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Guardianship in New York: Developing an Agenda for Change

The Guardianship Clinic, Benjamin N. Cardozo School of Law

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Guardianship in New York:

Developing an Agenda for Change

Report of the Cardozo School of Law Conference

The Guardianship Clinic
CARDZO LAW

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Guardianship in New York: Developing an Agenda for Change

Report of the Cardozo School of Law Conference

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The first section of this report was drafted by Rebekah Diller, director of the Guardianship Clinic, and Robert Cannon and Noam Srolovitz, students in the spring 2012 Cardozo Guardianship Clinic. They received valuable feedback from their fellow clinic students Sheri Adler, Martina Davis, Eric Gottlieb, and Gil Rein. We are grateful to the facilitators and reporters for each working group, who, respectively, planned and led the discussions on the day of the conference and wrote the summaries that appear as appendices.

The report and conference would not have been possible without the support of Kathryn O. Greenberg, whose vision and generosity led to the establishment of the Guardianship Clinic at the Benjamin N. Cardozo School of Law and to this conference.

Introduction

It has been twenty years since the Legislature passed a comprehensive set of reforms to modernize the primary means of obtaining adult guardianship in New York. Those reforms, which became Article 81 of the Mental Hygiene Law, were in keeping with a national movement at the time to increase protections for persons facing or living under guardianship.¹

Article 81 was – and remains – a model guardianship statute in many ways. Its due process protections are significant; the statute calls for no one to be deprived of their decision-making rights without a hearing, investigation by a court evaluator, and counsel, if requested.² The statute mandates a least restrictive alternative approach so that persons under guardianship are deprived of no more of their decision-making rights than are necessary to protect them from harm.³ Detailed reporting requirements aim to ensure that guardians remain accountable to those under guardianship and to the courts.⁴ In these ways, Article 81 differs significantly from New York's other form of guardianship, Article 17-A of Surrogate Court Procedures Act, which is limited to individuals with intellectual and developmental disabilities.⁵

Notwithstanding these important reforms, noteworthy challenges remain two decades later. Practitioners report long delays in what is supposed to be an expedited proceeding.⁶ Family

A dearth of resources and services places guardianship out of reach for families who cannot afford counsel and do not qualify for the limited non-profit guardianship services that are available.

members and friends encounter substantial problems commencing a guardianship case when unrepresented and navigating reporting and other requirements when they serve as lay guardians of their loved ones. A dearth of resources and services places guardianship out of reach for families

who cannot afford counsel and do not qualify for the limited non-profit guardianship services that are available.⁷ And, in some cases, guardianship is a blunt instrument, imposed too readily and with excessive powers, when a less restrictive alternative would suffice.

More dramatically, periodic scandals have exposed big shortcomings in the system for overseeing and monitoring guardians. In 2004, the Queens District Attorney impaneled a grand jury to investigate how an attorney was able to steal more than \$2 million over a five-year period from fourteen different persons for whom he served as guardian. Much of the blame, according to the grand jury, was attributable to inadequate scrutiny by court examiners – the court-appointed monitors who are mandated to review annual reports filed by guardians and are responsible for verifying the information in the reports.⁸

A 2010 Government Accountability Office (“GAO”) report identified additional examples of guardianship exploitation in New York, including a case in which the guardian misappropriated at least \$327,000 to herself, family and friends from an 82-year-old retired judge – all while presiding over the decrease of his estate from several million dollars to almost nothing.⁹ The same GAO investigation found that screening processes for guardians in New York need tightening.¹⁰

New York is certainly not alone in these problems.¹¹ Inadequate monitoring of guardianships appears to be the norm in many states.¹² Throughout the country, there is insufficient data about guardianship filings and caseloads. This lack of data extends to the most basic of facts; for example, it is not known how many people are under guardianship across the country.¹³ Training, particularly of family and friends who serve as guardians, is lacking nationwide.¹⁴

As the problems in guardianship practice persist, evolving civil and human rights norms have called into question whether guardianship itself is a violation of the rights of persons with disabilities.¹⁵ The Convention on the Rights of Persons with Disabilities¹⁶ (“CRPD”), adopted in 2006 during the sixty-first session of the United Nations General Assembly, recognizes the right of all individuals to exercise legal capacity and to receive support to exercise that capacity if, and to the extent that, assistance is needed.¹⁷ The United States is one of the 154 signatories to the CRPD.¹⁸ Although the United States has not ratified the CRPD, more than 100 countries have done so.¹⁹ The CRPD’s dictates therefore represent “the overwhelming weight of international opinion.”²⁰ Article 12 of the CRPD provides that any measures that limit an individual’s exercise of legal capacity must “respect the rights, will and preferences of the individual, must be free of conflict of interest and undue influence, must be proportional and tailored to the person’s circumstances, must apply for the shortest time possible and must be subject to regular review by a competent, independent and impartial authority or judicial body.”²¹ The Committee on the Rights of Persons with Disabilities, the authoritative body interpreting the CRPD, has urged States Parties, under the framework of compliance with Article 12, “to replace regimes of substituted decision-making with supported decision-making, which respects the person’s autonomy, will and preferences.”²²

As the guardianship landscape changes, state and national efforts at reform continue. In October 2011, the National Guardianship Network convened the Third National Guardianship Summit, which produced a set of national guardian standards and related recommendations for action by courts, legislatures and other entities.²³ The standards emphasize person-centered planning, preserving the dignity and self-determination of the person under guardianship, and maintaining communication with the court regarding changes in personal needs and financial status. Organizers aim to have local affiliates promote the standards and advocate for their incorporation into state court or administrative rules.²⁴ In New York, the Guardian Assistance Network program began offering online training for new guardians, thereby expanding the

training available to lay guardians significantly. And in the face of severe budget cuts, New York courts have preserved guardianship compliance units to monitor guardian reporting and have expanded training for court examiners.

Aims of the Conference

Against this backdrop, Cardozo Law School hosted a conference on November 15, 2011 to coincide with the launch of its new Guardianship Clinic. “Guardianship in New York: Developing an Agenda for Change” was a day-long convening of attorneys, advocates, court personnel, judges, and service providers, designed to foster dialogue and develop consensus about the next wave of guardianship reform in the state. The conference focused primarily on Article 81 but some of the recommendations bear on Article 17-A guardianships as well. The day began with a morning plenary that offered a variety of perspectives on guardianship, including an overview of national developments, discussion of alternatives to guardianship, and descriptions of public guardianship and similar programs.

After the plenary, participants broke into four working groups: 1) Streamlining Without Steamrolling; 2) Monitoring Issues; 3) Problems of Poor People in the Guardianship System; and 4) Alternatives to Guardianship. Each group was charged with discussing the problems in their particular area, envisioning ideal solutions, and then developing workable recommendations for reform. There was not a formal approval process for the working group proposals; rather, each group arrived at a consensus or majority view on core recommendations and identified some issues about which there was disagreement. The recommendations were presented initially as part of a final plenary during the conference. Afterwards, reporters for each group wrote summaries of the proceedings and circulated them to the participants for comment and revision.

The core findings and recommendations from the conference are summarized below. It was noteworthy that while the working groups’ agendas were disparate, in many cases they arrived at the same reform recommendations. Some of the suggested reforms require amendments to Article 81 and/or contemplate major changes in the guardianship system. But many recommendations are operational tweaks that could be fairly quickly accomplished with great benefit to parties and the courts alike.

The summary below captures what the conference organizers have identified as the key recommendations. It was not possible to repeat every recommendation of all the working groups and still produce a summary. The working group reports, all attached in their entirety as appendices, describe the various problems and suggested solutions at greater length and contain additional detailed recommendations.

Recommendations

General

1) **Establish a statewide task force on guardianship in New York.**

If anything is clear from the history of guardianship, it is that ongoing scrutiny is needed to ensure the system functions as intended and evolves to meet changing needs. Many of the recommendations that emerged from the working groups have been suggested repeatedly by various experts but have never been implemented. Without a standing body to identify key policy and practice issues and to coordinate reform implementation, change is not likely to occur.

New York should follow the recommendation of the Third National Guardianship Summit and establish a Working Interdisciplinary Network of Guardianship Stakeholders—or “WINGS” group—to facilitate cooperative efforts to advance best practices in guardianship.²⁵ This WINGS group would be an ongoing state-wide guardianship task force that would be charged with identifying key policy and practice issues and making and implementing recommendations for reform. Such a group would be composed of multiple stakeholders, including the courts, advocates, persons with disabilities, the private bar, persons with disabilities, lay guardians, and the service-provider community.

To date, planning for such statewide stakeholder entities has begun, is anticipated, or is ongoing at least in Missouri, Ohio and Delaware. New York can join these states at the forefront of the national guardianship reform movement by establishing its own WINGS group.

2) **Create Simplified, Standardized, Statewide Forms and Make Them Accessible Through the Web and Other Means.**

The Monitoring, Streamlining, and Problems of Poor Persons groups all recommended that guardianship-related forms be standardized, simplified, and made accessible to the public. These recommendations echo

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calls from nearly every group to study guardianship in New York in the last two decades.²⁶ The lack of standardized and simplified forms, combined with the lack of

assistance filling out existing forms, makes it next to impossible for unrepresented individuals to bring a guardianship proceeding. Moreover, the lack of standardization makes it very difficult to train lay guardians in their reporting obligations once appointed. The variety of forms among counties also poses challenges for practitioners.

The Streamlining group recommended the development of standardized, statewide orders to show cause, petitions, and judgments²⁷. These forms should be downloadable and should provide the standard language required.²⁸ Procedural guidance, broken down by county as appropriate, should also be available on the courts' websites. In addition, the Problems of Poor Persons group recommended that the Offices of the Self-Represented be responsible for providing forms and assistance to individuals seeking guardianship and individuals without counsel.

The Monitoring and Streamlining groups also recommended that standardized, statewide official forms be created for all initial, annual and final reports and be made available online. Both groups urged the courts to expand the e-filing system to accept initial and annual reports electronically.²⁹ Currently, forms vary from county to county and the requirements or standards for adequately completing these forms varies from judge to judge and from Court Examiner to Court Examiner. This makes it extremely difficult to train lay guardians.

3) **Implement Data-Gathering Systems.**

As a result of the courts' antiquated data management system, it is practically impossible to collect meaningful and comprehensive data about the guardianship system. While the system allows for calculation of the number of guardianship cases filed, it does not aggregate the number of active cases, or cases where the person under guardianship is still alive. The Monitoring group recommended implementing a data-gathering system to track the number of active cases, guardians' specific powers, whether the person under guardianship lives in the community or in an institutionalized setting, the amount of fees dispensed, and the names of the individuals appointed as court examiners and guardians. The group recognized that this information was available in individual court files but highlighted the need for a data management system that could aggregate this information and make it accessible.

Accurate, aggregate data could also guide important policy decisions. For example, the Monitoring group suggested it would be of particular benefit to know how much money was spent throughout the state on court examiners. This same amount, the group speculated, might be able to fund a non-profit agency to conduct monitoring.

4) **Promote Alternatives to Guardianship and Create a Guardianship Diversion Program.**

Guardianship is a last resort. Yet, there was widespread recognition that guardians are sometimes appointed when less restrictive alternatives would address unmet needs. The Streamlining Group recommended that a guardian of the property should normally not be appointed when assets are nominal and income can be managed through the representative payee or legal custodian process. The Alternatives group suggested studying why people do not choose available alternatives to guardianship (including power of attorney, representative payee and financial management systems, health care proxies, etc.) and ascertaining best practices for alternatives that support self-determination. The group also suggested gathering success stories about those who have used alternatives to guardianship and developing publications that describe the alternatives in ways that are easy to understand. In addition, the group recommended that advocates work with the court system to develop a guardianship diversion program to implement less restrictive alternatives to guardianship.

