

Representing a Person with a Guardian

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Michigan Elder Justice Initiative

The Michigan Elder Justice Initiative is part of a larger legal service program that includes both field offices and statewide advocacy projects that address the most pressing needs of low-income Michiganders, advocates for older adults, and people with disabilities statewide. MEJI's mission is to empower, educate, and protect low income older adults and people with disabilities through administrative and policy advocacy, litigation, educational efforts, and collaboration with multi-disciplinary partners on the local, state, and national level. MEJI also provides support to civil legal aid programs and other advocates to assist them in providing effective representation to and advocacy for low income older adults and people with disabilities. The project focuses primarily on issues affecting the most vulnerable older adults including long-term care; guardianship; public benefits; and elder abuse, neglect, and exploitation. It also works closely with disability advocates to address issues of shared concern.

Introduction

Guardianship proceedings are important civil liberties cases that often do not receive the respect they deserve. The Utah Judicial Council has stated that guardianship proceedings sometimes happen “with all the procedural rigor of processing a traffic ticket.” Once an adult is subject to guardianship, it can be almost impossible to escape a system that provides “all chutes and no ladders.” Too often, in addition to robbing individuals of autonomy and control over even the most basic decisions in their lives, guardianships can be a means of exploiting and abusing vulnerable individuals. As a result, legal services lawyers should be open to representing individuals under guardianship. Even when a state law sounds strong and appears to provide significant due process protections, determined advocacy will often be necessary to succeed when seeking to terminate or modify a guardianship.

You may need to take extra steps to ensure your client has the right to counsel of their choice. Once you can represent your client, be a strong advocate to ensure the proceedings are treated with dignity and the client's due process rights are upheld. This may include requesting reasonable accommodations to ensure your client's full participation. By using all the procedural and evidentiary tools at your disposal—including alternatives to guardianship—you can increase your client's independence and autonomy, and restore their civil rights.

Key Lessons

1. **You can represent a client subject to guardianship.** Even if your client has been found to be incapacitated and has a guardian appointed, the client still has the right to legal counsel of choice. Be ready to brief the issue if necessary.
2. **Hold firm on your client's rights.** These cases are often litigated in a perfunctory manner. Make sure everyone treats the proceeding with the dignity it deserves.
3. **Know the standard and who has the burden.** Petitions to modify or terminate guardianships are not mini appeals. The burden may be on the party wanting to maintain the status quo.
4. **Request reasonable accommodations.** Your client may need reasonable accommodations to participate in the proceedings and demonstrate capacity. You may need to get creative.
5. **Make your record.** Put everything in writing. Brief your issues. Use discovery, especially requests to

admit.

6. **Use less restrictive alternatives.** If you're not able to terminate outright, put yourself on the path of less restrictive alternatives.
7. **Get the medical evidence you need.** The list of "usual suspects" from the independent evaluator list may not be your best expert. Look to other professionals, like social workers and nurses, who can speak to your client's daily experience.

Consider Your Pre-Filing Options

The first step is to work with your client to decide what they are comfortable doing. Your client may want to terminate their guardianship, and at the same time they may fear the guardian and the consequences of challenging the guardian's authority. Counsel your client on available options, making clear the notice requirements and that a guardianship cannot be changed in secret. It may help to have your client consult with supportive people in their life before deciding to take any official steps. Having a support system in place during the process may enable your client to feel comfortable—and demonstrate to the court that with so many people in their corner, a guardianship is not necessary.

Do your research before agreeing to represent your client. Guardianship cases often have years of history behind them. Reviewing the case file, interviewing potential witnesses, and speaking with the guardian can all give you the context you need to decide if it is a case you can win and direction to chart a path forward. Pay attention to any medical evaluations. Often these are cursory and do not address issues of capacity—only issues related to a lack of supportive services. Courts may view evaluations done by neuropsychiatrists as the "gold standard." If you are confident that a new evaluation will provide needed information or refute prior findings, you should consider a new neuropsychology evaluation. You may also want to provide evidence of your client's functional abilities. If your client is managing their life appropriately, challenge findings based primarily on the prior neuropsychology report. In cases with warring family members or a challenging guardian, mediation may allow the parties to resolve their issues—or at least make some progress. This can be a good opportunity to pitch some alternatives to guardianship. Many states have community mediation centers that will handle cases on a sliding scale.

