

December 6, 2004

**COMMENTS TO THE SUPERIOR COURT OF
THE DISTRICT OF COLUMBIA
FROM HALT – AN ORGANIZATION OF AMERICANS FOR LEGAL REFORM
RE: PROPOSED PROBATE ATTORNEY PRACTICE STANDARDS**

The proposed Probate Attorney Practice Standards, drafted by the Probate Division Education Committee, were released for public comment on October 18, 2004. Pursuant to a request by the Superior Court of the District of Columbia, HALT – *An Organization of Americans for Legal Reform* hereby submits comments.

HALT urges the Court to revise the Committee's proposed standards to include strict and unambiguous language that leaves attorneys in little doubt as to their responsibilities to their wards. Specifically, HALT recommends that the Court adopt changes that would ensure attorneys maintain appropriate caseloads, require qualified doctors to make capacity decisions, encourage wards to accompany their attorney guardians to hearings, compel lawyers to file timely reports, and forbid financial impropriety on the part of guardians. In addition, HALT recommends that during this time of reflection, the Court, as well as the District's lawyer discipline system, take the opportunity to re-dedicate their respective efforts to increased oversight of the guardianship system. By amending the Practice Standards to include these important clarifications, the Court can meaningfully address the critical problems plaguing the current guardianship system.

Founded in 1978, HALT holds steadfast to its mission of advocating for systemic changes that will make the civil justice system more accountable, accessible and affordable, while also teaching Americans about the law, legal procedures and legal services. HALT's commitment to probate reform and improved estate planning started in 1980 with our appearance on the "Phil Donahue Show," and the publication of our ground-breaking *Citizens Legal Manual on Probate*. Since then, we have successfully pushed for probate reforms across the country that simplify the process and make it more efficient and consumer-friendly.

Last year, *The Washington Post* uncovered a widespread pattern of abuse in the District of Columbia's guardianship system through its series entitled "Misplaced Trust" (June, 2003). Highlighted in the series were examples of flagrant mistreatment and neglect of wards as well as critical defects in the court procedure for awarding guardianships. The *Post*'s investigative report showed that even as the Court's lax oversight allows guardians to neglect their responsibilities, it also permits some lawyers to take unnecessary control of people's lives. Relying, in part, on the findings of HALT's Lawyer Discipline Report Card (which graded each state's attorney discipline system),

one of the stories exposed significant flaws in the Bar’s discipline of unethical attorney guardians (“Cases against accused attorneys drag on,” June 16, 2003).

As the number of guardianships granted continues to increase, the Court has a growing responsibility to improve the system’s performance to ensure that these abuses come to an end. Now that a year and a half has passed since the *Post* published its startling findings, we are pleased that the Superior Court has decided to direct its attention to many of the failings cited in the series. The new Practice Standards proposed by the Probate Division Education Committee go a long way in putting an end to many of the abuses that have long crippled the District’s guardianship system.

We begin our comments by highlighting those standards we whole-heartedly endorse and urge the Court to adopt. We then list a number of standards that we think the Court—to ensure that the interests of wards are best served—should amend by including more specific language regarding the duties of guardians. Finally, HALT urges the Court to vigorously enforce the guidelines presented in these new Practice Standards as well as the District’s statute governing the obligations of guardians.

I. HALT Supports Proposed Practice Standards that Help to Repair Widespread and Systemic Problems in the District’s Probate Division.

If adopted, the Probate Division Education Committee’s proposed attorney Practice Standards will help to prevent pervasive abuses within the guardianship system and ensure that the District’s most vulnerable citizens receive adequate representation. In particular, HALT urges the Court to adopt Practice Standards 1.2(a) and 1.3, which require that attorneys receive training and understand their duties before the Court places them on the Probate Division appointments list. HALT also supports proposed Practice Standards 4.1 and 6.6, which help to ensure that a ward’s wishes receive adequate attention. In addition, HALT recommends adoption of proposed Practice Standard 6.3, which requires attorneys to avoid the appearance of a conflict of interest. Finally, HALT agrees with the Committee’s proposed Practice Standard 10.5 as it presents a solution to one of the most common forms of misconduct cited by the *Post* report, by requiring guardians to obtain prior Court approval before expending guardianship funds.

HALT urges this Court to adopt Practice Standard 1.2(a), which provides: “Attorneys seeking inclusion in the Probate Division appointments list maintained by the Superior Court of the District of Columbia shall receive training certification through the Office of the Register of Wills.” Since last year, when the Court instituted a requirement that lawyers receive at least six hours of training, the list has fallen from 240 to 160 attorneys. This rule requiring training ensures that guardians—those entrusted with the vital needs of more than 4,000 District residents—receive at least a basic education about their duties, the practicalities of caring for an individual and an understanding of the basic

rules of the Probate Division. By specifying the Office of the Register of Wills as the agency responsible for issuing certifications, proposed Practice Standard 1.2(a) offers specific guidance.

