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A Review of Twenty-First Century Indiana Case Law and Statutory Enactments Relating to Guardianships.

I. Introduction

Indiana's guardianship code, found at I.C. 29-3, is remarkable for its lack of extensive case law interpreting its provisions. One law professor has joked that teaching a class on Indiana guardianship law only takes a day or two. Of the case law that does exist, a majority of the cases come from the early twentieth century or the late nineteenth century.

It is probably safe to assume that the next decade or two will see an increase in appellate activity involving the guardianship code. Demographics being what they are, the increase in the number of guardianship cases will no doubt rise, and with it the number of novel questions, or issues requiring deeper or updated interpretations of the statute.

One of the purposes of this paper is to provide a general survey of twenty-first century case law on the theory that the traditional "annual case law update" approach wouldn't show much. Rather, when it comes to guardianship law, a decade-based approach (at least for now) is more appropriate.

Also, three sections of the guardianship code are brand new within the past decade. The stand-by guardian statute (I.C. 29-3-3-7) provides a means to allow a smooth transition from one court-appointed guardian to another in the event a guardian dies or becomes unable to perform their duties as

guardian. The Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act ("UGAPPJA")(I.C. 29-3.5) makes Indiana the twenty-sixth state to adopt a statute designed to address the dilemma of "granny-snatching" and other problematic issues surrounding jurisdictional battles in guardianship proceedings. The Volunteer Advocates for Seniors or Incapacitated Adults statute (I.C. 29-3-8.5) helps lay the groundwork for, and protect the work of, budding volunteer guardianship programs in Indiana. The Estate Planning Statute has been completely updated and revamped to allow greater flexibility for guardians, with court approval, to engage in estate planning on behalf of the protected person. Each of these statutes will also be reviewed in this paper.

II. Indiana Guardianship Case Law Review: 2000 to 2011

A. Guardianship Procedure

1. Notice.

Over the past year or two attorneys practicing before several courts in Indiana may have been confronted with something new when it came to obtaining emergency guardianships: judges and magistrates insisting upon the completion of an attorney's affidavit describing the efforts at providing notice of the request for an emergency order. In Marion County the probate court has a form handy that contains the following information at the bottom:

> "NOTE: The purpose of this form is to comply with requirements stated in In Re Anonymous, 729 N.E.2d 566 (Ind. 2000) *ex parte communication in a child custody matter* and In the Matter of Anonymous, 786 N.E.2d 1185 (Ind. 2003) *ex parte communication in a divorce matter requesting TRO*, as well as Trial Rule 65(B) and the Rules and Canons prohibiting improper ex parte contacts with the Court. See also subsection (b) of I.C. §29-3-3-4 as added by P.L. 178-2011, section 3."

Not much had changed in Indiana law that prompted the use of this new form – the applicable trial rules and ethical rules are the same now as they were before. As with much in Indiana guardianship practice, though, "the way things are done" has not always been in strict compliance with the law.

The issue of proper notice of guardianship proceedings came up in Wells v. Guardianship of Wells, 731 N.E.2d 1047 (Ind. Ct. App. 2000). In that case an Intervenor was attempting to attack the guardianship appointment on the basis of defective notice to him, even though that Intervenor was present at two hearings on the matter, and represented by

counsel. In other words, the attempt was to make the technical deficiency of notice determinative in the proceedings. The court was having none of that, stating:

> Intervenor offers no authority for the proposition that the failure to comply with the notice requirements of IC § 29-3-6-1 automatically invalidates an appointment of permanent guardianship, and we find none. Moreover, we are reluctant to create such a rule, especially where the complaining party received sufficient notice to enable him to retain counsel and appear at all proceedings relative to the permanent guardianship.

Id., at 1050

2. Presence of the Alleged Ward

Another area of proper guardianship procedural law frequently flouted in actual practice is the requirement that the alleged incapacitated person be present at the hearing. Indiana Code section 29–3–5–1(d) provides as follows:

> "(d) A person alleged to be an incapacitated person must be present at the hearing on the issues raised by the petition and any response to the petition unless the court determines by evidence that:
>
> (1) it is impossible or impractical for the alleged incapacitated person to be present due to the alleged incapacitated person's disappearance, absence from the state, or similar circumstance;
>
> (2) it is not in the alleged incapacitated person's best interest to be present because of a threat to the health or safety of the alleged incapacitated person as determined by the court;
>
> (3) the incapacitated person has knowingly and voluntarily consented to the appointment of a guardian or the issuance of a protective order and at the time of such consent the incapacitated person was not incapacitated as a result of a mental condition that would prevent that person from knowingly and voluntarily consenting; or
>
> (4) the incapacitated person has knowingly and voluntarily waived notice of the hearing and at the time of such waiver the incapacitated person was not incapacitated as a result of a mental condition that would prevent that person from making a knowing and voluntary waiver of notice."

In practice it is all too common for courts to let slide this requirement. Several excuses for such absences are made – the alleged ward would not understand what was going on, the alleged ward would be needlessly traumatized emotionally by the proceedings, etc. As a matter of due process, however, courts must necessarily be skeptical of such concerns. Certainly, though, there seems to be considerable discretion under the statute itself for a court to determine whether such presence is necessary.

This issue came up in the guardianship case of In re Guardianship of Atkins, 868 N.E.2d 878 (Ind. Ct. App. 2007) where a battle ensued between the parents of Patrick Atkins, the ward, and the ward's same-sex partner of twenty-five years, over who should serve as guardian. The trial court appointed the parents guardians over their adult son. The appellate court let that decision stand, but ordered that the guardians allow the ward's life partner to visit – something they had refused to allow before.

