TASC Training & Advocacy Support Center

*TASC is sponsored by the Administration on Developmental Disabilities (ADD), the Center for Mental Health Services (CMHS), the Rehabilitation Services Administration (RSA), the Social Security Administration (SSA), and the Health Resources Services Administration (HRSA). TASC is a division of the National Disability Rights Network (NDRN).*

**Q&A**

# Guardianship Standards and Procedures

Produced by Robert D. Fleischner, Center for Public Representation
with a grant from the Training and Advocacy Support Center (TASC)
June 2007

Q. We've been asked to participate on a task force to reform out state's guardianship standards and procedures. What should we try to accomplish?

A. Many states have begun to modernize their guardianship law and practice. This Q&A will suggest some of the important issues you should encourage the task force to consider.

## Introduction

Guardianship law is ancient. The first Massachusetts statute, for example, was enacted in 1694 and the Romans had provisions for guardianship in their laws. Although states call guardians by different names – for example, conservators, guardian advocates – their functions are similar.

Guardianship is a process by which a state, usually acting through its courts, assumes the responsibility to protect the assets and the "person" of an individual who cannot do so himself or herself. This is an extraordinary exercise of governmental authority and, therefore, should be accompanied by due process protections. Guardianship allows the state, in effect, to strip individuals of their rights to make decisions about their own lives and their own property and to invest in another the authority to do so for them. Because guardianship is a broad and very restrictive form of substitute decision-making, guardianship proceeding should be approached with care and caution. Many people with disabilities, particularly mental disabilities, are likely to find themselves subject to petitions for guardianship.

First Century Romans may have been the first to formalize procedures to protect the property and estates of people who by reason of mental disability were unable care for it themselves. The Romans, and later the English and colonial Americans, were concerned primarily with insuring that individuals with mental disabilities did not become a public burden and with protecting assets for the individual's heirs. John H. Cross, Robert D. Fleischner, Jinanne S.J. Elder, GUARDIANSHIP AND CONSERVATORSHIP IN MASSACHUSETTS, 1 (2d Edition 2003).

Massachusetts was one of the first states to provided for statutory guardianships when, in 1694, it required town selectmen to care for those who could not care for themselves because they were "wanting of understanding" and for those who were found to be "non compos mentis." In 1783, the legislature added a clear standard that guardianships could be imposed on people who were found to be incapable to care for themselves. Over time, courts of equity expanded the function of guardianship from merely financial to personal protection.

Other states followed suit. However, because guardianship is very much a matter of state law, no two jurisdictions have identical statutes and court interpretations. Nevertheless, there are several model statutes and codes that a number of states have adapted in full or in part to fit their unique circumstances. The most frequently used models are the National Conference of Commissioners on Uniform State Laws' Uniform Probate Code (Article 5) (UPC) and the Uniform Guardianship and Protective Proceedings Act (UGPPA) which may be adopted separately from the UPC. The UPC has been adopted in its entirely in 16 states. Other states have adopted parts of the code. The UPC and links to the states that have adopted it can be found at the Uniform Probate Law Locator, at www.law.cornell.edu/uniform/probate.html. The UGPPA was adopted in 1997 and can be found at www.law.upenn.edu/bll/ulc/fnact99/1990s/ugppa97.htm. Other useful sources are Am. Bar Ass'n Comm'n on Legal Problems of the Elderly and Nat'l Jud. Conf., *Statement of Judicial Practices* (Erica F. Wood, ed. 1986) and Comm'n on Nat'l Probate Court Standards, *National Probate Court Standards on Guardianship and Protective Proceedings* (1998).

There is also a considerable wealth of literature about reform efforts, successes, and failures in several states. See, e.g., Joseph A. Reinert, *Guardianship Reform in Vermont,* 32 VERMONT BAR J. 40 (2006); Colin K.K. Goo, *Protecting Minors and Incapacitated Adults – Hawaii's "New" Conservator and Guardianship Law,* 10 HAWAII BAR J. 4 (2006); Tricia M. York, *Note: Conservatorship Proceedings and Due Process: Protecting the Elderly in Tennessee,* 36 U. MEMPHIS L. REV. 491 (2006); Morris A. Fred, *Guardianship as a Cultural System: Reflections of the Illinois Guardianship Reform Project,* 5 MARQUETTE ELDER'S ADVISOR 1 (2003). (The Illinois reform effort was lead by the Illinois P&A.) For a description of the Wingspan and Wingspread guardianship reform conferences see, Marshall B. Kapp, *Reforming Guardianship Reform: Reflections on Disagreements, Deficits, and Responsibilities*, 31 STETSON L. REV. 1047 (2002).

