

Guardianship

Guardianship and Alternatives, Legal Assistance:

VISION - Guardianship Reform: Why This is Important

Most guardianship legislation in the country today is based on assumptions about individuals with developmental disabilities that were held in the early 1900's. One of the most prevalent assumptions is the belief that if you have an intellectual or developmental disability you are, by definition, incompetent and someone else should be appointed to make your decisions. As a result, guardianship systems have evolved which are

overprotective; do not honor the ability of individuals with disabilities to choose and be responsible for their own lives; and ignore the importance of social support. Most painful, when people are declared incompetent for decision-making purposes, they lose their status as citizens.



The emphasis on person-centered planning and self-determination, and an expanded understanding of intelligence and the various ways in which people learn and communicate, have greatly influenced the human service system. But unfortunately, the experience, practice and belief in the capabilities of all people, regardless of disability will take time to infiltrate the legal system. But we can lead the change. Key concepts like supported or joint decision making and alternatives to formal legal guardianship are beginning to influence individuals, families advocates, and law makers.

Until a person reaches age 18, parents are considered the “natural” guardians. Once persons reach what is known as the “age of majority”, some individuals may need assistance to make important legal, financial or medical decisions. Because a person’s freedom, civil rights, and self-determination are very important, be sure to consult with professionals before making decisions about guardianship and alternatives to guardianship.

CHECKLIST OF ISSUES, OPTIONS, ALTERNATIVES

- ✓ Individual as responsible for himself or herself with guidance from family and friends
- ✓ Individual with family member or family friend as advisor on all important decisions
- ✓ Person with disability with citizen advocate
- ✓ Check signature card
- ✓ Representative payee
- ✓ Power of attorney
- ✓ Trust fund “trustee”
- ✓ Limited guardianship/limited conservator
- ✓ Guardianship/Conservator
- ✓ Olmstead Decision
- ✓ Access to justice and fair treatment under criminal law
- ✓ Strategies for the justice system
- ✓ Legal assistance

Here are some things to consider and places to get more information.

CITIZEN ADVOCATE

The Citizen Advocacy Program, managed through the Council on Mental Retardation, matches mature, competent volunteers with people with disabilities who need assistance in caring for their personal or financial affairs. The volunteers might assist with budgeting, support activities or act as a general advisor. For more information, call the Council at (502) 584-1239.

POWER OF ATTORNEY

Parents, remember that if you have not established legal guardianship or one of the other legal arrangements for decision-making, when your adult son or daughter is admitted into the hospital, for example, you have no actual legal decision making power in the medical matters that may arise. If you think about it, you will probably want at least this step to be completed when your child turns 18. A power of attorney is a written document giving one person the power to act as an “agent” for an individual without the individual giving up

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his/her control. This may be used only if the individual fully understands what he or she is authorizing another person to do. A power of attorney may be revoked or modified at any time.

CHECK SIGNATURE CARD

Many banks will allow an account to be set up with two signatures to protect a disabled person's financial status. Either of the persons who set up the account may write checks on the account. This allows the person with the disability the opportunity in basic money management

REPRESENTATIVE PAYEE

A number of government benefit programs, such as Social Security and Supplementary Security Income (SSI) permit a representative payee to receive and manage the funds from that program for another person who is determined by the program as unable to manage personal funds. The payee is appointed through the government program, not the courts, and does not have legal authority beyond managing income from a particular program.

TRUST FUND

A "trust" gives a person or corporation (called the "trustee") the right to manage or control property for the benefit of another person (called the "beneficiary"). A parent or guardian may set up a trust to help provide future financial security for a person with a disability. One advantage of a trust is that it does not limit the beneficiary's civil rights, personal freedom, or control over money and property that are not part of the trust. (See details in Financial Concerns Section.)

CONSERVATOR/LIMITED CONSERVATOR

A conservator is a legal relationship between a person, agency, or corporation (usually a person) appointed through the courts and the legally disabled person (ward). The conservator is appointed to handle financial affairs.

Limited conservatorship is also an option in which very specific powers and duties are listed by a court order.

GUARDIANSHIP/LIMITED GUARDIAN

A guardian is a legal relationship between a capable adult (guardian) and a person who has been determined to be legally disabled (the ward) through a court proceeding. A full guardian has complete responsibility of a disabled

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person, and manages the personal and/or financial resources of that person. Guardianship usually is sought when an individual is not capable of exercising all the rights of an adult.

A limited guardian may be appointed if the disabled person is declared partially disabled by the court. A limited guardian manages only powers and duties that are specifically listed by a court order.

RESOURCES

Views on Guardianship, a draft position paper in which the point is made that people with disabilities need *personal* guardians, not *legal* guardianships and discusses things society and support agencies must do for people to survive well without legal guardianships. Available from People First Wisconsin, Marian Center, 3195 South Superior Street, Milwaukee, WI 53207, or call (414) 483-2546 or toll free 1-888-270-5352. We also have copies at the Leadership Institute if you would like to come by to get a copy.

