



THE SUPREME COURT *of* OHIO

GUARDIANSHIP *of* INDIVIDUALS
with **DEVELOPMENTAL**
DISABILITIES

TOOLKIT



for Judicial Use

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Guardianship of Individuals with Developmental Disabilities

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INTRODUCTION

In Ohio, when a person is found to be incompetent, the probate court shall appoint a guardian if it is found to be necessary. [R.C. 2111.02(A)] In 2015, guardianship rules were adopted into the Rules of Superintendence to help courts and guardians understand the roles and responsibilities of a guardian. Although these rules helped further the education of guardians and provide a more structured approach to fulfilling guardian appointments, there still is a need to better understand guardianship for individuals with developmental disabilities. This population tends to have additional considerations when determining what is in the person's best interest compared to a typical guardianship of an adult. Although an individual has a disability, he/she is not presumed to be incompetent. When a guardianship application is filed, the court may first consider less-restrictive alternatives to guardianship. And when guardianship is necessary, the court may consider the special needs of the population. For example, when investigating a guardianship, be mindful that this population is at higher risk of being abused and exploited because of their disabilities.

This guide is designed to provide an overview of the pertinent state laws and rules related to guardianship and this population. The guide also outlines practices and recommendations courts may use when making decisions about guardianship for individuals with developmental disabilities. The toolkit provides the rationale behind these recommendations and further resources for the court's reference. Note that references to state statutes and rules are considered accurate as of the date of this publication. However, laws and interpretation of laws are subject to change and readers should verify the accuracy of any information prior to using it.



1. UNDERSTANDING THE DEVELOPMENTALLY DISABLED POPULATION

There are multiple definitions for developmental disabilities (DD). Definitions can be found in professional guidelines, such as the *Diagnostic & Statistical Manual of Mental Disorders* (DSM-5) and the American Association on Intellectual & Developmental Disabilities (AIDD) 11, as well as in statute. See 42 U.S.C. 15002(8) and R.C. 5123.01(Q).

For the purpose of this guide, we will use the definition as outlined in the Ohio Revised Code. In this definition, a developmental disability is a severe, chronic disability that is attributable to a mental or physical impairment or a combination of mental and physical impairments that is manifested before age 22; is likely to continue indefinitely; and results, in the case of a person six years of age or older, in a substantial functional limitation in at least three of the following areas of major life activity: self-care, receptive and expressive language, learning, mobility, self-direction, capacity for independent living, and, if the person is at least 16 years of age, capacity for economic self-sufficiency. It also causes the person to need a combination and sequence of special, interdisciplinary, or other types of care, treatment, or provision of services for an extended period of time that is individually planned and coordinated for the person. In this definition, developmental disability includes intellectual disability.

A. Types of Developmental Disabilities

People not familiar with developmental disabilities may assume that one can immediately tell if someone is disabled. Some people may believe there are physical features, stereotypical behavioral, or vocal features associated with people who have developmental disabilities. This is not true. There are several conditions that are classified as developmental disabilities and it is estimated that up to 15% of children age 3-17 have one or more developmental disabilities.¹ Some of the conditions classified as developmental disabilities include, but are not limited to: autism, cerebral palsy, Down syndrome, intellectual disability, traumatic brain injury, language and speech impairment, hearing loss, visual impairment, learning disorders, Williams Syndrome, Prader-Willi Syndrome, Muscular Dystrophy, and Fragile X. The following is more detailed information on some types of developmental disabilities.

Autism Spectrum Disorder²

Autism, or autism spectrum disorder, refers to a range of conditions characterized

1 Center for Disease Control and Prevention, *Facts About Developmental Disabilities*; [cdc.gov/ncbddd/developmentaldisabilities/facts.html](https://www.cdc.gov/ncbddd/developmentaldisabilities/facts.html); (April 17, 2018).

2 Autism Speaks; [autismspeaks.org/what-autism](https://www.autismspeaks.org/what-autism).

by challenges with social skills, repetitive behaviors, speech, and nonverbal communication, as well as by unique strengths and differences. We now know there are many types of autism caused by different combinations of genetic and environmental influences. The term “spectrum” reflects the wide variation in challenges and strengths possessed by each person with autism.

Cerebral Palsy³

Cerebral Palsy refers to a group of neurological disorders that appear in infancy or early childhood that permanently affect movement, balance, and muscle coordination. Cerebral Palsy (CP) is caused by damage to or abnormalities inside the developing brain that disrupt the brain’s ability to control movement and maintain posture and balance. The term *cerebral* refers to the brain; *palsy* refers to the loss or impairment of motor functions. People with CP exhibit a variety of symptoms, including:

- Lack of muscle coordination when performing voluntary movements (*ataxia*);
- Stiff or tight muscles and exaggerated reflexes (*spasticity*);
- Weakness in one or more arm or leg;
- Walking on the toes, a crouched gait, or a “scissored” gait;
- Variations in muscle tone, either too stiff or too floppy;
- Excessive drooling or difficulty swallowing or speaking;
- Shaking (*tremor*) or random involuntary movements;
- Delays in reaching motor-skill milestones; and
- Difficulty with precise movements, such as writing or buttoning a shirt.

Down Syndrome⁴

Down syndrome occurs when an individual has a full or partial extra copy of chromosome 21. This additional genetic material alters the course of development and causes the characteristics associated with Down syndrome. A few of the common physical traits of Down syndrome are low muscle tone, small stature, an upward slant to the eyes, and a single deep crease across the center of the palm – although each person with Down syndrome is unique and may possess these characteristics to different degrees, or not at all. Individuals with Down syndrome possess varying degrees of cognitive delays, from very mild to severe. Most people with Down syndrome have cognitive delays that are mild to moderate.

3 National Institute of Neurological Disorders & Stroke; ninds.nih.gov/Disorders/All-Disorders/Cerebral-Palsy-Information-Page.

4 National Down Syndrome Society; ndss.org/about-down-syndrome/down-syndrome/.

Intellectual Disability⁵

Intellectual disability (ID), formerly known as mental retardation, is a disability characterized by significant limitations both in **intellectual functioning** (reasoning, learning, problem-solving) and in **adaptive behavior**, which covers a range of day-to-day social and practical skills. This disability originates before the age of 18.

Traumatic Brain Injury⁶

Traumatic brain injury (TBI) is a disruption in the normal function of the brain that can be caused by a bump, blow, or a jolt to the head, or penetrating head injury. It can be the result of a car accident or a fall. Some of the leading causes of TBI are falls and motor vehicle crashes. For this to be considered a developmental disability, the injury must originate before the age of 22.

Co-Occurring Disabilities or Dual Diagnosis

People with Intellectual or Developmental Disabilities can have co-occurring mental health diagnoses. The term dual diagnosis often is used for these individuals. The types of mental health diagnoses seen in individuals with ID or DD are the same as those seen in the general population; however, the individual's life circumstances or level of intellectual functioning may alter the appearance of the symptoms. Persons with a dual diagnosis can be found at all ages and levels of intellectual and adaptive functioning.

Some common diagnoses include:

Mood Disorders:	Depression, Bi-Polar Disorder
Anxiety Disorders:	Panic Attacks, Obsessive-Compulsive Disorder, Post-Traumatic Stress Disorder
Psychotic Disorders:	Schizophrenia, Schizoaffective Disorder
Personality Disorders:	Paranoia (Anti-social, borderline)
Other:	Substance Abuse, Dementia, Sleep Disorders, Eating Disorders

People may present with co-occurring developmental disabilities. For example, one individual may have Cerebral Palsy with ID while another may not have ID. As people with developmental disabilities age, they also may present with co-occurring dementia or other disorders associated with aging.

Additional information about other conditions is on the [Center for Disease Control and Prevention's Developmental Disabilities website on Specific Conditions](#).

5 American Association of Intellectual & Developmental Disabilities; aaidd.org/intellectual-disability/definition.

6 Centers for Disease Control & Prevention; www.cdc.gov/traumaticbraininjury/basics.html.

B. Historical Overview

The understanding of people with disabilities and particularly those with diminished mental capacity, has seen a great deal of evolution over time. During the time when Ohio ratified its current constitution in 1851, the “asylum movement” created institutions where isolation and daily activities were used to provide humane treatment to people with mental disabilities.⁷ Advancements in science, generally, and medicine and psychology, specifically, over the late 19th and early 20th centuries led to hope of more effective treatments for those seen as incapable of caring for themselves.⁸

The mid-20th century brought watershed changes to the perception and treatment of people with developmental disabilities. Media coverage⁹ led to aggressive federal litigation asking courts to address horrific conditions at the Willowbrook Institution in New York and at similar institutions for individuals with developmental disabilities in Ohio and around the country.¹⁰ The United States and the Ohio Supreme Court spelled out specific due process rights, including a right to counsel and to treatment for people who are detained against their will in state institutions.¹¹

Political and social gains also occurred. Following in the steps of the civil rights revolution, the independent living movement and groups such as ADAPT (American Disabled for Attendant Programs Today) took the refrain “nothing about us without us,” a slogan is still used today by the growing movement of people with intellectual and developmental disabilities (I/DD), such as Self Advocates Becoming Empowered, People First, and Autism Self Advocacy Network.

7 See generally Whitaker, *Mad in America: Bad Science, Bad Medicine, and the Enduring Mistreatment of the Mental Ill* (Perseus 2002); Appelbaum, *Almost a Revolution: Mental Health Law and the Limits of Change* (Oxford 1994)

8 Whitaker, *Id.*

9 Rivera, Geraldo (1972). *Willowbrook: The Last Great Disgrace*. WABC-TV. Film. A unique perspective of the Willowbrook school can be seen at “Unforgotten: Twenty-Five Years after Willowbrook,” [youtube.com/watch?v=FcjRIZFQcUY](https://www.youtube.com/watch?v=FcjRIZFQcUY). A similar documentary from the Ohio perspective is “Lest We Forget: Silent Voices.”

10 *New York ARC v. Rockefeller*, 357 F.Supp. 752 (E.D. N.Y. 1973). Cases were filed in Ohio against Orient State School (*Barbara C. v. Moritz*, S.D. Ohio No. C-2-77-887 (Oct. 19, 1981)); Order and plan for relief, and Apple Creek Developmental Center, *Sidles v. Delaney*, N.D. Ohio No. C75-300A, (April 26, 1976), resulting in orders that provided comprehensive standards for the management of the institutions.

11 *Youngberg v. Romeo*, 457 U.S. 307, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982) (Substantive due process requires that state institution provide treatment to those legally detained); *Addington v. Texas*, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979) (state must provide that person meets criteria for involuntary hospitalization by clear and convincing evidence); *In re Fisher*, 39 Ohio St.2d 71, 313 N.E.2d 851 (1974) (mandatory right to counsel for respondent subject to involuntary commitment)

2. OVERVIEW OF DEPARTMENT OF DEVELOPMENTAL DISABILITIES' ROLE

A. County Boards of Developmental Disabilities

County boards of developmental disabilities were created by law in 1967, by House Bill 169. The mission of county boards of developmental disabilities is to ensure the availability of programs, services, and supports that assist eligible individuals with developmental disabilities to create a life allowing them to live and work in the community and to assist and support families of persons with developmental disabilities in achieving these goals. County boards of developmental disabilities provide a range of services for infants and preschoolers, school-aged children, teens who are considering life after high school, adults through retirement, and senior citizens.

