider different ways of providing support.

Capacity vs. Competency



Capacity

- A Clinical determination.
- Made by a medical provider.
- Refers to whether or not a patient can understand and participate in an informed consent discussion.

Competency

- A Legal determination.
- Made by a judge.
- Refers to the legal status of a person with regards to a particular civil or criminal process.
- May involve reviewing opinions from medical providers.

Why Consider Alternatives to guardianship?



- It is the law
- 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

Where to Begin?



- Individualized Assessment of Capacity
 - Areas of Strength
 - Areas for Support
- What Family/Social Supports does the person have?
- What Identities does the person/family hold that will impact their experience in Court & Agencies?
- What does the person with the disability want?

Step 1- Assessments: Stoplight Tool

	<p>If the answer is "YES" place a ✓ in the box.</p> <p>If the answer is "NO" go to next column.</p> <p>→</p>	<p>If the answer is "YES", write what support is needed/available.</p> <p>If the answer is "NO" go to next column.</p> <p>→</p>	<p>If the answer is "YES", place a ✓ in the box.</p>
HEALTH & NUTRITION			
Does the person make decisions about where, when, & what to eat?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Can the person follow a prescribed diet and/or take medicines as directed?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Does the person understand the need to maintain personal hygiene and dental care?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Can the person make and communicate decisions regarding medical treatment, including understanding the consequences of not accepting treatment?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Does the person understand health consequences associated with high-risk behaviors (<i>substance abuse, overeating, high-risk sexual activities, etc.</i>)?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Can the person alert others and seek medical help for serious health problems?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
RELATIONSHIPS			
Does the person understand and practice appropriate relationship behaviors with family, friends, co-workers, intimate partners, etc. (<i>how we talk to and touch others</i>)?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Is the person able to make appropriate decisions concerning marriage and intimate relationships?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Does the person understand consent and permission in regards to sexual relationships?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
PERSONAL SAFETY			
Does the person understand and avoid common	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

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

Assessment: 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

Observations and Notes:

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

Personal Safety:

Observations and Notes
(List supports needed.):

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

Terms & Probate 101

INTRO 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

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

A Balancing Act of Best Interest

WARD RIGHTS AND GUARDIANSHIP RESPONSIBILITIES

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

Procedural Rights



- 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



- Most people in Ohio with guardians still have the right to vote.
- Court must make a separate determination of incompetence for the purposes of voting in order to remove this right.
- Guardians cannot vote on behalf of wards or tell them how to vote.
- Anyone with a disability can receive assistance with voting.
- Assistive technology is available at voting sites.

Guardian's Responsibilities



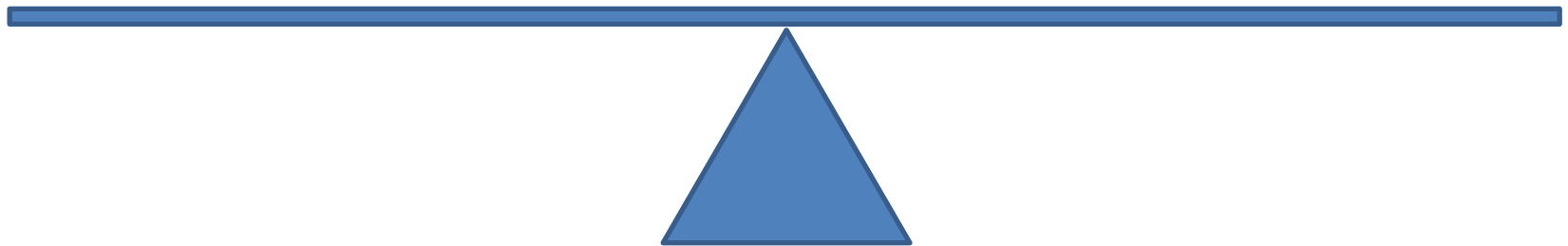
- Follow all laws and court orders
 - Probate court is superior guardian
- Make decisions in the ward's best interests
 - The decision that a reasonable person would make in the ward's position
 - Maximize what is best for the ward, including:
 - Least intrusive
 - Most normalizing
 - Least restrictive
 - 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

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 & Supported Decision Making

ALTERNATIVES TO GUARDIANSHIP

Basic Principles



- There are many options to support decision-making
- Consider from least restrictive to most restrictive
- Creativity & Flexibility are strengths
- 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

