

Protecting Liberties in Guardianship

**Restrictions
of Personal Liberty**



Restrictions of Personal Liberty

- Sources of “Liberty”
 - What is Liberty?
- Protections & Restrictions in the community
 - Guardianship & Civil Commitment law
- Protections & Restrictions in a nursing home
 - Bill of Rights law

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- Sources of “Liberty”
 - What is Liberty?
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 - Guardianship & Civil Commitment law
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 - Bill of Rights law
- *Who decides and how?*

SOURCES OF LIBERTY

Our American History

What is *liberty*?

Our American History

- Virginia Convention Patrick Henry Speech - *March 23, 1775*

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- Virginia Convention Patrick Henry Speech - *March 23, 1775*
- Declaration of Independence – *Signed July 4, 1776*
- United States Constitution – *Signed September 17, 1787*
- Bill of Rights / 5th Amendment – *Ratified 1791*
- 14th Amendment to the US Constitution – *Ratified 1868*

lib·er·ty (lĭb'ər-tē)

- 1. The condition of **being free** from **confinement, servitude, or forced labor**.
- 2. The condition of **being free** from **oppressive restriction or control by a government or other power**.
- 3. The right or power **to act as one chooses**.

Liberty in the US Constitution

- “**Liberty**” in the Constitution includes a freedom from all *substantial arbitrary impositions and purposeless restraints*
 - *Justice John Marshall Harlan (1961)*

Supreme Court Definition of Liberty

Liberty denotes *not merely freedom from bodily restraint* but also the right of the individual to **contract**, to engage in any of the common **occupations** of life, to acquire useful **knowledge**, to **marry**, establish a home and bring up **children**, to **worship** God according to the dictates of his own conscience and generally to enjoy those privileges long recognized as essential to the orderly **pursuit of happiness** of free men.

Meyer v. Nebraska (1923)

Basic Freedoms & Rights

- Freedom to pursue **ordinary calling or trade** (1897)
- Right to make **contracts** (1905)
- Right to control children's **education** (1925)
- Freedom to **travel** (1958)
- Right of a married couple to use **contraception** (1965)

Basic Freedoms & Rights

- Right to **marry interracially** (1967)
- Right to **abortion** (1973)
- NO right to **assisted suicide** (1997)
- Right to engage in **same-sex intimacy** (2003)
- Right of **same-sex couples to marry** (2015)

Guardian's Decisions

- What decisions have you made as a guardian that concerned the protection or restriction of someone's liberty?

Guardian's Decisions

- Surfing pornographic sites on the web
- Driving and maintaining a driver's license
- Hunting
- Gambling at the casino
- Leaving nursing home to visit relatives
- Making gifts of money (to female strangers)

John Locke (1632 – 1704)

In the area of political philosophy, Locke is best known for his arguments in favor of religious toleration and limited government.

Today these ideas are commonplace and widely accepted.

But in Locke's time they were highly innovative, even radical.



Locke's Legacy

- Locke's philosophies gave rise to the Separation of Powers and the system of checks and balances that are the basis of U.S. government.
- People consent to governments for the purpose of establishing social order and the rule of law.
- *Limitless freedom is untenable but our law protects individual liberty.*

Declaration of Independence

The unanimous Declaration of the thirteen United States of America, When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

- Grounds for political independence directed to King George III

Declaration of Independence

We hold these truths to be self-evident, that all men are created equal,

that they are endowed by their Creator with certain unalienable Rights,

that among these are Life, Liberty and the Pursuit of Happiness.

