

Strengthening Rights and Ensuring Accountability in Guardianship Systems and Practices: Part Two

- Hilary Dalin, Office of Elder Justice and Adult Protective Services, Administration on Aging Administration for Community Living
- Dennis Frick, Senior Law Project Director, Indiana Legal Services
- Jessica Brock, LAVA Project Director, Indiana Legal Services

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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 the NCLER through a contract with the Administration for Community Living's Administration on Aging.

About Administration for Community Living (ACL)

The Administration for Community Living was created around the fundamental principle that older adults and people of all ages with disabilities should be able to live where they choose, with the people they choose, and with the ability to participate fully in their communities.

By funding services and supports provided by networks of community-based organizations, and with investments in research, education, and innovation, ACL helps make this principle a reality for millions of Americans.

About Indiana Legal Services

Indiana Legal Services, Inc. (ILS) is a not-for-profit law firm and the largest provider of free civil legal assistance to eligible low-income people throughout the state of Indiana. ILS helps clients who are faced with legal problems that harm their ability to have such basics as food, shelter, income, medical care, or personal safety. Most of the cases ILS handles are cases such as family law where there is domestic violence, housing, consumer law, access to health care, and access to government benefits.

Legal Counsel for Proposed Protected Persons and Protected Persons

- **Part 1:** Highlighted impact and objectives of three ACL-funded Elder Justice Innovation Grants in Improving Guardianship.
- **Part 2:** Will talk about the role of the attorney in representing proposed protected persons or protected persons and the benefits of legal counsel.

Let's first contextualize - key principles in guardianship



Key Principles in Guardianship

- **Support of self-determination, person-directedness in decision-making rights**
 - Guardianship is always the last resort.
 - Less restrictive alternatives universally promoted primarily through diversion, and also through a pathway to revocation, less-than plenary appointments, or customized orders.
 - In all proceedings and decisions, the voice of proposed protected persons is paramount.
- **Integrity of Guardianship Proceedings**
 - Centered in the values and wishes of proposed protected persons.
 - Ensures effective and frequent oversight of guardian performance.
 - Frequent and thorough fiscal oversight by court.
 - Assures protected persons are fully engaged in decision-making to the fullest extent possible.
 - Frequently visited by guardian and court personnel.

Key Principles in Guardianship (Cont'd)

- **Guardianship Reforms**

- Reform is evidence-based and data-driven.
 - Based on the research, data, and proven models such as those developed through Working Interdisciplinary Networks of Guardianship Stakeholders (WINGS), National Guardianship Summits, and the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (UGCOPAA).

Indiana Legal Services

- We will cover:
 - Client representation and Role of attorneys in guardianship cases
 - Legal Strategies for defending protected persons' rights in guardianship cases

Client Representation and Role of Attorneys

Benefits of Legal Counsel

- The attorney for the respondent is the only person whose role is to advocate for what the respondent wants.
- In contrast, the role of a guardian ad litem or court visitor is to advocate for what they believe is in the best interests of the respondent.

Benefits and Role of Legal Counsel (1 of 3)

- The judge is more likely to take the case seriously and listen to a respondent who is represented by an attorney.
 - Judges begin with a belief a guardianship is needed if a petition is filed.
 - Move the case from the uncontested calendar to a contested calendar hearing.

Benefits and Role of Legal Counsel (2 of 3)

- Educate the respondent to understand the process and be able to present the best case.
 - The court room and the court proceedings can be intimidating.
 - Consider how the respondent will get to the hearing. Will the proposed guardian provide transportation? Does the respondent have someone who will transport them?
 - Consider if the respondent needs any accommodations to participate.
 - Will the respondent be able to hear?
 - Arrange for remote attendance if cannot appear in person.

