

# Representing a Client in a Defense of Guardianship Case

David Godfrey, American Bar Association Commission  
on Law & Aging, Washington DC

Catherine Seal, Kirtland & Seal, L.L.C.,  
Colorado Springs, CO

**September 10, 2019**

# Housekeeping

- All on mute. Use Questions function for substantive questions and for technical concerns.
- Problems getting on the webinar? Send an e-mail to [NCLER@acl.hhs.gov](mailto:NCLER@acl.hhs.gov).
- Written materials and a recording will be available at [NCLER.acl.gov](http://NCLER.acl.gov). See also the chat box for this web address.

# About NCLER

The National Center on Law and Elder Rights (NCLER) provides the legal services and aging and disability communities with the tools and resources they need to serve older adults with the greatest economic and social needs. A centralized, one-stop shop for legal assistance, NCLER provides Legal Training, Case Consultations, and Technical Assistance on Legal Systems Development. Justice in Aging administers the NCLER through a contract with the Administration for Community Living's Administration on Aging.

# About ABA COLA

The ABA Commission on Law and Aging is a collaborative and interdisciplinary leader of the American Bar Association's work to strengthen and secure the legal rights, dignity, autonomy, quality of life, and quality of care of aging persons.

The Commission accomplishes its work through research, policy development, advocacy, education, training, and through assistance to lawyers, bar associations, and other groups working on issues of aging.

# About Kirtland & Seal, L.L.C.

- Our special practice area focuses include estate planning, probate administration, elder law – including guardianships and conservatorships – and the work we are proud to undertake on behalf of families with special needs. In each of these important interests, we emphasize that thorough preparation leads to smooth execution of legal objectives.

# Key Lessons

- The first step is to protect the due process rights of the client; even if there is no substantive defense, it is essential to hold all parties responsible.
- The best defense is built on presenting evidence of what the client can do with help, and to minimize the unmet needs of the client.
- The testimony of the client can make or break your case; consider this before committing to go to trial.
- Guardianship laws and due process vary from state to state—understand what works in your state before moving forward.

# Focus on Four Roles In Defense

1. Protect the individual's due process rights
2. When a Guardian/Conservator is not needed
3. Advocating for a limited guardianship, when the filing asks for more than is needed
4. When a guardianship order is no longer needed, or a less restrictive order will work fine

# Representing Joe

Joe's son Max filed for guardianship of Joe. State law required that notice be delivered to all of Joe's "children." Thirty years ago, Joe had an affair, and Lisa was born outside of his marriage. The affair nearly ended his marriage. Lisa was seldom talked about and never included in family functions. Joe's name was on Lisa's birth certificate as her father. Max didn't list Lisa on the motion for a guardianship, and she was not provided with notice. You represent Joe and learned about this two weeks before trial.



# Poll #1: Joe

What should you do?

- A. File a report with the court acknowledging that there is no issue in dispute.
- B. File a motion asking the Court to overlook this as Max does not consider Lisa his sister.
- C. Ignore it, as notice to Lisa will not impact the outcome of the case, and Lisa is not your client.
- D. File a motion with the Court to compel notice to Lisa – the process is defective without it.

# Due Process Defenses

- Our core ethical responsibility with every client
- Important points:
  - Notice requirements
  - Technical requirements of pleadings
  - Opportunity to be present, to be represented, to be heard
  - Rules of evidence
  - Constitutional rights
- Safeguard due process even when there is not a substantive defense

# Right to Be Present in Court

- 47 states specifically address the right to be present in statute
- Generally excused if unable to be there or participate in the process
- If you are presenting a substantive defense, it is very helpful for your client be in Court

# Poll #2: What Factors Are Important?

In evaluating taking a case to trial, what is important?

- A. Your client's physical ability to attend the hearing
- B. Your client's ability to control emotional outbursts
- C. Your client's ability to tell their story

# Rules of Evidence: Freddy

Freddy has a serious mental illness and dementia. He was charged with crimes and the Court found him unable to stand trial on the criminal charges. Subsequently, an adult guardianship petition was filed. The pleadings in the guardianship case contain details of the criminal accusations. It is clear that the petitioner intends to enter into evidence the unproven accusations. You are his court appointed defense attorney.

# Poll #3: Freddy

What should you do?

