

A Step by Step Guide To The Contested Adult Guardianship

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FORMER CHAIR, ELDER LAW SECTION COUNCIL

4TH ANNUAL ELDER LAW BOOTCAMP
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BREAKOUT SESSION 3

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For Discussion Today....

- What do you do when things become adversarial?
- This session will discuss:
 - Litigating Incapacity
 - Battle for Guardian (Cross Petitions)
 - Removal of Guardian
 - Remedies Under the Power Of Attorney (POA)
 - A discussion of discovery and the use of experts

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LITIGATING INCAPACITY

- A Two Prong Inquiry:

1. Determining *the Need* for a Guardian; and
2. Determining *who* should serve as Guardian.

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First Prong in Contested Guardianship Litigation:

DETERMINING THE NEED FOR A GUARDIAN

- 1.) "To simply establish certain disabilities is alone insufficient to support the determination of incompetency. The evidence must also show the person's incapacity of managing one's person and estate."

In re Estate of McPeak, 53 Ill. App. 3d 133 (1977)

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Determining the Need for a Guardian (Cont.):



2.) Further, “although a person may be disabled in the statutory sense...a guardian is appropriate only if the alleged disabled person is not capable of making and communicating responsible decisions about his care.”

In re Estate of Hickman, 208 Ill. App. 3d 265 (1991)

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Determining the Need for a Guardian (Cont.):

THE GUARDIANSHIP HEARING



The alleged disabled person has the right to be present



The rules of civil procedure apply



Witnesses generally include doctors, social workers, caregivers & family members



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Determining the Need for a Guardian (Cont.): THE GUARDIANSHIP HEARING



Courts accord equal weight to medical and lay testimony.



The guardian ad litem will frequently be appointed to serve as defense counsel.



The alleged disabled person must be adjudged disabled by clear and convincing evidence before a guardian will be appointed.

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Second Prong in Contested Guardianship Litigation

DETERMING WHO SHOULD SERVE AS GUARDIAN:

In selecting a guardian "the best interest and welfare of the ward is of paramount concern in selecting a guardian."

In re Estate of Robertson, 144 Ill. App. 3d 701 (1986)

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Courts will consider the following factors when determining who should act as the Disabled Person's Guardian:

Recommendations of persons with kinship and family ties; relationship between the Disabled Person and the party being considered for appointment

Conduct by the Disabled Person prior to being adjudicated disabled, which manifests a trust or confidence in the proposed guardian;

Prior actions by the proposed guardian which indicate a concern for the well-being of the disabled person;

The ability of the proposed guardian to manage the Disabled Person's estate;

The extent to which the proposed guardian is committed to discharging responsibilities, which might conflict with his or her duties as guardian;

In re Conservatorship of Browne, 54 Ill. App. 3d 556 (1977)

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Determining *Who* Should Serve As Guardian:

The trial court must also consider any preference of the disabled person;

In re Estate of Debevec, 195 Ill. App. 3d 891 (1990)

The trend in guardianship contests is to settle matters by appointing banks, geriatric care managers, county public guardians, and the Office of the State Guardian, rather than the initial cross-petitioners;

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BATTLE FOR GUARDIAN (CROSS PETITIONS)

- Asserts that cross-petitioner or someone else should be the Guardian, or at the least, there should be Limited Guardianship
- May lead to cross-petitioner paying GAL's fees if the respondent or their estate is unable to pay these fees.
 - * See *In re Estate of Bishop*, 333 Ill.App.3d 1113 (2d Dist. 2002).

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Grounds For Removal Of A Guardian Of A Disabled Adult:

The representative fails to file an inventory or accounting after being ordered by the court to do so.

The representative conceals himself or herself so that process cannot be served or notice given to him or her.

The representative becomes incapable or unsuitable for the discharge of his or her duties.

There is other good cause.

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REMOVAL OF GUARDIAN (CONT.)

- There is other good cause
 - Neglect
 - Deprivation
 - Inability
 - Felony Conviction

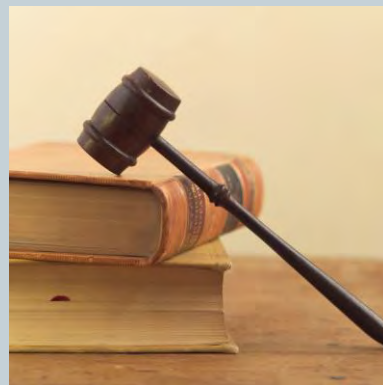
- *Because no Illinois case law strictly defines the meaning of "other good cause" under §23-2, a showing of harm to the ward or the failure of the guardian to fulfill his or her duties should suffice as grounds for removal of the guardian*

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REMEDIES UNDER THE POWER OF ATTORNEY

- Existence of Power of Attorney Documents
 - Healthcare
 - Property

- Validity of Power of Attorney Documents
 - Capacity
 - Undue Influence



- *Illinois Power of Attorney Act – 755ILCS 45/1.1 et seq.*

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Discovery and the Use of Experts: General rule on using lay witnesses/testimony

Rule 601: General Rule of Competency



Every person is competent to be a witness, except as otherwise provided by these rules, by other rules prescribed by the Supreme Court, or by statute

The above cited rule of evidence demonstrates that pretty much any person, including lay people, can be called as a witness unless they are found "incompetent."

