Ten Reasons People Get Railroaded into Guardianship

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Family law attorneys generally think of guardianship as applying to children. Guardianship, also known as conservatorship, also applies to adults, typically the elderly or adults who have been injured.

Family law attorneys should have familiarity with the subject. They should also know that while guardianship is a valuable tool, it can cause harm. Increasingly, there are reports of persons who find themselves or in unnecessary guardianships. In other cases, competent people are forced into guardianship. This article focuses on ten factors that allow these phenomena to occur and offers proposals for reform.

THE TEN FACTORS

A Misconception of Guardianship

The first factor that contributes to unnecessary guardianships is a misconception of guardianship itself. The word "guardian" creates a warm and fuzzy image. Guardianship is, however, a severe loss of liberty. *Guardianship of Hedin*, 528 N.W.2d 567, 573-74 (Iowa 1995), states:

[The ward] may be deprived of control over his residence, his associations, his property, his diet, and his ability to go where he wishes.

With the misconception that guardianship is always a good thing, proposed wards agree to it not understanding that their rights will be restricted. In *Guardianship of Halasz*, the ward, an injured construction worker, testified:

I would not have consented to this guardianship had I known what it entailed.[1]

Vague, "Politically Correct" Statutes

In many states, persons subject to guardianship were formerly deemed "incompetent."[2] To eliminate the stigma, many states passed statutes employing the word "incapacitated" instead.[3] This terminology is also contained in the Uniform Guardianship and Protective Proceedings Act (1998).[4]

This change in terminology has caused an implicit lowering of the burden of proof. A judge or jury might think twice about deeming someone "incompetent" to handle his affairs. But deeming someone "incapacitated" or as having "incapacities" is not that big a deal.

These new statutes facilitate putting someone under guardianship who should not be there.

Sudden Change and Potential Heirs

The third factor that contributes to unnecessary guardianships is sudden change, especially change that threatens potential heirs. More common

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examples include changing one's will, selling family property, seeing a younger woman and/or marrying her. Any such action by an older person can result in a petition for guardianship.

Consider, for example, *Estate of Wagner*, 367 N.W.2d 736 (Neb. 1985). A father allowed some of his children to use land owned by himself and the children's mother. *Id*. at 741. After his death, the mother instead leased the land to a third party for more money. *Id*. at 740 & 741. The children responded with a petition for guardianship. *Id*. at 739. The result was that their mother, a competent person, was placed under guardianship. *Id*.[5]

Trolling for Clients

Some professional guardians petition the court to have themselves appointed guardian of persons with whom they have no prior relationship. If appointed, the professional guardian becomes entitled to an income stream, *i.e.*, fees from the person's assets. This practice was been termed "trolling for clients."[6] The *LA Times* describes one version, as follows:

Conservators [guardians] find clients by sponsoring breakfasts at senior centers and networking at legal luncheons. . . . Once conservators [guardians] identify a prospect, they can go to court and initiate a case without the client's approval.[7]

With the professional guardian's lack of a prior relationship with the proposed ward, the professional guardian may not realize all the facts: for example, that the proposed ward was only temporarily incapacitated and is actually competent; or that the proposed ward has a valid power of attorney and his attorney-in-fact merely needs to be called. The professional guardian is then faced with a conflict of interest. He can admit that he was wrong and dismiss the guardianship, which may cause him to bear his own fees, or he can move forward for his own appointment. With the latter scenario, he may be appointed guardian even though the guardianship will be unnecessary.

Ageism

Ageism is "prejudice or discrimination on the basis of age."[8] In the context of guardianship, ageism can influence whether a guardianship is imposed. Commentator Mark Andrews describes this factor as follows:

A vast number of college freshmen "exhibit life-threatening behaviors" such as excess drinking, driving under the influence, drug experimentation, walking alone at night, speeding, unsafe sexual experiences, and the list goes on. *Such behaviors inspire alma mater nostalgia in youth, but result in a petition of guardianship for an elder*. (Emphasis added; footnote omitted).

Mark D. Andrews, The Elderly in Guardianship: A Crisis of Constitutional Proportions, 5 Elder.L.J. 75, 105-06, Spring 1997.

Court Visitors Are Not Always Neutral

The role of a "court visitor" is to provide a recommendation to the court as to whether the guardianship should be imposed.[9] The role is analogous to a guardian ad litem or parenting evaluator in a child custody case.[10] In some states, court visitors are called guardians ad litem.[11]

As custody attorneys know, guardians ad litem and evaluators are not always neutral; they instead follow their own value systems or other private criteria.[12] With this situation, custody attorneys often advocate for the appointment of a guardian ad litem/parenting evaluator whose views are compatible with their cases.[13] They may also move for the appointment of a guardian ad litem or parenting evaluator with whom they have an established relationship.[14] The person appointed can be pre-aligned to one side.[15]

These same types of issues exist with court visitors. The petitioner's attorney may nominate a visitor known to favor guardianships.[16] He may nominate a visitor with whom he has an established relationship.[17] If the nominated person is appointed, he or she may be predisposed to recommend a guardianship and/or be pre-aligned with the petitioner. The guardianship is more likely to be imposed.