This array of services is designed to allow persons with developmental disabilities to be fully included and actively participate in all aspects of their communities and society. Receiving services from a county board of developmental disabilities opens opportunities to persons with developmental disabilities, including obtaining services encouraging and promoting independent living skills, being part of the community, and creating opportunities for people with disabilities to use their strengths and talents to increase their economic wealth, have a sense of accomplishment, and create their own social identity.

Each county board of developmental disabilities is comprised of seven members – two appointed by the probate judge and five by the board of county commissioners. [R.C. 5126.021] The county board serves two primary functions: determining eligibility for services and service coordination.

B. Determining Eligibility

The county board determines eligibility by age. To be eligible for services from a county board, a person must have a developmental disability, which under Ohio laws is defined as a “severe chronic disability” that:

- Is attributable to a mental or physical impairment or combination of mental and physical impairments, other than one caused solely by mental illness;
- Is manifested before age 22; and
- Is likely to continue indefinitely. [R.C. 5126.01(F)]

The Ohio Eligibility Determination Instrument (OEDI) is used to measure a person’s current functional abilities in the life-activity areas of mobility, self-care, self-direction, capacity for independent living, learning, receptive and expressive language skills, and economic self-sufficiency.

The assessor completes the OEDI by interviewing the person and others who know him or her well, reviewing documents, and making direct observations to determine the individual's current functional levels. To be eligible for services, a person must show functional limitations in at least three of these areas.

If a person is found ineligible for services from a county board of developmental disabilities, he or she can appeal the determination. Ohio Adm.Code 5123:4-04 sets out due process rights for the individual. The county board must provide a 15-calendar-day notice. The individual may appeal within 90 days. The first level of review is an investigation by a supervisor; the second level is review by the board superintendent; the third level is an appeal to the full county board; and, finally, the complaint may be escalated to the director of the Ohio Department of Developmental Disabilities (DODD). The person may file a civil action upon exhaustion of administrative remedies.

C. Case Management: Service & Support Administration/Service Coordination [Ohio Adm.Code 5123:2-1-11]

Case management is a process to link people with developmental disabilities and families to needed services and support. It may include any of the following:

- Information and referral
- Eligibility determination and assessment
- Individual Service Plan (ISP) development and revision
- Assistance in provider selection and accessing services
- Quality assurance of services provided to people and families
- Crisis intervention

Through the county board, a service and support administrator (SSA) is assigned to the individual with a developmental disability and is the primary point of coordination for the person's services and support. The SSA completes an assessment of the person's need for services and works with him/her to develop an Individual Service Plan, which is a written description of the service, supports, and activities provided to the person with a developmental disability.

D. Role of Service & Support Administrator and the Team in the Development of the Individual Service Plan

A person's team is a group of people who provide support to an individual with a developmental disability to develop and change the ISP. Members of the team include the person; the SSA; staff who work with the person; providers; professionals; an adult who the person wants to have help him or her; the guardian; and others the person or guardian chooses to help the person consider possibilities and make decisions.

The role of the SSA includes, but is not limited to:

- Serve as the primary point of coordination for support and services
- Establish a budget for services

- Complete and obtain assessments, at least annually, identifying what is important to and for the person and any likely risks
- Develop, review, and revise the ISP at least annually
- Encourage self-determination and self-advocacy to enable individuals to effectively indicate their own interests, desires, rights, and needs
- Assist individuals in choosing providers
- Establish and maintain contact with all team members
- Complete individualized and continuous reviews to ensure that ISPs are developed and implemented.

E. Dual Responsibilities of the SSA and Guardian

By law, the service and support administrator has certain obligations he or she is required to fulfill in providing services to individuals with developmental disabilities. Under Sup.R. 66.09, the guardian of a person with developmental disabilities also has certain duties he or she is required to fulfill for the person under guardianship. The SSA and guardian’s roles and duties have several areas where they overlap. [See Sup.R. 66.]

DUTY	SERVICE & SERVICE ADMINISTRATOR	GUARDIAN
Coordination of Services	Primary point of coordination	Provide consent for all services to the individual to ensure needs are met
Plan Development	Responsible for development, implementation, and coordination of the Individual Service Plan	Guardian’s Plan is to state the guardian’s goal for meeting the person’s personal and financial needs
Person-Centered Planning	<p>Obtain information on the individual’s preferences, desired outcomes, needs, interests, abilities, health status, and other available supports</p> <ul style="list-style-type: none"> • Examine what is important to the individual and to maintain health and safety • Identify supports to promote rights (citizenship, due process, equality, responsibility), self-determination, emotional, physical and material well-being, personal development, social inclusion, and interpersonal relationships 	<ul style="list-style-type: none"> • Obtain information from the person, his/her family, and friends to know the person’s preferences and belief system • May obtain and consider the independent assessment of a person’s functional ability, health status, and care needs • Advocate for services focused on the person’s wishes and needs to reach full potential

DUTY	SERVICE & SERVICE ADMINISTRATOR	GUARDIAN
Abuse/Neglect	<ul style="list-style-type: none"> Report to the county board of developmental disabilities Identify trends and patterns of unusual incidents and major unusual incidents Report to law enforcement 	<ul style="list-style-type: none"> Report to court, county board, adult protective services as required and law enforcement Guardian receives notice from county board or provider
Assessment	Annually and more frequently if required	Assess services to determine they are appropriate and continue to be in the person's best interest
Contact with Team Members	Maintain contact with service providers, family members, friends, and others	<ul style="list-style-type: none"> Foster and preserve positive relationships in a person's life Have regular contact with all service providers
Plan Review	Annually	Annually
Visitation	Face-to-face visits at least annually; more frequently as required	Meet and communicate privately with the individual as needed, but not less than quarterly or as determined by the probate court
Benefits	Explain and assist in applying for Medicaid services and provide information on appealing denial or decrease in benefits	Maintain eligibility for benefits, for example, annual Medicaid recertification

F. Types of Services Available to Persons Found Eligible

There are a broad range of services available to help people with developmental disabilities with all aspects of their lives. These services may assist with daily living activities, help parents aid in their child's development, prepare for and working in the community, and getting around the community. The services persons with developmental disabilities receive are based on their needs and are documented in an Individual Service Plan.

Services, which may vary by county, include:

- Supported living services: the provision of housing, habilitation, homemaker and personal care services to enable a person to remain in a residence of his or her choice;
- Adult services: adult day habilitation services, adult day care, prevocational services, community employment and supported employment services, and sheltered employment;
- Vocational rehabilitation (VR) services: Under federal law, a discussion of transitioning from school to work (or post-secondary education) is required starting at age 14. An individual with developmental disabilities must be given a trial work period before there is a determination the person should be diverted to subminimum wage (workshop) or other day programs.

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- Habilitative services: assists a person in acquiring and maintaining life skills allowing him or her to cope more effectively with the demands of life (recreation programs, social skills);
 - Environmental modifications (widening doorways in one's home to achieve accessibility);
 - Assistive technology;
 - Transportation;
 - Respite (in home and out of home);
 - Special diets;
 - Occupational therapy, speech therapy;
 - Nursing;
 - Psychology or behavioral support counseling;
 - School services (up to age 22).

G. Service Funding

Services are funded in three ways:

- **Home and Community-Based Services (HCBS) Waiver Program:** People with developmental disabilities live in the community setting of their choice and direct their care within the limits of their budget (i.e., funding levels, type of services). Funding and services are based on each person and determined by a standard assessment tool. People with developmental disabilities can hire and remove providers as they desire.
 - Federal Medicaid funds cover approximately 60% of the cost, and the county board or DODD is responsible for the remaining amount. Because there is a limit to county and state funds, there is a waiting list for Ohio waivers in most counties. [Ohio Adm.Code 5123-9-04]
- **Facility-Based Care:** People with developmental disabilities may reside in a privately operated intermediate care facility (ICF) or a state-operated developmental center (DC). These facilities provide all services, as well as room and board. The funding is "owned" by the facility; if a person with a developmental disability chooses to move, they secure services and funding through an opening at another ICF or DC, or a waiver. That facility then will have an opening for another person with a developmental disability to move in.
 - Federal Medicaid funds cover approximately 60% of the cost; and the state is responsible for the remaining amount.
- **Locally Funded Services:** People with developmental disabilities reside in a community-based setting and receive services from their county board or another organization.

H. Residential Options for Individuals with Developmental Disabilities

Persons with developmental disabilities live in a variety of settings. Under the HCBS Waiver Program, waiver services can be provided in family homes, in apartments, in homes owned or leased by the individual receiving services or in homes that are licensed by DODD. Facility-based services also are available through Ohio's Medicaid state plan.

Family Homes – A person may choose to live with family members.

Independent Living – A person may choose to live in a home he/she owns or rents. To share living expenses, many people choose to live with other individuals with developmental disabilities who may or may not also receive waiver services. “Supported living” is when a person lives in a residence of his/her choice, with not more than three other persons with developmental disabilities.

Shared Living – A person may choose to live in a home with his/her paid provider. This is called Shared Living. This service may be provided by a caregiver who is an independent provider or one who is employed by an agency.

Licensed Homes – Also known as group homes, these homes are licensed by DODD and, generally, have four to six persons residing in each home. A person must apply for admission to the group home and the home is owned by the agency. All food, furniture, and furnishings are provided by the owner or operator of the group home. A group home also can discharge a person. When a person is discharged from a group home, he/she can appeal the decision to the director of the Ohio Department of Developmental Disabilities who will decide if the discharge should be granted. People who live in group homes still may choose different waiver providers for employment, transportation, or other supports.

Intermediate Care Facilities – A person may live in intermediate care facilities for individuals with intellectual disabilities, referred to as ICF/IID. These facilities are licensed by DODD and certified by the Ohio Department of Health as meeting federal requirements for Medicaid funding. ICF/IIDs can range in size from four beds to more than 16 beds.

ICF/IIDs are operated by a specific provider at a specific location who is responsible for providing for all aspects of care for the individual, including: financial matters, transportation, habilitation, and medical needs. Providers operating an ICF/IID can include a county board or board of county commissioners, a private nonprofit corporation, or a private for-profit corporation. Services are coordinated by a Qualified Intellectual Disabilities Professional (QIDP) and not an SSA. Persons who live in an ICF/IID may not be receiving

services from a county board of developmental disabilities.

A person must apply for admission to an ICF/IID. An ICF/IID can discharge a person. When a person is discharged from an ICF/IID, they can appeal the decision to the director of DODD. The director of DODD will decide if the discharge should be upheld.

DODD operates eight ICF/IIDs that are referred to as “Developmental Centers.” To be admitted to a developmental center, a person must be involuntarily committed pursuant to R.C. 5123.71 – 5123.76, or be a voluntary admission, per R.C. 5123.69, that is facilitated by a county board of developmental disability.

Persons with developmental disabilities have the ability to make choices in their living arrangements. To help those considering moves in or out of ICF/IIDs, DODD offers two counseling types. Pre-admission counseling is available to persons who consider moving into an ICF/IID with nine or more beds. This counseling is designed to help a person with a developmental disability obtain the information he/she needs to make a choice concerning available living options, such as living on their own, living with others in the community, or living in an ICF/IID. The final decision as to where to live is made by the person and/or his/her guardian.

