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Adult Guardianship: Protecting the Elderly or Shielding Abusers?

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Case #1

An elder abuse investigator received a call from a bank employee about a very frail elderly woman who was coming in every few days with her adult daughter and withdrawing $500 to $1,000 at a time. The investigator visited the woman at her home and found her to be extremely thin and malnourished. There was no food in the house, and the woman, who was quite confused, could not say when she last ate. The elder abuse investigator tried to speak with the adult daughter who appeared to be living with the woman, but she was uncooperative and refused to accept any support services. During the course of her investigation, the abuse investigator discovered the following: the woman had been adjudicated incompetent and her niece had been appointed her guardian one year earlier; the niece claimed that she was afraid of the daughter (her cousin) and, as a result, she had neither seen nor spoken to her aunt since the daughter moved in with her aunt six months ago; a $10,000 check was written to the guardian/niece on the aunt's checking account just prior to her being adjudicated incapacitated and a total of $9,000 in checks had been written to the niece subsequent to adjudication; the guardian/niece was in possession of a check for $200,000 (her aunt's share of the proceeds of the estate of a distant relative); and the adult daughter had outstanding arrest warrants for drug-related charges.

Case #2

The court is faced with cross-petitions for guardianship. On one side, a son claims that he wants to care for his mother, who has Alzheimer's, at home. On the other side, his stepsisters want to place their mother in a nursing home. The mother has no assets and receives only $800 per month in social security. The guardian ad litem investigating the case meets with the son, who appears credible. Further investigation yields the following information: prior to the mother's recent removal by the daughters, the son had been confining the mother to his home and, on one occasion, threatened his stepsisters at gunpoint when they came to get their mother; the police took a report and the son is facing criminal charges for illegal gun possession; when the daughters removed the mother from the home, she was filthy, her hair was matted, and she had lost a significant amount of weight; the son, who had been out of state for many years, returned to Illinois the previous year, removed his father from a nursing home, and had himself named representative payee for his father's social security check; the son is under investigation by the elder abuse agency.

The above stories illustrate the complexity of just two of the guardianship cases that the Loyola Elder Law Clinic has worked on over the past three years.[1] In both of these cases, elderly people faced financial exploitation, neglect, and abuse by family members who attempted to use the guardianship process to shield their actions.

The number of reported instances of elder abuse and neglect has skyrocketed over the past fifteen years. Incidents reported to adult protective agencies increased from 117,000 in 1986, to 293,000 in 1996, to 470,709 in 2000.[2] Moreover, it is estimated that more than 85 percent of elder abuse and neglect incidents go unreported.[3] While specific definitions vary from state to state, elder abuse generally includes physical abuse, sexual abuse, emotional abuse, financial exploitation, and neglect.[4] Most abuse is committed by family members, with adult children as the most frequent abusers.[5] Most victims are white females with an average age of 78.[6] Until 1996 it was believed that the majority of perpetrators were male, but more recently it appears that there is no significant difference between the sexes.[7] Nationwide, neglect is the most common form of abuse, followed by physical abuse.[8] In Illinois, however, more than 50 percent of elder abuse reports allege

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financial exploitation, 45 percent allege active or passive neglect, 45 percent allege emotional abuse, and 25 percent allege physical abuse.[9]

Court appointment of a guardian offers elder abuse and neglect programs a powerful legal tool in the fight to prevent and intervene in cases of elder abuse and neglect. Unfortunately, those seeking to abuse the elderly have equal access to this tool and can use it to obtain complete legal control over their victims. As life spans have increased, the need for court-appointed guardians to protect those who can no longer make their own decisions has increased as well, straining our court systems.[10] A lack of coordination between the court system appointing guardians and elder abuse agencies investigating abuse makes it more likely that an abuser can misuse the court system to his advantage.

In an effort to shed light on this problem and promote discourse on possible solutions, this article will describe how two overburdened systems, aiming to protect the elderly in Illinois and operating independently of one another, may unwittingly result in greater harm to an already vulnerable population. The focus in this article is on the protection of the mentally incompetent elderly who are in need of guardianship.[11] While the examples provided here are from Illinois, courts and adult protective service agencies are undoubtedly facing similar problems nationwide.

