

**DISABILITY RIGHTS**

IDAHO

Protection & Advocacy for Individuals with Disabilities



**SELF-ADVOCACY  
GUIDE TO  
GUARDIANSHIPS**



**A GUIDE TO HELP YOU  
UNDERSTAND AND  
PROTECT YOUR RIGHTS**

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# SELF-ADVOCACY GUIDE TO GUARDIANSHIPS

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## PURPOSE

The Self-Advocacy Guide to Guardianships was developed to be used by you and the attorney chosen to assist you when a person wants to be your guardian. The Guide's goal is to help you and your attorney understand and protect your rights. It can also be used by any person who wants to know more about guardianships.

### The Guide will help you to:

- Learn what a guardian does
- Understand how a guardian is chosen
- Remain as independent as possible
- Participate more fully in the hearing
- Learn to speak up and ask questions

### The Guide will help your attorney to:

- Know what you want
- Decide whether you need a guardian
- Review alternatives to a guardianship
- Know what choices you can make on your own
- Protect as many of your rights as possible

The Self-Advocacy Guide to Guardianships was developed by:

**DISABILITY RIGHTS IDAHO**

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## **PART I: PREPARING FOR A GUARDIANSHIP HEARING**

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**NOTE:** The steps in Part I can be done by you before you meet with the Evaluation Committee or your attorney. You can also do them with your attorney or you can do them by yourself or with a friend just to learn about guardianships.

### **STEP I: LEARNING ABOUT GUARDIANSHIP**

#### **A. What is a guardian?**

You may have been given or mailed papers telling you that someone wants to be your guardian. This means that someone believes that you need help making important choices. The person thinks you may make a choice that is not safe. The person wants to have a judge decide if you need someone to help you make choices. The person chosen to help you make choices is called a guardian.

#### **B. What does a guardian do?**

A guardian will make choices for you. For example, a guardian might decide where you will live, how your money is spent, or what medical treatment you get. A guardian may only be allowed to make some choices for you. It is important to think about what choices you want help with. It is also important to think about what choices you can make on your own.

#### **C. Do I need a guardian?**

You do not have to have a guardian just because you have a disability. You do not have to have a guardian just because you need some help making some choices. If you do not think you need a guardian, it is important to speak up and tell people you can make your own choices.

## D. What words do I need to know?

People will use the words listed below. Ask questions if you do not understand what they mean.

**WARD:** The word used for a person who has a guardian appointed for them.

**GUARDIAN:** A person chosen by the judge to make legal choices for you.

**CONSERVATOR:** A person chosen by the judge to decide how to spend your money and make choices about your property.

**ATTORNEY:** A person chosen by you or the judge to help you understand what happens in court and to tell the judge what you want to happen.

**JUDGE:** The person who is in charge of the court hearing and who decides whether you need a guardian.

**EVALUATION COMMITTEE:** People who the judge asks to meet with you and who tell the judge about you and the person who wants to be your guardian.

**HEARING:** A meeting at which the judge decides whether a person needs a guardian or conservator. A hearing is called “closed” if only certain people can come to the meeting. It is called “open” if anyone can come.

**COURT OR COURTHOUSE:** A building in which a hearing will be held to decide whether you need a guardian.

**COURTROOM:** One of the rooms in the courthouse where the hearing will take place.

**PETITION:** The papers that are given to the judge that tell the judge why you might need a guardian.

**LETTERS OF GUARDIANSHIP OR LETTERS OF CONSERVATORSHIP:** Papers signed by the judge saying who is your guardian or conservator and what choices that person can make for you.

**CONFIDENTIAL:** Information that is kept secret.

**COURT FILE:** Paperwork given to the judge and kept in a folder at the courthouse. Each court file has a number and has your name on it.

**EVIDENCE:** Information given to the judge that helps the judge decide whether you need a guardian.

**WITNESS:** A person asked to tell the judge at the hearing important information about you.

**RIGHTS:** Things that a law or a rule says you can do.

**SELF-ADVOCATE:** A person who tells other people what he or she wants.

**NOTE:** In this Guide, the word guardian is used to mean both the guardian and the conservator. Often the same person may be the guardian and the conservator.

## **E. Who will help me learn about my rights?**

The judge will choose an attorney to help you learn about having a guardian and your rights. This attorney will meet with you and ask you many questions. You can also ask the attorney any question you want. The attorney works for you. You can ask your attorney not to tell anyone what you say.

It is important to tell your attorney how you feel about having a guardian. You should also tell the attorney if the person who wants to be your guardian or anyone else has ever hurt you. The attorney can help you.

Making your own choices is an important right. The judge wants to make sure someone helps you keep as many rights as possible. There must be a good reason to take away some of these rights. Your attorney should help you keep some or all of your rights.

Your attorney's job is to help you understand what is going on. You can ask your attorney about anything you do not understand. Here are some questions you might want to ask your attorney:

- 1) Why does someone think I need a guardian?
- 2) Do I have to have a guardian?
- 3) When and where is the hearing going to be?
- 4) How do I get to the hearing?
- 5) Who will be at the hearing?
- 6) What should I wear to the hearing?
- 7) Where does everyone sit?
- 8) What happens at the hearing?
- 9) Do I get to talk to the judge?
- 10) Can you help me plan what to say in court?
- 11) Who will talk about me at the hearing?
- 12) Can anyone come to the hearing?
- 13) Can I keep people from coming to my hearing?
- 14) Can I ask people not to talk about me at my hearing?
- 15) What do I do if someone says something about me I do not like?
- 16) Can I ask people not to give information about me to the court?
- 17) Can you explain the court papers to me?
- 18) How do I know what the judge decides?
- 19) Will I have to move if I have a guardian?
- 20) What happens to my money if I have a guardian?
- 21) What will the guardian do for me?
- 22) What can I still do without my guardian?
- 23) How can I contact my guardian to tell them what I want?
- 24) Will I have a guardian forever?
- 25) Who do I tell if I do not like my guardian?
- 26) What are my rights even if I have a guardian?
- 27) What do you know about my different abilities?

