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WARD AND GUARDIAN

Guardianship Reform Revisited After 10 Years

Over the past 10 years, many states have revised their guardianship laws to address such problems as due process inadequacies, ineffective monitoring of guardians, and reliance on medical conclusions to determine legal findings. And increasingly, new legislative changes accommodating durable powers of attorney, living wills, and other medical declarations provide an alternative to traditional guardianships.

By Andrew P. Brusky

Recently, I was paging through various college memorabilia and happened to come upon a paper I wrote 10 years ago for a seminar class entitled "Politics of Aging." As my topic, I chose the issue of guardianship of the elderly. Being a college junior at the time, I probably knew as much about guardianship as I did about practicing law. Yet in reading the paper, I became interested in what were the perceived flaws in the guardianship system back in the early 1980s posed by the author's sources, presumably elder advocates. In fact, many of the abuses, violations of due process, and recommendations for dealing with these abuses suggested by authors at the time surprisingly are now being addressed in the 1990s as fundamental legislative proposals for statutory reform throughout the country. Likewise, as I reflect upon six years of practice as an elder law attorney, I begin to see a pervasive ideological shift in contemporary thought as to the treatment of our aging population.

My paper began with the common-law principle that guardianship law was traditionally grounded in the responsibility of the state, as parens patriae. It was the government's duty to protect those who could not

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or would not take care of themselves. The intent of guardianship was benevolent, typically sought by persons with genuine concern for the needs of the incapacitated individual. The state's parens patriae powers were traditionally exercised in an atmosphere of informality. Relaxed procedures were routinely justified by majority thinking that guardianship proceedings were for the most part nonadversarial. Consequently, the court's sole preoccupation was to determine what was in the individual's best interests, while paying little if any deference to the expressed desires of the individual.

Over the years, the need for a protective system has changed. Health care decision making has become more complex, due in part to advances in medical technology. Informal caregiving by family members has declined, which places an ever-greater responsibility on long-term care facilities and their staffs to provide care. Documented cases of Alzheimer's and other dementias have continued to increase and have become more pronounced. Unfortunately, for many years the protective system remained stagnant and entrenched in its archaic procedures, which ultimately resulted in individuals losing rights that did not need to be taken away. Eventually, elder advocates began to voice perceived abuses within the system, with criticism focused primarily on issues involving

1. Due process violations resulting from a lack of procedural requirements necessary to ensure a fair hearing.
2. The courts' reliance on medical conclusions instead of factual determinations regarding the functional abilities of the proposed ward as evidence of incapacity, resulting in court findings of full or plenary guardianships.
3. Ineffective court monitoring of guardians and annual reviews providing little evidence about changes in a ward's intellectual or physical status that may indicate a possible modification or termination of a guardianship.
4. Lack of control and direction by the incompetent individual over choice of guardian and placement decisions.

Over the past 10 years, many states have revised their guardianship laws to address the inadequacies of the protective system. States including New York and Oregon use a more "functional" rather than "medical" approach to defining incompetence. In place of relying upon diagnostic conclusions, a court is directed to evaluate the specific functional disabilities of an incapacitated individual to determine whether the individual warrants the imposition of a guardianship. Functional criteria are then used to tailor the guardianship to meet the incapacitated individual's needs in the least-restrictive manner.

Wisconsin is one example of a state in the process of completely revising its outmoded guardianship and protective placement statutes. Present law consists of a patchwork of statutes with no logical procedural order. Furthermore, Wisconsin statutes need to more clearly define the roles and responsibilities of a guardian and to codify recent case law that pertains to these issues. Proposed legislation will alter guardianship procedures to encourage greater use of limited guardianships and less restrictive alternatives. Guidelines providing better court monitoring of guardians, proper admission to facilities, and clarification as to who pays for protective services are all part of a comprehensive proposal submitted for legislative review and anticipated enactment.

Another advancement over the past 10 years affecting guardianship has been state legislation authorizing the execution of advance directives. These documents allow an individual to retain limited control over the guardianship process should the individual later become incapacitated and a court proceeding be initiated. Durable powers of attorney allow an individual to nominate a trusted person as guardian. Living wills and other medical declarations allow an individual to state specific desires regarding life-sustaining medical treatment to assist family members, health care professionals, and others in making critical decisions concerning the incapacitated individual's preferences. These documents provide some assurance that one's wishes will be complied with upon later incapacity.

A shift in attitude toward respect for elder autonomy has resulted in significant state legislative changes over the years. Guardianship laws must remain flexible to accommodate improved and innovative technology, including an ever-expanding

choice of community alternatives for long-term care. Continued revisions to guardianship procedures, adherence to least-restrictive alternatives, and a clear understanding of the roles and responsibilities of a guardian will ultimately ensure less deprivation of elder rights than previously had been the case.