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Due Process and Legal Ethics in the Practice of Guardianship Law

I. Introduction

We should begin any discussion of ethics, in the context of guardianship proceedings, with a reminder of the stakes involved.

“What other legal proceeding:

- Comprehensively strips an individual of numerous fundamental rights in one fell swoop
- In a hearing that can last less than 15 minutes
- Where the respondent is often not present
- And most of the testimony would be inadmissible in other legal contexts
 - Opinion testimony by lay witnesses
 - Strong reliance on hearsay
 - Medical testimony in the absence of an expert[?]”¹

Or, as stated by another scholar:

¹ Michael Jenuwine, “Overview of Guardianship in Indiana: Empirical Findings” – Presentation to the Indiana Adult Guardianship State Task Force, March 18, 2011.

“The typical ward has fewer rights than the typical felon.... By appointing a guardian, the court entrusts to someone else the power to choose where they will live, what medical treatment they will get and, in rare cases, when they will die. It is, in one short sentence, the most punitive civil penalty that can be levied against an American citizen, with the exception, of course, of the death penalty.”²

Granted, in probably most cases the two pillars of legal findings in a guardianship proceeding – (1) is the person an “incapacitated person” under Indiana law in need of a guardian, and (2) who is the most suitable person to serve as guardian? – are “no-brainers” and not the subject of much dispute. With the exception of intra-family squabbles that give rise to contested guardianship proceedings, most guardianships follow a rote pattern for both judges and attorneys. Therein lies the danger.

It’s not that the attorneys representing petitioners are misinformed or have questionable motives. Nor is that the case with the large majority of prospective guardians. Serving as a guardian is no picnic. Attorneys and their clients can be justified in feeling that they are doing the obvious, right thing, and any procedural hurdles or niceties merely discourage prospective guardians and wind up increasing the legal costs associated with it all.

Nevertheless, guardianship is serious business. As in other matters involving fundamental, constitutional principles, the rule of law can only be respected in the observance of procedural safeguards, whatever the inconveniences.

Guardianships are ripe for abuse (as are powers of attorney and health care declarations for that matter.) Still, guardianships can serve as society’s best hope for preventing the exploitation, abuse, and neglect of incapacitated adults, assuming that all of the players – judges, attorneys, and the guardians themselves, maintain a high level of conscientiousness with respect to the roles they play and don’t let guardianship proceedings become rote.

II. Due Process

We all know the concept of due process, found in the United States Constitution: The Fourteenth Amendment reads, in part, that no state shall

² Jennifer L. Wright, *Protecting Who From What, and Why, and How?: A Proposal For an Integrative Approach to Adult Protective Proceedings*, 12 *Incapacitated person L.J.* 53, 60 (2004).

“deprive any person of life, liberty, or property, without due process of law.” This applies to the states and to local governments.

As construed by the courts, procedural due process includes adequate notice, and a hearing in which the party may fully participate. See Goldberg v. Kelly, 397 U.S. 254, 267 (1970).

In guardianship proceedings, there can often be temptations to dishonor the spirit of due process requirements:

- Maybe you wait to send out notice of the guardianship hearing to the alleged incapacitated persons or other interested parties until the last minute allowed under the law.
- Maybe you seek a temporary guardianship and skirt around the requirement to provide reasonable notice of your actions under Trial Rule 65 or the notice provisions of IC 29-3-3-4.
- Maybe you don't bother to bring up to the court that a guardian *ad litem* is required under the law (IC29-3-2-3), and the hearing is conducted without the alleged incapacitated person either being represented by an attorney or their “best interests” represented by a guardian *ad litem*.
- Maybe you facilitate the petitioner client's desire not to bring the alleged incapacitated person to court when the exception to attendance under IC 29-3-5-1(d) is not really applicable.

Who is responsible for ensuring that due process standards are honored within the context of guardianship proceedings? In cases where the incapacitated person is represented by counsel, then it is fair to place that responsibility on their attorney. But in the vast majority of guardianship proceedings, the alleged incapacitated person is *not* represented by counsel. So, in that case, who holds the responsibility to ensure due process is followed? Of course, the court may be deemed to hold that responsibility, but we all know that the courts in guardianship proceedings are going to have to rely upon the petitioner and their attorney for the most part.

The very first words of the Indiana Rules of Professional Conduct, in the Preamble, are as follows: “A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.” Ind. RPC, Preamble, §1. Also within the Preamble is the statement, “The legal profession is largely self-governing. Although other professions also have been granted

powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.” Ind. RPC, Preamble, §10.

In a very fundamental sense, the petitioner’s attorney in a guardianship proceeding has an ethical duty to ensure, to the extent possible, that the due process rights of the alleged incapacitated person are respected. This is not to say that there are specific rules of professional conduct addressing the attorney’s duties in the context of guardianship proceedings, but it is hard to escape that conclusion when some of those rules are when read together in context.

- Rule 1.2 Scope of Representation: “...(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.”
- Rule 1.3 Diligence: Comment [1]: “...The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.”
- Rule 3.3 Candor Towards the Tribunal: “...(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.”

And, in the Comment [14] to this Rule:

“Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to

accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.”