Options counseling is available to persons currently living in an ICF/IIDs with nine or more beds.

Everyone who lives in an ICF/IID can elect to take part and learn about options available to support them if they want to move from an ICF/IID.

I. The Guardian and Court’s Roles in Residential Options [Sup.R. 66.08(E)]

It is generally expected that guardians will choose a residential option that is the least restrictive service to meet the individual’s needs. [R.C. 5124.68; Ohio Adm.Code 5123:2-9-02] A guardian is required to notify the probate court when a person intends to move to another residence or residential setting and the reason for the change. Except when impracticable, the notice must be given at least 10 days prior to the proposed change. When a person intends to move to a more restrictive setting, such as an ICF/IID or a Nursing Facility, in or outside of the county where the guardian resides, the change of residence is subject to the court’s approval, unless a delay in authorizing the change would affect the health and safety of the individual.



3. ALTERNATIVES TO GUARDIANSHIP AND LEAST-RESTRICTIVE ALTERNATIVES

Guardianship can be an appropriate and effective choice for an individual who is incapable of making necessary decisions. However, a person with a developmental disability is not automatically considered incompetent. Even if an application for guardianship was filed, the court may deny guardianship if a less-restrictive alternative exists. [R.C. 2111.02(C)(6)] The following outlines less-restrictive alternatives that may provide assistance people need with certain decisions and activities of daily living, which would prevent the need for guardianship.

A. Supported Decision-Making

Supported decision-making is a model allowing adults with disabilities to retain their legal decision-making rights while identifying a network of individuals who can assist them to better understand and evaluate decisions they make. Some individuals choose to create formal, written, supported decision-making plans identifying the people who they will consult about particular decisions. Other situations are handled informally, such as an adult who asks a parent to attend medical appointments or team meetings with them.

This model received international support. In 2006, the United Nations Convention on the Rights of People with Disabilities voted to adopt [Article 12](#). This article incorporates language supporting access for individuals with disabilities “to the support they may require in exercising their legal capacity.”

See Section 15 Resources for more information on Supported Decision-Making.

B. Chosen Representative [R.C. 5126.043]

An individual with a developmental disability is able to make decisions regarding services and programs through the developmental-disabilities system. However, these individuals may authorize a chosen representative to make decisions for them in regard to services and programs. The authorization must be in writing and the chosen representative cannot have a financial stake in the outcome of any decisions being made. If an individual is found to be incompetent, upon the appointment of a guardian, the ability to make decisions rests with the guardian.

Any chosen representative making such decisions shall make them in the best interests of the individual consistent with the needs, desires, and preferences of that individual with respect to services or programs provided through the developmental-disabilities system.

C. Protectorships [R.C. 5123.55]

Protectorships either can be appointed by the probate court or made in agreement with the individual. Advocacy and Protective Services, Inc. (APSI) acts as the Ohio Department of Developmental Disabilities’ contract agency for protective services for individuals with developmental disabilities. Probate court

protectorships can provide oversight or support of existing guardianships, or can provide a less-restrictive alternative for individuals who no longer need the full support of a guardian. Non-probated protectorships can assist individuals who were not found incompetent, but who request some assistance with making or carrying out decisions. APSI can serve as a protector, either by probate court appointment or by agreement with the individual.

D. Protective Services

Protective services can be pursued instead of guardianship when an individual is at risk of harm, but is capable of making decisions or otherwise not in need of a guardian. For example, if an individual who does not have a guardian experiences neglect in his/her family home and that home is an unsafe environment, then the county board could provide protective services to move him/her to a safe home. For more information about protective services and how to access these services, see *Section 8: Abuse, Neglect and Exploitation*.

E. Stable Accounts

Ohio Stable Accounts are an appropriate alternative to a guardianship of the estate and special-needs trust in cases when the individual is protecting assets of less than \$15,000 annually. Stable Accounts can be created online at www.stableaccount.com. These accounts can be created by the individual with a disability, parent, guardian, or POA. There is an annual limit of \$15,000 that can be deposited into a STABLE account. Funds in these accounts will not be considered a countable resource for Medicaid and Social Security purposes. Once opened, a debit card can be issued and receipts and records must be maintained.

F. Special Needs Trusts

If a STABLE Account cannot be created or cannot fully meet the person's needs, then a Special Needs Trust may be appropriate. The term "Special Needs Trust" is a trust funded with monies belonging to the individual receiving public-assistance benefits. The trust must be established in compliance with 42 U.S.C. 1396p(d) (4) (A) and the laws of the state of Ohio.

To qualify, the special needs trust must satisfy the following requirements:

- The trust is created by the beneficiary, the beneficiary's parents, grandparents, legal guardian, or court.
 - If the trust is created by the court, then it usually entails a judgment entry approving a trust submitted by an applicant. Courts need to determine whether to retain jurisdiction over the trust and the administration thereof.
- The trust is funded with assets that otherwise would belong to the beneficiary.
- The beneficiary is under age 65 at the time the trust is funded.

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- The trust is irrevocable.
 - The trustee has complete, sole, absolute, and uncontrolled discretion in making distributions and may make no distributions at all if the trustee so desires. The trustee's aforementioned discretion can be made contingent upon court approval if the trust remains under the jurisdiction of the court.
 - The trustee must be restricted from making distributions for food, shelter, cash, or cash equivalents.
 - The trustee must be restricted from making distributions of trust funds directly to the beneficiary.
 - At the death of the beneficiary or upon early termination of the trust, the trustee is required to pay the state up to an amount equal to the total medical assistance paid on behalf of the beneficiary under the state plan.

E. Wholly Discretionary Trusts

Wholly Discretionary Trusts often are confused with special needs trusts. A wholly discretionary trust can be established by any third party for the benefit of an individual with a developmental disability. As long as the trust is funded with assets of which the beneficiary has no legal interest or ownership, then the Wholly Discretionary Trust is not required to pay back the government upon the beneficiary's death (assuming it meets the other requirements of wholly discretionary trusts). The key to whether a wholly discretionary trust or a special needs trust is appropriate is the source of the funds being used to fund the trust. Generally, probate courts will not be asked or needed to establish a Wholly Discretionary Trust.

F. Representative Payees

Because Social Security benefits, including appointment and oversight of payees, are governed by federal law, appointment by a local probate court of a guardian of either the person or estate is not controlling. See *Section 10: Social Security and Payees* for more information.

G. Power of Attorney (POA)

The number of families utilizing POAs for individuals with developmental disabilities continues to increase. An individual with a "sound mind" can sign a power of attorney (both health care and durable financial). There are no cases or statutes defining "sound mind." The following are cases and statutes that may assist in determining "sound mind"/capacity to sign a power of attorney. *Testa v. Roberts*, 44 Ohio App.3d 161, 542 N.E.2d 654 (6th Dist., 1988).

- ... Derived from contracts law, the *test to be used to determine mental capacity is the ability of the principal to understand the nature, scope and the extent of the*

business she is about to transact. Vnerakraft, Inc. v. Arcaro, 110 Ohio App. 62, 168 N.E.2d 623 (1st Dist., 1959).

- Although mere confusion and the infirmities of old age are not of themselves determinative of an incapacity to transact one's business, they are competent proof of capability to understand the nature of the transaction and the ability of one to protect his own interests. *Monroe v. Shrivvers*, 29 Ohio App. 109, 162 N.E. 780 (5th Dist., 1927).
- Other capacity rules to consider:
 - Capacity of Settlor of Revocable Trust [R.C. 5806.01]
 - Testamentary Capacity *Niemes v. Niemes*, 97 Ohio St. 145, 119 N.E. 503 (1917).
 - Health Care POA [R.C. 1337.12(E)(4)]
 - Durable/Financial POA [R.C. 1337.28(C)]

H. Conservatorship [R.C. 2111.021]

Conservatorship is a voluntary alternative to guardianship for individuals who were not found incompetent. A person with a developmental disability who is able to make decisions, but wants to receive help in making or carrying out those decisions may select a conservator and file an application with the probate court. Conservatorships follow the same process as guardianships, but the person under conservatorship may limit, modify, or terminate the powers of the conservator at any time.

I. Limited Guardianship [R.C. 2111.02(B)(1)]

A limited guardian is a guardian appointed by the court for a limited purpose or with limited powers. The duration of a limited guardianship may be for a limited time or indefinite. The letter of authority should specify the guardian's limited power or time. Examples of limited-guardianship appointments include:

- Medical purposes only (to provide consent for medical procedures)
- Placement purposes only (admission to a group home)
- Purpose of approving behavior plans and/or psychotropic medication

This less-restrictive form of guardianship can be used instead of full guardianship. A ward for whom a limited guardian is appointed retains all rights in all areas not covered by the court's order. In determining whether a limited guardianship is appropriate, the court should consider whether it addresses all of the identified decision-making needs.

4. APPOINTMENT OF A GUARDIAN

Procedurally, the appointment of a guardian will follow the process outlined in R.C. Chapter 2111. When handling investigations and hearings involved in appointing a guardian for a person with a developmental disability, there are areas of inquiry and best practices to consider. For considerations regarding language during the investigation and at hearings, see *Section 13: Effective Communication* on tips to communicate and on using interpreters.

A. Pre-Hearing Investigation

Court investigators should inquire about recent Major Unusual Incidents (MUIs). An MUI is defined in the Ohio Administrative Code as any alleged, suspected, or actual occurrence that adversely affects the health and safety of an individual. [Ohio Adm.Code 5123-17-02(C)(16)] Recent MUIs, or lack thereof, will help clarify issues in a person's life that may or may not justify guardianship.

- Court investigators should inquire if the person wants counsel.
- Court investigators should make a recommendation to the court if counsel or a guardian ad litem (GAL) should be appointed.

B. Conflicts of Interest

There are more likely to be conflicts of interest in DD guardianships than in any other type. It is very common for a family member or close personal friend to serve as a paid independent provider. The court should always inquire about this, either as part of the investigator's probe or during the appointment hearing.

C. Hearing

- A hearing always shall be held prior to the appointment of a guardian, pursuant to R.C. 2111.02(C).
- The individual with a developmental disability always must be afforded the opportunity to attend and be present at the hearing, regardless of whether he/she has an attorney and within reason, regardless of what behavioral outbursts or disruptions may arise by virtue of the individual being present.
- The burden is on the applicant to produce clear and convincing evidence that the ward is incompetent and in need of a guardian.
- In some instances, hearsay evidence is admissible subject to the respondent's ability to subpoena and cross-examine the witness.

D. Stipulated Incompetency

- An individual who is alleged to be incompetent should not be asked to agree to his/her incompetence. Even if the ward and applicant agree, clear and convincing evidence must be presented to the court showing the individual is in fact incompetent.

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- For this reason, it is considered inappropriate to use a mediation process to determine incompetency. Mediation may be appropriate if it is a choice of which family member should be appointed as guardian.

E. Counsel/GAL

Individuals with developmental disabilities are entitled to litigation counsel of their choice at the initial determination of incompetency and need for a guardian. [R.C. 2111.02(C)(7)] The court must appoint counsel at its own expense if the person is found to be indigent. This right also applies to proceedings to review the need for guardianship under R.C. 2111.49(C). [See *In re Guardianship of Carpenter*, 2016-Ohio-3389, 66 N.E.3d 272, (3rd Dist.)]