The Guardianship Process

Guardianship is a court process through which an individual loses virtually all of his rights and a substitute decision-maker is put in place to make all major decisions.[12] Upon a finding of incompetency and appointment of a plenary guardian, the "ward" loses the right to completely control where he lives, what medical treatment he receives, whom he visits with, and how his money is spent.[13] Only incarceration and civil commitment infringe on personal liberty to a greater extent than the appointment of a guardian.[14]

The aging of our population has led to a dramatic increase in the need for court-ordered guardianships, severely straining our court systems. Moreover, judges in guardianship cases cannot rely on court-based professionals to investigate cases and conduct psychological evaluations of parties, as is increasingly the case in family law cases.[15] In uncontested cases, a judge's decision as to whether the proposed ward lacks decisional capacity is likely to be based on the testimony of the petitioner (the person seeking guardianship), a report from a doctor that requires minimal information, and, in some cases, a report from a guardian ad litem (discussed below).

In most adult guardianship cases, the elderly person is not present in court[16] and does not have a lawyer to represent his wishes.[17] No family members, other than the proposed guardian, are likely to be present.[18] Guardianship hearings are typically uncontested and last only a few minutes. With no court-based support services to investigate the appropriateness of the proposed guardian, judges rely heavily on the integrity of the lawyers involved in the case.

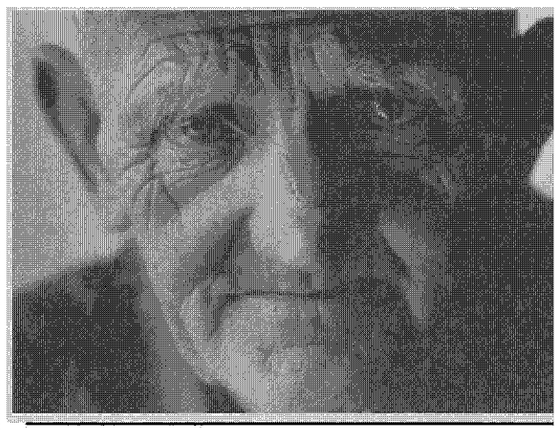
The Guardian Ad Litem in Adult Guardianship Cases

Illinois law requires the appointment of a guardian ad litem ("GAL") to "report to the court concerning the respondent's best interests consistent with the provisions of this Section."[19] This requirement is not absolute. The statute further states " . . . except that the appointment of a guardian ad litem shall not be required when the court determines that such appointment is not necessary for the protection of the respondent or a reasonably informed decision on the petition."[20] When appointed, the GAL is required by statute to do the following:

> personally observe the respondent prior to the hearing and shall inform him orally and in writing of the contents of the petition and of his rights...attempt to elicit the respondent's position concerning the adjudication of disability, the proposed guardian, a proposed change in residential placement, changes in care that might result from the guardianship, and other areas of inquiry deemed appropriate by the court.[21]

At or before the hearing, the GAL is required to submit a written report detailing his observations of the respondent, the respondent's responses, the opinions of the GAL concerning the appropriateness of guardianship and "any other material issues discovered by the guardian ad litem."[22]

There is no explicit statutory requirement that the GAL determine whether the particular petitioner would be an appropriate guardian.



The only requirement is to report his opinion of the appropriateness of the imposition of guardianship and the respondent's position concerning the proposed guardian. As a result, GALs do not routinely interview the person petitioning for guardianship. Moreover, while the state gives GALs broad authority to report on "any other material issues" they discover, most GALs concentrate on reading the respondent his rights and reporting on the wishes of the respondent and whether appointment of a guardian is at all appropriate.

In adult guardianship cases, there is no statutory requirement that

GALs be licensed to practice law. Illinois courts, however, require this almost unanimously. Interestingly, the statute provides that GALs who are not licensed attorneys "shall be qualified, by training or experience, to work with or advocate for the developmentally disabled, mentally ill, physically disabled, the elderly, or persons disabled because of mental deterioration, depending on the type of disability that is alleged in the petition."[23] There is no similar requirement for attorneys serving as GALs. Moreover, there are no written guidelines or requirements for attorneys serving as GALs in Illinois, and virtually no training is provided.

Even with the limitations discussed above, appointment of a GAL offers some protection to the elderly facing guardianship. Unfortunately, due to funding limitations, GALs are, for the most part, only appointed in cases where the proposed ward owns property and has the financial resources to pay for the GAL. By statute, GALs are entitled to "reasonable compensation" by the respondent or by the petitioner if the respondent is unable to pay.[24] When the respondent has no assets or income other than social security or supplemental security income ("SSI"), judges must locate a GAL to serve on a pro bono basis. In uncontested cases in which there are no assets or insubstantial income, the court may have no option but to rely on the testimony of the proposed guardian and a report from a doctor who is not in court.[25]

Under these circumstances, it would be easy for an abuser to become his victim's court-appointed guardian and thereby obtain full legal control over the ward's life. Due to courts' reliance on private parties to bring adverse facts about a proposed guardian to its attention, the poor and isolated elderly-those least likely to have family members willing and able to participate in a court proceeding-are particularly vulnerable to abusers who use the guardianship process to their advantage.

