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TEMPORARY GUARDIANSHIPS IN INDIANA

Temporary guardianships are designed to address true emergency situations. Yet, they are over-used and misused. Let's take a look at the law surrounding temporary guardianships to gain a better understanding of when and how they should be used.

Indiana Code section 29-3-3-4 is the temporary guardianship statute. It states, in essence, that a temporary guardianship can be granted if (1) an emergency exists; (2) the welfare of the incapacitated person or minor requires immediate action; and (3) no other person appears to have authority to act in the circumstances. Ind. Code § 29-3-3-4(a). Temporary guardians may only be granted after notice and hearing "unless it is alleged and found by the court that immediate and irreparable injury" may result before such a hearing can be held. *Id.* Further, the statute dictates that "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." Ind. Code § 29-3-3-4(d).

In other words, a temporary guardianship can only be issued if there is an emergency, after notice and hearing, and the order should specifically detail the powers of the temporary guardian. Notice and hearing can only be avoided if there is a threat of immediate and irreparable injury.

Yet, in several Indiana courts, a practitioner could walk into the courthouse and leave that same day with a temporary guardianship order. In Marion

County, no hearing was needed but the attorney did have to sign an affidavit stating he or she gave notice to interested parties.

This practice changed in 2015 when the Commission on Judicial Qualifications issued Advisory Opinion 1-15. This Opinion reminded judges that they must follow Indiana Rule of Trial Procedure 65(B) when granting ex parte petitions for temporary guardianships, otherwise they may be in violation of the Code of Judicial Conduct.

In practice, this means that, at least in Marion County, every temporary guardianship petition is set for hearing, usually within 5-7 days.

A few questions remain: what is an emergency, what about the guardian ad litem, and what type of notice must be give before the temporary guardianship hearing?

What is an emergency?

This is the chief substantive problem we are all faced with as practitioners in light of the Commission's advisory opinion. It remains clear that whether the facts support an "emergency" under Ind. Code § 29-3-3-4(a)(2) is within the discretion of the Court.

The guardianship code itself defines an emergency in language similar to Trial Rule 65(B): "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." I.C. 29-3-3-4(a).

However, it's unnerving to consider what the Commission opines, as an example, is not an emergency:

> Several of the more recent complaints before the Commission involve petitions in which the alleged emergency is merely the acting guardian's inability to obtain health insurance or Medicaid benefits for a child without a guardianship order, or the guardian's inability to enroll a child in school. Although it is important for children to have access to health care and education, neither a lack of insurance coverage nor an inability to be enrolled in school are emergencies which would – or should – override the custodial parents' rights to be heard.

What!? If your client doesn't get a temporary guardianship before the beginning of the following month so their temporary guardian can duly

marshal and spend down assets for the alleged incapacitated person to qualify for Medicaid benefits, thereby needlessly incurring thousands of dollars in nursing home costs that would otherwise be covered by Medicaid – that's not an emergency?

The worse habit of attorney practitioners in my mind is the practice of seeking a temporary guardianship with plenary powers, which is contrary to the specific language of the temporary guardianship statute:

> "(d) 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."

I.C. 29-3-3-4(d). **Emphasis added.**

I think it's fair to assume that most of the ethical complaints giving rise to the advisory opinion, at least as they relate to adult guardianships, stem from the fact that too often the temporary guardian powers are *not* confined to the emergency.

Best advice for attorneys and their clients has to be that if you think it's an emergency, articulate the emergency with precision, and seek only powers through the temporary guardianship to address that emergency. But don't be intimidated out of filing such a petition by the tenor of the advisory opinion if you and your client truly believe an emergency exists.

What about the guardian *ad litem*?

A guardian *ad litem* is required in all adult guardianship cases unless the alleged incapacitated person is adequately represented by their own counsel. I.C. 29-3-2-3.[1] But, because there is no separate funding for

[1] If the courts and Commission are truly concerned about due process in the guardianship context, as I think they are, then it's worth reminding that the mandatory requirement of guardians *ad litem* is frequently ignored. "Statewide, guardians ad litem were appointed to advocate on behalf of the prospective wards less than half of the time. Far fewer wards have legal advocates appointed (20%) when focusing on the majority of counties in which persons appointed as guardians ad litem contact with the parties outside of the courtroom, and conduct full investigations prior to the guardianship hearing. Taken together, appointment of legal representation by a guardian ad litem is not typical in Indiana, leaving proposed wards vulnerable and ill-equipped to protect their rights."

guardians *ad litem*, the courts are left to pay for such services out of their general operating budgets. As a practical matter, this budgetary constraint limits what can reasonably be expected of a part-time guardian *ad litem*.