While the appellate court reiterated the mandate in the statute that the ward be present unless one of the exceptions are found to exist, it nevertheless held that the right was personal to Patrick and could not be raised by either the parents or Patrick's partner:

> None of the exceptions to the rules mandating Patrick's presence are at issue herein, nor was there evidence presented that Patrick was unable to appear. Although there was evidence in the record establishing that Patrick was incompetent to *testify,* there is absolutely no evidence that his mere presence at the hearing would have endangered his health or safety. The trial court, therefore, erroneously declined to require Patrick's presence at the hearing.
>
> That said, however, the right to be present at the guardianship hearing is akin to a due process right belonging to the allegedly incapacitated person. Here, therefore, it was *Patrick's* right to be present at the hearing; neither Brett nor the Atkinses have standing to enforce that right. It was the duty of Patrick's court-appointed GAL to represent Patrick's interest and insist that he be present at the hearing. The GAL did not do so. Consequently, this right has been waived and we decline to remand for a new trial on this basis.

Id., at 886-87.

3. The Role of Guardian Ad Litems.

The standing issue upon which the appellate court rested in Atkins is troubling for another reason. It would appear to presume two things about guardian *ad litems* that are not necessarily true.

First, while a guardian *ad litem* (GAL) was involved in the Atkins case, in reality GALs are appointed in less than half of Indiana guardianship cases.[1] If there are no GALs in over half of the cases, then who does have standing to assert the alleged ward's due process rights?

Second, unless it meant to define the role of a GAL in a different way that is generally understood, the court has confused that role with that of an attorney.

Indiana's guardianship code does not define the role of a GAL. The statute pertaining to GAL appointments, I.C. 29-3-2-3, states:

> (a) Unless waived under subsection (b) [applicable only to minors] or if section 4 of this chapter does not apply, the court shall appoint a guardian ad litem to **represent the interests** of the alleged incapacitated person or minor if the court determines that the alleged incapacitated person or minor **is not represented or is not adequately represented by counsel**. If not precluded by a conflict of interest, a guardian ad litem may be appointed to represent several persons or interests. The court as part of the record of the proceeding shall set out its reasons for appointing a guardian ad litem.

[**Emphasis added.**]

Compare that statute with I.C. 29-3-5-1(c) which states: "Unless an alleged incapacitated person is already represented by counsel, the court may appoint an attorney to represent the incapacitated person."

In the statute that discusses the mandatory appointment of a GAL the language – "represent the interests" – and the suggestion that a GAL appointment is not necessary when the ward has adequate counsel, it seems to be implied that a GAL is, essentially, a court-appointed attorney for the ward. But if that is so, then what is the purpose of I.C. 29-3-5-1(c)?

The fact is that the definition of the role of a GAL in Indiana is muddy, at best. The National Guardianship Association defines a GAL as "A person appointed by the Court to make an impartial inquiry into a situation and report to the Court." And, indeed, that is usually the role taken by GALs

[1] Such is the conclusion of an empirical study conducted by the University of Notre Dame

appointed in Indiana. But that role is significantly different from that of an attorney zealously representing the position of ward.

So, in the Atkins case, why would the GAL have standing to object to the failure to ensure the presence of the ward if they are serving as an investigatory arm of the court?

The confusion over the role of the GAL can lead to other serious implications. If you are the attorney representing the petitioner, would you really want to accede to the request of the GAL to interview the petitioner without you being present? If the GAL is making a report to the court is it in the form of a motion that requires a response?

Atkins did nothing to clear up the role of GALs. Expect clarity to come in the next decade either from statutory changes or further appellate case activity.

4. Selection of Guardian

In re Guardianship of Brewer

Two sections of the guardianship code speak to the question of who should be considered as guardian should a guardianship be deemed necessary. Indiana Code 29-3-5-4 identifies factors that a court should consider in determining who is most suitable to serve. The next section, I.C. 29-3-5-5, expounds on these lists of factors, defining what is essentially a non-binding pecking order of priority for guardianship selection, with for example a person designated in a durable power of attorney having the highest priority.

The pecking order of priority, however, can be ignored by the court.

> "With respect to persons having equal priority, the court shall select the person it considers best qualified to serve as guardian. The court, acting in the **best interest** of the incapacitated person or minor, may pass over a person having priority and appoint a person having a lower priority or no priority under this section."

[**Emphasis added.**] I.C. 29-3-5-5(b).

Essentially, then, all the other factors in determining who should serve as guardian are trumped by the "best interest" of the protected person as determined by the court.

In In re Guardianship of Brewer, (Ind. App. 2010) 922 N.E.2d 82, Indiana's appellate court upheld the appointment of a neutral third party as guardian

for the protected person. In doing so, it concluded that the trial court's analysis of "best interests" led to the conclusion that the appointment of a neutral third-party was best as a means of avoiding a "protracted legal fight."

> "The trial court noted the animus that existed between Robert and the Appellants, a finding sufficiently supported by the record. The last thing in Toby's interest would be a protracted legal fight between her husband and children. The appointment of a disinterested party as the guardian over Toby's estate will hopefully prevent unnecessary disputes caused by mistrust between Robert and the Appellants. Therefore, we conclude that the Appellants have failed to demonstrate that the trial court abused its discretion when it appointed Bevers as guardian over Toby's estate.

Id., at 89.

This conclusion, while perhaps reasonable in the case presented, poses some troubling implications. Avoiding a legal battle will always avoid costs to the estate of the protected person, certainly, and maybe address issues of mistrust in the family, all of which **may** be objectively defined as in the "best interests" of the protected person. But neutrality within the family is not necessarily what's best for the protected person; a neutral third-party may choose to make decisions as guardian that are less designed to meet the needs of the protected person, than to keep peace in the family.

In re Guardianship of J.Y.

In In re Guardianship of J.Y., (Ind. Ct. App. 2011) 942 N.E.2d 148, reh'g denied (Apr. 18, 2011), transfer denied (Sept. 16, 2011), an issue was raised that could be of some significance in future years as the number of volunteer organizations seeking to serve as guardian increases. The issue had to do with whether non-profit organizations proposing to serve as guardian can do so if they are not "authorized corporate fiduciaries." The court of appeals concluded that they can.

The issue arose because under the probate code, corporations may only serve as personal representative if they are an "authorized corporate fiduciary." Under the probate code, "No person is qualified to serve as a domiciliary personal representative who is:…a resident corporation not authorized to act as a fiduciary in this state." I.C. 29-1-10-1(b).