A court can consider the appointment of a guardian ad litem (GAL) when the current guardian may not be representing the best interests of a ward or there is the possibility of a conflict of interest between the guardian's and ward's interests. A GAL who is not a licensed attorney cannot question witnesses or otherwise act as counsel for the ward. [See *In re J.L.R.*, 4th Dist. Washington No. 08CA17, 2009-Ohio-5812]

The duties of an attorney and GAL are not always identical and may conflict. [*In re Baby Girl Baxter*, 17 Ohio St. 3d 229, 479 N.E.2d 257 (1985)] The role of a GAL is to investigate the ward's situation and then to ask the court to do what the GAL feels is in the ward's best interest. The role of the attorney is to represent the client's legal interests, including the protection of rights codified in statute, within bounds of the law. *Id.*, at 232-33.

F. Limits to Guardianship for Behavioral Concerns

A guardianship application may be filed for a person with a developmental disability due to poor choices and actions of that person. In these situations, it is important to consider, during the investigation and the hearing, how the guardian may be able to assist the individual. Although the person may make poor choices, if they do not fit the definition of incompetency, then guardianship is not an available option.

At times, a person with a developmental disability will make poor choices and there may be a conflict between the individual, the provider, and the behavior-support plan. For example, if an individual is overeating or eating unhealthy foods and there are concerns about this causing or exacerbating health problems, can a guardian change this behavior? What is the risk of harm for this behavior? Are there other community resources or changes that could be made to assist this person without the appointment of a guardian? Have the less-restrictive alternatives or limited guardianships been explored? Does this situation fit the legal definition of incompetency? These questions may be answered differently in every situation, but it is recommended that all possibilities be addressed during the investigation and hearing to appoint a guardian.

5. RESTORATION AND TERMINATION OF GUARDIANSHIP

A. Termination of Guardianship

Guardianship may terminate under certain circumstances. These circumstances include:

- Marriage of a ward [R.C. 2111.45];
- When a minor ward reaches the age of majority [R.C. 2111.46]; or
- Proof that the necessity for the guardianship no longer exists, including the person is no longer competent [R.C. 2111.47].

NOTE: If a guardianship of an estate terminates, the guardian will be required to file a final accounting of the guardian's actions as guardian of the estate within 30 days after completing the administration of the ward's estate. [R.C. 2109.302]

Guardianship does not terminate automatically if the guardian moves out of state. When a guardian moves out of state, the following considerations may be made:

- A guardian of the person may live out of state if the guardian still is able to make appropriate decisions in the ward's best interest and comply with visitation requirements of Sup.R. 66 and the local rules of court.
- If a guardian moves out of state, he or she may file a request to resign with a probate court. However, he or she will remain the guardian of the ward until discharged by the court.
- A guardian of an estate of an Ohio ward must reside in the state of Ohio, with few exceptions. [R.C. 2109.21(C)(1)]
- A guardian of an estate may be removed upon proof the guardian of the estate is no longer a resident of Ohio. [R.C. 2109.21(C)(2)]

B. Restoration to Competency [R.C. 2111.49]

There is a common misconception that individuals with developmental disabilities will need guardians throughout their lifespans. In reality, many individuals are restored to competency and have their guardianships terminated. Some people in the DD system refer to this process as "becoming their own guardian."

The guardian's report is designed to continually assess the need for a guardian. In the report, the guardian must identify any changes to the ward's physical or mental condition. The report also requires a statement by a professional who has evaluated the ward within the past three months, if the guardianship needs to be continued. Additionally, the guardian must indicate his/her opinion of the continuation of the guardianship. These three sections of the report may be utilized by the court to determine if a guardianship still is necessary.

If the ward wants to be reassessed for competency and continuation of a guardianship, the process is similar to the process for establishing a guardianship and considering less-restrictive alternatives. Individuals with guardians have the right to request a review hearing to determine the necessity of the guardianship. Upon request, a hearing must be held each calendar year. At the review hearing, the ward has the same rights as at the initial hearing for the appointment of the guardian, including the right to appointed counsel and an evaluation. [*State ex rel. McQueen v. Cuyahoga Cty. Common Pleas Court Probate Div.*, 8th Dist. Cuyahoga No. 97835, 2012-Ohio-1839] If the ward seeks to terminate the guardianship based on competence, then the guardian must prove by clear and convincing evidence that the individual is incompetent.

6. RIGHTS OF INDIVIDUALS WITH A DEVELOPMENTAL DISABILITY UNDER GUARDIANSHIP

Guardianship does not terminate all rights, especially fundamental rights that implicate the person’s privacy. It is important to remember that individuals still may have the capacity to exercise certain rights even when they are found incompetent by a probate court. Capacity is fluid and can depend on the seriousness of the decision to be made, the type of understanding or expertise required to make the decision, and the extent to which the person’s well-being or understanding fluctuates over time. For example, a person who is incompetent generally still has the capacity to make non-life-threatening daily decisions about what to eat or what clothes to wear.

A. Voting Rights

Guardianship does not terminate an individual’s right to vote, but some guardians may be confused about their wards’ voting rights. In fact, some guardians incorrectly believe they have the right to complete an absentee ballot on their wards’ behalf. Guardians should be informed that their wards may choose to register and vote, except in the rare situations when the probate court held a hearing specifically to determine whether the ward is incompetent for voting purposes.

Poll workers are required to accommodate individuals with disabilities and a person’s right to vote cannot be challenged based solely on mental capacity. In 1984, the Ohio Secretary of State entered into a consent decree in the case of *Glancy, et al., v. Morrow County Bd. Of Elections, et al.*, MP/C-2-82-991, which clarifies the voting rights of individuals with developmental disabilities. The text of the consent decree is at disabilityrightsohio.org/voting-glancy-consent-order.

B. Driving Privileges [R.C. 4507.08; R.C. 4507.20]

Guardianship does not prohibit a person from obtaining or maintaining a driver’s license. A guardian’s permission is not required for an adult to obtain or maintain a driver’s license. However, if a registrar of motor vehicles believes a person has a mental or physical disability that prevents the person from exercising reasonable control over a vehicle, then the registrar can require the person to obtain a physician’s statement as to whether the person’s condition is under medical control and whether the person should retake any required vision, knowledge, or driving tests. Based on that information, the registrar may suspend or restrict the person’s license.

C. Marriage and Divorce

Guardianship does not necessarily prevent a person from marrying. [See R.C. 3101.01.] A person who has a guardian may marry if he or she has the capacity to enter into the marriage contract — that is, to understand the meaning, rights, and

obligations of marriage. However, there is a rebuttable presumption that a person under guardianship does not have the capacity to form a contract. R.C. 2111.45 states that the marriage of a ward terminates a guardianship of the person, but not a guardianship of the estate.

Because many individuals with developmental disabilities who have guardians receive Social Security benefits (SSI or SSDI), it is important for them to know that married couples receive a lower level of benefits than single individuals.

D. Sexuality

There is a common misperception that individuals with developmental disabilities are asexual or incapable of engaging in sexual activity. Guardianship does not terminate a person's right to engage in sexual activity. If there is a conflict over whether the individual has the capacity to consent to sexual activity, it can be helpful to obtain an assessment evaluating the person's knowledge of sexual issues (including risks and legal issues), voluntariness, and rationality.

Many county boards of developmental disabilities and advocacy groups offer sexuality education programs to assist individuals with developmental disabilities in understanding issues related to sex. These programs also equip individuals with developmental disabilities with knowledge and self-advocacy skills to protect themselves from sexual victimization.

E. Reproduction

Guardians do not have sole authority to make decisions on reproductive matters such as childbearing, abortion, and sterilization, given that these decisions involve fundamental privacy concerns for the individual. The guardian or the individual under guardianship can petition the court if there is a conflict over reproductive decisions. Medicaid will not cover sterilization procedures if the individual was determined to be incompetent, unless the person is declared competent to consent to sterilization.

Probate courts should exercise caution when entering orders affecting a person's ability to reproduce. In *Wade v. Bethesda Hospital*, 337 F. Supp. 671 (S.D. Ohio 1971), the court held that a probate judge did not have immunity from civil suit for ordering the sterilization of a person with a developmental disability.

F. Restrictions to an Individual's Rights

Service providers for individuals with developmental disabilities are required to follow the regulations of their oversight agencies, such as the Ohio Department of Developmental Disabilities, the Ohio Department of Health (ODH), and the federal Center for Medicare & Medicaid Services (CMS). If the providers do not follow these regulations, they can lose their licensure or certification to provide services.

Sometimes, these regulations conflict with directives from guardians who want the providers to take more restrictive actions to keep a ward safe. For example,

a guardian may tell a provider not to allow her ward to spend time with persons of the opposite sex because the ward has engaged in unhealthy relationships or risky sexual behavior in the past. The guardian may even ask the probate judge to order the provider to implement this directive. R.C. 5123.62(K) states that individuals with developmental disabilities have the right to social interaction with members of either sex and providers are required to respect those rights. When the provider is unsure whether to follow the guardian's request or the applicable statute or regulation, it is important for all involved parties to work together to reach a resolution that is in the best interest of the individual. If the issue cannot be resolved, it may come to the court's attention with evidence supporting what is in the best interest of the ward. The court can facilitate a determination of which plan is in the best interest.

These questions have become more prevalent since DODD updated its rule regarding behavior supports for individuals with developmental disabilities in 2016. Ohio Adm.Code 5123:2-2-06 limits the use of rights restrictions and other "restrictive measures" as means of last resort only when necessary to keep the individual safe and when approved by a local human rights committee. The human rights committee reviews requests for restrictive measures and determines whether those measures are appropriate and necessary to reduce the risk of harm or likelihood of legal sanction (such as criminal charges) for the individual. Note that this process is not required for court-ordered community controls, such as probation orders.

In some cases, guardians direct that a ward's rights be restricted, but the human rights committee did not approve the restriction. For example, a guardian may ask a provider to lock a refrigerator door, take away a cell phone, or restrict phone calls or visitors. It is often helpful for the guardian, provider, county board, and human rights committee to collaboratively consider the individual's specific needs (including the specific risk to the individual) and any alternative strategies that could address the guardian's health and safety concerns.

G. Rights Protection and Advocacy

Disability Rights Ohio (DRO) is a non-profit corporation with a mission to advocate for the human, civil, and legal rights of people with disabilities in Ohio. DRO is designated by the governor under federal law as Ohio's Protection and Advocacy (P&A) system and Client Assistance Program (CAP). DRO's vision is a society in which people with disabilities are full and equal members, enjoy the rights and opportunities of all people, are self-directed, make decisions about where, how, and with whom they will live, learn, work and play, have access to needed services and supports, and are free from abuse, neglect, exploitation, and discrimination. DRO provides legal and policy advocacy statewide. More information is at disabilityrightsohio.org/ and requests for service may be made by calling 1.800.282.9181, opt 2.