Benefits and Role of Legal Counsel (3 of 3)

- Assist the respondent in selecting reasonable objectives
 - Although the attorney must advocate for the objectives chosen by the respondent, the attorney should advise the respondent of the options and what may or may not be achievable.
 - Object to award of any guardianship
 - Attempt to limit the guardianship
 - Propose an alternative guardian

Benefits and Role of Legal Counsel

- Gather and present evidence to support the client's objectives
 - Review medical records and interview the doctor(s)/ other medical professionals / caregivers
 - Interview and select potential witnesses
- Identify and present any potential legal arguments – object to notice, pleading, fitness of proposed guardian, present legal issues as appropriate. Educate the judge as needed on the guardianship law.
- Conduct discovery as needed.

Case Study #1

Former nurse Betty has developed a long-distance relationship with Fred, whom Betty met on Facebook. Betty has emptied her retirement accounts and borrowed against her home to help Fred with his business. Betty's children file for guardianship over her income and property.

Betty comes to you to defend against the guardianship. She has no issues with activities of daily living, and she seems fully coherent. She tells you that she still has total confidence in Fred, even though he continues to delay coming to visit her in person.

- How do you represent her?

Legal Strategies for Defending Protected Persons' Rights

1. No *Ex Parte* Decisions

- *Ex parte* – hearing/decision without a response from or notice to the other side
- Case example: “Brutus” (older adult, blind, deaf)
- Intervention: Return hearing aids and glasses to the client, bring her side to the court’s attention
- Result: Termination and return home; judge vowed never to grant a guardianship without a hearing again

2. Be Aware of & Able to Name Bias

- *Ageism, ableism*
- Some common refrains from the bench or opposing counsel:
 - Well, they're an addict...
 - She won't take her meds once she's out of here.
 - He's going to have dementia eventually.
 - What if something bad happens after the guardianship is terminated?
 - She's under guardianship. She can't hire an attorney.

3. Before the Hearing...

Prep, Prep, Prep

- Client management
 - Do you need court accommodations?
 - Is transport needed? Who is providing it?
 - How will the client be dressed?
 - How will the client communicate?
 - When is the best time of day for the client to attend a hearing?
- Predict the bias and come with an answer.
- Have a Plan A, Plan B, and a Plan C. Always.

Case Study #2

- Client Marge has been placed under guardianship after the death of her mother.
- Marge has a developmental disability but has a job and can perform all activities of daily living.
- Guardians move their son, his girlfriend, and their children into Marge's house. Son has a criminal record of domestic violence.
 - Marge and her co-workers come to you for help. What do you do?
 - What is your Plan A? Plan B? Plan C?

4. Least Restrictive Alternatives

- Does your statute require that least restrictive alternatives be explored prior to petitioning for a guardianship?
- Do your state accountings require a report on efforts to use less restrictive alternatives each reporting period?

Caution: Prepare for the possibility of paternalism.

5. Modification and Termination

- Always petition to modify or terminate – always petition for both.
- Who are your witnesses?
 - Adult Protective Services/Elder Protective Services
 - Ombudsmen
 - Medical experts
 - Facility employees
 - Family and friends, neighbors, co-workers
- Have fiduciary duties been met – accountings, medical needs, clothing, food, contact with the client?

5. Modification and Termination (Cont.)

- Pay attention to who is writing the physician's statement(s)
 - History with the client
 - Relationship to opposing parties
- Consider the need to request a more thorough assessment.
 - Who should conduct it?
 - How will it be paid for?
- Pay attention to opposition to a second opinion

6. Accountings

- Craft requests for accountings carefully
 - Be very explicit in your petition and proposed order about what you want and the statutory basis for it.
 - Think about:
 - Receipts
 - Check ledgers
 - Asking your client if they do online banking
 - Asking your client if they use a debit card
- Be very detailed about what your client receives – food, clothing, mail, money, etc. – so you know what to expect.

Questions

Resources

- [Elder Justice State Court Grants](#)
- [Working Interdisciplinary Networks of Guardianship Stakeholders \(WINGS\)](#)
- [WINGS Replication Guide](#)
- [4th National Guardianship Symposium](#)
- [The Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act \(UGCOPAA\)](#)

Additional Resources

- NCLER Trainings: [Guardianship & Alternatives](#)
- National Center on Elder Abuse: [Guardianship & Conservatorship Publications](#)

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