



**Written Testimony of Barbara E. Buckley, Esq.
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For

**Hearing on “Abuse of Power: Exploitation of Older Adults by Guardians
and Others They Trust”**

United States Senate Special Committee on Aging

November 28, 2018

Statement to the U.S. Senate Special Committee on Aging

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INTRODUCTION:

I am honored to be here today to discuss a critical issue facing our country: exploitation of the elderly and adults with disabilities in guardianship court proceedings. As was noted in the last hearing, a compelling article, “How the Elderly Lose Their Rights” was written about the guardianship experience in my jurisdiction. This story is a poignant account of how a “private professional guardian” destroyed the lives of countless individuals, depriving them of their liberty, their right to see their family, and their assets. Guardians were being appointed without notice, often when there was no real need for a guardian. The court bypassed family members to appoint professional guardians or others who proceeded to loot the estate and isolate the individual from their loved ones. Family members were often disparaged in court records and dismissed as unsuitable to be guardian with no credible evidence to support the claim. The guardian, with access to the purse strings, would engage in a legal battle against the vulnerable person’s family members who only wanted a better outcome for their loved one. All of the legal fees incurred by the guardian were billed against the protected person’s estate with little to no oversight over the accountings. Lawyers for the guardians often charged exorbitant sums, further decimating the estate. The elderly adult or adult with disability at the center of the case was often the only party without an attorney as legal counsel for them was never appointed. They were left stranded without being able to express their wishes in court and had no one to enforce their rights. Cases were open for years without reports being filed about the person or estate over which guardianship had been granted.

It became clear that reforms were needed after families and protected persons, with their voices magnified by the press and others who believed in them, began coming forward about their victimization. In 2015, Nevada Supreme Court Chief Justice James Hardesty created a Guardianship Commission to examine the guardianship system and recommend reforms. Sixteen legislative recommendations were made along with fifteen court rule recommendations and nine policy statements. My testimony today focuses on the most significant of these reforms and what other states and communities can and must do to protect the rights of the elderly and adults with disabilities in guardianship court. The three main areas of reform I will address are: the right to counsel, the protected person’s Bill of Rights and other statutory reforms, and the establishment of the Guardianship Compliance Office.

THE RIGHT TO COUNSEL:

The right to counsel for individuals facing guardianship or in a guardianship action is one of the most important recommendations from the Guardianship Commission, enacted by the Nevada Legislature, and approved by our Governor. It was determined that individuals facing and under guardianship should have the same constitutional right to counsel guaranteed an indigent criminal defendant in the landmark case of Gideon v. Wainwright. The concept of a “civil Gideon” has been discussed for years, and its applicability in guardianship proceedings where

significant deprivation of rights and liberties occur quickly garnered widespread support in Nevada. The goal of counsel is:

- To ensure that the least restrictive alternative to guardianship is explored and selected before guardianship is considered so as to maximize the independence and legal rights of those who would otherwise be placed under guardianship.
- To provide a voice in court proceedings for seniors and individuals with disabilities who want to contest a guardianship, either because it is deemed unnecessary or because the guardian is abusing their power.
- To protect and represent the due process rights of seniors and individuals with disabilities who are currently saddled with an inappropriate guardian who ignores their needs, exploits them, and/or overbills them.
- To advocate for the wishes of seniors and individuals with disabilities in a guardianship action when they want to remain in their home, or, when this is not possible, live in a place of their choosing where they feel safe and comfortable.
- To stop guardians from unilaterally liquidating the property, keepsakes, and heirlooms of a person under a guardianship.
- To ensure that seniors or individuals with disabilities are fully able to communicate their wishes directly to the guardianship court and have those wishes acted upon.
- To recover the property and/or funds of an individual under guardianship through the civil law process when the assets were improperly taken by a guardian or other person.

Model of Representation:

The Commission recommended and the Legislature agreed that counsel would follow a client-directed model of representation rather than a guardian ad litem model. The client-directed model requires the attorney follow their client's direction and work to achieve the client's stated goals. If the client is unable to form a traditional attorney-client relationship, the attorney represents the client's legal and constitutional interests. Nevada decided that legal aid attorneys should provide this representation. Under this program, legal aid attorneys become experts in the field of elder law and guardianship, attend trainings, and share best practices with each other. In addition to providing top-notch representation, this process is financially prudent by providing legal representation at a fraction of the cost of a private sector attorney.

Since the advent of this program, there is a completely different landscape and culture in guardianship court. As soon as a petition is filed, legal aid is appointed to represent the person who is the subject of the guardianship action. An attorney visits the client where they live and ensures they are informed of the action and what it means to be under guardianship. The client makes the decision whether to support or oppose the guardianship, including who is appointed

guardian. If the guardianship is granted, the attorney advocates for the client's money to be placed in a blocked account. I am also pleased to say that the private professional guardian depicted in the *New Yorker* has been in jail since her arrest in March 2017 on more than 200 counts and will be sentenced shortly following a plea agreement. As a result of the reforms in guardianship court, legal aid attorneys have had unscrupulous guardians removed, unnecessary guardianship actions dismissed, and their clients' assets recovered. We ended a failing system where the most important person in the case had no voice, was ignored, and unrepresented.