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Lay Witness/Testimony Continued

Three elements to consider when determining testimonial competency:

- 1. The competence of the witness to observe the events in question at the time of the occurrence;*
- 2. The capacity of the witness to recollect the events; and*
- 3. The capacity of the witness to narrate the facts.*

With regard to the third element, a witness must be able:

to understand the questions that are asked,

to frame intelligent answers to those questions, and

to understand the moral responsibility to tell the truth.

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Rule 602: LACK OF PERSONAL KNOWLEDGE

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.

In *Trojczak v. Hafziger*, son and daughter witnesses provided testimony regarding whether they felt that on the day the decedent executed her will she was capable of performing and understanding such an act. 7 Ill. App. 3d 495 (1972). The Court found that while the law permits a lay witness to give his or her opinion concerning testamentary capacity on the basis of observations made by the witness, the witness may not offer an opinion concerning whether the testator was capable of executing a valid will on the day of the execution when the witness did not observe the testator on that day. *Id.* at 500.

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Character Evidence

In contested guardianships in particular, character evidence may prove to be very useful on either side of the case. As such, it can be very useful to understand the ways to have character evidence admitted, or excluded, depending on which side of the table you are on.

For example:



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Hypothetical

Imagine that both Bill and John want to be guardian for their mother, Mary, and file cross-petitions for guardianship. An amicable resolution to the matter has proven impossible, and the parties go to hearing on who will be appointed guardian.

You represent Bill. Bill happens to know that John has very poor character, and has been involved in violent activities in the past. You want to bring to the Court's attention the fact that John has been known to get into bar fights on the weekends. Following are excerpts of rules of evidence that may be hurdles for you to cross.

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Rule 404: Character Evidence not Admissible to Prove Conduct; Exceptions; Other Crimes

Character Evidence - Generally, evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(3) Character of Witness. Evidence of a witness's character may be admitted under Rules 607, 608, and 609.

- Rule 607 allows any party, including the party that called the witness, to attack a witness's credibility. Rule 608(a) allows a witness's credibility to be attacked or supported by testimony about the witness's reputation for having a truthful or untruthful character or by opinion testimony on the witness's character. However, evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.
- Under Rule 608(b), evidence of specific instances of conduct of a witness for the purpose of attacking or supporting his credibility is generally barred. There are, however, two exceptions: (1) specific instances are provable when they have been the subject of criminal conviction, and (2) specific instances may be inquired into on cross-examination of the principal witness or of a witness giving an opinion of his character for truthfulness
- Rule 609 allows the use of certain prior bad acts and criminal convictions to impeach the credibility of a defendant testifying on his or her own behalf. Rule 609(a)(2) permits a defendant in a criminal case to be impeached with proof of any conviction that involves dishonesty or false statement, regardless of the punishment; Rule 607(a)(1) allows impeachment with any felony conviction if the probative value of the conviction outweighs the prejudice to the defendant.

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Opinion Testimony

Opinion testimony can, at times, be very helpful in a guardianship hearing. Often times, opinion testimony is thought of in the context of expert opinions, but offering a lay witness' opinion may prove to be helpful as well. For example:

Hypothetical #3

You represent Jean, a woman who is litigating against her sister, Brenda, for the guardianship of their father, Andy. Jean happens to know that Brenda's home is often very messy, has rats, and her neighbors complain because she has broken down cars on her property. In Jean's opinion, Brenda is unable to properly manage her own life, let alone manage the life of another with a debilitating disease. You may want to elicit opinion testimony from Jean, or even maybe Brenda's neighbors, regarding their opinion of Brenda's ability to manage her own life and property. The rule below is a hurdle you may have to cross:

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RULE 701: OPINION TESTIMONY BY LAY WITNESSES

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Per this rule, the following are facts you may elicit from Jean or Brenda's neighbors:

1. I have seen garbage left on the property
2. The property has had numerous complaints regarding noxious odor
3. I often see groups of bikers going in and out of Brenda's home
4. Brenda leaves and comes home at all hours of the night
5. I sometimes hear screaming and yelling coming from Brenda's home

Therefore

- In my opinion, Brenda is not suitable to be a guardian for someone with dementia.

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QUESTIONS??



THANK YOU!

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