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# 1990 Guardianship Law Safeguards Personal Rights Yet Protects Vulnerable Elderly

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## 1990 GUARDIANSHIP LAW SAFEGUARDS PERSONAL RIGHTS YET PROTECTS VULNERABLE ELDERLY

A Chicago social worker discovered an 83-year-old woman lying in a urine-soaked bed suffering from severe malnutrition and dehydration. . . . The woman, under guardianship of her daughter, was cared for by grandchildren who . . . fed her once a day, called her "Fido" and spent her Social Security checks.<sup>1</sup>

Nationwide, guardianship abuses captured headlines and triggered accelerating demands for change in guardianship laws and procedures.<sup>2</sup> Locally, advocates extensively lobbied for reform.<sup>3</sup> In response, the Ohio legislature passed the Guardianship Reform Bill.<sup>4</sup> This legislation offers heightened procedural safeguards to protect the decision-making powers of vulnerable elderly.<sup>5</sup>

The reform bill addresses a number of abuses. However, actual protection will vary as each probate court applies the law. Advanced age is no longer a cause for determining competency.<sup>6</sup> Potential wards may request counsel and may have a friend with them at their guardianship hearing.<sup>7</sup> Independent expert evaluators may

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<sup>1</sup> Bayles & McCartney, *Guardians of the Elderly: An Ailing System: Few Safeguards Keep Wards from Abuse, Ruin*, Akron Beacon J., Sept. 22, 1987, at A1, A10, col. 2. In a comprehensive six-part series, 57 Associated Press reporters collected information on more than 2200 guardianship cases throughout the country. The study was published in more than 300 stories nationally. It prompted federal and state legislation to address the reported abuses. The abuses were greater than isolated individual cases. A Rhode Island Probate Judge said, "I don't know where the wards are, who's caring for them, what they're doing. I have no support staff, I have no welfare workers, I have no aides, I have no assistants and I have no money." *Guardians of the Elderly: An Ailing System*, Akron Beacon J., Sept. 20, 1987, at A1, A8, col. 1 [hereinafter *Guardians*]. See also Parry, *Summary, Analysis and Commentary: Selected Recommendations from the National Guardianship Symposium at Wingspread*, 12 MENTAL & PHYSICAL DISABILITIES L. REP. 398 (1988) (ABA Commissions on Mentally Disabled and Legal Problems of the Elderly co-sponsored a national guardianship symposium which drafted 33 reform recommendations, most of which were adopted by the ABA House of Delegates).

<sup>2</sup> Parry, *supra* note 1, at 398.

<sup>3</sup> Tobin & Smith, *Guardianship Bill Signed*, 9 Apologist, Sept. 1989, at 1.

<sup>4</sup> Sub. S.B. 46, 118th Leg., Reg. Sess., 143 Ohio Laws S. 46. Effective, January 1, 1990, Sub. S.B. 46 amended nineteen sections and enacted six new sections to revise probate court guardianship laws.

<sup>5</sup> The Associated Press series and this Comment focus on guardianship and the elderly. One study found that 80% of guardianships were for persons over 65 years of age. ALEXANDER, LEGAL PERSPECTIVES: ISSUES IN COMPETENCY, IN VALUES, ETHICS AND AGING 71 (Lesnoff-Caravaglia ed. 1985). However, legal and social science literature reflect problems with all types of guardianships including those of mentally ill and mentally retarded persons. Parry, *supra* note 1, at 398.