Less Restrictive



More Restrictive

Continuum of Supports: Financial Decisions



- Informal support/assistance
 - Direct deposits/payments
- Supported decision-making
- Release of information
- ABLE/STABLE Accounts
- Trusts
- Power of attorney
- Conservatorship
- Representative payee
- Limited guardianship
- Full guardianship of the estate

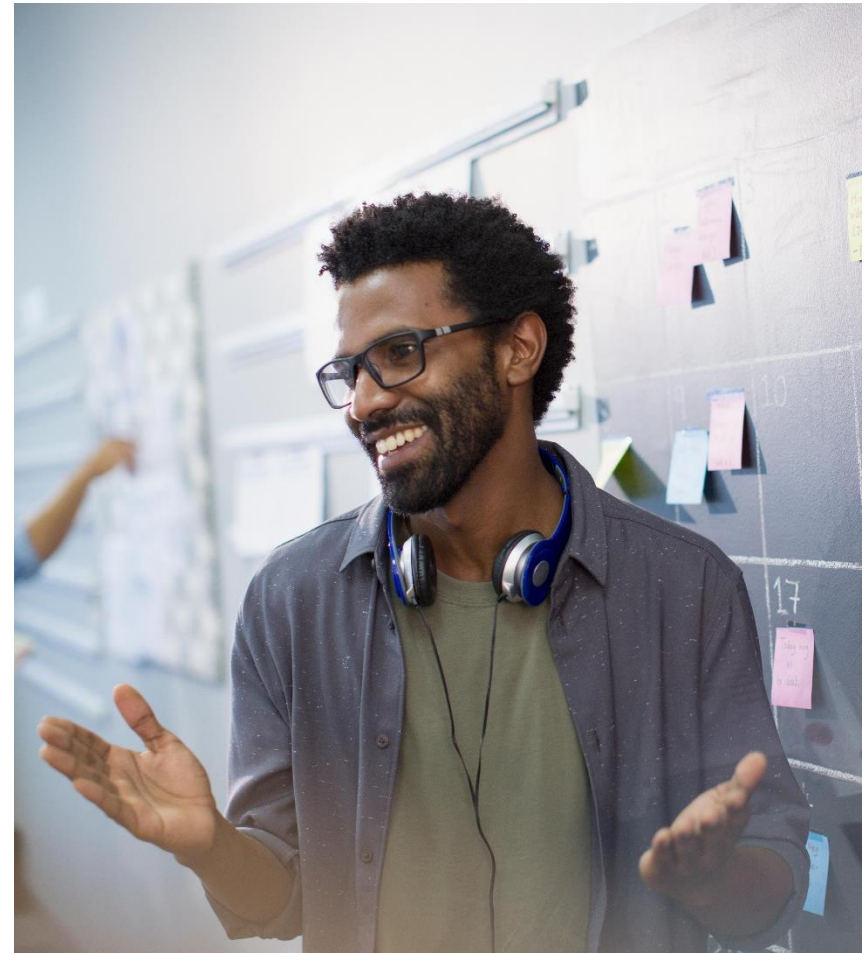
Less Restrictive



More Restrictive

How to: Informal Support

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

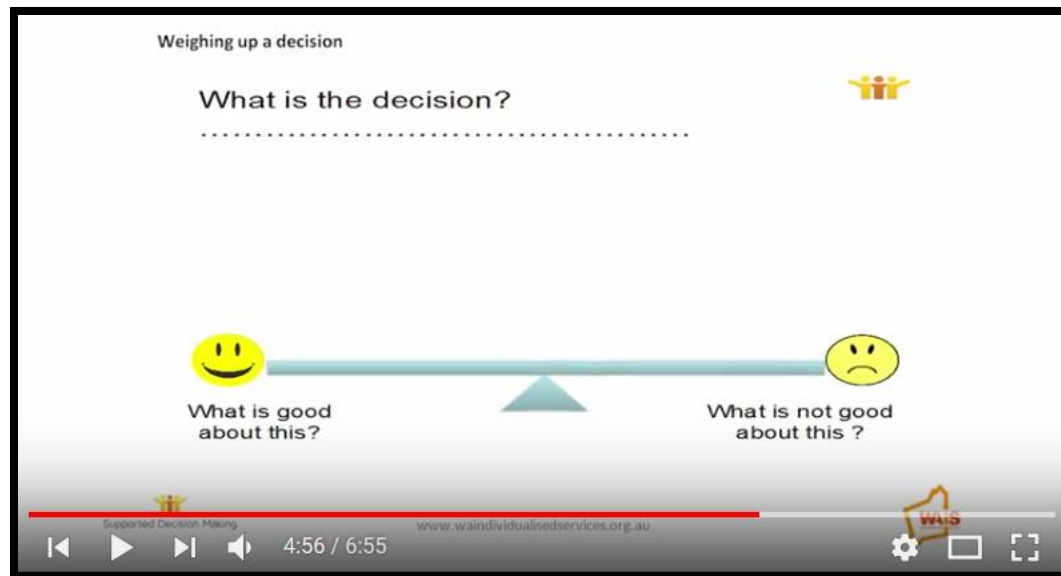


How to: Supported Decision-Making



- Examples in Texas and Massachusetts
 - No formal process in Ohio – but a committed team could figure it out.
 - Supported Decision Making Network of Ohio
- 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

Video on Supported Decision-Making



