

Testimony on Guardianship Matters before the Subcommittee on Disabilities

November 9, 2012

by Léonie Rosenstiel, MPH
Responsible Guardianship Advocate

Good afternoon, Mr. Chair and members of the committee. Thank you for allowing me to address you on the subject of responsible and ethical guardianship. My name is Léonie Rosenstiel. I have a master's degree in public health. A close relative of mine had a private company that served as court-appointed guardian, and a close relative of mine also served as the guardian for another relative, so I have first-hand experience of how the system fails. For the sake of full disclosure, let me say that I have run these comments past my attorney. He is in agreement that I may speak to you today, but has advised that I not comment on the specifics of my own family's situation.

I should also disclose that I am the co-producer of a documentary now in production about guardian abuse of wards and their families nationally. I've found that events outside New Mexico parallel events inside the state. Much information was given to me on condition that I not name names or expose individuals, for fear of retaliation. I must respect these wishes in order to protect my sources.

The very profitable guardianship industry began in earnest during the 1980s. Exhibit A contains, a copy of two articles describing the abuses of the industry that are still with us and the industry's general business plan. Back in 1987, when those articles were written, the guardians targeted elders with \$500,000 or more in assets. Accounting for inflation, it would now target elders with \$1 million or more.¹

Certain specific abuses are consistent:

- 1) The secrecy of guardianship proceedings is used to block access to family, friends, and sometimes even the ward him/herself to a legal event that will determine the quality of the rest of that person's life. Critical information is allowed to remain secret. Required reports that guardians and conservators file are unaudited, unverifiable, and contain scanty information.
- 2) The enforced separation of the ward from those closest to that person, often on spurious and unsubstantiated grounds. This separates the ward from loved ones, and substitutes strangers with a financial interest in their place
- 3) Inaccurate statements placed into the court record that cannot be effectively challenged because under current New Mexico practice courts tend to only listen to self-interested parties, including the guardians themselves. I note that a relatively small number of people work in this area.

¹ The exact figure is \$1,009,276.38, according to

- 4) The ward is sometimes kept under unsafe or unsanitary conditions. The state has no inspection system for homes with fewer than three people.
- 5) It is often difficult for loved ones to get agreements with commercial guardians regarding visitation; an existing court order might not be followed. Loved ones can be compelled to go to court to gain the right to visit.
- 6) Commercial guardian/conservator annual reports may claim that it costs more than \$300,000/year to keep a ward in a normal-sized private home for a year when that person is not ill—other than having dementia. Losses of at over \$50 million dollars have been reported from a small number of affluent wards who have been kept under commercial guardianships in New Mexico alone.
- 7) Commercial guardians may attempt to change the ward's will in favor of individuals/organizations of the guardian's own choosing, or create trusts or distribute assets in ways never sanctioned by the ward when s/he was competent. Pressure is placed on family members to accede to these changes, and conflicts that exist within families are exploited by guardians to achieve their goals.
- 8) A bill was introduced in 2011, attempting to allow the guardian to arrange the ward's funeral without consulting the family, the guardian alone to determine whether an autopsy shall be done, and then had no requirement to share the results with the family. This would allow the guardian, who is responsible for the health and safety of the ward, to cover up abuse or negligent treatment of the ward. Who, other than commercial guardians, would think this was a good idea? In fact, it is a step in a direction away from where other states are heading.
- 9) The same proposal would have allowed the guardian to remain in place for a year after the demise of the ward. This would by-pass the ward's will and effectively name the guardian, automatically, as the personal representative of the ward. It also allows commercial guardians to continue to feed at the ward's trough for an extra year.

There are 14 specialized, for-profit guardianship businesses listed on the New Mexico Guardianship Association's website. We may reasonably conclude that there must be at least several hundred individuals under guardianship throughout the state. The group's professional members come from 33 guardianship-related businesses, including home health services, professional guardians, professional conservators, and law firms. There are also several non-profit guardianship organizations.

Often a person suffering from early dementia is unaware of what is happening and wishes to maintain independence even when that may be hazardous to his/her safety. The individual may contest guardianship proceedings. Or, living and financial arrangements for the potential ward may be disputed within the family. In contested cases, our busy courts often do not attempt to ascertain which side's position might have more merit, but simply impose a commercial guardian and/or conservator, with the results I've just listed.