5) **Explore Replacing Guardianship with Supported Decision-Making Models.**

The Alternatives group recommended exploring the potential for law reform to comply with the CPRD by replacing substituted decision-making regimes with support that ensures respect for the person's autonomy, will, and preferences. The group also recommended determining whether funding might be available for a supported decision-making pilot program, which could explore the use of alternative supports in lieu of guardianship. In addition, as part of the effort to move away from guardianship toward decision-making support, the group recommended developing a lawsuit to challenge the validity of Article 17-A guardianships, which have been widely recognized as not comporting with all the due process and rights-based principles incorporated in Article 81.³⁰

Monitoring and Guardian Accountability

6) **Improve Court Examiner Training on Personal Needs Monitoring and Ensure Persons Under Guardianship Are Living in the Least Restrictive Setting.**

Both the Monitoring and Problems of Poor Persons groups recommended that the courts improve their monitoring of the personal needs of those under guardianship. The Monitoring group noted that court examiners (individuals appointed by the court to review annual reports submitted by guardians) tend to focus almost exclusively on

the finances of the individual under guardianship without scrutinizing to the same degree their personal needs or general well-being. Court examiners should receive more training on personal needs monitoring and annual reports should include more specific questions on residential status, medical treatment and social activities. The Monitoring group also called for more rigorous enforcement of the rules requiring that copies of initial and annual reports be provided to Mental Hygiene Legal Service (“MHLS”) when it represented the Alleged Incapacitated Person in the guardianship proceeding;³¹ this way, the attorneys most familiar with the individual’s needs can spot any problems.

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In addition, both groups called for court examiners to do more to ensure that the person under guardianship is being maintained in the least restrictive setting, as required by the statute.³² One means of clarifying this would be to adopt statewide guardian standards stating that the least restrictive setting is a priority that trumps the conservation of money in the person under guardianship’s estate.³³ The “least restrictive setting” standard is of particular importance to Article 81 guardianships, the Monitoring group noted, because persons under Article 81 guardianships are generally not connected to another protection or advocacy agency. As an additional measure, the Problems of Poor Persons group suggested developing more services to determine if those in nursing homes or otherwise institutionalized can resume living in the community and to assist in moving those who are able to back to community settings.

7) **Evaluate Guardianships Regularly to Determine if they Should Be Terminated.**

The Problems of Poor Persons group recommended that guardianships regularly be evaluated to determine if they should continue or, ultimately, terminate and recommended that more free legal services be made available for persons who wish to terminate their guardianships. While guardians are required to state in annual reports any facts indicating the need to terminate the guardianship or alter the guardian’s powers, there is little proactive effort by the courts to determine if a guardianship should end.³⁴

8) **Develop a Pilot, Interdisciplinary, Volunteer Monitoring Program.**

There was consensus among the Monitoring and Problems of Poor Persons groups that personal visits to persons under guardianship are needed to ensure effective monitoring. Under the current system, guardians are supposed to visit the person under guardianship four times a year and report on their visits to court examiners. But

Participants gave examples of situations where just a single intervention, such as a short personal visit, could have stopped significant abuse of a guardianship arrangement.

neither the court examiner nor anyone from the court necessarily checks with the person under guardianship themselves to see how they are doing. In addition to reporting, personal visits by someone from the court ought to be made and routine status

conferences held to determine the conditions and needs of the person under guardianship. Participants gave examples of situations where just a single intervention, such as a short personal visit, could have stopped significant abuse of a guardianship arrangement.³⁵ A pilot volunteer monitoring program should be created to do personal visits with individuals under guardianship.³⁶ Such a program exists now in Suffolk County and in a number of jurisdictions outside New York.³⁷ Should the pilot prove successful, a longer-term goal would be the establishment of a not-for-profit organization dedicated to interdisciplinary monitoring of guardianships. Such an organization would help train and supervise students from disciplines such as social work, law and accounting, retirees, and other volunteers.

9) **Reduce Backlogs for the Review of Reports and Develop a “Tickler System” to Remind Guardians of Overdue Reports.**

A significant amount of time can pass before anyone reviews a guardian's report, let alone responds to problems, in certain counties. The Problems of Poor Persons group noted that the process is akin to a lottery: in some cases the court catches when reports are overdue while, in others, it might go unnoticed. Along with the Monitoring group, it recommended the development of a “tickler system”—a program that would automatically send letters to guardians reminding them of their reporting requirements and providing due dates.³⁸ An automated system would not only provide guardians with extra reminders, but it would also save the court the time, effort, and money spent on following up on missing reports.

10) **Screen All Potential Guardians Up-Front.**

The Monitoring group recommended that courts conduct routine background checks of proposed guardians with the aim of identifying individuals with a criminal history or a

history of unethical conduct that should be disqualifying. Such screening should include a review of a person's criminal background, bar complaints, and Family Court orders of protection for domestic violence. Furthermore, it should be determined prior to the hearing, whether the proposed guardian can be bonded. The Streamlining group recommended that counsel be alerted on the courts' website and/or through official forms of the need to determine whether a proposed guardian can be bonded, has committed a felony, or has declared bankruptcy.

Improving Access for Low-Income and Unrepresented Individuals

11) Create a Standardized Complaint Procedure.

It is currently unclear how a concerned person or a person under guardianship should register a complaint about a guardian's conduct. There is no central place where such complaints can be directed. The process currently requires the complainant to track down the particular judge with authority over the guardianship—a burdensome process for non-lawyers—and contact chambers. Every judge, in turn, handles complaints differently.

It is currently unclear how a concerned person or a person under guardianship should register a complaint about a guardian's conduct.

The groups recommended two responses to this problem. First, the Problems of Poor Persons group recommended that letters to the court from unrepresented individuals not be discarded or disregarded as ex parte communications, but should be furnished by the court to all parties and reviewed to determine if the letter should be treated as a motion for relief. Second, the Monitoring group recommends the creation of a Guardianship Ombudsman office – similar to the Long Term Care Ombudsman Program—that would be responsible for fielding complaints about the guardianship process.

12) Simplify Reporting Requirements for Lay Guardianships with Minimal Assets.

The Streamlining group suggested two changes that would help simplify the requirements where the guardianship has limited funds. First, the group recommended that clerks not conduct a review of the court examiner's report concerning property where resources are below a specified floor and when there has been no significant principal received during the accounting period. This streamlining measure may be in tension with the concern for personal needs monitoring expressed

by the Monitoring group. The group made room for exceptions, in which case review of such accountings should be limited to the staff of the appointing judge and the Court Examiner. Second, the group posited that annual accountings for low-asset/income cases should consist only of copies of bank statements and canceled checks together with a brief summary statement. The Streamlining Group also suggested that when appropriate, in low asset/income cases, guardians should be given an approved budget and not be required to give a line item accounting of expenditures within that budget.

The Problems of Poor Persons group suggested simplifying the reporting requirements for low-asset/income estates, in particular where the sole asset is Social Security, Supplemental Security Income (“SSI”) benefits. The group envisages a far less detailed accounting form potentially modeled on the short reporting form used by the Social Security Administration for representative payees.

13) **Improve Language Access in All Guardianship Matters and Especially for Lay Guardians.**

Both the Monitoring and Problems of Poor Persons groups flagged the lack of translation services and forms in languages other than English as a serious concern. Currently, all correspondence (including, for example, report forms and supplemental testimony questions sent by court examiners) in guardianships is conducted only in English. The Monitoring group noted that family members who serve as guardians often times have limited English proficiency and, as result, have great difficulty filling out reports and adequately corresponding with court examiners. This results in court examiners, and ultimately the court itself, not being able to properly monitor the financial condition and/or personal well-being of the person under guardianship.

The groups recommend that (1) the courts provide translation services for interactions that guardians have with their court examiners, and that (2) the courts develop pro se “plain English” forms and instructions for guardians, as well as instructions in other languages.³⁹

14) **Expand Guardian Training and Mechanisms for Guardian Assistance.**

Three of the four workgroups recommended more guardian training and assistance post-appointment. While guardians are required to attend training after appointment, there is little continuing training or assistance thereafter. These shortcomings cause problems. Monitoring is more difficult when guardians do not file proper and timely reports. It is especially a problem for low-income, lay guardians.

The Monitoring group called on the courts to provide *pro se* guardian clerks who would be available to walk lay guardians through the various processes and explain requirements. For those guardians requiring the most assistance, this would be a quick and easy way for them to obtain the help that they need. The Problems of Poor Persons group recommended enlarging and replicating the Kings County-based Guardianship Assistance Network, which provides assistance and services to family members or friends appointed as Article 81 guardians.

Lastly, the Streamlining group recommended the creation of a procedure whereby lay guardians can get assistance in qualifying. The group posited that such a responsibility might fall on petitioner's counsel or on a *pro se* clerk. Additionally, the Streamlining group recommended creating a hotline that lay guardians could access for assistance after being appointed, at which volunteers or court personnel could refer guardians to online resources or otherwise point them in the right direction.

15) **Evaluate the Impact of Fee Caps for Guardians and Exempt Court Examiners from the Caps.**

Current court rules provide that if an individual has been awarded more than \$75,000 in compensation from court appointments during any calendar year, that person may not receive compensated fiduciary appointments during the next calendar year.⁴⁰ In addition, no one may receive more than one appointment within a calendar year for which the compensation anticipated to be awarded in a calendar year exceeds \$15,000.

It is widely recognized that the goal of these “caps”—to root out corruption and patronage in court appointments—is salutary. However, concerns have been expressed about unintended consequences such as preventing economies of scale necessary to build a successful practice as a professional guardian or court examiner.

Accordingly, the Problems of Poor Persons group recommended studying whether the cap on appointments adversely affects the ability of private law firms to take on low-income guardianship cases and, if so, re-evaluating the cap. Likewise, the Streamlining group recommended that Court Examiners' fees should not be subject to these caps, and that the court examiner fee structure as a whole be re-examined and revised.

16) **Expand public guardianship-type services and free legal services.**

Unlike other states, New York does not have a Public Guardian program to serve as guardian for those with limited income. This creates enormous problems when no one is available to serve as guardian. In New York City, when a guardianship is

commenced by Adult Protective Services, non-profit agencies may serve as community guardians. Nassau County has a community guardianship program as well for cases

Projects such as Vera should receive increased funding to permit them to be expanded and replicated throughout the state, as an alternative to a public guardian program.

commenced by the Department of Social Services. However, when cases are not brought by Adult Protective Services, there is no such service in place and judges struggle to find guardians to serve, especially when the person under guardianship has no significant resources. In

other parts of the state, there are no significant community guardianship programs. The Vera Institute of Justice fills this gap somewhat in New York City by serving as a pilot public guardian-type project. Projects such as Vera should receive increased funding to permit them to be expanded and replicated throughout the state, as an alternative to a public guardian program.

In addition, more free legal services are needed at every step in the process: legal services to avoid guardianship, to commence guardianship proceedings, to help guardians with guardianship related filing requirements and the legal problems of their wards, to terminate guardianships that are no longer necessary. Dedicated funding for legal services programs for this purpose (from public and philanthropic sources) would be appropriate, as well as encouragement of pro bono initiatives, including provision of CLE credits for volunteer attorneys. However, even in the absence of additional funding, legal services programs should be encouraged to provide guardianship-related legal services; currently almost no such offices do so.

Eliminating Unnecessary Procedural Bottlenecks

17) Combine the Order and Judgment Appointing a Guardian with the Commission.

The Streamlining group recommended having a single document contain the Order and Judgment and the Commission, thereby consolidating what are now two independent steps that can produce delay in the process.

18) Notify Guardians When Court Examiners Change and Ensure Examiners Turn Over their Files to Their Successors.

The Streamlining group recommended that guardians be notified when court examiners are removed and steps be taken to ensure that the exiting examiner hands over his or her file to their successor.

19) **Reduce Unnecessary In-Court Appearances.**

Routine status conferences, such as initial conferences to determine whether the guardian has obtained his or her commission or those to verify whether all qualifying documents have been filed, should be held by conference call unless the court determines it is not appropriate. A status conference to address financial reporting issues may be waived if the court examiner confirms to the court that the guardian has carried out his duties.

20) **Simplify the Final Accounting Process Upon the Death of A Person Under Guardianship.**

The Streamlining group suggested a number of measures to expedite what can now be a drawn out process to settle a final accounting and discharge the guardian upon the death of a person under guardianship. First, the use of Mental Hygiene Law § 81.34—which permits the court to issue a decree discharging the guardian upon the filing of a petition—should be encouraged; there should be streamlined or no review where accountings are submitted on that basis. Guardians should be permitted to file final accountings that consist of copies of all approved annual accountings, an accounting for any period for which an annual account has not been approved, plus a summary statement. The final accounting should supersede and make unnecessary review of unapproved annual accountings by the court examiner.