## SELF-ADVOCACY TIP:



Be sure to ask the attorney a lot of questions. Tell your attorney what you want. The attorney cannot help you if you do not speak up.

## F. How is a guardian chosen?

A meeting called a hearing will be held in a courtroom at the courthouse. At the meeting, the judge will decide if you need a guardian. You, your attorney, and the person who wants to be your guardian will be at the hearing. Other people may come and talk about you. They must promise to tell the truth. A person from the Evaluation Committee may also be at the hearing to talk about you. The hearing is important and is about you. People will talk about what you need. After the people are finished talking and asking questions, the judge will say whether you do or do not need a guardian.

## SELF-ADVOCACY TIP:



**IT'S YOUR LIFE!** It is important that you go to the hearing. The hearing is “**all about you.**” It is important that you be a part of it.

Use this space to write down other questions you have about a guardian:

## STEP 2: PLANNING FOR THE HEARING

### A. How can I be a self-advocate?

The people that talk to you about the guardianship need to know about what choices you can make on your own. This includes your attorney and the people who evaluate you, such as the Evaluation Committee. You can help these people get to know you by answering the questions in the boxes below.

<p style="text-align: center;"><b>Topic #1 - People:</b></p> <hr/> <p><i>You should be able to visit and be friends with the people you like!</i></p>	<p style="text-align: center;"><b>Questions?</b></p> <hr/> <p>The friends or family I want to see often:</p> <p>Who I want to be my guardian: Why?</p> <p>Who I do not want to be my guardian: Why not?</p>
<p style="text-align: center;"><b>Topic #2 – Home:</b></p> <hr/> <p><i>You should be able to live where you can be the most independent!</i></p>	<p style="text-align: center;"><b>Questions?</b></p> <hr/> <p>Where I want to Live:</p> <p>The type of home I want:</p> <p>Where I do not want to live:</p>

### Topic #3 – Activities:

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*You should be able to do the things you like to do!*

### Questions?

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Where I want to go on vacation and who I want to go with

Where I want to go around home:

The hobbies I like:

What I want to spend money to do:

### Topic #4 – Education:

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*You should be able to choose your future - **IT'S YOUR LIFE!!!!***

### Questions?

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Where I want to go to school or get training:

What I want to learn:

**Topic #5 – Work:**

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*You should be able to do a job you like!*

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**Questions?**

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What job I want:

Where I want to work:

Who I want to help me get a job:

**Topic #6 – Health:**

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*You should be able to say how you want to take care of your health!*

**Questions?**

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What doctor I like:

What medicines or treatment I like:

What medicines or treatment I do not like:

**Topic #7 – Money:**

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*You should be able to spend some or all of your own money!*

**Questions?**

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The stuff I want or need to buy:

How much money I want to spend each month:

**Topic #8 – Support Team:**

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*If you have people who help you make decisions, you may not need a guardian!*

**Questions?**

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People who help me:

People who help me in an emergency:

What I do if I am afraid or in trouble:

## SELF-ADVOCACY TIP:



You have the right not to be hurt by anyone. If someone is hurting you, tell your attorney or a friend. It can stop.

### B. How can I keep my rights?

You should be able to keep many rights even if you have a guardian. To do this you need to tell people what choices you can make on your own and what rights are important to you. The checklist below will help you do that.

I want to keep my right to: (put a check mark (✓) in the box)

- REGISTER TO VOTE AND VOTE
- CHOOSE MY BOYFRIEND OR GIRLFRIEND
- MARRY WHO I WANT
- SPEND SOME MONEY EACH MONTH
- SELL MY STUFF
- DECIDE WHO GIVES ME SERVICES
- CHOOSE MY JOB
- CHOOSE WHERE I LIVE
- CHOOSE MY ROOMMATE
- APPLY FOR A DRIVER'S LICENSE
- DRIVE AND OWN A CAR
- RIDE A BICYCLE OR SCOOTER OR MOTORBIKE
- WRITE A WILL
- HIRE AN ATTORNEY
- SAY WHO CAN SEE MY RECORDS
- BUY GIFTS FOR FRIENDS AND FAMILY
- CHOOSE MY SCHOOL OR SCHOOL PROGRAM

- HAVE CHILDREN SOME DAY
- CHOOSE MY FRIENDS AND GO PLACES WITH THEM
- HAVE PRIVATE TIME WITH MY FRIENDS
- APPLY FOR A LICENSE FOR HUNTING OR FISHING
- CONSENT TO MEDICAL DONATIONS OF MY BODY
- PARTICIPATE IN MEETINGS ABOUT ME
- CONSENT TO MY TREATMENT
- MAKE CHOICES ABOUT MY TRAVEL
- HIRE OR FIRE MY PROVIDERS
- REFUSE CONSENT TO MEDICATION
- REFUSE SHOCK THERAPY
- KEEP MY RIGHT TO AGREE TO MY IEP OR SCHOOL PLAN
- GET A DIVORCE
- RECEIVE ALL MY MAIL AND NOTICES
- CONSENT TO THE SALE OF MY HOUSE
- CHOOSE BIRTH CONTROL
- HAVE A RELIGION OR CHOOSE NOT TO HAVE ONE

### **SELF-ADVOCACY TIP:**



It is important to let the judge know what you can do. The judge can say you can make certain choices by yourself even if you have a guardian.

