Supported Decision Making and Guardianship

Ohio Developmental Disabilities Council

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About the Ohio DD Council

The Ohio Developmental Disabilities Council (ODDC) is a planning and advocacy group of over 30 members appointed by the Governor. The ODDC receives and disseminates federal funds in the form of grant projects in order to create new ideas, pilot new approaches, empower individuals and families, and advocate for systems change to more fully include people with disabilities in their communities.

Foreword

When an individual turns 18, in the eyes of the law, the individual is considered an adult and legally responsible to make decisions for themselves. If a person is not able to make decisions or care for themselves independently, a decision-making framework is necessary to support the individual to live as happily, safely, and independently as possible. Historically, guardianship has been the default strategy for supporting an adult with developmental disabilities. More recently, changes to Ohio law requires that less restrictive alternatives be explored before a guardianship is established. Due to tremendous advocacy by stakeholders, alternatives to guardianship are being more widely adopted and utilized and guardianship is more frequently recognized as the option of last resort. It is our hope that this book will provide information to self-advocates, their families and supporters about the many options that exist to support someone with decision making so that all options are considered when determining how best an individual can be supported to live their best life.

This information is written for individuals with special needs and families who have a loved one with special needs but may be relevant for others who need to navigate the often confusing and intimidating world of decision-making, probate court and guardianship. We hope this book will help families and individuals understand the strategies available to plan for an individual with a disability, lessen the fear of adulthood, and provide guidance so that all individuals in Ohio live as happily, productively, and independently as possible.

This book is not legal advice but instead offers general information that may or may not be applicable to any one situation. Readers should consult their own attorneys to plan for their own unique situations.

Best,
Logan Philipps and Derek L. Graham

Table of Contents

Table of Contents

Glossary

In order explain the concepts of Supported Decision Making and Guardianship, it is necessary to define terms. Many of these terms (Ward, Incompetent, etc.) are used in this book because they appear in current Ohio law. In addition to these terms, we include alternative words or descriptions that are more widely accepted within the community of self-advocates, family members and supporters.

Guardian(s)
An adult person(s) appointed by a probate court to act on behalf of a person who has been determined by a court to be incompetent.

Ward
An adult for whom a probate court has appointed a guardian.
***The authors prefer to use the term person under guardianship as opposed to Ward*

Probate Court
The county common pleas court that determines if a guardianship is necessary and thereafter serves as the superior guardian who oversees the guardianship.

Letter of Guardianship
The court order signed by the probate court judge that provides the authority of the guardian to act on behalf of the ward.

Incompetent
Any person who is so mentally impaired – as a result of a mental or physical illness or disability, as a result of intellectual disability, or as a result of chronic substance abuse – that the person is incapable of taking proper care of the person's self or property, or fails to provide for the person's family or other persons for whom the person is charged by law to provide.

Capacity
The ability to understand the effects of one's acts and decisions.

Agent
A person who acts on behalf of another person.

Power of Attorney
The authority to act for or with another person in specified legal or financial matters.

What is Supported Decision Making?

Supported Decision Making is a framework that all of us use on a regular basis. It is the process of seeking out trusted friends, advisors and supporters to provide input which we then process and consider when making a decision for ourselves. It most often occurs naturally without any legal documents, but it also can be structured and centered around legal documents and it should even occur within a guardianship. Supported Decision Making can be as simple as asking a friend for advice on what clothes to wear or can be much more complicated such as seeking help making decisions related to health-care choices. One central component of Supported Decision Making is that it allows the individual with a disability to make the decision with support from a person or persons they choose. In Ohio, much work and advocacy is being done toward advancing the awareness and use of Supported Decision Making. Much of this work is being performed by the Supported Decision Making Network of Ohio (SDMNO). For more information, please refer to the SDMNO website at: https://ohionetworkforinno.wixsite.com/supported-decision-m.

A brief description of a guardianship is necessary in order to fully discuss the alternatives to guardianship that exist. The different types and uses for guardianships are described in more detail later in this book. A guardianship is a court-ordered relationship in which one adult is authorized to make decisions

for and act on behalf of another adult person. A guardianship is often established so that a third party (often a parent or family member) is authorized to make decisions for and act on behalf of an individual. To establish a guardianship of an adult, the person must be determined incompetent. This is a legal determination and is defined in the glossary on page 6. A person is considered incompetent if they are incapable of taking proper care of themselves or their property.

