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COMMENTARY



'A Civil Death': Guardianship Reform Is Needed Now



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March 17, 2023 at 11:49 AM



Elder Law

By Karen C. Buck and Valerie Snow | March 17, 2023 at 11:49 AM



It has been called a “civil death.”

Guardianship usurps the autonomy and fundamental decision-making rights of an individual, when found to be “incapacitated.” It is an issue that has the attention and efforts of the Pennsylvania Supreme Court and Pennsylvania legislature, the U.S. Department of Justice, the U.S. Senate, and families, attorneys, judges and advocates around the nation. Ripe for abuse and exploitation, guardianship has enormous economic and personal impact, affecting billions of dollars and thousands of families and individuals. As of March 1, in Pennsylvania alone, there are 19,502 active guardianship cases, supervising over \$1.6 billion in assets.

Guardianship can be an important tool for helping to care for vulnerable individuals who need assistance when they lose capacity to make certain decisions for themselves. But guardianship must and should be, by law, the last resort.

Why is guardianship so controversial? Per the findings of judges, attorneys, advocates and leaders across the nation at the Fourth National Guardianship Summit in 2021, to which SeniorLAW Center was a delegate:

“While much progress has been made, the past decade continued to see reports of financial exploitation and abuse by guardians, and limited resources to track and monitor guardian activity. Stronger court oversight, better monitoring technology and creative judicial solutions are imperative.”

A guardian of the person is appointed to make personal, residential and medical decisions for an individual. A guardian of the estate makes and implements financial decisions and manages income and property. In a plenary guardianship, the guardian has the authority to make all decisions necessary for the personal well-being of the incapacitated person—a lofty responsibility indeed. Plenary guardianships are so broad and all-encompassing that the National Guardianship

Summit recommended eliminating them altogether, promoting tailored or limited guardianship only. In this way, the court specifies the areas over which the guardian has authority and the areas over which the incapacitated person retains authority.

In Pennsylvania, nearly all guardianships granted are plenary guardianships. The time is ripe for reform. Three key improvements are: appointment of counsel in all guardianship cases; guardianship certification; and enforcing consideration of less restrictive alternatives. These reforms are necessary to ensure individual rights are protected and to ensure guardianship is imposed only when absolutely necessary.

Appointment of Counsel

It is shocking that in this legal proceeding when one's most fundamental rights are at stake, there is, in Pennsylvania, no guarantee of counsel. Pennsylvania is one of only eight states which does not guarantee a right to appointed counsel for an alleged incapacitated person facing a guardianship petition. Given the fundamental liberty and property interests at stake in guardianship proceedings, it is constitutionally imperative that courts appoint counsel for all individuals facing guardianship who have not retained their own counsel.

The current guardianship statute allows "the right ... to have counsel appointed if the court deems it appropriate" but fails to define "appropriate case." While several Orphan's Courts across the commonwealth wisely and independently require the appointment of counsel as practice within that county, the system is fragmented and inconsistent. Access to counsel and justice should not be determined by your zip code. It is time for Pennsylvania to join the overwhelming majority of states that recognize that individuals facing the loss of their most fundamental rights and their autonomy through an adjudication of incapacity must be afforded counsel to ensure guardianship is imposed only if it is in fact necessary, and that it is structured in the least restrictive way.

Nevada, whose guardianship system was ripe with abuse and exploitation and cloaked in secrecy, was featured in The New Yorker's seminal article "How the Elderly Lose Their Rights," which sparked a national conversation and transformed their system in response, led by the chief justice of the Nevada Supreme Court. Nevada has successfully accomplished right to counsel with a robust legal aid infrastructure, with nonprofit attorneys representing the majority of Nevada adults facing a guardianship petition. The Nevada program estimates that its legal-aid model delivers these vital services at less than 30% of the cost of a private sector model. And the impact has been powerful, with recovery of stolen assets and protection—and in many cases restoration—of individual rights.

Importantly, appointed counsel must serve as a zealous advocate for the alleged incapacitated person—not to be confused with, or combined with, a guardian ad litem (best interest) approach. Pennsylvania Rule of Professional Conduct 1.14, Client With Diminished Capacity, makes this clear, stating that "the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client." If the lawyer believes that substantial risk of harm may occur without protective action, the rule permits seeking the appointment of a separate guardian ad litem, which can and does occur in guardianship cases when the judge wishes for an independent party to conduct a best interests analysis.

Least Restrictive Alternatives

Guardianship should be the "nuclear bomb" response. Our most fundamental liberty interests are at stake. As such, petitions should include factual allegations demonstrating that less restrictive alternatives were considered and are insufficient. These may include supported decision-making, a health care representative, a valid agent under a power of attorney or a representative payee. Courts should make specific findings of fact based on the evidentiary record demonstrating by "clear and convincing" evidence that each less restrictive alternative was considered and why it was insufficient. While current Pennsylvania law requires consideration of less restrictive alternatives, in practice, these are not routinely considered. Guardianship should be granted only when no other alternatives are sufficient to meet the needs of the individual.

Certification

In light of reports of guardianship abuse and exploitation in our communities and throughout the nation, certification of professional guardians who serve as a guardian to three or more individuals should be required. This helps ensure that individuals who are appointed as guardians will not abuse their powers. Including a criminal background check, a review of work history and a core competency examination will ensure that individuals serving as guardian to multiple individuals do not have a history of exploitation and that guardians have received the necessary training to best serve individuals under guardianship.

It Is, Inescapably, Time for Reform

Bipartisan guardianship reform is on the Pennsylvania legislative docket. Reintroduced on March 7 by Sens. Lisa Baker (R) and Art Haywood (D), SB 506 proposes all of these key improvements to the guardianship system. The Philadelphia and Pennsylvania Bar Associations have passed resolutions and recommendations supporting guardianship reform legislation. These reforms are also consistent with several recommendations of the Pennsylvania Supreme Court's elder law task force, issued in November 2014, a groundbreaking initiative led by now Chief Justice Deborah Todd. Today, the Supreme Court's advisory council for elder justice in the courts, led by Senior Judge Paula Ott and Zygmunt Pines, works to implement these and other recommendations promoting access to justice. SeniorLAW Center is proud to have been an active member of these transformative initiatives, which are models for the nation, since they launched 10 years ago.

The new Guardianship Tracking System created by the Administrative Office of Pennsylvania Courts and the Pennsylvania Supreme Court, under the leadership of the advisory council on elder justice in the courts, is one of the most sophisticated in the nation. AOPC and the court sought and were recently awarded a competitive three-year \$3 million federal grant from the U.S. Administration on Community Living to promote guardianship reform and improvement, including a pilot guardianship legal assistance project, volunteer monitoring, advanced data collection and analysis, and education and training of families, lawyers and judges. The U.S. Senate Special Committee on Aging, before which SeniorLAW Center testified in 2018 on state practices in guardianship, abuse and the impact of legal representation, continues to examine how guardianship affects the civil rights of older Americans. And just last month the U.S. Department of Justice launched an investigation into whether adults with disabilities in Pennsylvania are being unnecessarily placed under guardianship and moved into nursing homes, violating the Americans with Disabilities Act.

Guardianship reform will protect our most basic individual rights, due process, freedoms and autonomy—those of our clients, our loved ones, and one day, perhaps ourselves. What could be more fundamental to our system of justice?

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