New Mexico "sequesters" all guardianship cases, holding all hearings in secret and closing the files, thereby making it impossible to know exactly how many New Mexico guardianships exist. HM 61, which passed the House last year, assumed that non-professional guardians neglect to file reports, and that these individuals need training. However, my research

reveals something very different, namely that the current system leads to egregious abuses by “commercial” guardians.

We know the problems, but what are the solutions?

- 1) It should not matter whether someone has \$1 million or \$1. No one should be told the ward’s monetary status during the evaluation period. This information should not be requested from the petitioner. The court visitor, psychiatrist and guardian ad litem should be examining a person, not a bank account.
- 2) Select all court-appointed experts at random, using a computer, from a pool of pre-qualified professionals, unless good cause is shown to disqualify one of them. This would help prevent cronyism. All potential guardians and conservators should attest annually, to the court, that the principals and their firms are solvent.
- 3) End sequestration of guardianship cases; this relic of the 19th-century prejudice against those with mental challenges is the source of many abuses and should be abolished. Any interested party should be allowed to speak at the competency hearing, which should be an evidentiary hearing and preferably should be a jury trial. All experts should testify, not simply submit reports, and questions of fact should be decided by a jury, as is generally called for by the New Mexico constitution. Everyone should testify under oath, subject to cross-examination.
- 4) Powers of Attorney the potential ward signed, while competent, should determine the ward’s choice of guardian of choice. Appoint others only if that person cannot serve. Changes made to legal documents within days of the hearing, and without proof of competence, should not be considered by the court.
- 5) Acknowledge that court-appointed experts have never been neutral. Professional guardians and conservators always stand to gain generous and long-term fees, if appointed in a long-term capacity, and referrals in the case of psychiatrists and GALs. Currently, the GAL or court visitor—a person previously unknown to the ward—is often named guardian. The system must change so these abuses stop.
- 6) Commercial guardians should post bond proportional to the size of the ward’s estate; a major increase in the size of the estate should mean a commensurate increase in the size of the bond. Failing bond, a proportion of the estate should be held in escrow.
- 7) All guardian and conservator reports to the court should be subject to periodic audit, with a final audit after the conservatorship/guardianship ends. Financial audits should be conducted by a CPA whose name was drawn at random from a pool of qualified professionals; questionable financial transactions should automatically be reported to the proper authorities. Material misstatements of fact should also be subject to penalties for perjury.
- 8) Acknowledge that staying in one’s own home, able to come and go, and also to see others at will, is not the same thing as being kept in one’s own home, unable to leave, and not allowed to see most of the people one would customarily see. The first situation is freedom, the second is imprisonment.

Here is a very brief summary of what Massachusetts and Florida have recently done to protect wards against commercial guardian abuses: Massachusetts now requires the courts to appoint as guardian, by preference, the person named in the individual’s most recent power of attorney and to follow the ward’s existing estate plan. Florida now requires bond pegged to the

value of the estate, and specifies that all assets be returned to the rightful owner after the ward's demise, and that in some cases the guardian not receive a fee greater than 5% of the ward's annual income. Both states require specific methods of monitoring the guardian's care of the ward and the ward's property.

If these changes are made in New Mexico, good guardians and conservators will be rewarded, as they should be. On the other hand, miscreants will be exposed fairly rapidly because they will no longer have the cloak of secrecy to shield their true activities from public view.

Mr. Chair, ladies and gentlemen of the committee, thank you for your attention

EXHIBIT A

THE NEWS HERALD, Panama City, Fla., Sunday, October 11, 1987, Page 1D, 3D

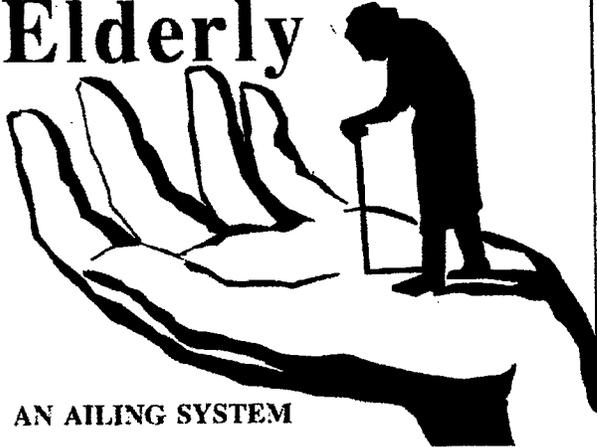
Focus

Sunday, October 11, 1987

The News Herald

D Section

Guardians of the Elderly



AN AILING SYSTEM

Guarding the guardians

System for protecting the elderly often allows abuse, theft, neglect

FRED BAYLES

Associated Press

The nation's guardianship system, a crucial last line of protection for the ailing elderly, is failing many of those it is designed to protect.

