

aging news alert

THE SENIOR SERVICES & FUNDING REPORT

Lack of Standards Enables Exploitation by Guardians

By Pamela D. Wilson, CSA, MS, BS/BA, CG

Abuse of the elderly represented by guardians is not always reported. However, reports of family and professional guardians participating in emotional, physical, and financial abuse are more frequently in the news and under investigation.

In 2010, the Government Accountability Office released an investigative report citing 10 cases where guardians stole \$54 million in assets from 158 victims. These guardians included: public guardians, a New York lawyer serving as guardian, a case manager from the office of public guardian who started her own business, and a probate judge appointed as guardian. The report confirms that states failed to check the background of guardians, failed to report cases of abuse to the federal government, and failed to oversee ongoing cases.

Local grass roots efforts in many states are advocating for increased court oversight. Nationally, The Catherine Falk organization is committed to passing the Peter Falk bill to promote visitation of adult children in situations of second marriages as the result of denied access to visitation of celebrity parents including Casey Kasem, Mickey Rooney, Peter Falk, and Glenn Campbell.

How to Regulate Guardianship

Many questions surround regulation of guardianship. Should states set standards for all individuals including family, and professionals acting as guardians? Should state courts be more proactive in identifying basic requirements for individuals serving as guardian -- including identifying conflicts of interest when a judge, attorney, or prior employee of the state government working in the office of the public guardian, adult protective services, or some other public office is appointed guardian? Should there be higher standards for individuals reporting themselves as professional guardians -- or should anyone be able to hang a shingle and enter this specialty?

The individual, called the "ward," over whom guardianship is granted is deemed incompetent or "incapacitated," meaning that he or she is unable to effectively receive and/or evaluate information or is unable to make and/or communicate decisions to such an extent that physical health or safety is in jeopardy.

Muddling through the Mire

Challenges exist in determining the accuracy of situations due to levels of high emotional involvement by interested parties. Many times situations are not as they appear. Investigation is required to determine history, events over time, and ongoing concerns. There are times when situations, after further investigation, are found to be more appalling than originally anticipated.

This raises the question of whether states should set standards for all individuals, family and professionals acting as guardians.

The National Association of Elder Law Attorneys is a member of the National Guardianship Network, a collaborative group of national organizations dedicated to effective adult guardianship law and practice. The National Guardianship Association, a member of NGN, originated in 1988 with the mission of advancing nationally recognized standards of excellence in guardianship. Twenty-four states are NGA affiliates, meaning that these states have local guardianship associations that support continuing education and collaboration, including supporting the standards and practices of NGA. Members of the NGA may become certified guardians through the National Center for Guardianship Certification.

Is Certification Necessary?

Persons acting in the role of a guardian do not have to be a member of any certifying organization or have any specific education or experience qualifications. Guardians are typically discussed in terms of professional and public guardians, and family guardians. Many states are in the process of establishing the office of the public guardian and working to set minimum education and experience standards for professionals acting as guardians. Qualifications for family members or friends who serve as guardian are minimal.

Lack of clarity revolves around the “fiduciary” responsibility of a guardian. Guardians are required and expected to act in a manner that is honest and responsible, with good faith and in the best interest of the ward. The meaning of these words and terms varies according to the ethics and morals of the individual appointed guardian. Some family guardians see no issue with taking a ward’s funds and purchasing vehicles or sporting equipment (like a boat) for private use even though these funds might be beneficially spent on in-home care. Professional guardians fall into similar traps.

National probate standards through the National Center for State Courts state that the court should only appoint fiduciaries who are competent to serve, aware and understand the duties of the office, and capable of performing effectively; yet when appointing family members or friends, the standard is a person having a substantially identical interest. Standards also encourage courts to appoint a guardian with the least potential for a conflict of interest.

Deciding What’s in the Best Interest

Most important is the ability of the guardian to question whether actions are in the best interest of the ward. These decisions can be difficult when situations surround quality of life, extending life with medical supports, or behavioral issues are at hand and knowledge exists of past injurious or self-destructive behaviors. Guardianship, many times, is complicated by situations that have no clear right or wrong answers.