A guardianship cannot be established without an expert evaluation, completed by a medical professional, stating that the proposed ward is, "incompetent." These evaluation forms (and most other guardianship forms) are available on the Supreme Court of Ohio Website and most county probate court websites.

A guardianship is the most restrictive strategy available to support individuals. For this reason, Ohio law requires that alternatives to guardianship be explored. As part of the guardianship investigation, court personnel must determine if a less restrictive alternative exists. Under many of these alternatives, the individual with a disability does not lose any rights, instead he or she grants someone else the authority to act for or with him or her. He or she keeps their rights but in essence says,

"I would like help doing some things and making some decisions and sometimes I want someone else to act for me or make decisions for or with me depending on the situation."

Because Ohio law requires guardianship to be the last resort, Supported Decision Making and other alternatives may be the first strategy considered when a person with a disability reaches their 18th birthday. Supported Decision Making emphasizes that all people over the age of 18 have a right for self-determination and that a disability should not preclude a person from making decisions that impact their life. It should also be noted that there is no deadline by which a family must pursue guardianship. Accordingly, if a family or support network is unsure of whether to rely upon alternatives or pursue guardianship, then Ohio law directs them to pursue alternatives first and then fall back on guardianship if that is not effective.

Natural Supported Decision Making occurs when an individual does not sign any formal legal documents. Natural Supported Decision Making is very successful for some individuals. However, these authors prefer Supported Decision Making that involves inclusion of legal documents explained below and referred to as Decision Making Support Documents. All individuals (with or without a developmental disability) are encouraged to sign legal documents to formalize Decision Making Supports. In order for a person to sign the Decision Making Support Documents detailed in the next section, the person must have capacity (defined in the glossary). Importantly, a person who might be found incompetent may still have capacity to make certain decisions, including the capacity to sign the Decision Making Support Documents referenced herein.

What are Decision Making Support Documents?

A person can exercise **Decision Making Support Documents** by signing a series of documents that confer authority to other individuals to act with the person or for the person. Documents generally needed to provide necessary support are the following:

- **Authorized Decision Maker**
- **General Power of Attorney**
- **Health Care Power of Attorney**
- **Education Power of Attorney**
- **Release of Information / Privacy Waivers**

It is important to note that once a guardianship is established, the individual should not sign legal documents such as those listed above until the guardianship is terminated. An attorney should be consulted before asking an individual under guardianship to sign these or any other legal documents.

Authorized Decision Maker: Decision Making in the Developmental Disability (DD) System

In 2012, decision making for the services and programs offered through county boards of developmental disabilities and the Ohio Department of Developmental Disabilities (DODD) was changed to embrace individual autonomy and independence.

There is a presumption of competency, which means that if a guardianship has not been established, the individual, "shall be permitted to make the decision." The individual may seek and obtain advice, support, and guidance from an adult family member or another person without giving up the right to make the decision for themself.

Authorized Decision Maker

A person receiving services in the DD system may authorize an adult to make decisions for them about DD programs and services if they do not have a guardian and are not comfortable making those decisions themselves.

The Authorized Decision Maker applies only with DD services and not any services or programs provided by agencies outside the DD system.

This authorization must be in writing. Although DODD has developed a form for such authorizations – which has the advantage of being easily recognized – the law does not limit a written authorization to this form.

A chosen representative appointed pursuant to this written authorization must be an adult. They may not have any financial interest in the decision relating to the service or program. For example, a provider cannot serve as an authorized representative and sign the person up to receive services from the agency for which they work. Also, chosen representatives may not admit the person they represent into a developmental center. It is expected that in many cases, the chosen representative will be a parent or other family member, even if they also provide services or natural supports.

General Power of Attorney

A common concern for those who seek assistance for a guardianship is that the proposed ward will be taken advantage of, and therefore make poor financial decisions, such as opening credit accounts or running up large bills. A Durable General Power of Attorney allows an adult to name a person as their agent to act for them if they are unable. This Power of

Attorney grants the agent broad authority to manage financial affairs as well as most non-medical affairs. Medical affairs and decisions are covered by a Health Care Power of Attorney discussed later in this book. In this way, the individual with a disability maintains rights necessary to foster independence. The individual, with an agent, can work out a plan that protects them without impacting their rights. For example, if the adult signs a contract or buys a car, the agent has the ability to exercise the termination clause in the contract. With a Power of Attorney, the agent can monitor bank accounts or debit card transactions and close accounts, if necessary.