RIGHTS OF PERSONS WITH A DEVELOPMENTAL DISABILITY [R.C. 5123.62]

The rights of persons with developmental disabilities include, but are not limited to, the following:

- (A) The right to be treated at all times with courtesy and respect and with full recognition of their dignity and individuality;
- (B) The right to an appropriate, safe, and sanitary living environment that complies with local, state, and federal standards and recognizes the persons' need for privacy and independence;
- (C) The right to food adequate to meet accepted standards of nutrition;
- (D) The right to practice the religion of their choice or to abstain from the practice of religion;
- (E) The right of timely access to appropriate medical or dental treatment;
- (F) The right of access to necessary ancillary services, including, but not limited to, occupational therapy, physical therapy, speech therapy, and behavior modification and other psychological services;
- (G) The right to receive appropriate care and treatment in the least intrusive manner;
- (H) The right to privacy, including both periods of privacy and places of privacy;
- (I) The right to communicate freely with persons of their choice in any reasonable manner they choose;
- (J) The right to ownership and use of personal possessions so as to maintain individuality and personal dignity;
- (K) The right to social interaction with members of either sex;
- (L) The right of access to opportunities that enable individuals to develop their full human potential;
- (M) The right to pursue vocational opportunities that will promote and enhance economic independence;
- (N) The right to be treated equally as citizens under the law;
- (O) The right to be free from emotional, psychological, and physical abuse;
- (P) The right to participate in appropriate programs of education, training, social development, and habilitation and in programs of reasonable recreation;
- (Q) The right to participate in decisions that affect their lives;
- (R) The right to select a parent or advocate to act on their behalf;
- (S) The right to manage their personal financial affairs, based on individual ability to do so;
- (T) The right to confidential treatment of all information in their personal and medical records, except to the extent that disclosure or release of records is permitted under R.C. 5123.89 and 5126.044;
- (U) The right to voice grievances and recommend changes in policies and services without restraint, interference, coercion, discrimination, or reprisal;
- (V) The right to be free from unnecessary chemical or physical restraints;
- (W) The right to participate in the political process;
- (X) The right to refuse to participate in medical, psychological, or other research or experiments.

7. ABUSE, NEGLECT, AND EXPLOITATION

The rights of a person with a developmental disability include the right to be free from psychological, emotional, and physical abuse, the right to live in a safe environment, and the right to manage financial affairs based on his/her ability to do so. [R.C. 5123.62] To ensure that people are free from abuse, neglect, and exploitation, several processes were put into place to help this vulnerable population. This section will explore what abuse, neglect, and exploitation are for this population, the guardians' role, and the Department of Developmental Disabilities' role in identifying and protecting individuals.

Research has shown that persons with developmental disabilities are more likely to be victims of crimes. According to the Bureau of Justice Statistics, it is believed that one in five disabled victims of violent crimes were targeted due to their disability. In 2015, the rate of violent crimes against persons with disabilities was two and a half times higher (29.5 victimizations per 1,000 people) than the rate for those without disabilities. Moreover, the severity of the crime against persons with disabilities is higher than those committed against persons without disabilities. Persons with disabilities face challenges when it comes to being abused, neglected, and exploited, including physical or social isolation, lack of independence on matters of housing, transportation, and ability to care for oneself; and significant dependence on caregivers.

These factors often contribute to an increased risk of victimization.

A. Reporting Incidents of Abuse and Neglect

Under R.C. 5123.61, any person who has reason to believe a person with a developmental disability has suffered or faces a substantial risk of suffering any wound, injury, disability, or condition of such a nature as to reasonably indicate abuse or neglect of that person is to immediately report or cause reports to be made to a law enforcement agency or a county board of developmental disabilities.

Examples of persons required to report incidents of abuse include all providers who are under contract or certified or licensed to serve persons with developmental disabilities and all employees of county boards of developmental disabilities.

As defined in R.C. 5123.50, "abuse" means (1) the use of physical force that reasonably can be expected to result in physical harm or serious physical harm; (2) sexual abuse; or (3) verbal abuse. "Sexual abuse" means the unlawful sexual contact or sexual conduct as defined in R.C. 2907.01. "Verbal abuse" means purposely using words to threaten, coerce, intimidate, harass, or humiliate an individual.

"Neglect" means, when there is a duty to do so, failing to provide an individual with any treatment, care, goods, or services necessary to maintain the health and safety of the individual. [R.C. 5123.50]

B. Major Unusual Incidents of Persons with Developmental Disabilities

The developmental disability system investigates many allegations of abuse, neglect, and exploitation as Major Unusual Incidents (MUIs). Courts can receive information about substantiated allegations of abuse, neglect, and exploitation from guardians at the conclusion of these investigations.

Major Unusual Incident (MUI) is defined in Ohio Adm.Code 5123-17-02 as an alleged, suspected or actual occurrence of an incident when there is reason to believe the health and welfare of an individual may be adversely affected and the individual may be placed at a reasonable risk of harm.

The following occurrences are MUIs:

- Accidental or suspicious death
- Exploitation
- Failure to report
- Misappropriation
- Neglect
- Peer-to-peer act
- Physical abuse
- Prohibited sexual activity
- Rights code
- Sexual abuse and verbal abuse
- Attempted suicide
- Medical emergency
- Missing individual
- Death (other than an accidental or suspicious)
- Significant injury
- Law enforcement
- Unapproved behavior supports
- Unscheduled hospitalizations

County boards of developmental disabilities contract with or employ investigative agents (IA) who are certified by DODD. Their only role is to investigate MUIs and conduct other MUI functions.

IAs are required to investigate MUIs and ensure proper notifications are made to law enforcement, when required, and to the guardian. The investigation process is

to identify the primary cause and contributing factors to prevent future incidents from occurring. DODD conducts the investigation when it would be a conflict of interest for the county board of developmental disabilities to complete. The findings of the investigation are reported to the guardian.

An MUI contact person is appointed at each county board of developmental disabilities to receive reports of possible MUIs. Incidents may be reported to that person or to any employee of a county board of developmental disabilities. DODD also has a hotline at 1.866.313.6733, which may be used if there are concerns or difficulties in reporting to the county board of developmental disabilities.

All MUI reports are reviewed by DODD to ensure immediate action, timely reporting, good investigations, and necessary implementation of prevention plans. DODD reviews patterns and trends for individuals and the state.

C. Unusual Incidents (UI)

Unusual incidents are defined in Ohio Adm.Code 5123-17-02 as an event or occurrence involving an individual that is not consistent with routine operations, policies, and procedures, or the individual's care or individual service plan, but is not a major unusual incident.

UIs include, but are not limited to, dental injuries; falls; injuries that are not significant; medication errors without a likely risk to health and welfare; overnight relocation of an individual due to a fire, natural disaster, or mechanical failure; incident involving two individuals that is not a peer-to-peer act; major unusual incident; and rights code violations or unapproved behavior supports without a likely risk to health or welfare.

UIs are to be reported and investigated by the provider. The provider is required to conduct a monthly review of UIs and keep a log of UIs by name of the person that includes the date, time, and location of the incident, as well as the preventive measures implemented to address the incident.

MUI REPORTING FLOW CHART

INCIDENT OCCURS



PROVIDER'S ROLE



Immediate action to protect health and safety is completed by the provider



Notifies legal guardian (same day)



(Parents who are not the legal guardians only may be notified with approval by the son or daughter or the legal guardian)



Notifies the county board immediately and no later than 4 hours when the allegation is abuse, neglect, misappropriation, exploitation, suspicious or accidental death



Notifies the police/or children's services board when there is an alleged crime



Written incident report is filed by the provider to the county board by 3 p.m. of the next working day

COUNTY BOARD'S ROLE



Ensures or notifies police of a possible crime

And/or

Children's services board of suspected abuse or neglect and the person is under 21



Notifies county board SSA (same day)



Notifies the licensed or certified residential provider if the incident happened in the county board program (same day)



Ensures legal guardian is notified the same day



Submits a report on the department's incident tracking system by 3 p.m. the next working day following the notification



Sends a summary letter to the legal guardian and residential provider 5 calendar days after the case was recommended for closure by the county board

DODD'S ROLE



Intake reviews all initial reports to ensure immediate actions occurred, notifications were made, and the MUIs were classified appropriately



Conducts investigation when it is a conflict for the county board to do so



Review cases prior to closure to assure appropriate cause/contributing factor identification and prevention plan development



Notifies Ohio Department of Job and Family Services via online incident reporting system

D. Protective Services Statutes for Adults with Developmental Disabilities Are Located in R.C. 5126.30 - .333

“Protective services” are services provided by county boards of developmental disabilities for the prevention, correction, or discontinuance of an act, as well as conditions resulting from abuse, neglect, or exploitation.

County boards of developmental disabilities are authorized to file a complaint with the probate court for the issuance of an order for the board to provide protective services for an adult eligible to receive services from the county board. Prior to issuing a final order, the court can issue a number of temporary orders, including: a temporary protection order, an order requiring the evaluation of the adult, and an order requiring a party to vacate the adult’s place of residence or legal settlement.

Upon the issuance of the order for protective services, the board files a protective services plan with the court. The protective services plan is an individualized plan developed to prevent further abuse, neglect, or exploitation of the adult. The court is to designate the services necessary to deal with the abuse, neglect, or exploitation or condition resulting from the abuse, neglect, or exploitation that are available locally, and authorize the board to arrange for only those services. An order for protective services is valid for six months and can be renewed for an additional six months. The protective services plan only can be changed by court order.

If the court finds all other options for meeting the adult’s needs are exhausted, then it may order the adult be removed from the adult’s place of residence and placed in another residential setting. Before issuing that order, the court must consider the adult’s choice of residence and determine the new residential setting is the least-restrictive alternative available to meet the adult’s needs and is a place where the adult can obtain the necessary requirements for safe daily living. The court shall not order an adult to a hospital or public hospital, as defined in R.C. 5122.01, or a state institution (residential facility under the jurisdiction of the Department of Developmental Disabilities) as defined in R.C. 5123.01.

The court shall not authorize a change in an adult’s placement ordered, unless it finds compelling reasons to justify a change.

A probate court, through a judge or magistrate, may issue by telephone an “ex parte emergency order” when there is a reasonable cause to believe the adult is incapacitated and there is a substantial risk of immediate physical harm or death. Emergency Protective Services are protective services furnished to a person with developmental disabilities to prevent immediate physical harm. An ex parte emergency order is good only for 24 hours and a complaint for protective services must be filed.

In these proceedings, the adult is entitled to counsel and, if indigent, counsel is to be appointed. The adult can waive his/her right to counsel if the court finds he/she made a voluntary, informed, and knowing waiver. The county board is represented by the prosecutor or an attorney designated by the board. The Ohio Rules of Evidence apply to the hearings. The parties to a protective services case are the adult with developmental disabilities, the caretaker (person responsible for the care of the adult, including the guardian or a person who assumed the responsibility for the care of the adult as a volunteer, family member, by contract, or by the acceptance of payment for care) and any other person designated by the probate court, including, but not limited to, the adult's spouse, custodian, guardian, or parent.

E. Court's Response to Abuse, Neglect, and Exploitation

Guardians are required under Sup.R. 66.08(C) to report allegations of abuse, neglect, or exploitation of their wards to the probate court and, when applicable, to adult protective services.

When a probate court becomes aware that abuse, neglect, or exploitation occurred, the court will take appropriate action. Oftentimes, the probate court will send a court investigator to investigate the matter. Upon the conclusion of the investigation, or concurrently with the investigation in cases where immediate action is needed, the court takes the appropriate steps to guarantee the health, safety, and well-being of the ward. The course of action the court takes depends upon the facts of the case and whether the ward was abused, the victim of self-neglect or neglect by others, or exploited.

