H. Kennard Bennett
Scout Guardianship Services, Inc.
120 E. Market St., Suite 1120
Indianapolis, IN 46204

t (317) 202-1909
f (317) 644-2915

www.scoutguardianship.com

Indiana Guardianship Law: Warts and All

Introduction

If you have represented clients seeking to become appointed guardian for an incapacitated adult, then you know that most guardianships tend to be low-key, uncontested affairs. Most often, the nature of the incapacity is obvious – mental illness or Alzheimer's disease, for instance – as is the choice of guardians. You complete the standard pleadings for the client, you attend the "hearing," which lasts maybe ten minutes, you get your order of appointment and you're done. Thereafter, for the most part, the remaining issues in your case involve money and assets; the filing of the Inventory and then the accountings that will follow.

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.

> "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."[1]

Professor Michael Jenuwine of the Notre Dame School of Law, who has recently concluded a comprehensive study of guardianships in Indiana, asks it this way:

"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[?]"[2]

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.

---

[1] 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).

[2] Michael Jenuwine, "Overview of Guardianship in Indiana: Empirical Findings" – Presentation to the Indiana Adult Guardianship State Task Force, March 18, 2011.

Over the next few decades, as baby boomers age, the need for guardianships will increase dramatically. To address this need there will need to be changes in Indiana legislation pertaining to guardianships, improvements in the way Indiana courts administer those guardianships, increases in the number of volunteer guardians to fill the need for unbefriended adults, and improvements in the manner and means in which we train and support court-appointed guardians.

I. General Overview of Indiana Guardianship Statutory and Case Law.

Indiana's guardianship code can be found at I.C. 29-3 *et seq*. It establishes the structure for legal proceedings, including the requirements for notice and hearings to conform to due process requirements. It establishes the criteria for identifying suitable guardians, establishes accounting requirements, and identifies the powers and responsibilities guardians hold.

It is fair to describe most guardianship proceedings in equitable, rather than legal terms. Most of the issues surrounding guardianships have little to do with the fine points of law, but much more to do with what might be called questions of right and wrong. Perhaps no better example of the essentially equitable nature of guardianship proceedings is the is found in this rather broad section of the guardianship code:

> "All findings, orders, or other proceedings under this article shall be in the discretion of the court unless otherwise provided in this article."

I.C. 29-3-2-4(a).

It is also telling that there is very little case law in Indiana pertaining to guardianships. Anyone wanting to see how our courts interpret any particular section of the guardianship code is likely to be disappointed in their research.

There are a number of oddities in Indiana's guardianship code, and anomalies in guardianship practices around the state. As mentioned in the Introduction to this paper, a fair interpretation of these quirks is that for the most part guardianships involving clearly incapacitated

adults, with responsible family members brining the petitions, are the norm. Therefore, the establishment of such guardianships are generally processed by rote and the "warts" in Indiana's guardianship law are either ignored, or work-arounds are created.

II. Finding and Training Suitable Guardians: An Update on Efforts Underway to Professionalize the Job of Guardians and Support Volunteer Guardianship Programs.

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.

Indiana law allows for "any interested person" to petition for guardianship, and sometimes friends or institutions petition to have themselves appointed. However, most institutions, and probably most friends of the incapacitated adult, don't want to be put in that position, nor are they necessarily best suited to provide such services.

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 funding available.)

However, there are some significant efforts in various parts of Indiana to provide guardianship services through non-profit organizations. Perhaps the most established of these is the Northwest Indiana Adult Guardianship Services.[3] There is also Volunteer Advocates for Seniors in Northwest Indiana, and a similar program recently established here in Indianapolis at Wishard Hospital.[4]

Significantly, there is a project underway called the Indiana Adult Guardianship Services Project[5] ("IAGS") that 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

[3] www.niags.org/services.htm
[4] www.volunteeradvocatesforseniors.org
[5] www.arcind.org/index/iags/project-mission-and-goals.asp

organization to strengthen guardianship and related services through networking, education, and tracking, and commenting on legislation."[6]

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.

