Board on the Unauthorized Practice of Law of The Supreme Court of Ohio

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Avisory Opinion UPL 24-01
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Laypersons Serving Individually or On Behalf of an Agency as Guardians Pursuant to Section 5123.01 et seq.

OPINION: This advisory opinion addresses inquiries by the Montgomery County Probate Court (via the Dayton Bar Association) and the Portage County Guardianship Board in regard to the filings that a public or private entity may make, either through an individual employee or in the name of the entity, to initiate guardianship proceedings on behalf of those persons who are developmentally disabled or incapacitated and to carry out the duties of a guardian without engaging in the unauthorized practice of law.

QUESTIONS PRESENTED:

1. Is representation by counsel required when an application for appointment of a guardian of the person is filed by a corporation and whenever subsequent filings are made after the corporate guardian is appointed by the court?
2. Is an Executive Director acting on behalf of a Guardianship Service Board in relation to all guardianship matters permitted under R.C. 2111.01 et seq. to initiate guardianship proceedings with the probate court and to discharge any post appointment duties required by the court without those activities constituting the unauthorized practice of law?

Both inquiries came through and upon referral from the Ohio Board of Professional Conduct and necessarily involve the definition of what is the unauthorized practice of law and the appropriateness of a layperson acting on behalf of a public or private nonprofit corporate entity.

It has been asserted that there is a growing concern in Ohio that there is a shortage of attorneys willing to serve as guardians and the appointment of laypersons is increasingly critical to the protection of those who need guardianships. Because of the growing number of laypersons and service boards acting through laypersons serving as guardians, guidance has been requested regarding what is the unauthorized practice of law in the guardianship context, including the issue of whether a nonprofit corporation can be represented by a layperson serving as a guardian.

CONCLUSION:

There is no statutory requirement that a guardian, either an individual or corporate entity, be a lawyer. Where the guardian, either an individual acting on behalf of a corporate entity or the named corporate entity, does not undertake activities beyond those requiring "ordinary intelligence rather than the skill peculiar to one trained and experienced in the law" and does not engage in the preparation of pleadings and other legal documents, direct or cross-examine witnesses, argue in adversary proceedings, manage legal actions for clients, or provide legal advice, the guardian is not engaged in the unauthorized practice of law. The prohibition against a nonlawyer representing a corporate entity is not applicable where the nonlawyer is not engaged in the unauthorized practice of law. The probate court, serving as the "superior guardian" in all guardianship matters should ensure that those guardians appearing in court do not cross the line into the unauthorized practice of law. To the extent that guardians might have interactions with the probate court that do not involve legal issues, the probate court is encouraged to provide forms to guardians to complete which only require factual information.

BACKGROUND:

Statutory Authority for Guardianship Appointments and Duties

Chapter 2111 of the Ohio Revised Code governs generally the appointment of guardians. R.C. 2111.01 defines "guardian," in pertinent part, as follows:

> …any person, association, or corporation appointed by the probate court to have the care and management of the person, the estate, or both of an incompetent or minor. . . ."Guardian" also includes "an agency under contract with the department of developmental disability for the provision of protective service under sections 5123.55 to 5123.59 of the Revised Code when appointed by the probate court to have the care and management of the person of an incompetent."

"Incompetent" means either of the following:

> (1) 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;
> (2) Any person confined to a correctional institution within this state.

R.C. 2111.01(D).

Chapter 5123 governs the Department of Developmental Disabilities. R.C. 5123.01(F) provides a definition of "developmental disability" to include a mental or physical impairment or a combination of mental and physical impairments that results for those age 6 and over a substantial functional limitation in three areas of major life activity such as "self-care, receptive and expressive language, learning, mobility, self-direction, capacity for independent living, and, if the person is at least age sixteen capacity for economic self-sufficiency." It also includes "intellectual disability."[1]

R.C. 5123.56 specifically provides that the department of developmental disabilities is to develop a statewide system of "protective services" defined, in part, as the "performance of the duties of a guardian …with respect to a person with a developmental disability." R.C. 5123.55 (D). R. C. 5123.58 provides that a public or private agency providing protective services may be "nominated" to serve as a "guardian, trustee, protector, conservator, or as trustee and protector of a person with a developmental disability" under enumerated conditions.