### **C. What if I do not want a guardian?**

If you do not want a guardian, answer the questions on the next page and give the answers to your attorney, a friend, or any person who is helping you. Make sure to tell your attorney you do not want a guardian.

- 1) I DO NOT NEED A GUARDIAN BECAUSE:
  
- 2) I CAN TAKE CARE OF MYSELF BECAUSE I CAN:
  
- 3) I HAVE HELP TO MAKE DECISIONS FROM A SUPPORT TEAM WHO HELPS ME BY:
  
- 4) I DO NOT WASTE MY MONEY BECAUSE I SPEND IT ON:
  
- 5) THE PEOPLE WHO CAN TELL THE JUDGE THAT I DO NOT NEED A GUARDIAN ARE:
  
- 6) SOME THINGS I DO ARE RISKY, SUCH AS \_\_\_\_\_, BUT I STILL WANT TO DO THEM BECAUSE:
  
- 7) WHAT I WANT THE JUDGE TO KNOW ABOUT WHY I DO NOT WANT A GUARDIAN IS:

### SELF-ADVOCACY TIP:



Just because you have a disability does not mean you have to have a guardian. Speak up and tell the judge you do not want a guardian. Think of ways to show that you can take care of yourself.

## **STEP 3: UNDERSTANDING YOUR RIGHTS**

### **A. What are my rights at the hearing?**

Below is a list of your rights at the hearing. Talk to your attorney if you have questions about your rights.

#### **RIGHTS AT THE HEARING**

- TO KNOW WHEN AND WHERE THE HEARING WILL BE
- TO BE AT THE HEARING
- TO GET A COPY OF ALL PAPERS GIVEN TO THE JUDGE
- TO TELL THE JUDGE WHETHER OR NOT YOU WANT A GUARDIAN
- TO HAVE AN ATTORNEY HELP YOU AT THE HEARING
- TO HAVE YOUR ATTORNEY ASK QUESTIONS OF ANY PERSON TALKING AT THE HEARING
- TO CHOOSE PEOPLE TO TALK ABOUT YOU AT THE HEARING
- TO TALK IN PRIVATE WITH YOUR ATTORNEY
- TO HAVE SOMEONE COME WITH YOU TO THE HEARING
- TO TELL THE JUDGE WHO YOU WANT FOR YOUR GUARDIAN
- TO CHOOSE A PERSON TO EVALUATE YOU AND TELL THE JUDGE WHETHER YOU NEED A GUARDIAN
- TO ASK THAT THE HEARING BE PRIVATE

- TO ASK THAT NO ONE BE ALLOWED TO READ YOUR COURT FILE WITHOUT THE JUDGE’S PERMISSION
- TO SHOW THAT YOU HAVE OTHER SUPPORTS SO YOU DO NOT NEED A GUARDIAN
- TO HAVE A GUARDIAN CHOSEN FOR YOU ONLY IF YOU ARE NOT SAFE
- TO KEEP THE RIGHT TO MAKE MANY CHOICES ON YOUR OWN
- TO HAVE A COPY OF THE JUDGE’S ORDER, CALLED “LETTERS OF GUARDIANSHIP”
- TO HAVE YOUR GUARDIAN WRITE A REPORT TO THE JUDGE EVERY YEAR ABOUT YOU
- TO HAVE A COPY OF ALL REPORTS BY YOUR GUARDIAN
- TO DISAGREE WITH THE JUDGE’S DECISION AND ASK YOUR ATTORNEY TO CHANGE IT
- TO END THE GUARDIANSHIP IF YOU LEARN TO MAKE SAFE CHOICES

## **B. What are my rights in everyday life?**

Even if you have a guardian, you still have rights. Read the list below and discuss them with your attorney or friend.

### **RIGHTS**

- TO BE FREE FROM HARM
- TO DISAGREE WITH ANY PROVIDER, INCLUDING YOUR GUARDIAN OR CARE GIVER
- TO HAVE COPIES OF INFORMATION ABOUT YOU

- TO HAVE YOUR MONEY USED FOR YOUR NEEDS AND NOT TAKEN BY OTHERS
- TO BE TREATED WITH RESPECT BY YOUR GUARDIAN
- TO TRY TO CHANGE YOUR GUARDIAN OR OTHER PROVIDERS
- TO CHOOSE YOUR FRIENDS AND ACTIVITIES IF YOU ARE SAFE
- TO HAVE INFORMATION ABOUT YOU TOLD TO SOMEONE ELSE ONLY IF YOU AGREE OR IF IT IS NECESSARY TO HELP YOU
- TO VOTE IN ANY ELECTION
- TO GO TO SCHOOL OR GET A JOB
- TO PARTICIPATE IN MEETINGS ABOUT YOU
- TO HAVE FUN AND BE SAFE!