Finding that this definition for personal representatives does not apply to definition for guardians, the court upheld the appointment of a nonprofit corporation as guardian even though that corporation could not serve as

personal representative of a decedent's estate unless they were a licensed fiduciary in Indiana.

In re Guardianship of Hollenga

If a Power of Attorney contains a designation of the attorney-in-fact as the principal's preferred guardian if a guardianship is required, then that designation must be given "due regard" by the court deciding who should be appointed guardian. I.C. 29-3-5-4(1).

It is slightly unclear just what standard the court must apply in considering the appointment of the person designated in the Power of Attorney to be guardian. Such a person must be given priority consideration in the appointment by the court, although the court may ignore that priority if doing so is deemed to be in the alleged incapacitated person's "best interests," according to I.C. 29-3-5-5.

On the other hand, the Power of Attorney statute provides that, "The court **shall make** an appointment in accordance with the principal's most recent nomination in a power of attorney except for good cause or disqualification." [**Emphasis added.**] I.C. 30-5-3-4. Presumably, the "best interest" standard and the "except for good cause or disqualification" standard are sufficiently subjective to essentially mean the same thing.

(It is worth emphasizing that these sections of the Indiana Code only apply to instances where the Power of Attorney specifically *designates* the attorney-in-fact as the principal's preference for guardian appointment. Often, a Power of Attorney is entirely silent on this point, and in such cases the attorney-in-fact under the Power of Attorney need not be given any greaterconsideration by the court in the guardianship appointment.)

In In re Guardianship of Hollenga, 852 N.E.2d 933, 939 (Ind. Ct. App. 2006), the court of appeals remanded with instructions a decision by the trial court to designate someone other than the designee under the Power of Attorney.

> "Thus, pursuant to these statutes, a person designated in a durable power of attorney is entitled to primary consideration as the person to be appointed as guardian and *shall* be appointed guardian **unless good cause or disqualification** is shown."

[**Emphasis added.**] Id., at 938. Because there was no finding by the court that "good cause" was shown, it remanded the case with instructions to appoint the designee in the Power of Attorney as guardian unless there is a showing, and then a finding by the court, that good cause existed not to do so.

5. Claims Against Guardian – Fraud v. Accounting

Under I.C. 29-3-9-6(g) there is a requirement for a guardian to file an accounting with the court.

> "When a guardian files with the court proper receipts or other evidence satisfactory to the court showing that the guardian delivered to the appropriate person all the property for which the guardian is accountable as guardian, the court shall enter an order of discharge. The order of discharge operates as a release from the duties of the guardian's office that have not yet terminated and operates as a bar to any suit against the guardian and the guardian's sureties, unless the suit is commenced within one (1) year from the date of the discharge."

In First Farmers Bank & Trust Co. v. Whorley, (Ind.App. 2008) 891 N.E.2d 604 the question presented was just how far that release and discharge goes in defining the liability of the guardian. Specifically, the question was whether this statute effectively creates a one-year statute of limitations for *all* issues relating to the guardian's activities. The court ruled that it did not.

First Farmers had been named guardian of the estate for Whorley's father. After Whorley's father died First Farmers was appointed personal representative of his estate. During its tenure as guardian of the estate, First Farmer's made certain decisions regarding the sale of farmland for cash and then the treatment of the transaction for tax purposes. After the estate was closed Whorley was notified by the Internal Revenue Service that the tax treatment taken by First Farmers was rejected, resulting in a tax liability of over $500,000. Whorley brought suit against First Farmers for breach of fiduciary duty and First Farmers asserted the claim was untimely because it was brought after the one-year limitations period found in I.C. 29-3-9-6(g).

But the appellate court ruled that Whorley's claim was not time barred, reasoning that the one-year limitations period applied only to those matters covered by the accounting filed, and not to claims of breach of fiduciary duty, which is a tort carrying a two-year limitations period, which begins to run only after discovery.

> "As has been the law in Indiana for more than one hundred years,
>
> > it is not necessary that the approval of a guardian's report in final settlement should be set aside, in order to maintain an action against the guardian for negligence, unless the approval of the report was in some way an adjudication of the matters of

> which complaint is made; that the approval of such settlement report is an adjudication of all matters involved in, or which properly belong to, the proper accounting of moneys with which the guardian was chargeable; but that such approval does not adjudicate the subject of the guardian's negligence in the management of the ward's estate, unless that subject is embraced in the report.
>
> *State ex rel. Coleman v. Peckham,* 136 Ind. 198, 36 N.E. 28, 29 (1894); *see also Wainwright v. Smith,* 106 Ind. 239, 6 N.E. 333, 334 (1886); *State ex. rel. Millice v. Petersen,* 36 Ind.App. 269, 75 N.E. 602, 604 (1905). In other words, the approval of a guardian's final report is only an adjudication of all matters included within the report; it is not an adjudication of a subject that is not embraced in the report. Although we recognize that the cases relied upon are not of recent vintage, they represent our courts most recent determinations on the issue and we are not free to disregard them."

First Farmers Bank & Trust Co. v. Whorley, at 609.

B. Substantive Guardianship Issues

1. Attorney Fees.

In re Guardianship of Phillips

The guardianship code has two sections specifically addressing the award of attorney fees from the funds of the protected person. Indiana Code 29-3-9-9 states:

> "(a) Whenever a guardian is appointed for an incapacitated person or minor, the guardian shall pay all expenses of the proceeding, including reasonable medical, professional, and attorney's fees, out of the property of the protected person.
>
> "(b) The expenses of any other proceeding under this article that results in benefit to the protected person or the protected person's property shall be paid from the protected person's property as approved by the court."

That statute is the one relevant to guardianship proceedings, as opposed to protective order or single transactions proceedings. These latter proceedings

have their own section of the guardianship code, and with it their own provision for attorney fees found at I.C. 29-3-4-4, which states:

> "If not otherwise compensated for services rendered, any guardian, attorney, physician, or other person whose services are provided in good faith and are beneficial to the protected person or the protected person's property is entitled to reasonable compensation and reimbursement for reasonable expenditures made on behalf of the protected person. These amounts may be paid from the property of the protected person as ordered by the court."