If a Power of Attorney only concerns financial matters it is often referred to as a *Financial Power of Attorney.*

Any Power of Attorney can be made "durable." A Durable Power of Attorney is one that states that if the signer later becomes incapacitated, the agent retains the rights granted in the document.

How this might look:

Family/Friends would like their loved one to gain the ability to manage finances. If they become a guardian for the individual, the person might never have the chance to manage his or her own property or bank accounts. However, if the individual signed a Power of Attorney for their loved one(s), then they could be more involved in the self-advocate's spending. Taking it a step further, suppose the self-advocate is working and the family/friends would like to assist them with obtaining their own bank account, but are concerned that the self-advocate may misuse the funds or spend them on their,

"new friend." Many families state this is a huge concern as their loved one has, "never met a stranger." The family/friends might consider having the self-advocate's wages deposited into a savings account that is inaccessible except by going into the bank to withdraw. The family/friends could then establish a separate checking account with a debit card linked to it. The family/friends could take money from the savings account and deposit it into the checking account for the self-advocate to use. The amount of the deposit would depend on the self-advocate's ability to manage the proceeds. The idea being that if the family/friends deposit $25 into the checking account for the self-advocate to use for lunch for the week and the self-advocate then spends the $25 in one day buying lunch for their friends, then the family/friends can counsel the self-advocate and the self-advocate is out only $25. This sort of arrangement allows for the self-advocate to demonstrate the ability to manage funds, with the goal being to independently manage increasing amounts.

Are there potential drawbacks with a Durable Power of Attorney?

A Power of Attorney is a legal document that gives someone else, an agent, the authority to act on an individual's behalf. A person must be competent when he or she gives someone else the authority.

Because the person with the disability who signs the Power of Attorney retains the right to speak and act for themself, the individual could still be taken advantage of by nefarious people. Therefore, diligence by the agent is important to ensure that the person is not exploited. In addition, the individual is able to overrule the agent and undo their work perhaps to the detriment of the individual. This is a balancing act, just because an agent may not agree with the decision of the individual doesn't mean the individual is wrong.

Although rare in the authors' experience, a Power of Attorney does not have to be accepted or recognized as valid by an organization, business, or individual. For example, a bank might not recognize the Power of Attorney that allows the agent to act. In most cases like this, the business or institution will have their own Power of Attorney to be completed.

In addition, because a person must have legal capacity to sign a Power of Attorney, a legal challenge as to the capacity of the person at the time of signing could be raised by an individual or organization who does not wish to allow the agent to act.

Health Care Power of Attorney

A Health Care Power of Attorney allows a person to state who they want to make health care decisions for them if the person cannot make those decisions themself. Importantly, a person can also nominate the person they would want to serve as their guardian should one become necessary. All guardians must be approved by a probate court, but a person's nomination is given preference if the nominated person is competent, suitable, and willing to accept the appointment. A Health Care Power of Attorney can be found online at http://www.akronbar.org/wp-content/uploads/2015/08/3 NLTBasicProbateEstatePlanning.pdf.

Education Power of Attorney

An Education Power of Attorney allows a person to be a voice and act for a person in the educational arena. The person appointed can, among other things, fill out forms, speak at Individualized Education Program (IEP) meetings, and stand in a real or "virtual" line to register for classes or meet with school counselors, teachers, and others.

Release of Information / Privacy Waivers

A person may sign a form that allows personal information to be given to a third party. Such releases are often used by providers to accommodate the requests from family members or caregivers for information. A Health Insurance Portability and Accountability Act (HIPAA) Waiver is essentially a release of information form.

A person with a disability can include other individuals in meetings with health care professionals and can grant access to protected health information. They can also communicate their intent to have another individual assist them with medical appointments. In this way, the individual with a disability maintains rights necessary to foster independence. A HIPPA release can be signed to allow another person to access medical information.