HALT also supports Practice Standard 1.3, which provides a clear set of duties to persons appointed in probate cases. HALT hopes that the certification classes address each of the obligations enumerated under Practice Standard 1.3 by providing details and examples, so that guardians will better understand their responsibilities to “thoroughly prepare for all hearings” and “participate in negotiations,” for example.

The most valuable of the proposed standards are those that will ensure that an individual’s wishes receive paramount consideration. Specifically, Practice Standard 4.1 requires guardians *ad litem* to “[r]eview legal documents executed by the subject and interview persons who most likely have personal knowledge of the subject’s wishes.” This will ensure that an individual’s power of attorney or health care directive receives sufficient attention. This standard is particularly important in light of *In Re Mollie Orshanky*, which brought to light the Court’s practice of sometimes disregarding the subject’s wishes as expressed in their power of attorney documents or living will. 804 A.2d 1077 (2002). Such proposed Practice Standards are critical because they provide guidance to rules not fully enumerated in the Code. See D.C. Code § 21-2033 (2004). Other proposed guidelines such as Practice Standard 6.6, which requires that guardians “ensure the self-reliance and independence of the ward are maximized and that the ward is involved in decision-making regarding habilitation, health care, recreation and other personal choices where appropriate,” reinforce the importance of keeping the individual’s wishes at the forefront of every decision.

In addition to rules that require guardians to respect the wishes of their wards, the proposed attorney Practice Standards emphasize the importance of avoiding conflicts of interest with respect to the ward’s estate. Proposed Practice Standard 6.3 provides that “the guardian shall avoid any appearance of conflict of interest when dealing with the needs of the ward.” As the *Post*’s series showed, negligent or fraudulent attorneys plague the guardianship system, preying on the Court’s most susceptible subjects. Sending attorneys the message that even the appearance of impropriety will not be tolerated is an important step in ridding the guardianship process of attorneys who fail to serve their client’s best interest.

Finally, HALT supports proposed Practice Standard 10.5, which states, “Before expending guardianship funds, the guardian shall obtain prior Court approval.” As the *Post*’s series demonstrates, one of the primary problems facing the guardianship system is the misappropriation of the subject’s resources. Notification to and approval from the Court will help guarantee that a ward’s funds are being used appropriately; with the Court’s careful oversight, it is unlikely that guardians will have the audacity to misuse client funds.

As the Court considers the proposed probate attorney Practice Standards, HALT hopes that the focus of any reform continues to be the interests of the wards that depend on the Court's judgment. In their current form, the proposed standards are an important step in the right direction, but further reform is needed to ensure that the interests of the District's most defenseless consumers are protected.

II. HALT Urges the Court to Amend the Proposed Probate Attorney Standards To Include Specific and Unequivocal Rules Protecting Individuals.

To effectively prevent guardianship abuses, the proposed probate attorney Practice Standards, in many instances, require clarification and amendment. Identification of the appropriate doctor to make a capacity or incapacity determination needs to be delineated in Practice Standard 2.1. Perhaps most important, Practice Standard 3.5, regulating ineffective and unethical attorneys for the subject, as well as attorneys for the petitioner, should be strengthened to require lawyers to explain the importance of hearings to their wards. Reporting obligations in Practice Standard 6.1 and specific examples of guardian conduct in Practice Standard 6.3 require further clarification.

The decision to remove an individual's basic freedoms should be made with diligence and only with clear evidence of incapacity. Unfortunately, ambiguities in Practice Standard 2.1 could undermine the Court's effort to protect the needs of District citizens. A Practice Suggestion accompanying 2.1 provides, in relevant part:

If the petitioner provides a medical report, ascertain whether the physician indicates on the report his or her qualifications and that those qualifications are appropriate to make the recommendation regarding capacity or incapacity contained in the report.

The current version fails to prevent erroneous guardianship decisions because it uses the overly broad term "physician" and fails to indicate the necessary scope of the physician's evaluation. To underscore the gravity of the capacity determination, this Court should amend the standards by adding the following sentence to the end of the above Practice Suggestion:

The medical report must be drafted by a certified gerontologist or psychiatrist. In rare cases, with the approval of the Court, the subject's primary care physician may render the capacity determination. In any event, the medical report must be based on a thorough evaluation of the subject. A medical conclusion based upon a single examination will not meet the Court's standard.