Thus, individuals and public and private not for profit entities may be appointed as guardians under R.C. Chapters 2111 and R.C. 5123. Advocacy and Protective Services, Inc. (APSI) is a statewide independent organization that has been providing advocacy and "protective services" for adults with developmental disabilities for over 40 years. *In re L. M.*, 2023-Ohio-4326 (10th Dist.); www.apsiohio.org. It receives both state and federal funding according to its 2023 audited financials. www.apsiohio.org. APSI's website states that a court must find a person to be "incompetent" before APSI will be appointed as a guardian. www.apsiohio.org/mission.

Ohio law also allows a county or multicounty guardianship service board, a not-for-profit private corporate entity, to be established to receive appointments from the county probate court to serve as guardians and may charge a reasonable fee approved by the probate judge. R.C. 2111.52(F)(1), (3), (5). Some of those boards may undertake guardianship responsibilities for those wards who also are under the care of a county board of alcohol, drug addiction, and mental health services "or any other guardianships." R.C. 2111.52(C). R. C. 2111.52(F)(3) specifically states that the director or a designee of the board may "act on behalf of the board in relation to all guardianship matters," including matters of both the person and the estate." [2]

Rules of Superintendence by the Ohio Supreme Court

[1] Because of the use of different terms and definitions for incompetency and developmentally disabled, it is presumed that there is a distinction between someone deemed "incompetent" and someone who has been determined to be developmentally disabled. Both terms are used in the inquiries presented to this board.

[2] It should be noted that this advisory opinion does not address guardianships over minors, the difference between guardianship of the person or of the estate, or attempt to completely explain the guardianship structure in the State. The focus is the activities that a guardian must perform and at what point the activity appears to be or becomes the practice of law.

The Ohio Supreme Court has set forth rules for the appointment of guardians over those who exhibit "mental incompetency." Sup. R. 66. "Guardian" has the same meaning as in R.C. 2111.01(A). "Ward" means any adult person found by the probate division of a court of common pleas to be incompetent and for whom a guardianship is established. Sup. R. 66.02 states that the Supreme Court rules "apply to the employees of a corporation who provide guardianship services in an adult guardianship case where the probate division of a court of common pleas appoints the corporation as guardian."

A guardian is to act in the "best interest" of the ward, "including consideration of the least intrusive, most normalizing, and least restrictive course of action possible given the needs of the ward." Sup. R. 66.01(A)

"Guardianship services" is defined to mean the "duties assigned to a guardian in an adult guardianship case pursuant to R.C. Chapters 2109 and 2111. The Ohio Supreme Court has also set out specifically what a guardian "shall" do in Sup. Rule 66.09, including but not limited to the following:

(A) act in a manner above reproach,
(B) exercise due diligence in making decision that are in the best interest of a ward, including but not limited to communicating,
(C) make a choice or decision for a ward …while imposing the least limitations on the ward's rights, freedom,
(D) advocate for services,
(E) foster positive relationships in the ward's life,
(F) meet with ward, assess the ward's physical and mental conditions and limitations; assess needs for additional services; notify the court if level of care is not being met, document and report complaints as necessary to the court; submit a list of names to the court those who should be excluded from visiting the ward.
(G) may provide direct services only if approved by the court,
(H) monitor and coordinate services and benefits, and
(I) seek advice regarding extraordinary medical issues.

The Role of the Probate Court

Notably, it is a longstanding Ohio Supreme Court precedent that guardianship proceedings are not adversarial. Rather they are considered *in rem* proceedings involving only the probate court and the ward. *In re Guardianship of Spangler,* 2010-Ohio-2471. See also, *In re Guardianship of Love,* 19 Ohio St. 2d 111, 113 (1969), citing *In re Clendenning,* 145 Ohio St. 82 (1945). Yet, independent counsel may be appointed to represent a potential ward if the ward requests or the court determines that such is necessary.