Guardianship in Kentucky: a Guide for Citizens with Disabilities

To order, contact Protection and Advocacy Division, 100 Fair Oaks Lane, 3rd Floor, Frankfort, KY 40601 or call (502) 564-2967. You may also call 1-800-372-2988 and leave your name, full address, and the name of the booklet and they will send it to you.

Guardianship and the Alternatives: A Guide for Making Informed Decisions, to order, contact the Jefferson County Disability Clerk at (502) 595-4053 or (502) 595-4933. Although this document is provided by the Jefferson County Attorney's Office, the basic information about guardianship and the alternatives in this booklet are applicable to persons in all seven counties of our region. (The information above was taken from the **Building Your Future** guide provided by Seven Counties Family Support Services Unit.)

AMERICAN WITH DISABILITIES ACT/OLMSTEAD DECISION

In July, 1999, the Supreme Court issued the Olmstead v. L.C. decision. The Court's decision in that case clearly challenges Federal, State, and local governments to develop more opportunities for individuals through more accessible systems of cost-effective community-based services. The Olmstead decision interpreted Title II of the Americans with Disabilities Act (ADA) and its implementing regulations, requiring states to administer their services, programs, and activities "in the most integrated setting appropriate to the needs of qualified individuals with disabilities." The Olmstead decision said that states couldn't force people with disabilities to live in institutions if they didn't need to. The court ruled that the Americans with Disabilities Act sometimes requires states to provide community services for people with disabilities. States can comply

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with the Olmstead Decision by providing community services or reasonably accommodating people with disabilities. The Supreme Court suggested that states might successfully defend themselves against individual suits if they developed “comprehensive, effectively working” plans to show how they were going to move people out of institutions who didn’t need to live there. Many states are in the process of creating or have already written an “Olmstead Plan.” (For more information about Olmstead Planning in Kentucky, see <http://www.kypa.net/selfadvoc.html>.)

KENTUCKY’S WAITING LIST CASE

In 2002, four persons with developmental disabilities filed suit against state officials over unreasonable delays in providing community-based treatment for persons with mental retardation. The four seek to make the suit a class action that would give relief to all present and future Kentuckians eligible for such services and currently living at home with aging caretakers. The lawsuit, Michelle P. v. Morgan, concerns the state’s “waiting list” for community mental retardation services and is the latest of eighteen similar suits filed in states around the nation. Of the fifty states, only Mississippi devotes a smaller percentage of total financial effort to community services than Kentucky. It is estimated that in the year 2000 there were over 10,000 persons with developmental disabilities living in households with caregivers aged 60+ years. For more information see the website for Kentucky Protection and Advocacy: <http://www.kypa.net/waitinglist.html>

ACCESS TO JUSTICE AND FAIR TREATMENT UNDER CRIMINAL LAW

“Position Statement #20” from the ARC.

Individuals with mental retardation who become involved in the criminal justice system as victims, witnesses, or defendants are more likely to face injustice if the system does not consider their disabilities and capabilities.

People with mental retardation encounter many problems that are caused by their disability when involved with the criminal justice system. Because they attempt to hide mental retardation, they fail to have their disability identified by authorities. Wanting to please often leads to giving incriminating, but inaccurate, “confessions” because they are confused or misled by inappropriately used investigative techniques. Being found incompetent to stand trial because



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the individual cannot understand the criminal justice proceeding and being inappropriately placed in an institution for a long period of time as a result of being found incompetent are two “catch 22” problems. Many may waive their rights unknowingly in the face of required warnings such as Miranda. Having their testimony not deemed credible as a witness, victim, or defendant causes further victimization.

Other current major problems:

- Fear, prejudice and lack of understanding of people with mental retardation exist and are magnified when they become involved in a crime.
- Most attorneys, judges, law enforcement personnel, and citizens serving on juries lack the knowledge and skills necessary to ensure that people with mental retardation obtain justice.
- Appropriate investigations and expert testimony to ensure adequate representation are costly. Since most people with mental retardation have limited resources, investigations and expert testimony may not be available.
- Incarcerated (in jail or prison) people with mental retardation are particularly vulnerable to abuse and exploitation.
- There are few organized and recognized resources for information, training, technical assistance and referral for people with mental retardation when they encounter the criminal justice system.
- People with mental retardation involved with the criminal justice system encounter problems that are caused by their disability.

(See complete position paper at <http://thearc.org/posits/justice.html>.)

Strategies for serving women with developmental disabilities in the justice system are described in great detail in an article by Marc Dubin, which appears in a newsletter called IMPACT. (IMPACT is published by the Institute on Community Integration out of the College of Education at the University of Minnesota.) In the article, Dubin explores some of the issues facing police, prosecutors, judges, advocates and members of the criminal justice system and provides specific suggestions for each group. (For complete text, see website: <http://ici.umn.edu/products/impact/133/over7.html>.)

LEGAL ASSISTANCE:

For information on various attorneys who specialize in the legal services described in this section, contact the agency that provides services to your dependent adult for a recommended list. If you are not connected with any agency, ask the advice of fellow parents or call the Council On Mental Retardation at 584-1239 or the Leadership Institute at 587-6500 for a list.