In 2010 the Indiana Court of Appeals had occasion to address the attorney fee statute in guardianships, I.C. 29-3-9-9, as it related to a party that successfully objected to and defended a petition for estate planning initiated by the guardian. The case was In re Guardianship of Phillips, (Ind.App. 2010) 926 N.E.2d 1103. At issue was a guardian's petition for estate planning for the protected person, specifically proposing to revoke a trust.

The trust was created by the protected person's husband before his death using a power of attorney the protected person had previously given to him. The trust provided that after the death of the husband the trust principal and income would be used for the protected person's benefit, however upon the protected person's death a friend of the couple's (who also served as successor trustee of the trust after the husband's death) was named as beneficiary. The problem was that the trust's dispositive scheme differed from the expression of the protected person and her husband in a Last Will & Testament dated almost twenty years earlier.

Following the husband's death, the court had appointed another friend of protected person as her guardian. This was not the same friend that served as trustee of the trust. The guardian filed a petition for estate planning seeking to revoke the trust. The trustee objected to that petition and was successful (for reasons that are addressed below in the section on guardian-sponsored estate planning.) After succeeding in defending the revocation effort the trustee sought an award of attorney fees from the protected person's assets, which was granted. The guardian appealed that decision and lost at the appellate level. Because the defense of the revocation effort was in the best interests of the protected person, the court held that the award of attorney's fees was appropriate under I.C. 29-3-9-9(b).

In re Guardianship of M.K.

In a case involving two adult children arguing over control of their mother's affairs, the Indiana Court of Appeals reaffirmed the statutory mandate that

requires the award of reasonable attorney fees when a guardianship is appointed. The case is In re Guardianship of M.K., (Ind.App. 2006) 844 N.E.2d 555, wherein the daughter held a Power of Attorney from mother and made decisions, such as the sale of the family farm, that the son disagreed with. Son filed a petition for guardianship.

The trial court entered an order revoking the Power of Attorney, and after a lengthy trial appointed the son guardian of the estate and daughter guardian of the person. But the trial court judge denied son's petition for attorney fees. "[T]he judge explained that he was denying an award of attorney's fees from M.K.'s estate because the judge concluded that the expense could have been avoided had M.K.'s children made a better attempt to resolve the issues among themselves."

The appellate court looked to the mandatory language of I.C. 29-3-3-9(a) ("shall pay") and concluded that once the decision was made to grant the guardianship, the trial court had no discretion to not allow the award of attorney fees, although the judge retained the discretion to determine what was a "reasonable" fee.

In re Guardianship of Hickman

Perhaps winning the award for the most litigious guardianship proceeding this past decade, In re Guardianship of Hickman (Ind.App.2004) 811 N.E.2d 843, rehearing denied, transfer denied 831 N.E.2d 737, involved four separate appeals. One of the issues addressed in one of the appeals was the reasonableness of an attorney's fee award. The amount approved by the trial court was $367,043.50.

The primary valuable of Hickman on the question of attorney fee awards is its reaffirmation of the attorney fee statute's reference to matters other than the guardianship proceeding itself that nevertheless benefited the protected person. I.C. 29-3-9-9(b). In this case there were a number of other ancillary issues relating to the business affairs of the protected person that were the subject of the attorney fee request. Per the statute, the court was required to award a reasonable fee for such services if they "result in benefit to the protected person."

The appellant attempted to make the argument that after the court had appointed a guardian *ad litem* in the proceedings for the protected person, there was no longer a role for the petitioner's attorney. But the court identified a difference in the interests of the petitioner and that of the protected person that rendered the involvement of a guardian *ad litem* as something other than a replacement for the petitioner:

> "Unlike the guardian ad litem, the petitioner is not required to act in accordance with the incapacitated person's best interests. Given that Joseph's interests as the petitioner might have been different from Josephine's interests, Leo's argument that Joseph's request for attorney fees after a guardian ad litem was appointed was unreasonable is without merit."

Id, at 852. (The Hickman court missed an opportunity to further address or more carefully define the nature of the role of a guardian *ad litem*, which continues to be a source of confusion in guardianship practice.)

2. Guardian and Family Caregiver Fees

Schwartz v. Schwartz

The issue of fees for the guardian and for family caregivers comes up in Schwartz v. Schwartz, (Ind.App. 2002) 773 N.E.2d 348, 355. The facts involved a granddaughter who became the court appointed guardian for her grandmother upon an agreement between her own mother (the protected person's daughter) and her uncle (the protected person's son). Against a backdrop of unauthorized moves from one facility to another and, ultimately, an unauthorized move of the protected person out of a nursing home and into the home of her daughter, and of questionable payment of the protected person's funds without prior court authorization, the trial court nevertheless awarded fee requests of both the granddaughter/guardian, and the daughter/caregiver.

While the amount of fees requested were far less than what they had asked for, the fact that fees were awarded at all is significant. The fee awards were upheld despite the lack of a written compensation agreement, the lack of any clear understanding of what level of compensation was expected by the fee petitioners, and the lack of any time records.

The issue of compensation for family caregivers comes up frequently. The Indiana Court of Appeals had previously addressed the question this way:

> "Where one accepts valuable services from another the law implies a promise to pay for them. *Silverthorne v. King* (1979), 179 Ind.App. 310, 314, 385 N.E.2d 473, 476. Where services are performed by a non-family member, an agreement to pay may be implied from the relationship of the parties, the situation, the conduct of the parties, and the nature and character of the services rendered. *Cole v. Cole* (1988), Ind.App., 517 N.E.2d 1248, 1250. However, where the parties

> are family members living together, and the services are rendered in the family context, no implication of a promise to pay by the recipient arises. *Id.* Rather, there is a presumption that services are performed gratuitously when there is evidence of a blood or family relationship between the decedent and the claimant, unless a contract implied in fact is shown. *Id."*

Estate of Hann v. Hann, 614 N.E.2d 973, 979 (Ind. Ct. App. 1993)

But in Schwartz, the court distinguished Hann on the basis that, whereas in Hann the arrangement for which services were sought was one of "mutual benefit," such could not be said for the arrangement in the case before the court. In Schwartz the protected person's daughter invited her to live with her because the care in the nursing home was poor. The daughter quit her part-time job, and provided apparently good care for essentially twenty-fours a day. The court's conclusion was that the arrangement was not for "mutual benefit," and therefore an implied contract for compensation was appropriate.