It is not clear that a guardian *ad litem* must be present on a hearing for temporary guardian. The statute is not clear, but the advisory opinion implies that a guardian *ad litem* should be involved, and it would seem to be in the spirit of due process that one be involved. However, it's always worth reminding that the temporary guardianship process is not the same as a regular guardianship process. It is a unique remedy afforded by a separate section of the guardianship and as such I think it can be reasonably argued that a guardian *ad litem* is not, technically, required in a temporary guardianship proceeding.

Still, let's agree that it's a good idea, and an homage to due process we should not lightly ignore. Marion County is in the process of launching a new volunteer adult guardian *ad litem* program. It is still unclear if this means a guardian *ad litem* will be present at every temporary guardianship hearing. In the meantime, the attorney practitioner should treat the guardian *ad litem* as an opposing counsel on all temporary guardianship matters, provide her notice of the hearing and appropriately share any information that will enable her to properly fulfill her responsibilities at the hearing.

What about notice?

The sense with temporary guardianships is that they are happening on the fly because, well, there's an emergency of some sort. Really, though, there are two types of emergencies, it seems. First, there's the situation that is such an emergency that the relief requested can't wait for notice and hearing (let's call it a *real*-emergency). In such cases, the court has the discretion to grant the temporary guardianship on the spot. Second, there's the situation that while it is an emergency of some sort, it can wait for a few days before a hearing can be scheduled (let's call it a *kinda*-emergency). Obviously, the form and content of notice only becomes relevant with the kinda-emergency.[2]

Who's Overseeing the Overseers? A Report on the State of Adult Guardianship in Indiana, supra, pg. 25.

[2] This has been, in my mind, the heart of the problem all along. Can the emergency wait for a hearing with notice? Well, it depends on how far out on the calendar you're talking. Assuming that the new procedures in Marion County – Tuesday and Thursday afternoons reserved for emergency hearings – don't result in congested calendars, then yes, the kinda-emergencies can probably be processed in a fashion that's both timely and respectful of Constitutional principles. On the other hand, if we're talking ten days or

As a general guideline for notice: (1) written notice is technically required; (2) it's not really a "hearing" in the sense that there's no record, swearing in of witnesses, etc.; and (3) there's no guardian *ad litem* present to look out for the best interests of the alleged incapacitate person.

a. Content of the Notice

There appears to be no question that the content of the notice must substantially conform to the language set forth in Ind. Code § 29-3-6-2, even though that notice is really designed to convey the nature of the hearing on a *regular* guardianship rather than a *temporary* guardianship where the powers of the prospective guardian will be constrained to specific powers necessary to address the emergency. So, while the statutory form should be used, I think it best to include some additional language to convey the fact that it's a *temporary guardianship* that's sought.

b. Method and Timing of Notice

There's no guidance provided under the Code on the method and timing of notice of hearings on temporary guardianship. Certainly, Ind. Code § 29-3-6-1 requires notice be given by regular United States mail, but that appears to be for notices on regular guardianship hearings. Besides, it would not seem meaningful to place a notice in the regular mail for a hearing that's to happen three or four days later. There's also no guidance provided under Trial Rule 65(B).

Surely, fealty to due process principles requires as prompt delivery of notice as possible. Hand-delivery would make the most sense, but fax or email may also be deemed appropriate. In any event, because the law is not clear, best practices would also include following up any method of delivery, other than personal service of the notice, with placing the notice in the regular United States Mail.

Remember that Trial Rule 65(B) requires that the petitioner's attorney "certifies to the court in writing the efforts, if any, which have been made to give notice and the reasons supporting his claim that notice should not be required." Forgetting the inherent contradiction in this language, this certification appears to be required as a means of convincing the court that you've done the best you could to give the

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more, then no. If it can wait that long, I might as well simply seek a regular guardianship. This becomes a matter of triaging the nature of the emergencies being presented to the Court.

alleged incapacitate person and other interested persons *reasonable* notice of the temporary guardianship hearing.

As all practitioners know, the procedures that occur in each county will vary drastically. It is up to the practitioner to not only follow local rules but also follow the letter of the law. Remember that a guardianship – even a temporary one – is a drastic reduction in the constitutional rights of a person. Accordingly, we must afford everyone due process protections including notice, hearing, and a limited set of guardianship powers.

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.

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Sara graduated from the University of North Dakota in 2008 and the Indiana University McKinney School of Law in 2011. Sara is a Nationally Certified Guardian and is a partner at the law firm of Bennett & McClammer LLP where her practice focuses on guardianship and elder law issues.

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