Application to appoint: The probate court on its own motion or on "application by any interested party" shall appoint a guardian of the person, the estate or both, of an incompetent

pursuant to R. C. 2111.02, 2109.21 and 2111.121. [3] Further, if an agency or service believes a person to be in need of protective service, the agency or service may file an application for guardianship, trusteeship, or protectorship with the probate court." R.C. 5123.58(D)

Prior to the appointment of a guardian the court is required to hold a hearing on the requested appointment. R.C. 2111.02(C). The proposed guardian must appear, be duly sworn and, among other duties, file a true inventory pursuant to R.C. 2111.14, find and report all assets of the ward's estate, and file timely and accurate reports and accountings. R.C. 2111.02 (C)(1). Further, if the hearing is conducted by a magistrate, Civ. Rule 53 (regarding the appointment of magistrates) is to be followed.

R.C. 2111.03 provides that the contents of an application for guardianship of an incompetent shall contain statements: of the estate of the ward, its value and annual rents of the ward's real property; whether the applicant has been charged or convicted with a crime of theft, physical violence, or sexual, alcohol or substance abuse; whether a limited guardianship is sought and the limitations requested; name, age, residence of the proposed ward; facts upon which the application is sought; name degree of kinship, age and address of the next of kin.

The burden of proving incompetency is by clear and convincing evidence. R.C. 2111.02(C)(4). In such a hearing, the "alleged incompetent" has the right to: (a) be represented by independent counsel of choice; (b) have a friend or family member of choice present; (c) have evidence of an independent expert evaluation; (d) and upon request the right to have counsel and independent evaluator appointed for the hearing and appeal. R.C. 2111.02 (C)(7).

At the time of the appointment, the person with the developmental disability and the applicant are to be informed of the process to terminate the appointment. R.C. 5123. (D).

Post-appointment: Once appointed, R.C. 2111.50(B) states that the powers of a guardian include but are not limited to: (1) conveying, releasing or disclaiming interests in real or personal property; (2) exercising powers as a trustee, personal representative, or custodian; (3) entering into contracts and creating, amending or revoking trusts of property; (4) exercising options to purchase securities or other property; (6) exercising rights under annuities, insurance policies and retirement accounts; (7) exercising rights to an elective share in estate of deceased spouse; and (8) making gifts. [4] The guardians must file biennial reports with the Court and the Court has the power to terminate or intervene with the guardianship as necessary. R.C. 2111.48.

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[3] While the term "incompetent" is used, for purposes of this discussion it will be assumed to include those who are "developmentally disabled" even though it is recognized that the two terms are not necessarily synonymous.

[4] While not directly on point, the Ohio Supreme Court has enacted Ohio Sup. R. 48.03 governing the responsibilities of a guardian *ad litem*, differentiating between the role of a layperson guardian *ad litem* and an attorney guardian *ad litem*. Besides the obligation of recommending that which is in the best interests of the minor child, maintaining objectivity, avoiding *ex parte*

Superior guardian: The probate court is considered throughout the process as the "superior guardian" and the appointed guardian is "simply an officer of the court subject to the court's control, direction, **** and supervision. *Id.* citing *In re Guardianship of Daugherty,* 1984 Ohio App. LEXIS 9329 (7th Dist. Mar. 09) The guardian has no personal interest in his or her appointment or removal. *Id.*

The power and authority of a guardian are limited by the law and the probate court who serves as the "superior guardian of wards who are subject to its jurisdiction." R.C. 2111.50 (A)(1). A guardian is to "obey all orders of the court" *Id.;* Sup. Rule. 66.08 (A). The probate court may confer upon the guardian any power granted to the court under the Revised Code and the court may limit or deny any power that is granted to a guardian. R.C. 2111.50 (A)(2).

Practices in the Various Ohio Counties

Depending on the county jurisdiction, an appointed guardian may be in the name of the agency and in others, a named individual employee of the agency serves as the guardian.[5] The advantage of the appointment of an agency is that when an individual leaves the employ of the agency or is otherwise incapable of serving, a new guardian does not need to be appointed.

There also appear to be different practices throughout the state in regard to the filing of papers and the appearance of laypersons in court proceedings. In some instances, an attorney will file an application to initiate the guardianship on behalf of the nonprofit; in other instances, the nonprofit files through its Executive Director; and yet in other instances, an individual from the nonprofit files to initiate the guardianship. It appears however, that should a dispute arise between the ward and the guardian, including the issue of appointment, an attorney is appointed to represent the ward. There also appears to be different schools of thought as to whether the corporate guardian is representing or serving the interests of the guardian or that of the ward.