Schwartz concluded that:

> "However, our court has noted that the 'expectation of compensation may coexist with higher motives prompted by affection or the sense of duty, and that the existence of the latter does not necessarily exclude the idea of pecuniary compensation.' *Walting v. Brown,* 139 Ind.App. 18, 24, 211 N.E.2d 803, 807 (1965) (quoting *Wainwright Trust Co. v. Kinder,* 69 Ind.App. 88, 95-96, 120 N.E. 419, 421 (1918)). We also observe that persons who render beneficial services to a protected person in good faith are entitled to reasonable compensation and reimbursement. *See* Ind.Code § 29-3-4-4 (1994).

Id., at 355.

Williamson v. Williamson

In Williamson v. Williamson, (Ind.App. 1999) 714 N.E.2d 1270, after a protected person died, his son, who had been appointed guardian, became personal representative of the estate. There was a final accounting filed in the guardianship proceeding and it was closed. During the administration of decedent's estate, though, he paid himself a $10,000 fee for his services as guardian. His brother argued that this was improper.

> "The disbursement was made after the guardianship was closed and after an agreed order approving the guardian's final accounting had been entered. No guardianship fee was received during the course of

> the guardianship; nor was a fee requested as a part of the guardian's final accounting."

Id., at 1274-75.

The court ruled that:

> Once the trial court approved the final accounting, Donald's claim for a guardianship fee was barred unless he first petitioned the trial court to set aside its judgment. *Trinkle,* 650 N.E.2d at 752. He filed no such petition. Thus, the trial court erred in approving the fee as a part of the probate estate.

Id., at 1275. Nevertheless, the court found that the trial court's error was harmless.[2]

Estate of Prickett v. Womersley

The timing of a claim for personal services by a family caregiver came up in Estate of Prickett v. Womersley, (Ind. 2009) 905 N.E.2d 1008. There the Indiana Supreme Court addressed the question of whether a claim for personal services rendered in a non-fiduciary capacity to a protected person by a family member must be filed in the guardianship proceedings rather than in a subsequent probate estate. It ruled that that was not necessary.

> "We acknowledge that the role and purpose of the guardian of an estate endows the guardian with a competence, if not expertise, when passing on the compensability of claims. But in the absence of legislative direction mandating a guardian's approval, we are apprehensive of the administrative and other practical consequences of ordering a guardian's review of all claims filed in a probate estate that accrue during a decedent's guardianship."

Estate of Prickett v. Womersley, 905 N.E.2d 1008, 1011-12 (Ind. 2009). So, a claim for guardian's fee must be made within the guardianship proceeding as a part of the final accounting, but a claim for fees by a non-guardian for services rendered to the guardianship need not.

3. Contracts

Indiana Code 29-3-8-5(b) provides that "Every contract, sale, or conveyance executed by a protected person is void unless the protected person is a minor, in which event the contract, sale, or conveyance is voidable."

[2] The court's explanation for why the error was harmless is not clear.

In City of Mishawaka v. Kvale, (Ind.App. 2004) 810 N.E.2d 1129, while under guardianship, an adult entered into three mortgage loans with the City of Mishawaka, which in turn built him a garage (even though the protected person did not own an automobile and was unable to walk from his home to the garage.) The mortgage contract was deemed legally void.

However, the Kvale court found that there was a question of fact as to whether the value of the garage unjustly enriched the protected person's estate by increasing the value for sale or the ability to sale the property. It therefore reversed the grant of summary judgment to the protected person's estate.

III. The Stand-By Guardian Statute

About fifteen years ago Mary Johnson, age 70 at the time, was appointed guardian for her mother, Maedella Johnson, then age 88. This year Mary developed cancer and died. Maedella, though continuing to suffer from the dementia that triggered the need for the guardianship, is still going strong at 103 years of age.

This is becoming an increasingly common fact scenario, where the protected person simply outlives the guardian. Obviously, a new guardian needs to be appointed to take over the management of the protected person's affairs, but doing so takes time, the most obvious choice to take over is not always clear or is disputed, and getting started with the legal process of appointing a successor guardian all in the midst of dealing with the death of the guardian is the last thing a grieving family necessarily wants to focus upon. In the meantime, decisions need to be made for the protected person, bills paid, assets managed, etc.

Effective July 1, 2011, Indiana's legislature passed a new law to help plan for this scenario. Indiana Code 29-3-3-7 now allows a guardian to make a written declaration designating a "stand-by guardian" to take over guardianship responsibilities should the guardian become "unable to serve, refuses to serve, renounces the appointment, dies, or becomes incapacitated after the death of the declarant."

There are strict requirements for this new written declaration form:

> "(b) A declaration under this section must contain the following information:
>
> (1) The names of the declarant, the designated standby guardian, and the alternate standby guardian, if any.

(2) The following information concerning each minor child or protected person for whom a standby guardian is designated by the declaration:

(A) The person's full name as it appears on the birth certificate or as ordered by a court.

(B) The person's date of birth.

(C) The person's Social Security number, if any.

(3) A statement that the declaration becomes effective upon the death or incapacity of the declarant.

(4) A statement that the declaration terminates ninety (90) days after becoming effective unless the standby guardian files a petition for a guardianship of the minor or protected person during that ninety (90) day period.

"(c) A declaration executed under this section must be signed by the declarant in the presence of a notary public."