Your Client Chooses Who Represents Them

Individuals subject to guardianship have the right to counsel of their choice. In some states, this right is explicit in statute. In situations when your client is represented by appointed counsel, that lawyer may be relieved to have you substitute in on their behalf, knowing that the hearing is going to be contested and time consuming. This is particularly true if appointed counsel is paid a flat fee. In other states, you may have to file a motion and brief the constitutional issue. Due process, agency law, contract law, and the ethical rules of your state all provide grounds supporting your client's right to counsel of their choice.

Know the Standard and Burden

Petitions to modify or terminate guardianships are not mini-appeals. They are essentially de novo hearings on whether the status quo should be maintained. Your judge may feel uncomfortable modifying or terminating a guardianship unless there is new information. But if the opposing parties cannot meet the burden, you should prevail. What lessons can you learn from reviewing the record at the first hearing? Consider whether the party that originally sought the guardianship is going to contest the petition.

Exercise Your Client's Rights

Courts may be used to moving through guardianship cases at a rapid clip. Your client has important rights that can slow down the process and allow for due process. Your jurisdiction may give your client rights to a jury

trial, a closed court room, or an independent medical examination. It may be tempting to ignore these rights because of court pressure to follow “business as usual.” By exercising these rights, you can not only ensure your client has the full protection of the law, but that the court recognizes the gravity of the situation.

Request Reasonable Accommodations

If your client is subject to a guardianship, they may have a disability as recognized by the Americans with Disabilities Act, Rehabilitation Act of 1973, or your state statutes. This can entitle your client to reasonable accommodations. If you have a client who cannot safely come to court, the location of the hearing may need to be moved. For clients with hearing or visual impairments, you may need to request assistive technology, such as microphones and headphones, or moving the podium closer to a witness so they can hear.

CASE EXAMPLE

You may need to get creative. One enterprising lawyer requested an order regarding how her client would be questioned. Because of the client’s disabilities, the court banned multipart questions, requiring that questions be concrete and simple. The client was permitted to write answers if he was able, or to point to prewritten signage with phrases like, “I don’t understand the question” or “I need a break.” Affidavits from your client’s service or health care providers may give you the evidence you need to get a reasonable accommodation.

Make Your Record

Guardianship proceedings in your jurisdiction may be less formal. Make your record with written objections, requests for reasonable accommodations, jury demands, or requests for independent medical evaluations. If there is a legal issue, brief it.

PRACTICE TIP 1

This is litigation, but some courts seem to forget discovery is part of the litigation process. If a commercial contract dispute is entitled to robust discovery, the deprivation of civil liberties is too. Interrogatories, requests for production, and even depositions can be useful tools to prepare your case. If you need more time to prepare, stipulate or move for a continuance.

PRACTICE TIP 2: LOOK FOR A PLAN B, C... OR Z

Restoring your client’s rights may be a process. You may have success by replacing a restrictive—or just plain bad—guardian with someone who shares your client’s goals of independence and autonomy and who might later support a petition to terminate. Simply replacing the current guardian with a person of your client’s choice can be an important victory, even if that change is unlikely to result in termination down the road.

An alternative to guardianship, such as a power of attorney, increased supportive services, or a representative payee, may also allow you to terminate or modify.

PRACTICE TIP 3: GET THE EVIDENCE THAT WORKS FOR YOU

An independent medical evaluator from your court’s list of approved experts may not be the person you want. A social worker experienced in finding home and community-based services may show that a guardianship is unnecessary with proper supports. Your client’s long-time primary care physician and

other witnesses may be able to talk about how your client has managed in the community, painting a very different picture of your client's abilities than testimony regarding diagnoses and test scores.

Conclusion

Modifying or terminating a guardianship can feel like an uphill battle. If a court has already found someone to need a guardian, you may have to work doubly hard to change the court's perception. But the potential to free your client from an abusive or negligent guardian and to restore some control over their life—as well as to educate courts who too often make these decisions without an understanding of the impact on an individual's life—makes these cases well worth the effort.

Additional Resources

- ABA Commission on Law and Aging, [*Guardianship and Supported Decision-Making*](#)
- ABA Commission on Law and Aging, [*Representation and Investigation in Guardianship Proceedings*](#) (Dec. 21, 2018)
- Nina A. Kohn, [*Lawyers for Legal Ghosts: The Legality and Ethics of Representing Persons Subject to Guardianship*](#), 91 Wash. L. Rev. 581 (2016).

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

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