

How Lawyers Protect the Protected Person:

A Lawyer's Role in Adult Guardianships

BY MICHAEL KOSTRINSKY, ESQ.



So, you were contacted by one of your clients who believes their parent can no longer make their own health care and/or financial decisions, and no estate plan or powers of attorney exist. Or maybe your client has a child with a disability who is turning 18. In either of these scenarios, you determine guardianship is the best way to proceed. You prepare the guardianship petition, obtain a physician's assessment, request a hearing date, and serve the pleadings as required by statute.

Let's assume all of this occurs without the consent of the person for whom guardianship is sought. (That person used to be called the "ward" but is now referred to as the "Protected Person.") Consent has not been obtained because the Protected Person may be unable to comprehend the legal ramifications, has a current mental or physical health condition that impedes understanding, or simply does not want a guardian and/or does not believe their disability necessitates one. Who speaks for Protected Persons who cannot speak for themselves, or asserts and defends the rights of those who want to be left alone?

For many years, a Protected Person had very little say when faced with these situations. Most of the

time, the guardianship process went on around them without the Protected Person's participation or voice. Some court-appointed guardians moved forward and provided care, support, and much-needed assistance. Other times, a guardian was forced upon a Protected Person, overriding their decisions on where they wanted to live, whether they wanted a health care procedure to take place, or how they wanted to spend their money. Worse yet, a guardian might exploit a Protected Person's finances and plunder their estate. Historically, a Protected Person had no one in their corner.

To address those areas of concern, the Commission to Study the Creation and Administration of Guardianships in Nevada's Courts was created in

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2015. The commission's hard work led to a final report, which was soon thereafter acted upon by Nevada's legislature. The legislature significantly amended, updated, and revamped Nevada's guardianship statutes, contained in Nevada Revised Statute Chapter 159.¹ Several of these amendments addressed protecting a Protected Person. These protections, discussed *infra*, include the appointment of counsel and the creation of the Protected Person's Bill of Rights.

The primary protection now afforded, and also the very first mandate in the Protected Person's Bill of Rights, is the right to counsel, specifically the right to have an attorney at any time during the entire course of a guardianship.² Nevada enforces this right by mandating that the presiding judge promptly appoint an attorney for the proposed Protected Person upon the filing of a petition. So how does the appointment process occur and who gets appointed? If the proposed Protected Person resides in a county that has a program for legal services for the indigent, and it can handle guardianship cases (for example Legal Aid Center of Southern Nevada in Clark County), the judge shall appoint an attorney who works for that organization. Such organizations are financially assisted for this added workload, in part, through a filing fee surcharge.³ If the county does not have such an organization, the surcharge goes into a segregated account. When it comes time to appoint

counsel, the court will use funds from that account to compensate counsel it appoints.⁴ Just like the legislature sought to prevent a guardian being thrust upon a Protected Person, the legislature permits a Protected Person to knowingly, voluntarily, and reasonably waive their right to counsel.⁵

The mandatory appointment of counsel, upon the filing of the guardianship petition, commenced on January 1, 2018. As for cases pending prior to the reforms, counsel may now be appointed to represent the Protected Person retroactively at the discretion of the presiding judge. Actions that may trigger the appointment of counsel in pre-existing cases might include the non-compliance of a guardian regarding mandatory annual filings (i.e., annual accountings and reports); the disclosure of irregularities in such filings, for example missing funds or the failure to pay creditors; or a report to the court by Adult Protective Services or mandatory reporting agencies. The appointment of counsel in such cases takes place in the same fashion as discussed, *supra*.

Once appointed, counsel must zealously advocate for the Protected Person's wishes.⁶ Such wishes might include opposing the guardianship, terminating an existing guardianship, or removing the guardian. At a minimum, this representation requires meeting with the Protected Person and explaining their rights and their legal options and alternatives.⁷ It also requires enforcing the rights bestowed upon the Protected Person via the Protected Person's Bill of Rights to-wit: the right to have independent investigations to ascertain the facts of the case, ensuring there are no less-restrictive alternatives to guardianship, to remain as independent as possible, to be treated with respect and dignity, to receive telephone calls and have visitors, to participate in developing a care plan, to have their preferences for living arrangements honored, and to receive prudent financial management of their assets, including detailed accountings.⁸

As a matter of course, the Protected Person's counsel reviews all pleadings filed throughout the case. When reviewing annual accountings, irregularities are closely scrutinized, such as excessive cash transactions and unspecified payments. Annual reports and petitions for attorneys' fees are likewise reviewed. When questions arise, additional information from the guardian may be necessary, or it may trigger an investigation through the State Guardianship Compliance Office.

At times, a guardianship petition may be filed by healthcare providers, such as a hospital when an incapacitated person is brought to their facility, or by the Office of the Attorney General when someone is being exploited. On such occasions, the Protected Person may be non-responsive and unable to communicate with counsel. Such representation becomes more difficult, but at the very least requires that the Protected Person's due process rights be enforced.

The above information explains the minimum requirements for representing a Protected Person. In reality, representation goes far beyond those enumerated responsibilities. For example, the Legal Aid Center of Southern Nevada was recently appointed to represent a Protected Person in a 2002 guardianship. Over the years, the guardian had been replaced several times, and numerous attorneys representing the guardians had come and gone. After reviewing 20 years of pleadings and accountings, court-appointed counsel discovered that not all of the proceeds of a \$1 million malpractice settlement had been satisfied. After thorough investigation, an unpaid, untracked annuity was discovered. This annuity should have started in 2019 and proceeded through the life of the Protected Person. The latest guardian had been unaware that this annuity existed. The Legal Aid Center worked with the guardian to assist in getting the annuity resuscitated, with all back payments satisfied and future payments scheduled to benefit the Protected Person.

Representing a Protected Person is not unlike representing clients in other areas of the law.⁹ You represent the Protected Person: not the guardian,



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not the court, and not the family. You provide advice, but the Protected Person makes the decisions. As with most attorney-client relationships, the lawyer advises, but does not advocate, what is in the best interest of the Protected Person. A Protected Person's best interests are preserved by the guardian, and at times, the court. Court-appointed counsel must zealously advocate for their client's wishes.

Statutes govern the attorney-client relationship, but actual representation extends far beyond what is required. There are outrageous stories about abusive and exploitative guardians that have overly restricted the lives of those they are tasked to protect and have ravaged their estates.¹⁰ With the enactment of the 2018 amendments to Nevada's guardianship statutes, and the mandatory appointment of counsel, significant layers of protection have been created to protect Protected Persons.

MICHAEL KOSTRINSKY enjoyed his work as in-house counsel for Nevada's largest casino-resort companies for 15 years, handling transactions and managing litigation. He spent the next eight years litigating some of Las Vegas' largest construction defect cases. Today, he relishes protecting Nevada's most vulnerable from fraud and exploitation with the Legal Aid Center of Southern Nevada.

ENDNOTES:

1. For a thorough discussion of this legislative transformational process, see Debra Bookout, *Nevada Guardianship Reform Bills*, Nevada Lawyer, July 2017.
2. NRS §159.328(1)(a).
3. NRS §247.305(3)(a)(1)(I).
4. NRS §247.305(3)(a)(2).
5. See Statewide Rules for Guardianship Rule 9(A).
6. *Id.* at Rules 9(B) and (E)(1).
7. *Id.* at Rule (E)(3).
8. See Protected Person's Bill of Rights at NRS §159.328.
9. Nev. R. Prof. Conduct 1.14(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
10. See e.g. Jennifer M. Richards, "Children of Celebrities Spur Guardianship Law Changes" *Nevada Lawyer*, July 2017.