Appendix A

Streamlining without Steamrolling Working Group Report

FACILITATORS:

Lesley De Lia – Director, Mental Hygiene Legal Services, 2nd Judicial Department
Laura Negrón – Director, The Guardianship Project, Vera Institute of Justice
Ira Salzman – Partner, Goldfarb, Abrandt, Salzman & Kutzin LLP

On November 15, 2011 the Cardozo Law School hosted an all-day conference on the subject “Guardianship in New York, Developing an Agenda for Change.” This report is a summary of the discussions and recommendations emanating from a workshop that was held as part of that conference concerning streamlining the guardianship process.

THE PARTICIPANTS:

In addition to the facilitators, there were 20 attendees at the workshop, as shown below. Attendees agreed that in order for any recommendation to be adopted, 75 percent of the participants would have to voice agreement. Therefore, the fact that a recommendation was adopted by the group is not a statement with regard to the views of any particular attendee. In addition, a small number of participants were not present for the entire workshop.

Office of Court Administration and Court Personnel (11)

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RECOMMENDATIONS

The following recommendations were agreed upon by at least 75% of those who attended the workshop.

Web Site Issues

1. Statewide forms should be adopted and be made available at one web site in a form that is downloadable to a word processor.
2. Procedures should be adopted to make people aware of the web site, including but not limited to rubber stamps placed on all orders to show cause and judgments appointing guardians that alert participants to the web site.
3. Procedural guidance, broken down by county as appropriate, should be available on the web site.
4. Procedures on paper should be available for pro se litigants who do not have web access.

The Application Process

1. There should be state-wide official forms for the order to show cause, petition and judgment. These forms should be available online in a format that is downloadable to a word processor. The goal of these forms should be to advise counsel of the standard language that is required, while at the same time, providing flexibility based on the facts of each case. The forms could provide checklists with regard to powers, but should not be an excuse to eliminate the process by which powers are tailored to the needs of each incapacitated person. When the need to file a petition is emergent, subject to any statutory requirements, there should be sufficient flexibility to skip certain information on the condition that it be provided as soon as it becomes available but in no case later than by the return date.
2. Counsel should be alerted, on the web site and/or in official forms, of the need to determine prior to any hearing whether the proposed guardian can be bonded, has committed a felony, or has declared bankruptcy. In addition, all proposed guardians need to be made aware of the duties of a guardian. Counsel should be alerted to the possibility of using restricted accounts or other options, such as but not limited to the appointment of a co-guardian, when a proposed guardian cannot be bonded for all of the assets of the incapacitated person.
3. Normally, a guardian of the property should not be appointed when assets are nominal and income can be managed through the representative payee or legal custodian process. Nominal assets can be transferred to a representative payee or legal custodian account by court order without the need for the appointment of a guardian.
4. Reducing the time between the court's decision to appoint a guardian and the guardian's authority to act could be achieved by consolidating the steps involving the submission of the bond and executed Oath and Designation with the signing of the Order and Judgment, such that a single document could include the Order and Judgment and Commission. This option should be further explored and implemented.

Serving as Guardian

1. There should be a mechanism whereby lay guardians are assisted in qualifying. This responsibility should in the first instance, fall to the petitioner's counsel,

or where appropriate, a pro se clerk. Ministerial assistance, such as referral to online resources, could be provided by court personnel.

2. Routine status conferences, such as initial conferences to determine whether the guardian has obtained commission or to verify whether all qualifying documents have been filed, should be held by conference call unless the court determines that a conference call is not appropriate. A status conference to address financial reporting issues may be waived if the court examiner confirms to the court that the guardian has carried out his duties.
3. There should be a formal procedure to obtain relief or guidance with regard to expenditures requiring court approval. A procedure similar to the one utilized in Queens County should be considered. (*See Short Form Application/Order on page 23.*)

Technology Issues Concerning Initial Reports, Annual Accounts, Intermediate Accounts and Final Accounts

1. In Minnesota, all accountings are filed online. The online system checks math and flags possible errors. The use of a similar system in New York should be explored. If an electronic filing system is established, it should accommodate the uploading of statements.
2. Absent an online system, statewide official forms, made available online in a form that can be downloaded to a word processor, should be mandated for all initial reports, annual accountings, intermediate accountings and final accountings.

Annual Accountings

1. Manhattan is currently conducting a pilot effort whereby all annual accountings are intermediate accountings, and a similar procedure is followed in Kings County. If successful, this approach should be implemented statewide.
2. Annual accountings for which the opening and closing balance is under \$25,000.00 should not be reviewed by guardianship clerks unless there has been significant principal received during the accounting period. In such cases, review should be limited to the court examiner and the staff of the guardianship judge.
3. For guardianships in low-asset/income cases, annual accountings should consist of copies of all bank statements and canceled checks plus a brief summary statement. Specific asset and income levels should be defined.
4. The rules with regard to the interpretation of S.C.P.A. § 2307 and § 2309 should be standardized.
5. Financial institutions should be required to send electronic copies of all statements to the court examiners, with the understanding that the court examiners would not be required to actually review them until they review the annual accounts.
6. Where court examiners are removed or have resigned, the guardians whose cases are assigned to them should be timely notified by the court. In addition, there should be specific requirements that resigning or removed court examiners turn over their files to their successors. A compliance conference should be scheduled to make sure that this turnover has taken place.
7. When appropriate, in low asset/income cases, guardians should be given an approved budget and not be required to give a line item accounting of expenditures as long as they stay within the budget. Specific asset and income levels should be defined.
8. The fees of court examiners should not be subject to the Part No. 36 caps. The fee structure of court examiners should be revisited.

Final Accountings

1. The use of Mental Hygiene Law § 81.34 should be encouraged and there should be no review or streamlined review where accountings are submitted on that basis.
2. In appropriate cases, the order appointing guardian should have different definitions of interested parties when an incapacitated person is alive and when an incapacitated person is deceased. This would make it clear who needs to consent when an application to settle a final accounting under Mental Hygiene Law § 81.34 is made.
3. Guardians should be permitted to file final accountings that consist of copies of all approved annual accountings, an accounting for any period for which an annual account has not been approved, plus a summary statement.
4. Review of unapproved annual accountings by the court examiner should cease upon the filing of the final accounting.

Education

More comprehensive education and training of guardians should be ensured. This would promote greater efficiency and reduced delays.

ADDENDUM

There were a number of issues that were discussed at the workshop but about which no consensus could be reached. In addition, there were a number of issues that the facilitators planned to submit to the workshop for discussion, but were prevented from doing so because of time constraints. The facilitators believe that some or all of these issues are nevertheless worthy of at least continued discussion if not active consideration. They are therefore listed below.

1. While there was total agreement that there is sometimes an unacceptably long delay between the conclusion of a hearing at which a decision is made to appoint a guardian and the issuance of an order that allows the guardian to qualify and act, there was no consensus as to how to eliminate this “choke point.” Court personnel expressed a preference for ordering the transcript and crafting the order and judgment in accordance with the findings on the record despite the delay it causes while practitioners generally felt that this step should be dispensed with.

2. There was some discussion of issues about how to filter out guardianship cases that should not be brought in the first place without adding another step that makes the process even more cumbersome. There was little agreement as to how to deal with this problem, the obstacle being the court clerks cannot give legal advice and should not be deciding legal issues. It was proposed that cases filed by nursing homes and hospitals to facilitate collection efforts with no benefit to AIP should be diverted and dealt with separately. It was proposed that cases brought to obtain health care decision-making authority should be reviewed in light of the Family Health Care Decision Making Act and, in appropriate cases, be diverted and dealt with separately. However, the mechanics of implementing proposals such as these was a major concern to all in that no one wanted to add a step that would cause further delay in all cases.

3. It was suggested by some that it would be helpful to bifurcate some contested proceedings and/or utilize the services of a mediator in these cases. If a case was bifurcated, the court could hold an evidentiary hearing on the issue of whether the AIP needed a guardian and then use the service of a mediator to attempt to forge a consent as to who should be appointed as guardian. Those concerned about this process felt that it might make the process more cumbersome, more time-consuming, and more expensive. One participant thought that bifurcation should be used to isolate the issues that are not germane to the determination of whether the AIP is functionally impaired and in need of a guardian. This might include issues such as applications to void real estate transactions and/or gifts made by the AIP. Others thought that issues with regard to voiding transactions often involve the same underlying facts which necessitate the appointment of a guardian. It was pointed out that at least with regard to some ancillary issues, if they remain in the guardianship proceeding for determination, third parties who may be affected by the determination would have to be made parties to the proceeding. This might actually prolong cases rather than speed them up. There was some agreement that it would be possible to separate the determination of the need for a guardian from the determination of who should serve in that capacity, but the questions of what mediation would look like, whether it be done by the court or outside mediator and how it would be paid for were not resolved.

4. It was suggested by some that the testimony prepared by the court examiners should be eliminated. One idea was to have testimonies replaced with a brief statement and make a summary sheet stating the total assets, total income, total expenditures, where the AIP lives and the age of the AIP. It was thought that the annual accounts of the guardian are given under oath and that the

testimony represents unnecessary duplication of work. This issue was never fully discussed by the workshop participants.

5. It was suggested by some that the Mental Hygiene Law be amended to permit final accountings to be settled in the same way as estates are settled in the Surrogate Court. This would include the use of receipts and releases. It was suggested by some that if this statutory amendment was proposed it should specifically limit the use of receipts and releases to guardians who are family members and/or guardians who are not Part 36 appointees.

6. It was suggested by some that there needs to be a structured operational review of the guardianship process. Vera Institute of Justice is now undertaking a preliminary review of 175 Kings County cases. It is examining the time period between petition and signed order, the fee payments on accounting and the time between the date of the death of the incapacitated person and the date of discharge of the guardian. This could be useful as a model for other guardians to document their experiences or for further study/grant funding and may help provide a stronger, evidence-based approach in making the fee lag and other service delay and resource drain issues clear. This issue was not fully presented to the workshop participants because of time constraints.

**Exhibit to Streamlining Report, Queens County Form for Expenditures Requiring
Court Approval (Serving as Guardian, Point 3)**

SUPREME COURT: STATE OF NEW YORK
COUNTY OF QUEENS
In The Matter of _____

SHORT FORM APPLICATION/ORDER
FORM 101

Index No. _____

[Name of IP]

An Incapacitated Person. _____

To The Justice Presiding

1. Guardian respectfully requests permission to expend the sum of \$ _____
For the following:

The current amount of the estate is \$ _____

2. The Guardian believes that the aforesaid expenditure is for the direct benefit of the incapacitated person.

3. I have annexed supporting expense estimates and other necessary information.

Date _____

Signature of Guardian/Fiduciary

Notary Public

-----To Be Submitted to Court Examiner For Consideration-----

I respectfully recommend _____ I do not Recommend _____
Comments _____

Date _____

Signature of Court Examiner

-----TO BE SUBMITTED TO ASSIGNED JUDGE FOR DECISION-----

UPON READING AND FILING THE FOREGOING EXPENDITURE IS

APPROVED _____ NOT APPROVED _____

DATE _____, J.S.C.

Appendix B

Monitoring Working Group Report

PARTICIPANTS

- Facilitators: Jean Callahan, Executive Director, Brookdale Center for Healthy Aging & Longevity of Hunter College
Erica Wood, Assistant Director, American Bar Association Commission on Law & Aging
- Reporter: Rebekah Diller, Clinical Assistant Professor of Law and Director, Guardianship Clinic, Benjamin N. Cardozo School of Law
- Participants: Meg Bailey, Mental Hygiene Legal Service (“MHLS”), Orange County
Jamie Butchin, MHLS, Nassau County
Hon. Kristin Booth Glen, Surrogate, New York County
Hon. Paula L. Feroletto, Administrative Judge, Eighth Judicial District
Debra Gandler, Guardianship Compliance Part - Kings County Supreme Court
Kathy Greenberg, Esq.
Degna Levister, Supervising Attorney, CUNY School of Law Elder Law Clinic
Alex Mondesir, Guardianship Compliance Part – Kings County Supreme Court
Emily Rees, Student Attorney ,CUNY School of Law Elder Law Clinic

DISCUSSION

This Working Group examined ways in which the monitoring of existing guardianships could be improved.⁴¹ The group began by defining “monitoring” as everything that happens in the guardianship process after a guardian is appointed. The discussion was then divided into three parts. First, the group discussed problems and gaps in New York’s current system for monitoring guardians. Second, the group engaged in a visioning exercise, in which we developed a “wish list” of how guardianship monitoring would take place in ideal circumstances. Third, we transformed this wish list into concrete, achievable recommendations for reform. This report follows the same three-part structure.

