

COMMENTS ON GUARDIANSHIP AND ABUSE

By Carol J. Scott, Missouri State Long-Term Care Ombudsman

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Thank you for this opportunity to speak on an issue that affects an untold number of citizens of this country.

Let me start by quoting Jenny Joseph's poem "Warning": "When I am an old woman I shall wear purple with a red hat which doesn't go, and doesn't suit me" This poem ends with "But maybe I ought to practice a little now? So people who know me are not too shocked and surprised when suddenly I am old, and start to wear purple."

When guardianships occur, it is the constitutional rights (such as voting, property, contracts, etc.) that are taken away. It often seems that there is a never-ending battle to debunk stereotypic notions of older or disabled adults. Often the labeling of an individual is tantamount to creating a presumption of the need for guardianship.

Finding yourself under a court appointed guardianship could happen quickly. A man in Missouri was driving his pickup down the street and within two weeks was in a nursing home with a guardian. Within 6 weeks all his belongings were thrown away, and all real estate was sold. Within that time, he got better, and with the help of the Ombudsman Program, the nursing home and his physician, he asked the court to overturn the guardianship.

That request was denied.

In another Missouri case, the guardian of 7 residents of one nursing home moved these individuals to another facility because the guardian was mad at the nursing home for requesting payment of bills. One of those residents had lived in that nursing home for more than 25 years.

From across the country, the Ombudsman stories remain the same: the system is not working, as it should in all cases. It is far too easy to take advantage of people, no one is looking and there are no safeguards in place to protect these vulnerable people.

Ohio: The Ombudsman Program has had cases where the guardianship agencies have overstepped their bounds. One agency moved all their wards from their nursing home, without talking to them. The Ombudsman visited and notified the court, but the residents were moved anyway. One resident died after the move. The agency wrote a letter to the new facility telling them not to allow the ombudsman to visit residents without the guardian present. This is against federal law, and the Ombudsman Program is not complying with this request.

New Jersey: A case of an attorney who was appointed guardian. The guardian applied for Medicaid on behalf of the resident in 2005, who should have had \$49,000 in the bank. This case is now under investigation by the County Prosecutor.

Michigan: Two cases where each of the wards was placed in a locked Alzheimer's unit in the nursing home. Neither person had dementia, and in both cases the facility and physicians felt the individuals did not need a guardian.

In Missouri, we have a system that has an elected official in each county, who assumes the role of guardian for our citizens who have no one else or for whom there is a dispute over who should

be the guardian. There are no requirements for being elected; these people have less than 30 hours of training, and yet control the lives and finances of many people. Their only oversight is from the judge in their county.

While many family members and friends assume the role of guardian or conservator, there are no training requirements and only a yearly accounting of finances, which is sent to the court.

Low-income family members face difficulties because of the cost of establishing a guardianship. In these situations, family members who are willing to be guardians ought to be encouraged, not punished by the cost of becoming the guardian.

There are many best practices across the country. States need to look at these and make appropriate changes.

As far as a role for the federal government:

First, there is a great need for coordination between the Social Security Administration, VA representative payment programs and state courts handling guardianships. This issue was described in the 2004 GAO report.

Second, in the federal Older American's Act, there is a provision for each state to develop a legal services program. In many states, that system is floundering due to lack of attention and funding. In states that have a strong legal services program as part of their services for the elderly and disabled, we have seen some good best practices.

Third, the National Conference of Commissioners on Uniform State Laws has convened a committee to address interstate issues. It would be great if Congress could somehow promote the portability of guardianships created in other states.

Fourth, the federal government could conduct a study of the connection between guardianship and the inappropriate institutionalization of individuals in nursing homes.

When guardianship works well, it is fine to have control at the local probate court level. When it is not working, there is a need for some other type of oversight. There may be a need for someone to have oversight to review financial dealings, the living arrangements of the ward and other quality of life issues.

So, training, education, and oversight are solutions that can happen, but will take time and money. Empathy, caring, showing respect and “doing the right” thing, can happen now. We must take care of the people who can’t care for themselves. In addition to my testimony, I am submitting in writing some case stories and further recommendations for action.

I wish there were easy answers. In many, perhaps most cases, the current system is working. But there are lots of cases where that is not true. I look forward to going back to Missouri and expanding our current work group to identify specific solutions to our specific problems. I hope that everyone in this room will do the same.

Thank you for this opportunity to speak to you.

Some case examples:

Case No. 1

Ms. A, a retired real estate agent, lives at home. Her housekeeping skills deteriorate considerably. Daughter, only child, seeks and is granted limited guardianship and limited conservatorship. Ms. A must pay over \$11,000 in daughter's attorney fees. Daughter lives 1,500 miles away.

Ms. A. is to retain right to pay her own bills. Daughter ignores this limitation, and fiercely controls money. Will not give Ms. A money to go out to lunch with her friends. Will give Ms. A only \$10 to buy Christmas gifts for her great grandchildren (despite Ms. A having about \$120,000 in the bank.)

Daughter seeks court permission to sell house and move Ms. A to assisted living. Granted by court. Ms. A is in assisted living for short period, and "acts out." Without seeking court approval, daughter places Ms. A in the Alzheimer's unit of a nursing home. Ms. A has no day-to-day medical needs.

Ms. A is conversant and entirely rational. Ms. A is miserable, for she loves to interact with people, but those who live on her unit cannot communicate.

Daughter refuses to consider assisted living, although this is both desired by Ms. A, and appropriate based on her abilities and needs.

Case No. 2.