The unanimous Declaration of the thirteen united States of America,

When in the Course of human events, it becomes necessary for one People to dissolve the political bands which have connected them with another, and to assume among the Powers of the earth, the separate and equal Station to which the Laws of Nature and of Nature's God entitle them, a decent Respect to the Opinions of Mankind requires that they should declare the Causes which impel them to the Separation. — We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness. — That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the governed, — That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its Foundation on such Principles, and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient Causes; and accordingly all experience hath shewn, that Mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the Forms to which they are accustomed. — But when a long Train of abuses and Usurpations, pursuing invariably the same Object evinces a Design to reduce them under absolute Tyranny, it is their Right, it is their Duty, to throw off such Government, and to provide new Guards for their future Safety. — Such has been the Patient Sufferance of these Colonies; and such is now the Necessity which constrains them to alter their former System of Government. — The History of the present King of Great Britain is a History of repeated Injuries and Oppressions, all having in direct or indirect Effect the Establishment of an absolute Tyranny over these States. — To prove this, let Facts be submitted to a candid World. — He has refused his Assent to Laws, the most wholesome and necessary for the public Good. — He has forbidden his Governors to pass Laws of immediate and pressing Importance, unless suspended in their Operation till his Assent should be obtained; and when so suspended, he has utterly neglected to attend to them. — He has refused to pass other Laws for the Amendment of large Tracts of his People, unless those People would relinquish the right of Representation in the Legislature, a right inestimable to them and pernicious to all others. — He has called together legislative Bodies at places unusual, uncomfortable, and distant from the City of the Capital, for the sole Purpose of frustrating their Intentions. — He has refused to assent to their Petitions. — He has dissolved Representative Houses repeatedly, for opposing with manly Firmness his Invasions on the Rights of the People. — He has refused to accept of a new Session, till after a long Time, the Members had dispersed; or to cause others to be called; whereby the Legislative Powers, incapable of Annihilation, have returned to the People at large for their Exercise; in the mean Time, exposed to all the Dangers of Anarchy and Confusion. — He has endeavored to prevent the Population of these States; for that purpose obstructing the Trade for Migration of Persons; refusing to pass other Laws to encourage their Migration hither, and raising the Conditions of new Appropriations of Lands. — He has obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary Powers. — He has made Judges dependent on his Will alone, for the Tenure of their Offices, and the Amount and Payment of their Salaries. — He has erected a multitude of New Offices, and sent hither Swarms of Officers to harass our People, and eat out their Substance. — He has kept among us, in Times of Peace, Standing Armies without the Consent of our Legislature. — He has endeavored to bring the Sea and Commerce to the British Port. — He has endeavored to obstruct the Trade of the Colonies with all Parts of the World. — For imposing Taxes on us without our Consent; — For depriving us in many Cases, of the Benefits of Trial by Jury; — For transporting us here without our Consent, for pretended Offences; — For abolishing the free Election of English Representatives in a neighboring Province, establishing therein an arbitrary Government, and enlarging its Boundaries so as to make it at one an Example for introducing the same absolute Rule into these Colonies; — For taking away our Charters, abolishing our most valuable Laws, and altering fundamentally the Forms of our Governments; — For suspending our own Legislatures, and declaring themselves invested with Powers to legislate for us in all Cases whatsoever. — He has abdicated Government here, by declaring us out of his Protection and waging War against us. — He has plundered our Seas, ravaged our Coasts, burnt our Towns, and destroyed the Lives of our People. — He is at this time transporting large Armies of foreign Mercenaries to complete the Works of Death, Desolation and Tyranny, already begun, with Circumstances of Cruelty & Opprobrium scarcely paralleled in the most barbarous Ages, and unheard of among the most civilized Nations. — He has constrained our fellow Citizens taken Captive on the high Seas to bear Arms against their Country, to become the Executioners of their Friends and Brethren, or to fall themselves by their Hands. — He has excited domestic Contentions among us, and has endeavored to bring on the Inhabitants of our frontiers, the merciless Indian Savages, whose known Rule of Warfare, is an undistinguished Destruction of all Age, Sex and Condition. — In every Stage of these Oppressions We have Petitioned for Redress in the most humble Terms: — Our repeated Petitions have been answered only by repeated Injury. — A Prince, whose Character is thus marked by every act which may define a Tyrant, is unfit to be the ruler of a free People. — Nor have We been wanting in Attention to our British Brethren. We have warned them from Time to Time of Attempts by their Legislature to extend an unwarrantable Jurisdiction over us. We have reminded them of the Circumstances of our Situation and Settlement here. We have appealed to their native Justice and Magnanimity, and we have conjured them by the ties of our common Kindred to disavow these usurpations, which would inevitably interrupt our Commerce and Correspondence. — They too have been deaf to the Voice of Justice and of Consanguinity. — We must, therefore, acquiesce in the Necessity, which denounces our Separation, and hold them, as we hold the rest of Mankind, Enemies in War, in Peace Friends.