A. Monitoring Problems

The group discussed a wide range of monitoring problems known to occur after the appointment of a guardian. They largely fell into one of the following four categories: 1) problems with the court examiner system; 2) the lack of a standardized complaint

procedure when guardians perform unsatisfactorily; 3) obstacles encountered by lay guardians attempting to comply with reporting requirements; and 4) lag times and inadequate data management systems in the courts.

1) **Problems with the Court Examiner System**

New York law requires that guardians submit an initial report within 90 days of appointment and annual reports thereafter. The courts rely on “court examiners” – usually private attorneys appointed by the courts⁴² – to examine those reports and determine the condition, care, and finances of the person under guardianship as well as the manner in which the guardian has carried out her duties and exercised her powers.⁴³ Court examiners are generally compensated for their work out of the individual’s estate, when the estate has sufficient funds.

Participants pointed to a number of problems with the court examiner system. First, while the court examiner is statutorily required to “determine the condition and care” of the person under guardianship,⁴⁴ many in the group believed that court examiners tended to focus almost exclusively on examining finances and not personal needs or well-being. For example, one participant noted that she had never heard of a court examiner demanding a conference with a guardian to inquire about a personal needs issue.

This tendency, some thought, reflected the fact that court examiners tend to be drawn primarily from the ranks of attorneys and not from other professions, such as social work, that are more accustomed to assessing personal needs. In addition, participants noted, examiners do not receive special training in personal needs assessments.

Relatedly, while Article 81 generally incorporates the “least restrictive alternative” concept, participants observed that there is often no meaningful analysis by the court examiner of whether the person under guardianship is being maintained in the least restrictive setting. In the initial, 90-day report, guardians with personal needs powers must set forth a plan for providing for those needs. In annual reports thereafter, guardians of personal needs must include “a statement of whether the current residential setting is best suited to the current needs” of the person under guardianship.⁴⁵

However, participants observed that court examiners were not in the practice of scrutinizing these aspects of the reports closely to determine if the person

under guardianship was living in the least restrictive setting. Participants believed that there should be a clearer standard requiring such scrutiny. It was also suggested that the standard for examining reports should be clarified to emphasize that living in the least restrictive setting is a priority that trumps the conservation of money in the individual's estate.⁴⁶ The lack of clarity on this point, combined with the obstacles people in the community face when seeking home care, creates a perverse incentive structure that pushes persons under guardianship toward nursing homes and institutionalized care.

One participant noted that this “least restrictive alternative” watchdog function was especially important for those under Article 81 guardianships because they are generally not connected to any other agency charged with looking after their welfare, as exists for developmentally disabled individuals under Article 17-A guardianships.⁴⁷

Participants from Mental Hygiene Legal Service who represent Alleged Incapacitated Persons during the guardianship proceeding also noted that they do not generally receive copies of the initial and annual reports filed by guardians though service on them is required under the statute⁴⁸ and they may be uniquely situated to spot problems in the personal needs area.

2) **Lack of standardized complaint procedure**

Participants also noted that despite the various safeguards built in to Article 81, it was unclear how a concerned person or individual under guardianship could register a complaint about a guardian's conduct. Lodging a complaint requires figuring out who the judge is with authority over the guardianship, a cumbersome task for a non-lawyer. There is no centralized place or one individual to whom complaints about guardianship can currently be directed.

In addition, once the correct judge is identified, the procedure for registering a complaint is likely to vary significantly from court to court and chambers to chambers. Some judges may ask that a letter be submitted; others may handle it differently. Several participants noted that even if someone writes to the court or registers a complaint in some other fashion, there is no guarantee that the court will follow up on such a complaint or investigate the allegations further.

3) **Obstacles for lay guardians**

The group also discussed the many problems encountered by lay guardians – usually family members or loved ones of the person under guardianship -- who have trouble navigating the reporting requirements. A common complaint heard from lay guardians is that court examiners require lengthy “testimony” in addition to reports submitted. The testimony – additional questions to be answered in writing under oath – is often onerous, confusing, and unnecessary for lay guardians, participants said.

The lack of standardized reporting forms was also seen as a significant problem. Forms vary from county to county and requirements for filling out those forms vary from judge to judge and court examiner to court examiner. In addition, there is no standardized form for the additional testimony court examiners may require. This lack of standardization makes it very difficult to train lay guardians.

Beyond the initial court-mandated training for lay guardians, there is little assistance for lay guardians in meeting their compliance obligations after they are appointed. The courts do not send letters to remind them of their deadlines to submit annual reports. Lay guardians often have trouble filling out the financial parts of the annual reports. For example, it is sometimes the case that a court evaluator, when performing his or her investigation prior to the appointment of a guardian, might identify the possible existence of certain bank accounts but not establish their existence for a fact. As a result, when a guardian files the initial report 90 days after appointment, there is not a definitively established list of accounts against which the court examiner can compare the guardian's report. Lay guardians in particular have trouble resolving this appearance of a discrepancy.

Language access was also identified as a significant barrier for lay guardians. Family members who serve as guardians may have limited English proficiency (LEP) and, as a result, may have difficulty filling out the report forms, which currently exist only in English. In addition, the supplemental testimony questions sent by court examiners are also only sent in English, making it difficult for family members to comply.

4) **Lag times and inadequate data management systems**

Participants noted a more fundamental problem of long lag time and backlogs for reviewing all reports. For example, Kings County currently has 24 examiners for a total of 1,500 guardianship cases filed (though it is unknown how many of these cases remain open). In many parts of the state, long stretches of time can go by before anyone takes a look at reports submitted, much less responds to any problems noted. In addition, the current data management system used by the courts does not generate “ticklers” to remind guardians of their obligation to submit reports.

Antiquated data management systems in the courts also mean that it is impossible to obtain basic data about the guardianship system. Current court data systems can determine how many guardianship cases have been filed (via the specialized index number for guardianships). However, the information systems do not reflect how many of those filed cases are still active or in how many of the cases the person under guardianship is still alive. In addition, there is a lack of transparency about fees expended in guardianships. It may be possible to determine how fees were dispensed within one guardianship case; however, there is no data on the total amounts of fees expended for court evaluators and court examiners. The lack of aggregate data makes it difficult to make basic policy decisions in an informed way.

B. **Wish List: Ideal Solutions to the Monitoring Problems**

The group then brainstormed about ideal solutions to these problems. First, participants said they would want better data about the guardianship system, including the total number of existing adult guardianships, how many of those are guardianships of the person or of the property or of both, the primary reason for the guardianship, the time it took from filing to commission, the time it took to examine and settle a report, and the aggregate number of appointments for individual guardians and court examiners. Of particular use would be to know how much money is spent statewide on court examiners. Depending on the answer, it is possible that the aggregate amount could be used to create a more efficient and vigorous monitoring system.

Second, the group discussed using the aggregate amount of fees currently spent on court examiners to fund a not-for-profit organization whose mission would be to engage in interdisciplinary monitoring of guardianships. This monitoring organization could train and supervise students from disciplines such as social work, law and accounting,

retirees and other volunteers to monitor guardians. Monitoring would be done in teams consisting of students or volunteers with backgrounds in different disciplines.

Key to this approach would be personal visits by the monitoring team to the person under guardianship to assess his or her condition and needs. One participant who represented a young person who had been financially exploited by his guardian noted that if just one person from the courts had talked to the boy and his family about the choices his guardian was making, the abuse could have been stopped and/or prevented.⁴⁹

Under the existing system, participants also recommended the following changes to ensure that monitoring is vigorous, as due process requires⁵⁰:

- substantial training of court examiners on personal needs issues;
- having the court evaluator who has made an extensive factual investigation at the appointment stage serve as the court examiner;
- the creation and imposition of standards for guardians⁵¹; and
- an ombudsperson to field complaints about the guardianship system, like the existing Long Term Care Ombudsman Program (or LTCOP) in New York that investigates long-term care complaints.

The group also recommended the following changes to help lay guardians comply with their reporting obligations:

- ensuring the availability of adequate translation services for lay guardians when are asked to submit testimony⁵²;
- standardizing guardian report forms and the monitoring process statewide;
- the creation of *pro se* guardian clerks who could walk lay guardians through the process;
- the creation of do-it-yourself (“DIY”) computer kiosks that lay guardians could use to enter information and generate reports.

C. **Recommendations for Reform**

The group then refined and expanded upon these ideas to develop a list of achievable reform recommendations. Those recommendations were grouped into five categories:

1) **Standardize the monitoring process and improve the courts' data management capacity.** Better information systems and standardization were seen as key to the following needed improvements:

- **Standardize the forms used in the guardian reporting process.** There should be one set of forms for initial, annual and final reports used statewide.
- **Place the forms online, preferably in an interactive program that permits guardians to enter information, generate a report, and then e-file that report.** For example, Minnesota has recently instituted an online program to generate and file annual accountings.⁵³
- **Implement a data-gathering system that could generate reports on the total number of existing adult guardianships, whether the guardianships are of the person, the property or both, the primary reason for the guardianship, the time it took from filing of the petition to issuance of the commission, the time it took to examine and settle a guardian's report, whether the persons under guardianship live in the community or institutionalized settings, the amounts of fees dispensed, and the aggregate number of appointments for individual guardians and court examiners.** This information exists in individual court files but there is no data management system to aggregate the information.
- **Develop a "tickler system" to send letters to remind guardians that reports are due.** Currently, Article 81 guardians receive no such reminder notice; rather, they only hear from the court after they have missed a deadline. An automated system to send reminder notices could save the courts time and effort later to track down missing reports. The Surrogate's Court in New York County currently sends such reminders to Article 17-A guardians.

2) **Improve personal needs monitoring.**

- **Under the existing system, train court examiners to assess more rigorously guardians' reporting on personal needs.** Appointing the court evaluator in a case as the court examiner after the guardianship commences may also be helpful because the court evaluator has visited the individual and done an extensive factual investigation of his or her needs.

- **Make clear that personal needs should be prioritized over cost savings in guardian decision-making.** This principle should be incorporated into court examiner and guardian training.
 - **As an alternative to the existing court examiner system, develop a pilot, interdisciplinary monitoring program in which team members from various disciplines visit persons under guardianship and review guardian reports.** Such a program could leverage participation from local social work, accounting and law schools and recruit retirees and other volunteers to participate. This pilot would benefit from the American Bar Association's Commission on Law and Aging recently published Volunteer Guardianship Monitoring Handbooks that provide a template for development of volunteer monitoring programs.⁵⁴
 - **Ensure that attorneys who have represented an alleged incapacitated person receive subsequent guardian reports.** The statute currently requires guardians to send Mental Hygiene Legal Service with copies of annual reports when MHLS served as court evaluator or counsel for the alleged incapacitated person.⁵⁵ However, MHLS attorneys report that they rarely receive such reports.
- 3) **Conduct better screening of guardians up-front.** The courts should conduct background checks up front of proposed guardians to identify and permit judges to screen out those with a criminal history or history of unethical conduct. Such screening should include a criminal background check, review of bar complaints, and a check of Family Court orders of protection for domestic violence. To conduct these checks, proposed guardians should be required to provide their Social Security numbers and dates of birth; the courts need mechanisms to protect the privacy of this information.
 - 4) **Improve language access for lay guardians.** The courts should provide annual report forms in multiple languages so that lay guardians with limited English proficiency are better able to comply with their reporting obligations. In addition, the courts should ensure that translation services are available when lay guardians must respond to testimony or other requests from their court examiners.
 - 5) **Create an ombudsperson's office and standardized complaint procedure.** There should be one central office that a concerned individual could call to register a complaint or concern about a guardian. In addition, there should be

an accessible and standardized process in place in the courts to make a complaint.