- Rule 3.4 Fairness to Opposing Party and Counsel:

“A lawyer shall not

“(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

* * *

“(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;”

When all these Rules of Professional Conduct are taken together, it can be said that the petitioner’s attorney has an ethical obligation to help ensure that the due process rights of the alleged incapacitated person are fully respected.

III. The Special Nature of the Guardian Client Relationship.

Representing a petitioner in a guardianship proceeding is representing someone in a fiduciary capacity. This is an important distinction, because while the petitioner themselves may be “the client,” they are your client only in a capacity created to protect and serve another (the alleged incapacitated person.)

- Ind. RPC 1.14 Client With Diminished Capacity, Comment [4]: “... If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).”
- Ind. RPC 1.2 Scope of Representation, Comment [11]: “Where the client is a fiduciary, the lawyer may be

charged with special obligations in dealings with a beneficiary.”³

In Marion County, the court’s local rules require guardians to sign a set of instructions, which includes an explicit waiver of any attorney-client privilege in the event that the attorney believes the fiduciary client may be doing something wrong:

“I authorize my attorney to notify the Court in the event that he or she has reason to believe that I am not timely performing or am improperly performing my duties to the protected person even if such information would be otherwise confidential.”

Marion County Probate Form 412.0 and Marion County Probate Form 412.1.

In a way, then, the attorney for the guardian client is really the guardian for the best interests of the protected person. Consider these provisions of the Marion County Probate Rules (LR49-PR00 Rule 402), which are replicated in whole or part in other jurisdictions around the State:

"402.3 Supervision and Guidance. An attorney for a fiduciary is required to reasonably supervise and guide the actions of the fiduciary unless and until said attorney is permitted by order of the Court to withdraw from representation of the fiduciary.

"402.4 Attorney Notice of Possible Non-Compliance. An attorney for a fiduciary is required to notify the Court in the event the fiduciary is improperly performing his or her fiduciary duties to the protected person, creditors and beneficiaries of the estate. The notice and required proposed Order shall be substantially in accordance with the form of MSCPR Form 402.4. By the required signing of the Court’s Instructions as provided in MSCPR 412, the fiduciary shall be deemed to have given his or her informed consent to waive the attorney-client privilege as to the filing of the notice and no other Order of the Court regarding such waiver shall be required or issued by the Court. Upon receipt of the notice, the Court will set the matter for hearing and require the fiduciary to personally appear and account to the Court for all actions taken or not taken by the fiduciary. At the hearing, the attorney shall not be required to testify as to the actions of the fiduciary unless the attorney believes that the fiduciary has committed perjury. In the event of an occurrence within the scope of the first sentence of this MSCPR 402.4, the Court deems that Rule 1.6 (b) of the

³ As Comments go in the Rules of Professional Conduct, this hand-wringing one doesn’t particular offer much guidance – only a caution.

Indiana Rules of Professional Conduct requires the attorney to testify as the Court directs.

402.5 Fiduciary Notice of Possible Non-Compliance. A fiduciary is required to notify the Court in writing in the event the attorney for the fiduciary is not timely performing or improperly performing his or her duties to reasonably supervise and guide the actions of the fiduciary. Upon receipt of the notice, the Court will set the matter for hearing and require the attorney for the fiduciary to personally appear and account to the Court for all actions taken or not taken by the attorney. The Court reserves the right to require the attorney to undertake certain actions and to take the performance of the attorney on behalf of the estate into consideration in ruling upon any request by the attorney for fees and expenses.

Given the special nature of the attorney-guardian client relationship, the attorney would be well served to include language in their letter of representation that explains to the prospective guardian petition the special nature of the representation, the attorney's unique duties stemming from that special nature.

The specialness of this relationship, and the explicit language of some of the Rules of Professional Conduct and local rules, an interesting question arises: Does the attorney have a special obligation to ensure that the guardian client is not only *not* stealing or misusing the protected person's monies, but also to ensure that the guardian is adequately performing their duties as "guardian of the person"?

- "An attorney for a fiduciary is required to notify the Court in the event the fiduciary is improperly performing his or her fiduciary duties to the protected person." LR49-PR00 Rule 402.4.
- "An attorney for a fiduciary is required to reasonably supervise and guide the actions of the fiduciary..." LR49-PR00 Rule 402.3

If indeed this is an ethical obligation of the attorney, then the attorney must themselves take steps to properly educate the client on not only financial management issues, but also on issues involving the guardian's responsibilities as "guardian of the person." This would include advice and supervision concerning such issues as:

- Encouraging self-reliance and independence on the part of the protected person. IC 29-3-8-3(4);
- Consider recommendations relating to the appropriate standard of support, care, education, and training for the protected person. IC29-3-8-3(5);

Indiana law does not codify any standards of practice or code of ethics for guardians. Indiana has no certification or licensing requirements for guardians. However, that is not to say that there are no such standards of practice out there. In particular, the National Guardianship Association has promulgated its “Standards of Practice” and a “Model Code of Ethics for Guardians,” (copies of which are included as Appendices) that are available to help guardians in the performance of their duties. Best practice for attorneys representing guardians could reasonably include sharing such documents with the guardian client.

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.

About the Author, H. Kennard Bennett

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.