In cases of physical, mental/emotional, or sexual abuse, the court can issue a no-contact order between the ward and alleged abuser, change the ward's placement to ensure the ward's safety, and secure counseling or other beneficial therapeutic services for the ward. If the ward is engaging in self-neglect or is the victim of neglect by others, then the court can order proper services and support be put in place to alleviate the neglect or move the ward to protect the ward's health and safety. In cases of financial exploitation, the probate court can freeze financial accounts and order an accounting of assets and/or restitution. The court can concurrently order that only expenditures that are reasonable, necessary, and beneficial for the ward are permitted.

In addition to investigating, issuing orders, and moving the ward, the probate court can schedule a review hearing. The court will elicit testimony regarding the incident and issue any other necessary orders at the review hearing. In all cases of abuse, neglect, or exploitation, the probate court will coordinate with law enforcement, the prosecutor's office, adult protective services, the county board of developmental disabilities, or other community partners when appropriate. Further, the probate court tracks and reviews MUI reports to confirm a suitable plan or preventative measures are put into place.

Sup.R. 66.09(A) prohibits the guardian from financially exploiting, abusing, or engaging in any activity not in the best interest of the ward. If the perpetrator of the abuse, neglect, or exploitation of the ward is the guardian, then the probate court will undertake any actions detailed above that are necessary to guarantee the health, safety, and well-being of the ward. If the probate court determines the guardian is no longer suitable and qualified to serve as guardian for the ward, the court will accept the guardian's resignation or set the matter for a removal hearing, remove the guardian, and appoint a successor guardian.



8. MEDICAID AND WAIVERS

A. Medicaid Waivers Administered by DODD

A Medicaid waiver is one way to pay for services that help persons with a disability live their life. Those services can be things like help getting dressed or taking a shower, help shopping for food or help cooking food, or training and help finding a job, along with other services.

Self-Empowered Life Funding (SELF) Waiver

- The SELF Waiver is Ohio's first participant-directed waiver. The person directs where and how he/she receives services.
- *Eligibility:* People with developmental disabilities must be willing and able to self-direct at least one waiver service, be able to have their health and welfare needs met through the SELF Waiver, need at least one SELF Waiver service, be Medicaid-eligible, and have an intermediate-care-facility level of care.

Level One Waiver

- The Level One Waiver allows for minimal paid support and relies heavily on natural supports assisting people with developmental disabilities to live in community settings of their choice with support instead of living in an institution.
- *Eligibility:* People with developmental disabilities must be Medicaid-eligible and have an intermediate-care-facility level of care.

Individual Options (IO) Waiver

- The Individual Options Waiver is a more comprehensive waiver allowing people with developmental disabilities to live in community settings of their choice with support instead of living in an institution. The IO Waiver has a higher funding limit and waiver services are developed in order to meet a person's individualized needs.
- *Eligibility:* People with developmental disabilities must meet Medicaid-eligibility criteria and have an intermediate-care-facility level of care.

If a waiver opportunity is not immediately available, a person can request to be placed on the home- and community-based services waiting lists. While on the waiting lists, the county board will assist in identifying people's immediate needs and assist in obtaining alternative services.

Waiver eligibility and level of care must be renewed annually, which can be done through the county board. In addition, once enrolled on a waiver, a person must continue to meet Medicaid-eligibility requirements every month to continue waiver services. Medicaid eligibility also must be renewed annually with a person's local job and family services office.

Determination of eligibility for Medicaid services is separate and distinct from eligibility for county DD-board services.

B. Services and Due Process Rights in Medicaid

Under both federal and state Medicaid law, an applicant or recipient must be given written notice of any planned denial, modification, or termination of services. The notice must contain written information about appeal rights. The person or his/her “authorized representative” may appeal. The appeal must be received by the state Medicaid department within 90 days of the mailing date on the notice. Medicaid services must be continued at the current level during the appeal, but only if the appeal is made within 15 days of the mailing date on the notice.

Ohio has a two-tier appeal process for people who receive Medicaid through a managed-care plan. This includes almost all recipients, except for those on long-term services and supports (nursing homes, ICFs, and HCBS waivers).¹² Before pursuing formal Medicaid-hearing remedies, the person must appeal to the managed care provider. The appeal must be submitted within 60 days of the adverse notice or within 15 days if the person wishes the services to continue. [Ohio Adm.Code 5160-26-08.4] After exhausting this level of appeal, the person may file a due process appeal with the Ohio Department of Medicaid.

After the Medicaid hearing officer issues a ruling, the person may file an administrative appeal to the state department. If that is not successful, the person may appeal an adverse determination to the court of common pleas in the county of residence. In some limited cases, federal courts also can consider violations of federal statute that result in denial or termination of services.

More detailed information is available at disabilityrightsohio.org/medicaid-appeals-overview.

A Qualified Income Trust (QIT) or sometimes referred to as a “Miller Trust” is a special legal arrangement that allows the Ohio Department of Medicaid to not recognize an individual’s income that is over a specific amount (currently \$2,205) into a monthly trust. Additional information on eligibility is available at medicaid.ohio.gov/Portals/0/Initiatives/DDR/FAQ-QIT.pdf.

¹² People on the MyCare Ohio demonstration waiver who receive long-term services and support are covered by managed care. This applies only to individuals who are dual recipients of Medicare and Medicaid and is limited to recipients in Butler, Clark, Clermont, Clinton, Columbiana, Cuyahoga, Delaware, Franklin, Fulton, Geauga, Greene, Hamilton, Lake, Lorain, Lucas, Madison, Mahoning, Medina, Montgomery, Ottawa, Pickaway, Portage, Summit, Stark, Trumbull, Union, Warren, Wayne, and Wood counties.

9. SOCIAL SECURITY AND PAYEES

Under federal law, some individuals who receive disability payments under Title II (SSDI) or Title XIV (SSI) of the Social Security Act and are deemed by the Social Security Administration not capable of handling their own funds are required to use the services of a representative payee. [42 U.S.C. 1007] Some individuals who are under guardianship also may have a “representative payee” assigned by the Social Security Administration to manage the person’s benefits under Title II or Title XVI disability programs. The court does not have jurisdiction over the payee.

More information on payees and Social Security disability generally can be found in the Social Security Administration’s “Red Book.”¹³

The secretary or designee is responsible for the oversight of these payees. In 2018, Congress created a program that charges the protection and advocacy agency (P&A) to investigate representative payees in the state. Ohio’s P&A is Disability Rights Ohio.

The P&A reviewers will:

1. Help representative payees understand their obligations to the beneficiary;
2. Review financial records the representative payees use to keep track of the beneficiaries’ Social Security benefits to ensure no concerns are present;
3. Speak with the representative payee and beneficiary about the payeeship in order to discuss issues either or both may have;
4. Make outside referrals if other issues are uncovered through the review;
and
5. Ensure any issues found are addressed through the appropriate agencies.

If abuse, neglect, or exploitation is found, the P&A may conduct further investigations and make necessary reports or refer the matter to the appropriate entity. This could include the probate court if the payee also is the guardian.

¹³ ssa.gov/redbook/.



10. WHEN FAMILY MEMBERS ARE GUARDIANS

Family members serve as guardians for the majority of individuals with developmental disabilities who have guardians. These family members — whether parents, siblings, or extended family — are important natural supports throughout the individuals' lives. This section provides information about issues courts should be aware of and resources to handle potential conflicts.

A. Family Conflicts

Conflict within a family may arise in a variety of circumstances, such as parents who are divorced or siblings disagreeing about the guardianship or services for another sibling after the death of their parents. Courts may become involved in these conflicts when multiple family members apply for guardianship or when family members file complaints against the appointed guardian.

When reviewing competing applications, courts should consider whether the applicant is able to appropriately handle the conflict and prioritize the interests of the individual with a disability over the applicant's own interests in the conflict.

Some questions to consider in these cases include:

- Will the applicant restrict communication between the individual and his/her family members because of the family conflict?
- Will the applicant consider professional opinions about whether restricting or allowing communication is in the individual's best interest?

If the court determines the family conflict is too intense for any family member to serve as guardian, then it may be appropriate to appoint an independent third party or professional guardian.

Most courts offer mediation services to resolve family conflicts. Court mediators are neutral third parties who facilitate communication and negotiation among family members to assist them in reaching a voluntary solution regarding their dispute. Court mediators have extensive training, including training in domestic-abuse issues. Mediation often is successful because the parties are involved in creating solutions that best fit their individual circumstances and when families are involved in creating the solutions, the families are more likely to adhere to the agreements.

Conflicts also may arise between the family-member guardian and another entity involved in the ward's care or services. For example, a county board of developmental disabilities or a service provider may disagree with the guardian's decisions and file a complaint with the probate court. In extreme cases, the county board or provider may encourage the court to remove the family member as guardian. Sometimes, the conflict is due to the guardian's zealous advocacy for the individual or differences in communication style or personality. Before removing a

guardian in situations when the guardian is not abusing, neglecting, or exploiting the individual, courts should consider whether the parties are able to put aside their differences to focus on their joint goals of advocating for the quality of life of the individual.

B. Child Support, Custody and Visitation of the Adult with I/DD

For children with I/DD whose parents are separating, the domestic relations court has jurisdiction to determine custody, support, and visitation rights. In *Castle v Castle*, 15 Ohio St.3d 279, 473 N.E.2d 803 (1984), the Supreme Court of Ohio ruled that an order for support could survive the majority of the person with I/DD. This rule was codified in 2000. R.C. 3119.86(A) states “[n]otwithstanding section 3109.01 of the Revised Code, *** [t]he duty of support to a child imposed pursuant to a court child support order shall continue beyond the child’s eighteenth birthday.” R.C. 3109.01 defines the age of majority in Ohio as “eighteen years or more, who are under no legal disability,*** Several courts have applied this analysis to provide support orders for adult children who have I/DD and are unable to support themselves. See *Donohoo v. Donohoo*, 12th Dist. Clermont Nos. CA2011-11-080, CA2011-11-081, 2012-Ohio-4105 and cases cited in ¶ 15. *But see Geygan v. Geygan*, 2012-Ohio-1965, 973 N.E.2d 276 (10th Dist.).

For adult children (over 18) of separating parents, the domestic relations court has no jurisdiction over questions of custody or visitation; *Geygan, supra*, and these questions eventually may end up before the probate court on an application for guardianship. The adult person with I/DD has a legally protected interest in determining when and whether to spend time or reside with a parent. *In re Guardian of Batista*, 11th Dist. Geauga No. 2013-G-3140, 2014-Ohio-1349, ¶ 25. See *In re Guardianship of Constable*, 12th Dist. Clermont No. CA99-05-039, 2000 WL 745297 (June 12, 2000) (The parent does not have absolute right to visit or have custody of a child). Full due-process protections should be observed, particularly for questions of visitation, as these implicate privacy and associational interests that are protected by the 14th Amendment. The court should make an effort to determine the stated interests of the person with I/DD regarding the relationship with the parents and his or her interest in spending time visiting or residing with them, *Batista*, ¶25. The appointment of a GAL may be in order.