Appendix C

Problems of Poor Persons in the Guardianship Process Working Group Report

FACILITATORS:

Janet Lessem, M.S.W.

Toby Golick, J.D.

PARTICIPANTS:

The participants comprised a mixed group of advocates (including lawyers and law students in law school elder law clinical programs), and court personnel, including judges:

Steve Atchison, Selfhelp Community Services Inc.

Hon. Betsy Barros, Justice, Dedicated Guardianship Part, Kings County Supreme Court

Georgeann Caporal, Mental Hygiene Legal Services

Helen Ferraro-Zaffram

Professor Gretchen Flint, Clinical Professor, Pace Law School

Jesse Freeman, CUNY Law Student, Elder Law Clinic

Carrie Goldberg, Supervising Attorney, Vera Institute of Justice Guardianship Project

Professor Toby Golick, Clinical Professor, Cardozo Law School

Aaron Hauptman, Court Attorney, Hon. Hagler, Special Integrated Guardianship Part

Janet Lessem, Director, Guardian Assistance Network

Deirdre Lok, The Weinberg Center for Elder Abuse Prevention at the Hebrew Home

Diane Lutwak, Supervising Attorney, Legal Aid Society Office for the Elderly

Renee Murdock, CUNY Law Student, Elder Law Clinic

Michael D. Neville, Mental Hygiene Legal Services

Marita Robinson, CUNY Law Student, Elder Law Clinic

Professor Edward Tetelman, former New Jersey Public Guardian, Adjunct

Professor Rutgers University School of Social Work

Felice Wechsler, Mental Hygiene Legal Services, 1st Department

DISCUSSION:

There is widespread recognition that the problems resulting from incapacity are not limited to persons of financial means. But much of the guardianship system is focused on protection of

finances of an incapacitated person, with the expectation that funds exist to meet the costs of managing a guardianship. When the incapacitated person has inadequate resources, though, these assumptions collapse, and the problems of incapacity, along with the burdens of poverty, create huge challenges. Our discussion group identified some of these challenges, and made a number of recommendations, some easily implemented, and some possible but requiring legislative or regulatory changes.

Avoiding Guardianship: All agreed that guardianship, with its attendant loss of autonomy, is a last resort. We discussed some of the ways that guardianship could be avoided, with a particular focus on low-income individuals. Some recommendations were in the category of providing more outreach and education to individuals in low income groups about planning for the possibility of incapacity, to increase the use of planning documents like powers of attorneys where appropriate. The need for increased available of social services that would include voluntary financial management was noted. Other recommendations focused on the potential role some of the agencies that have contact with poor persons could play in identifying “at risk” individuals earlier in the process. The New York City Housing Authority (NYCHA) was particularly mentioned, since over 630,000 people live in NYCHA housing, but too frequently that agency’s first, rather than last, step in dealing with a problem tenant is an eviction proceeding. Finally, participants discussed the problems of agencies, such as Medicaid or Mitchell-Lama housing, refusing to deal with family members, making it necessary to get a guardianship merely to accomplish a non-controversial task such as recertifying for housing.

Some participants mentioned the fact that although Article 81 contemplates limited and short-term guardianships, guardianship orders tend to give full powers to the guardian for convenience, to avoid the need for coming back to court repeatedly to expand powers. It was also mentioned that guardianships, once established, tend to continue, without much consideration of whether they are still needed. These issues are not unique to low-income populations, however.

Simplification: While simplification of procedures has virtues across the board, the complexity of guardianship procedures causes particular problems for poor people who may not have access to legal counsel, and who may also be poorly educated or not fluent in English. A number of recommendations dealt with making the procedures more accessible and easier for unrepresented individuals to use, by providing clear instructions and forms using plain language.

Gaps in service: There was considerable discussion of the areas where limited (or non-existent) funding has created great difficulties in the system. Lack of funding for

free legal services creates huge barriers for individuals attempting to navigate the guardianship system: services are seldom available for individuals seeking legal help to commence a proceeding, to deal with reporting requirements, or to seek changes in the guardianship. Reduced funding and availability of legal services also creates burdens for family guardians seeking help with legal issues their wards may have with Medicaid, Medicare, Social Security and SSI benefits, housing and other matters.

Most critically, problems arise when there are no funds to pay a guardian. By law, the Community Guardian program is available only for cases commenced by Adult Protective Services (APS). APS in New York City does not seek guardianship on behalf of individuals in nursing homes (on the ground that they are not “at risk”) so there is a category of persons who could potentially reside in the community with community guardian services, but who cannot access these services. Other individuals in the community similarly have no access to community guardian services because APS has determined not to commence a guardianship proceeding. Community Guardian programs do not exist in much of the state. Judges in guardianship cases where no one is available to serve as guardian are put in the unfair position of having to entreat individuals to serve, leading to a perception that favors are being traded, which looks bad to outside observers.

Monitoring: The annual reporting required of guardians is frequently difficult for lay guardians, who do not understand how to prepare and complete the required documents. No reminders are sent prior to the time forms are due; some courts in some cases seem to catch cases where reports are not sent, but in other cases, the lack of annual reports goes unnoticed. At the same time, although a “medical report” or some similar information may be requested by the court evaluator, the monitoring system is not set up to assure the physical well-being of the ward, and nothing in the monitoring system would be likely to catch the fact that a ward is being inappropriately cared for, or even not cared for at all.

RECOMMENDATIONS

The following recommendations had the full support of the group. It is recognized that some of the suggestions here are already being implemented in some courtrooms and agencies, but are included because the implementation is not widespread.

1. Legal services and bar groups should increase outreach efforts to encourage individuals to consider executing durable powers of attorney, as well as providing counseling on the risks and correct use of these planning documents. Legal services programs in particular should be encouraged to provide this information to individuals who come to their offices for services on other matters.

2. Simplified instructions should be created for powers of attorney to explain the use and risk of these forms.
3. Educational materials should be created for the use of organizations dealing with populations of poor persons (including the police) to help identify “at risk” individuals and make referrals for other services or protective interventions when needed. There should be special outreach to programs such as the New York City Housing Authority and other large housing programs to encourage consideration of such steps prior to commencing eviction proceedings.
4. Programs that provide voluntary financial management, such as APS and AARP financial management services, should be expanded.
 1. Administrative or legislative changes, as appropriate, should be implemented so that friends or family members of an incapacitated individual can engage in certain transactions with government agencies and housing programs on behalf of the incapacitated individual without the necessity of formal guardianships. These changes can be modeled on the “representative payee” program of Social Security, which permits such actions, and provides safeguards such as notice to the affected individual.
 2. More use should be made of limited guardianships, notwithstanding the convenience of giving broad powers in the initial guardianship order.
 3. Guardianships should be regularly evaluated to determine if they continue to be needed or can be terminated.

Simplification

1. Develop pro se “plain English” forms and instructions for non-lawyers, as well as instructions in other languages.
2. Offices of the Self-Represented in the state courts should be willing to provide forms and assistance to individuals without counsel in guardianship cases, and should be asked to collaborate with advocates and guardianship clerks in preparing usable forms and templates for unrepresented individuals.
3. Courts should create automatic scheduling for compliance hearings, have templates of orders and similar forms in the format the court wishes, and avoid unnecessary

“settling orders on notice” and similar steps that are confusing to unrepresented individuals.

4. Letters to the court from unrepresented individuals involved in a guardianship should not be discarded or disregarded as ex parte communications, but should be furnished by the court to all parties and reviewed to determine if the letter should be treated as a motion for relief.
5. Financial reports for small estates should be simplified, and in cases where the only asset is Social Security, Supplemental Security Income or SSI benefit, detailed accounting should be not required; a form modeled on the short reporting form used by the Social Security Administration for representative payees should be sufficient.

Monitoring

1. Instead of detailed financial reporting, the annual reports should include more questions about the well-being of the ward, including residential status, medical treatment, and social activities.
2. There is a need to actually visit persons under guardianships and to report on their findings. A pilot program to train and use volunteers for their purpose should be undertaken.
3. APS should not automatically stop services and oversight once a guardian is appointed, but should continue to monitor at least until it is clear that the guardianship is underway and the guardian has qualified and commenced services.

Filling gaps in services

1. The Community Guardian program should not be limited to cases brought by Adult Protective Services, but should be an option for the court in cases where there is no other appropriate guardian.
2. Projects such as the VERA Institute of Justice Guardianship Project should receive increased funding to permit them to be expanded and replicated throughout the state, as an alternative to a public guardian program.
3. More free legal services are needed at every step in the process: legal services to avoid guardianship, to commence guardianship proceedings, to help guardians with guardianship related filing requirements and the legal problems of their wards, to

terminate guardianships that are no longer necessary. Dedicated funding for legal services programs for this purpose (from public and philanthropic sources) would be appropriate, as well as encouragement of pro bono initiatives, including provision of CLE credits for volunteer attorneys. However, even in the absence of additional funding, legal services programs should be encouraged to provide guardianship-related legal services. Simplified procedures and forms, discussed elsewhere in these “Recommendations” would facilitate the provision of services by legal services programs.

4. The “Guardianship Assistance Network” providing services to family guardians should be enlarged and replicated throughout the state.
5. “On-line” resources should be developed, where forms and instructions are available to individuals with sufficient computer literacy to make use of them. However, this should not be the exclusive way to obtain forms and instructions.
6. We should develop services and outreach to individuals in nursing homes to determine if they could resume living in the community. This may require coordination of housing (since housing is often lost following institutionalization), home care and financial management services, either in the context of a formal guardianship, or using alternatives to guardianships.
7. Coordinate with programs that recruit and train volunteers to increase the use of volunteers, including creating a volunteer guardian program, and a program of “volunteer mentors” for lay guardians, who could assist in various tasks.
8. Encourage agencies and programs (for example, Medicaid, the Social Security Administration, NYCHA, the Department of Finance SCRIE/DRIE program) that serve poor people to designate high level liaisons to expedite solving problems encountered by the courts handling guardianships.
9. Related to the above recommendation, provide social work services for use by the courts handling guardianships.
10. Better training for Guardians ad Litem with regard to their role in assisting litigant and accessing community resources.
11. Evaluating whether the “cap” on guardianship appointments is adversely affecting the availability of law firms to take low-income guardianships, and, if so, reconsidering the cap.

Appendix D

Alternatives to Guardianship Working Group Report

A. Participants

Co-Facilitators: Donna Dougherty (Jewish Association for Services for the Aged)
Leslie Salzman (Cardozo Bet Tzedek Legal Services)

Reporter: Kevin Cremin (MFY Legal Services, Inc.)

Participants: Cathy Anagnostopoulos (Mental Hygiene Legal Services)
Lisa Caligiuri Boranian (Mental Hygiene Legal Services)
Ann Brownhill-Gubernick (Fordham University-Graduate School of Social Service)
Amanda Caccavo (Henry Viscardi School)
Gregg Cohen (Law Office of Gregg Cohen)
Gene Flagello (Mental Hygiene Legal Services)
Lisa Herman (Mental Hygiene Legal Services)
Cecille Hershkovitz (Jewish Association for Services for the Aged)
John Holt (Vera Institute for Justice)
Arlene Kanter (Syracuse University Center on Disability Studies, Law, and Human Policy)
Grace Machuca (Supreme Court – Civil)
Beatrice Maloney (Beth Israel Medical Center)
Tina Minkowitz (Center for the Human Rights of Users and Survivors of Psychiatry)
Ken Onaitis (Carter Burden Center for Aging)
Kiana Douglas Osei (Vera Institute for Justice)
Raquel Romanick (Brookdale Center for Healthy Aging & Longevity - Hunter College)
Marcie Serber (Attorney, Private Practice)
Doen Zheng (Elder Law Clinic)

B. Background

In New York, two laws directly govern guardianship proceedings. Guardianships are generally determined under Article 81 of the Mental Hygiene Law (“MHL”). Guardianships for people who are “mentally retarded” or “developmentally disabled” are determined under Article 17-A of the Surrogate's Court Procedure Act (“SCPA”).