FOR MORE INFORMATION ABOUT YOUR RIGHTS CALL:

**DISABILITY RIGHTS IDAHO**

**1-866-262-3462**



This is the end of Part I. Part II is for your attorney. Give a copy to your attorney or tell him or her to call **DisAbility Rights Idaho** for a copy.

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## PART II: ADVOCACY STRATEGIES FOR THE ATTORNEY

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**NOTE:** Part II is designed to provide information and resources to the attorney for the proposed ward to enable the attorney to advocate for maximum independence.

### 1. The Importance of Independence

American society places a strong emphasis on personal autonomy, a person's right to self-governance, and a person's right to give consent to major decisions concerning the person's interests and values. All citizens are presumed to be competent or to have the capacity to make decisions regarding their lives. A person with a disability is presumed to have an interest in autonomy that is every bit as strong as the interest of a person without a disability.

The legislative intent of [Idaho's Treatment and Care of the Developmentally Disabled Act \(DD Act\)](#), [Idaho Code § 66-401 et seq.](#), is to "promote the general welfare of all citizens by establishing a system which permits partially disabled and disabled persons to participate as fully as possible in all decisions which affect them, which assists such persons in meeting the essential requirements for their physical health and safety, protecting their rights, managing their financial resources, and developing or regaining their abilities to the maximum extent possible." [I.C. § 66-401](#).

Assistance in decision making should offer the least restrictive intervention and be for the shortest possible time to maintain the principles of autonomy and self-governance. The assistance of lay advocates or family members is preferred to court-ordered determinations of incompetency or incapacity. Where court intervention is necessary, it should be as limited as possible. Limited or partial guardianships should be ordered instead of plenary guardianships in the majority of cases.

Do not confuse the person's informational poverty with his or her decisional capacity. Seek out ways to enhance the person's knowledge base and take extra care to communicate effectively. If necessary, enlist the assistance of an individual who is familiar with the person.

Even if your client consents to a guardian or meets the criteria for a guardian in the statute, self-determination is still an important principle to preserve. It is extremely important that the individual be included in any decision making process. Self-advocates have a pertinent slogan: “Nothing about me, without me.”

It is the opinion of some people that a legal piece of paper naming a person a guardian is in reality only a mostly false sense of security and provides for an unnecessary amount of control. Typically, parents and others believe that a legal guardianship document can prevent bad things from happening, can insure good things will happen, and will fix things that go wrong. Unfortunately, none of these commonly held beliefs are true. Even when people have guardians, they can be abused, exploited and hurt by others. Just like anyone else, they can be physically hurt by friends or strangers. They can be hit by a car, or they can choose the wrong foods, activities, or friends.

The best and most respectful way to minimize harm, increase the prospect of a quality life, and provide advocacy is not the removal of someone’s rights. Often guardians assume more control than necessary in a person’s life and limit such things as the person’s ability to choose their own clothes, friends, or even food. Ideally, the best support for a person is a caring, involved family and a network of community connections. If these are in place, the person will be cared for, and parents and other relatives are free to lead their own lives. In today’s society, it is more appropriate to build partnerships that foster dignity and freedom than to promote unnecessary guardianships.

## **2. The Evaluation Process**

If the client is considered to be developmentally disabled, the guardianship must be brought under the DD Act. If it has been brought under the Idaho Probate Code, the Petitioner should be requested to dismiss or amend the Petition. Individuals with developmental disabilities are specifically excluded from the definition of individuals possibly subject to a guardianship under the Idaho Probate Code.

The DD Act requires that an evaluation committee be appointed to evaluate the individual’s need for a guardian and the appropriateness of the potential guardian. Typically, the judge will issue an order appointing the evaluation committee from the Idaho Department of Health and Welfare. Make sure the Order is forwarded to the Department by the court clerk or someone else. The committee is made up of employees or other persons associated with the Idaho Department of Health and Welfare’s Bureau of Developmental Disabilities Services and conducts the evaluations without charge. The purpose of

appointing this committee is to have the evaluations done by professionals who have experience communicating with individuals with disabilities, evaluating their functional levels, and identifying needed services. The DD Act requires certain information to be in the report of the committee. The committee should state what specific skills the ward has and suggest ways to limit the guardianship. The committee should also make a determination regarding whether the ward's living arrangements are the least restrictive environment, and if not, make suggestions for what is the least restrictive environment. The report should also contain an assessment of the potential guardian as well as an indication of the preferences of the ward. Reports lacking these areas should be sent back to the committee or inquired into on cross-examination.

The committee report should be compared to other evaluations to substantiate the skill level of your client. Often an assessment of skills and behaviors, such as the Scales of Independent Behavior-Revised (SIB-R), will have been done to determine eligibility for certain Medicaid services. These will be in the client's Medicaid file or the file of the provider agency.

Psychological evaluations from school districts will provide previous intelligence testing and academic skill levels. The Idaho Division of Vocational Rehabilitation may have done skill assessments. Neuropsychological evaluations may also be available or obtained with Medicaid funding. If these evaluations are not consistent with the evaluation committee report, obtain, or ask the judge to order, an independent evaluation.

