

The Rise of the Guardians

Apart from being the title of a popular DreamWorks animated film, “The Rise of the Guardians” could describe the coming growth in the number of guardianships in Indiana, and in the complexity of guardianship practice for attorneys. Two forces are at play. First is the sheer numbers of baby-boomers entering that age bracket where the need for guardianship increases. Second is the growing phenomenon of elder financial exploitation and abuse at the hands of family members or others charged with caring for Indiana’s elders.

The United States Census Bureau projects that the population age 85 and over could grow from 5.7 million in 2008 to 19 million by 2050. Some type of disability was reported by 37% of older persons in 2009. Fifty six percent of people over age 80 reported some form of severe disability and 29% reported that they needed assistance.

Many of us will need assistance in later years with decision-making, as well as health care and financial management. Indiana’s health care consent law has provisions empowering family members to make health care decisions for an incapacitated loved one even if no advance directive has been executed. However, no similar law naturally empowers family or friends to manage the *financial* affairs of an incapacitated person. Only if you have executed a Power of Attorney, or placed another family member’s name on a bank account, or taken some other step such as establishing a trust and conveying title to assets into that trust, can someone of *your choice* take care of your financial affairs.

When no such advance arrangements are made, then it may become necessary for family, friends, or others to pursue the establishment of a guardian over an incapacitated adult. This requires a court proceeding and then the submission of regular accountings to the court, which is supposed to supervise the activities of the guardian.

We attorneys will argue that guardianships cost money and involve (in theory) court supervision of what many feel should be “family business.” And that’s true. That’s why we recommend the preparation of advance directives, as part of general “estate planning”, as a way of avoiding that cost and intrusion.

But here’s the thing: There’s no power of attorney police out there – no one to serve as a check on the propriety of what the power of attorney is doing. Even trusts don’t require court supervision in most instances. Moreover, anyone can easily get a Power of Attorney form off the internet and arrange to have an elder sign it, without involving an attorney, even if they may not have the capacity to understand what it is they are doing. So there’s the real potential for financial abuse at the hands of those serving as powers of attorney or trustees. That financial abuse can often be the proximate cause of an elder not getting the services they need to maximize their own quality of care and quality of life.

Hopefully, of course, when you create a power of attorney or trust you name someone you really, really trust will do right by you. And in most cases, that's likely to be true.

As I've said, though, there is growing evidence of the financial exploitation of elders. Why is this so? Well, you'll remember the famous story of Willie Sutton: when asked why he robbed banks he replied, "Because that's where the money is." Similarly, it's probably not surprising to learn that most of individual wealth in the United States is held by people over the age of 65. That's where the money is! Couple that with a weak economy that creates financial stress in even the best of families and you can begin to see how elders would be financially exploited. Even elders with nothing more than social security income and a pension are frequently subject to exploitation by family members and others who use that income stream for their own needs.

How to address the growing trend in elder exploitation? Increasingly, guardianship is becoming the answer. Through guardianship proceedings an existing power of attorney can be revoked by order of the judge. The guardian will be required to fully account for the finances of the elder, and the court can serve as an arbiter of any disputes or issues involving the guardianship assets. In other words, the guardianship proceeding brings court oversight to the management of the financial affairs of the elder.

In Indiana it is estimated that over three thousand new guardianships are established each year over incapacitated adults. Again, that number will no doubt increase, not only because of demographic changes, but also because guardianships will increasingly be seen as tools to help address cases of financial exploitation.

But I've also mentioned that guardianships will become increasingly complex for attorneys. There are a couple of reasons for that.

First, a lot of guardianship *practice* simply does not comport with what's required under guardianship *law*. A study of 1071 individual court case files by the Notre Dame Law School found significant evidence demonstrating the disparity between what's supposed to happen in guardianship proceedings and what's actually happening: proper notice of guardianship proceedings is not always given, evidence of functional incapacity is often lacking, accountings are often ignored, etc.

In response to the findings of the Notre Dame study and the recognition of the growing need for guardianship services, advocates have been busy developing and proposing changes in the way guardianship is practiced. Just this year the Indiana legislature authorized the creation of an Office of Adult Guardianship in the office of State Court Administration, which is a division of the Indiana Supreme Court. Several recommendations to help ensure guardianship law is properly applied are now underway. Required training for family guardians is on the horizon, as are the promulgation of standards for professional (including attorney) guardians.

For more information on these issues, and the recommendations being made, see "Who's Overseeing the Overseers? A Report on the State of Guardianship in Indiana," which

was published in 2012 by the Indiana Adult Guardianship State Task Force. A link to the full report can be found on the home page of www.indianacare.org.

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