Do, therefore, the Representatives of the united States of America, in General Congress, Assembled, appealing to the Supreme Judge of the world for the Rectitude of our Intentions, do, in the Name, and by Authority of the good People of these Colonies, solemnly publish and declare, That these United Colonies are, and of Right ought to be Free and Independent States; that they are absolved from all Allegiance to the British Crown, and that all political Connection between them and the State of Great Britain, is and ought to be totally dissolved; and that as Free and Independent States, they have full Power to levy War, conclude Alliance, establish Commerce, and to do all other Acts and Things which Independent States may of Right do. — And for the support of this Declaration, with a firm reliance on the Protection of Divine Providence, we mutually pledge to each other our Lives, our Fortunes and our sacred Honor.

Richard Smith
Lynch Hall
Galloway.

John Jay
Joseph Hewes
John Adams

John Hancock

Samuel Adams
John Adams
George Washington

Benjamin Franklin
Thomas Jefferson
John Adams

John Adams
John Adams
John Adams

John Adams
John Adams
John Adams

George Washington
John Adams

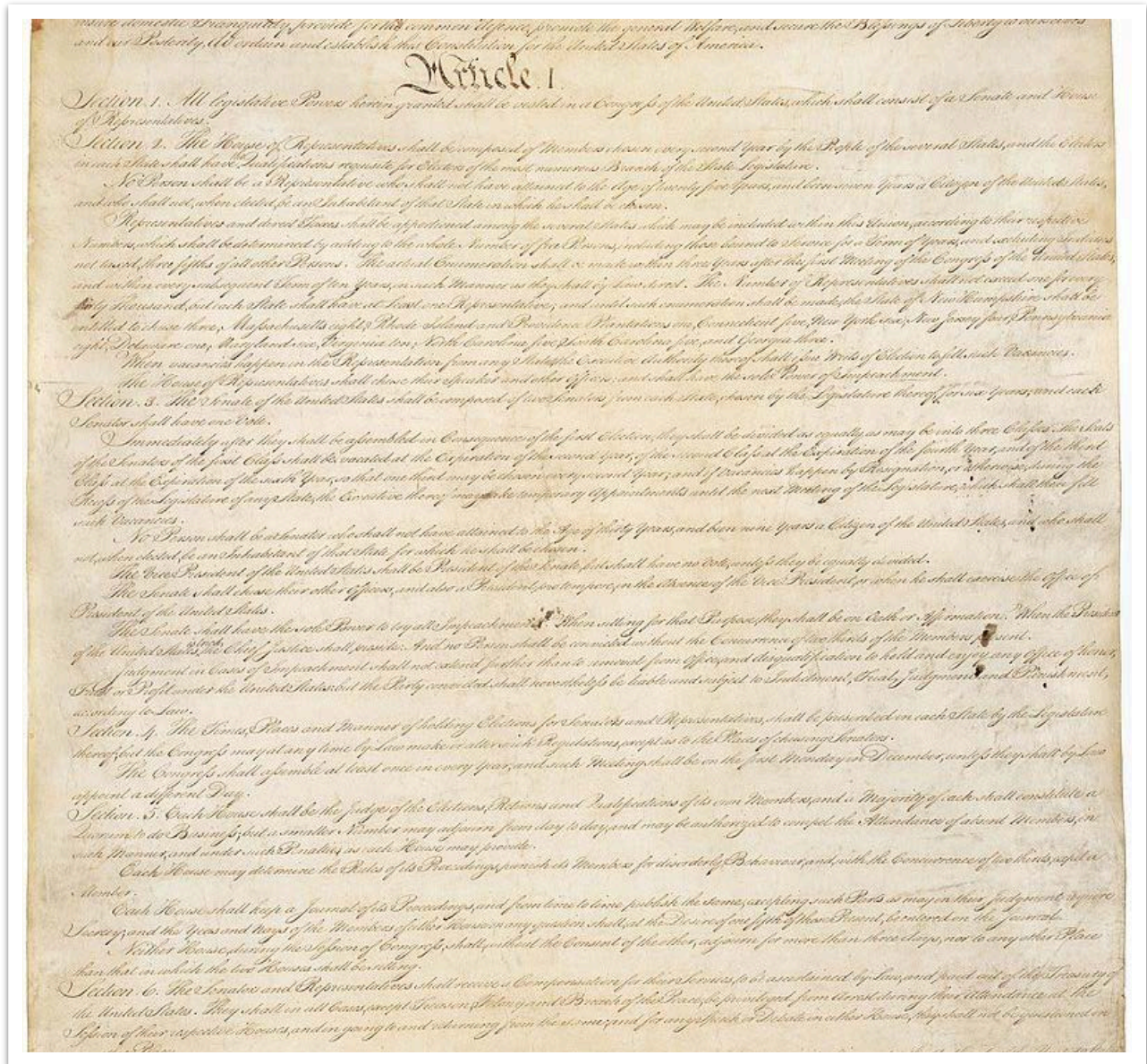
John Adams
John Adams

John Adams
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John Adams
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Constitution of the United States of America

We the People of the United States, in order to form a more perfect Union, establish Justice, ensure domestic Tranquility, provide for the common defense, promote the general welfare and secure the **blessings of liberty** to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.



5th Amendment to the US Constitution

No person shall be * * * deprived of life, *liberty*, or property, without due process of law * * * .

First 10 Amendments to the US Constitution are the “Bill of Rights” and state freedoms of the individual

14th Amendment to the US Constitution

① All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside; ② No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; ③ nor shall any state deprive any person of life, liberty, or property, without due process of law; ④ nor deny to any person within its jurisdiction the equal protection of the laws.

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Concepts of the 14th Amendment

- Adopted after the civil war (1861 – 1865) – ratified by the states in 1868
- Contains a number of important concepts –
 - Citizenship
 - Limits action of state government (Privileges & Immunities)