### **3. Alternatives to Guardianship or Conservatorship**

The DD Act states that the court's role is to "determine the nature and scope of the guardianship or conservatorship services necessary to protect and promote the respondent's well-being." [I.C. § 66-404\(6\)\(d\)](#). To aid the court in making this determination, the Evaluation Committee's report must include a recommendation regarding the type and extent of guardianship or conservatorship assistance, if any, required by the respondent and a discussion regarding why no lesser restrictive alternative would be appropriate. The report should include specific reasons and not merely make general conclusory statements. Some of the alternatives to a guardianship or conservatorship that should be reviewed are:

## A. Financial Alternatives

Representative Payee: If your client's only income is Social Security benefits, the Social Security Administration may have already appointed a representative payee to manage these funds. This is also true for some other benefit programs. A guardian or conservator to manage these funds is, therefore, unnecessary.

Joint bank account: A joint bank account can be established that would limit your client's access to funds without the need to appoint a conservator.

Trust: If a person has, or will receive, resources in excess of the Social Security and Medicaid limits, a special needs trust can be established to preserve the person's eligibility for these benefits. Once a trustee is appointed, the person should have no need for a conservator. The trustee will manage the funds and the beneficiary of the trust will not be allowed to receive any significant amount of direct payments. Another type of trust is a Miller or Income trust that is used if a person has income in excess of the Medicaid eligibility limits and the person meets a certain level of care need. This would also limit the person's access to funds because the amounts put in the trust are used to pay the person's share of the cost of the Medicaid services. These trusts would be preferable to a conservatorship because they would establish Medicaid or benefit eligibility and would avoid unnecessary court involvement.

## B. Decision Making Alternatives

Power of Attorney, including a living will and durable power of attorney for health care (I.C. § 39-4510): If your client is competent to understand the terms of a power of attorney and consents to the terms, this would be a simpler and less intrusive option to allow another person to make certain decisions.

Transition planning, person centered planning and other forms of assisted decision making: These are processes widely used with persons considered to be developmentally disabled that are designed to allow the individual to communicate his or her preferences and make decisions. This process values the individual's decisions and honors them unless they are dangerous. It enhances dignity and self-determination and can be a more reliable indicator of the person's desires because it is a group effort. The person with a disability partners with others to exercise joint power through partnerships at meetings and planning sessions. The person with a disability can authorize relatives and

others to attend these meetings simply by indicating the person agrees to have them attend and see records. This ensures the person with a disability has every opportunity to communicate, is treated respectfully, and that professionals focus on supporting a person's dreams and on recognizing and nurturing a person's strengths, not deficits. This system develops a network of supports who share in providing the supportive services.

Supported living: Some individuals with developmental disabilities receive Medicaid funded services that provide necessary supports in the community that will assist the individual with making decisions and spending money. These programs are training programs that are aimed at developing skills and will provide oversight of the individual's care. These services can be developmental therapy provided in an individual's home or community, residential habilitation, certified family home placement, or personal care services. Individuals between 18 and 21 years of age are entitled to additional Medicaid services, including several hours a day of personal care services in their home or in a personal care provider's home.

The Medical Consent and Natural Death Act (I.C. § 39-4504): This Act states that if an individual is unable to provide consent for medical care, consent may be given by another person. The statute prioritizes the persons who may give such consent. If for some reason additional authority to consent is required, a temporary appointment for a guardian to make a particular decision can be obtained.

Adult Protection Services intervention or a Protection Order: If a person with a disability is being subjected to abuse and neglect, Adult Protection Services can investigate and help remove the person from any danger. Also a protection order can be sought to obtain a court order against an individual who may be harmful to the person with a disability. A guardianship is not necessary, and does not necessarily protect a person from abuse by others.

Assistive technology, service animals, and/or community supports: Making the living situation of the person with disabilities more supportive is very feasible and can be the answer to meeting the needs of the person without a guardian. Advice and funding for these services are available from community resources. These services could include alarms in the home, safety devices, adult day care or treatment centers, community centers, home visitors, service or companion animals, meal and grocery delivery, transportation, and personal care assistance.

#### 4. Least Restrictive Environment

The Legislative intent expressed in the DD Act in I.C. § 66-401 is that those subject to the Act:

“be diagnosed, cared for, and treated in a manner consistent with their legal rights in a manner no more restrictive than for their protection and the protection of society, for a period no longer than reasonably necessary for diagnosis, care, treatment and protection, and to remain at liberty or be cared for privately except when necessary for their protection or the protection of society. Recognizing that every individual has unique needs and differing abilities, it is the purpose of the provisions of this chapter to promote the general welfare of all citizens by establishing a system which permits partially disabled and disabled persons to participate as fully as possible in all decisions which affect them, which assists such persons in meeting the essential requirements for their physical health and safety, protecting their rights, managing their financial resources, and developing or regaining their abilities to the maximum extent possible. The provisions of this chapter shall be liberally construed to accomplish these purposes.”

The above language, while strongly expressing the intent of the legislature for maximum independence, does not as a practical matter provide much guidance concerning the authority of a guardian to consent to voluntarily admit a person to a facility. The DD Act does not require court approval for such placements. On occasion, guardians will consent to facility placement for individuals or refuse to consent to their discharge despite the fact that the individuals could reside in the community. For instance, a parent may be reluctant to consent to a community placement for fear that the provider would cease providing services and the guardian would then have to take care of the person or find a new provider. Some guardians might believe a facility could provide greater safety than a community placement.