C. Conflicts of Interest

When appointing and reviewing family members as guardians, courts should inquire about potential conflicts of interest and determine whether those conflicts prevent the family member from serving as guardian or whether the conflict can be addressed in other ways. Some potential conflicts include:

- *Family members who are paid providers of “direct services,” such as services provided through Medicaid waivers:* If the family member is the guardian and the service provider, there could be a financial conflict of interest in choosing the provider and ensuring the individual receives appropriate services.

Sup.R. 66.04(D) addresses this conflict by prohibiting the appointment of guardians who provide direct services.

- *Family members who live with the individual and manage the finances as a representative payee or guardian of the estate:* In some cases, the family members have used the individual's income to pay a disproportionate share of household expenses or charged exorbitant "rent" that consumes all of the individual's income. Courts should provide oversight of these arrangements by questioning guardians about how expenses are handled and by reviewing annual guardians' reports.

Some courts developed visitation programs to periodically meet with individuals and their guardians to ensure conflicts of interest are not leading to the neglect or exploitation of the individuals.

D. Succession Planning

Many courts are dealing with situations when an aging caregiver becomes unable to serve as guardian for a family member. These situations can become emergencies when the guardian passes away suddenly or the individual has an urgent need and the court becomes aware that the guardian is unable to continue serving as guardian. Courts can encourage families to prepare for these situations through succession planning.

R.C. 2111.121 provides a process for a person to nominate a guardian for the person's adult child and for the nominee to designate a successor guardian. Courts should provide information about this process to aging parents who serve as guardians for their adult children. Some counties developed programs to help aging caregivers plan for these future needs. Courts could partner with their county boards of developmental disabilities on these programs.

When identifying potential successor guardians, families first should consider other family members who are willing and able to serve as guardian. If all family members reside outside of Ohio, they may consider co-guardianship with a local resident. Other considerations could include family friends and others who developed a supportive relationship with the individual. If no other people are available, then families can explore professional guardians and guardianship agencies in their areas. APSI is available to serve when all other potential guardians were considered and determined to be unavailable.

In addition to succession planning, courts should be aware of warning signs that a family member is no longer able to serve as guardian. Potential warning signs include:

- Annual guardian's report indicates a lack of visits due to the guardian's declining health; and
- Another family member may initiate guardianship proceedings for the guardian due to dementia or mental illness.

Courts may consider developing processes to identify these problems through a review of reports and cross-referencing court filings. This is another situation when visitation programs can assist the court in identifying problematic situations or connecting the family-member guardian with appropriate support so he/she can continue serving as guardian.

11. COMMON CONCERNS

A. For the Guardian

There are some common situations guardians may need to take to the court for consideration. This includes vacation.

Vacation for the Guardians

Guardians of the estate and of the person are able to take vacations without the ward. However, the guardian must fulfill all duties required of the guardian. This includes the requirement to meet with the ward not less than quarterly or otherwise determined by the court. [Sup.R. 66.09(F)(2)(a) Communication with the ward] Even if the guardian is able to meet his or her duties, there are other considerations to be made to ensure that the ward's interests are met if the guardian is unavailable.

These include:

- Is the person aware of the guardian's absence? Does the person have access to the guardian while he or she is on vacation?
- Is the guardian able to delegate authority for emergency decision-making if needed? If so, has contact information been provided to the ward, court, service providers, and others involved in the person's care?
- Will the time away interfere with any scheduled appointments, with the guardian's regular visits, or with a care-planning meeting?
- Will the guardian be on call for emergencies? Has an emergency plan been determined with any care managers or responsible family members?
- Did the guardian develop a written plan for care of the individual during the absence, taking into account these factors?

Vacation with the Ward

If the ward is traveling out of the country for a vacation, the guardian may want to provide information to the court. If the vacation is for an extended period, the guardian will need to consider the definition of residence so that no changes in guardianship need to occur. [R.C. 2111.02 (A)]

Other considerations for the court and the guardian include:

- What are the wishes of the person? Is this in accord with his or her values and preferences?
- Was the trip written into the guardian's care plan or should it have been?
- Are there specific travel challenges to be addressed in planning?

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- Will the time away interfere with scheduled appointments or medical procedures; are there medication prescriptions that need to be renewed, etc.?
 - Have the case manager and all service providers been notified, particularly if the vacation coincides with appointments?
 - Who will pay for the trip? If it will come out of the individuals' estate, is it a prudent use of the funds that can be supported? Will the guardian keep an account of trip expenses to submit to the court?
 - Have family members been informed?

12. EFFECTIVE COMMUNICATION

According to The Arc, an advocacy organization for people with developmental and intellectual disabilities, people with developmental disabilities routinely have their rights limited or denied. When a person also is part of a minority culture, whether due to race, ethnicity, gender identity, or sexual orientation, their rights may be even further ignored.¹⁴ Since developmental disabilities occur across all cultures, when the court and guardian work with an individual from a minority culture, they should consider accommodations available to meet the needs of the person. Some accommodations are required by law, others are considerations that may help make decisions in the best interest of the individual.

Individuals with disabilities are protected against discrimination by federal laws. When a person also is part of a minority group, his or her civil rights may also be protected under federal law. The following are some actions a court and guardian may consider to make decisions in the best interest of the person.

A. Communication Best Practices

Practical Tips for Communication during Hearings, Interviews, and Other Interactions¹⁵

- Prior to the interview, it will be helpful to meet briefly with the caregiver to establish the individual's level of functioning — including receptive language abilities — and to get advice on how best to meet and interact with the client. Identify circumstances that might be upsetting to the individual (many questions, busy/noisy environment, moving too close).
- Familiarity helps (e.g., caregiver present)
- Encourage the use of comforting objects (favorite thing individual likes to carry) or actions (standing, rocking)
- Utilize a quiet spot without interruptions
- Try to establish a positive relationship
 - Interested in object person is holding
 - Show warmth/positive regard
 - Be sensitive to cue/tone of voice
 - Be aware of your own nonverbal behavior

¹⁴ thearc.org/who-we-are/position-statements/rights/human-and-civil-rights.

¹⁵ Adapted from Bradley et al, *Guidelines for Managing the Patient with Developmental Disability in the Emergency Room*, Clinical Bulletin of the Developmental Disability Program (2002), 13.

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- Be aware of the person's response to those around him/her (e.g., too many people)
 - Respect personal space (including a wheelchair or other adaptive equipment)
 - Ask permission, explain, and pre-warn
 - Ways to communicate effectively
 - Use simple words/break sentences down
 - Speak slowly
 - Pause; do not overload the individual with words
 - Be sensitive to the individual's nonverbal cues and adjust behavior accordingly
 - Use visuals
 - Use gestures

You should be aware of the following:

- Persons with developmental disabilities and autism spectrum disorders (ASD) show a great deal of heterogeneity in level of functioning, understanding, ability to communicate needs, discomforts, and concerns. You will have to adapt your approach.
- Those unable to communicate verbally will be aware of nonverbal behaviors in others and are often sensitive to negative attitudes in others toward them. They quickly will pick up on fear and anxiety in you. A warm, accepting, calm, and reassuring attitude will help.
- Appearances may be deceptive. Individuals with DD may appear hearing impaired or that they don't speak, but that does not mean that they don't hear or speak. They frequently overhear comments about them and have strong reactions to such comments.
- Persons with DD/ASD have even greater difficulty understanding what is going on and are likely to be apprehensive and scared.

D. Communication with Individuals with Limited English or Are Hard of Hearing

When communicating with individuals who are limited-English proficient (LEP), deaf, or hard of hearing, make sure you check the resources available on the Language Services web page of the Supreme Court of Ohio to assist you in putting resources in place.

- Determine the language of the party or the communication method of the deaf or hard-of-hearing individual.

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- For LEP and deaf individuals, the Supreme Court's language services program has a roster of certified and otherwise qualified interpreters.
 - In some instances, telephonic interpretation or remote video interpretation may be useful when encountering foreign languages that have little if any interpreter available and video interpreters when the need arises instantaneously.
 - Options vary for telephonic interpreting. National services include LanguageLine Solutions, ALTA language Services, Lionbridge Translations and others. For sign-language video remote interpreters, there are Purple Communications and Stratus Video, as well as LanguageLine Solutions and ALTA Language Services.



13. APPLICABLE STATE AND FEDERAL STATUTES

A. Ohio Probate Court Statutes

R.C. Chapter 2111: Guardians; Conservatorships

- 2111.01 Guardian and conservatorship definitions.
- 2111.011 Guardianship guide.
- 2111.02 Appointment of guardian - limited, interim, emergency, or standby guardian - nomination.
- 2111.021 Physically infirm adult may petition for conservatorship.
- 2111.03 Application for appointment as guardian.
- 2111.031 Appointing physicians and other persons to determine need for guardianship.
- 2111.04 Notice of appointment.
- 2111.041 Investigating circumstances of alleged incompetent.
- 2111.05 Termination of guardianship based on value of ward's estate.
- 2111.06 Guardian of the person.
- 2111.07 Powers of guardian of person and estate.
- 2111.09 Administrator or executor ineligible to be appointed guardian.
- 2111.091 Restrictions on attorney representing guardian.
- 2111.10 Corporation as guardian.
- 2111.11 Spouse may be appointed guardian.
- 2111.121 Nomination of guardian.
- 2111.13 Duties of guardian of person.
- 2111.14 Duties of guardian of estate.
- 2111.141 Inventory to be supported by evidence.
- 2111.15 Duties of guardian of person and estate.
- 2111.151 Liability of guardian or conservator as to contracts and debts.
- 2111.17 Suits by guardians.
- 2111.18 Claim for injury to ward or damage to property - settlement.
- 2111.23 Guardian ad litem.
- 2111.24 Insolvency of ward.
- 2111.40 When nonresident ward becomes a resident.

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- 2111.45 Marriage of ward.
 - 2111.47 Wards other than minors.
 - 2111.471 Transfer of court having jurisdiction.
 - 2111.49 Report of guardian of incompetent.
 - 2111.50 Probate court is superior guardian of wards.
 - 2111.51 County indigent guardianship fund.

B. Rules of Superintendence

Sup.R. 66: Guardianship

- 66 Guardianships
- 66.01 Definitions
- 66.02 Application of Rules
- 66.03 Local Guardianship Rule
- 66.04 Establishment of Guardianship
- 66.05 Responsibilities of Court Establishing Guardianships
- 66.06 Guardian Pre-Appointment Education
- 66.07 Guardian Continuing Education
- 66.08 General Responsibilities of Guardian
- 66.09 Responsibilities of Guardian to Ward

Sup.R. 80 – 89: Interpreters

- 80 Definitions
- 81 Certification for Foreign Language Interpreters
- 82 Certification for Sign Language Interpreters
- 83 Revocation of Certification
- 84 Code of Professional Conduct for Court Interpreters and Translators
- 85 Continuing Education
- 86 Certification Roster
- 87 Registered Foreign Language Interpreters
- 88 Appointment of a Foreign Language Interpreter or Sign Language Interpreter
- 89 Use of Communication Services in Ancillary Services

C. Ohio Department of Developmental Disabilities Statutes

The statutes for the Ohio Department of Developmental Disabilities are in R.C. 5123.01 - .99. Outlined below are statutes pertinent to guardians.

