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Steven C. Perlis

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A Guardianship Jury Trial Case Study

An attorney relates his recent experiences with guardianship jury trials. He shares insights gained and explains why the jury system can serve as an effective tool for advocating on behalf of elders.

By Steven C. Perlis

Looking back, my two guardianship jury trials this summer were an important pioneering effort for me. I was personally testing a previously untried tool for advocating on behalf of elderly clients. Success with the jury would be great, and even failure would at least be useful as a learning experience. Because jury trials are not that common in guardianship cases, the Guardianship Special Interest Group (“Guardianship SIG”) suggested that I relate some of my experiences in deciding whether to accelerate the case on the trial calendar, selecting jury

instructions and the jurors, and calling my client as a witness.

Pretrial Chronology

My second jury trial concluded on July 20, 2000, with a unanimous verdict awarding full guardianship both of the estate and person against my client. Was this therefore a failure? I think not. I learned much from the experience.

The sole issue was competence. My opponent was the Cook County Public Guardian’s Office. The staff attorneys, regular attendees at NAELA programs, have a history of vigorous and enlightened advocacy on behalf of seniors in adult disabled (as well as juvenile) cases.

This case, from the beginning, promised to be both hard fought and a bit entertaining. I entered the case as the court-appointed guardian ad litem. This process, at least in Chicago, involves being chosen by the trial judge from a revolving pool when an adult guardianship petition is brought. My initial role in such a case is to advise the alleged disabled person (ADP) of his or her rights, and act as the eyes and ears of the court in making a written report. During one of the conferences before the trial began, the court entered an order changing my role to attorney for the ADP.

My first visit to the ADP was unremarkable. When I went to her house, no one appeared to be at home, so I left the statement of rights in her mailbox, and a note asking that she call me. Within a day, she called me, and we had a detailed discussion about the Public Guardian’s petition. She and a friend came to the first court hearing on April 30, 2000. At that time, appearing in my capacity as guardian ad litem, I presented my written report to the court. Basically, the report stated that the ADP objected to

Steven C. Perlis is the founder of the Family Center for Elder Law in Arlington Heights, Illinois. He is a member of the National Academy of Elder Law Attorneys and its Board of Directors. His legal expertise is focused on helping senior citizens and people with disabilities. He is the author of numerous articles on aspects of elder law.

guardianship in general, as well as to the Public Guardian being her guardian. She agreed, on my advice, to accept service of the petition at the Sheriff's Office at the courthouse, to avoid having to be served with the summons at her home.

On May 2, 2000, with the ADP's consent, I appeared on her behalf a second time and presented an appearance, jury demand, motion to advance matter to trial, and response to petition to appoint a guardian. In Illinois, a person must be over seventy years of age and show good cause in order for the court to advance the trial to an earlier date. The court indeed granted our motion, and shortened the time the Public Guardian had to complete discovery and file pretrial motions to sixty days. At a status hearing on May 11, 2000 the court scheduled the trial for July 18, 19, and 20, 2000.

On June 28, 2000, opposing counsel and I appeared at a jury instruction conference. Because some of the instructions were not worked out to the court's satisfaction, there was a second jury trial conference on July 11, 2000. This, too, resulted in some unfinished business, so we returned a third time on July 13, 2000. At that time, our jury instructions (which were principally written by me) and the voir dire questions (which were principally written by opposing counsel) were approved by the court.

Jury Instructions

Attorneys who have not done a jury trial lately, or at all, frequently ask what instructions were used, and occasionally want a copy. I have provided the Guardianship SIG with a copy of the marked-up instructions, so these are available on request. The reader should know that the set in the SIG forms library contains references to the Illinois Pattern Jury Instructions and to case law and statutory authority. These references did not appear on the so-called "clean set" that was actually read and then given to the jurors to use when they deliberated. The preface to the Illinois Pattern Jury Instructions states that the exact wording of these instructions should be used wherever appropriate, and modifying language should be used wherever appropriate. Where no standard instructions are available, then a "non-IPJ" instruction is to be given to the jurors.

