

Issue Brief: Guardianship Abuse

Overview

Each year thousands of Americans are placed under the supervision of court-appointed guardians. Guardianships are sought for individuals (called wards) who are considered legally incompetent to make decisions for themselves. HALT research shows that the nation’s guardianship system offers few procedural protections, and has spawned a profit-driven professional guardianship industry that often enriches itself at the expense of society’s most vulnerable members—the elderly. Yet despite numerous calls for reform, most states have done little to monitor professional guardians and prevent abuse. This issue brief points to emerging reform strategies for dealing with professional guardians and other problems currently plaguing the nation’s guardianship system.¹

How the System is Supposed to Work

Guardianship proceedings, when conducted properly, offer much-needed protection for adults who can no longer take care of themselves. Most guardianship cases begin with the filing of a petition for guardianship, in which the person seeking to be appointed as guardian tells the court why the proposed ward is incompetent and why his or her appointment as guardian would be in that person’s best interests. Family members, friends, social service agencies, attorneys and even for-profit entrepreneurs may petition to be named as guardian.

¹ Many states use the term “conservatorship” when a guardian is appointed specifically to manage a ward’s property, while some states refer to all adult guardianship arrangements as conservatorships, whether establishing authority over financial or personal decisions. This issue brief will use “guardian” and “guardianship” in discussing these court-appointed protective relationships, although this terminology is not universally accepted in every state.

Before a guardian is appointed, the court must determine whether the proposed ward is actually incompetent. Guardianship laws provide some safeguards against mistaken incompetency declarations. Proposed wards have a right to receive notice of a guardianship petition, to be present at the hearing, to be represented by a lawyer and to present evidence of their ability to take care of themselves. In many jurisdictions, a court investigator may furnish an independent assessment of the ward to the judge. Finally, the law presumes that guardianship is a last resort, and that it should be used only when an impaired person's needs cannot be met in some less intrusive manner. The principle of limited guardianship requires that a guardian only be granted the powers that are necessitated by a particular ward's condition.

Those seeking appointment as guardians carry the burden of proving the proposed ward's incompetence. However, the standard of proof that the petitioner for guardianship has to show the court varies by jurisdiction. In some states, courts require petitioners to submit clear and convincing evidence of a ward's incapacity, while other states only require a petitioner to show only that the proposed ward is more than likely not competent to manage his own affairs.

A guardianship terminates only when the ward dies or the court rules that there is good reason to reconsider the arrangement such as the ward regaining a marked degree of competence, the guardian spending down the ward's entire estate until it is no longer able to pay bills, or misconduct on the part of the court-appointed guardian.

Serious Problems

Few Procedural Protections. Despite what the law says, in reality few of these safeguards are actually practiced in the courtroom. Many jurisdictions do not

require courts to appoint a lawyer to represent proposed wards that cannot afford an attorney, or even require that the proposed ward be present for the hearing.

Discretion in making competency determinations and guardianship appointments rests in the hands of the presiding judge. Sadly, daily exposure to the woes of the elderly influences the attitudes of many judges, and they may presume the incompetence of proposed wards even though the law requires the opposite. Judges may similarly find it easier to give a guardian complete powers over a ward despite the principle of limited guardianship. In 2008, the *Boston Globe* found numerous instances of judges appointing guardians based on inadequate medical documentation of incompetency, including a six word diagnosis in one case.

Judges who preside over guardianship cases are usually responsible for very heavy caseloads, and many cut corners to move cases along. They may justify doing so because guardianship proceedings are supposed to be non-adversarial. All the parties are assumed to have the same, rather than conflicting, interests—the protection of the proposed ward. In addition, the obligation of the attorney who represents a proposed ward in non-adversarial guardianship proceedings is to serve the client’s best interests rather than to follow the client’s instructions or wishes. Court-appointed attorneys, who may be as over-burdened as judges, therefore will often simply consent to guardianship after quickly assessing a client, thus waiving normal procedural protections.

Many states also allow the court to appoint an “emergency” guardian without so much as prior notice to the proposed ward if it agrees with the petitioner seeking guardianship that delay would likely result in harm to the ward’s health, safety or welfare. Although such arrangements are meant to be temporary, once an emergency guardianship has been established it is usually very easy for the guardian to argue for a permanent guardianship.

A Profit-Driven and Poorly Regulated Guardianship Industry.

Although family members are usually given a statutory preference, a court can appoint anyone to be a guardian. Because of burgeoning case loads, courts have come to rely increasingly on for-profit “professional” guardians. Guardians are allowed to be compensated from their wards’ accounts for the services they provide, and many have seized the economic opportunity presented by the incapacity of others by making a business of acting as a guardian. Although there are few reliable numbers, the guardianship industry is growing. In 2005, for example, at least 15 percent of guardianship cases in Southern California were handled by professionals.