Court Visitors Effectively Lower the Burden of Proof

Caselaw provides that the constitutionally required burden of proof for a guardianship is "clear and convincing evidence."[18] In many cases, this burden is easily met. The proposed ward is demented. There is no alternative to guardianship such as a power of attorney because the proposed ward is incompetent to execute such a document.

In other cases, however, the burden would not be easily met *i.e.*, if the petitioner would actually be required to show clear and convincing evidence. The petitioner, however, is often not required to meet this burden because as a practical

matter, he only needs to convince the court visitor. For this task, hearsay and innuendo are often sufficient, for example, that the proposed ward is a spendthrift.

If the visitor's recommendation to impose the guardianship is accepted by the court, the guardianship will be imposed. This is a typical result. The supporting evidence will not be clear and convincing, but hearsay and innuendo.

Court Visitors Recommend the Lawyers

Court visitors also contribute to the imposition of unnecessary guardianships because in many states, the visitor recommends whether the proposed ward should be given a lawyer.[19] The proposed ward does not have an automatic right to counsel.[20]

This situation creates a conflict of interest. If the visitor recommends that the proposed ward have counsel, there will be a potential adversary to the visitor. For this reason, this author has seen the visitor decline to recommend counsel.

With the proposed ward unrepresented, it is easier to impose guardianship against him.

The Visitor's Fee Creates Another Conflict of Interest

The next two sections are based on the law of Washington State, where the author is most familiar with local practice. In Washington state, the person performing the role of court visitor is called a guardian ad litem. In privately funded cases, the guardian ad litem is paid a fee approved by the court.[21] The other parties, for example the petitioner, have a right to object to the fee. At least by custom, this is what happens.

If the guardian ad litem recommends counsel for the proposed ward, or if the guardian ad litem recommends against the guardianship, the petitioner may object to the guardian ad litem's fee. The "smart" guardian ad litem, who wants to get paid, is thus under pressure to go along with the petition, not "make waves."

The guardian ad litem is, regardless, more likely to be paid if the guardianship is imposed. This is because with the appointment of a guardian, there is an official person (the guardian) who will be ordered to pay the guardian ad litem's fee from the ward's assets. If, by contrast, the guardianship is not imposed, there will be no official person to pay the fee. The court could also order another, less solvent party to be responsible. For example, Wash. Rev. Code § 11.88.090(10) states:

> If the petition is found to be frivolous or not brought in good faith, *the guardian ad litem fee shall be charged to the petitioner*. (Emphasis added).

What if the petitioner has no money?

The "smart" guardian ad litem who wants to be paid is thus under pressure to recommend a guardianship. Otherwise, he could find himself working for free.[22]

Incentives to Sell Out the Client (No "Dream Team" for the AIP)

In Washington State, there are also conflicts of interest involving the lawyer for the proposed ward (the "alleged incapacitated person"). This is because the lawyer's appointment and fee are also subject to court approval with the other parties having the right to object.[23] Like the guardian ad litem, the "smart" lawyer who wants to be paid will not do anything that causes the petitioner to be unhappy, such as vigorously fighting the petition. The "smart" lawyer will also avoid disagreeing with the court, as the court has direct authority to appoint him, approve fees and order payment. The bottom line, there is pressure on the lawyer to sell out his client. For this reason also, a person may be placed under guardianship when it is not appropriate.

PROPOSALS FOR REFORM

Politically Correct Statutes

State or federal statutes should be enacted that clarify: that guardianship is a last resort; and that the burden of proof is clear and convincing evidence that the proposed ward is incompetent to handle his affairs. The politically correct "incapacitated" should be removed from all statutes designating the burden of proof.

Eliminate Court Visitors/Mandatory Appointment of Counsel

The role of court visitor should be eliminated. A defense attorney for the proposed word should instead be appointed upon the filing of the petition, unless the proposed ward already has counsel.[24] The petitioner should then be required to prove his case with admissible evidence.

If the proposed ward is obviously incompetent with no alternative to guardianship, a summary procedure could be used to impose the

guardianship. Otherwise, the matter would be dismissed or proceed to trial.

Conflicts of Interest

The conflict of interest in which the proposed ward's lawyer is subject to economic pressure by the petitioner and the court, should be eliminated. A possible solution would be to remove the lawyer's appointment from direct court supervision, for example, to a defenders association.

Other conflicts of interest should be studied and eliminated wherever they occur.

Public Awareness

Some guardianships are preventable through education and estate planning, *e.g.*, the execution of a durable power of attorney. Efforts should be made to increase public awareness in this regard.[25]

CONCLUSION

The law provides that guardianship not be imposed unless there is clear and convincing proof. In practice, this proof is often not required due to the factors identified above: vague, politically correct statutes; the role of court visitors; and in many states, the lack of mandatory counsel for the proposed word.

More broadly, there are numerous conflicts of interest that allow competent individuals to find themselves forced into guardianship. The next time, it could be you.

