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# *Guardianship in Ohio*

Published by



**Ohio Developmental  
Disabilities Council**

## 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

*It is our pleasure to offer this book to the community. Building on a prior version written by David Zwyer, this book offers a comprehensive overview of guardianship and alternatives in Ohio in a question and answer format. The information is written for families who have a child with a developmental disability but may be relevant for others who need to navigate the often confusing and intimidating world of 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 guardianship, 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. Over the years, we have provided information to parents, friends, relatives, and individuals about guardianships for adults who have developmental disabilities. Readers should consult their own attorneys to plan for their own unique situations.*

*When a person turns 18, in the eyes of the law, he or she is now considered an adult and legally responsible to make decisions for him or herself. If a person is not capable of making decisions or caring for him or herself independently, a decision-making framework is necessary to support the individual to live as happily, safely, and independently as possible.*

*Like each individual, each situation is unique. When families come into our office, they often think they need a guardianship because they have been told that by someone else, but a guardianship may not be necessary or recommended as the right strategy to promote the health, safety, and independence of an individual with special needs. When a family comes to us, we discuss the alternatives to a guardianship to ensure that the least restrictive yet effective strategy can be used. Because of this common misconception that a guardianship is the only strategy, this book will first discuss less restrictive strategies.*

*This book contains many of the questions we have been asked over the years and the answers we give.*

*Best,*

*Logan Philipps and William (Bill) Root*

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# Glossary

**Guardian(s)** – an adult person(s) appointed by a probate court to act on behalf of an adult with a disability

**Ward** – an adult with a disability for whom the guardianship is established

**Probate Court** – the county court that determines if a guardianship is necessary and oversees the person appointed to be guardian

**Letter of Guardianship** – the legal document 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

**Conservatorship** – a legal arrangement in which a competent adult with physical disabilities voluntarily relinquishes rights to another individual

**Agent** – a person who acts on behalf of another person

**Power of Attorney** – the authority to act for another person in specified or all legal or financial matters



## *W*hat is a guardianship and are there alternatives?

*[ A brief description of a guardianship is necessary in order to discuss the alternatives. ]*

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 parent or parents is/are authorized to make decisions for and act on behalf of an adult child. Either, or both parents can be appointed as guardians. A parental relationship is not a prerequisite for a guardianship; another responsible adult can serve as guardian. It is important to remember that in a guardianship, the ward loses rights and the ability to act for him or herself. The type and scope of the guardianship determines what rights and abilities the ward loses.

## *H*ow do I know if a guardianship should be established?

A guardianship is only established for individuals over the age of 18. Up until the 18th birthday, parents are already the guardians of their children. The process can begin before the 18th birthday, usually at 17 years and six months at the earliest.

To establish a guardianship of an adult, the person must be considered incompetent. This is a legal determination and is defined in the glossary on page 4. 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 are available on the Supreme Court of Ohio Website and most county probate court websites.

## *A*re there alternatives to guardianship?

Yes, a guardianship is not always necessary (or recommended) for an adult with a disability. In fact, part of the investigation performed by court personnel is a determination if a less restrictive alternative exists. Under each 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 him or her. He or she keeps their rights but in essence says, “I want someone else to do things for me.”

## *D*ecision Making in the 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 him or herself.





***Chosen Representative*** – A person receiving services in the DD system can now authorize an adult to make decisions for him or her about DD programs and services if he or she does not have a guardian and is not comfortable making those decisions him or herself.

### ***Choosing a Substitute Decision Maker***

An individual may also choose someone else to make a decision on his or her behalf. This decision maker applies only with DD services and not any services or programs provided by agencies outside the DD System. A power of attorney would be necessary in this instance.

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. If the individual expresses an intent to revoke the authorization, it should be revoked.

A chosen representative appointed pursuant to this written authorization must be an adult. He or she cannot 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 he works. 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.

***Financial 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. There may be a less restrictive alternative to a guardianship for this purpose. A Financial Power of Attorney may be signed by the adult to grant another adult (an agent) the authority to manage his or her financial affairs. In this way, the individual with a disability maintains rights necessary to foster

independence. He or she, with the agent, can work out a plan that protects the individual without sacrificing rights. For example, if the adult signs a contract or buys a car, the power of attorney 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.

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:

*Parents would like their child to gain the ability to manage finances. If they become a guardian for their child, the child will never have the chance to manage his or her own property or bank accounts. However, if the child signed a power of attorney for his or her parents, the parents could monitor the child's spending. Taking it a step further, suppose the child is working and the parents would like to provide her with the opportunity to have her own bank account, but are concerned that the child may misuse the funds or spend them on her “new friend.” Many families state this is a huge concern as their child has, “never met a stranger.” The parents might consider having the child's wages deposited into a savings account that is inaccessible except by going into the bank to withdraw. The parents could then establish a separate checking account with a debit card linked to it. The parents could take money from the savings account and deposit it into the checking account for the child to use. The amount of the deposit would depend on the child's ability to manage the proceeds. The idea being that if the parents deposit \$25 into the checking account for the child to use for lunch for the week and the child then spends the \$25 in one day buying lunch for her friends, then the parents can counsel the child and the child is out only \$25. This sort of arrangement allows for the child to demonstrate the ability to manage funds, with the goal being to independently manage increasing amounts.*



## *A*re there potential drawbacks with a Durable Financial 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 him or herself and can overrule the agent, diligence by the agent is very important to ensure that the person is not exploited. Nonetheless, for a person who has been taken advantage of in the past, the power of attorney may be insufficient.