Ms. B lives alone in her house, quite content. Her eyesight is failing. She crosses a road to get groceries and go to the bank. Instead of going to the light, she jaywalks, creating a danger to herself.

Ms. B has granted a durable power of attorney for health care in favor of her daughter, an only child.

After being hospitalized for a blood clot in her leg, her daughter, puts Ms. B. in the locked, Alzheimer's Unit of a nursing home. (Ms. B was recently tested with an IQ of 132; all agree she does not have Alzheimer's disease).

The nursing home contacts the State Long Term Care Ombudsman, for the nursing believes Ms. B has no nursing home needs, and fears there is financial abuse by daughter. The nursing home physicians refuse to trigger the advance directive, believing Ms. B is fully capable of making informed decisions.

Daughter applies for guardianship and conservatorship. Court grants emergency guardianship, then guardianship and conservatorship, even though a) there is no emergency; b) Ms. B is not an "incapacitated individual" as defined in statute; and c) guardianship is not necessary (a requirement of statute) because of the durable power for health care (statute states a guardian cannot be given powers a patient advocate has).

Ms. B. requests reconsideration of the probate court's decision; it is summarily dismissed. Daughter refuses to consider assisted living. She expresses fear if Ms. B's home is sold to pay for assisted living, she will not inherit anything. On the other hand, if Ms. B is in a nursing home

resident, and her (lifetime) stay is paid by Medicaid, the house will be an exempt asset, and inherited by daughter or granddaughter. (This is not true in all states. For instance in Missouri, the state would put a lien on the home to recoup the money that Medicaid paid on behalf of the resident.)

Case No. 3

Numerous hotlines since 2002 (substantiated filth/vermin/squalor, inadequate supervision, inadequate personal care, etc), numerous court hearings and entry warrant. Severely demented woman had a lot of money. The Dept. of Health and Senior Services (DHSS) staff had been told by the Trust of the Estate since 2002 that they controlled all aspects of the money of Ms. XXX. When she moved to Missouri, they purchased her a large brick home in a very nice neighborhood (not sure of the cost, but likely \$200,000+) in which to live. Her caregiver neglected her, neglected the house, and basically trashed the house (many, many dogs, ferrets, cats) - so bad that Ms. XXX was removed, as well as the children of the caregiver, by children's services. The trust not only paid for the house, but also paid the monthly bills (without receipts, just with the caregiver telling them how much the bills were, which was not accurate!). Trust was made aware of the conditions of the home, but did nothing about it.

Guardianship was granted to the brother of the caregiver in 2003. Guardian lived in California and visited once for 2 days in the entire 4 years of this case. He was made aware of the situation, but did nothing visibly to rectify the situation. In fact, he often protested DHSS involvement and placement of Ms. XXX in a protected environment. In more than one instance, he could not be contacted for days on an issue pertaining to Ms. XXX's health. Guardian denied any information about assets or income of Ms. XXX (which is questionable, as he knew that caregiver did not work and had access to monthly money).

Trust was made the official conservator of Ms. XXX in 2005. It was not until 2006 that DHSS became aware that the trust DID NOT control (nor had EVER controlled) Ms. XXX's monthly income, which was about \$2000 a month (Social Security and other Pension). Between 2002 and 2006, Ms. XXX had been in/out of the nursing home for over 20 months. The trust had paid cash for the nursing home stay. The caregiver had full access to the monthly income and had been spending this money on herself (she actually admitted this in court!). Even in the nursing home, the trust was still paying the household bills!

Basically, the caregiver had a house, all bills paid, monthly income of \$2000, declared no income, got food stamps and Medicaid, and earned rent from outside people she allowed to live in the home. Public Administrator was made guardian/conservator in June 2006. She is currently in a lengthy court battle to remove caregiver from the home (which will have to be extensively remodeled before sold). PA has stopped the caregiver's access to monthly income of Ms. XXX's. PA and DHSS have filed Medicaid fraud charges against caregiver, food stamp fraud, and are seeking federal charges stemming from the misuse of social security funds. Ms. XXX now permanently resides in a nursing home and receives the best of care.

Some recommendations:

1. Designate funds for Adult Protective Services.
2. Provide guardianship grants to public agencies to provide guardianship services.
3. Provide incentives to state prosecutors to prosecute persons who exploit the elderly.
4. Ensure that all state Long-Term Care Ombudsman Programs have adequate legal counsel as outlined in the Older American's Act.
5. Clarify and more clearly delineate the requirements of Legal Services, as found in the Older American's Act.
6. Encourage banks and other financial institutions to always have a face-to-face meeting with the elderly person when executing loans or other indebtedness. Have trained staff evaluate whether the individual has capacity.
7. Encourage banks and other financial institutions to conduct educational sessions for their staffs on the exploitation of the elderly and what to look for, and how to react, e.g. don't give them large amounts of money without looking into the situation.
8. Address the issue of the undocumented incapacitated person, e.g. access to long-term care services.
9. Provide necessary services for the elderly person in need of mental health or substance abuse rehabilitation services and support services. These individuals do not always need to be under guardianship.
10. Have the Veterans Administration remove their guardians and transfer fund authority to a state/local appointed guardians, where one is appointed in order to reduce duplication of effort.
11. Continue to develop public assistance programs that serve low-income individuals and not allow eligibility to be based on voluntary impoverishment or other schemes. (Cap the cost of exempted purchases.)
12. Provide support for the states to develop and implement guardianship training programs for family/friends to become guardian. Provide assistance to the elderly and disabled on how to avoid guardianship using other legal processes, such as durable powers of attorney.
13. Encourage courts to monitor guardianships.