

Guardianship Monitoring: A Demographic Imperative

Hon. Steve M. King[i]

Demographic trends are converging to create an unprecedented increase in guardianships. State courts are faced with the responsibility of ensuring their wards receive appropriate care without exploitation and neglect. A decades-long process of improving court monitoring of guardianships continues as the federal government focuses on the issue.

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Overview

The number of people age 65 and older numbered 35.9 million in 2003. As the baby boomers come of age, this older population will more than double, reaching more than 71 million by 2030.¹ The number of people aged 85 and older is expected to triple by 2040 to 15 million.²

Our awareness of Alzheimer's disease and related dementias are becoming more prevalent. In 2007 there are now more than 5 million people in the United States living with Alzheimer's disease, 4.9 million of whom are over the age of 65. This is a 10 percent increase from the previous prevalence nationwide estimate of 4.5 million. ³

In addition, guardianships include an increasing number of younger adults with developmental disabilities and mental illness. Intellectual disabilities affect about one in ten families in the USA.⁴

At the same time, incidents of elder abuse are rising. Between 1986 and 1996, reports of abuse and neglect to state adult protective services agencies of seniors age 60 and older increased 150% from 117,000 to 293,000.⁵ However, these cases are often grossly underreported. A 1998 national study conducted by the National Center on Elder Abuse estimated that approximately half a million seniors were victims of abuse or neglect in domestic settings in 1996, yet only 16 percent of these cases were reported to state APS agencies.⁶

As some of these elderly adults become physically or mentally incapable of making or communicating important decisions, those who do not have family members who can informally assume responsibility for their decision-making may require appointment of a guardian to ensure that these incapacitated people are protected from abuse and neglect.

In response to these demographic changes and the increased need for surrogate decision making, the incidence of professional or agency guardianship entities, both for-profit and not-for-profit, as well as governmental public guardianship programs have become a major factor in the provision of guardianship services for those who have no family or friends available and qualified to serve as guardian. These agency guardians must frequently functions with high caseloads and insufficient funding, making decisions about the care of their wards with little knowledge of their lives or values. ⁷

As the number of guardianships reach an all-time high and continue to escalate, methods for ensuring that such arrangements are safe and effective have become increasingly crucial. Unfortunately, the track record for the courts in monitoring those under their charge has not been particularly effective. Recent newspaper series in different parts of the country have sounded a call for increased vigilance in ensuring that wards already under guardianship are, in fact, being properly cared for and their financial and tangible assets prudently managed. 8 This admitted shortcoming not only endangers those under guardianship, it weakens public confidence in the courts.

Milestones in Guardianship Monitoring

1987 Guardians of the Elderly: An Ailing System, an Associated Press series, raised a furor that engendered a climate of guardianship reform.⁹

1988 Wingspread, the first interdisciplinary National Guardianship Symposium, convened by the American Bar Association. It made several recommendations on accountability of guardians.

1991 First national study of guardianship monitoring practices.¹⁰

1991 AARP initiated a National Volunteer Guardianship Monitoring Project funded by the State Justice Institute. The project used trained volunteers as court visitors, auditors, and records researchers, and the model was adopted by over 50 courts throughout the country. 11

1991 St. Louis University School of Law and School of Medicine developed a national model for judicial review of guardian performance based on an analysis of monitoring in six courts.¹²

1993 National Probate Court Standards. The Commission on National Probate Court Standards, under the aegis of the National Center for State Courts, set out specific procedures for guardianship monitoring.¹³

1997 Uniform Guardianship Act (2nd Revision). This revision included provisions on guardianship monitoring, and the commentary highlighted the importance of “an independent monitoring system... for a court to adequately safeguard against abuses.”¹⁴

2001 Wingspan, the Second National Guardianship Conference (the “Wingspan conference”) made seven recommendations on monitoring and accountability, drawing on and clarifying the earlier Wingspread statements.¹⁵

2003 Guardianships Over the Elderly: Security Provided or Freedoms Denied? A hearing of the U.S. Senate Special Committee on Aging¹⁶