In addition, because only a competent person may sign a power of attorney, a legal challenge as to the competency 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.

**Representative Payeeship** – If the only significant income an individual receives is his or her monthly Social Security benefit, it may not be necessary for a person to have a Guardian of the Estate or a Plenary Guardian. A representative payee, which can be an individual or a company, can be established through the Social Security Administration for monthly payments to be made to the representative payee for the benefit of the individual with a disability. The representative payee can then pay bills and distribute money for the benefit of the individual. In this way, the representative



payee may be able to handle all relevant financial matters. A Guardian of the Person or a Limited Guardian could handle all other matters.

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.

***Direct Deposits and Automatic Bill Pay*** – Having funds from employment or Social Security directly deposited into a bank account keeps the actual cash from going directly to the person. 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.



***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 attorney directly to the person or entity providing a service.



## *Are there alternatives to guardianships for non-financial matters?*

**General Powers of Attorney** – A General Power of Attorney is used to authorize an agent to act on behalf of the person signing the power of attorney to care for his or her non-financial affairs. Non-financial affairs include taking care of pets, making living arrangements, talking with a provider, attending Individualized Education Program (IEP) meetings, etc.

Most individuals do not seek a General Power of Attorney alone. Our clients primarily seek us to prepare a Financial Power of Attorney first and the non-financial matters are usually incidental to the financial powers. As an illustration, the Ohio Revised Code includes a form “Statutory Power of Attorney” because a Financial Power of Attorney is so frequently needed. This form of power of attorney is only considered a Financial Power of Attorney unless it is expanded by including non-financial matters in the “Special Instructions” section. This form can be found online at <http://www.akronbar.org/wp-content/uploads/2015/08/3-NLTBasicProbateEstatePlanning.pdf>.

Despite what is written above, a General Power of Attorney can be established without a Financial Power of Attorney.

**Health Care Power of Attorney** – A Health Care Power of Attorney allows a person to state who he or she wants to make health care decisions for him or her if he or she cannot make those decisions him or herself. Importantly, a person can also nominate the person he or she would want to serve as his or her 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 IEP meetings, and stand in a real or “virtual” line to register for classes.

**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 him or herself. 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 him or her 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.

**Supported Decision Making** – Supported Decision Making is a process by which a person with a disability employs the relationships he or she has with other people or agencies (i.e. family, friends, staff, volunteers and advocates) to assist him or her in making decisions and communicating decisions. This group of people can help ensure that the individual has a support system that meets all of his or her needs and advocates on the individual's behalf.

**Release of Information** – 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 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 HIPAA 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 the child, the mother sits down in the corner and allows the child 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 the child before the appointment and the child 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 the child. The doctor then can go back into the examining room and visit with the child with the information the mother has provided. The idea being the child 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.*

**Conservatorship** – If an individual is mentally competent but has a physical disability, the person can:

- Ask the probate court to appoint a conservator of either person or estate, or both;
- Select the conservator;
- Discharge the conservator if he or she is unhappy with the person or if his or her physical disability decreases; and
- Specify to the court just what authority he or she wants the conservator to have.

A conservatorship looks and feels like guardianship; but most importantly, it does not involve any finding of incompetence. See *definition in glossary on page 4*.







# Guardianship

*In addition to the information included here, readers are encouraged to review the Ohio Attorney General's "Ohio Guardianship Guide," available on the web.*

## *W*hat rights does a guardian have and what rights does a ward have?

It is important to remember that when a guardianship is established, certain rights are taken away from the ward. When thinking about rights, it is important to recall that if a guardian has authority over an aspect of the ward's life, the ward does not. Depending on the type of guardianship established, different rights will be taken away.

It is also important to recognize that some rights are personal to the individual and cannot be exercised by a guardian. A guardian cannot make a will. In addition, voting is a fundamental right. 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 on page 17).

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. However, courts may prevent or nullify the marriage of a ward, especially if the marriage takes place without the guardian's consent.

# *W*hat types of guardianship can be established?

## ***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 removed.

Thus, you might have a Limited Guardian 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 time-frame (e.g., one year) instead of for a purpose.

## ***Guardianship of the Person***

Guardianship of the Person is a relationship where the guardian controls and protects the personal needs of the ward. Guardianship of the Person gives the guardian the authority to make all day-to-day decisions of a more personal nature (that is, all decisions except financial decisions) on behalf of the ward. 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), Individual Habilitation Plans, consents to participate in Special Olympics, to have a photo of the individual used, and so on.