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communications, notifying the court if the guardian's recommendations differ from that of the child, it is specifically stated that ***"[i]f the guardian ad litem is an attorney***, [the guardian may] file pleadings, motions, and other documents as appropriate and call, examine, and cross-examine witnesses pursuant to the applicable rules of procedure…attorneys shall comply with Rule 3.7 of the Rules of Professional Conduct" and if the guardian ad litem is not an attorney, "avoid engaging in conduct that constitutes the unauthorized practice of law and be vigilant in performing the duties of the guardian ad litem… and "request the court of appoint an attorney for the guardian ad litem to file pleadings, motions, and other documents as appropriate and call, examine, and cross-examine witnesses pursuant to the applicable rules of procedure…." This delineation of certain activities which are to be performed by an attorney are in accord with the Supreme Court's statement in *Land Title Abstract & Trust Co. v. Dworken*, 129 Ohio St. 23 (1935).

[5] The Board has not been asked to analyze the appointment of an individual as a guardian who often is a family member or close friend of the ward.

DISCUSSION:

What is the unauthorized practice of law?

The Supreme Court of Ohio has the sole and exclusive power to regulate and define the practice of law in Ohio. *In re Unauthorized Practice of Law in Cuyahoga Cty.*, 175 Ohio St. 149, 151 (1963) cited in *Cleveland Bar Ass'n. v. CompManagement, Inc.* 2004-Ohio-6506, ¶39. (*CompManagement I*)

Gov. Bar R. VII(2)(A) of the Supreme Court Rules for the Government of the Bar of Ohio defines the unauthorized practice of law as "the rendering of legal services for another by any person not admitted to practice in Ohio." This rule implemented by the Ohio Supreme Court limits the practices of law to licensed attorneys in order "to protect the public against incompetence, divided loyalties, and other attendant evils that are often associated with unskilled representation." *Id. at* ¶40.

However, as the Ohio Supreme Court has stated, "[t]he power to regulate includes the authority to grant as well as the authority to deny, and in certain limited settings the public interest is better served by authorizing laypersons to engage in conduct that might be viewed as the practice of law." (*CompManagement I,* ¶39*; Cleveland Bar Assn. v. CompManagement, Inc.* 2006-Ohio-6108 (*CompManagement II*) ¶17. *See also, Cleveland Bar Ass'n v. Pearlman*, 2005-Ohio-4107 ¶1. It is in regard to this service of the public interest that appears to have led the Ohio Supreme Court to take "a more fluid approach" to what is the unauthorized practice of law. Recognizing that third-party administrators and union representatives played an important role in the resolution of workers' compensation claims without expensive litigation, the Court noted:

> "Instead, we will consider the allegations in this case under a more fluid approach, which allows third-party administrators to offer general claims assistance as long as that assistance does not involve legal analysis, skill, citation, or interpretation. See, e.g., *Dayton Bar Assn. v. Lender's Serv., Inc.* (1988), 40 Ohio St.3d 96, 532 N.E.2d 120, syllabus (the mere use of legal terms as headings in a title abstract without any legal analysis does not constitute the practice of law); *State ex rel. Doria v. Ferguson* (1945), 145 Ohio St. 12, 30 O.O. 241, 60 N.E.2d 476, paragraph one of the syllabus (providing that a title report containing only facts in the public record without engaging in any legal analysis does not constitute the practice of law); *Gustafson v. V.C. Taylor & Sons, Inc.* (1941), 138 Ohio St. 392, 397, 20 O.O. 484, 35 N.E.2d 435 (filling out preprinted forms for realty sales involves "ordinary intelligence rather than the skill peculiar to one trained and experienced in the law" and did not constitute the practice of law)."

CompManagement II, ¶49. Further, as recently noted at p. 2 of *Advisory Opinion UPL,* 22-01 (July 28, 2022), "beginning at least as early as 1986 [in *Henize v. Giles,* 22 Ohio St. 3d 213 (1986)], the [Supreme] Court has concluded that some activities by nonattorneys are definitionally 'the rendering of legal services to another' nevertheless do not constitute the unauthorized practice of law in limited circumstances."