The declaration is designed to be a stopgap measure until the court can appoint a successor guardian. Section (d) of the statute provides that:

> (d) A declaration executed under this section becomes effective upon the death or incapacity (as defined in IC 29-3-1-7.5) of the parent or guardian and terminates ninety (90) days after the declaration becomes effective. However, if the designated standby guardian files a petition for a guardianship of the minor or protected person during that ninety (90) day period, the declaration remains in effect until the court rules on the petition.

Thus, for example, if the stand-by guardian files a petition for the appointment of a successor guardian 89 days after they began serving as stand-by guardian and the court sets the matter for three months after that filing, then the stand-by guardian's authority can effectively last for almost six months. Conversely, if the court conducts a hearing within the 90 day window and appoints a successor guardian for the protected person (whether or not that turns out to be the one who had been serving as stand-by guardian), then the stand-by guardian's authority could last less than 90 days.

There is no requirement that the declaration be filed with the court having jurisdiction over the guardianship. Rather, it appears that the document should be treated much like a Power of Attorney in that the person designated as the stand-by guardian should either be given the declaration in advance of the need, or at least know how to get it should it become necessary.

Some practical issues will arise in the application of this new statute. Such issues will need be addressed by legal practitioners in future:

First, there is no mechanism for the court clerk to issue a new Letters of Guardianship to the stand-by guardian. Rather, the evidence of the stand-by guardian's authority would seem to be the designation itself. This will take some getting used to by third-parties. Will the bank branch manager accept that written designation when the stand-by guardian comes in to have themselves placed on the guardianship account? Will the doctor accept it when it comes time to make significant health care decisions for the protected person?

Second, not only is the death of the original guardian a triggering event, but so is the "incapacity" of that guardian, as defined by I.C. 29-3-1-7.5, which states:

> "Incapacitated person" means an individual who:
> (1) cannot be located upon reasonable inquiry;
> (2) is unable:
> (A) to manage in whole or in part the individual's property;
> (B) to provide self-care; or
> (C) both;
> because of insanity, mental illness, mental deficiency, physical illness, infirmity, habitual drunkenness, excessive use of drugs, incarceration, confinement, detention, duress, fraud, undue influence of others on the individual, or other incapacity; or
> (3) has a developmental disability (as defined in IC 12-7-2-61).

While oftentimes the evidence of the "incapacity" is self-evident to everyone concerned, there will be occasions when such is not the case. No adjudication of incapacity as defined by the statute is required for the stand-by guardian's powers to be triggered, so what if there is a dispute? The most common example will likely be where an aging spouse serves as guardian and she designates an adult child as stand-by guardian. Then the adult child becomes concerned with mom's ability to manage things, although mom disagrees.

IV. The Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act ("UGAPPJA")

Fred and Wilma lived for years in Florida after having moved there from Indiana. They lived independently in a retirement village. No in-home services were provided there. Wilma was in fairly good cognitive health, but

her physical health was poor. Fred, who historically acted in a loving, but domineering, manner within the couple's relationship, started to have serious cognitive decline.

Fred and Wilma had a son who also lived in Florida near his parents. He had assisted his parents with errands, bill-paying, etc. over the years. This son was growing increasingly concerned over Fred's cognitive decline. Concerned for his father, but also concerned for his mother who he felt was being unduly burdened by trying to care for her husband, this son sought to have his parents move into an assisted living center and to allow him to take over further responsibilities with regard to managing their assets.

Fred refused his son's help, refused to consider moving to an assisted living facility, and told his Florida son to leave them alone. This son grew increasingly concerned for the health of his mother who was forced to tend to household chores and tend to her husband's needs, all at the expense of her own physical health.

Growing increasingly alarmed, the Florida son initiated guardianship proceedings in a Florida court over both parents. A court-appointed guardian *ad litem* conducted an investigation, which included a visit with Fred and Wilma in their home. Her recommendation to the court was that, indeed, a guardianship would be appropriate.

Meanwhile, Fred, who had grown livid with his Florida son, contacted his other son in Indiana. The Indiana son, who was estranged from the Florida son, insinuated himself into the situation and reinforced his father's worries over the actions by the Florida son, agreeing with his father that a guardianship was unnecessary and an insult.

Days before the Florida hearing on the guardianship, and with the help of the Indiana son who made the travel arrangements, Fred took Wilma and fled to Indiana, leaving most of their belongings in their apartment.

Now what?

Does the Florida court retain jurisdiction? Have Fred and Wilma effectively transferred their residence to Indiana?

Scenarios like this are increasingly common and pose serious jurisdictional and conflict of law questions. Even in other situations, where "granny snatching" is not the issue, for instance when a well-considered decision to move someone already under guardianship to a different state, jurisdictional questions arise and answering them can be difficult.

On July 1, 2011, Indiana became the twenty-sixth state to adopt the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act ("UAGPPJA"). It can be found at I.C. 29-3.5. This act is designed to address three common jurisdictional issues:

- determining which state has jurisdiction to appoint a guardian or conservator;
- transferring an existing guardianship from one state or country to another; and
- recognizing and giving full faith and credit to a guardianship order from another state.[3]

Most of the UAGPPJA addresses the need for courts of different states to cooperate in sorting out jurisdictional issues for guardianships and assist each other in evidence-gathering for determining issues in guardianship proceedings.

For the Indiana practitioner, the immediate relevance of UAGPPJA is that it will now be necessary to determine whether Indiana is the prospective ward's "home state" (defined under I.C. 29-3.5-1-2(6))or, if not, whether Indiana is a "significant connection state" (defined under I.C. 29-3.5-1-2(15)). It is advisable, beginning July 1, 2011, for Indiana attorneys to include an assertion in their petitions for guardianship that Indiana fits one of those categories. If Indiana is *not* the prospective ward's "home state," then the petitioner's attorney will need to provide the court with other facts to prove that the court has jurisdiction over the case. *See* I.C. 29-3.5-2-3.

The Indiana practitioner should also be aware that UAGPPJA also affords a mechanism for evidence gathering, including compelling deposition testimony and/or medical evaluations in other states. However, attorneys cannot make requests themselves, but rather must ask the Indiana court to make the request for assistance to the court in the other state. *See* I.C. 29-3.5-1-5.