As the representative for the ward, however, it would be important to ensure that the guardian has appropriate reasons for consenting to placement in a facility and that no community based placement is feasible. Idaho has only one large residential facility for individuals with developmental disabilities. This facility is the Idaho State School and Hospital in Nampa, Idaho and it is considered an intermediate care facility for the mentally retarded (ICF/MR) under Medicaid laws and is usually paid for by Medicaid. Idaho also has a system of small bed

ICFs/MR which typically have between four (4) and eight (8) residents living in a house in a residential neighborhood. These are also funded by Medicaid and the individual receives treatment and supervision in his or her home and community. Other supported living options are also available, including a certified family home, apartments with supports, assisted living centers and personal care homes. An individual can also receive services in his or her own home. All community based options should be explored before placement in a more expensive and restrictive facility.

The court order appointing the guardian should require notice to you of any potential facility placements or refusals to discharge your client from a facility. The order should require court approval for facility placement in many circumstances. Preventing, or requiring court approval of, the sale of a person's home is another way to help ensure that the ward is not placed in a facility merely because the person has no home of his or her own.

## **5. The Right to Take Risks or the “Dignity of Risk”**

The DD Act defines the lack of capacity to make informed decisions to mean “the inability, by reason of developmental disability, to achieve a rudimentary understanding of the purpose, nature, and possible risks and benefits of a decision, after conscientious efforts at explanation.”

**I.C. § 66-402(9)**. This section also requires that this lack of capacity shall not be evidenced by improvident decisions within the discretion allowed individuals without developmental disabilities. This is an important concept that is often referred to as the “**dignity of risk.**”

This concept places great value upon allowing individuals with developmental disabilities the freedom and dignity to make decisions that can entail some risk. Adults make decisions every day that other members of society may not see as beneficial or may see as extremely risky. People choose to smoke, drink, sky dive or ski. Sometimes individuals want to be a person's guardian to prevent them from making certain decisions. This often results in extreme tension between the guardian and the ward because it is in reality the wrong reason for being appointed a guardian and gives the guardian more control over the person's life than is warranted. It is important that the attorney for the person preserve as much independent decision making as possible and to advocate against these types of intrusive guardianships.

## 6. Creating Partial Guardianships

Section 66-405 of the DD Act limits the authority of the guardian in some significant ways. A guardian cannot:

- a) Consent to medical or surgical treatment the effect of which permanently prohibits the conception of children by the respondent unless the treatment or procedures are necessary to protect the physical health of the respondent and would be prescribed for a person who is not developmentally disabled;
- b) Consent to experimental surgery, procedures or medications; or
- c) Delegate the powers granted by the order.

It is appropriate to request that these limitations be stated in the Order of Guardianship. Not all guardians know the law.

There are many other important limitations that can be included in the Order of Guardianship. The DD Act favors partial or limited guardianships and these should be used as often as possible. Many guardians do not fully understand what powers the law grants them and what powers the law does not grant them. In addition, Idaho law does not fully clarify the scope of the guardian's power. For example, there is no clear statement in Idaho law regarding whether a guardian can refuse consent for a person to marry. Guardians, therefore, sometimes exert more control over an individual than their authority allows. It is important, therefore, to specifically include protections for those rights that the ward can exercise. Review the sample limitations below and develop a proposed order tailored to your client's wishes and skills.

### Consider limitations such as:

- Requiring court approval to place a ward in a more restrictive environment
- Requiring court approval to sell the ward's home
- Limiting decision making powers so that some specific decisions remain with the ward such as some educational, medical, financial, residential and/or vocational decisions

- Limiting the guardian's power to refuse to consent to discharge from a facility if staff of the facility or other knowledgeable experts recommend discharge to a community placement
- Requiring the guardian to agree to a community placement if the ward is eligible and the placement is recommended by treating professionals or a treatment team
- Preserving the ward's right to marry and have children
- Specifying certain amounts of money for the ward to spend without interference
- Maintaining the ward's right to own or drive a car, ride a bike or travel independently by public transportation, and require money be spent to allow these activities
- Maintaining the ward's right to choose leisure time activities and requiring the guardian to allocate money for these activities
- Maintaining all rights not specifically denied, such as the right to vote, marry, file a lawsuit, etc.
- Maintaining the right of the ward to contest the guardianship or conservatorship and to hire an attorney to do so
- Maintaining the ward's right to request and receive his or her records
- Maintaining the ward's right to associate and have visitors of his or her choice
- If the ward lives in a facility, maintaining his or her right to exercise all the rights enumerated in the Idaho Code or other laws for the specific type of facility, e.g., [I.C. § 66-412](#)
- Maintaining the right of the ward to consent to his or her Individual Education Plan (IEP) developed pursuant to special education law, e.g., [20 U.S.C. § 1415\(m\)](#) and [34 C.F.R. § 300.520](#)