<sup>6</sup> Ohio Rev. Code Ann. §2111.01(D) (Anderson 1990) The statute defines "incompetent" as "any person who is so mentally impaired as a result of a mental or physical illness or disability, or mental retardation, or as a result of chronic substance abuse, that he is incapable of taking proper care of himself or his property or fails to provide for his family or other persons for whom he is charged by law to provide, or any person confined to a penal institution within this state." *Id.*

<sup>7</sup> Ohio Rev. Code Ann. §2111.02(C)(7) (Anderson 1990) The Guardianship Reform Bill provides that the

challenge unsubstantiated medical notes or fill-in-the-blank forms from a family doctor.<sup>8</sup> Guardianship is no longer an all-or-nothing determination but may be tailored to compensate for the particular ward's deficits.<sup>9</sup>

Given the demographic imperative of an aging population guardianship reform measures are timely.<sup>10</sup> Currently, it is estimated that more than half a million older Americans are under guardianship.<sup>11</sup> Moreover, the expected dramatic increase in proportion and absolute numbers of older adults, will undeniably increase the number of individuals with mental and physical impairments.<sup>12</sup> As more people become impaired, guardianships may be abused.<sup>13</sup> For-profit guardianship service programs are springing up across the country to serve increasing numbers of frail dependent clients.<sup>14</sup> Once established, these programs have a stake in maintaining enough guardianships to keep themselves in business.<sup>15</sup> Guardianship questions are emerging as significant social, medical, ethical and public policy issues for the 1990's.<sup>16</sup>

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alleged incompetent has the following rights:

- a. independent counsel of his choice
- b. friend or family member at hearing
- c. independent expert evaluation introduced into evidence; and,
- d. if indigent, the proposed ward has the right to counsel at the initial hearing and upon appeal.

*Id.*

<sup>8</sup> *Id.*

<sup>9</sup> See Ohio Rev. Code Ann. §2111.02(B)(1) (Anderson 1990).

<sup>10</sup> U.S. Congress. House. Select Committee on Aging, *Surrogate Decisionmaking for Adults: Model Standards to Ensure Quality Guardianship and Representative Payeeship Services one-5* (1988) [hereinafter *Surrogate Decisionmaking*].

<sup>11</sup> *Id.* at IX.

<sup>12</sup> Scoggin & Perry, *Guardianship Proceedings with Older Adults: The Role of Functional Assessment and Gerontologists*, 10 *LAW & PSYCHOLOGY REV.* 123 (1986).

<sup>13</sup> *Surrogate Decisionmaking*, *supra* note 10, at one-4. Committee on Aging members identified four trends linked to a growing public concern about increased use of guardianships, including:

- (1) the aging of the nation's population and the dramatic growth in frail and vulnerable persons over 85 years of age;
- (2) the deinstitutionalization of chronically mentally ill persons, including a large number of elderly who were moved from state hospitals into nursing homes;
- (3) mandatory elder abuse reporting laws in many states, including Ohio, that might deprive the elderly of their rights and freedom of choice in an effort to "protect" them. See also Regan, *infra* note 22;
- (4) reliance of hospitals and nursing homes on guardians to ensure legal and financial protection for decisions regarding elderly patients.

<sup>14</sup> *Id.* at one-9.

<sup>15</sup> *Id.*

<sup>16</sup> Iris, *Guardianship and the Elderly: A Multi-Perspective View of the Decisionmaking Process*, 28 *THE*  
<http://ideaexchange.uakron.edu/akronlawreview/vol24/iss1/8>

Therefore, this Comment will review the historical underpinnings of guardianship law, briefly examine nationwide excesses, and outline reform measures advanced by advocates for the elderly and mentally disabled. Then the Comment will analyze key elements of Ohio's Guardianship Reform Bill including the court investigator's role, expanded powers provisions, reporting and revalidation measures, and the Indigent Guardianship Fund. Finally, this Comment will address areas of potential concern as Ohio's Probate Courts throughout the state implement the law.

### THE LAST LINE OF PROTECTION FAILS THOSE IT SEEKS TO PROTECT

The nation's guardianship' system [is] . . . 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.<sup>17</sup>

Guardianship is a "legal relationship which authorizes one individual to become a substitute decision-maker for another."<sup>18</sup> Central to guardianship issues is the powerful tension between due process in protecting a person's legal rights and society's desire to properly care for its incapacitated citizens.<sup>19</sup> This section will examine the historical background of guardianship law, major inadequacies that developed in the system, and the reform movement's response to guardianship abuses.