Finally, the Indiana practitioner should be aware that if his guardian-client decides it is appropriate to transfer the residence of the ward to a different state, then UAGPPJA affords a process for arranging the transfer of the guardianship to that state. *See* I.C. 29-3.5-3 *et seq*.

[3] Taken from "Nine Ways to reduce Incapacitated person Abuse Through Enactment of the Uniform Adult Guardianship and Protective Proceedings Act," Lori A. Stiegel, J.D., Senior Attorney, and Erica F. Wood, Assistant Director, American Bar Association Commission on Law and Aging.

V. Volunteer Advocates for Seniors or Incapacitated Adults Statute

In Indiana family members initiate most guardianships over an incapacitated adult. In situations where there are no appropriate or available family members, or where those family members are the source of exploitation, abuse or neglect, there are few alternatives to provide protection to the prospective ward.

Unlike other states, Indiana does not have a significant state-funded guardianship program. (There is such a program that serves indigent adults, mainly through Area Agencies on Aging, but such services are limited to about 23 counties, and the services are limited by the funding available.)

Expect to see more volunteer guardianship programs in Indiana. There are some already providing such services, such as (in central Indiana) Mental Health America, Families First, the Wishard Volunteer Advocates Program, and others. A few years ago The Indiana Adult Guardianship Services Project[4] ("IAGS") was launched. It seeks to "build a framework of community-based adult guardianship services projects / programs across the state." There is also an Indiana State Guardianship Association, "incorporated in July 1996 as a non-profit organization to strengthen guardianship and related services through networking, education, and tracking, and commenting on legislation."[5]

An IAGS task force has been meeting for a couple of years to discuss the experiences of certain "pilot" and "model" volunteer guardian programs, and to formulate a public policy approach to foster the development of volunteer programs and establish some standards of practice for them to follow. It is anticipated that the white paper will be completed by the end of 2011 and its specific proposals will be promoted to the private bar, the judiciary, legislators, and others.

In 2004, in response to the need for, and the growth of, volunteer guardianship programs, Indiana passed a new chapter to its guardianship code. Called the "Volunteer Advocates for Seniors or Incapacitated Adults Act" (VASIAA), it can be found at I.C. 29-3-8.5 *et seq*. In addition, definitions for key terms are found in the guardianship code's definition section:

- "volunteer advocate for incapacitated adults" (I.C. 29-3-1-15.5);
- "volunteer advocate for seniors" (I.C. 29-1-3-16);

[4] www.arcind.org/index/iags/project-mission-and-goals.asp
[5] http://www.indianaguardian.org/mainIndex.html

- "volunteer advocates for incapacitated adults program" (I.C. 29-3-1-17); and
- "volunteer advocates for seniors program" (I.C. 29-1-3-18).

(The only actual distinction between the terms, as they refer to "incapacitated adults" and "seniors" is that the latter refers to programs/advocates that deal with advocates over the age of fifty-five, while the former deals with all those over the age of eighteen. They are referred to collectively hereafter as "volunteer programs" and "volunteers".)

VASIAA requires that such volunteer programs be Indiana nonprofit or municipal corporations or programs of such corporations, or programs operated by a county or court. The act contemplates that such programs submit an operational plan approved by the court that addresses conflicts of interest and volunteer training policies. Beyond the duties and powers otherwise outlined in the guardianship code, VASIAA establishes additional reporting requirements for the volunteer programs. The act clearly contemplates the use of volunteers as temporary guardians, rather than permanent, but it does not foreclose their appointment as permanent guardians. I.C. 29-3-8.5-5 states that:

> "(a) If a court appoints a volunteer advocates for seniors program or a volunteer advocates for incapacitated adults program, the initial appointment shall be for a period of ninety (90) days.
>
> "(b) After the initial ninety (90) day period, the court may, upon petition by the volunteer advocates for seniors program or volunteer advocates for incapacitated adults program or upon the court's own motion, extend the appointment for a period as determined by the court to be necessary to protect the best interests and property of the incapacitated person or senior."

Perhaps more so than traditional guardians, volunteer programs are explicitly treated as "officers of the court". I.C. 29-3-8.5-6. Perhaps the primary feature of the VASIAA is that it provides civil immunity for the volunteer programs and volunteers "except for gross misconduct." I.C. 29-3-8.5-8. (Immunity is not unique to volunteer programs. I.C. 29-3-11-4 provides for civil immunity for guardians except for "gross misconduct" too.)

VI. The New Estate Planning Statute.

The ability of guardians to engage in estate planning on behalf of the protected person is sometimes an important tool for the guardian to fulfill her fiduciary duty. Indiana's guardianship code has long had a section outlining

the powers of guardians in that regard. Prior to July 1, 2010, that statute was found at I.C. 29-3-9-4. As of that date, however, I.C. 29-3-9-4 was repealed, and the statute completely rewritten. It is now found at I.C. 29-3-9-4.5, which provides:

> "(a) After notice to interested persons and upon authorization of the court, a guardian may, if the protected person has been found by the court to lack testamentary capacity, do any of the following:
>
> (1) Make gifts.
>
> (2) Exercise any power with respect to transfer on death or payable on death transfers that is described in IC 30-5-5-7.5.
>
> (3) Convey, release, or disclaim contingent and expectant interests in property, including marital property rights and any right of survivorship incident to joint tenancy or tenancy by the entireties.
>
> (4) Exercise or release a power of appointment.
>
> (5) Create a revocable or irrevocable trust of all or part of the property of the estate, including a trust that extends beyond the duration of the guardianship.
>
> (6) Revoke or amend a trust that is revocable by the protected person.
>
> (7) Exercise rights to elect options and change beneficiaries under insurance policies, retirement plans, and annuities.
>
> (8) Surrender an insurance policy or annuity for its cash value.
>
> (9) Exercise any right to an elective share in the estate of the protected person's deceased spouse.
>
> (10) Renounce or disclaim any interest by testate or intestate succession or by transfer inter vivos.
>
> "(b) Before approving a guardian's exercise of a power listed in subsection (a), the court shall consider primarily the decision that the protected person would have made, to the extent that the decision of the protected person can be ascertained. If the protected person has a will, the protected person's distribution of assets under the will is prima facie evidence of the protected person's intent. The court shall also consider:
>
> (1) the financial needs of the protected person and the needs of individuals who are dependent on the protected person for support;
>
> (2) the interests of creditors;
>
> (3) the possible reduction of income taxes, estate taxes, inheritance taxes, or other federal, state, or local tax liabilities;

(4) the eligibility of the protected person for governmental assistance;

(5) the protected person's previous pattern of giving or level of support;

(6) the protected person's existing estate plan, if any;

(7) the protected person's life expectancy and the probability that the guardianship will terminate before the protected person's death; and

(8) any other factor the court considers relevant.