- 5123.01 Department of developmental disabilities definitions.
- 5123.55 Protective services definitions.
- 5123.56 Statewide system of protective service.
- 5123.57 Evaluation before guardianship or trusteeship begins.
- 5123.58 Nomination of protective services agency as guardian, trustee or protector.
- 5123.59 Bond.
- 5123.60 Ohio protection and advocacy system.
- 5123.61 Reporting abuse, neglect, and other major unusual incidents.
- 5123.611 Reviewing report of abuse, neglect, or a major unusual incident.
- 5123.612 Reporting unusual incidents.
- 5123.613 Subject of report or representative has right to report and related records.
- 5123.614 Procedure following report of major unusual incident.
- 5123.62 Rights of persons with a developmental disability.

D. Ohio Administrative Code for Community Services

The rules listed below provide standards for all county boards and providers working with individuals with developmental disabilities. These rules are in Ohio Adm.Code 5123:2 Community Services. Outlined below are rules applicable to this toolkit.

- 5123:2-2-06 Behavioral support strategies that include restrictive measures.

E. County Boards of Developmental Disabilities

The statutes for the County boards of developmental disabilities are in R.C. 5126.01 - .99. Below are applicable sections for easy reference.

- 5126.30 Protective services for adults with developmental disability definitions.
- 5126.31 Reviewing reports of abuse and neglect.
- 5126.33 Complaint process.
- 5126.331 Ex parte emergency order.
- 5126.332 Probable cause hearing.

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- 5126.333 Investigation of allegation of substantial risk.
 - 5126.043 Decisions by individuals with mental retardation or other developmental disability; authorization for decision by adult; decisions by guardian.
 - 5126.044 Confidentiality.
 - 5126.046 Right to community-based services; list of providers.

F. Federal Law

Below is the federal statute pertaining to developmentally disabled individuals. Applicable sections are highlighted for easy reference.

- **42 U.S.C. 12101 – EQUAL OPPORTUNITY FOR INDIVIDUALS WITH DISABILITIES**
- Americans with Disabilities Act
- **42 U.S.C. CHAPTER 7 – SOCIAL SECURITY:** The United States Social Security Administration provides benefits for disabled people, and funding for disabled individuals with limited financial resources.

14. RESOURCES

***Understanding Your Role as a Guardian*, by Ohio Judicial Conference**

This guide provides an overview of the role and responsibilities of a guardian. It includes references to standard probate forms the guardian is required to complete. This guide can be accessed [online](#).

***Guardianship in Ohio*, by the Ohio Developmental Disabilities Council**

This guide provides an overview of guardianship and alternatives in Ohio. This publication was intended for families with a child who has developmental disabilities. This guide can be accessed [online](#).

ABA PRACTICAL Tool

In 2016, the American Bar Association released a publication to assist attorneys and judges in assessing whether an alternative to guardianship would be appropriate for an individual. The PRACTICAL Tool for Lawyers: Steps in Supported Decision-Making is a useful resource for attorneys and judges who are reviewing whether a person needs a guardian and how any decision-making support can be tailored to the individual's needs. This publication can be accessed [online](#).

Resources for Limited English Proficiency or Disability Impairment

- [Supreme Court of Ohio's Language Services Program](#)
- [Certified or Other Qualified Interpreters](#)
- [ABA's COURT ACCESS for Individuals Who Are Deaf and Hard of Hearing: A GUIDE](#)

Supported Decision-Making

For more information on supported decision-making and related resources, visit the [National Resource Center for Supported Decision-Making](#). The center provides sample supported decision-making agreements, educational tools, and other resources for the public.

**DESIGNATION OF ASSISTED DECISION-MAKER
FOR JOHN DOE**

Appointment of Decision Making Authorization. I, John Doe, of Franklin County, Ohio, hereby designate and appoint my parents, whose names, address, and telephone numbers are set forth below, as my Authorized Decision Makers pursuant to O.R.C. § 5126.043 (“Agent”).

**James and Jenny Doe
101 Pretend Avenue
Columbus, Ohio 43215
614-999-9999**

It is my direction that my parents, James and Jenny Doe have any and all authority to assist me in the making of any decisions I may otherwise be able to make pursuant to O.R.C. § 5126.043, including but not limited to making decisions on my behalf. This Designation is intended to work in conjunction with any powers of attorney that I have executed.

Scope of Authority. The scope of authority granted in this designation is intended to be broad in nature and shall include my Agent having full ability to assist me with any decision I may make, including but not limited to decisions regarding: services, programming, employment, waiver applications, waiver administration, administrative appeals, state hearings, care conferences, team meetings, individual service plan meetings, eligibility redeterminations, residential placement, selection of providers, selection of day habilitation services, selection of employment options, education, transportation providers and any other decisions I am asked to make.

Authority to Release Information. In addition to the designation set forth above, I hereby release, authorize and instruct any service provider or governmental entity, including but not limited to any County Board of Developmental Disabilities to provide complete access to any and all records pertaining to me or the services I may receive or be eligible to receive to my Agent as listed above. This is intended to be broad in nature and it is my intention that my Agent have access to any document or record pertaining to me.

IN WITNESS WHEREOF, I have signed this Designation of Assisted Decision-Maker on June 1, 2019.

John Doe

STATE OF OHIO:
COUNTY OF _____, to-wit:

The foregoing instrument was acknowledged before me on June 1, 2019, by _____ who is known to me or from whom I have obtained adequate proof of identity.

Notary Public

QUALIFIED INCOME TRUST

This declaration of trust made this ____ day of _____, 20__, by _____ (Grantor-name of person establishing the Trust), is to be known as the _____ (name of the Primary Beneficiary) Qualified Income Trust (QIT), and is to be governed by the terms set forth below. The identification number for the Qualified Income Trust is the Primary Beneficiary's social security number.

Article I

Trust Purpose. This is an irrevocable Qualified Income Trust, sometimes referred to as a "Miller Trust", and is authorized by 42 U.S.C. §1396p(d)(4)(B). The purpose of this Trust is to enable the Primary Beneficiary to qualify for medical assistance ("Medicaid").

Article II

Trust Funding. The property to be placed in the Trust is monthly income received by the Primary Beneficiary including income from the following source(s):

- | | |
|----------|----------|
| 1. _____ | 3. _____ |
| 2. _____ | 4. _____ |

No property other than the Primary Beneficiary's income may be placed in the Trust. Income must be deposited into the trust account during the same month in which the income is received by the Primary Beneficiary.

Article III

Trust Distributions. No expenditures shall be made from the Trust except in accordance with this paragraph. The trustee shall make distributions from the trust only in amount and for the purposes necessary to maintain income eligibility of the Primary Beneficiary for Medicaid. Consistent with the requirements of the Medicaid program that require all income including any income that is not placed in the Trust be used for post eligibility expenses, the Trustee shall make payments from the Trust in the following priority, no later than the last day of the calendar month in which the income is received by the Trust:

1. A monthly personal or maintenance needs allowance for the Primary Beneficiary;
2. A maintenance allowance for the spouse, if any, of the Primary Beneficiary and, if applicable, a maintenance allowance for family dependents;
3. Incurred medical expenses of the Primary Beneficiary. In accordance with rule 5160:1-3-04.3 of the Administrative Code, when income is used to help pay for long term care services or other medical care provided to the individual, the individual is considered to have received fair market value for the income placed in the trust, up to the amount actually paid for other medical care provided to the individual and to the extent that the payments purchased care at fair market value;

4. The Trustee may also make payments from the Trust for bank fees, attorney fees, and other expenses required to establish and administer the trust in a reasonable amount up to fifteen dollars per month or as otherwise authorized under Rule 5160:1-6-03.2 of the Ohio Administrative Code.

Article IV

Trustee. The Trustee shall administer this Trust in good faith to effectuate its purpose, and shall act in accordance with the terms of the Trust and with all applicable laws including, but not limited to Chapters 5801. to 5811. of the Ohio Revised Code. These powers include the power to open and manage accounts with any bank, credit union, or other financial institution. The Trustee shall complete attached Certification of Trust document and take it to the bank to open the QIT account. The Trustee shall not be required to furnish bond nor to obtain leave or confirmation from any court or other person whatever before exercising or performing any such powers. No person dealing with the Trustee shall be obligated to inquire into the Trustee's authority for any action proposed. The initial Trustee is _____. If the initial Trustee resigns, becomes deceased or is otherwise unable or unwilling to serve, then _____ shall serve as successor Trustee. Any Trustee may, while serving as Trustee, appoint one or more successor trustees.

Article V

No Transfers or Assignments. The Trust's assets, income and distributions shall not be anticipated, assigned, transferred or encumbered in any manner. The Primary Beneficiary shall not have the power to anticipate, assign, transfer or encumber the Primary Beneficiary's interest in the Trust, nor shall such interest, while in the possession of the Trustee, be liable for, or subject to the debts, contracts, obligations, liabilities or torts of the Primary Beneficiary.

Article VI

Termination. This Trust shall terminate upon the death of the Primary Beneficiary, at which point the remaining Trust property shall be distributed to the Ohio Department of Medicaid or its successor up to an amount equal to the total medical assistance paid on behalf of the Primary Beneficiary; the Trustee is prohibited from repaying other persons or creditors prior to this distribution. Any remaining Trust property after the Ohio Department of Medicaid (or its successor)'s claim has been paid shall be distributed to the estate of the Primary Beneficiary.

Signed and dated on _____, 20____.

Grantor

Trustee

CERTIFICATION of TRUST

(Ohio Revised Code Section 5810.13)

_____, as Grantor, and _____, as Trustee, entered into The _____ (Primary Beneficiary) Qualified Income Trust on _____, 20__.

I. **Trustee.** _____ is the current Trustee of this trust. His/Her current address is _____.

II. **Limitation of Liability.** I understand that Ohio Revised Code Section 5810.13(F) states that a person who acts in reliance upon this Certification (without knowledge of incorrect representations in the Certification) is not liable to any person for so acting and may assume without inquiry the existence of the facts in this Certification.

III. **Powers of Trustee.** In addition to all other powers granted by law and stated in the Trust, the Trustee shall have the following powers and discretion:

- A. The Trustee shall administer this Trust in good faith to effectuate its purpose, and shall act in accordance with the terms of the Trust and with all applicable laws including, but not limited to Chapters 5801 to 5811 of the Ohio Revised Code.
- B. The Trustee has the power to open and manage accounts with any bank, credit union, or other financial institution.
- C. The Trustee shall not be required to furnish bond nor to obtain leave or confirmation from any court or other person whatever before exercising or performing any such powers.
- D. No person dealing with the Trustee shall be obligated to inquire into the Trustee's authority for any action proposed.
- E. Generally, the Trustee has authority to do all acts and to exercise all rights powers and privileges that an absolute owner of the property would have, subject to the discharge of their fiduciary obligations and subject to any limitations specified in this agreement.

IV. **Revocability.** This trust is irrevocable.

V. The trust has not been revoked, modified or amended in any way that would cause the representations in this Certification of Trust to be incorrect. This Trust still exists.

VI. The taxpayer identification number (TIN) for this trust is the Primary Beneficiary's social security number.

Signed and dated on _____, 20_____.

Trustee

APPENDIX

Acronyms & Glossary

There are multiple online resources available to define terms, including:

- Ohio Department of Developmental Disabilities: [*Alphabet Soup: A Guide to Disability Related Acronyms*](#)
- Ohio Department of Medicaid: [Acronyms & Glossary](#)
- United States Social Security Administration: [Glossary of Social Security Terms](#).

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