Under Article 81 of the MHL, a court should not appoint a guardian unless an individual is at risk of harm due to an inability to meet personal and/or financial management needs, considering the “sufficiency and reliability of available resources as defined in 81.03(e).” Although the list of “available resources,” is not exclusive, the list of alternatives is quite limited and contemplates fairly traditional (and generally non-client centered) resources, i.e., “visiting nurses, homemakers, home health aides, adult day care and multipurpose senior citizen centers, powers of attorney, health care proxies, trusts, representative and protective payees, and residential care facilities.”⁵⁶

Article 81 requires that the guardianship petition set forth “the available resources, if any, that have been considered by the petitioner and the petitioner’s opinion as to their sufficiency and reliability.”⁵⁷ The court evaluator reports to the court on whether there are “sufficient and reliable” “available resources” to meet the individual’s personal and property management needs without the appointment of a guardian.⁵⁸ When appointing a guardian, the court must make a formal finding that the appointment is necessary to prevent harm and must set forth the duration of appointment.⁵⁹ The court is required to discharge the guardian or modify the guardian’s powers if the “incapacitated person” dies or experiences an increase or a decrease in needs.⁶⁰

The SCPA governs guardianship proceedings for people who are “mentally retarded” or “developmentally disabled.”⁶¹ For purposes of the SCPA, a person is “mentally retarded” if medical professionals certify that the person as “as being incapable to manage him or herself and/or his or her affairs by reason of mental retardation and that such condition is permanent in nature or likely to continue indefinitely.”⁶² A person is “developmentally disabled” if medical professionals certify that the person has “an impaired ability to understand and appreciate the nature and consequences of decisions which result in such person being incapable of managing himself or herself and/or his or her affairs by reason of developmental disability and that such condition is permanent in nature or likely to continue indefinitely”⁶³ For people with “developmental disabilities,” the disability has to be attributable to: “cerebral palsy, epilepsy, neurological impairment, autism or traumatic head injury”; “any other condition of a person found to be closely related to mental retardation because such condition results in similar impairment of general intellectual functioning or adaptive behavior to that of mentally retarded persons”; or dyslexia.⁶⁴

Article 17-A was passed “primarily to provide a means for parents of mentally retarded children to continue exercising decision making power after those children reached age twenty-one.”⁶⁵ A petition for Article 17-A guardianship can be brought by a parent, an interested adult, or a “corporation authorized to serve as a guardian.”⁶⁶

A court is authorized to appoint a guardian for a person who is “mentally retarded” or “developmentally disabled” if the appointment is in the person’s “best interest.”⁶⁷ Although Article 17-A gives the alleged incapacitated person “the right to jury trial,” that right is waived unless the person demands a jury trial.⁶⁸ The court also has the discretion to dispense with a hearing if the petition has been filed by: “(a) both parents or the survivor; or (b) one parent and the consent of the other parent; or (c) any interested party and the consent of each parent.”⁶⁹ Article 17-A does not require that the alleged incapacitated person be represented by counsel or present at the hearing.⁷⁰ By default, the scope of an Article 17-A guardianship is plenary.⁷¹

Other laws are potentially relevant to guardianship proceedings and systems. For example, the Americans with Disabilities Act is relevant to guardianship because it requires governments to provide services in the most integrated setting appropriate to the person who has a disability. Title II of the ADA protects the rights of individuals with disabilities to participate in the services, programs, and activities of public entities.⁷² A “public entity” is a state or local government or “any department, agency, special purpose district, or other instrumentality of a State or States or local government.”⁷³ The ADA requires public entities to make “reasonable modifications to rules, policies, or practices” for qualified individuals with disabilities.⁷⁴

The Attorney General has the responsibility to promulgate regulations for Title II.⁷⁵ The Title II regulations flesh out the ADA’s prohibitions against discrimination by public entities.⁷⁶ These regulations elaborate on the ADA’s focus on the right to full and equal participation in civil society.⁷⁷ One Title II regulation requires that: “A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.”⁷⁸ The preamble to the Title II regulations explains that the “most integrated setting” for an individual is “a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible.”⁷⁹

Guardianship programs have been criticized as potentially violating the ADA’s integration mandate.⁸⁰ Leslie Salzman has made a compelling case that substituted decision making systems “violate the [ADA]’s mandate to provide services in the most integrated and least restrictive manner.”⁸¹ Although people who have guardians might “reside in the community and are not physically segregated by the walls of an institution, guardianship creates a legal construct that parallels the isolation of institutional confinement.”⁸² Like institutionalization, guardianship entails the loss of civic participation—“when the state appoints a guardian and restricts an individual from making his or her own decisions, the individual loses crucial opportunities for interacting with others.”⁸³ There is evidence that guardianship often leads to institutionalization.⁸⁴ Salzman emphasizes that less segregated options than guardianship are used by other countries and that the United Nations Convention on the Rights of Persons with Disabilities dictates supported—as opposed to substitute—decision making.⁸⁵

As Salzman points out, the Convention on the Rights of Persons with Disabilities⁸⁶ (CRPD) is also potentially relevant to guardianship. The CRPD was adopted on the 13th of December, 2006, during the sixty-first session of the United Nations General Assembly.⁸⁷ Pursuant to Article 42, the CRPD and its Optional Protocol was opened for signature as of March 30, 2007.⁸⁸ The United States is one of the 153 signatories to the CRPD.⁸⁹ Although the United States has not ratified the CRPD, over 100 countries have.⁹⁰ The CRPD's dictates therefore represent "the overwhelming weight of international opinion."⁹¹

The purpose of the CRPD is "to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity."⁹² "Discrimination" is broadly defined to include "any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."⁹³

The CRPD prohibits "torture or [] cruel, inhuman or degrading treatment or punishment."⁹⁴ State parties are required to "take all effective legislative, administrative, judicial or other measures to prevent persons with disabilities [] from being subjected to torture or cruel, inhuman or degrading treatment or punishment."⁹⁵ The CRPD also repeatedly focuses on the right that people with disabilities have to liberty and to participate and be included in the community.⁹⁶

Article 12 of the CRPD recognizes the right of all individuals to exercise legal capacity and to receive support to exercise that capacity if, and to the extent that, assistance is needed. Article 12 also provides that any measures that limit an individual's exercise of legal capacity must "respect the rights, will and preferences of the individual, must be free of conflict of interest and undue influence, must be proportional and tailored to the person's circumstances, must apply for the shortest time possible and must be subject to regular review by a competent, independent and impartial authority or judicial body."⁹⁷

The Committee on the Rights of Persons with Disabilities, the authoritative body interpreting the CRPD, has urged States Parties, under the framework of compliance with Article 12, "to replace regimes of substituted decision-making with supported decision-making, which respects the person's autonomy, will and preferences."⁹⁸

C. Discussion

In New York, Article 81 of the MHL provides that guardianship should not be utilized when an individual does not need assistance with personal needs or property management because there are other "available resources." Nevertheless, courts continue to appoint guardians for

individuals who have adequate informal supports, for individuals who could manage their property and personal needs if existing resources were made available to them, and for those who could exercise their capacity to make decisions and express their desires with appropriate decision-making support.⁹⁹ With the goal of ensuring that individuals are not divested of their decision-making rights through guardianship except in very rare circumstances, this workgroup discussed:

- 1) Resources and supports that have been successfully utilized to enable individuals to exercise their own capacity and avoid or defeat guardianship petitions;
- 2) How best to ensure that individuals and courts give meaningful consideration to all potential resources and supports; and
- 3) Whether there is a need to reform the guardianship system.

Discussion Point 1: Existing Alternatives to Guardianship

There are many existing potential alternatives to guardianship. New York appellate courts have reversed orders appointing guardians where the individual had a validly executed advanced planning instrument or surrogate decision-making document, such as a power of attorney, living will or health care proxy, and there was no showing that the appointed agent was unreliable or acting improperly.¹⁰⁰ However, trial court decisions have not uniformly found such arrangements to be adequate alternatives to guardianship, and in a range of legal contexts, advocates have been told by courts to seek guardianships in cases where the court has been unwilling to recognize a valid power of attorney or health care proxy.

This workgroup began by discussing the existing alternatives to guardianship,¹⁰¹ including:

- Informal Financial Management/ Representative Payment
- Power of Attorney
- Health Care Proxy/Psychiatric Advanced Directive/Living Will/Family Health Care Decisions Act, etc.
- Case Management
- Assertive Community Treatment
- Peer Support
- Home Care Services/Consumer directed home care/Home and Community Based Services (under waiver and under a state plan option 1915(i) (no requirement for budget neutrality but stricter financial eligibility criteria)(funds

psychosocial rehab, home health/personal care/nursing, habilitation and case management)

- Supportive Housing¹⁰²
- Supported Housing¹⁰³
- Self-Directed Care: Newer option that provides facilitation and funding to allow individuals to develop and fund a life/recovery plan that sets goals for health/mental health, social and family relationships, civic participation, education and employment and utilizes friends, family, and paid and unpaid peer supports to assist individual with development and achievement of goals.¹⁰⁴
- Money Follows the Person Demonstration (requires minimal 6 mo. institutional stay and provides only one year of services)
- Positive Behavioral Interventions and Supports (PBIS) as part of Nursing Home Transition and Diversion Waiver

While many potential alternatives to guardianship exist, the workgroup noted that many people are not choosing those alternatives that are currently in place. People are sometimes resistant to taking advance action and utilize alternatives to guardianship such as powers of attorney. Part of the problem could be a lack of knowledge about the available alternatives, but part of the problem could also be that the available alternatives are not desirable. The workgroup agreed that additional study was necessary to determine why people often do not choose the currently available alternatives to guardianship. Some members of the workgroup raised concerns about the impact that some of the available alternatives have on autonomy and the need to speak to individuals who have been personally involved in some of the existing alternatives to determine the strengths and weaknesses of the available alternatives.

Discussion Point 2: Ensuring that People with Disabilities, Attorneys, and Judges are Aware of and Utilize the Alternatives to Guardianship

Workgroup participants shared examples of people with disabilities who had successfully utilized available resources or supports to avoid guardianship. Financial management, for example, was cited as an example of a service that can address a concern that can sometimes lead to guardianship proceedings, while allowing the person retain autonomy. Restrictions can be placed on the amount of money a person is allowed to spend while allowing them the freedom to decide how they will spend that money. Unfortunately, cuts to social service programs are jeopardizing community supports that are less restrictive than guardianship. The workgroup agreed that it is essential to protect access to and strengthen the community resources that people with disabilities use to avoid guardianship.

While there are such success stories, workgroup participants agreed that they were not as prevalent as they could be for at least two reasons. First, judges, court evaluators, attorneys, people with disabilities, and family members of people with disabilities are not always aware of the less restrictive alternatives to guardianship. Second, it is often difficult for people with disabilities to access vital community resources and supports without sacrificing their autonomy.

In addition to promoting the civil and human rights of people with disabilities, many of these community services are also cost-effective. Workgroup participants agreed that people with disabilities should not be forced to choose between autonomy and access to services.

Discussion Point 3: Reforming the Guardianship System

In addition to discussing alternatives to guardianship that currently exists in New York, the workgroup also discussed whether there was a need to reform the guardianship system. Some members of the workgroup believed that the guardianship system could be improved with reforms. Other members were less optimistic that meaningful reform could be achieved within the current guardianship paradigm, which divests individuals of legal capacity rather than providing them with any necessary support to exercise that capacity.¹⁰⁵ The workgroup was particularly critical of Article 17-A of the SPCA, because it lacks the procedural safeguards that are present in Article 81 of the MHL. We discussed the theory that substitute decision-making programs like New York's guardianship system might violate the Americans with Disabilities Act.

The workgroup also discussed New York's supported housing program. We noted that supported housing is now generally accepted as a more integrated and cost-effective alternative to psychiatric institutions. The workgroup discussed whether a pilot program might be developed to determine whether a supported decision-making model could be a viable alternative to New York's current guardianship system. Such a pilot program could provide evidence regarding whether a supported decision-making program could be successful and cost-effective. The workgroup discussed whether funding might be available to develop such a pilot program.