"(c) A guardian may examine and receive, at the expense of the guardian, copies of the following documents of the protected person:

(1) A will.
(2) A trust.
(3) A power of attorney.
(4) A health care appointment.
(5) Any other estate planning document."

This new statute greatly expanded the limits of estate planning from the previous statute. Before, the disposition of assets was limited to property

> "that the court determines to be in excess of that likely to be required for the protected person's future support or for the future support of the protected person's dependents during the lifetime of the protected person, in order to carry out the estate planning that the court determines to be appropriate for the purposes of minimizing current and prospective income, estate, or other taxes."

I.C. 29-3-9-4 (now repealed).

This limited focus on tax savings failed to consider other reasons, such as planning for asset protection for the protected person while obtaining or preserving public benefits such as Medicaid. Under the new statute a much broader range of reasons for estate planning is available. Such planning may only be done with court approval and after notice to effected parties.

The new statute will no doubt spawn appellate activity over the next decade. Of chief interest will be the scope of the estate planning powers with respect to dispositions of the protected person's assets upon death. Such issues were discussed in case law interpreting the prior statute. For instance, in In re Guardianship of E.N., (Ind. 2007) 877 N.E.2d 795, the Indiana Supreme Court was asked to interpret court-authorized estate planning that impacted the disposition-upon-death scheme that had been put into place by the protected person in earlier, contrasting versions of wills.

> "To the extent E.N. had a valid will, the estate plan effectively revoked it. This legislation does not authorize overriding a will made while competent based on the protected person's perceived post-incapacity desires. It may be desirable to provide a means other than a pre-incapacity will or intestate succession to dispose of a protected person's entire estate at death. The current statutes, however, do not authorize the court to write a will for the protected person, **nor do they authorize the practical equivalent of a will in the form of a trust that disposes of the person's assets beyond those determined to be in excess of the person's needs**. The legislature is certainly free to authorize guardians to dispose of all property at the protected person's death, but as of now it has not done so.

[**Emphasis added.**] Id., at 800.

Note that the new statute has removed the reference limiting planning to assets "in excess of the person's needs." Thus, the question will arise again as to whether the estate planning statute allows the court to effectively rearrange the disposition scheme upon the death of the protected person. As it is, the new statute explicitly allows for the court to approve an estate plan that will "change beneficiaries under insurance policies, retirement plans, and annuities." I.C. 29-3-9-4.5(a)(7).

Will the new statute allow a court to approve an estate plan that will fundamentally alter the disposition-upon-death scheme of the protected person? Creating a new will is not part of the powers granted under the new estate planning statute, however it does explicitly allow the creation of "a revocable or irrevocable trust **of all** or part of the property of the estate, including a trust that extends beyond the duration of the guardianship." [**Emphasis added.**] I.C. 29-3-9-4.5(a)(5).

The new statute certainly allows greater flexibility and provides more tools for the fiduciary to take steps that reasonably respond to the changing needs of the protected person and the changing environment for public benefits qualification, tax law, etc. However, the new statute also presents the risk of altering the protected person's pre-incapacity determinations with respect to their disposition-upon-death plans. In Phillips, *supra*, the Indiana Court of Appeals perhaps anticipated this outcome:

> "Indiana Code section 30–4–3–1.5(f), part of the trust code, provides '[a] guardian of a settlor may exercise the settlor's powers with respect to revocation, amendment, or distribution of trust property only with the approval of the court supervising the guardianship.' The trial court interpreted these statutes to mean Indiana law does not permit a

> guardian or a court 'to revoke a valid trust executed as part of an estate plan without cause and when [such revocation] is not determined based upon evidence to be in the best interests of an incompetent person.' App. of Appellant at 8. We agree with this interpretation of the statutes, adding that, as indicated by Indiana Code section 29–3–9–4 (2009), determination of an incapacitated person's best interests accounts for both the person's need for financial support **and his or her apparent intentions regarding the disposition of property**.5
>
> * * *
>
> "[Footnote 5]: Because this appeal is governed by the statutes that were in effect when the trial court issued its order and that remain in effect until July 1, 2010, **we express no opinion regarding whether the statutes effective starting July 1, 2010, would require a different analysis or result**.

[**Emphasis added.**] In re Guardianship of Phillips, at 1107-08.

The information contained in this article cannot be a substitute for individual legal counsel. Every person's situation is different. You should not act upon the information contained in this article without first consulting with an attorney.

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Ken Bennett graduated from Wabash College in 1979 and the Indiana University McKinney School of Law in 1982. He is a partner in the elder law firm of Bennett & McClammer. He founded and serves as Executive Director and Senior Counsel to the Center for At-Risk Elders, Inc., a public interest law firm that among other things operates the CARE Volunteer Advocates Program, providing guardianship services to low-income, unbefriended, incapacitated adults.

Ken also serves in a leadership role with the Indiana State Guardianship Association. He is a past president of the Alzheimer's Association, Indiana Chapter and has served in leadership roles with the National Academy of Elder Law Attorneys, United Senior Action Foundation, and other groups focused on the well-being of incapacitated adults. He currently serves as Chairman of the Central Indiana Senior Fund Advisory Board, which is a fund of the Central Indiana Community Foundation.

Ken is proud to say that he is an Eagle Scout.