The amendment proposed above would help this Court avoid problems such as those at issue in the case of Mollie Orshansky, in which the Court of Appeals held that guardianship was improperly granted where a finding of incapacity was made on the sole basis of a report by a general internist who examined Ms. Orshansky just once, the day after she was admitted to the hospital. The Court of Appeals suggested that gerontologists and psychiatrists would be in a better position to make capacity and incapacity determinations and that repeated evaluations are necessary to render such a critical conclusion. By adopting the above amendment, the Court can help ensure that guardianship is awarded only in cases when it is absolutely necessary.

Fortunately, the Committee recognizes the need for strengthened rules regulating ineffective and unethical attorneys for the subject, as well as attorneys for the petitioner. A Practice Suggestion supplementing Practice Standard 3.5 requires attorneys to “protect the subject’s right to counsel and the subject’s right to be present at all hearings.” However, the Practice Standard should be amended to emphasize the guardian’s requirement to take proactive steps to have the subject accompany him to hearings. HALT suggests the following amendment to the Practice Suggestion under 3.5:

Explain the significance of each court appearance and make every attempt to bring the subject to all hearings. Unless good cause is shown for the subject’s absence, guardianship will not be awarded if the subject is not present.

This amendment will help to combat a persistent problem discussed in the *Post*’s series—an average of only one in four subjects is present during his own guardianship hearing in the District. While some individuals may be unable to attend for health reasons, the *Post* discovered that many of the subjects were either not informed of the hearing or were discouraged from attending by their court-appointed attorneys. By requiring guardians to explain the significance of court appearances and to make every attempt to bring the subject to the hearing, we can help make certain that District citizens have a more active role in the guardianship system. Ultimately, however, ensuring the participation of the subject will require the vigilance and oversight of the Court.

The process of deciding whether an individual requires a guardian is only the beginning of the Court’s duty to the subject. After this phase, the guardian and the Court need to collaborate to ensure that the ward’s wishes are respected. Proposed Standard 6.1 requires that a guardian “timely file reports to the Court and all interested persons.” While this is a good first step, it is important to define the frequency with which a guardian must file reports and the repercussions for failing to comply with this critical requirement. HALT recommends the following straightforward language in place of proposed Practice Standard 6.1:

At a minimum, the Guardian shall file reports semi-annually to the Court and all interested persons. Failure to do so will result in disciplinary action.

This guideline is essential. The *Post*'s series found that one in five guardians had missed reporting deadlines, sometimes for years. To prevent this problem, HALT's proposed amendment clarifies reporting obligations and explains the penalties for failing to file necessary documents.

In addition, proposed Practice Standard 6.3, which deals with avoiding the appearance of impropriety with regard to managing the ward's assets, should be strengthened to include specific prohibitions on guardian conduct. HALT suggests that the Court add a Practice Suggestion to Standard 6.3, which would mirror the Practice Suggestion for Standard 9.6. We propose the following Practice Suggestion to modify Practice Standard 6.3:

Guardians and fiduciaries should refrain from taking, using, borrowing, purchasing or securing interest in the assets of the ward, either directly or through the assistance of another, so as to avoid charges of self-dealing.

One of the most damaging findings of the *Post*'s series was the sheer number of cases where a guardian over-billed or misappropriated the funds of their ward. Even more shocking was that the Court continued to assign new wards to these attorneys, even after the problem had been identified. This Practice Suggestion would more clearly define misconduct for guardians who also manage the assets of their wards.

By clarifying the evidence required for making an incapacity determination, instructing attorneys to involve subjects in the guardianship process, establishing a specific timeframe for filing reports and defining guardian conduct that would bring about charges of self-dealing, this Court can instill the Practice Standards with guidelines that will protect District citizens and restore integrity to the guardianship system.

III. The Superior Court of the District of Columbia Should Take This Opportunity to Improve Oversight of the Probate Division.

We welcome the Court's commitment to improving the quality of representation of the District's more than 4,000 wards. Unfortunately, the proposed attorney standards are only half of the problem. To truly reform the District's guardianship system, the Court must improve not only the conduct of the attorneys it appoints but also the quality and degree of the Court's oversight. Even the most well-intentioned regulations will mean little if the Court lacks the resources and resolve to enforce them.

According to the *Post*'s series, many of the problems facing the Court are the result of special treatment among a small group of professional peers. These colleagues share business and recommend one another for court appointments. Lawyers told the *Post* that they make a point to befriend the clerks. Judges reported that they typically appoint attorneys they know. Unfortunately, this close relationship sometimes results in a judge allowing an attorney to neglect his ward and miss filing deadlines without repercussions.

