CLIENT EMPOWERMENT & GUARDIANSHIP LAW (2016)

DISABILITY RIGHTS OREGON

Presented by Jan E. Friedman, Attorney
Disability Rights Oregon

Persons with disabilities have suffered from being "*invisible*",

and have tended to be viewed as "**objects**" of protection, treatment and assistance rather than the subjects of rights.

Disclaimer

The information contained in this presentation is not legal advice for any case or purpose.

If you need legal advice regarding a particular concern or situation, contact an attorney.

The Protection & Advocacy (P&A) System

A 1975 series by Geraldo Rivera (at the time a local television news reporter) was the catalyst for the creation the P&A systems across America.

This series of investigative reports exposed that the people who were institutionalized were subject to egregious abuse and neglect. The institution was run by New York State as a residence for people with developmental disabilities.

Once Congress was alerted to these problems, they mandated that each state and territory receiving funding under the Developmental Disabilities Assistance and Bill of Rights Act of 1975 (commonly referred to as the DD Act) establish a P&A system to protect the rights of people with developmental disabilities.

Disability Rights Oregon

Disability Rights Oregon (formerly Oregon Advocacy Center) was established in 1977 (as the Oregon Developmental Disabilities Advocacy Center) and designated by the Governor as Oregon's P&A system.

Following the creation of the P&A system via the DD Act, Congress gradually expanded our responsibilities as a P&A to advocate for people with all types of disabilities (mental health, traumatic brain injury, and physical disabilities).

Disability Rights Oregon (DRO) promotes Opportunity, Access and Choice for individuals with disabilities by assisting them with legal problems directly related to their disabilities.

DRO also has programs to assist people in gaining Assistive Technology; to advocate for people receiving vocational rehabilitation services; to assist people who receive SS and are working; to advise people of their rights in receipt of benefits (WIPA).

DRO does not charge for its services.

Disability Rights Oregon (cont'd)

Our first priority is always to act in the best interests of Oregonians with disabilities. We do this in a variety of ways, which include:

- **Promoting** awareness for people with disabilities of their rights under the law
- **Providing** information, tools and referrals that empower individuals to advocate on their own behalf
- **Investigating** and, when appropriate, addressing reports of abuse and/or neglect
- **Representing** individuals in cases where legal expertise is needed
- **Pursuing** policy changes that benefit many people with disabilities, both now and into the future through legislation and less formal channels
- **Litigation** when necessary—e.g., Lane class action case

DRO’s Procedures

- Who can call DRO?
- When?
- What’s DRO’s process?
- What are the possible outcomes?
- How does DRO choose its G & P?

DRO's role in guardianship cases

We advocate for:

- Alternatives to guardianship and Due Process Rights
- Guardianship only as a last resort & Limited Orders
- Enhance the person with a disability's
  - Self-empowerment
  - Civil Rights
  - Quality of life
- Guardian accountability

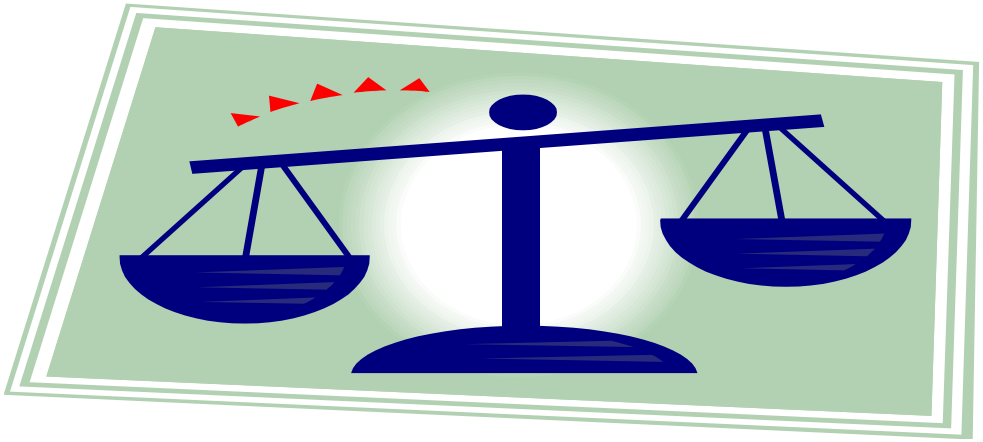
DRO's role in guardianship cases (continued)