How this might look:

A newly-turned 18-year-old invites his mother into his appointment with his doctor. Instead of speaking for her son, the mother sits down in the corner and allows him to explain his symptoms to the doctor. The mother can then fill in the gaps for the doctor. Taking this a step further, the mother can prepare her son before the appointment and he can then go into the examining room by himself to communicate with the doctor. The doctor can then come out to the waiting area and visit with the mother, independent from her son, even though he is an adult. The doctor then can go back into the examining room and visit with the patient with the information the mother has provided. The idea being the newly-turned 18-year-old can grow into a more proactive advocate for his health care, but his mother or father are there to be sure the proper information is communicated.

Other supports available that should be considered include:

Representative Payeeship

A representative payee is a person or company appointed by the Social Security Administration to manage Social Security benefits for an individual with a disability. A representative payee receives and manages the monthly payments for the benefit of the individual. The representative payee can then pay bills and distribute money for the benefit of the individual. If the beneficiary's needs do not consume the monthly payment, the representative payee saves the money for later use. is important to note that even if a person is under a guardianship or has appointed a Financial Power of Attorney Agent, the Social Security Administration still requires a representative payee if necessary. It becomes another "hat" for the agent or guardian to wear. The same person can serve as both guardian or agent and representative payee.

A representative payeeship, authorized representative or designated advocate may also be available for other state and federal benefit or entitlement programs. Each agency may have its own forms or requirements that may need to be completed.

For detailed information on the role of the representative payee see the DD Council's publication: https://ddc.ohio.gov/resources-and-publications/financial-estate-planning/rep-payee-handbook.

Direct Deposits and Automatic Bill Pay

Having funds from employment or Social Security directly deposited into a bank account allows for funds to go directly to that account and avoids cash or checks going to an individual who might not be able to handle the money properly. Automatic payments can be set up to take care of regular expenses such

as utilities. In addition, if the account is a joint account with a trusted person where two signatures are required for withdrawals, that person can manage the funds. It is important that only those assets belonging to the individual with disabilities be placed in this account because Medicaid, Social Security, and other means tested benefits will consider all the funds in the account to be owned by the person with disabilities and will count them as a resource. There are tools that are available for saving money that will not be counted as a resource. Those resources are explained in Planning for Bright Tomorrows available here: https://ddc.ohio.gov/resources-and-publications/financial-estate-planning/financial-estate-planning.

Direct Payments to Provider of Service

To assist an individual who may have trouble managing his or her own funds, payments could be made by a representative payee, trustee, or agent directly to the person or entity providing a service.

Protective Services

A court may order a county board of developmental disabilities to provide protective services for a short time to an adult with developmental disabilities who is being abused or neglected if that adult lacks the capacity to make decisions to protect themself. This is described in Sections 5126.30 to 5126.34 of the Ohio Revised Code (ORC). If the individual who needs assistance is over the age of 60, then the individual might also be eligible for other services available to the elderly through Adult Protective Services.

Protection Orders

A person may also ask a court to order someone who is hurting or threatening to hurt them to stay away and not have any contact. It would be overly restrictive to take away an individual's rights through a guardianship in order to keep the individual safe when it might be possible to accomplish the same with a court order of protection.

Guardianship

Guardianship is intended to be a last resort. But for many people with developmental disabilities, it is the right course of action, and the families are encouraged to pursue legal guardianship when it is appropriate and in the best interest of the person under guardianship. Please refer to pages 7 and 8 for a description of guardianships.

What rights does a guardian have and what rights does a ward have?

It is important to remember that when a guardianship is established, the ward does not actually lose any rights but rather they lose the ability to exercise those rights themself. Rather, once guardianship is established, the guardian has the legal authority to make decisions on behalf of the individual.

The Ohio Supreme Court has issued rules emphasizing that when guardians act on behalf of a person under guardianship, the wishes, desires and preferences of the person under guardianship must always be a guidepost for what decisions a guardian makes.

It is also important to recognize that some rights are fundamental to the individual and cannot be exercised or limited by a guardian. Examples include certain procedural rights within the guardianship proceedings and more common rights such as voting. Unless a court specifically rules that a person is incompetent for purposes of voting, an individual retains the right to vote – even if the individual has a plenary guardian (described below).

Other areas of the individual's life may touch upon fundamental rights or a right of privacy. There may be certain medical procedures to which a probate court will not allow a guardian to give consent, such as abortion or sterilization.

What types of guardianship can be established?