It is time for reform, including the elimination of court-appointed recommenders such as court visitors and guardians ad litem. Cases should instead be decided by the court based on the evidence.

ENDNOTES

1. *Id*.

2. *See*: Uniform Guardianship and Protective Proceedings Act (1998), §102(5). For a copy of the Act, *see*: *www.nccusl.org*.

3. *In re Guardianship of Gabriel Halasz*, King County Cause No. 02-4-06260-9SEA, WA State, Declaration of Gabriel Halasz, December 4, 2003, p. 1, ¶ 2.

4. *See*, *e.g.*: Wash. Rev. Code § 11.88.005; Wash. Rev. Code § 11.88.010(1)(f); and N.J. § 30:4-165.13.

5. *Wagner* is discussed in DIANE G. ARMSTRONG, THE NIGHTMARE RETIREMENT: HOW TO SAVE YOURSELF FROM YOUR HEIRS AND PROTECTORS (Prometheus Books, 2000), p. 119. In *Wagner*, the mother was eventually released from guardianship, which is unusual. *Id*. at 122.

6. The practice of professional guardians petitioning for their own clients has been more derisively termed "bounty hunting for the elderly." *See e.g.*, *Guardianship of Joan M. Gammon*, King County Cause No. 04-4-01218-7SEA, WA State, Larry Gammon's Motion for Reconsideration to Vacate Order Appointing Guardian as Void, and for Fees, p. 20 ("The potential for abuse is boundless").

7. Robin Fields, Evelyn Larrubia and Jack Leonard, *When a Family Matter Turns into a Business*, LA TIMES, November 13, 2005.

8. OXFORD UNIVERSITY PRESS DICTIONARY

9. Uniform Guardianship and Protective Proceedings Act (1998), § 305 (describing the role of the "court visitor," including the duty to file a report with recommendations).

10. Cf. Margaret K. Dore, *Court-Appointed Parenting Evaluators and Guardians ad Litem: Practical Realities and an Argument for Abolition*, DIVORCE LITIGATION, Vol. 18, No. 4, April 2006 (Parenting evaluators and guardians ad litem investigate custody arrangements and report back to the court with their recommendations [or provide a brief]). (*http://www.margaretdore.com/docs/Dore_Div_Lit_Article_4-06.pdf*).

11. *See e.g.*, Wash. Rev. Code § 11.88.090(5)(describing the duties of the "guardian ad litem," with such duties being similar to those of a court visitor under the Uniform Act, § 305).

12. The tendency for evaluators/guardians ad litem to follow their own criteria has been documented in at least one reported decision. *See*: *Gilbert v. Gilbert*, 664 A.2d 239, 242 at fn.2 (Vt 1995) (describing survey results, including that "many [guardians ad litem] are not following applicable law"). This tendency is also documented in an article by Paul S. Appelbaum, M.D. He states:

When an evaluator recommends [a child's placement] we are learning not about the relative capacities of the parties but, instead, about the relative values of the evaluators.

Paul S. Abbelbaum, M.D., "*The Medicalization of Judicial Decision-Making*", THE ELDER LAW REPORT, Vol. X, No. 7, February 1999, p. 3, ¶1, last line.

13. Cf. Dore, *supra* at 53.

14. *Id*. at 54.

15. *Id*.

16. Cf. Cheryl Phillips, Maureen O'Hagan and Justin Mayo, *Secrecy Hides Cozy Ties in Guardianship Cases*, SEATTLE TIMES, December 4, 2006 ("the Snohomish County Court appointed the guardian ad litem whom [the petitioner's attorney] recommended . . .").

17. *Id*.

18. Uniform Guardianship and Protective Proceedings Act (1998), § 311, Comment ("The clear and convincing evidence standard for the appointment of a guardian is new to the Act, but mandated by the Constitution . . .").

19. *See e.g.*, Wash. Rev. Code § 11.88.090(5)(g) and Uniform Guardianship and Protective Proceedings Act (1998), § 305(b)(Alternate 1).

20. *Id*.

21. Wash. Rev. Code § 11.88.090(10).

22. Professors Raven Lidman and Betsy Hollingsworth make a similar point:

If the guardian ad litem is being paid by one party or can only reasonably expect payment from one party, her judgment and recommendation may be or may appear to be influenced by this consideration. (Emphasis removed).

Raven C. Lidman and Betsy R. Hollingsworth, The Guardian ad Litem in Child Custody Cases: The Contours of Our Judicial System Stretched Beyond Recognition, 6 Geo. Mason L. Rev. 255, 302 (1998).

23. Wash. Rev. Code § 11.88.045(2).

24. Cf. Uniform Guardianship and Protective Proceedings Act (1998), § 305(b)(Alternate 2), which states:

Unless the respondent [the proposed ward] is represented by a lawyer, the court shall appoint a lawyer to represent the respondent in the proceeding.

25. *See e.g.*, Written Testimony of Tami Ingraham before the Washington State Senate Judiciary Committee, January 26, 2007 (regarding a proposed public awareness campaign). Contact *tmingraham2@hotmail.com*