 - **Due Process**
 - Equal Protection

Liberty & Due Process

- Has the same meaning in both 5th and 14th Amendments
- Guarantees ***fairness*** to all individuals when deprived of life, liberty or property
 - Notice of court proceedings
 - Opportunity to be heard
 - Decision with substantial evidence to support it
- To deprive individuals of basic liberties, state has to show that there was ***due process***.

Liberty & Due Process

Fundamental Rights

Those rights deeply rooted in the Nation's history and tradition.

- Fundamental liberty interests cannot be infringed *at all*, unless the infringement is narrowly tailored to serve a compelling state interest.
 - Public safety
 - National security
 - Protection of the rights of others

Liberty Interests - Religion

Fundamental Rights

- No prayer in public school – there is a right to be free from state-imposed religious practices (1963)
 - Freedom to exercise religion may be restricted to protect rights of others

Liberty Interests - Lists

- Government list of “excessive drinkers” – hearing required (1971)
 - Deprived of right to obtain alcohol
 - Reputation , honesty, integrity & freedom from stigmatization
- Government photo list of “active shoplifters” – no hearing required (1976)
 - No liberty interest - no deprivation
 - Reputation altered by one’s own actions

Liberty Interests - Lists

- Government list of “convicted sex offenders” – no hearing required (2003)
 - No liberty interest - no deprivation
 - Mere injury to reputation, even if defamatory, does not constitute the deprivation of a liberty interest

Liberty Interests - Suspensions

- State can suspend driver's licenses of persons refusing breathalyzer without hearing (1979)
 - Driving is a privilege, not a right
- Hearing required before teacher can be suspended (1985)
 - Deprivation of right to employment

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Equal Protection

- **Wealth Discrimination**

- States must provide free court transcripts and free lawyers to indigents appealing criminal convictions (1963)
- States must provide free psychiatric assistance to indigent defendants (1963)

- **Voter Discrimination**

- State tax to vote violates equal protection (1966)
- Restriction requiring owning property or having children in school district to vote violates equal protection (1969)

Equal Protection

- **Gender discrimination**

- Prohibiting men from nursing school violates equal protection (1982)
- Prohibiting women from entry to military school violates equal protection (1996)