## 7. Utilizing Medicaid to Promote Independence

Ensuring access to Medicaid benefits is crucial to help individuals with developmental disabilities receive treatment and services in the community. In Idaho, many individuals with disabilities are eligible for Medicaid because they are also eligible for Supplemental Security Income (SSI) benefits. Some children would not have been eligible for SSI because of their parental income. After age 18, these children may become eligible and should apply for SSI and Medicaid simultaneously. Some children who turn 18 begin to earn Social Security Child's Insurance benefits based on a parent's disability status. If the person was previously eligible for SSI, the amount of the new SS benefits may make him or her ineligible to continue to receive the SSI payments. The person should still maintain Medicaid eligibility, however, because of a law allowing individuals receiving child's insurance benefits to maintain Medicaid eligibility if it is these new benefits that makes him or her ineligible. Idaho Medicaid has administrative rules regarding this eligibility category, referred to as Disabled Adult Child eligibility. See [42 U.S.C. § 1383c\(c\)](#), [IDAPA 16.03.05.806](#); and [42 U.S.C. § 1396a](#) and [42 C.F.R. § 435.135](#) (protections against loss of Medicaid due to COLA increases in SSDI). Additionally, individuals who have income, either from working or other types of benefits, may make too much money to qualify for Medicaid. These individuals may be able to gain Medicaid eligibility by applying for a Medicaid waiver program. If found eligible for the waiver program, the person will have full access to Medicaid services. If the person's income is above the waiver limits, the person can reduce their income and become eligible by setting up an income or Miller trust, applying for the Medicaid for Workers program, or using SSDI/SSI work incentives, such as a PASS plan. If the person has resources over the Medicaid limit, a special needs trust may be set up according to Medicaid rules to establish eligibility. If your client is not eligible for Medicaid, it is important to explore all these available options to eligibility so that the person can receive all necessary medical services.

Medicaid offers several community based services that will help foster independence for individuals who meet the Medicaid criteria for having a developmental disability. Adults who are between 18 and 21 can also access additional services. These include community residential placements, such as personal care homes, therapeutic foster care, certified family homes, and supported living arrangements. These care givers provide support so that the individual can live as independently as possible. These individuals also support the person in obtaining the information the person would need to

make informed decisions. Individuals can receive services in their own home and community, including personal care services, developmental therapy, counseling and behavior supports. If an individual is eligible for a Medicaid waiver program, the individual might also receive safety equipment for their home, job support, home modifications, etc.

If the individual can safely reside in his/her own home or in a facility with these services and is helped in making important decisions, the individual should not need a guardian. The individual's service provider will often have completed evaluations of the person's abilities and can provide testimony at the hearing regarding the person's skills.

## **8. Additional Tips for the Ward's Attorney**

- Under the DD Act, an attorney is appointed to represent the proposed ward. There is no provision for the appointment of an attorney to act as a guardian ad litem or for the appointment of a guardian ad litem in place of an attorney. The attorney's main duty, therefore, is to represent the client's wishes and advocate to achieve these goals.
- Always remember to treat the client with respect and dignity, using people first language. Speak with the client directly, using a method of communication that is chosen by the client. Request help communicating, if needed, but still remember to speak directly to the client. The client is not a disabled person; he or she is a person with different abilities.
- Interview the client without the guardian or care giver present. During the interview, allow the client time to answer your questions and do not fill in the answers or lead the client. Have the client repeat back the information you provide to make sure he or she has understood you.
- Allow the client his or her day in court. Do not discourage a client from being at the hearing unless there is a very good reason. Walk in your client's shoes by asking yourself how would you feel about having a guardian or being subject to the terms of the court order.

- Obtain all available pertinent records regarding the client. The person probably has had many previous evaluations that contain relevant information. These records may already have been collected by parents, a targeted services coordinator, a developmental disabilities agency, or other service provider.
- Ask for and review the client's Person Centered Plan, Individual Education Plan, or Individual Rehabilitation Plan. The child's school will have psychological and educational evaluations. Ask for records by specific name or category. Pertinent records to ask for would be: psychological testing, including intelligence quotients, adaptive behavior tests, academic functioning assessments, therapy assessments and evaluations, neuropsychological evaluations, and testing for emotional disturbance or behavior management needs. Requesting records from Social Security will probably be of little value in determining your client's functioning level.
- Be aware of the high rate of individuals with disabilities that are subject to abuse. To investigate the potential guardian, check for any child or adult protection service records, review the results of background checks, and review Social Security payee accountings. Even if nothing is in the client's record, ask the client about any abuse. The individual might disclose abuse for the first time.
- Educate yourself on what services the client is entitled to receive. If the client does not receive all these services, ask why not. Ask the potential guardian about future planning for finances, living situations, educational training, vocational training, etc. A guardian's decision to place an individual in a facility or institution because the guardian desires to have the individual placed in a "safe" place for a long time is not an acceptable decision.

## 9. Community Support Resources

### A. Agency Resources for Services

#### Regional Health and Welfare Offices

[www.healthandwelfare.idaho.gov](http://www.healthandwelfare.idaho.gov)

*The Department of Health and Welfare's Bureau of Developmental Disabilities Services provide information on community supports. The website contains contact information for regional offices.*

#### Idaho Commission for the Blind and Visually Impaired (ICBVI)

[www.icbvi.state.id.us](http://www.icbvi.state.id.us)

341 W. Washington Street  
Boise, ID 83720-0012  
208-334-3220 or 1-800-542-8688

*Provides information and services regarding education, job training and independent living training for individuals with visual impairments.*

#### Idaho Division of Vocational Rehabilitation (IDVR)

[www.vr.idaho.gov](http://www.vr.idaho.gov)

*Provides education and job training services for persons with disabilities. The website contains contact information for regional offices.*

#### Work Incentive Planning and Assistance Project (WIPA)

1-866-262-3462

*A project that helps Social Security beneficiaries make informed choices about work by explaining how work may affect their benefits including Medicaid, housing or Social Security.*

## Client Assistance Program (CAP)

1-866-262-3462

*A federally funded program that will provide assistance in obtaining appropriate services from rehabilitation service agencies, such as the Idaho Division of Vocational Rehabilitation.*