Guardianship of the Person
Guardianship of the Person is a relationship where the guardian has broad authority to make decisions and provide support in most areas of an individual's life, including but not limited to health care decisions, residential placement decisions, day to day programming decisions and many more. Such decisions would include arrangements for food, clothing, residence, medical care, recreation, education, and other concerns. It also includes medical consents, consents to Individual Service Plans (ISPs), consents to participate in Special Olympics, to have a photo of the individual used, and so on. The vast majority of individuals who have a developmental disability and who need a guardian, will only need a Guardianship of the Person.

Guardianship of the Estate
Guardianship of the Estate is a relationship where the guardian controls and protects the assets of the ward. Guardianship of the Estate gives the guardian the authority to make all financial decisions for the ward. This includes the ability to enter into contracts on behalf of the ward.

Plenary Guardianship
Plenary Guardianship is a combination of the authority of both the Guardianship of the Person and Guardianship of the Estate. Plenary Guardianship gives the guardian the authority to make nearly all decisions for the individual (although even with Plenary Guardianship the Guardian should incorporate Supported Decision Making into the guardianship decision-making process as much as possible).

Limited Guardianship
Limited Guardianship is a relationship where the guardian has control only over a portion of the ward's life. Only certain,

specific rights are impacted. Thus, you might have a Limited Guardianship for medical purposes only (that is, to provide consent for medical procedures), for placement purposes only, or for the limited purpose of approving behavior plans and/or psychotropic medications. Because this is the least restrictive form of guardianship, it should be used whenever possible when some form of guardianship is necessary. A Limited Guardianship may also be limited to a timeframe (e.g., one year) instead of for a purpose.

Emergency Guardianship

Emergency Guardianship allows a court to intervene to appoint someone for a short and definite period of time. The Emergency Guardianship lasts for only 72 hours. Emergency Guardianship can be extended by the probate court for an additional 30 days after a hearing.

Interim Guardianship

Interim Guardianship allows a court to appoint someone on a temporary or interim basis because the former guardian is no longer available. An Interim Guardian can be initially appointed for a period of 15 days, and for good cause the Interim Guardianship may be extended another 30 days.

Co-Guardianship

Co-Guardianship occurs when two people are appointed to act as guardian for someone at the same time. In other words, two people share the guardianship responsibilities. The success of a Co-Guardianship hinges upon the ability of the Co-Guardians to work as a team when making decisions so any animosity or personality conflicts that prevent teamwork may be considered by the court as grounds to deny a Co-Guardianship. While some courts encourage Co-Guardianship because of the inherent succession planning involved, other courts have policies prohibiting Co-Guardianship because of the ability for conflict.

To determine if Co-Guardianship is an option in your county, contact your county probate court office. The probate court of the county of residence for the ward should be contacted to make a determination if Co-Guardianship is available.

Is a guardian responsible if a ward commits a crime or injures another person or property?

If a guardian is diligent in the performance of their duties and manages the information they have about risks and concerns correctly, a guardian will not have any liability for the actions of the person under guardianship.

What kind of liability does a guardian have for contracts and expenses of the ward?

Potential guardians do not have to worry about exposing their personal assets when they consider whether to become guardians.

Ohio law provides that a guardian is not personally liable under any contract signed by the guardian on behalf of the ward, unless the contract itself states that the guardian is liable, or the guardian is acting negligently or outside the scope of authority as guardian. Negligence is a legal term. A person is negligent with respect to circumstances when, because of a substantial lapse from due care, the person fails to perceive or avoid a risk that such circumstances may exist.

When signing documents, it is imperative that a guardian make it known that he or she is acting in the official capacity as guardian.

The words "guardian" or "as guardian" should be used following the name or signature of the guardian.

Some examples of an appropriate signature are as follows:

Derek Graham, by Logan Philipps, his Guardian

Logan Philipps as Guardian for Derek Graham

Logan Philipps, Guardian of the Person of Derek Graham

A guardian (any type) is not personally liable for any debt of the ward, unless the guardian or conservator agrees to be personally responsible for the debt, or the guardian is liable for that debt because of another legal relationship (i.e., medical care for a spouse, the negligence of the guardian caused the debt, or the guardian acted beyond their authority and caused the debt).

Must a guardian live in Ohio?