The IAGS task force conducted a two-day retreat in March 2011 at the University of Notre Dame to lay the foundation for a white paper that will lay out legislative and other proposals relating to the establishment of volunteer guardianship programs for adults in Indiana. A smaller group is in the process of drafting the white paper to present back to the full IAGS task force for review and approval. 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.

Among the proposals expected will be the establishment of training standards for volunteer guardians. Even some form of minimum training for family guardians (most likely a requirement to watch a short training video) is being discussed as a means of promoting a more professional standards for guardians across the board.

In the Indianapolis area, under the leadership of Robin Bandy at the Wishard Volunteer Advocates Program, a coalition has formed to establish a central Indiana volunteer guardian program for adults. Its first meeting was in May 2011 and it is expected to continue with its organizational efforts through the rest of the year.

III. **The Confused Role of Guardian *Ad Litems*.**

When a guardianship petition is filed the court is required under the law to appoint a guardian *ad litem* if the court "determines that the alleged incapacitated person or minor is not represented or is not adequately represented by counsel." I.C. 29-3-2-3. After making such an appointment, "[t]he court as part of the record of the proceeding shall set out its reasons for appointing a guardian ad litem."

A couple of anomalies here:

[6] http://www.indianaguardian.org/mainIndex.html

First, Indiana courts are not at all consistent with their practices in regard to the appointment of a guardian *ad litem*. Indeed, Professor Jenuwine's study reveals that this requirement is followed in less than 47% of the guardianship cases litigated in Indiana. If Marion County's figures are removed from this calculation, only 31% of cases see the appointment of a guardian *ad litem*. Remove both Marion County and Allen County from the equation and the figure is even more dismal – at 20%.

Lest it be thought that the lack of a guardian *ad litem* appointment is due to a determination that the prospective ward is represented by counsel, Professor Jenuwine's study revealed that in Indiana the prospective ward is represented by counsel only 2.4% of the time.

The only conclusion that can be drawn is that the widespread practice among Indiana's courts is to simply ignore the guardian *ad litem* requirement. Why is this so? Beyond the rote patterns lawyers and judges alike have fallen into, the lack of guardian *ad litem* appointments can also (perhaps most likely) be attributed to a lack of funds. This author is informed that courts are not provided with any designated funding to pay for the services of guardian *ad litems.* Payment for such services comes from the court's general budget. It is an "unfunded mandate."

In Marion County, a guardian *ad litem* is routinely present in the typical uncontested court proceedings and will examine witnesses where the alleged incapacitated person does not have an attorney. In other counties, however, where the number of guardianship cases is much fewer in number and/or where the judge's docket extends to matters civil and criminal, well beyond just probate jurisdiction, no guardian *ad litem* is routinely appointed.

The appointment of a guardian *ad litem* is mandatory upon certain findings – namely, that the alleged incapacitated person is not represented by counsel (fairly easy to determine, it would seem) or if the court determines that they are not "adequately represented" by counsel. How does a court determine that an alleged incapacitated person is not adequately represented by counsel until after the fact?

The statute contemplates a deliberative act by the judge to determine whether the alleged incapacitated person is represented by counsel, and make as part of the record their reasons for appointing a guardian *ad litem*. However, even in counties where a guardian *ad litem* is regularly present, it is doubtful that the court will make any such

record unless the petitioner's attorney puts such language in the prepared order most courts expect.

Second, what exactly is the role of the guardian *ad litem*? The role is poorly defined in Indiana law, which states only, "the court shall appoint a guardian *ad litem* to represent the interests of the alleged incapacitated person…" I.C. 29-3-2-3. Does that mean that the guardian *ad litem* acts as the *attorney* for the alleged incapacitated person? If so, then is their charge to provide zealous advocacy of the alleged incapacitated person's wishes, or is it to act in the "best interests" of that person? If you represent the petitioner, can the guardian *ad litem* contact your client without your permission or presence?