- Under state statute, receive pleadings to ensure:
  - Respondent's legal rights protected
  - Protected Person's legal rights protected
    - Liberty infringement
    - Due Process before move to another residence
    - Financial exploitation

Guardianship topics

1. Guardianship legal process
2. Rights retained by a “protected person”
3. Strategies to Empower protected person

1. Overview of the guardianship legal process



Early purposes of guardianship

- Ancient Roman, English and American law
- An exercise of *parens patriae* authority
- Early purposes:
  - Prevent people with disabilities from becoming a public burden
  - Ensure against the dissipation of assets to the detriment of heirs

Modern purposes

- Provide protection and assistance to enhance a person's independence and self-reliance

- Provide protection and assistance in financial affairs

Whatever the reason, guardianship is a massive intrusion into an individual's basic fundamental right to liberty.

Who can appoint a guardian for an individual?

- Only a Circuit Court Judge (State Court)
- Probate Court has sole jurisdiction
- Judge can also decide against guardianship

Oregon guardianship law

A guardian may be appointed for an adult person only as is necessary to promote and protect the well-being of the protected person.

A guardianship for an adult person must be designed to encourage the **development of maximum self-reliance and independence** of the protected person and may be **ordered only to the extent necessitated by the person's actual mental and physical limitations.**

ORS 125.300(1)

Heart of guardianship proceeding

Preservation of a protected person’s well-being

- Maximize self reliance & independence
- Least restrictive
- Retain all civil rights

Some basic terms

- Allegedly Incapacitated Person
  - Person who is Allegedly Incapacitated (PAI)
- Protected Person
- Guardian
- Conservator
- Petitioner
- Respondent

Threshold issue

Does the PAI meet the stringent legal definition for “incapacitated”?

If the PAI does not meet the definition, then the case must be dismissed.

Definition of incapacity

Oregon law defines incapacitated in ORS 125.005(5) as:

A condition in which a person's ability to receive and evaluate information effectively or to communicate decisions is impaired to such an extent that the person presently lacks the capacity to meet the essential requirements for the person's physical health and safety.

Meeting the essential requirements for the person's physical health and safety means those actions necessary to provide the health care, food, shelter, clothing, personal hygiene and other care ***without which serious physical injury or illness is likely to occur.***

Basis for guardianship is the ***actual functional impairment*** which may be due to:

- Mental illness
- Developmental disability
- Traumatic brain injury (TBI)
- Alcohol/drug addiction
- Age (advanced age/minor)

Consideration of alternatives to guardianship

If the PAI meets the stringent legal definition of incapacitated, then the judge should consider alternatives to guardianship prior to imposing a guardianship.

Alternatives to guardianship

- Family or other assistance
- Developmental Disability Services Health Care Representative (under OAR 410-365-0100 et seq.)
- Advance Directive for Health Care
- Declaration for Mental Health Treatment

Alternatives to Guardianship (cont.)

- Power of Attorney
- Supported Decision Making
- Representative payee
- Joint Ownership

Health Care Representative- ISP

OAR 411-365-0100 et seq.

The Support Team in DD residential services is allowed to appoint a HCR **IF**

- The person is not capable of making medical decisions
- The person cannot appoint his/her own HCR
- Numerous Additional Safeguards

HCR- ISP Safeguards

- Requires consensus at several key steps
- Requires inclusive team process
- Required special training
- Required notification of the State of appointments
- Prohibited certain decisions (life-ending, abortions, psychiatric hospitalizations, etc.)

Due process

The PAI has the right to:

- Notice of guardianship petition
- Object
- Be present
- Counsel
- A hearing by a judge
- A high standard of proof
  - Clear & convincing evidence

Court Visitor

- Determines whether the PAI:
  - Is incapacitated
  - Objects & wants an attorney
- Also determines whether proposed guardian is qualified
- Submits a report to the court--carries weight

Who can object?

- The PAI has an absolute right to object
- Any interested person has a right to object to the guardianship proceeding

How to assist PAI with objection

- PAI should be personally served with all of guardianship documents
- Blue form = objection form
- Choose appropriate blank on form and mark
- Return the form to the Circuit Court's Probate Department

How to assist PAI with objection (cont.)