Yet, the Court has also recognized that there are lines that cannot be crossed. Any definition of the practice of law inevitably includes representation before a court, as well as the preparation of pleadings and other legal documents, the management of legal actions for clients, all advice related to law, and all actions taken on behalf of clients connected with the law. *Dworken,* 129 Ohio St. 23 (1934) at ¶ 1, syllabus quoted in *CompManagement II* at ¶22.

Notably in *Dworken,* the Court included in the definition of the unauthorized practice of law generally "representation before a court" which would appear to necessarily include the work of a guardian appearing in court on behalf of a ward to represent the interests of the ward. However, it would also appear that given that guardians are permitted generally to be laypersons, further analysis is required. In light of *Comp Management I and II,* an evaluation as to whether the guardian's work involves legal analysis, strategy, and interpretation of the law is required. If so, then the activity would be considered the practice of law.

When the Representation of a Corporate Entity Is Not the Unauthorized Practice of Law

R.C. 4705.01 states in pertinent part:

> No person shall be permitted to practice as an attorney and counselor at law, or to commence, conduct, or defend any action or proceeding in which the person is not a party concerned, … unless the person has been admitted to the bar by order of the supreme court in compliance with its prescribed and published rules.

See also, Union Sav. Assn. v. Home Owners Aid, Inc., 23 Ohio St.2d 60, 64 (1970); *Cleveland Bar Assn. v. Woodman,* 2003-Ohio-1634 cited in *CompManagement II at* ¶22. (a layperson generally also may not represent the corporation or take legal action on behalf of a corporation before a court).

Given the statutory allowance for corporate entities to serve as guardians, however, it should be assumed that the General Assembly did not create an exception to the rule that a layperson may not represent a corporation in legal matters. Rather, in allowing corporate entities to serve as guardians, the General Assembly recognized that the appearance on behalf of certain corporate entities serving as guardians does not necessarily always involve legal analysis, strategy or advice. *See, Cleveland Bar Ass'n. v. Pearlman,* 2005-Ohio-4107, ¶20 (In finding that R.C. 1925.17 which states who can appear in small claims court was not unconstitutional as asserted by

the CBA, the Court noted that "the legislature has acknowledged our authority in regulating the practice of law.")

As the Second Appellate District Court stated in 2018, "This [rule against lay person representing a corporation] means that 'only a licensed attorney may file pleadings and other legal papers in court or manage court actions on another's behalf'." *Cannabis for Cures, L.L.C. v. State Bd. of Pharm*, 2018-Ohio-3193 at ¶9 (2d Dist.) citing *Disciplinary Counsel v. Givens,* 2005-Ohio-4101, ¶7. *See also, Pearlman* at ¶23 ("In the absence of an attorney at law, a corporate representative may not 'engage in cross-examination, argument, or other acts of advocacy'.")

In *Givens*, the Ohio Supreme Court determined that the chief executive officer of a nonprofit corporation had engaged in the unauthorized practice of law when he filed motions to dismiss against a complaint filed by the Attorney General. Noting that the unauthorized practice of law "consists of rendering legal services for another by any person not admitted to practice in Ohio, the Court stated that only a licensed attorney may file pleadings and other legal papers in court or manage court actions on another's behalf." *Id.* at ¶*7.*

While the language of *Givens* is broad in its prohibition against a layperson filing "other legal papers in court" on behalf of a corporation, again, the Court there was concerned with the "unauthorized practice of law." If the filing of forms that do not require the use of legal analysis or strategy but are purely factual in nature, then the unauthorized practice of law is not at issue when the guardianship service boards file, under the supervision of the court as a superior guardian, the forms necessary for the initiation of a guardianship. This is clear from the cases cited in *CompManagement II* and other pronouncements by the Ohio Supreme Court.

In *Pearlman,* the Supreme Court also made an exception to the prohibition of a layperson representing a corporate entity in small claims court. Finding that a purpose of small claims court proceedings is to provide fast and fair adjudication as an alternative to judicial proceedings to allow individuals to resolve uncomplicated disputes quickly and inexpensively, the Court held that "a layperson who presents a claim or defense and appears in small claims court on behalf of a limited liability corporation as a company officer does not engage in the unauthorized practice of law, provided that the individual does not engage in cross-examination, argument or other acts of advocacy." *Id.* at ¶ *15. See also, Advisory Opinion UPL,* 22-01 (July 28, 2022) ("duly authorized nonattorney employee of a municipal tax department who prosecutes a tax delinquency case in a small claims court does not engage in the unauthorized practice of law so long as the nonattorney employee does not engage in cross-examination of witnesses, argument or other acts of advocacy").