- A. Wait until trial, to see what happens and object if needed
- B. There is no dispute that Freddy needs a guardian, so let it slide
- C. Argue that the accusations of crimes have nothing to do with his ability and he does not need a guardian
- D. File a motion to exclude information about the criminal accusations

# Substantive Defenses

- The evidence does not meet the standard or definition in the statute
- Contrary evidence argues that a guardian is not needed
- Advance directives and/or other supportive arrangements keep the client out of harms way, and no guardianship is needed

# Uniform Guardianship Conservatorship and Other Protective Proceedings Act

- The person; lacks ability to meet essential requirement for physical health, safety, or self-care even with appropriate supportive services, technological assistance, or supported decision-making; (an) adult (is) unable to manage property or financial affairs; unable to receive and evaluate information or make or communicate decisions; identified needs cannot be met by a protective arrangement instead of guardianship or other less restrictive alternative; or; appointment (is) necessary to avoid harm or significant dissipation of property.
  - UGCOPPA 301(a)(10(A), 401 (b)(1), 401(b)(1)(A), 301 (a)(1)(B), 401 (b)(3), and 401 (b)(2).



# Look to State Law

## Capacity Definition & Initiation of Guardianship Proceedings (Statutory revisions as of December 31, 2018)

<u>nState</u>	<u>Court</u>	<u>Legal Status</u>	<u>Definition of Incapacity</u>				<u>Notable Petition Elements</u>	<u>Initiator</u>
			<u>Functionality</u>	<u>Cognition</u>	<u>Necessity Risk/Harm</u>	<u>Conditions</u>		
<b>Alaska:</b> Statute	<b>13.06.050(7)</b> Superior	<b>13.26.113(c)</b> incapacitated	<b>13.26.005 (4)</b> person lacks ability to provide essential requirements for physical health or safety	<b>13.26.005(4)</b> ability to receive and evaluate information or communicate decisions impaired	<b>13.26.005(4)</b> need for court ordered assistance	<i>Not stated</i>	<b>13.26.105</b> existence of any other restrictions on capacity; respondent nomination of guardian	<b>13.26.105 (a)</b> Any person, alleged incapacitated person
<b>Arizona:</b> Rev. Stat. Ann.	<b>14-1201(9)</b> Superior	<b>14-5304</b> incapacitated	<i>Not stated</i>	<b>14-51-1(1)</b> lacks sufficient understanding or capacity to make or communicate responsible decisions about person	<b>14-5304</b> appointment necessary to provide for needs	<b>14-5101(1)</b> mental illness, mental deficiency, physical disability or illness, alcoholism, drug addiction	<b>14-5303(B)</b> if general guardianship requested, that other alternatives explored & why limited is not appropriate; if limited requested, state specific powers	<b>14-5303(A)</b> interested person; alleged incapacitated person
<b>Arkansas:</b> Code Ann.	<b>28-65-107</b> Probate	<b>28-65-105</b> incapacitated	<b>28-65-101(1)</b> lacks capacity to meet essential requirements for health or safety	<b>28-65-101(1)</b> lacks sufficient understanding or capacity to make or communicate responsible decisions	<b>28-65-105</b> ordered only to extent necessitated by limitations	<b>28-65-101(1)</b> mental illness, mental deficiency, physical illness, chronic use of drugs or alcohol	<b>28-65-205(b)</b> any agency from which respondent receives services notified	<b>28-65-205(a)</b> any person

# Evidence

- Evaluations and reports by professionals
- Testimony of the client
- Lay evidence of the accommodations meeting the needs of the client

# Evaluations by Professionals

- If no guardian has been appointed, the client should be able to consent to evaluations.
- Find the best experts available
  - Experience in evaluating capacity based on state law definition of standard for incapacity or functional capacity, cognitive ability, and unmet needs
  - Experts with experience in this kind of case
  - State law may limit who can be an expert

# Finding Expert Witnesses

- Geriatric physicians, psychiatrists, psychologists, social workers
  - Public health, community mental health organizations, government, or non-profit groups
  - Disability rights advocates
  - University faculty

# Assessing Capacity

- Two Handbooks:
  - [Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers](#)
  - [Assessment of Older Adults with Diminished Capacity: A Handbook for Psychologists](#)

# Tips for Working with Experts

- Select the best experts you can find (not all professionals are trained in this area).
- Schedule at a time and place that works best for your client.
- Facilitate the meeting, but don't interfere.
- Evaluations and reports should be done far enough in advance to allow you to review the reports and prepare the witnesses for trial.

# Battle of the Experts

- The Petitioner's experts say a guardian is needed and your experts say no guardian is needed
- Credibility of the expert
  - Experience
  - Process
  - Demeanor
- Cross examination
- 2 out of 3 experts agree

# Lay Witnesses

- Not experts
- Need first hand knowledge
- Effectiveness of accommodations such as:
  - Financial management arrangements
  - Powers of attorney and advance health care directives
  - Supervised living arrangements
  - Home or community based services
  - Transportation services
  - Family and community support



# Lay Witnesses on Values and Beliefs

- How has the person lived their life?
- Is this a change in behavior?
- Risk tolerance of the person
- What is most important to the person?
  