Professional guardians, however honest, act principally out of economic motives and not from affection or family obligation. They secure business by cultivating relationships with doctors, hospitals, lawyers, courts and government agencies responsible for the elderly. Because professional guardians are repeat participants in the guardianship system, some can manipulate the system to a ward’s disadvantage. For example, professional guardians frequently invoke the procedural loopholes of the emergency guardianship as a tactic for gaining control over a ward’s rights and assets. According to the *Los Angeles Times*, more than half of all guardianship petitions filed by professional guardians in Southern California between 1997 and 2003 were granted by the courts on an emergency basis. Of these emergency appointments, 56 percent were granted without notice to the proposed ward, 64 percent before an attorney was selected to represent the ward, and a stunning 92 percent before an otherwise mandatory court investigator’s report.

Although many are lawyers, almost anyone can become a professional guardian. The industry is extremely poorly regulated and few states require

licensing or training. As one professional guardian admitted, “I could be a shoe salesman at a five and dime store one day and a professional guardian the next.”²

A System Plagued by Abuse. Reports of guardianship abuse from government agencies and the media have become alarmingly common. The most common kind of abuse is simple pilfering of a ward’s assets. Guardians who do not steal outright from their ward’s account may slowly drain a ward’s life savings by charging exorbitant fees for mundane tasks. Guardians may charge wards hundreds of dollars for having a bag of groceries delivered or towing a car, and some have even reportedly billed a deceased ward’s estate for attending the ward’s funeral. Other common examples of abuse include placing wards in nursing homes against their will, selling property without permission and blocking contact with loved ones.

There is no shortage of horror stories. In a case documented by the *Washington Post*, the guardian of a well-to-do widow suffering from dementia plundered her estate and let the IRS execute a tax lien on her home. The ward, left homeless, slept in abandoned buildings, while her guardian informed the court that she “preferred to reside in city shelters.” A U.S. Government Accountability Office report detailed similar outrages, including one instance in which a private guardianship firm was found to have committed felonies against more than 600 of its incapacitated wards, going so far as to sell one ward’s home to an employee’s relative for \$500.

The number of Americans in guardianship will continue to grow as the U.S. population ages over the coming decade. The incidence of guardianship abuse is likely to increase along with the total number of guardianships.

Poor Record-Keeping and Oversight. The rampant abuse of incapacitated wards by unscrupulous professional guardians persists because sloppy supervision

² Yeoman, Barry. “Stolen Lives.” *AARP: The Magazine* (Jan. – Feb. 2004).

by court officials makes it difficult to detect exploitation and mismanagement. According to the American Bar Association, in more than one quarter of all courts nationwide, guardians do not have to file annual reports on a ward's personal status. Nearly 20 percent do not require annual accountings of a ward's finances. Among courts that do collect such information, more than one third do not have an official who is designated to verify the content of the guardians' reports, and less than 20 percent verify every report. In more than 40 percent of courts, no one is assigned to visit individuals under guardianship. Nearly 75 percent of America's courts do not have a computerized data system to track guardianship cases and identify problems.

The failure of courts to provide adequate supervision has predictable consequences. For example, nearly half of the guardianship reports required under District of Columbia law were filed at least a year late between 1995 and 2000. From 2003 through 2007, there were no financial reports filed in 85 percent of the guardianship cases in Suffolk County, Massachusetts. Even when a guardian makes a report to the court, lax standards of review allows courts to overlook warning signs. A *Los Angeles Times* investigation similarly uncovered numerous instances of egregious abuse by guardians where evidence of abuse was already in the courts' own files; most county courts in Southern California ignored an online registry created to identify and track problem guardianships. And gross overbilling often occurred with the explicit approval of probate judges, who must sign off on guardians' expenditures in most jurisdictions. A *Houston Chronicle* investigation found that the court routinely allowed guardians to charge their hourly rates typical for legal work when performing even the simplest nonlegal tasks.

Thin budgets and understaffing account to some extent for the inadequate supervision of guardianship appointments. According to the ABA, 43 percent of courts have insufficient funds available to implement effective guardianship

oversight, and nearly a third have no specific funding stream for guardianship monitoring.

Even worse, some judges may be more concerned with protecting guardians than wards. In many guardianship systems, a tight-knit network of judges, lawyers and professional guardians (many of whom are also lawyers) routinely interact with one another. According to the *Washington Post*, one guardian who was removed from the District of Columbia's guardian appointment list several times for failing to appear at hearings continued to receive new assignments from judges who simply bypassed the official list; even though she was remiss in many of her duties, this one woman's caseload accounted for a whopping 15 percent of all guardianships in the District. In a revealing interview, a former chief probate judge defended the D.C. court's practice of continuing to appoint as guardians those attorneys who had been the subject of frequent complaints, stating, "You have to be careful about barring someone from cases. It may be the lawyer's only source of practice."

Reforming the Guardianship System

Public uproar over the rampant abuse of incapacitated adults at the hands of profit-driven professional guardians has spurred efforts to reform guardianship systems in some states. HALT has identified some of the promising reform strategies, including mandatory training and licensing of for-profit guardians, adopting detailed standards of conduct for guardians that may be grounds for disciplinary action, providing thorough review of all court-mandated reports on the status of wards, requiring periodic visits to wards and their guardians, establishing compensation guidelines and restricted accounts for guardians, notifying wards of the right to file for restoration of rights, reforming the procedures for emergency

guardianships, and establishing independent regulatory bodies with disciplinary authority.