Similarly, third-party administrators were permitted to represent corporate employers before the Industrial Commission in *CompManagement I and II,* as long as they did not engage in certain activities. As the Ohio Supreme Court noted in *CompManagement I and II,* "[L]imiting the practice of law to licensed attorneys is generally necessary to protect the public against

incompetence, divided loyalties, and other attendant evils that are often associated with unskilled representation." *CompManagement I* cited in *CompManagement II at* ¶*23.* And further noting that "representation may not always require the training and experience of an attorney and that "the protective interest" may be outweighed by other important considerations." *Id.*

Those other considerations may include, on the facts, here the role of the Probate Court as the "superior guardian" and the role of advocacy organizations serving the interests of the ward. Both of these are significant when it is considered that the definition of "incompetent" appears to be broad, ranging from those with a mental disability that so impairs the person that the person is incapable of taking proper care of the person's self to one with perhaps a lesser development disability. In one instance, it may be that the person who is incompetent does not have the ability to know if a guardian is in that person's interest versus a different situation where a person who welcomes the guardianship. In the former, it may be that the Probate Court would see fit to appoint legal counsel for the proposed ward and in the latter, no legal counsel is required. It must be assumed that the Probate Court as the superior guardian knows when a lawyer is needed.

In sum, the definition of "guardian" in R.C. 2111.01 does not refer to the guardian taking legal action but refers to the appointment of "any person, association, or corporation …to have the care and management of the person, the estate, or both of an incompetent or minor." The definition of "guardian" does not mandate that the appointee be an attorney. Similarly, R.C. 2122.03 "Application for appointment as guardian" refers to "a person" applying. The same statute provides for the specific information to be included in the application, including the "[f]acts upon which the application is based." No legal authority or analysis is requested for the application process, where uncontested.

There are activities that a guardian must undertake once an appointment is sought and then undertaken that the Probate Court can properly assume are not the unauthorized practice of law.

- **The preparation, signing and filing of documents versus pleadings:** As noted in *CompManagement* II, where court or administrative agency provided forms and reports are completed with factual information and do not require legal analysis, such would not be the practice of law. "Pleadings" are defined by Black's Law Dictionary, as the "formal allegations by the parties of their respective claims and defenses." By that definition, pleadings require more than facts and are governed by the Rules of Civil Procedure. The Board encourages the probate courts to provide forms requiring responses to factual inquiries to avoid guardians having to prepare documents that require a determination of that which is necessary to carry out the guardians' functions and obligations. If pleadings are required, then those must be done by counsel.
- **Negotiation and Assessment of Financial Matters:** As these are matters that do not require the exercise of legal judgment, skill or training and may be tantamount to those services performed by financial advisors, bankers or realtors, this is not the practice of law.

- **Appearance in Court:** Appearance in court is permitted as long as the guardian need not argue a position on behalf of the ward. If questioning is necessary, then that should be done by the judge or magistrate.
- **Counseling of the Ward:** The statutes provide the areas upon which the ward may be counseled. If those matters require legal analysis or strategy, a non-lawyer guardian may not advise. The Ohio Supreme Court in *Dworken* stated that the practice of law "includes legal advice and counsel, and the preparation of legal instruments and contracts by which legal rights are secured." *Id. at p. 652.*
- **Recommendation for Appeal or Adversary Actions:** This would require the use of legal counsel.

The guidance provided by the Ohio Supreme Court as to what constitutes the unauthorized practice of law, along with the Court's view that a "fluid" approach should be taken in assessing the actions required by various courts and administrative proceedings to accomplish activities that do not require legal analysis, advice or advocacy, is instructive. The Court has consistently made a distinction between the rendering of legal services and those activities that can be carried out effectively without a legal degree. It would appear from this authority that representation of a ward, consistent with the carrying out of the ward's financial interests and seeking assistance regarding mental and physical health conditions, would not be the unauthorized practice of law.

_____, Secretary
BOARD ON THE UNAUTHORIZED PRACTICE OF LAW

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