As part of this discussion, we identified systems or models that are in place in other municipalities or countries. One model, for example, is a private supported decision-making agreement. In such a system, a person with a disability has the right to enter into a private legal agreement with one or more agents of his choosing who will provide decision-making support or act as formal decision-making representative(s) to make legally binding decisions.¹⁰⁶ The person with a disability does not thereby lose the legal right to make his/her own decisions.¹⁰⁷ In addition, in at least one model, an individual who would not be deemed to have

the generally accepted level of legal capacity to enter into a general or health care power of attorney could create a legally binding support agreement.¹⁰⁸

D. Recommendations

The workgroup agreed that, in order to promote alternatives to guardianship, a two-track approach was necessary. Our recommendations therefore focus on promoting alternatives to guardianship within the current guardianship system as well as on reforming the guardianship system. Some members of the workgroup recommended the abolition of guardianship and its replacement with a system based entirely on support. While the workgroup represented a wide range of experiences and opinions, we also recognized that, going forward, the workgroup would benefit from including more people with disabilities, the psychiatric survivor community, self-advocates, peer advocates, government officials, and representatives from disability-rights organizations such as ADAPT.

1. **Existing Alternatives to Guardianship**
 - a. Study why people often do not choose the currently available alternatives to guardianship
 - b. Study the currently available alternatives to guardianship to determine best practices and the ways in which those alternatives support or undermine individual autonomy and self-determination
2. **Ensuring that People with Disabilities, Attorneys, and Judges are Aware of and Utilize the Alternatives to Guardianship**
 - a. Gather advocacy stories about people with disabilities who have successfully utilized the less restrictive alternatives to guardianship
 - b. Develop publications that describe the alternatives to guardianship in easy to understand terms
 - c. Use success stories and publications to educate judges, court evaluators, and attorneys about the less restrictive alternatives to guardianship
 - d. Use success stories and publications to provide community education, including know-your-rights trainings for people with disabilities, regarding the less restrictive alternatives to guardianship

- e. Use success stories to lobby to protect access to and strengthen community supports and resources
- f. Work with the court system to develop a guardianship diversion program to promote less restrictive alternatives to guardianship

3. Reforming the Guardianship System

- a. Determine whether funding might be available for a supported decision-making pilot program
- b. Develop a supported decision-making pilot program
- c. Develop a lawsuit to challenge the validity of Article 17-A
- d. Explore the potential for law reform to comply with the CRPD by replacing substituted decision-making regimes with support that ensures respect for the person's autonomy, will, and preferences

Endnotes

¹ Article 81 was enacted amid a wave of guardianship reform nationally. In 1987, a watershed Associated Press investigation exposed widespread neglect and malfeasance in the guardianship process throughout the country. Fred Bayles & Scott McCartney, *Guardians of the Elderly: An Ailing System*, ASSOCIATED PRESS, Sept. 1987. The following year, the ABA Commission on Legal Problems of the Elderly and the Commission on Mental and Physical Disability Law sponsored a National Guardianship Symposium, known as the “Wingspread Conference.” That conference produced an agenda for reform intended to “produce a guardianship system . . . more fair, just and responsive to the needs of the wards.” AMERICAN BAR ASSOCIATION COMMISSION ON THE MENTALLY DISABLED AND COMMISSION ON LEGAL PROBLEMS OF THE ELDERLY, *GUARDIANSHIP: AN AGENDA FOR REFORM, RECOMMENDATIONS OF THE NATIONAL GUARDIANSHIP SYMPOSIUM IV* (1989), available at <http://www.guardianshipsummit.org/wp-content/uploads/2011/03/Agenda-for-Reform.pdf>. Many of these recommendations resulted in state legislative reforms. See, e.g., Sally Balch Hurme & Erica Wood, *Guardian Accountability Then and Now: Tracing Tenets for an Active Court Role*, 31 STETSON L. REV. 867 (2001).

² N.Y. MENTAL HYG. LAW § 81.11 (hearing); M.H.L. § 81.09 (court evaluator); M.H.L. § 81.10 (counsel).

³ N.Y. MENTAL HYG. LAW § 81.02(a)(2).

⁴ N.Y. MENTAL HYG. LAW §§ 81.30, 81.31.

⁵ The conference focused primarily on Article 81 guardianships. For a helpful description of the different origins of the two guardianship regimes, see Rose Mary Bailly & Charis B. Nick-Torok, *Should We Be Talking? Beginning a Dialogue on Guardianship for the Developmentally Disabled in New York*, 75 Alb. L. Rev. 807 (2012).

⁶ See REPORT OF THE SUB-COMMITTEE ON GUARDIANSHIPS OF THE NEW YORK STATE BAR ASSOCIATION: ELDER LAW SECTION 5 (January 2010).

⁷ See The Vera Institute of Justice, *Guardianship Practice: a Six-Year Perspective*, 4-5 (December 2011), available at <http://www.vera.org/download?file=3393/Guardianship-Practice-a-Six-Year-Perspective.pdf> (describing how New York’s fee-for-service model of guardian compensation excludes many indigent individuals from accessing guardianship care).

⁸ REPORT OF THE GRAND JURY OF THE SUPREME COURT, QUEENS COUNTY (March 2004), available at http://www.queensda.org/newpressreleases/2004/03-03-2004_Grand_jury.htm.

⁹ GOVERNMENT ACCOUNTING OFFICE, *GUARDIANSHIPS: CASES OF FINANCIAL EXPLOITATION, NEGLECT, AND ABUSE OF SENIORS* 13 (Sept. 2010).

¹⁰ *Id.* at 25.

¹¹ *Id.* at 2 (noting that GAO investigators had reviewed cases of alleged abuse in 45 states plus the District of Columbia).

¹² CENTER FOR ELDERLY & THE COURTS, ADULT GUARDIANSHIP COURT DATE AND ISSUES: RESULTS FROM AN ONLINE SURVEY 5 (March 2010), *available at*

http://aja.ncsc.dni.us/pdfs/GuardianshipSurveyReport_FINAL.pdf

¹³ *Id.* at 4, 8.

¹⁴ *Id.*

¹⁵ For a compelling case that substituted decision making systems such as guardianship “violate the [Americans with Disabilities Act’s] mandate to provide services in the most integrated and least restrictive manner,” *see* Leslie Salzman, *Rethinking Guardianship (Again): Substituted Decision Making as a Violation of the Integration Mandate of Title II of the Americans with Disabilities Act*, 81 U. COLO. L. REV. 157, 157 (2010).

¹⁶ Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, G.A. Res. 61/106 (2007) [hereinafter “CRPD”].

¹⁷ United Nations, Convention on the Rights of Persons with Disabilities, art. 12, May 3, 2008, <http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf>.

¹⁸ United Nations, Convention on the Right of Persons with Disabilities, <http://www.un.org/disabilities/countries.asp?navid=12&pid=166> (last visited September 14, 2012).

¹⁹ *Id.*

²⁰ *Cf. Roper v. Simmons*, 543 U.S. 551, 578 (2005) (acknowledging “the overwhelming weight of international opinion against the juvenile death penalty” in holding that “[t]he Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed.”).

²¹ CRPD, Art 12(4).

²² Concluding Observations on the report of Spain, CRPD/C/ESP/CO/1, paragraphs 33-34; also with less detail, Concluding Observations on the report of Tunisia, CRPD/C/TUN/CO/1, paragraphs 22-23.

²³ National Guardianship Network, Third National Guardianship Summit Releases Standards and Recommendations, *at* http://www.americanbar.org/content/dam/aba/uncategorized/2011/2011_aging_summit_recs_1111.authcheckdam.pdf.

²⁴ *Id.* at 5.

²⁵ For more information on the National Guardianship Network and the Summit recommendations, *see* <http://www.guardianshipsummit.org>.

²⁶ *See, e.g.*, Report of the Commission on Fiduciary Appointments (“Birnbbaum II”) 50, *available at* <http://www.courts.state.ny.us/reports/fiduciary-2005.pdf>.

²⁷ If standardized judgments are used, extra care must be taken to make sure that the most limited guardianship necessary under the circumstances is imposed and that the powers granted to a guardian are all supported by individualized findings.

²⁸ These recommendations are consistent with recommendations from Chief Judge Lippman's Access to Justice Task Force, which called for standardizing forms in all types of cases around the state. THE TASK FORCE TO EXPAND ACCESS TO CIVIL LEGAL SERVICES IN NEW YORK, REPORT TO THE CHIEF JUDE OF THE STATE OF NEW YORK 30 (2011), *available at* <http://www.courts.state.ny.us/ip/access-civil-legal-services/PDF/CLS-TaskForceREPORT.pdf>.

²⁹ Minnesota currently accepts all accountings online.

³⁰ For a discussion of ways in which the courts have read flexibility into the 17-A regime, *see* Rose Mary Baily & Charis B. Nick-Torok, *Should We Be Talking? Beginning a Dialogue on Guardianship for the Developmentally Disabled in New York*, 75 Alb. L. Rev. 807 (2012).

³¹ N.Y. MENTAL HYG. LAW §§ 81.30(f), 81.31(c).

³² N.Y. MENTAL HYG. LAW §81.32.

³³ *Cf.* Standard #4.6 from the recent national guardianship summit: "The conservator shall value the well-being of the person over the preservation of the estate." THIRD NATIONAL GUARDIANSHIP SUMMIT: STANDARDS OF EXCELLENCE – GUARDIANSHIP STANDARDS (2011), *available at* http://www.mobar.org/uploadedFiles/Home/Committees/Fall_Committee_Meetings/2011/Course_Materials/summit_guardian_standards_11-10-11.pdf.

³⁴ N.Y. MENTAL HYG. LAW § 81.31(b)(10).

³⁵ *See, e.g., In re Matter of Jones*, 2011 N.Y. Slip Op. 50501U, No. 99008/91 (N.Y. Sup. Ct. Kings Cty. March 31, 2011) (guardian was found to have depleted disabled young man's assets while depriving him of accessible living arrangements). The attorney who uncovered the guardian's abuse and self-dealing in that case stated that one visit from the court or one conversation between court staff and the affected family could have uncovered the abuse long before it came to light.

³⁶ The pilot project would benefit from the extensive guidance for volunteer monitoring programs developed on the national level. *See* A.B.A COMMISSION ON LAW & AGING, VOLUNTEER GUARDIANSHIP MONITORING AND ASSISTANCE: SERVING THE COURT AND THE COMMUNITY (2011), *available at* <http://ambar.org/VolunteerGrdMonitor>.

³⁷ NAOMI KARP & ERICA WOOD, GUARDING THE GUARDIANS: PROMISING PRACTICES FOR COURT MONITORING (2007), *at* http://assets.aarp.org/rgcenter/il/2007_21_guardians.pdf.

³⁸ The Surrogate's Court in New York County currently sends such reminders to Article 17-A guardians.

³⁹ These measures are required by Title VI of the Civil Rights Act of 1964, which requires that all courts that receive federal assistance, as New York's do, must provide for adequate language access. The Department of Justice has stated that "[p]roviding meaningful access to the legal process for [limited English proficiency] individuals might require more than just providing interpreters in the courtroom. Recipient courts should assess the need for language services all along the process, particularly in areas with high numbers of unrepresented individuals"67 Fed. Reg. 41,455-01 at 41,471 (June 18, 2002).

⁴⁰ Rule 36.2(d)(2) of the Rules of the Chief Judge of the State of New York.

⁴¹ Like much of the conference, the Monitoring working group focused on guardianship under Article 81 of the Mental Hygiene Law and did not cover guardianships under Article 17-A of the Surrogate's Court Procedure Act.

⁴² See M.H.L. § 81.32(b) (authorizing the presiding justice of the appellate division in each department to designate examiners to perform the required court examination of guardians' initial and annual reports). There is no statutory requirement that court examiners be attorneys.

⁴³ M.H.L. § 81.32(a)(2).

⁴⁴ M.H.L. § 81.32(a)(2).

⁴⁵ M.H.L. § 81.31(b)(6)(i).

⁴⁶ A similar standard was recently adopted at the Third National Guardianship Summit. See NATIONAL GUARDIANSHIP NETWORK, THIRD NATIONAL GUARDIANSHIP SUMMIT: STANDARDS OF EXCELLENCE –GUARDIAN STANDARDS AND RECOMMENDATIONS FOR ACTION, Standard 4.6 (“The conservator shall value the well-being of the person over the preservation of the estate.”) (October 2011), available at <http://www.guardianshipsummit.org/wp-content/uploads/2011/11/Final-Summit-Standards-Recommendations-5-122.pdf>.