A yearlong investigation by *The Associated Press* of courts in all 50 states and the District of Columbia found a dangerously burdened and troubled system that regularly puts elderly lives in the hands of others with little or no evidence of necessity, then fails to guard against abuse, theft and neglect.

In thousands of courts around the nation every week, a few minutes of routine and the stroke of a judge's pen are all that it takes to strip an old man or woman of basic rights.

The 300,000 to 400,000 elderly people under guardianship can no longer receive money or pay their bills. They cannot marry or divorce. The court entrusts to someone else the power to choose where they will live, what medical treatment they will get, and, in rare cases, when they will die.

The AP investigation examined more than 2,200 randomly selected guardianship court files to get a portrait of wards and of the system that oversees them.

After giving guardians such great power over elderly people, overworked and understaffed court systems frequently break down, abandoning those

incapable of caring for themselves.

A legal tool meant to protect the elderly and their property, guardianship sometimes results instead in financial or physical mistreatment, the AP found.

"Guardianship is a process that uproots people, literally 'unpersons' them, declares them legally dead," said Dr. Dennis Koson, a law and psychiatry expert in Florida. "Done badly, it does more hurting than protecting."

That danger was confirmed by the AP investigation, which involved staff reporters in every state. The AP found:

◆ Elderly in guardianship court are often afforded fewer rights than criminal defendants. In 44 percent of the cases, the proposed ward was not represented by an attorney. Three out of 10 files contained no medical evidence. Forty-nine percent of the wards were not present at their hearings. Twenty-five percent of the files contained no indication hearings had been held.

Some elderly people discover they are wards of the court only after the fact.

A Bennington, Vt., woman learned she was under guardianship only when told by her nursing home she could no longer spend money without the permission of the guardian, her daughter. A Fort Lauderdale woman found she

had a guardian only when she was turned away from the polling booth.

"Guardianship became a rubber-stamp procedure over the years," said Indianapolis Probate Judge Victor Pfau, a leader in a judicial reform movement.

◆ While laws in 45 states require guardians to file regular accountings of the ward's money, they were missing or incomplete in 48 percent of the files examined. Thirteen percent, more than one in 10, of the files were empty but for the initial granting of guardianship powers.

Such files are critical to the court's knowledge that wards are being cared for and that their money is being spent properly. Without the files, the door is open to abuse.

So a court in Missoula, Mont., had no record of what happened to the \$131,000 estate of a 92-year-old man found ill and alone in a cabin in 1985 after a couple described as "friends" became his guardians. And a Pittsburgh court learned of a

decade-long misappropriation of \$25,000 in Social Security checks only when a state hospital complained of non-payment for a ward's care. The ward's guardian, an attorney, was disbarred in 1985.

◆ What reports are filed are rarely audited or even checked by probate courts, which handle guardianships in most jurisdictions. One of the last rungs on the courthouse ladder, often dealing more with affairs of the dead than of the living, probate courts are swamped. Many can't even guess how

many guardianships they have on file.

"I don't know where the wards are, who's caring for them, what they're doing," said Probate Judge Anthony Sciarretta of Providence, R.I. "I have no support staff, I have no welfare workers, I have no aides, I have no assistants and I have no money."

In San Diego, judges routinely signed off on annual accountings filed by lawyer Robert Kronemyer for the estate of his ward, Joshua Baily. Not until after Baily's death did a friend become suspicious. Kronemyer was convicted in 1983 of theft and perjury for taking hundreds of thousands of dollars in cash and bonds.

Most guardians are dedicated, caring people who see that their wards get proper food, clothing, shelter and medical attention. A good guardian can protect against greedy relatives and scheming con men.

Yet if the nation's elderly population jumps 22 percent by century's end, to nearly 35 million, as projected, the problems of guardianship are likely to grow.