Perhaps state courts should be more proactive in identifying basic requirement for individuals serving as guardian -- including identifying conflicts of interest when a judge, attorney, or prior employee of the state government working in the office of the public guardian, adult protective services, or other office is appointed guardian -- and verifying the criminal and financial background of family members before appointing.

Due to the increasing number of elder abuse cases reported and states with mandatory reporting laws regarding elder abuse, the number of guardianship cases is growing. Due to factors relating to each case – e.g., the presence or absence of qualified family members, financial resources to pay a private guardian, and the presence of a petitioner -- cases may linger with delayed progress. In many states, Adult Protective Services becomes the guardian if there are no funds to pay a professional guardian. Many states

have or are working to finalize the office of public guardian to serve as legal guardian in the absence of family members, friends, or resources to pay private guardians.

Finding Funding: The Eternal Problem

Funding in cases where no financial resources exist is an ongoing challenge for states. This reality often results in the appointment of family members who are under skilled or inept at serving as guardian and acting in the best interest of a loved one. Many family guardians lack understanding of the high level of accountability of the role of guardian because guidance or classes were not offered by the state court.

A major challenge related to guardianship is the ability of the family guardian to advocate appropriately. Caregiving is a subject of increasing national attention due to the aging population. Many family caregivers experience physical and emotional health declines due to the number of tasks, responsibilities, and emotional stress of care situations. Sometimes called “compassion fatigue,” this results in challenging family relationships with aging and frail parents and siblings that result in contentious situations debated in the offices of elder law and probate attorneys.

In reality, the care and well-being of aging and frail parents often suffers due to the inexperience of family caregivers who are appointed guardian related to the ability to advocate, to investigate services and supports, and the ability to be proactive and to make appropriate decisions. Many family guardians are directed to retain the services of a care advocate or care manager who possess this expertise. Some professional guardians possess this expertise which benefits the care of the ward.

The field of older adult services is growing at a rapid pace with entrants increasing daily in the field of guardianship, ownership of assisted living communities, home health care agencies etc. It is recognized that many who enter the field do not possess honorable motives and believe this field to offer significant financial gain. New entrants sometimes lack experience and education in the field of aging, and this can result in more harm than benefit. Maintaining appropriate professional boundaries and avoiding situations of conflict of interests are common concerns. Failure to do so can result in families being exposed to inadequate care or bad information that places loved ones at risk.

Experience versus Familiarity

What about the appointment of guardianship for judges, attorneys, or past employees of state offices who start their own business to act in the role of a guardian? Does this appointment pose a conflict of interests? Opinions are mixed due to the pool of qualified and available candidates in the system. Many believe it’s better to appoint a qualified candidate or a known candidate rather than an unknown. Reputations are at risk; a bad referral in a small, tight-knit industry damages company reputations.

Many elder law attorneys report that they would never serve in the role of a guardian for their client and others see no issue with the appointment. Many employees who work in state offices of adult protective services or the office of public guardianship and leave to start their own guardianship business and then receive referrals from their past employer.

Does this potentially incestuous referral system represent a closed system insulating, benefitting, and protecting its own interests? Some believe so. Front-page newspaper stories illustrate relationships between judges, county attorneys, and attorneys who failed to disclose relationships prior to appointments. One solution is to fully disclose relationships in writing to prevent backlash from those who allege damage or inappropriate conduct.

The United States is country of opportunity where consumers must be discerning when hiring a professional or a company to act on their behalf or in their best interest. Nevertheless, due to the vulnerability of the elderly population, protections and standards should be put in place and that, above all, promote the avoidance of conflict of interests.

Info: The preceding article comes to *Aging News Alert* by way of its author, Pamela D. Wilson, MS, BS/BA, CG, CSA, Certified Senior Advisor, who specializes in working with family and professional caregivers to navigate healthcare and aging concerns. Wilson, an expert in the field of caregiving, has personally helped thousands of family and professional caregivers since 2000 in her career as an advocate, a care navigator, and an educator. Through her company, The Care Navigator, she is an advocate and service provider in the roles of guardian, power of attorney, care manager, and transition specialist. Her new book, "*The Caregiving Trap: Solutions for Life's Unexpected Changes*," is available through all major bookstores as well as on PamelaDWilson.com.

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