In what is a note of extreme caution for reformers, after labeling the American guardianship system "a joke," the authors of a 1997 article express deep pessimism that any reform will be in place in time to serve aging baby boomers. Arguing that decades of studies and knowledge have been ignored, the authors lament that "[e]nough has not been done to sustain the autonomy and the individual rights of those who could choose guardianship alternatives, and

enough has not been done in constructing access to guardians, training of guardians and monitoring of guardians in the future." A. Frank Johns & Vicki Joiner Bowers, *Guardianship Folly: The Misgovernment of Parens Patriae and the Forecast of its Crumbling Linkage to Unprotected Older Americans in the Twenty-First Century – A March to Folly? Or Just a Mask of Virtual Reality?*, 27 STETSON L. REV. 1, 88 (1997).

**Standards for Appointment**

Many states differentiate among several kinds of quite broad "incompetence categories" for the purpose of guardianships or conservatorships, usually, for example, mental illness, mental retardation, physical disability, and alcoholism. Some states include "physical illness" or "physical disability" as a sufficient disabling condition, and some even include "advanced age" and the catch-all "or other cause." Usually the diagnostic label must be accompanied by a finding that the person is unable to manage his or her affairs -- such as "inability to meet personal needs for medical care, nutrition, clothing, shelter, or safety" – because of the diagnosis.

The model statutes and most reforms have rejected the diagnostic categories and looked instead to "cognitive functioning" tests. The UGPPA, for example, defines "Incapacitated person" as an individual who, for reasons other than being a minor, is unable to receive and evaluate information or make or communicate decisions to such an extent that the individual lacks the ability to meet essential requirements for physical health, safety, or self-care, even with appropriate technological assistance. UGPPA § 102(5).

Most states have now also added threshold requirements for guardianship intervention. For example, many statues and some court decisions require a court to find that the there is no alternative to guardianship and that it is necessary to meet the individual's needs. For example, the court should determine if assistive technology is available that would obviate the need for the guardianship.

**Guardianship Practice and Procedure**

Since liberty rights are implicated in the appointment of a guardian, due process considerations are important. Some courts tend to treat guardianship matters rather informally, no matter what the statutes require procedurally.

<u>The Petitioner</u>

Many states allow a guardianship petition to be filed by "any interested person." Other states are a bit more restrictive. In Massachusetts, for example, the following individuals or agencies which may act as petitioner(s) in guardianship matters:

- a parent of a mentally ill or mentally retarded person;
- two or more relatives or friends of a mentally ill or mentally retarded person;
- a nonprofit corporation organized under the laws of the Commonwealth whose corporate charter authorizes the corporation to act as a guardian of a mentally ill person; or
- certain state agencies.

The Petition

States vary in the detail that they require to be in the petition. More modern laws increasingly require more extensive factual allegations and information. Certainly, the petition should include some description of the need for the guardianship. The allegations should be sufficient to give notice to the proposed ward of the basis for the petition. Some states require that the petition be accompanied by a sworn statement of a clinician or clinicians attesting to the person's incapacity. This is particularly true in states that continue to use diagnostic criteria as a basis for guardianship.

If the petitioner seeks a plenary (full) guardian, the petition should state why a limited guardian is not appropriate. Some statement of the qualifications of the proposed guardian and that he or she is free from any conflict-of-interest should also be required in the petition.

Most states also require that the petition include the names and addresses of heirs and family members and some description of the individual's assets and property. Massachusetts, at least, requires the petitioner to describe whether the proposed ward has executed a power of attorney or a heath care advance directive.

The petitioner usually nominates him or herself or some other person or organization to be guardian. Some states have public guardianship commissions that, at least in part, are state supported. Family members are usually preferred as guardians, though in some cases families may prefer not to be guardians as the guardian may have to make decisions that the ward will disagree with and the families prefer not to be in an adversary relationship. One problem with private and state guardians is that many have huge caseloads that make it difficult to pay close attention to each individual case. Oklahoma has a sensible limit of five wards per guardian. Okla. Stat. Title 30, §4-101.

**Incapacity**

Incompetence or incapacity is a legal status. Traditionally, the determination has been heavily influenced by medical opinion rather than by evidence of the individual's abilities and the resources available to him or her. As noted above, the more modern statutes tend to look to functional capacities rather than diagnosis.