It is desirable for the guardian to live near the ward, preferably in the same county and same state. It is difficult for a guardian to carry out duties if he or she does not have frequent face-to-face contact with his or her ward. A probate court has broad authority to appoint an in-state or out-of-state resident as the guardian of the person of an individual. However, a probate court is only able to appoint an out-of-state person to serve as Guardian of the Estate if a parent nominated the out-of-state person in any document signed by two witnesses or notarized.

After parents die, who will serve as guardian for the ward?

A parent may (and should) nominate a person to serve as guardian for their incompetent adult child. Typically, this is done in a Last Will and Testament but can also be done in a separate document and will be effective if the parent signs the document before two witnesses who also sign the document as witnesses, or if the document is notarized.

Ohio law respects the right of parents to choose guardians for their children who are unable to take care of themselves, no matter where the guardian lives. Therefore, parents may nominate an out-of-state resident to serve as guardian, but parents should recognize that not all probate courts in Ohio are willing to appoint an out-of-state resident. Further, because Medicaid does not transfer from Ohio to another state, if the intention of a parent or parents is for their child to live with the guardian, an in-state guardian may want to be given strong consideration.

It is important to remember that a nomination is not an automatic assignment. Parents may "nominate" a guardian, but the nominated guardian will still need to apply to the probate court and demonstrate to the probate court that they are suitable to serve. Generally speaking, probate courts always appreciate parents making a guardianship nomination and when possible, give deference to the nomination of parents.

While Ohio law only provides legal authority for parents to make a nomination, the reality is that Ohio suffers from a

shortage of persons willing to serve as guardian. For that reason, probate courts encourage and appreciate all guardians and family members thinking about and nominating successor guardians. While there is nothing that requires a probate court to consider nominations from non-parents, probate courts are always looking for ways to create continuity of service and to avoid vacancies of any duration in the role of guardian.

How is a guardianship established?

A proposed guardian must file an application in the probate court of the county where the proposed ward lives. After the application is filed, a probate court investigator, typically called a Court Investigator, will contact the proposed guardian or the contact person listed on the application and arrange to visit the proposed ward and make an independent assessment regarding the need for the guardianship and the proposed guardian's ability to serve.

Applicants for guardianship will have to submit a criminal background check and will have to sign an affidavit agreeing to notify the probate court within 72 hours if at any time the guardian is charged with a crime (misdemeanor or felony).

During the meeting with the proposed ward, the Court Investigator will inform the proposed ward that he or she has the following rights:

- The right to object to the guardianship;
- The right to have an attorney represent them, even if they cannot afford one;
- The right to be present during the hearing;
- The right to receive notice of the hearing;
- The right to request a record of the hearing;
- The right to have a friend or family member of their choice present;
- The right to have an independent evaluation.

The Court Investigator will produce a report for the court. In this report, the Court Investigator will provide their opinion about whether the guardianship should be established and the suitability of the proposed guardian. The probate court will schedule a hearing to be held. At that hearing, the applicant has the burden to prove that the person is incompetent, and that the applicant is suitable to serve as the guardian.

The proposed guardian must attend the hearing and will be asked questions regarding the relationship, the need, and the willingness to serve as guardian. The proposed guardian will take an oath, promising to fulfill the legal duties associated with guardianship.

The proposed ward is not required to attend the hearing but has a right to attend all hearings. At the hearing, the proposed ward may have an attorney at no cost. The proposed ward or their attorney may communicate to the court if they disagree with the guardianship and the proposed guardian at the hearing. The proposed ward may offer evidence to demonstrate why the guardianship is unnecessary or that the proposed guardian is not suitable.

Is an attorney necessary to file for guardianship?

Whether you need an attorney to assist you depends upon the rules of the probate court for the county where the proposed ward lives, and the type of guardianship for which you are applying. Before applying, the person applying for guardianship should call the clerk of the probate court to ask whether an attorney is required.

In some counties, it will be necessary to hire an attorney to file the guardianship application in probate court. This is especially true when the application is for a Guardianship of the Estate where a bond will also have to be posted.

If an attorney is not required, you may apply to serve as a guardian. The process is form driven and many probate courts have packets of the required forms. As a practical matter, if your county does not offer a packet, a person seeking guardianship is required to use the guardianship forms found on the Ohio Supreme Court's website. For those who are uncomfortable navigating the process or unsure of how to proceed, it is recommended that you hire an attorney to assist you with the process.