- Ensure PAI tells Court Visitor and Court Visitor marks down
- Contact the Court by telephone to confirm objection been received
- Assist PAI in appearing in person at Probate Dept. of Circuit Court to make oral objection

Critical Portion of PAI's Objection Form

I object to the petition for the following reasons:

___ I do not want anyone else making any of my decisions for me.

___ I do not want [name of proposed guardian] making any decisions for me.

___ I do not want [name of proposed guardian] to make the following decisions for me.

Reasonable accommodation requests for Court hearing

The Uniform Trial Court Rules (UTCR) require that:

- Individual with a disability must notify the court at least four judicial days in advance
  - Judicial day: a day the court is open
- Court may waive four-day advance for good cause
- Notice to court must include:
  1. Type of disability
  2. Type of requested accommodation

  [See UTCR 7.060]

Who pays for cost of an accommodation?

- The public entity pays
- Individual with disability **may not** be charged

[See TAM II-7.1000]

Can authority of guardian be limited?

Yes.

Limited Guardianship Orders Should Dominate

Oregon law requires the court to enter the least restrictive order.

"The court shall make a guardianship order that is no more restrictive upon the liberty of the protected person than is reasonably necessary to protect the person."

ORS 125.305(2).

Types of guardianship

- Full/ Plenary guardianship
- Limited guardianship
- Emergency/ Temporary guardianship

Powers & duties of a full guardian

General powers include decision-making authority for:

- Health care
- Placement/residence
- Care, comfort & maintenance
- Disposition of remains
- Finances (up to $10,000; otherwise Conservatorship)

ORS 125.315

Who can be guardian?

- Family
- Friend
- Public Guardian—e.g., Multnomah County and Oregon Public Guardian
- Professional Guardian
- Anyone who meets criteria—adult, no unexplained bankruptcy/ crime, qualified, willing

Guardian Should Listen to Express Wishes and Desires of PP

- The National GCA promotes substituted judgment. Best interest should only be used when no other option.
- Your 1st Year as Guardian: A Guide to Help You Make Decisions Based on a Protected Person's Preferences and Values.

National GCA Substituted Judgment

- A. Substituted Judgment is the principle of decision-making that substitutes, as the guiding force in any surrogate decision made by the guardian, the decision the ward would have made when competent.

NGCA Continued

- B. Substituted Judgment promotes the underlying values of self-determination and well-being of the ward.
  C. Substituted Judgment is not used when following the ward’s wishes would cause substantial harm to the ward or when the guardian cannot establish the ward’s prior wishes.

Emergency temporary guardianships

- Requires proof of a life-threatening emergency
- Appointment of temporary guardian for no more than 30 days
- Notice must be given to the PAI & other persons at least 2 days prior to the appointment of a temporary guardian

ORS 125.600

Legal arguments for a hearing

- PAI is not incapacitated.
- No guardian is needed, but a protective order may be appropriate.
- The proposed guardian is not suitable.
- The guardian’s authority should be restricted.
- No emergency exists (temporary)

Differing Decision-Making Perspectives

Who is the guardian?

- Family member or long-time friend
- Professional guardian or agency with history of personal contact
- Stranger guardian/agency with little contact
- Emergency guardian

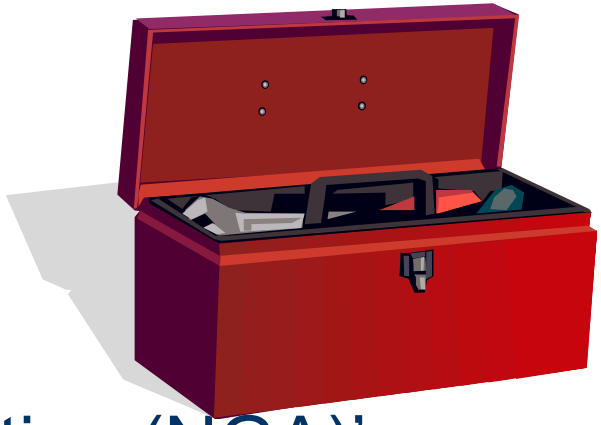
Do the PAI's choice of guardian matter?

Yes.

