

Guardianship News: Some Problems Facing Guardians

By Robert Kruger

When accepting an appointment as guardian, we often don't know what we are getting into. I suppose it is not unlike courtship and marriage; while courting (we hope) one is on his or her best behavior, something that may not survive the wedding. As my wife says (referring to someone other than me), "When I married Mr. Right, I didn't realize his first name was Always."



Attempts at humor to one side, your willingness to accept an appointment may be predicated on a positive assessment of an IP, or his/her family. Even if it is a "big" case, you might reconsider if the family or the IP presents management problems. I have had several unpleasant surprises with incapacitated persons and their families. I also had one appointment where death threats were made, an even more unpleasant surprise.

One underlying theme of this article is to explore some (not all) typical problems that a guardian may face.

When I started this article, I had two recent cases in mind. As I dug into the article, a number of problematic cases resurfaced and those cases were, actually, far more difficult to handle than the first two. One pedagogical point here is case selection; if the case is problematic early, it will likely get worse, not better.

Another blinking red light is constant phone calls. Incessant, repetitive phone calls, followed by the "when" question. When will the judge sign the order... in one case, four calls a day. Or if the caller is the IP, as "Julia" was, repeating answers to her repetitive questions, until I found a way to say "good bye." Why did I take those assignments? Over confidence, or hubris certainly.

Another sign of trouble comes with the agendas of the families. If the case is a child case and is sizable enough, you can anticipate a request for a home, a car and a stipend for the mother. The court may approve all three, although not necessarily at once. But, if the home the family desires has six bedrooms and four baths it is surely a sign of grandiosity and as well a

sign of potential future conflict. I was always reluctant to reject an appointment, but at times the money is simply not worth the aggravation.

If a case is deeply problematic at the outset, consider rejecting that appointment, because failure is programmed into the DNA of the case. Yet why did I accept the appointment in "Joseph" where, besides death threats, one child is relentlessly litigious?

On a different track, I have found that many (trial) lawyers make promises to the families to induce the parents to sign a general release and they leave it to the guardianship attorney to redeem those promises. If the promises can't be redeemed, whom do you think the family blames...the attorney who obtained a seven (7) figure settlement or the guardianship attorney who can't deliver. In the first place, the family may resent the appointment of a professional co-guardian; it will only get worse if they fail to obtain what they want at the very beginning of the guardianship. Measuring the degree of hostility at that point is difficult; you don't know these people. The same is true for managing expectations. We bring a middle class mindset to families who have no experience making these decisions. Can the guardianship afford a top-of-the-line Lexus rather than a Camry? Will the judge balk? Will the family even understand that it is the child's money, not family money?

In fairness to the families of child tort victims, many have endured considerable hardship as a result of their child's disability. With a seriously disabled child, the parents are often in conflict over the mother's focus on the child. The mother becomes the rescuer, and the father resents being sidelined. It is not uncommon to see a divorce result, even if the "divorce" is simply the father walking away.

When the recovery arrives, the family, whatever its configuration, has endured financial hardship for years. There is a tremendous amount of pent up demand. In the case I call "Charles" promises were made to Charles's two sisters by Charles's mother that their ship would come in with Charles's recovery. It was a big case, and the monthly house-support was generous. The care manager and I actually did an audit of the receipts on cash purchases and there was a big discrepancy. One daughter admitted sending money to her

boyfriend, who was a guest of the state at Auburn State Prison on a manslaughter conviction.

The trial lawyers had represented the family as the “salt of the earth.” They may have been, but Charles’s mother, a very decent woman, never quite understood that Charles’s recovery was for Charles. It was not “family” money, yet she made these promises to her two daughters, intending no harm. Had I known what was coming, I would have been much tougher at the outset. My mistake was being too responsive in the beginning. It made it harder, later, when I toughened up.

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I have, in my notes, another three (3) matters with management problems. Rather than recite anecdotes of family dysfunction, accompanied by a saccharine caveat.... Beware! I want to change focus to the Bench. Stories filter back to me about attorneys fending off families’ complaints in front of judges who treat them as strangers.¹ If the Bench lacks insight into the role of a guardian, the guardian is undefended when the family alleges guardian misconduct. And, if a judge is concerned (afraid?) of criticism by OCA, the guardian is even more vulnerable.

I remember the time...from 1985 or so to approximately 2001...when guardianship judges protected their appointees. If you do this work it is inevitable that a disgruntled family member is going to indulge his or her hostility at some point. During this period, there was one judge only sitting in the counties in the Second Department. Those judges had a practical understanding not only of the guardianship process, but of human nature as well. That is the culture that Judge Prudenti came from.

Before Judge Prudenti became Chief Administrative Judge, the regulators at OCA manifested little interest, much less understanding, about guardianship, perceiving guardianship as patronage. The “regulators” were invited to observe as court evaluators visited AIPs. Every one declined. They were ignorant and they were determined to remain so.

Many guardianship judges were all too aware that the regulators were ignorant and hostile. Judges often

became defensive because of concern about offending OCA. I heard judges say so. Consequently, the notion that a judge might protect his or her guardian was compromised.

I saw it personally when I was surcharged for responding to a crisis by releasing funds to buy food for the family. Although the surcharge was reversed by the Appellate Division, I felt that no judge from the preceding era would have done that. And yet judges complain about the difficulty in finding attorneys to accept appointments; allowing attorneys to be abused is no way to win friends.

I have avoided offering solutions, because solutions are facile; change in attitude evolves, it cannot be compelled. I have also avoided naming judges or designating counties where problems exist, to avoid over-personalizing the anecdotes or the examples. Nevertheless, the anecdotes are true. I merely changed (or avoided) names.

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Endnote

1. Of course, this remark assumes that such treatment is wrong. Since the guardian was trusted enough to be appointed, one would think that the complainant has the burden of proof. Not often enough.

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