## Targeted Service Coordinators

[www.healthandwelfare.idaho.gov](http://www.healthandwelfare.idaho.gov)

*A service funded by Medicaid that allows a person to hire someone to coordinate services. Contact the Idaho Department of Health and Welfare's Bureau of Developmental Disabilities Services for a list of service coordinators.*

## Centers for Independent Living

*Federally funded agencies that will assist with locating and maintaining independent living in the community.*

### Regional Offices:

**LIFE, Inc.**  
(Southeastern Idaho)  
<http://idliflife.org>

**Disability Action Center, NW, Inc. (DACNW)**  
(Northern Idaho)  
<http://www.dacnw.org>

**LINC**  
(Boise, Nampa, Caldwell, Twin Falls & surrounding areas)  
<http://www.lincidaho.org>

## Additional Agency Resources

[www.yellowpagesforkids.com](http://www.yellowpagesforkids.com)

Contains numerous resources regarding services for individuals with disabilities.

### B. Self-Determination/Self-Advocacy Resources

#### Idaho Council on Developmental Disabilities

[www.icdd.idaho.gov](http://www.icdd.idaho.gov)

802 W Bannock Street, Ste 308  
Boise, ID 83702  
208-334-2178 or 1-800-544-2433  
208- 334-3417 (fax)

#### Idaho Self-Advocate Leadership Network (ISALN)

[www.icdd.idaho.gov/saln](http://www.icdd.idaho.gov/saln)

802 W Bannock Street, Suite 308  
Boise, ID 83702  
208-334-2178 or 1-800-544-2433  
208-334-3417 (fax)

#### DisAbility Rights Idaho

[www.disabilityrightsidaho.org](http://www.disabilityrightsidaho.org)

*A private, non-profit federally funded agency that provides free advocacy and legal services to individuals with disabilities.*

1-866-262-3462

**Center for Self-Determination**

<http://www.self-determination.com>

C. **Parent Support Services**

**Idaho Parents Unlimited, Inc. (IPUL)**

[www.ipulidaho.org](http://www.ipulidaho.org)

1878 West Overland Road  
Boise, ID 83705  
208-342-5884 or 1-800-242-4785

*A parent support network that provides information and assistance with obtaining services, including appropriate educational services.*

**Idaho Federation of Families for Children’s Mental Health**

[www.idahofederation.org](http://www.idahofederation.org)

802 South Robert Street, Suite 101  
Boise, ID 83705  
208-443-8845 or 1-800-905-3436

*A parent support network for parents of children with mental health needs.*

D. **Disability Information Resources**

**Epilepsy Foundation of Idaho**

[www.epilepsyidaho.org](http://www.epilepsyidaho.org)

*Provides information on epilepsy and local resources.*

## **United Cerebral Palsy**

[www.ucp.org](http://www.ucp.org)

*Website has information on cerebral palsy and has a link to a one-stop resource guide for Idaho.*

## **Idaho Assistive Technology Project**

[www.idahoat.org](http://www.idahoat.org)

*Provides assistance with locating assistive technology to assist a person to become more independent.*

## **Idaho Center for Assistive Technology (ICAT)**

[www.idahocat.org](http://www.idahocat.org)

5420 W Franklin Rd, Ste. A  
Boise, ID 83705  
208-377-8070 or 1-888-289-3259

## **University of Idaho Center on Disabilities and Human Development**

<http://www.idahocdhd.org>

129 W 3<sup>rd</sup> Street  
Moscow, ID 83843  
208-885-3557 or 1-800-432-8324

*A university-based research, education and services program.*

## Idaho Help Family Support

### 360 Project

[www.idahocdhd/dnn/idhelp](http://www.idahocdhd/dnn/idhelp)

*An online directory of services, resources, and information designed to help individuals who have disabilities and their families locate resources and supports in their own communities.*

This document was developed by staff of DisAbility Rights Idaho (DRI). DRI is a private non-profit corporation designated by the Governor of Idaho as the state's Protection and Advocacy System. DRI receives federal funding to provide legal and advocacy services to Idahoans with disabilities. This document was funded in part with a grant from the Administration on Developmental Disabilities. The views in the document do not necessarily reflect the views of the funding source. This document is for informational purposes only and is not intended to provide legal advice. 9/2009

# NOTES

# DISABILITY RIGHTS

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Protection & Advocacy for Individuals with Disabilities



DisAbility Rights Idaho collaborates with other national, state and local organizations to improve the lives of Idahoans with disabilities. You can help this effort by making a tax-deductible donation to our work. All donations are used to further DisAbility Rights Idaho's mission.

To make a donation you can visit our website: [www.disabilityrightsidaho.org](http://www.disabilityrightsidaho.org) and click on [Donations](#), or you may mail a check or money order to our Boise Office at the address below.

To contact **DisAbility Rights Idaho** directly, please use any of the following methods:

**Toll-Free:** 1-866-262-3462

**Boise Office:** 4477 Emerald Street, Suite B-100  
Boise, ID 83706  
208-336-5353  
208-336-5396 (fax)

**Moscow Office:** 428 West 3<sup>rd</sup> Street, Suite 2  
Moscow, ID 83843  
208-882-0962  
208-883-4241 (fax)

**Pocatello Office:** 845 West Center Street, C-107  
Pocatello, ID 83204  
208-232-0922  
208-232-0938 (fax)

**Email:** [info@disabilityrightsidaho.org](mailto:info@disabilityrightsidaho.org)