- Beyond the scope of this program:
  - Who to appoint as guardian
    - Who did the person trust?
    - How did the person live their life, manage their affairs?
    - Who did the person not want in their life, and why?

# Avoid Lay Witnesses

- As sole witness contradicting an expert (counter an expert with an expert)
- Offering opinions on the Client's physical or mental health
- Character testimony

# Client as a Witness

- In a defense or restoration, your Client is a critical witness
- The Client's ability to communicate should be considered in deciding to go to trial
- They should testify to:
  - What they can do
  - What they are able to do with help
  - Changes and accommodations that they are willing to make
  - What their unmet needs are
  - What risks they are willing to accept

# Proving Your Case

- Start with motion practice if expert reports don't meet the burden of proof.
- Present your own experts and other witnesses to prove that the standard of proof can not be met.
- The best defense is to assume the burden of proof.

# Melinda

Melinda's son became concerned that Melinda was being financially exploited by her housekeeper and filed for guardianship. Records showed that Melinda was paying her housekeeper nearly \$50 an hour and allowing the housekeeper to use her credit card for personal expenses. At a hearing, when asked about the housekeeper, Melinda said, "I am very difficult to get along with. When I pay housekeepers less, they quit, and I can't live alone without them. I know I am paying more than others, but it is worth it. Without her, I wouldn't have clean clothes, a clean house, I wouldn't eat properly or remember to take my pills. I will pay whatever it costs- I can't take the money with me."

# Poll #4: Melinda

Will the Court find that Melinda needs a guardian?

- A. Yes
- B. No
- C. Maybe

# Evidence of Less Restrictive Alternatives

- The Uniform Law and many state statutes require consideration of alternatives.
  - Power of attorney
  - Advance health care directives / health care agents
  - Financial arrangements
    - Direct deposit and autopayment
    - Money managers
    - Trusts with successor trustees
  - Health care assistance
  - Homemaker services
  - Transportation
  - Assisted living or other supervised living arrangements
  - Other appointed fiduciaries

# Supported Decision-Making

- Model act and increasingly state laws require consideration of Supported Decision-Making agreements or arrangements as an alternative
- Evidence would be:
  - Testimony by Client
  - Testimony by supporters
  - Written agreements
  - Other enabling documents



# Focus on the Purpose

- The reason for guardianship is to protect a person who is unable to protect themselves from unreasonable risk or harm
- Present evidence that the risks are otherwise controlled, and there is no reason for guardianship

# Limited Guardianships

- Every state allows a limited or tailored order
- Yet, most guardianships are plenary involving the guardian in every right and decision that can be delegated by law.
- Limit orders to only areas of unmet needs
- Must overcome
  - Progressive illness, we will just be back later
    - Not if alternatives fill the unmet needs

# Modifying or Terminating a Guardianship

- No defense was presented
- Original order was broader than necessary
- The person has recovered
- Alternatives are now in place to mitigate unreasonable risks

# Being Properly Engaged

- Does the existing order limit the persons ability to hire an attorney?
- Ask the guardian to consent to the engagement
- Ask the court to approve the engagement or for the court to appoint an attorney
- Court may ask for a “showing of proof” that there has been a change in circumstances or a mistake in the original order.

# Without Proper Engagement

- The Court may refuse to hear you
- May deny motion for fees (even if you are successful)

# Poll #5

Have you ever defended a client in a guardianship/conservatorship case, or sought modification or termination of an order?

- A. Yes
- B. Yes, and this program added to my knowledge
- C. No
- D. No, but I feel better prepared to do so after seeing this program.

# Other Roles for Attorneys

- Representing interested parties seeking damages for bad-acts by guardians.
- Representing persons seeking the appointment of a guardian.
- Representing either the protected person, or another interested party in seeking to have a guardian replaced or held accountable.
- Representing a potential guardian, where there is more than one person asking to be appointed as guardian.
- Representing guardians who have been accused of wrong-doing.

# Questions?



Type your questions in the question box on the webinar interface.



# Visit Our Website: [NCLER.acl.gov](https://ncler.acl.gov)

NATIONAL  
CENTER ON  
**LAW &  
ELDER  
RIGHTS**

Search for resources

**Read practice tips**

Sign up for the email list

**Request a case consultation**

Learn about upcoming trainings

[ncler.acl.gov](https://ncler.acl.gov)



# Case Consultations

Case consultation assistance is available for attorneys and professionals seeking more information to help older adults. Contact NCLER at [ConsultNCLER@acl.hhs.gov](mailto:ConsultNCLER@acl.hhs.gov).