In our first full year of operation since the right to counsel law, our office accepted **907 cases**, averaging 75 new cases a month. Most were new cases, but some involved problematic cases that had been open for years. Of the 146 cases closed by our office during this same time period:

- 40% were due to the guardianship case being denied/avoided meaning the initial petition filed by the proposed guardian went nowhere
- 19% of the cases we closed were due to our lawyers advocating for the guardianship to be terminated because a guardian was no longer needed
- 38% of the guardianships were terminated due to the client's death. During these cases, our attorneys advocated on behalf of their client's rights and either had the guardian changed or removed, and/or protected or recovered estate assets.
- 37% of our clients were 81 and above, 14% were 71-80, 22% were 61-70, and 27% were ages 18-60.

The most important person in any guardianship proceeding, the person facing or under guardianship, is no longer silenced by the lack of counsel.

CREATION OF A BILL OF RIGHTS FOR INDIVIDUALS FACING GUARDIANSHIP AND ADOPTION OF OTHER STATUTES PROVIDING FOR SPECIFIC PROTECTIONS FOR PROTECTED PERSONS

In Nevada, like many other places, there seemed to be a callous indifference even among caring people about the preservation of the rights and dignity of the elderly and adults with disabilities in guardianship court. There was, and still is, a sense that if someone is confused at times, they have no capacity and should not be consulted about anything, ever. A guardian acted almost God-like, deciding who could see the protected person, where they should live, and who should visit. Instead of acting as a trusted fiduciary, preserving the important ties between the protected person and their family and friends, and preserving the assets, the guardian acted as if only their opinion mattered while charging exorbitant fees against the estate.

To combat this callous treatment of protected persons, the State of Nevada adopted a Protected Person's Bill of Rights. The Bill of Rights provides:

NRS 159.328 Legislative declaration of protected persons' rights.

1. The Legislature hereby declares that, except as otherwise specifically provided by law, each proposed protected person has the right to have an attorney before a guardianship is imposed to ask the court for relief, and each protected person has the right to:

- (a) Have an attorney at any time during a guardianship to ask the court for relief.
- (b) Receive notice of all guardianship proceedings and all proceedings relating to a determination of capacity unless the court determines that the protected person lacks the capacity to comprehend such notice.
- (c) Receive a copy of all documents filed in a guardianship proceeding.
- (d) Have a family member, an interested party, a person of natural affection, an advocate for the protected person or a medical provider speak or raise any issues of concern on behalf of the protected person during a court hearing, either orally or in writing, including, without limitation, issues relating to a conflict with a guardian.
- (e) Be educated about guardianships and ask questions and express concerns and complaints about a guardian and the actions of a guardian, either orally or in writing.
- (f) Participate in developing a plan for his or her care, including, without limitation, managing his or her assets and personal property and determining his or her residence and the manner in which he or she will receive services.
- (g) Have due consideration given to his or her current and previously stated personal desires, preferences for health care and medical treatment and religious and moral beliefs.
- (h) Remain as independent as possible, including, without limitation, to have his or her preference honored regarding his or her residence and standard of living, either as expressed or demonstrated before a determination was made relating to capacity or as currently expressed, if the preference is reasonable under the circumstances.
- (i) Be granted the greatest degree of freedom possible, consistent with the reasons for a guardianship, and exercise control of all aspects of his or her life that are not delegated to a guardian specifically by a court order.
- (j) Engage in any activity that the court has not expressly reserved for a guardian, including, without limitation, voting, marrying or entering into a domestic partnership, traveling, working and having a driver's license.
- (k) Be treated with respect and dignity.
- (l) Be treated fairly by his or her guardian.

- (m) Maintain privacy and confidentiality in personal matters.
- (n) Receive telephone calls and personal mail and have visitors, unless his or her guardian and the court determine that particular correspondence or a particular visitor will cause harm to the protected person.
- (o) Receive timely, effective and appropriate health care and medical treatment that does not violate his or her rights.
- (p) Have all services provided by a guardian at a reasonable rate of compensation and have a court review any requests for payment to avoid excessive or unnecessary fees or duplicative billing.
- (q) Receive prudent financial management of his or her property and regular detailed reports of financial accounting, including, without limitation, reports on any investments or trusts that are held for his or her benefit and any expenditures or fees charged to his or her estate.
- (r) Receive and control his or her salary, maintain a bank account and manage his or her personal money.
- (s) Ask the court to:
 - (1) Review the management activity of a guardian if a dispute cannot be resolved.
 - (2) Continually review the need for a guardianship or modify or terminate a guardianship.
 - (3) Replace the guardian.
 - (4) Enter an order restoring his or her capacity at the earliest possible time.