Even in functional capacity states, there is no single test of competency. Many states are moving in the direction of understanding legal concepts of competency as a functional assessment of the person's ability

- to understand the information conveyed,
- to evaluate the options, and
- to communicate a decision.

Comprehensive research conducted by the Research Network on Mental Health and Law may provide the clinical basis for appellate courts to sharpen the legal definition of incompetence. Paul S. Appelbaum & Thomas Grisso, *The MacArthur Treatment Competence Study: I. Mental Illness and Competence to Consent to Treatment*, 19 LAW & HUM. BEHAV. 105 (1995). For a very helpful and comprehensive "checklist" for lawyers to assess the capacity of their clients, see, Charles P. Sabatino, *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers,* ALI-ABA CLE COURSE OF STUDY (2006).

**Process**

Notice

Nearly every state has some statutory requirement for notice. Constitutional due process requirements would seem to require it. The proposed ward must be served a copy of the citation in-hand by a sheriff or other disinterested person. Publication in the legal notices section of a newspaper of general circulation may be required in cases in which all interested persons (i.e., heirs at law, including the proposed ward's spouse) have not received "actual notice." It is, of course, very unlikely that the proposed ward will see or read the newspaper notice.

The purpose of the notice is inform the individual and the interested parties that a petition for guardianship has been filed, the statutory grounds for the petition, and the date by which an appearance must be filed if the individual or interested party wants to contest the petition.

Appointment of a Guardian Ad Litem, "Visitor," or Counsel for the Ward

Some states appoint attorneys for all proposed wards. Others leave appointment to the discretion of the court. Other states require counsel only certain cases, for example those involving forced treatment or end-of-life decisions. A few states, including Oklahoma and Florida, have found that appointment of counsel is constitutionally required. See, e.g., *In re Fey*, 624 S.2d 770 (Fla. Dist. App. 4th 1993); *In re Guardianship of Deere*, 708 P.2d 1123, 1126 (Okla. 1985)("guardianship proceeding must comport with constitutional notions of substantial justice and fair play" including "representation by counsel."); *Estate of Millstein v. Ayers*, 955 P.2d 78 (Colo. Ct. App. 1998).

The UGPPA takes an equivocal position on the appointment of counsel, providing alternative language. In one alternative appointment is usually discretionary, but is required when requested by the putative ward or recommended by the "visitor." In the other alternative, appointment is mandatory in all cases. UGPPA § 305. P&As will almost certainly want to advocate for mandatory appointment.

In some states it is common for judges to appoint a guardian ad litem (GAL) for the proposed ward in all guardianship matters. For example, in a case seeking guardianship for the purpose of signing the ward in to a nursing home, a judge may appoint a GAL to investigate the suitability of nursing home placement. If a GAL is appointed, the case will usually not go forward until a written report is filed.

The UGPPA makes appointment of a "visitor" mandatory. The visitor serves as a sort of investigator, the role played by a GAL in some states. The visitor could be a physician, psychologist, or other individual qualified to evaluate the alleged impairment. The model act requires the visitor to individually meet with the respondent, the petitioner, and the proposed guardian. The visitor is intended to file a written report that contains information and recommendations to the court regarding the appropriateness of the guardianship, whether lesser restrictive alternatives might meet the respondent's needs, recommendations about further evaluations, powers to be given the guardian, and, when it is not mandatory, the appointment of counsel. § 305.

Oklahoma has an apparently unique system analogous to the juvenile court's CASA program, called Court Appointed Advocates for Vulnerable Adults (CAAVA). Okla. Stat., Title 30 § 3-106.1. The advocate can perform some of the tasks for the putative ward that are ordinarily outside the usual role of the appointed attorney.

Independent Examinations

In many states, the court, either *sua sponte* or upon the motion of a party, may order the proposed ward to submit to examination by an independent medical or other expert. It is important that there be provision for the respondent to have access to his or her own independent evaluation, paid for by the state if necessary. Without an expert, the proposed ward is at a disadvantage in countering medical evidence introduced by the petitioner.

Hearings

Hearings in guardianship matters can range from routine, uncontested proceedings handled upon representation by counsel to contested evidentiary trials. Some judges require testimony sufficient to establish the elements of the

petition even in cases where there is no contest or objection. These judges may particularly want to hear from the proposed guardian, who should be required to attend the hearing. Reform efforts should include provisions that formalize the proceedings. For example, the UGPAA requires that the respondent must attend the hearing unless excused by the court on a showing of good cause. § 308.