2004 Government Accountability Office (GAO) report, Guardianships: Collaboration Needed to Protect Incapacitated Elderly People.¹⁷

2004 National Wingspan Implementation Session: Action Steps on Adult Guardianship Reform. Several national groups convened a session focused specifically on practical implementation of selected Wingspan recommendations, including those on monitoring.¹⁸

2005 National Survey on Court Monitoring - AARP's Public Policy Institute & ABA Commission on Law and Aging¹⁹

2005 "Guardians for Profit," Los Angeles Times November 2005, an extensive four-part series detailing the findings from a review of every case handled by professional guardians in Southern California between 1997 and 2003 (more than 2,400 cases).²⁰

2006 Guardianships: Little Progress in Ensuring Protection for Incapacitated Elderly People, a follow-up report to the Chairman, Special Committee on Aging, U.S. Senate, September 2006 detailing the inadequate nature of guardianship monitoring and the unwillingness of the Social Security Administration to work collaboratively for reform.²¹

2007 Guardianship Monitoring Symposium - AARP Public Policy Institute, AARP Foundation & ABA Commission on Law and Aging brought together experts to review, discuss, evaluate and add to a menu of oversight techniques as a part of their ongoing Guardianship Monitoring Project.²²

2007 Social Security Representative Payee Study – National Academy of Sciences (in progress) Approximately 5,100 representative payees and 2,500 beneficiaries will be interviewed. A final report to SSA is tentatively scheduled for release in July 2007.²³

2007 The Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act is on the agenda for consideration at the annual meeting of the National Conference of Commissioners on Uniform State Laws on July 27 and 28, 2007.²⁴

"Best Practices" in Guardianship Monitoring

Through the years of conferences, meetings and symposia, a consensus list of "best practices" to ensure effective guardianship monitoring has emerged. Although this list is not all-inclusive, using the rubric of the National Commission on Probate Court Standards, many of these best practices include:

A. Training and Outreach

- Develop and implement regular training of court staff, attorneys, guardians and court visitors to identify, understand and acknowledge their responsibilities, both in "social work" skills and "financial management" duties.
- Require certification of all professional fiduciaries.
- Provide training and comprehensive materials for guardians including forms, information on medical decision-making, government programs, community resources, etc.
- Develop "stakeholders committees" between courts, attorney groups, mental health professionals, social services staff, adult protective services, agencies on aging, long-term care ombudsman, etc. can regularly interact to exchange information on issues and challenges in the area of guardianship generally and guardianship monitoring in particular.
- Develop a vehicle for interaction between court staff in jurisdictions within the state to exchange operating procedures and collaborate on solutions.

- Develop strong working relationship between the court and state agencies to protect the elderly and law enforcement entities for referral in cases of suspected abuse.
- Advocate for sufficient court resources to support an enhanced level of court oversight and monitoring.
- Work with constituent groups to establish, amend, or repeal state legislation to improve this field of law.
- Since many courts receive no state funding, develop fee-based funding strategies to finance monitoring efforts.
- Educate budgetary decision-makers of importance and needs of guardianship services, including monitoring.
- Advocate with decision-makers for adequate statewide funding for monitoring programs.

B. Reports by Guardians

- Mandate uniform forms to ensure consistent reporting and review practices and make forms generally available (trainings, website, clerk's office)
- Require regular periodic (preferably annual) reports on the condition and well-being of the Ward and verified accountings as to all assets, receipts and expenditures
 - Require care plans for the ward and management plans for ward's estate
 - Require a final report, both for the ward and the estate, before discharge of the guardian

C. Review of Reports

- Adopt a 'redemptive' rather than 'punitive' approach to erring guardians.
- Develop uniform reporting and accounting documents, as well as audit procedures, and train court staff, guardians and attorneys on implementation and use.
- Encourage use of monthly allowances by guardians to develop budgeting skills and minimize need for "emergency" applications for expenditures.
- Observe appropriate bonding practices or require restricted access to fiduciary accounts and review bond adequacy annually.
- Require court approval of reports and accounts.
- Develop and implement computer technology to store, retrieve and sort case information including the capacity to identify and manage cases with overdue reports/accounts and trigger notification to guardians and other interested parties.
- Develop and implement a monitoring program using trained volunteers (retirees, law students, social work students, nursing students) as visitors, acting under supervision of court staff.
- Consider development of state-wide monitoring by social service agencies.