> The Court has a duty to appoint the "most suitable person who is willing to serve as a fiduciary after giving consideration to the specific circumstances of the respondent, **any stated desire of the respondent**, the relationship by blood or marriage of the person nominated to be fiduciary to the respondent, any preference expressed by a parent of the respondent . . ."
>
> ORS 125.200 (Emphasis added to original).

2. Rights Retained by the Protected Person

Oregon law and guardian practice standards are tools



- ORS chapter 125
- National Guardianship Association (NGA)'s Standards of Practice
- Rights of Individuals Receiving Developmental Disability (DD) Services

Oregon guardianship law

- Emphasizes that a guardianship should:
  - Be the least restrictive
  - Be designed to maximize the protected person's self-reliance & independence
  - Be preserving of the protected person's civil rights

Oregon law

"A protected person **retains all legal and civil rights provided by law** except those that have been expressly limited by court order or specifically granted to the guardian by the court. Rights retained by a person include but are not limited to the right to contact and to retain counsel and to have access to personal records."

ORS 125.300(3)

What civil rights does the protected person retain?

- Right to vote (Esther tabling for DRO today)
- Right to associate & marry
- Right to contact & obtain counsel
- Right to seek termination of guardianship
- Right to receive notices concerning any aspect of guardianship proceeding

The ONLY exception is when these rights are specifically limited by or granted to the guardian by court order.

Decision-making power

- Adults are able to make their own decisions
- Guardian assigned some decision-making power
  - No more than protected person would have had
  - Three main areas:
    - Residential placement
    - Health care
    - General care & comfort

Limits to a guardian's authority

- Guardian must notify the Court and others, including the protected person if intending to:
  - Move the person into a different residence for people with DD or MI
  - Sell the protected person's home (if guardian is conservator too).
- The protected person has the right to due process, including the right to object and to be heard.

Oregon Guardianship Law: Written Resources

- ORS chapter 125
- DRO's Guardianship Handbook
- OCDD's Planning My Way to Work: A transition Guide for Students with Disabilities Leaving High School

National Guardianship Association (NGA) – Standards of Practice (2012)

The guardian shall understand and advocate for person-centered planning and the least restrictive alternative on behalf of the ward.

NGA Standards of Practice

The guardian shall:

- Recognize value of family and friends to the protected person's quality of life
- Treat all professionals and service providers with courtesy and respect
- Implement informed consent principles in decision-making
- Use substituted judgment

NGA Standards of Practice: Written Resources

- **NGA**
  Website: www.guardianship.org

- **Guardian/Conservator Association of Oregon, Inc.**
  Website: www.gcaoregon.org

Provider's Duties to Clients with DD

- Promote the client's independence, dignity & self-esteem
- Provide services reflecting the client's age & preferences
- Provide services that are least restrictive on the client's liberty & least intrusive
- Provide the client an individualized service plan

Rights of Individuals Receiving DD Services

- To vote
- To marry
- To have or not have children
- To own & dispose of property
- To enter into contracts
- To religious preference
- To contact & visit family, friends, advocates & professionals

Students in Transition

- Ask student with I/DD who has turned 18 if they want their parents to continue helping them make decisions. If yes, draft simple paragraph appointing parents surrogate decision-makers. This creates a “formal” option and districts can’t exclude the parent for the remainder of their transition program because they granted the request.

3. Strategies to Empower Protected Persons

Seek Alternatives to Guardianship

- There are many, including reasonable accommodations for people pursuant to the ADA
- Consider maintaining a person’s individual liberties as much as possible through creative less restrictive alternatives

What if a guardian…

- Restricts phone calls?
- Cuts off friends & family?
- Decides or prevents employment?
- Threatens to move protected person?
- Bullies staff?
- Does not listen? . . .

Working with Difficult Guardians

"When a relationship breaks down. . . It can lower productivity, ruin morale, sap your energy and worse. . . Affect the quality of your work."

Simon D'Arcy

Communication Tips to Interact with Difficult Guardians

1. Identify your goal at the outset.
2. Separate the person from the problem.
3. “Seek first to understand. . .”
4. Consider guardian’s behavior style and how to maximize rapport.
5. Repeat guardian’s “keywords and phrases” to show s/he is being understood.
6. Find and acknowledge guardian’s “positive intent”.
7. Speak in the first person. Use “I” statements.
8. Handle one concern at a time.
9. Make specific requests, obtain closure.