- **Race Discrimination**

- Segregated schools are inherently unequal (1955)
- Reverse discrimination violates equal protection (1978)

PROTECTIONS & RESTRICTIONS

Ohio Law & Rules

Ohio Law & Rules

- Ohio **Revised Code** – abbreviated ‘ORC’ or ‘RC’
 - Statutory law
 - Originate as bills in the Ohio House and Senate which are signed into law by the Governor
 - Chapter 21 - Probate
- Ohio **Administrative Code** – abbreviated ‘OAC’
 - Administrative law
 - State agencies promulgate rules and regulations in the Register of Ohio, which are in turn codified in the Ohio Administrative Code
 - Chapter 37 – Ohio Department of Health

Ohio Law & Rules

- Ohio **Rules of Superintendence** – abbreviated ‘Sup.R.’
 - Relate to the internal operation of Ohio courts and provide for fair, impartial and speedy resolution of cases without unnecessary delay
 - Written by the Ohio Supreme Court, adopted by local courts
 - Not ‘law’

Ohio Guardianship Law

- **GENERAL DUTIES:**
- Protect and control the person of the ward R.C. 2111.13(A)(1)
- Provide suitable maintenance for the ward R.C. 2111.13(A)(2)
- Authorize or approve provision to the ward of medical, health, or other professional care, counsel treatment, or services R.C. 2111.13(C)

Ohio Guardianship Law

- **SPECIAL CIRCUMSTANCES**

- Consent to autopsy or post-mortem examination

R.C. 2111.13(D)

- Authorize burial or cremation R.C. 2111.13(E)

- Marriage of ward shall terminate the guardianship as to the person R.C. 2111.45

Ohio Guardianship Law

- **VOTING**
- At least once each month, each probate judge in this state shall file with the board of elections the names and residences addresses of all persons over eighteen years of age who have been adjudicated incompetent for the purpose of voting. R.C. 3503.18(B)

Sup. R. 66.09

Responsibilities of Guardian to Ward

- Least restrictive alternative

Unless otherwise approved by the probate division of a court of common pleas, a guardian shall make a choice or decision for a ward that best meets the needs of the ward while imposing the *least limitations on the ward's rights, freedom, or ability to control the ward's environment*. To determine the least restrictive alternative, a guardian may seek and consider an independent assessment of the ward's functional ability, health status, and care needs.

Ohio Civil Commitment Law

- Narrowly tailored restriction of liberty under ORC Chapter 5122.
 - Guardianship = incompetent
 - Civil Commitment = mentally ill and subject to court order
- Provides for involuntary treatment of the mentally ill
 - Hospital or community based treatment
- Prosecutor can seek a forced medication order
- Prosecutor can seek a motion for more restrictive setting

Ohio Civil Commitment Law

- **MENTAL ILLNESS**
- No person shall be deprived of any public or private employment solely because of having been admitted to a hospital or otherwise receiving services, voluntarily or involuntarily, for a mental illness or other mental disability.

R.C. 5122.301

Ohio Civil Commitment Law

- **MENTAL ILLNESS**

- Any person admitted to a hospital (for mental illness or other mental disability) * * * retains all civil rights * * *

R.C. 5122.301

- Contract
- Hold a license – professional, occupational, motor vehicle driver, commercial driver
- Marry & Divorce (or annulment or dissolution)
- Make a will
- Vote
- Sue and be sued

Ohio Civil Commitment Law

- **MENTAL ILLNESS**
- Court approval required when incompetent/mentally ill patient is in a hospital for the mentally ill and requires:
 - Surgery
 - Convulsive therapy
 - Major aversive interventions
 - Sterilizations
 - Any unusually hazardous treatment procedures
 - Psycho-surgery
- Court-appointed guardian may give informed, intelligent and knowing written consent. R.C. 5122.271

Ohio Civil Commitment Law

- **MENTAL ILLNESS**
- Guardian may authorize “forced” psychotropic medication, if ordered by the court and
 - Patient lacks capacity to give or withhold informed consent
 - Medication is in the patient’s best interest
 - No less intrusive treatment will be as effective
- *Steele v. Hamilton Cty. Community Mental Health Bd.*, 90 Ohio St. 3d 176, 2000-Ohio-47, 736 N.E.2d 10 (2000)