Standard of Proof

The standard of proof in a guardianship case in most states is the civil preponderance of the evidence standard. The UGPPA adopts the clear and convincing evidence standard for the appointment that is recommended by most commentators. See, *Sabrosky v. Denver Dep't Social Services*, 781 P.2d 106 (Colo. Ct. App. 1989); *In re Guardianship of Reyes*, 731 P.2d 130 (Ariz. Ct App. 1986); *In re Estate of Boyer*, 636 P.2d 1085 (Utah 1981). P&As should advocate for the higher standard.

**Appointment of Guardian**

If the judge finds that the statutory elements have been established, the court may appoint a guardian of the proposed ward's person and estate. Some judges in some states are entering so-called "equity-style" decrees, requiring the guardian to periodically report to the court about the ward's welfare. The decree may also require the filing of a guardianship plan, "which would prepare a program of specific action to assure the protection of the ward's health, welfare, and property by securing for him all necessary and desirable social, rehabilitative, and other services." See, *Guardianship of Bassett*, 7 Mass. App. Ct. 56, 61 (1979).

Temporary or emergency guardianship

The rather deliberate processes for the appointment of a permanent guardian do not lend themselves to emergency situations. Therefore, most states make provision for the appointment of a temporary or emergency guardian when the welfare of the proposed ward requires immediate imposition of guardianship. Reform statutes should require that a court find there is an emergency warranting appointment before temporary guardianship is decreed. The Massachusetts Appeals Court vacated a temporary guardianship order in a case in which the trial judge made no findings and the medical certificate and the GAL report contained no indication that "an emergency was at hand." *New England Merchants National Bank v. Spillane*, 14 Mass. App. Ct. 685, 690 (1982).

The temporary guardian's authority should be valid for only a limited time – for example, ninety days -- unless extended upon a motion by the petitioner. The temporary guardianship order should limit the authority of a temporary guardian to "the particular harm sought to be avoided." The UGPPA sets rigorous standards for appointment of an emergency guardian. Such a guardian may be appointed if the court finds that compliance with the normal procedures "will likely

result in substantial harm to the respondent's health, safety, or welfare, and that no other person appears to have authority and willingness to act in the circumstances, the court, on petition by a person interested in the respondent's welfare." § 312.

Limited Guardianship

Many states recognize that a person may be legally incapacitated in some areas but not in others. Therefore, even when appointing a permanent guardian, the court need not assign the guardian plenary authority. Rather, the decree may limit the guardian's authority to specific areas in which the court determines the ward in not competent and needs protection. The UGPPA and most commentators strongly stress that nearly all guardianships should be limited.

For example, a guardianship may be limited to the person only, keeping the ward's finances within his or her own control. Or, a guardianship may apply only to serious medical treatment decisions. As a practical matter, it is easier to limit a guardianship at the outset rather than after the entry of the court's decree appointing a guardian of both the person and estate.

Consequently, if there is a GAL or visitor, it would be appropriate for the court to specifically request that his or her report address those areas of daily life in which the proposed ward can exercise independent authority. The UGPPA requires the visitor to make recommendations about limitations to the guardian's authority. Unfortunately, limited guardianships appear to be far more the exception than the rule in most states.

Whether a ward has the right to marry is a matter of state law. In most states a marriage is presumed to be valid, but may be voided if one of the partners was not competent to enter into the marriage contract. CPR has prepared a Q&A on this topic and it is available on the NDRN website.

Voting

The voting rights of people with guardians have been an issue, and even subject of litigation, in several states. Statutes should at least establish that a person under guardianship has the right to vote unless that right is specifically limited by the court. See, *Doe v. Rowe,* 156 F.Supp. 35 (D. Me. 2001). Although Massachusetts law makes persons "under guardianship" ineligible to vote in all elections, Mass. Gen. L. c. 51 §§ 1, 36, the state supreme court has raised substantial doubt about the constitutionality of that provision. *Guardianship of Hurley*, 394 Mass. 554 (1985). In response, the Secretary of State's Elections Division has concluded that "under guardianship" should be interpreted to refer only to those guardianship orders which contain a specific finding prohibiting voting. Opinion of the Election Division, reported in 41 The Public Recorder 5 (January 1991).

## Powers and Fiduciary Responsibilities

The guardian's responsibility to the ward is one of a fiduciary, acting under the supervision of the court. Generally speaking, the guardian must act as a substitute decision maker, in the ward's best interest, to protect the ward's estate, manage it frugally and without waste, and apply the ward's property for the comfortable and suitable maintenance of the ward, in a manner consistent at least with the ward's standard of living prior to the appointment.