Guardianship duties are set forth in the Ohio Revised Code, the Ohio Rules of Superintendence and local probate rules. Some of those duties include the following:

Authority

The guardian of a ward is under the jurisdiction and authority of the probate court. This means the magistrates and judges of the court supervise the guardians. The court is called the Superior Guardian. Therefore, guardians must follow all orders of the probate court, which is their Superior Guardian and the source of their authority. They can be removed if they do not.

Education

Ohio law requires that all guardians attend mandatory training. There is a one-time fundamentals course lasting six hours and continuing education requirements (3 hours) for each following year. To help meet this requirement, the Supreme Court of Ohio offers free courses to guardians of adults. These courses are offered in many communities throughout Ohio and online via the Internet. In addition, some counties offer local options for guardianship education.

Reporting

Reports

At a minimum, guardians must file either annual or biannual reports with the probate court to enable the court to monitor the condition of the ward and to determine whether there is a need for the guardianship to continue.

The law requires a guardian to file a guardian's report with the probate court at least once every two years, but most courts require the guardian's report annually. Not only will guardians be required to state whether there is need for the guardianship to continue, but they also must submit another Statement of Expert Evaluation signed by either a physician, a licensed social worker, a licensed clinical psychologist, or the person's developmental disabilities team. In some counties, the Statement of Expert Evaluation may be waived after the first report has been filed, if the ward's condition and the need for guardianship is not expected to change. This waiver of annual reporting is granted by the local court at the request of the guardian. The request must be accompanied by a signed statement from the expert stating that the ward's condition is not likely to improve.

Abuse, Neglect and/or Exploitation

A guardian must notify the court of any appropriate allegations of abuse, neglect, or exploitation of the ward. This report should be in the form of a written letter or memorandum with a succinct explanation of what happened and what steps the guardian is taking to prevent the issue from happening again.

Change of Residence

A guardian must notify the court of a change of residence and should notify the court before the change occurs. A ward's change of residence to a more restrictive setting in or outside of the county of the guardian's appointment must be approved by the court, unless a delay in authorizing the change of residence would affect the health and safety of the ward.

Finances

Guardians of the Estate are required to get permission from the probate court before making expenditures from the ward's estate. Guardians of the Estate must report annually as to how they spent the funds of the ward on his or her behalf during the prior year. Guardians are required to keep an accounting and submit receipts for all such expenditures. Guardianship of the Estate may be cumbersome. Unless it is absolutely necessary, consider the use of an alternative. Very few individuals with developmental disabilities in the state of Ohio will ever need a Guardship of the Estate due to various alternatives available.

Seeking Guidance

When in doubt as to what to do on behalf of the ward, guardians may seek direction from the probate court. It may be necessary for the guardian to submit a motion to the court for direction, and to request a hearing, in order to get such direction. It is strongly recommended that guardians consult legal counsel before filing any such motion with the probate court.

Care and Advocacy

Guardians are expected to exercise due diligence and seek expert opinions when providing informed consent on behalf of a ward. Guardians are expected to educate themselves and advocate for services and supports that best meet the needs of the ward. Complicated medical decisions and end-of-life treatment decisions fall within the responsibility of a guardian. In all such cases the guardian needs to understand the preferences and wishes of the ward to the greatest extent possible and to weave those preferences into the decision being made. Guardians cannot delegate their authority in these situations and guardians do need to be mindful of protecting a ward's right to privacy.

Maximize Person-Centered Planning

Ohio law makes clear that all individuals with developmental disabilities, including those with guardians, have the right to participate in decisions that affect their lives and to have their needs, desires, and preferences considered. Guardians must prepare and file an annual plan that lists personal and financial goals for the person under guardianship. The annual plan is in addition to the guardianship report. This requirement became effective in June 2015 and is a reflection of the extraordinary act that guardianship is and reminds all persons that a ward is a human being with goals and rights, and that a guardian must serve as an advocate to help the ward live as independently as possible.

What happens if the guardian is not appropriate or doing an appropriate job?

If someone believes that a guardian is not doing a good job, he or she should bring the matter to the attention of the probate court. All probate courts are required to have a mechanism in place whereby any person or entity can file a complaint with the probate court regarding the performance or decision-making of a guardian. The court may set any such complaint for hearing, or it might ask its investigator to review the ward's situation and the involvement of the guardian.