While guardianship procedures vary, even from county to county, the laws follow a pattern: A petition is filed, usually by a family member, alleging a person is incompetent and no longer

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- Dr. Dennis Koson

Guard

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able to care for himself or herself. The person is evaluated, and the court rules on the petition.

If granted, guardianship reduces these "wards of the court" to the status of legal infants who may no longer drive a car, vote or, in many states, hire an attorney. "A prisoner has more legal rights," said Winsor Schmidt, a Memphis (Tenn.) State University professor who has studied guardianship in 13 states.

Once shuffled into guardianship, the elderly have few ways out. Some states bar wards from hiring attorneys because they have been ruled incompetent. Only 17 states require courts to regularly check the status of the wards. Some judges are reluctant to reopen cases to remove guardianships.

In Grand Junction, Colo., Vivian Steiner, 68, has written to the judge who placed her under guardianship, contending she has recovered from medical difficulties and can leave the nursing home where she is confined. Pitkin County District Judge J.E. DeVilbiss hasn't answered her, standing by his 1984 ruling that she is incompetent.

"The guardianship is done and it's done unless someone calls it to the court's attention," DeVilbiss said.

The AP found institutions are increasingly using guardianship as an answer to a variety of problems. Hospitals, faced with new Medicare regulations limiting coverage for extended care, use

guardianship to move patients to nursing homes. Nursing homes require guardianship to ensure someone will pay the bills.

But critics challenge using such a harsh remedy to guarantee payments.

"You don't need someone to strip you to the rights of a 5-year-old to check you into a nursing home," said David Grant, director of the Guardianship Diversion Project, a Los Angeles group promoting less restrictive alternatives for the elderly.

Baltimore courts now use an expedited procedure that allows hospitals to file petitions of guardianship on elderly patients, then move them to nursing homes before the petitions are approved.

While the hospitals and the courts say this is simply an efficient way of handling patients, Jerry Dresner, an attorney with the Maryland Disability Law Center, calls it "after-the-fact due process."

Nursing homes, hospitals and doctors are also using guardianship as a hedge against liability in tough decisions such as amputations and disconnecting life support systems.

"If I ran a nursing home, I'd insist on it," said Pat Graves, a social worker who runs a senior citizens program at an Albuquerque, N.M., hospital.

Federally mandated adult protective services programs in each state have created a cadre of social workers vigorously checking reports of abuse, "self-neglect" and irrational behavior among the elderly. But their eagerness sometimes leads them to file guardianship petitions on old people who simply may be having trouble

keeping house or keeping track of bills.

"The whole problem with guardianship as it is practiced today is that they take someone who's got a bit of a problem and put them away," said Theresa Bertram, director of the Cathedral Foundation, a Jacksonville charity offering support services to try to keep the elderly out of guardianship.

As America ages, the system faces change. Medical advances have led to longer lives — and more cases of incompetence. As social services are pushed to the breaking point, many turn to guardianship. The AP has even found petitions for guardianship in AIDS cases filtering into probate court.

To be sure, most guardians are honest and well-intentioned. Many judges defend the present system as humane and effective, arguing that guardianship is a family business and not in need of outside supervision.

But guardians are not always family members. The AP found one-quarter of today's guardians are friends, attorneys, professional guardians or government agencies with no familial relationship to their wards.

A new industry has cropped up of professional guardians, who bill their wards' estates as much as \$65 an hour for their services. The AP has found such entrepreneurs with responsibility for 100, 300, and in one case 400 wards.

Those who can't pay are herded into a growing number of state or county public guardianship offices, with caseloads reaching several hundred per social worker.

Opportunity for profit attracts entrepreneurs to guardianship

(EDITOR'S NOTE: State and county governments are not the only ones getting into guardianship. It's becoming a business. The increasing elderly population provides plenty of opportunities for accountants, lawyers and banks to earn money as the guardians of old people.)

**FRED BAYLES
and SCOTT McCARTNEY**
Associated Press

PHOENIX, Ariz. — Charles Arnold looks out on the rest of country from this retirement mecca and sees unlimited possibilities for the guardianship business.

"I think guardianship is unquestionably the future," he says. "The business is overwhelming and the need is dramatic."