2. The rights of a protected person set forth in subsection 1 do not abrogate any remedies provided by law. All such rights may be addressed in a guardianship proceeding or be enforced through a private right of action.

Other Nevada reforms include a requirement that the proposed protected person be present at the hearing where the court can see and hear from them, enhanced notice requirements concerning sale of property belonging to the protected person, and statutes providing that the guardian shall not restrict the right of a protected person to communicate, visit or interact with relatives and friends.

Armed with the Bill of Rights and statutory protections, the elderly and adults with disabilities in the State of Nevada now have clear, specific rights guaranteed to them.

GUARDIANSHIP COMPLIANCE OFFICE:

The third major plank of reform in Nevada involves the creation of the State Guardianship Compliance Office which was inspired by a presentation we received from Palm Beach County, Florida. When the guardianship horrors were revealed, the Eighth Judicial District Court quickly established a hotline to report fraud and abuse. But the Guardianship Commission wanted a strong statewide office to guard against fraud and abuse. The Guardianship Compliance Office opened in January 2018 and employs one manager, two financial forensic specialists and two investigators to provide auditing and investigative services to the district courts during the administration of guardianship proceedings pursuant to Chapter 159. The types of investigations include:

- locating protected persons with whom the court has lost contact;
- pre-guardianship investigations, which provide court information on the necessity of guardianship or whether a lesser restrictive alternative to guardianship exists;
- appropriateness of the guardian;
- investigations into the treatment and care of the protected person by the guardian; and/or
- reports of alleged isolation, restrictive placement or other rights violations.

Audits of estates have been ordered for a variety of reasons, including potential misuse of estate funds by the guardian, routine review of an accounting of a large estate when the court does not have the resources to do so, and to determine, after the death of a protected person, the final disposition of the estate. Many of the issues that caused a district court judge to order an audit into an estate were resolved during or after the conclusion of the audit as the issues stemmed from the guardian's lack of education with regard to their responsibilities. Several guardians have reimbursed estates, while others received education and training related to the proper management of the protected person's estate. Since March 2018, the Guardianship Compliance Office received court orders to investigate 121 guardianships and audit 50 guardianship estates. The total value of estates audited by the Office exceeds \$21,471,101.00.

The Office established a hotline that is designed to offer the public a central place to report guardianship issues in Nevada or to ask general guardianship related questions. Reports that raise significant concerns about the treatment and care of a protected person, or the management of their estate are reported to the court and if indicated, to protective services or law enforcement. In addition, the Office provides callers with resource navigation services, which provides referrals to agencies and organizations that might be able to meet their needs if the call is outside the scope of the office. Other initiatives include the development and delivery of training for guardians on their roles and responsibilities, as well as specific issues, such as how to complete an annual accounting and recognize abuse, neglect and exploitation; train for judicial officers on guardianships and lesser restrictive alternatives, such as supported decision making; as well as training for protected person's counsel on guardianship issues.

CONCLUSION:

It is hard to describe the heartache and suffering caused by the lack of oversight that existed in Nevada's guardianship system. Lives were ruined. I remember one salt-of-the-earth Nevadan speak to me about her neighbor – she was becoming frail, but the cul-de-sac was full of caring neighbors. When her neighbor was removed from her home, she went to court to protest, only to find that the hearing was cancelled because no opposition to the guardianship action was filed. When her neighbor's son tried to get guardianship, he was dismissed and demeaned. After all of her estate was looted, and her son finally got guardianship, she was too diminished to return home. Every time this kind neighbor looks at her former neighbor's house, she is saddened by what happened to her friend. This system destroyed individuals and families. It decimated their spirits and robbed them of the little time they had to spend with their loved ones. It created financial devastation to those who tried to fight the system. Those who spoke up against the dysfunctional system that had been in place for so long were branded as troublemakers trying to buck the system. Yet, it was the system that needed to be changed, not the people destroyed by it. We are proud of the strides we have made in a relatively short time with policy and statutory changes and most importantly, our work to change the culture in adult guardianship so that the focus is on the individual who is at the heart of the case. And I would be remiss if I do not cite the arduous work done by Chief Justice Hardesty, our courts, our lawmakers, and our victims' families to make these reforms happen. Our work is not done. There are still some in our system who seek to put their financial gain above the rights of our most vulnerable and who seek to erode the progress we have made. But important historic reforms were enacted and hard work has been done to improve the system for the better, in sharp contrast to the state of affairs just a few years ago.

In closing, I want to thank Senator Catherine Cortez Masto who, as Nevada Attorney General, recognized the danger of unregulated "private professional guardians" in the guardianship arena and requested legislation to regulate them. I also would like to thank her for all she does for our State and for inviting me here today. I would also like to thank this panel for the honor of allowing me to testify. In conclusion, I would urge this panel to place its considerable weight and influence behind ensuring reform happens throughout our country, through legislation, grants, and appropriations. I would urge the panel to engage with jurists, lawmakers, and stakeholders throughout the country to embrace reform. Our most vulnerable deserve a better system.