Regulating the Professional Guardianship Industry. Alaska, Arizona, Florida, Texas, Washington and a handful of other states have established procedures for the licensing or certification of for-profit guardians by the courts, each mandating strict training and other requirements. For example, would-be professional guardians in Washington State must attend a two-day class that covers the responsibilities and limitations of guardianship, the process of completing required records, and ethical questions that may arise. Some jurisdictions in Florida require professional guardians to devote up to 48 hours to similar training, and the state recently installed the toughest licensing exam for prospective guardians in the country. Alaska requires that professional guardians be certified by a nationally recognized organization such as the Center for Guardianship Certification, a process that includes passing an examination on the duties of a guardian, meeting general educational requirements, and having a clean criminal record and history of performance as a guardian.

Adopting Standards of Conduct for Guardians. In 2001, the Second National Guardianship Conference, the “Wingspan Conference,” recommended that all states establish minimum standards of good practice for guardians. Unambiguous standards of conduct that enumerate a guardian’s ethical and professional obligations toward the ward leave professional guardians in little doubt as to actions that would constitute misconduct. Arizona and Washington are among the small number of states that have articulated detailed conduct standards for guardians that go beyond a brief list of duties in a governing statute.

Unfortunately, awareness of standards of practice is not enough to ensure that they are obeyed. States must make it clear that conduct will be measured by such standards in disciplinary processes. In Washington State, for example,

disciplinary regulations expressly declare that a violation of the standards of practice constitutes grounds for disciplinary action.

Improving Court Monitoring and Enforcement. A 2007 AARP Public Policy Institute report cited exemplary jurisdictions in Arizona, Texas and Minnesota that actively utilized computerized management of guardianship cases. Computer systems automatically notify court officials and guardians when status reports on the care of wards are due; some systems also alert officials of needed action if the required report is not received. In Maricopa County, Arizona, an overdue report results first in an order of noncompliance, then an order to show cause, and finally, an arrest warrant.

Other jurisdictions perform multiple levels of review on reports submitted by guardians. For example, a state statute in Florida requires that courts clerks review every guardianship status report to ensure that the appropriate information is provided, and a court program in Hillsborough County employs two full-time counselors who scrutinize all plans and accountings in addition to the initial audit performed by the court clerk.

Another promising approach to improving guardianship monitoring is the use of investigators, either professional or volunteer, to periodically visit wards and their guardians and recommend follow-up actions to the court. Visitor programs have been implemented in jurisdictions in Arizona, Idaho, and Texas, among others.

Establishing Compensation Guidelines and Restricted Accounts for Guardians. In many states, professionals are supposed to receive approval from the court of the monies that they charge wards for providing guardianship services. However, judges oftentimes turn a blind eye to questionable billing practices. In Harris County, Texas, the probate court recently instituted strict standards for

reviewing guardians' bills, barring attorney guardians from charging legal rates to complete nonlegal work and capping fees for legal work.

Other innovative states, including Arizona, protect ward assets through restricted investment accounts that cannot be accessed by the guardian without a specific court order.

Revising the Procedures for Emergency Guardianships. Emergency placements are prone to abuse by the professional guardianship industry. In Texas, proposed wards must be given notice of emergency guardianship proceedings, with no exception, and must be assigned attorneys before the court rules on their cases. California also recently adopted protective legislation for proposed wards, requiring timely investigation of all emergency guardianships, interviews with all interested parties, and notice to the proposed ward of his or her legal rights. However, the Governor has indefinitely delayed funding for these reforms.

Notifying Wards of the Right to File for Restoration of Rights. In Hennepin County, Minnesota, the guardian must notify the ward annually of his right to seek a restoration of rights. Since some incapacitating conditions may improve or resolve completely, it is critical that the ward be notified that he may seek to limit the scope of the guardianship or have it dismissed altogether. The court may ensure that this notification occurs by requiring the guardian to file a proof of the notice.

Establishing Regulatory Bodies and Disciplinary Mechanisms. When allegations of abuse by a professional guardian are brought to the attention of the court, a very few states, including Arizona, New York and Washington, have an official individual or entity within the judicial system that is responsible for following up on complaints and taking disciplinary action, where appropriate, against the guardian.

Many scholars and elder-rights advocates want states to go further in protecting wards and have proposed independent ombudsman programs for individuals in guardianship. Similar to the ombudsman for long-term care that is required in each state, these programs would educate the public, assist in resolving complaints, and advocate on behalf of incapacitated individuals.

The nation's guardianship system was designed to help family members take care of their loved ones. While the system works well for some, too many seniors are suffering at the hands of unscrupulous professional guardians who swiftly take control of seniors' lives often without their knowledge or consent.

States must strengthen procedural protections and improve guardianship oversight to stop these abuses. To be successful, reforms of state guardianship systems must be accompanied by an adequate commitment of resources by courts, legislatures and governors. Americans should not have to fear the very system set up to protect them should they become incapacitated and vulnerable.

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