#### *Guardianship' Concept Based in Roman and English Law*

Guardianship is rooted in the ancient Roman times of Cicero.<sup>20</sup> Initially, both Roman law and early English common law allowed surrogates to manage the property, but not the personal affairs of the mentally disabled.<sup>21</sup> In England and colonial America, the doctrine of *parens patriae*--the responsibility of benevolent society to care for those unable to care for themselves--was the legal and philosophical basis for guardianship.<sup>22</sup> Gradually, guardians became responsible for the

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GERONTOLOGIST 39, 39-45 (Supp. 1988). See also, Nano, *Guardians of the Elderly: An Ailing System: Efforts Being Made to Improve Law in Ohio*, Akron Beacon J., Sept. 21, 1987, at A10, col. 1.

<sup>17</sup> *Guardians*, supra note 1, at A1, col. 4.

<sup>18</sup> ABA Comm. on Mentally Disabled, *Guardianship & Conservatorship 1* (1979) (Commission surveyed guardianship and conservatorship statutes nationwide and proposed a model statute.)

<sup>19</sup> Parry, supra note 1, at 398-99.

<sup>20</sup> W. SCHMIDT, K. MILLER, W. BELL & B. NEW, *PUBLIC GUARDIANSHIP AND THE ELDERLY* 7 (1981).

<sup>21</sup> ABA Comm., supra note 18, at 1.

<sup>22</sup> *Id.* See also Regan, *Protecting the Elderly: The New Paternalism*, 32 HASTINGS L.J. 1111 (1981) (Involuntary civil commitment and guardianship statutes have developed along somewhat parallel lines. However, civil commitment proceedings are grounded in the state's police power rather than the state's *parens patriae* power. *Id.* at 1113-1114. Standards under both types of statutes were vague and unreliable. However, due process reforms began earlier for civil commitment laws. *Id.* at 1114.); See Comment, *Rx for the Elderly: Legal Rights (and Wrongs) Within the Health Care System*, 20 HARV. C.R.-C.L. REV. 425 (1985), which suggests that as procedures for institutionalizing elderly psychiatric patients tightened,

personal affairs of their mentally disabled wards.<sup>23</sup> A jury of twelve men determined competency or mental disability in medieval England.<sup>24</sup> Later, however, under the benevolent paternalism of *parens patriae*, people believed there were no opposing sides because only the “best interests” of the incompetent were at issue.<sup>25</sup> The ward “won” by securing the protection of his guardian. Also, due process was given only if it was consistent with the prospective ward’s best interests.<sup>26</sup>

During the last twenty years, advocates have increased interest in guardianship issues.<sup>27</sup> Sensitivity to the elderly’s rights includes recognition of the significant losses associated with guardianship.<sup>28</sup> These losses include loss of the right to own a house, to manage money, to decide where or with whom to live, to drive a car, to vote, or to make medical decisions.<sup>29</sup> “The adult who becomes a ward is reduced to the legal status of a child.”<sup>30</sup> However, at the same time, other social thinkers advocated broadening guardianship powers to encompass anyone who might benefit from a guardianship regardless of incompetency.<sup>31</sup>

### *Inadequacies in the Guardianship System*

Inadequate procedural due process and vague competency standards plague the guardianship system.<sup>32</sup> An Associated Press study revealed that 75 percent of prospective wards had a hearing, but only 36 percent were represented by counsel and an overwhelming 92 percent either were not present at their hearings or their presence could not be determined.<sup>33</sup> Further, the reporters found that many courts determined competency “with almost no substantial evidence to support their legal conclusions.”<sup>34</sup> Plastic surgeons, gynecologists, urologists, lawyers, social workers and even the persons seeking guardianship judged the alleged ward’s mental abilities.<sup>35</sup> Other due process violations included cursory hearings, inadequate notice, “symbolic rather than aggressive representation,”<sup>36</sup> and an almost non-

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guardianships became “alternative avenues for placement of the elderly.” *Id.* at 435; See also Rosoff & Gottlieb, *Preserving Personal Autonomy for the Elderly* 8 J. LEGAL MEDICINE, March 1987, at 1 (Substantive grounds and procedural methods under civil commitment standards indicate that society might be leaning more toward paternalism than toward due process concerns. *Id.* at 30-37).