## ***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, and combines the authority of Guardianship of the Person and Guardianship of the Estate. It also sweeps away more personal rights than any other form of guardianship.

### ***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.

### ***Guardian ad litem***

Guardian ad litem is a different type of guardianship in which a guardian is appointed for the very specific purpose of representing a minor or someone who is allegedly incompetent during the course of a particular type of litigation. A Guardian ad litem's authority ends when the litigation ends.



## **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. Co-Guardianship is often not a good idea in a divorce situation and many courts will not consider it. A court will also not appoint co-guardians in a situation in which there is animosity between the potential co-guardians. Depending on the county court and judge, Co-Guardianship may also require both guardians to sign every form, creating additional logistical problems in completing paperwork on time. Co-Guardianship is not recognized in every county. 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?***

A guardian is not liable for the actions of a ward who commits a crime or otherwise injures someone or another's property.

## ***What kind of liability does a guardian have?***

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.



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.

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).



## *M*ust 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. However, a probate court is 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.

## *A*fter parents die, who will serve as guardian for the ward?

A parent may 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. However, because Ohio Medicaid Waivers do 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. However, if the requirements of the law are followed, the person nominated by the parents will have a preference in appointment.





## *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.

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 him or her, even if he or she 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 his or her choice present;
- The right to prevent his or her personal physician and certain other parties from testifying against him or her; and
- The right to have an independent evaluation.

The probate court will schedule a hearing to be held. At that hearing, a probate judge or magistrate will determine whether a guardianship is necessary and the suitability of the proposed guardian to serve.

The proposed guardian must attend the hearing and will be asked questions by the magistrate regarding the relationship, the need, and the willingness to serve as guardian. The proposed guardian will take an oath, promising to care for the ward.

The proposed ward is not required to attend the hearing but has a right to. At the hearing, the proposed ward may have an attorney at no cost. The proposed ward or his or her attorney may communicate to the court if he or she agrees with the guardianship and the proposed guardian at the hearing. The proposed ward may offer evidence to demonstrate why the guardianship is unnecessary or the proposed guardian is not a good choice.

## *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 can use the forms available on the Franklin County Probate Court's website as a guide, being mindful that local courts may have their own forms.







## *W*hat are the duties of a guardian?

Being a guardian can be a lot of work. Both the Ohio Revised Code and local rules govern the duties of a guardian. 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.

### **Reporting:**

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 report with the probate court at least every two years, but some 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.



A guardian must notify the court of any abuse, neglect, or exploitation of the ward.

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.

Guardians of the Estate are required to get permission from the probate court before making expenditures from the ward's estate, unless such authority is

specifically granted in their letter of guardianship or other order of the court. 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.



### ***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. At a minimum, the court will expect a Guardian of the Person to keep the ward safe, nourished and healthy, and a Guardian of the Estate to protect the ward's assets.

### ***Care and Advocacy:***

Guardians are expected to follow the recommendations of physicians concerning the health of their wards. Guardians may have to seek to put behavior support plans in place for their wards, work collaboratively with service providers to solve issues related to behavior support plans, or if issues cannot be resolved advocate for their ward in Court. Sometimes acting in the best interest of their wards means that guardians will have to speak up and advocate for them.

Guardians cannot delegate their authority through a power of attorney or otherwise. However, a guardian who is going to be absent for a time, might show their Letter of Guardianship to the family physician and let the physician know in whose care the ward will be during their absence. The guardian might also complete a form that gives the temporary custodial party permission to seek medical attention for their ward in their absence. A guardian is expected to use his or her judgment and seek advice from the probate court if needed in determining what is in the best interest of the ward.

### ***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 (taking away rights) 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. The court may set the matter 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.

Short of the ward suffering loss of assets, injury or ill health as a result of neglect by the guardian, probate courts are unlikely to remove a guardian who wants to continue to serve, especially a family member. Even motions by divorced spouses to take over guardianship of their child are unlikely to succeed without a very clear and persuasive reason to make a change.

## *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 to the court 120 days after the guardianship becomes effective, asking that the guardianship be ended. 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 his or her competence, the burden of proving his or her incompetence by clear and convincing evidence is on the guardian.

A court will 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 parent 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. However, the probate court may exempt relatives from this prohibition. The probate court must approve of a guardian becoming a paid provider.

# *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 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.





## *A*bout the Authors

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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.

Logan lives in Grandview Heights with his wife and three boys.



### **William (Bill) K. Root, Principal Resch, Root & Philipps, LLC**

Bill has been an attorney since 1980. Bill has limited his practice to estate and business planning, which allows him the opportunity to work with individuals and business owners to help them plan their personal estates, and for the successful transition of their business interests.

Bill's special needs planning practice started in 1985 with the birth of his second child, Erin. He and his wife attended more IEPs, school meetings, seminars, doctor's appointments and consults that he can begin to count. They participate in a number of special needs organizations. They also established the Erin Root Fund for Children at the Columbus Foundation and have directed their charitable giving to organizations created to serve children with special needs.

Bill lives in Dublin with his wife, Tina.



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