Likewise, if the ward wants a new guardian, the ward should bring that to the attention of the probate court. The court may hold a hearing on the matter. In an ideal situation, the current guardian would resign and a new person approved by the ward would apply to become the successor.

Probate courts have broad discretion in the appointment and removal of a guardian. While probate courts are often hesitant to remove a guardian, where evidence of neglect, abuse or just failure to provide guardianship services is demonstrated to a probate court, the court will remove the guardian and appoint a successor guardian.

Can a guardianship be terminated once it is established?

Sometimes it becomes apparent that a guardianship should not have been created in the first place, that a guardianship is no longer necessary, or the level of restrictiveness is no longer appropriate. Only the court can terminate a guardianship. This process is started by submitting a motion to the probate court.

A ward may submit a motion asking that the guardianship be ended to the court 120 days after the guardianship becomes effective. The ward may renew his or her request once a year after that. See O.R.C. Section 2111.49 (C). If the ward alleges they are competent, the burden of proving their incompetence by clear and convincing evidence is on the guardian. This is called a review hearing and any time the ward requests a review hearing, the ward has all of the rights enumerated above that were afforded to the ward when the guardianship was established. This means that if a ward wants to terminate a guardianship, they may request an attorney (at no cost to the ward) to represent them in that endeavor and may also request a court appointed doctor to render an updated opinion on whether the guardianship is still necessary. Even if a guardian disagrees with a ward's opinion that the guardianship should be ended, a guardian has a legal duty to assist the ward with requesting a review hearing with the probate court if the ward has communicated that desire to the guardian.

A court will often require evidence as to why the underlying condition that justified the guardianship in the first place has abated and that the guardianship is no longer necessary.

A marriage of the ward terminates guardianship of the person but not the estate. There is a presumption that the spouse will now oversee the personal care of the incompetent spouse. However, if the competent spouse does not have legal authority via a guardianship or power of attorney, that spouse will not be able to legally make decisions for the spouse who needs care.

If two individuals who are under a guardianship get married, both will no longer have guardians of their person. Therefore, if two individuals under guardianships wish to be married, their guardians should be prepared to file a new application after the marriage if they wish to reestablish the guardianships.

Can a family member be guardian and a paid provider of services?

Yes, if the probate court will allow it. Ohio rules generally prohibit a court from issuing letters of guardianship to a paid provider because it creates a conflict of interest. However, the probate court may exempt relatives from this prohibition. The probate court must approve of a guardian becoming a paid provider. Ohio law strictly prohibits a non-family member from being a paid provider and guardian of the same person.

Final Thoughts

It is our sincere hope that this book has provided you with some answers to questions that you have. Because every individual is unique, each situation regarding supported decision making, decision making supports and guardianship is unique. If you have additional questions, you should ask other parents, the Ohio DD Council office, other trusted advisors, or an attorney with a focus on Special Needs Planning for additional information.

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Logan has been an attorney since 2006. As an estate planning attorney, Logan helps people plan for bright tomorrows for themselves and their loved ones.

An area of concentration for Logan's practice is planning for families with children with special needs. Before becoming a lawyer, Logan taught elementary school in Cincinnati, Ohio. He utilizes his teaching background to educate individuals, parents, grandparents, and loved ones about the strategies available to protect family members. His experience with special needs started as a teenager when his father remarried and he gained a stepbrother who has special needs.

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Derek Graham is an estate planning attorney and partner at Resch, Root, Philipps & Graham, LLC in Dublin, Ohio. Derek's practice focuses on developmental disability law, special needs planning, guardianship, probate, probate litigation and business (organizational, transactional and succession). Early in his career he was fortunate to get experience in civil litigation, business transactions and estate planning. Then in 2009, he and his wife had their first daughter who was born with Down syndrome. Like many of his clients today, they were inundated with information and felt overwhelmed. He now spends the majority of his days helping similarly situated families with the various resources that exist. Derek finds it very rewarding to help families understand how to effectively and practically plan their estate. More than that though, he enjoys helping families understand the resources available to them and how to get the most out of these resources.

For more information about the authors or Resch, Root, Philipps & Graham, LLC, please visit www.rrpg-law.com

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