One of the pattern instructions includes a definition of "clear and convincing evidence." This is interesting because the commentators to the Illinois Pattern Jury Instructions recommended *not* giving

the jurors an actual definition. The commentators felt that more confusion than clarity would result from actually giving such an instruction. At the first conference, the Public Guardian argued unsuccessfully that the evidentiary standard should be preponderance of the evidence. We countered that although there was no Illinois case so holding, dicta in two cases talked in terms of clear and convincing evidence. We also argued that these proceedings involved radical deprivation of rights and liberties, and the same evidentiary standard used in civil commitment and criminal cases should apply in adult guardianship adjudications. The court agreed with us on this point.

Both sides argued whether a limited guardianship instruction should even go to the jurors. We agreed on four instructions:

- fully able as to making and communicating personal decisions,
- fully able as to making and communicating estate decisions,
- fully unable as to making and communicating personal decisions, and
- fully unable as to making and communicating estate decisions.

In addition, there were two "held back" instructions: only partially unable as to making and communicating personal decisions, and only partially unable as to making and communicating estate decisions. Over the Public Guardian's objections, the judge allowed the latter two-limited guardianship instructions to go to the jurors, along with the four that were agreed on.

Voir Dire

This process was interesting inasmuch as the court sought to keep a rather tight rein on the number of questions counsel could ask. Case law says it is an abuse of discretion to refuse to allow any questions from counsel at all; however, there is considerable leeway for the court to restrict the number or nature of those questions. The questions agreed to by both sides were written out ahead of time, and the court would ask these questions of each prospective juror. Each attorney was allowed to ask only two additional questions of each juror.

Each side had three "peremptory" challenges (namely, no reason needs to be given for the

challenge), and an unlimited number of challenges for cause. A prospective juror can be challenged “for cause” when he has a fixed and abiding bias or prejudice that he cannot set aside. A prospective juror can also be challenged “for cause” for one of the reasons listed on a statutory checklist. Illinois statute allows a “for cause” challenge when the prospective juror . . .

- Is under eighteen years of age;
- Is infirm or decrepit;
- Is not free from all legal exceptions;
- Is not of fair character or approved integrity;
- Does not have sound judgment;
- Is not well informed;
- Is unable to understand the English language;¹
- Is not one of the regular panel, having served as a juror on the trial of a case in any court in the county within one year previous to the time of the person being offered as a juror;²
- Is a party to a suit pending for trial in that court,³ having sought within the past sixty days the position of a juror, or the fact that any attorney or party has sought the placing of such a juror upon a jury within the past sixty days.⁴

Since the judge was very knowledgeable about what constitutes a challenge for cause, opposing counsel was unsuccessful in getting any of their challenges for cause allowed.

After the judge introduced herself, the deputy, and counsel to the jurors, she began by explaining that the case involves a petition to adjudicate disability, that the petitioner is asking that the ADP be adjudicated a disabled person, and that the ADP disagrees. The judge asked the for-cause questions. One prospective juror was excluded because he was a party to a pending case. Another person was excluded because of a license-suspension violation. On the other hand, a person with a pending bankruptcy case was kept on the prospective panel. For the sake of keeping track, the jurors were questioned in clusters of four. The juror numbers were as follows:

The Public Guardian’s counsel used all three of their peremptory challenges. One was a woman who said that persons facing guardianship should not have their rights taken away. She reluctantly said she could be fair to both sides. Another prospective stated that

his son has Tourettes syndrome, that if a person can care for himself then the court should not interfere, that he had sued the Illinois Tollway in 1988 and felt that he gotten a raw deal, that his parents had been in a nursing home and there had been some abuse there, and that his great-niece had been through a court guardianship. Although he stated that he still could be fair and impartial in spite of all this, he was struck. The third person challenged off the panel by the Public Guardian was a special-education teacher in the public schools who voiced a strong opinion that everybody has a right to make his own decisions whenever possible, including health decisions.

My sole peremptory challenge was against a person who is self-employed as a computer consultant and had asked to be discharged because she is a sole proprietor in her business and could not afford time away. Also, she had been a witness in an age-discrimination lawsuit in which an older employee had identified her as a younger employee whom the employer had retained while discriminating against the plaintiff as an older employee. The court pointedly asked me if the challenge was because the person had asked to be excused, and I responded affirmatively.