An attorney and former public guardian in Phoenix, Arnold is part of a new and growing field of guardianship entrepreneurs — professionals who, for a fee, will run the lives of old people.

Called professional guardians or fiduciaries, they take on a role once held by sons and daughters. They earn their money by making all the decisions for their elderly wards, including where they will live and, in some extreme cases, when they will die. Their fees come from the people whose lives they control.

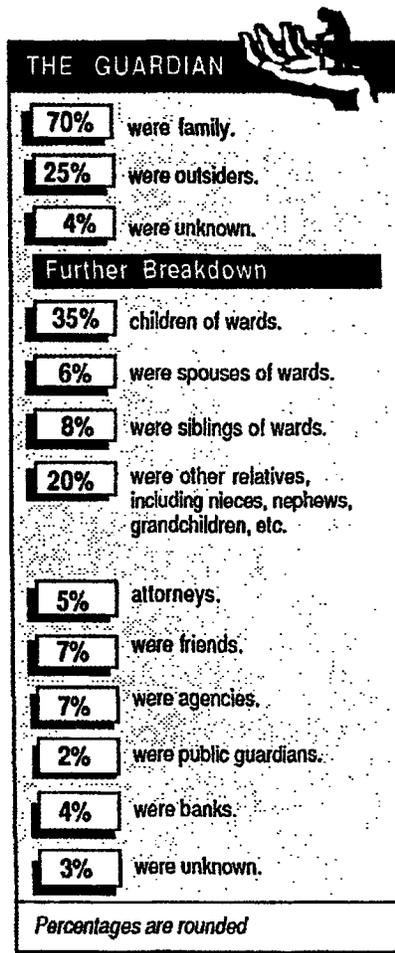
Yet, no state requires a license to hang out a shingle.

The ranks include people such as Frank Repensek, who agonizes over the medical decisions he must make for his wards.

"Substituting judgment for another adult who sits there and says I don't want this operation, it's just miserable," said Repensek, the executive director of the Guardianship Program of Dade County Inc., a non-profit Miami firm.

Others define their role in terms of cost effectiveness, economies of scale and bottom lines.

"It is basically money management," said Alan May, a Detroit-area attorney with 400 wards. "It is basically the review of their financial affairs to make sure the nursing homes are charging them the correct amount of money, that the nursing home is paid, that the



money is provided for their needs."

While guardianship still is largely seen as a family affair, a legal step taken by children to better care for their parents, a yearlong *Associated Press* study of the nation's guardianship systems found an increasing number of strangers taking over as the legal "parent" of the elderly.

For some, the deeper issue is the commercialization of guardianship, a shift from family caring and commitment to a business arrangement that often promotes itself with color brochures and slide-tape presentations.

The growth in professional guardianship has many causes. The movement of retirees to the Sun Belt, where professional guardianship thrives, has cut off many of the

aged from families and friends.

Hospitals and nursing homes looking for someone to guarantee the payment of bills for elderly patients often direct cases to private guardians when family or government agencies are not available.

Some firms aim for specific markets. Ourself Conservatorship Services in Santa Ana, Calif., avoids committing itself to wards with estates of under six figures. "We have to try to stay with estates of \$150,000 and over," said Judy Okonski. "We have a policy of staying with these people until they expire."

Professional guardianship does not come cheap. Judith Chinello, a guardian in Glendale, Calif., whose office receives 25 referrals a month, charges \$65 an hour for her time, less for duties performed by workers who may cook, clean or chauffeur a ward. Planned Protective Services bills at \$37.50 an hour for nearly all its services, but offers them free to 42 percent of its 200 wards.

But the generosity of Planned Protective Services is not common. In many situations, once the money is gone, professional guardians petition the court to end their service, leaving the wards, already declared incompetent to handle their affairs, in a legal no-man's land.

Most professional guardians advise keeping a close eye on the ledger because profits can be marginal. May, the Detroit-area probate attorney, said he was in the business only because "it's a nice part of my practice. It fits."

Some worry that the rise of professional guardianship has come without regulations and licensing. Most state laws place few or no conditions on who can be a guardian; some ban nursing home employees and convicted felons, but few require background checks. There is no state licensing of professional guardians.

Others note that licensing won't be a cure-all. "You can't legislate compassion and morality," said Chinello, although she favors licensing as a first step.