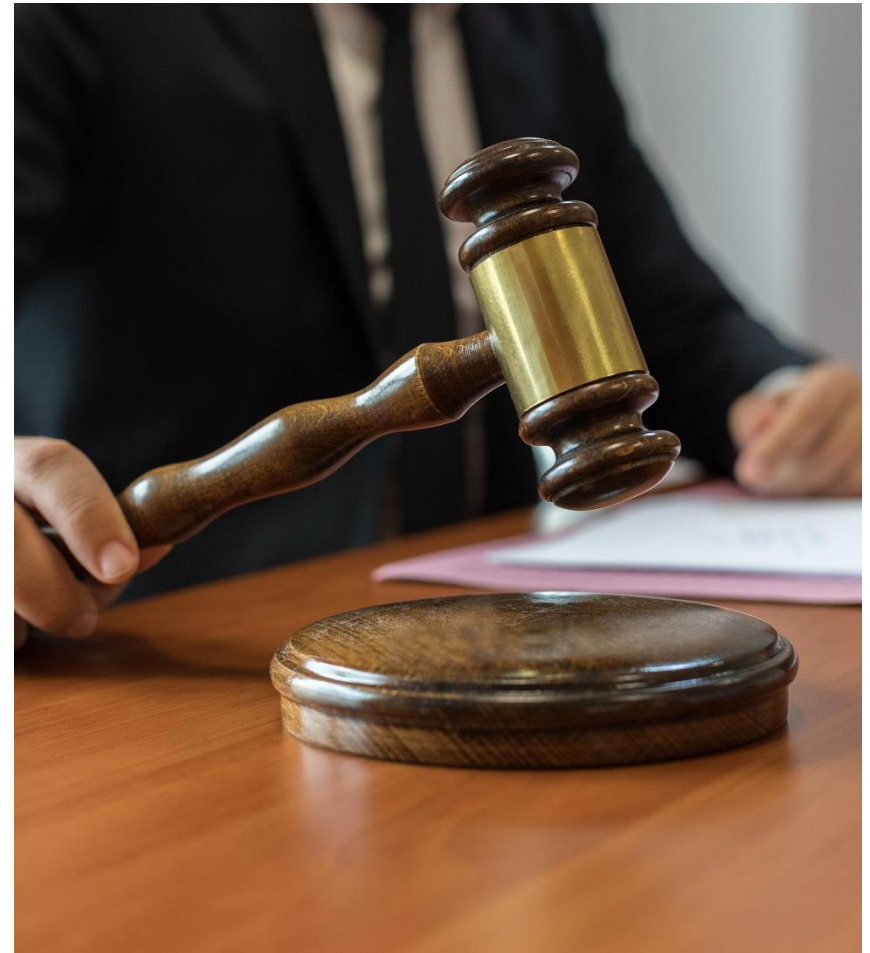
How to: Releases and Authorized Representatives



- 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
- Special Needs Trusts & Benefits planning requires a level of expertise in a niche area of the law.

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 ***note certain language is required under Ohio law**
- Legally moot once a Guardianship is established.*

How to: Representative Payee



- Need determined by Social Security or the V.A.
- 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



- Supported Decision Making Network of Ohio
- 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
 - http://www.americanbar.org/groups/law_aging/resources/guardianship_law_practice/practical_tool.html



Questions?

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