Abusers are able to exploit the system by petitioning to become their victim's guardian. Given the lack of investigation prior to entering the guardianship, this happens often. Once the guardianship is in place, virtually no monitoring of the guardianship takes place. While individual judges may require guardians to submit written reports annually, the only mandate that makes this occur comes from local Circuit rules, which in some areas only require guardians of the estate to file an accounting.[26] Furthermore, due to lack of funding, there are no computer programs or other "tickle" systems tracking these cases to ensure that even this minimal requirement is fulfilled. Therefore, it is impossible, relying solely on court records, to track the extent to which guardians and potential guardians exploit their wards.

The Elder Abuse and Neglect Program

State adult protective service agencies vary significantly from state to state. Moreover, virtually all agencies report that they suffer from a lack of funding and insufficient training.[27] In Illinois, the elder abuse investigation system is completely decentralized. Front-line elder abuse investigators work for non-profit organizations that obtain funding through the Illinois Department on Aging, which distributes federal funding available to states through the Older Americans Act.

Illinois law mandates that when a call comes in reporting abuse or neglect, a trained elder abuse caseworker must respond within 24 hours, 72 hours, or seven days, depending on the seriousness of the alleged abuse.[28] Where the elderly person is mentally incompetent and therefore unable to make his own decisions, the elder abuse agency may petition to have a guardian appointed. Depending on the situation, this may be the state, public guardian, a friend, or family member of the elderly person.[29] Concurrently, the elder abuse agency may seek an Order of Protection to keep the alleged abuser away from the victim pending investigation. In the most severe cases where there is substantial evidence of abuse, the State's Attorney's Office may also pursue criminal charges. While elder abuse investigators often need to access the court system to provide protection for the elderly, it can be difficult for them to obtain legal assistance. Unlike child abuse investigators, who work with lawyers from the Child Welfare Litigation Division of the Attorney General's' Office, elder abuse agencies must hire private attorneys or locate *pro bono* counsel.[30] There is little funding available for lawyers to represent elder abuse agencies in the legal proceedings needed for intervention and protection of the elderly in abuse cases. Consequently, elder abuse investigators often appear in court unrepresented (or *pro se*) in these cases.

The View from the Front Row

Elder abuse investigators offer critical insight into cases where abusers obtain or attempt to obtain guardianship over their victims. In some cases, investigators report that the alleged abuser is appointed guardian in spite of their efforts to intervene.[31] As a practical matter, unless the elder abuse agency cross-petitions to have someone other than the alleged abuser appointed guardian, they have no formal role in the guardianship proceeding.

When the agency petitions to have the state or public guardian's office appointed, they must overcome the hurdle of demonstrating to a judge that a government agency would better serve an elderly person than the family member who may have been providing care for years. Further complicating the matter is the fact that assistance from the alleged abuser may be enabling the incapacitated person to avoid placement in a nursing home. Unless the elderly person has substantial personal wealth to pay for twenty-four hour home care or

family members are willing to step in and provide full-time care, denying the alleged abuser's petition for guardianship will most likely result in nursing home placement. For this reason, GALs may be reluctant to accept elder abuse claims.

Elder abuse investigators realize that they may investigate cases and never discover that the alleged abuser is petitioning for guardianship. There are no formal mechanisms for sharing data between the Circuit Court and the Elder Abuse and Neglect Program. In most cases, the only link between elder abuse investigators and the probate court is the abuser, and he has little incentive to bring these two entities together.

As court records are public information, an elder abuse investigator could simply contact the court in each case to determine whether the alleged abuser is petitioning for guardianship. Likewise, a judge or GAL attempting to determine whether a proposed guardian has been the subject of an abuse investigator can obtain this information from the elder abuse agency.[32] Nonetheless, judges and GAL may not be aware that they are they are specifically exempted from the confidentiality requirement for elder abuse and neglect records where this information may be "necessary for the determination of an issue before the court."[33] Because they do not routinely share information, a court conducting a guardian ship proceeding and an investigator in an elder abuse case may be completely unaware that the two proceedings are occurring simultaneously. At present, there is no way of estimating how often this occurs.