Strategies

1. “Guardian” Authority? ***
2. Informal
3. Mediation
4. Court
5. Abuse/Neglect Reporting ***

1. Is “Guardian” Legitimate?***

- Determine whether person claiming to be guardian has legal authority.
- Request a copy of the court documentation.
  - Full guardianship
  - Limited guardianship
  - Emergency guardianship

2. Informal Strategies

- Client discussion with guardian
- Provider discussion with client’s guardian
- ISP meeting
- Case manager
- Supervisor

3. Mediation

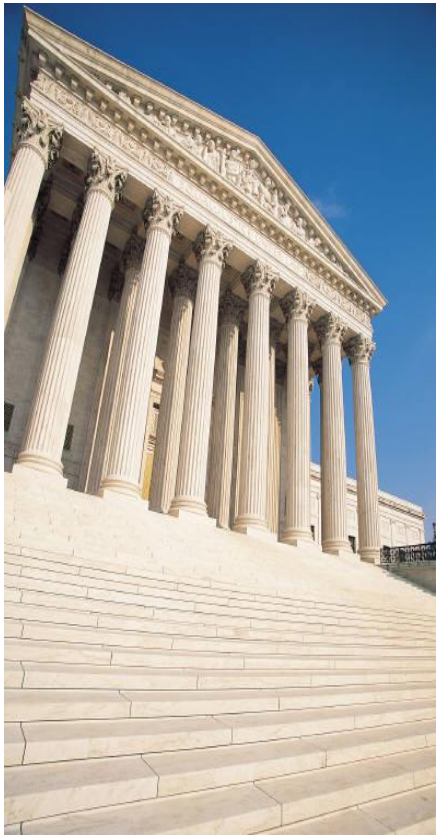
- **Oregon Mediation Association**
  Website: www.omediate.org

- Resolution Northwest
  Website: www.resolutionsnorthwest.org

- Family Court Services
  Website: www.courts.oregon.gov/OJD

4. Court

- Guardian Annual Report
- Write to court
- Substitute guardian
- Limit or terminate guardianship



5. Reporting abuse & neglect

How to report abuse & neglect:

- If you believe abuse is occurring, **immediately** contact your county developmental disability program.
- You may also report abuse to the Office of Adult Abuse Prevention Investigation (OAAPI) with the Oregon Department of Human Services (DHS) by calling **1-855-503-SAFE (7233).**
- If it appears to constitute a crime, contact the local police.
- In Multnomah County, call Guardian Partners (fka SAVO) by calling **971-409-1358**

Client Empowerment Strategies Include:

- *Being informed as to your client's legal rights and options.*
- Weeding out fake "guardians".
- Ensuring that your client's personal values, wishes and dreams are heard in all decisions, whether your client has a guardian or not.
- Fostering trust with the guardian by providing clear written materials and maintaining the boundaries set therein.
- Maintaining your ethics and duties to your client and not compromising them due to a difficult guardian.
- Providing meaningful referrals to supporting agencies including Disability Rights Oregon; Legal Aid Services; the GAPS program; the Long Term Care Ombudsman; the Governor's Advocacy Office.
- Assisting your client in accessing legal advice from a private attorney.
- Reporting guardian abuse/neglect to county or OAAPI for investigation.

Special Advocate Oversight

- Protected Person Special Advocate
  - Volunteers in some counties who will check out guardianship at Judge's behest. Sort of informal Court Visitor.
  - In statute for whole state as of 2014.
  - Related to Guardian Partners' Efforts at Oversight

Attorney Fees

- Generally the Protected Person is responsible for Attorney Fees for the fiduciary, experts, etc.
- Attorney Fee Provision cites a number of factors, with benefit to the protected person being a threshold consideration as of the last legislative session.

How to Evaluate Client

- 1) Does the person really lack capacity?
- 2) What has been tried to increase capacity?
- 3) Are there really no less restrictive alternatives?
- 4) What has been done to prove that?

Thank You for the Work You Do

Together we can continue to focus on our clients and maximizing their:

1. independence,
2. self-reliance, and
3. dignity.

Questions?

Jan E. Friedman, Attorney
Disability Rights Oregon
Voice: (503) 243-2081
Website: www.disabilityrightsoregon.org