The guardian's traditional duties as a fiduciary include the preparation and filing in the court of an initial inventory of the ward's assets and, usually an annual account. Additional duties may include:

- Petitioning for authority to establish an estate plan,
- Obtaining a license from the court to sell, mortgage or lease real estate,
- Obtaining authorization to compromise or adjust any claim in favor of or against the ward's estate.

Many states are less than active in their oversight of guardians after their appointment. Reform statutes should address this issue. The UGPPA requires annual filing of reports that must contain the current mental, physical and social condition of the ward and information regarding the ward's participation in decisions, future care plans and the need for continuing the guardianship. § 317. States should establish a system for monitoring guardianships, which would include, but not be limited to, mechanisms for assuring that annual reports are timely filed and reviewed. An independent monitoring system is crucial for a court to adequately safeguard against abuses in the guardianship cases. § 317, Commentary.

In addition to estate management responsibilities, guardians are increasingly called upon to make personal decisions on the ward's behalf. Examples might include determining the ward's place of residence or consenting to medical care or other individual programs or social services.

### Determining Place of Residence

One of the most contentious issues in guardianship is the extent of a guardian's authority to decide where her or his ward will live. This has not been faced squarely by a Massachusetts court in well over a century and a half. *Holyoke v. Haskins*, 22 Mass. 20, 5 Pick. 20 (1827). The issue has implications for people with mental disabilities who disagree with their guardians about where they should live, and for elders who oppose nursing home placement. Reform laws should limit the authority of guardians to make restrictive placements.

Medical care

The UGPPA allows orders that give the guardian the power to consent to medical treatment. Nevertheless, the model Act states that if there is a valid health-care power of attorney, the decision of the health care agent takes precedence over that of the guardian, absent a court order to the contrary. §316(c). This could be an important feature for many P&A clients.

Additionally, statutes in many states prohibit a guardian from consenting to certain procedures without prior court order or without first complying with detailed statutory requirements, especially procedures which implicate the incapacitated person's constitutional rights. For example, a guardian may not commit a ward to a mental health-care institution without following the state's statute on civil commitment. § 316(d). A more difficult and largely unresolved question is whether a guardian may prevent a ward's discharge from a facility when the treatment team recommends community placement. See, e.g. the court's discussion in *In re Easly,* 771 A.2d 844, 851-54 (Pa. 2001) (moving ward over the well founded objections of her guardian was tantamount to moving the ward over the ward's objection; therefore the *Olmstead* consent criterion was not met).

There may be similar requirements regarding a guardian's consent to electroconvulsive therapy (ECT) or other shock treatment, experimental treatment, some or all end-of-life decisions, adoption of the ward's children, sterilization, forced medication with psychotropic drugs, or abortion.

**Discharge and Removal**

As a practical matter, it is probably much harder to remove a guardian than to appoint one. A guardian may resign his or her trust with permission of the court. If a guardian is incapable of performing his or her trust or is unsuitable, the court, after notice and a hearing, may remove him or her. A guardianship may also be terminated upon petition of the ward or other interested person, when it appears that the guardianship is no longer necessary. In some states, the ward may have the burden of proof to demonstrate that he or she in currently capable and no longer in need of a guardian. *Sullivan v. Quinlivan, 308 Mass. 339 (1941).*

The UGPPA takes a slightly different approach. The person seeking termination need only present a prima facie case for termination. Once the prima facie case has been established, the burden shifts to the opposing party to establish by clear and convincing evidence that continuation of the guardianship is in the best interest of the ward. § 318.

Inasmuch as the statute allows a ward to seek removal of his or her guardian, there should be at least a presumption that the ward has the capability to retain counsel for that purpose. Courts should be skeptical of challenges by a

guardian to the authority of ward's counsel to appear and prosecute a petition to discharge. Compare, the pro-ward decision in *Towne v. Hubbard*, 3 P.3d 154 (Okla. 2000)(holding ward's have a due process right to select their own counsel) with the very cautious approach taken in Massachusetts in *Guardianship of Hocker*, 791 N.E.2d 302 (2003) and *Guardianship of Zaltman*, 2006 WL 509408 (Mass. Appeals Ct. 2006).

Reform statutes should make processes for removing a guardian (or limiting the guardian's authority) as straightforward as possible.