Again, practices in Indiana courts will vary in their approach to defining the role of the guardian *ad litem*. Most guardian *ad litems* will think of themselves as independent investigators for the court, making recommendations based upon their own investigation. This practice seems more in line with the National Guardianship Association's Ethics and Standards for Guardians definition of "guardian *ad litem"* as "A person appointed by the Court to make an impartial inquiry into a situation and report to the Court."

IV. Granny-snatching and Interstate Jurisdictional Issues: Indiana's 2011 Adoption of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act – A Wart Removed?

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 May 10, 2011 Indiana's Governor signed into law H.B. 1055, which is the adoption of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act ("UAGPPJA"). It will become effective July 1, 2011. 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.[7]

Most of the UAGPPJA addresses the need for courts of different states to cooperate in sorting out jurisdictional issues for guardianships and assisting in evidence-gathering across states 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 whether 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 additional 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 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*.

V. The Adjudication of Incapacity: The Anomaly of the "Physician's Report".

An adjudication of incapacity under Indiana guardianship law is made by a judge (or a jury), and not by a physician:

> "(a) Except under subsection (c), if it is alleged and the court finds that:

[7] 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.

(1) the individual for whom the guardian is sought is an incapacitated person or a minor; and

(2) the appointment of a guardian is necessary as a means of providing care and supervision of the physical person or property of the incapacitated person or minor;

the court shall appoint a guardian under this chapter."

I.C. 29-3-5-3.

Nevertheless, local rules of court will likely require that a "Physician's Report" on a form prescribed by the court be presented before any guardianship is established. In Marion County, that local rule is found at LR49-PR00-410. The report form is familiar to most Indiana attorneys. (Indeed, the report form that most Indiana attorneys are familiar with started with the Marion County Local Rule form.) Professor Jenuwine's study reveals that a physician's report is used in 62.8% of Indiana guardianship cases.

The use of the Physician's Report has become so familiar to attorneys and physicians alike that their use has gone unquestioned. But here's an inconvenient truth: completing that report involves the release of confidential medical information, or "individually identifiable health information," as defined by HIPPA. 45 CFR §160.103. Some physicians may be hesitant to complete the physician's report form unless they have some assurance that doing so is not a violation of HIPPA.

That assurance may come from a reading of 45 CFR §§164.502, which allows that such information can be provided without consent "to carry out treatment, payment, or health care operations, except with respect to psychotherapy notes." [Emphasis added.]

The term "treatment" is defined in HIPPA as "provision, coordination, or management of health care *and related services* by one or more health care providers, *including the coordination or management of health care* by a health care provider *with a third party*...." 45 CFR §164.501 [*Emphasis added.*]

A reasonable argument may be made that seeking physician's report to obtain guardianship so that an incapacitated person may receive necessary care is part of the plan of "treatment" in the provision of health care.

Obtaining the physician's report, however, may not be enough. In situations where the guardianship petition is contested, the physician's report may be challenged as hearsay, which indeed it is. In such situations the live testimony (or deposition testimony, if applicable) of the doctor may be necessary to overcome hearsay objections.

VI. **The Expensive Right of Jury Trial.**

Most guardianships do not involve a jury trial. However, the right to jury trial is specifically preserved in guardianship proceedings. A request for jury trial must be made within 30 days of service of the notice of the hearing, and no later than 72 hours prior to the initial hearing date. I.C. 29-3-5-1(e).

The issues upon which a jury trial may be sought are "the issues raised by the petition and any response to said petition." Id. Interestingly, the findings of a jury may be trumped by the judge. Indiana's guardianship code has a provision that states: "All findings, orders, or other proceedings under this article shall be in the discretion of the court unless otherwise provided in this article." I.C. 29-3-2-4. Does this give the judge the ability to ignore the findings of the jury and make its own? (Doing so would not be unfamiliar to the law; Trial Rule 50's provisions on directed verdict or judgment on the evidence allows judges to bypass jury findings in other cases.)