One particularly egregious example of a negligent attorney allowed to continue working is Rozan Cater. Within a few years of her first appointment in the Court, complaints about her caretaking began to surface. According to the *Post*, she neglected a ward suffering from dementia for nearly three years. The attorney filed no updates to the Court on the ward's condition, and no court officials followed up with her. Attorney Cater actually admitted to the *Post*: "If I'm remiss in my duties, it seems to me that the court should have pulled me on the carpet for that right away. . . . Why haven't they removed me? Why haven't they done any of those things that are put in place to safeguard and to check?" Ultimately, Cater was taken off the Probate Division's assignments list, but it took years of shoddy work, persistent neglect, and unaccounted client funds before the disciplinary system stopped the attorney from taking on new wards.

As the *Post*'s series showed, removal from the assignments list does not necessarily stop an attorney from receiving guardianship cases. The case of lawyer Gloria Johnson, who was cited by the *Post* for filing excessive petitions, is instructive. Although she repeatedly failed to appear at hearings and was removed from the Court's appointment list several times, she continued to receive new assignments from judges who simply bypassed the list. Even though she was remiss in many of her duties, Ms. Johnson's caseload accounted for a whopping 15 percent of the Court's total caseload.

The Court should take steps to end leniency and favoritism by publicizing and enforcing rules designed to oversee guardians. Only when an attorney knows and respects the consequences for missing filing deadlines will he comply with regulations. For those attorneys that continue to miss deadlines, the Court should pursue disciplinary measures and refuse to assign the attorney any more wards. In addition, attorneys that are the subject of ongoing disciplinary investigations should be removed from the list of eligible guardians. Wards still under their care should be monitored closely. Allowing negligent or fraudulent guardians to operate without censure puts the District's most vulnerable residents at risk.

Unfortunately, Practice Standard 1.4, which requires attorneys to maintain a "manageable caseload," offers no guidance on what constitutes a "manageable" caseload. While each guardianship case is unique and the number of "manageable" cases will differ from one attorney to the next, strong judicial oversight is needed to ensure that guardians

file timely reports, do not take on more cases than they can handle and—if removed from appointment lists—are not allowed to bypass those lists and take on new assignments.

Administrative Order 04-06 is an excellent first step in addressing this problem. However, ensuring that attorneys fulfill their obligations to their wards will require stronger and more expansive rules for all attorneys. Every attorney should be periodically expected to sign a statement certifying that he is properly managing his wards. Guardians should be required to make these certifications on a regular basis—not simply when they are applying to represent a new ward. By strengthening this administrative order, the Court can increase the scope of its oversight and add teeth to the rules that regulate attorney guardians.

In addition to supporting increased regulation by judges in the Probate Division, we also urge this Court to recommend better oversight by Bar administrators. The *Post* revealed that wayward probate lawyers are rarely punished by the District’s disciplinary body, even when they have broken the law, violated ethical standards or failed their clients. When it does impose sanctions, HALT’s Lawyer Discipline Report Card showed that the District’s system is inconsistent and slow, giving lawyers so many protections that cases can drag on for as long as nine years. As former chairman of the Board on Professional Responsibility Mark Foster stated, “The system is created by lawyers for lawyers” (“Cases against accused attorneys drag on,” *Washington Post*, June 16, 2003).

During this period of reflection, it is critical that judges in the District’s Probate Division and disciplinary administrators at the D.C. Bar improve their methods of oversight and enforcement. While the Committee’s proposed Practice Standards help clarify a guardian’s duties under the D.C. Code, they can not be expected to single-handedly transform the system into one that thoroughly cares for the District’s most defenseless citizens. Rather, the most important mechanisms to repair this broken system are the watchful eyes of the Court and the Bar.

Conclusion

HALT respectfully requests that the Superior Court of the District of Columbia issue new Practice Standards that strengthen the rules governing court-appointed guardians. Proposals by the Probate Division Education Committee go a long way to correct abuses documented by *The Washington Post*, but in order to transform the guardianship system into one that vigilantly protects the District’s 4,000 wards, many of the Practice Standards need to be clarified. In particular, the standards should include clear guidance on the evidence required to make an incapacity determination, specific timeframes for filing reports and detailed examples of misconduct and conduct that would appear improper on the part of District guardians.

In addition, the Court should take this opportunity to add teeth to the standards by increasing the scope and degree of its management of guardians. To complement this oversight, the District's attorney discipline system should increase its dedication to weeding out incompetent, negligent and unscrupulous attorney guardians from the profession and off the Probate Division assignments list.

By transforming a system once plagued by neglect, chaos and carelessness with one marked by dedication and order, we can rebuild the District's reputation for serving and protecting the nation's most vulnerable citizens. We thank the Court for its consideration of these critical issues.

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