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Guardianship Reform Efforts

A 1987 Pulitzer Prize-winning Associated Press article is generally credited with spurring the most recent wave of interest in guardianship reform.[34] Over the past fifteen years, national conferences have been held, reports published, and extensive recommendations issued.[35] In 1999, a task force was convened in Illinois to study adult guardianship and issue recommendations.[36]

Despite the efforts of these distinguished bodies, there has been little statutory reform and no increase in court-based services for guardianship cases in Illinois.[37] One obstacle to reform nationwide has been the lack of empirical data on guardianship. For instance, in Illinois, as in most states, it is not even possible to determine how many court ordered reports are overdue or the percentage of guardians removed by the court for misconduct.[38] Consequently, while there is a wealth of anecdotal information about guardians who abuse their wards, there is no way of determining how often this takes place.

A lack of leadership and funding on the federal level also hampers guardianship reform efforts. A promising new federal proposal would assist states with improving their practices concerning elder abuse. The Elder Justice Act, which is currently pending in both the House and the Senate, would provide funding for research on the causes and prevalence of elder abuse.[38] Passage of the Elder Justice Act would also create offices of Elder Justice at the Departments of Health and Human Services and Justice to study and publicize the best laws and practices regarding guardianships.[40]

While the Elder Justice Act offers hope for the future, there are relatively small steps that can be taken in the meantime on the state level to prevent the misuse of the guardianship process. Courts and elder abuse agencies, overburdened and understaffed, will understandably resist un-funded mandates. At a minimum, however, there is a need for courts and elder abuse agencies to develop mechanisms for data sharing. Additionally, elder abuse investigators can assist courts in developing screening tools and procedures to identify potential abuse cases and systems for monitoring guardians once they have been appointed. Elder abuse investigators should also participate in trainings for judges, GALs, and attorneys who handle these cases. Sharing resources, information, and expertise can lead to early identification of the misuse of the guardianship process by abusers. It will also reduce the time and amount of resources it takes to remedy the situation when an abuser is inadvertently appointed guardian. Most importantly, coordination between court and elder abuse agencies will reduce abuse of the elderly by court appointed guardians and help ensure that guardianship is used to protect the elderly, rather than shield their abusers.

CITE LIST

1. The Loyola Elder Law Clinic is part of the Elder Law Initiative of the Institute for Health Law. In Case #1, a clinic student represented the elder abuse investigation agency. In Case #2, a clinic student served as guardian at litem.
2. The Nat'l Ctr. on Elder Abuse, The National Elder Abuse Incidence Study at 2-2, Am. Soc'y on Aging, Elder Abuse and Neglect research Explored at World Congress, available at http://wwww.asaging.org/at/at221/ResearchT1.html.
3. Senator John B. Breaux and Senator Orrin G. Hatch, *Confronting Elder Abuse, Neglect, and Exploitation: The Need For Elder Justice Legislation*, 11 Elder L.J. 207, 208 (2003).
4. National Center on Elder Abuse, *Types of Elder Abuse in Domestic Settings*, Elder Abuse Information Series No. 1, 1999.
5. National Center on Elder Abuse, *Trends in Elder Abuse in Domestic Settings*, Elder Abuse Information Series No. 2, 1999.
6. Breaux and Hatch, supra note 3.
7. Id.
8. Id.
9. Illinois Department on Aging, "What is Elder Abuse?", available at http://www.state.il.us/aging/1abuselegal/abuse what-is.htm.
10. There are no statistics available on the number of adults under guardianships nationwide. While available for some states, Illinois does not compile this data. In Cook County, there were 18,822 adults under guardianship as of 9/15/03. Telephone conversation with Jennifer Smith, Chief Deputy Clerk, Probate Division, Circuit Court of Cook County.