The right to a jury trial is certainly sacrosanct. However, any such request can dramatically increase the costs associated with the guardianship proceedings, and could dramatically delay proceedings.

What factors goes into the judgment over whether a jury trial request is appropriate? Such requests have been known to be used tactically – simply make the request and you can dramatically postpone the hearing – which raises the question of how to address the ward's needs in the meantime, assuming their functional abilities are obviously impaired? Moreover, who pays the extra attorney fees and expenses associated with a jury trial? If the guardianship is granted, then those costs will most likely be borne by the ward. I.C. 29-3-9-9.

Good practice would seem to dictate that a jury trial be requested by counsel for the protected person only in those instances where the stakes are high enough for the ward, and the chances of successfully defending against the guardianship appointment are calculated to be higher. In other words, prudence and zealous advocacy may weigh in favor of the jury trial request, but the ward must understand that

there's a high price tag to the request, whether or not they are successful on the merits of the petition.

VII. The Propriety and Practicality of "Limited" Guardianships.

For years senior advocates and advocates for the mentally disabled have advocated for limiting the powers of guardians to confine those powers to what's necessary to meet the needs of the incapacitated person, allowing them to retain as much personal autonomy as possible.

> "Use of guardians who are limited in their powers would promote the values of autonomy, self-determination, and individual dignity, and discourage the overreach of societal interference and manipulation."

Lawrence A. Frolik, *Plenary Guardianship: An Analysis, A Critique, and a Proposal for Reform,* 23 Ariz.L.Rev. 599, 654 (1981).

In 1979 a study by the American Bar Association Commission on the Mentally Disabled recommended that states change their laws to prevent the overreaching that may accompany plenary guardianships.

The Indiana Adult Guardianship Services Project states on its website with regard to limited guardianships: "This is the least restrictive form of guardianship and should be utilized whenever possible."[8]

Under Indiana's guardianship code the emphasis on limited guardianship is not as pronounced as it is in other states. Our code provides that:

> "(b) If it is alleged and the court finds that the welfare of an incapacitated person would be best served by limiting the scope of the guardianship, the court shall make the appointive or other orders under this chapter to:
>
> (1) encourage development of the incapacitated person's self-improvement, self-reliance, and independence; and
>
> (2) contribute to the incapacitated person's living as normal a life as that person's condition and circumstances permit without psychological or physical harm to the incapacitated person."

I.C. 29-3-5-3.

[8] http://www.arcind.org/index/iags/guardianship-and-alternatives.asp#04

Thus, it must first be "alleged" (by whom is an open question) that limitations on the guardianship would be appropriate, and then the court must find that to be the case.

Limited guardianships are rarely granted for very practical reasons. In the case of an incapacitated person with a degenerative condition, such as Alzheimer's, it is likely that limiting the powers of the guardian now will require further expansion of the guardian's powers later as the disease progresses. This costs money, presumably a new hearing with notice to the protected person, etc., all of which may feel like a waste of the incapacitated person's resources.

In addition, any limitations on the powers of a guardian "must be endorsed on the guardian's letters." I.C. 29-3-8-8. This runs the risk of causing third-persons to have to interpret, and then possibly question, the actual powers of the guardian. Such disputes or misunderstandings can lead to practical problems that become a headache for the guardian and, ultimately, a disservice to the protected person.

Plenary guardianships of incapacitated persons with chronic, progressive diseases that make them incapacitated would seem to be most appropriate in most circumstances. Having said that, it is important to remember that despite of (or better to say, in *furtherance* of) the appointment of guardianship, the guardian should do what's necessary to promote as much independence and autonomy for the incapacitated person as possible.

Indeed, our code requires that a court-appointed guardian *shall* "encourage self-reliance and independence of the protected person." I.C. 29-3-8-3(4). Therefore, limitations on the plenary guardianship powers to ensure maximum autonomy and independence for the incapacitated person are unnecessary *if* the guardian does their job.