- Develop protocols for the use of e-filing in guardianships to allow guardians to electronically file reports and accounts.

D. Re-evaluation of the necessity for guardianship

- Review annually any need to alter or modify the guardianship.

F. Enforcement of court orders

- Develop a comprehensive policy for enforcement of reporting, including the use of database technology and progressive notices, sanctions and procedures for removal and replacement of guardians

Footnotes

1. GAO-06-1086T, Guardianships: Little Progress in Ensuring Protection for Incapacitated Elderly People, a report to the Chairman, Special Committee on Aging, U.S. Senate September 2006 www.gao.gov/new.items/d061086t.pdf

2. GAO-04-655, Guardianships: Collaboration Needed to Protect Incapacitated Elderly People a report to the Chairman, Special Committee on Aging, U.S. Senate July 2004 www.gao.gov/new.items/do4655.pdf

3. Alzheimer's Association Alzheimer's News 3/20/2007 http://www.alz.org/news_and_events_rates_rise.asp

4. President's Committee for People with Intellectual Disabilities, Administration for Children & Families, U.S. Department of Health and Human Services. "Fact Sheet." Retrieved Dec. 6, 2005 from www.acf.hhs.gov/programs/pcpid/pcpid_fact.html

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6. National Incidence Study, October 8, 1998, National Center on Elder Abuse www.aoa.gov/eldfam/Elder_Rights/Elder_Abuse/ABuseReport_Full.pdf

7. Karp, Naomi and Wood, Erica, Guardianship Monitoring: A National Survey of Court Practices, AARP Public Policy Institute, www.aarp.org/pp_#2006-14 June 2006

8. "Guardians for Profit," Leonard, Jack; Fields, Robin, & Larrubia, Evelyn Los Angeles Times November 13-16, 2005 www.latimes.com; "Questions, Allegations Surround Texas Probate Courts," Olsen, Lise Houston Chronicle July 9, 2007 www.chron.com

9. cited in Karp, op cit.

10. Hurme, Sally Balch. Steps to Enhance Guardianship Monitoring. Washington, DC: American Bar Association Commission on the Mentally Disabled and Commission on Legal Problems of the Elderly 1991.

11. Karp, op cit.

12. Zimney, George, et al. (1991), cited in Karp, op. cit.

13. Commission on National Probate Court Standards. Williamsburg, VA: National Center for State Courts, 1993. www.ncsconline.org/wc/CourTopics/ResourceGuide.asp?topic=ProbCt

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www.law.upenn.edu/bll/archives/ulc/fnact99/1990s/ugppa97.htm

15. Wingspan — The Second National Guardianship Conference
www.naela.com/pdf/Recommendations.pdf

16. February 11, 2003 Committee on Aging Print: 108-3
http://aging.senate.gov/hearing_detail.cfm?id=271872&

17. GAO-04-655, *supra*

18. a collaborative effort of the National College of Probate Judges, the National Guardianship Association and the National Academy of Elder law Attorneys. 45 action steps were developed to implement the Wingspan recommendations.
www.maricopa.gov/pubfid/pdf/wingspanreport.pdf

19. Karp, *op cit*.

20. Leonard, Fields, & Larrubia, *op. cit*.

21. GAO-06-1086T, *supra*

22. ABA Commission on Law and Aging Informational Report, Annual Meeting 2007
www.abanet.org/aging/about/informationalreport.shtml

23. National Academy of Sciences
www8.nationalacademies.org/onpinews/newsitem.aspx?RecordID=06252007

24. National Conference of Commissioners on Uniform State Laws
<http://www.nccusl.org/update/meetings/fullnotices/sapa0407.pdf>

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