⁴⁷ For example, the Protection and Advocacy for Persons with Developmental Disabilities (PADD) program is charged with assisting with problems encountered by individuals and their families regarding developmental disabilities services. See <http://cqc.ny.gov/advocacy/protection-advocacy-programs/padd>.

⁴⁸ M.H.L. §§ 81.30(f), 81.31(c).

⁴⁹ See *In the Matter of Roy W. Lantigua*, 2011 N.Y. Slip Op. 50501, No. 99008/91 (N.Y. Sup. Ct. Kings Cty. March 31, 2011).

⁵⁰ See *In re Mark CH*, 28 Misc 765, 2010 NY MISC. LEXIS 918 (Surr. NY Co. 2010) (holding that due process requires courts to monitor guardianships closely once individuals have been stripped of substantial liberties by being placed under guardianship).

⁵¹ This is consistent with the national movement toward adopting standards for guardians. See NATIONAL GUARDIANSHIP NETWORK, THIRD NATIONAL GUARDIANSHIP SUMMIT: STANDARDS OF EXCELLENCE –GUARDIAN STANDARDS AND RECOMMENDATIONS FOR ACTION (October 2011), available at <http://www.guardianshipsummit.org/wp-content/uploads/2011/11/Final-Summit-Standards-Recommendations-5-122.pdf>.

⁵² Language access is required by Title VI of the Civil Rights Act of 1964 for all courts that receive federal assistance, as New York's courts do. For the U.S. Department of Justice's detailed guidance on the application of Title VI to state courts, see 67 Fed. Reg. 41,455 (June 18, 2002). The guidance notes that “[p]roviding meaningful access to the legal process for LEP individuals might require more than just providing interpreters in the courtroom. Recipient courts should assess the need for language services all along the process, particularly in areas with high numbers of unrepresented individuals” 67 Fed. Reg. at 41,471.

- ⁵³ See Minnesota Judicial Branch, Conservator Account Monitoring Preparation and Electronic Reporting (CAMPER), at <http://mncourts.gov/?page=4058>.
- ⁵⁴ American Bar Association Commission on Law and Aging, *Volunteer Guardianship Monitoring: Serving the Court and the Community*, <http://ambar.org/VolunteerGrdMonitor>.
- ⁵⁵ M.H.L. § 81.31(c).
- ⁵⁶ M.H.L. § 81.03(e).
- ⁵⁷ M.H.L. § 81.08 (a)(14).
- ⁵⁸ *Id.* § 81.09(c)(5)(vi).
- ⁵⁹ *Id.* § 81.15. In practice, it is common for judges to make findings that do not limit the duration of the guardianship.
- ⁶⁰ *Id.* § 81.36(a). “[T]he guardian, the incapacitated person, or any person entitled to commence a [guardianship] proceeding” can move to discharge a guardian or modify the guardian’s powers. *Id.* § 81.36(b).
- ⁶¹ See *In the Matter of Chaim A.K.*, 885 N.Y.S.2d 582, 584 (“SCPA Article 17-A as originally enacted in 1969 applied to persons with ‘mental retardation’ It was revised in 1989 to add to its coverage persons who are ‘developmentally disabled’”) (internal citations omitted).
- ⁶² SCPA § 1750(1).
- ⁶³ *Id.* § 1750-a(1).
- ⁶⁴ *Id.*
- ⁶⁵ *In the Matter of Chaim A.K.*, 885 N.Y.S.2d at 586 (citing *Matter of Maryanne Cruz*, 2001 N.Y. Slip Op. 40083(U), *4, 2001 WL 940206 (2001) and Lawrence R. Faulkner and Lisa Klee Friedman, Distinguishing Article 81 and Article 17-A Proceedings, II Guardianship Practice in New York State, p. 160 (New York State Bar Association 1997)).
- ⁶⁶ SCPA § 1751.
- ⁶⁷ *Id.* §§ 1750, 1750-a(1); 1754(5).
- ⁶⁸ *Id.* § 1754(1).
- ⁶⁹ *Id.*
- ⁷⁰ SCPA § 1754.
- ⁷¹ *In the Matter of Chaim A.K.*, 885 N.Y.S.2d at 587 (“17-A provides no gradations and no described or circumscribed powers.”).
- ⁷² 42 U.S.C. § 12132.
- ⁷³ *Id.* § 12131(1).
- ⁷⁴ *Id.* § 12131(2).
- ⁷⁵ *Id.* § 12134(a).
- ⁷⁶ 28 C.F.R. § 35.130.
- ⁷⁷ See, e.g., *id.* § 35.130(a) (“No qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity”); 35.130(b)(2) (“No qualified individual with a disability

shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity”).

⁷⁸ 28 C.F.R. § 35.130(d).

⁷⁹ *Id.* § 35.130(d), App. A, p. 450 (1998).

⁸⁰ Leslie Salzman, *Rethinking Guardianship (Again): Substituted Decision Making as a Violation of the Integration Mandate of Title II of the Americans with Disabilities Act*, 81 U. COLO. L. REV. 157 (2010).

⁸¹ *Id.* at 157.

⁸² *Id.* at 194.

⁸³ *Id.*

⁸⁴ Joseph A. Rosenberg, *Poverty, Guardianship, and the Vulnerable Elderly: Human Narrative and Statistical Patterns in a Snapshot of Adult Guardianship Cases in New York City*, 16 GEO. J. ON POVERTY L. & POL'Y 315, 341 (2009) (“Guardianship is certainly part of the process that results in a person being institutionalized in a nursing home, and perhaps in some cases at least part of the cause.”).

⁸⁵ Salzman, *supra* note 80, at 161 (“a move to a supported decision-making paradigm is consistent with the ADA, as well as with the recently adopted U.N. Convention on the Rights of People with Disabilities”); see Arlene Kanter, *The United Nations Convention on the Rights of Persons with Disabilities and its Implications for the Rights of Elderly People under International Law*, 25 GA. ST. U. L. REV. 527, 563 (citing CRPD, Art. 12).

⁸⁶ Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, G.A. Res. 61/106 (2007) [hereinafter *CRPD*].

⁸⁷ United Nations, Convention on the Rights of Persons with Disabilities, <http://www.un.org/disabilities/default.asp?navid=14&pid=150> (last visited Aug. 24, 2011).

⁸⁸ *CRPD*, art. 42.

⁸⁹ United Nations, Convention and Optional Protocol Signatures and Ratifications, <http://www.un.org/disabilities/countries.asp?navid=12&pid=166> (last visited Aug. 24, 2011).

⁹⁰ *Id.*

⁹¹ *Cf. Roper v. Simmons*, 543 U.S. 551, 578 (2005) (acknowledging “the overwhelming weight of international opinion against the juvenile death penalty” in holding that “[t]he Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed.”).

⁹² *CRPD*, art. 1.

⁹³ *Id.*, art. 2.

⁹⁴ *Id.*, art. 15(1).

⁹⁵ *Id.*, art. 15(2).

⁹⁶ Prior to the *CRPD*, “no specific binding international human rights convention exist[ed] to protect explicitly the right of people with disabilities to live in the community or to be free from indeterminate institutionalization.” Eric Rosenthal & Arlene Kanter, *The Right to*

Community Integration for People with Disabilities under United States and International Law, in *Disability Rights Law and Policy: International and National Perspectives*, available at http://www.dredf.org/international/paper_r-k.html. However, “[r]eferences to community integration are found in Article 23 of the Convention on the Rights of the Child, and in instruments and documents of the UN General Assembly such as the Declaration on the Rights of Mentally Retarded Persons, the 1991 Principles for the Protection of Persons with Mental Illness, the 1993 Standard Rules on Equalization of Opportunities for Persons with Disabilities, and General Comment 5 to the International Convention on Economic, Social and Cultural Rights, as well as in the Charter of Fundamental Rights of the European Union.” *Id.*

⁹⁷ CRPD, Art 12(4).

⁹⁸ Concluding Observations on the report of Spain, CRPD/C/ESP/CO/1, paragraphs 33-34; also with less detail, Concluding Observations on the report of Tunisia, CRPD/C/TUN/CO/1, paragraphs 22-23.

⁹⁹ This workgroup will not address the important issue of the appointment of a guardian for an individual who neither needs nor wants support, but who is at risk of guardianship because a court may disagree with the individual's choices.

¹⁰⁰ *See, e.g., In re May Far C.*, 61 A.D. 3d 680 (App. Div. 2d Dep't 2009) (POA and no evidence of impropriety by appointed agent); *In re Albert S.*, 286 A.D.2d 684 (2d Dept. 2001)(Health care agents acting pursuant to a living will and attorney in fact adequately managing property and previously created trust); *In re Mildred MJ*, 43 A.D.3d 1391 (App. Div. 4th Dep't 2007) (validly executed POA and HCP and no evidence of undue influence). *See also St. Francis Hosp. (Matter of Rose)*, 907 NYS2d 104 (Sup. Ct. Dutchess Co. 2010)(Validly executed POA and HCP); *In re G.S.*, 841 NYS2d 428 (Sup. Ct. Bronx Co. 2007) (POA and HCP were sufficient to provide for AIP's personal needs and property management; that Article 81 was not intended to be used as a nursing home collection mechanism).

¹⁰¹ This list of existing alternatives to guardianship is descriptive; it is not meant to imply that the workgroup endorses all of these alternatives.

¹⁰² In New York, “supportive housing” refers to a range of housing programs, including: Congregate Treatment, Congregate Support, Community Residence/Single Room Occupancy, Apartment Treatment, and State-Operated Community Residence. See New York State Office of Mental Health, Residential Program Descriptions, http://bi.omh.ny.gov/adult_housing/index?p=res-programs.

¹⁰³ [In](#) New York, “supported housing” is a “form of housing in which individuals with mental illness live in their own apartments scattered throughout the community and receive supportive services.” *Disability Advocates, Inc. v. Paterson*, 598 F. Supp. 2d 289, 292 (E.D.N.Y. 2009); see also New York State Office of Mental Health, Supported Housing Guidelines, <http://www.omh.ny.gov/omhweb/adults/SupportedHousing/supportedhousingguidelines.html>.

¹⁰⁴ See *In the Driver's Seat: A Guide to Self-Directed Mental Health Care*, prepared by the Bazelon Center and UPENN Collaborative on Community Integration, April 2008

¹⁰⁵ For example, Tina Minkowitz, who is a member of this workgroup, has pointed out that:

CRPD Article 12(2) states, "States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life." This guarantee is the heart of the Convention for people with psychosocial disabilities. All laws directed at restricting our freedom and self-determination are premised on an equation of psychosocial disability with legal incapacity, and legal incapacitation is the primary way that the law deals with persons with psychosocial disabilities. A guarantee of legal capacity on an equal basis with others in all aspects of life should result in the elimination of all such legal regimes.

The United Nations Convention on the Rights of Persons with Disabilities and the Right to be Free from Nonconsensual Psychiatric Interventions, 34 SYRACUSE J. INT'L. L. & COM. 405, 408 (2007) (emphasis added).

¹⁰⁶ See Representation Agreement Act, R.S.B.C., ch. 405, pt. 1, § 2 (1996) (British Columbia); Doug Surtees, *The Evolution of Co-Decision-Making in Saskatchewan*, 73 SASKATCHEWAN L. REV. 75, 84-91 (2010); Decision-making, Support and Protection to Adults Act S.Y.T, ch. 21, pts. 1-2; pt. 2, §§ 7, 9 (2003) (Yukon) (creating two legally distinct options, one of support and one of representation).

¹⁰⁷ See, e.g., Representation Agreement Act, pt. 6, § 36 (1996).

¹⁰⁸ Compare Representation Agreement Act, pt. 2, §§ 7-8 (1996) with Decision-making, Support and Protection to Adults Act S.Y.T, ch. 21, pt. 1, § 6 (2003) (setting a higher standard for the execution of support agreement). See generally, Mildred MJ 43 A.D.3d 1391, 1392 (4th Dept. 2007) (discussing the capacity of an individual with moderate dementia to authorize an individual to act on her behalf).