VIII. **The Use and Misuse of Emergency or Temporary Guardianships.**

In instances where an incapacitated person is at immediate risk of neglect, abuse or exploitation, an emergency can be said to exist. Because of obvious due process concerns, our law does not favor emergency appointments of guardianships.

The complete section in the guardianship code addressing these emergency orders is found at I.C. 29-3-3-4:

"(a) If:

(1) a guardian has not been appointed for an incapacitated person or minor;
(2) an emergency exists;
(3) the welfare of the incapacitated person or minor requires immediate action; and
(4) no other person appears to have authority to act in the circumstances;

the court, on petition by any person or on its own motion, may appoint a temporary guardian for the incapacitated person or minor for a specified period not to exceed sixty (60) days. No such appointment shall be made except after notice and hearing unless it is alleged and found by the court that immediate and irreparable injury to the person or injury, loss, or damage to the property of the alleged incapacitated person or minor may result before the alleged incapacitated person or minor can be heard in response to the petition. If a temporary guardian is appointed without notice and the alleged incapacitated person or minor files a petition that the guardianship be terminated or the court order modified, the court shall hear and determine the petition at the earliest possible time.

(b) If the court finds that a previously appointed guardian is not effectively performing fiduciary duties and that the welfare of the protected person requires immediate action, the court may suspend the authority of the previously appointed guardian and appoint a temporary guardian for the protected person for any period fixed by the court. The authority of the previously appointed guardian is suspended as long as a temporary guardian appointed under this subsection has authority to act.

(c) A temporary guardian appointed under this section has only the responsibilities and powers that are ordered by the court. The court shall order only the powers that are necessary to prevent immediate and substantial injury or loss to the person or property of the alleged incapacitated person or minor in an appointment made under this section.

(d) Proceedings under this section are not subject to the provisions of IC 29-3-4.

(e) A proceeding under this section may be joined with a proceeding under IC 29-3-4 or IC 29-3-5. *As added by P.L.169-1988, SEC.1. Amended by P.L.33-1989, SEC.65; P.L.154-1990, SEC.13."*

The language of the statute is similar to that used in other civil contexts when a temporary restraining order is sought. *See* Trial Rule 65(B), Indiana Rules of Trial Procedure.

Indiana courts are required, by the implementation of local rules, to give precedence to hearings upon temporary restraining orders. T.R. 40 While this does not directly address emergency guardianship orders (as opposed to orders styled as "temporary restraining orders"), the principle is the same. In Marion County, local rule provides that**:**

"Whenever the Judge who presides in the Marion Circuit or Superior Court is absent or cannot, for any reason, hear any cause pending in such court, or issue any emergency orders in connection herewith, any other Judge of such Marion Circuit or Superior Court may preside in that court."

[Emphasis added.] LR49-TR63-219

Consequently, in seeking an emergency guardianship order, it is important to remember the provision of Indiana Trial Rule 72(A), which states that,

"The trial courts shall be deemed always open for the purpose of filing any pleading or other proper paper, of issuing and returning process and of making and directing all interlocutory motions, orders, and rules. Terms of court shall not be recognized."

In true emergencies, if the judge normally having jurisdiction over the guardianship matter is not available, then the practitioner may seek the order from another judge.

The emergency order in a guardianship context is actually the appointment of a temporary guardian with specifically enumerated powers designed to limit the guardian's powers to address the emergency only. The appointment is for a period not to exceed 60 days.[9]

[9] Legislation is expected to be introduced in the 2011 Indiana General Assembly that will change this to 90 days.

Professor Jenuwine's study reveals that a temporary guardianship is sought in about a third of the guardianship cases filed in Indiana. Anecdotally, there is reason to believe that temporary guardianships are oftentimes misused in Indiana courts. One judge is reported to automatically appoint a temporary guardianship upon the filing of a guardianship petition, apparently to serve as a "trial run" before the hearing on the permanent guardianship request. Others have come to make such appointments for no other reason than their hearing calendars are stretched so far out into the future.