Side Bars

Lots of time was spent outside the jurors’ presence discussing questions of evidence, procedure, and points of law. One especially interesting point was when one of the Public Guardian’s occurrence witnesses started to testify about something I had allegedly said to her while I was interviewing her as a hostile witness. I told the court (outside the jurors’ presence) that this thrust me into the position of having to testify in rebuttal, and this might disqualify me as counsel for the ADP. I also pointed out that this amounted to unfair surprise. The court sided with me on this, over my opponent’s objection, and that aspect of the witness’s testimony was never heard by the jurors.

Generally, the court would conduct a side bar anytime either side requested one. The court in this case was extremely strong and practical in making decisions on the various points as they arose, and contributed greatly toward the speedy and fluid handling of the trial throughout the entire three days.

Jury Deliberation and Verdict

The jury deliberated less than half an hour. In hindsight, this should not have been surprising, since they

began deliberating after 5:00 p.m. on the last day of the trial. I am sure the lateness of the hour contributed to the quick decision.

It is doubtful that a quick decision is good news for an ADP who is arguing against any guardianship, but if guardianship is necessary, then it should be only a limited guardian. Limited guardianship is hard for a layperson to understand and harder to apply, so the time pressures present in this case made the process all that much more difficult.

Calling the ADP as a Witness

Deciding to have my client testify proved to be the critical part of the trial. The ADP rallied and testified well during my direct questioning, and she appeared to do even better during the Public Guardian's cross. Unfortunately, her refusal to comply with discovery (written interrogatories, written request for production for documents, and documents requested at her oral deposition) resulted in a heated side bar when we finally tried to produce bank records at the start of the third day of trial. The court denied the Public Guardian's motion to sanction us for discovery violations, but we were barred from using any of the information. We could not get these items admitted under the business records exception to the hearsay rule because we did not have the custodian of the records available to testify in court.

Our quest for at least limited guardianship was significantly damaged by the ADP's reaction to the judge's ruling barring use of the bank records she had been so reluctant to produce during discovery. As a result, we were unable to get her bank records properly admitted into evidence. The ADP virtually erupted and kept saying loudly enough for everyone in the courtroom to hear that I should have used her records to prove her competence. Even worse, after she had finished testifying, and while two of the Public Guardian's rebuttal witnesses were testifying, she actually stood up and went over to opposing counsel's table and flung her IRA passbook onto the table and demanded that opposing counsel look at it. When I polled the alternate juror after the trial was over, he said the ADP's actions were what did her in as far as he was concerned. Something tells me that the six regular jurors probably felt the same way.

The Use of Humor

Throughout the trial, I borrowed from an analogy used by Ed Boyer at an earlier NAELA conference.

Whenever I could not remember my question and a witness wanted me to repeat it, I said my "lava lamp" was burning a little low. This, as you may recall, relates to Ed's having likened competence in many of our clients to a lava lamp whose fluids and colors ebb and flow within the lamp that contains them.

At several points, some of the jurors broke out laughing as I continued to do this. During the trial, the bailiff several times referred to me as "Mr. Lava Lamp."

Conclusion

This jury trial (and the one before it) was difficult in many ways for all concerned. Nevertheless, the process did not take significantly longer than a bench trial would have, and the petitioner certainly had to follow the rules of evidence and procedure very closely to get their jury verdict awarding guardianship. The critics of using a jury in an adult-guardianship case can continue to be critical if they wish. Nevertheless, it is clear that the system worked during those three days (and during the previous jury trial as well), and there will now be a clearer path for others to follow in future guardianship jury cases.

I have a chancery division case coming up soon in which I represent an elderly woman suing her son for taking over her life's savings, proceeding to self-deal, and making horrible investments with the money. Punitive (or exemplary) damages are being sought, and a twelve-person jury demand has been made. Hopefully, the experience gained from the two previous cases will make my handling of this and other future jury cases more skilled and effective.

To the extent that the jury trial is a fundamental and important part of our legal system, and needs to be considered and pursued in at least some guardianship cases, these two cases were a victory for all elder-law attorneys. In short, I am not bothered by the outcome. Rather, I am proud of having been able to be part of the process.

Endnotes

1. 705 ILL. COMP. STAT. ANN. 305/2 (2000).
2. 705 ILL. COMP. STAT. ANN. 305/14 (2000).
3. *Id.*
4. 705 ILL. COMP. STAT. ANN. 305/13 (2000).