11. The elder abuse and neglect program has additional means of assisting the mentally competent elderly, which will not be addressed here.
12. 755 ILCS 5/11a-1 (2003).
13. 755 ILCS 5/11a-10e (2003).
14. Center for Social Gerontology, National Study of Guardianship Sytstems: Findings and Recommendations 98 (1994).
15. For a discussion of the development of family courts in the United States, see Barbara A. Babb, *Fashioning an Interdisciplinary Framework for Court Reform in Family Law: A Blueprint to Construct a Unified Family Court*, 71 S. Cal. L. Rev. 469 (1998).
16. 755 ILCS 5/11a-11(a) provides that "[U]nless excused by the court upon a showing that the respondent refuses to be present or will suffer harm if required to attend, the respondent shall be present at the hearing."
17. 755 ILCS 5/11a-10 (b) provides that the court may appoint counsel for the respondent if it will best serve his interests, and shall appoint counsel if respondent requests counsel or if the respondent takes a position adverse to that of the GAL. Judges will appoint pro bono counsel for respondents who do not have funds for a private attorney. The statute also authorizes the court to order the petitioner to pay for the respondent's attorney.
18. Although the proposed guardian is required by statute to notify the elderly person's living relatives by mail, there is no proof of this other than the statement of the proposed guardian himself, which may not be made under oath.
19. 755 ILCS 5/11a-10.
20. 755 ILCS 5/11a-10(a).
21. 755 ILCS 5/11a-10(a).
22. Id.
23. 755 ILCS 5/11a-10(a).
24. 755 ILCS 5/11a-10(c).
25. 755 ILCS 5/11a-11(d) provides that in an uncontested proceeding for the appointment of a guardian the person who created the report required by Section 11a-9 will only be required to testify at trial upon order of court for cause shown.
26. Eg. Rules of the Circuit Court of Cook County, Rule 12.13(d).
27. The National Center on Elder Abuse, *Problems Facing State Adult Protective Services Programs and the Resources Needed to Resolve Them* (Jan. 2003).
28. 320 ILCS 20/4 (2003).
29. The Office of the State Guardian is created by 20 ILCS 3955/30 (2003), and the Office of the Public Guardian is created by 755 ILCS 5/13 (2003) in counties having a population in excess of 1,000,000.
30. 20 ILCS 505/9.8(a) (2003).
31. Investigators offer a variety of explanations for why this occurs. Some were informed by the attorney for the petitioner (the alleged abuser) that they could not testify unless they were called by a party as a witness. Others stated that they attended court proceedings but did not speak up because they did not know how or when to do so.
32. 320 ILCS 20/8 (5) (2003).
33. Id. Access is limited to an in camera inspection, unless the Court rules otherwise.
34. Marshall B. Kapp, *Reforming Guardianship Reform: Reflections on Disagreements, Deficits, and Responsibilities*, 31 STETSON L. REV. 1047 (2002) citing AP Special Report, Guardians and the Elderly: An Ailing System, (Sept. 1987).
35. Id.
36. Morris A. Fred, *Illinois Guardianship Reform Project, Final Report*, Equip for Equality (Feb. 2001).
37. Kapp, supra note 37.
38. Id.
39. Breaux and Hatch, *supra*, note 3.
40. Id. at 210.

FCC's Media Ownership Plan Axed: Deregulation and the Debate Over Democracy

Alice Nam

In June 2003 the United States Senate voted 55 to 40 to overturn the Federal Communication Commission's ("FCC") new ownership rules.[1] The decision comes after a Senate Committee's vote to block one part of the FCC's new rules that would have allowed national media companies to own more television stations.[2] The Senate's vote, under a rarely used procedure called a "resolution of disapproval,"[3] sends the matter to the United States House of Representatives. The House's July 23rd vote of 400 to 21, for a bill that would essentially overturn the FCC's decision to relax regulations, indicates that it would be a long shot for the FCC's decision to be supported.[4] If the House sends the resolution to the White House, aides to President George W. Bush at the Office of Management and Budget say they will recommend the President veto it.[5] The decision of whether to overturn the landmark liberalization of the rules will be one of the most important deregulatory actions undertaken in the Bush administration.

Congressional and Court Directives

In the 1996 Telecommunications Act ("Act"), Congress mandated that the FCC review its broadcast ownership rules every two years to determine whether any of them are necessary in the public interest as a result of competition.[6] The Act requires the FCC to repeal or modify any regulation it determines to be no longer in the public interest.[7]

In addition to this statutory mandate, the old rules had been under attack in court. In February 2002, the U.S. Court of Appeals for the D.C. Circuit sided with media companies, including Fox, NBC, Viacom, and the National Association of Broadcasters against the FCC.[8] The organizations had claimed the FCC exceeded its authority and violated both the First Amendment and the Administrative Procedure Act.[9] In *Fox Television v. FCC*, the Court agreed, finding that the FCC's 35 percent national ownership cap for television was "arbitrary and capricious" and, therefore, contrary to law.[10]

A few months later, in April 2002, the same appeals court reached a similar conclusion in *Sinclair Broadcast Group v. FCC*, holding that the Commission failed to demonstrate that its adoption of local television ownership rules was "necessary in the public interest."[11] In both cases, the court ruled that the Telecommunications Act of 1996 demanded more than broad theories about the benefits of diversity or competition to justify ownership regulations. It is from this series of controversial rulings that the FCC decided the recent media ownership guidelines.