Again, the most likely explanation for such improprieties is the routine nature of most guardianships, but the constitutional implications are significant. Even with a temporary guardianship, and adjudication of incapacity is a necessary prerequisite. I.C. 29-3-5-2. In instances where temporary guardianships are appointed with little to no evidence other than the assertions of the petitioner, it is unlikely that any adjudication is, or could be, made.

Temporary guardianships are indeed necessary in many instances. However, judges must take care to require the presentation of sufficient evidence to make an adjudication of incapacity. Attorneys assisting clients in seeking such temporary guardianships must be prepared with sufficient evidence of the incapacity to present that evidence to the court. This should include not only the testimony of the client, but that of others as well, including physicians or nurse practitioners, if necessary.

IX. **The Importance of *Quality* Guardianships.**

A court-appointed guardian assumes a solemn responsibility under our law. While the court retains jurisdiction over guardianships once established, the fact of the matter is that the courts cannot effectively supervise the guardians they appoint. Certainly, built-in protections, such as bonds, can protect the incapacitated person's assets from misappropriation, but when it comes to protecting the incapacitated person themselves and, just as importantly, promoting the incapacitated person's quality of care and quality of life, the courts must for the most part rely upon the good faith of the guardian.

As the legal practitioner for a guardian, a certain responsibility for the supervision of the guardian/client's work exists. In a comment to Rule 1.14 of the Indiana Rules of Professional Conduct it states:

> "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)."

This makes sense when you consider the scope of your representation on behalf of a guardian (or prospective guardian). In that capacity you are representing the client *in their fiduciary capacity*, and not in their individual capacity. This distinction should always be made, and explained, when establishing the attorney-client relationship.

Serving as guardian is hard work. It requires attention not just to the money, but also to those issues that affect the quality of care and quality of life of the incapacitated person. It is not sufficient for a court-appointed guardian, for instance, to consider their work done when they have placed an incapacitated person in a nursing home. The guardian must be sufficiently engaged in the incapacitated person's care at the nursing home to be an advocate for them. In such instances, guardians should attend care plan conferences, should speak with the doctors and nurses, should be sufficiently *informed* in order to provide the *informed* consent for which they are now responsible.

In the coming years the number of guardianships is likely to explode. Indiana does not have a public guardianship program, therefore identifying suitable persons to serve as guardians is, and increasingly will become, a real challenge in situations where obviously suitable family members are nonexistent or unavailable.

New volunteer guardianship programs are being established. Indiana has adopted laws to assist and foster such programs. *See* I.C. 29-3-8.5, *et seq*. Progress in the development of such programs is painfully slow, however the ones now established excel in the training of guardian volunteers and need the support of the bar.

Guardianship can serve as the mechanism for protecting at-risk incapacitated persons from exploitation, abuse and neglect. Unfortunately, without careful supervision by courts, attorneys, or volunteer programs, sometimes guardians themselves can become the *source* of the exploitation, neglect or abuse.

A recent study by the Government Accountability Office (GAO) delivered to the United States Senate Special Committee on Aging reported a large number of abuse, neglect and exploitation cases perpetrated by court-appointed guardians. Perhaps of greater concern in trying to address this problem, the GAO found that,

> "Although we continue to receive new allegations from family members and advocacy groups, we could not locate a single Web site, federal agency, state or local entity, or any other organization that compiles comprehensive information on this issue."

http://www.gao.gov/new.items/d101046.pdf

Starting January 1, 2011, the first of the Baby Boom generation turned age 65 – the traditional beginning of senior citizen status. These seniors will live longer, but will also be more likely to face a debilitating disease than did their parents. Many will require supervision of their care and resources to protect them from abuse, neglect (including self-neglect) and exploitation. Whether our mechanisms for providing that supervision will be sufficient to meet the need remains to be seen. However, attorneys will play an important role in helping to ensure that the legal process is ready to respond.

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.