Nursing Home Patients' Bill of Rights

- Ohio Revised Code enumerates 32 specific rights of residents of a home -
 - Law went into effect in 1990
 - 43 court decisions interpreting some of the rights
 - Some rights have been discussed in the Ohio Administrative Code
 - “Rights” apply to licensed and unlicensed facilities

- R.C. 3721.13

- OAC 3701-17

DECISION MAKING

Using the Ohio law

Right to Dignity and Respect

- #2 - “The right to be free from physical, verbal, mental, emotional abuse and to be treated at all times with courtesy, respect and full recognition of dignity and individuality.”
- Nursing home workers [fired / not fired] taunting resident / calling resident vulgar name.

Right to Dignity and Respect

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- Nursing home workers [**fired** / not fired] taunting resident / calling resident vulgar name.

Physician of Choice

- #7 - “The right, * * * to select as the attending physician a **physician who is not on the staff of the home.**”
- Nursing home resident’s right to choose personal attending physician [could be/could not be] limited to only those physicians approved by the medical director under a facility medical management agreement.

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Records Confidentiality

- #10 - “The right to confidential treatment of personal and medical records * * * .”
- Names and addresses of nursing home resident’s roommates [are/are not protected] (when persons are potential material witnesses in a lawsuit).

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Smoking Tobacco

- #18 - The **right to use tobacco** at the resident's expense under the home's safety rules * * * unless not medically advisable.”
- Resident [may be / may not be] required to smoke in a designated room, when the outside temperature was below 35 degrees, with the window open, exhale smoke out the window and not take portable oxygen into the designated room.

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Visitation

- #21 - “The right upon reasonable request to private and unrestricted communications with the resident’s family, social worker, and any other person, * * * Private and unrestricted communications include * * * the right to: [private visits at any reasonable hour.](#)”
- Labor relations representative is [guilty / not guilty] of criminal trespass when he enters resident’s room during visiting hours, no reasonable request for the visit was made by the resident and rep refuses to leave.

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Visitation – ORC & OAC Provisions

- #21 - “The right **upon reasonable request** to private and unrestricted communications with the resident’s family, social worker, and any other person, * * * Private and unrestricted communications include * * * the right to: **private visits at any reasonable hour.**” R.C. 3721.13 (A)(21)
 - “Members of a resident’s immediate family, guardian, physician, friends, sponsors, or spiritual advisor **may visit the resident at any time** unless the resident objects. * * *
- OAC 3701-17-09

Visitation

- When Revised Code and Administrative Code read together -
 - Visitation during daily visiting hours for everyone
 - One member of defined group may visit at any time, as long as visits do not interfere with home's operation.

Mail

- #21 - The right upon reasonable request to * * * private and unrestricted communications * * * unless not medically advisable * * * except that communications with public officials or with the resident's attorney or physician shall not be restricted. * * * Communications * * * include the right to receive, send and mail sealed, unopened correspondence.”
- Nursing home [may / may not] monitor and sort a resident's mail and summon the resident to the office to open checks from the Social Security Administration.

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Mail – ORC & OAC Provisions

- #21 - “ * * * the right upon reasonable request to * * * receive, send, and mail sealed, unopened correspondence.” R.C. 3721.13(A)(21)
- The administrator shall ensure that all mail, telegrams, or other communications addressed to residents is delivered to the addressee unopened and unread immediately upon receipt * * * and opened and read to the resident * * * if the resident so requests. OAC 3701-17-09

Mail

- 2008 Ohio Administrative Code section found invalid as it conflicts with the statute and does not require a nursing home resident ***to request*** to receive unopened mail.

Restrictions of Personal Liberty

- Sources of “Liberty” – Declaration of Independence, Constitution, Court interpretation of ORC, OAC, Sup.R.
- Restrictions in the community - unlimited power (guardianship) vs narrow restrictions (civil commitment)
- Restrictions in a nursing home – ORC
- Who decides and how? – Guardian and the court

Ohio Guardianship Association

Thank you -

Magistrate Patricia A. Hider
Butler County Probate Court
101 High Street, Hamilton OH 45011