

Representing a Person with a Guardian

David Godfrey, ABA Commission on Law & Aging

Emily Miller, CVLAP-Elder Justice Initiative, Michigan Poverty Law Program

Nicole Shannon, Michigan Elder Justice Initiative

November 10, 2020

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.
- Written materials and a recording will be available at 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 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.

Introductions

- Emily Miller
 - Managing Attorney, Michigan Crime Victim Legal Assistance Project – Elder Justice Initiative, Michigan Poverty Law Program
- Nicole Shannon
 - Systemic Advocacy Attorney, Michigan Elder Justice Initiative

Agenda

- Getting into the case
- Procedural tools
- Evidentiary tools
- Righting wrongs

Key Lessons

- You can represent a legally incapacitated client
- Hold firm on your client's rights
- Develop alternatives
- Get the expertise you need
- This is litigation

Getting into the Case

Do Your Diligence

- Client contact
- Review the file
- Potential witnesses

Pre-Filing Options

- What is the guardian's position
- Family feud
- Mediation
- Alternatives to guardianship

The Case

- Clarify the right to counsel of choice
- Appointed counsel may be eager to leave
- Know your court's practice
- Be ready to brief it

Procedural Tools

Standards and Burdens

- What is the standard to terminate or modify?
- Who has the burden?
- This isn't a mini-appeal! It's probably a de novo hearing

Client Rights

- Closed courtroom and/or jury trial
- Independent medical evaluation
- Physical presence (moving the hearing?)
- Reasonable accommodations

Reasonable Accommodations (1 of 2)

- Move the hearing
- Use assistive technology, especially for clients with visual or hearing impairments
- Accommodation in questioning (see next example)

Reasonable Accommodations (2 of 2)

IT IS ORDERED that:

4. The following accommodations be made available to Robert Dingwell during the course of any deposition, during course of trial and any other program, service or proceeding as it relates to this court case:
 - a. Respondent's attorney is to speak in a clear and concise, concrete and simple manner, eg. no multipart questions and no loaded questions.
 - b. Allow for Robert Dingwell to write down answers if he is able.
 - c. Allow for Robert Dingwell to point to prewritten signage such as:
 - I did not understand the question
 - I don't know
 - Please go slower
 - I need a break
 - d. Allow for ample time for Robert Dingwell to be fully understood.
 - e. Allow Robert Dingwell the opportunity to respond in a fashion that allows for him to effectively answer.
 - f. Repeating information using different wording or a different communication approach

Put it in Writing

- Make your record starting with the petition
- Ask for accommodations in writing
- Brief it
- Use discovery

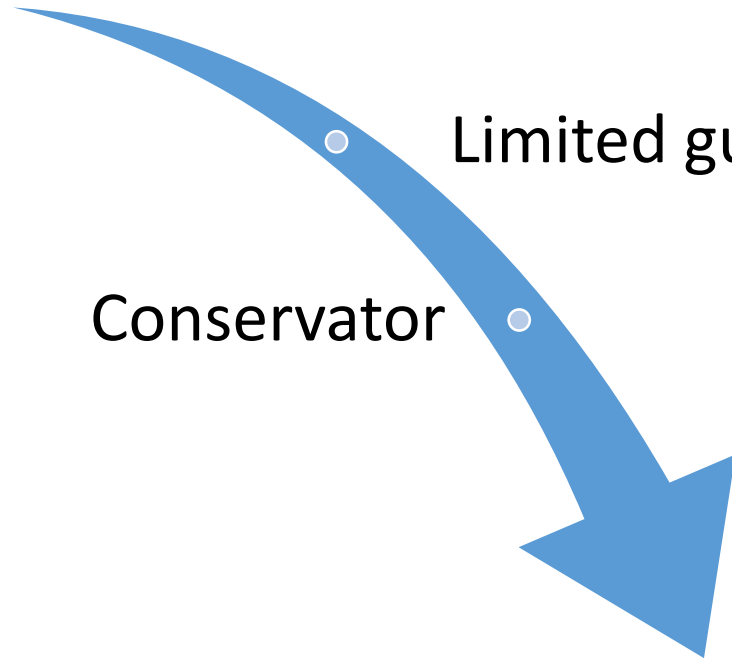
Less Restrictive Alternatives

Full guardian

Limited guardian

Conservator

Protective order



Get the Best Guardian

- Know your prioritization statute
- Do the guardianship “two step”
- Find someone who shares the goal of modification/termination in the future

Evidentiary Tools

Alternatives as Evidence

- If there's an alternative, guardianship isn't necessary
- Will services solve the problem?
- Will a Representative Payee solve the problem?

Medical Evidence

- Find a doctor you like
- Primary care physician
- Medical or mental health professional who understands the stakes
- Nurse/social work evaluation for services

Righting Wrongs

It's an Emergency!

- Emergency ex parte temporary restraining order
- Be prepared: this is labor intensive
- Have model pleadings and a checklist prepared in advance

Financial Wrongs

- What court has jurisdiction?
- Surcharge the bond
- Potential causes of action
 - Unjust enrichment
 - Conversion
 - Embezzlement
 - Breach of fiduciary duty
- Make friends with your prosecutor (you have civil discovery, and they don't)

Non-Financial Wrongs

- Removal for cause (make the record)
- Report to court administrators and licensing authorities
- Modify with a better guardian or terminate outright
- Potential causes of action
 - Personal injury torts
 - Breach of fiduciary duty
- Make friends with your prosecutor (you have civil discovery, and they don't)

Final Thoughts

- Prepare for appeal and make your record
- Make everyone treat the hearing with the respect it deserves
- Have your plan B, C, D, and Z ready

Visit Our Website: 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



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.