<sup>23</sup> Frolik, *Plenary Guardianship: An Analysis, A Critique and a Proposal for Reform*, 23 ARIZ. L. REV. 599, 601 (1981).

<sup>24</sup> W. SCHMIDT, *supra* note 20, at 8.

<sup>25</sup> Frolik, *supra* note 23, at 609.

<sup>26</sup> *Id.* at 609-10.

<sup>27</sup> W. SCHMIDT, *supra* note 20, at 8.

<sup>28</sup> *Id.* at 10.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> Frolik, *supra* note 23, at 612-13.

<sup>32</sup> Parry, *supra* note 1, at 398.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> W. SCHMIDT, *supra* note 20, at 14.

existent appeal process.<sup>37</sup>

Incompetency is the threshold determination of a guardianship appointment.<sup>38</sup> In theory, incompetency is defined narrowly, consistent with the client's limitations. In reality, the law has been applied in an all-or-nothing manner, irrespective of the client's limitations.<sup>39</sup> Standards for determining incompetency are vague and ill-defined.<sup>40</sup> Definitions of incompetency are state-specific but might be classified into three standards or models: the traditional causal link model, the Uniform Probate Code classification, and the functional or therapeutic approach.<sup>41</sup> Causal link statutes have a two-step definition of incompetence: the proposed ward must fall

<sup>37</sup> *Id.*

<sup>38</sup> Parry, *supra* note 1, at 398-99.

<sup>39</sup> *Id.* at 399. There are four types of guardianships, including:

- (1) plenary guardianship - confers all decisionmaking rights,
- (2) guardianship of the estate - confers right to manage financial and property interests
- (3) guardianship of the person - confers right to make personal decisions
- (4) limited guardianship - modern mechanism that tailors the guardianship to the needs of the ward.

*Id.*

<sup>40</sup> Regan, *supra* note 22, at 1114. See Caplan, *Let Wisdom Find a Way: The Concept of Competency in the Care of the Elderly*, 10 GENERATIONS, Winter 1985, at 10, 11. Clinical competency standards include the expected determinations of orientation, emotional stability, integrative thinking, and appropriate behavior. In practice, medical determinations often hinge on a person's "compliance with medical opinion" and a person's membership in an identified class, such as elderly or disturbed. Thus, competency depends upon the content of a person's decision rather than the mental decision-making process. *Id.* at 11-12. See also Appelbaum & Roth, *Clinical Issues in the Assessment of Competency* 138 AM. J. PSYCHIATRY 1462, 1465 (1981) (Competency may fluctuate and should be measured during at least two contacts on two different days). See also Comment, *supra* note 22, at 437. Vague competency standards invite risk of restricting persons who are "different" as well as those who are "disabled." *Id.* See Frolik, *supra* note 23, at 603. "Mental incapacity and mental incompetency are not to be confused with unreasonable, foolish or even 'crazy' behavior, for it is not the wisdom of the decision but rather the quality of the thought process that is at issue." *Id.*

<sup>41</sup> Nolan, *Functional Evaluation of the Elderly in Guardianship Proceedings*, 12 LAW, MEDICINE & HEALTH CARE 210, 212 (1984). Somewhat confusing is a parallel reference in guardianship literature to another set of three models which focus on the philosophical relationship between guardian and ward. The three views of guardianship include:

- (1) Parent-child model - "best interest" model that perceives the guardian as the caretaker whose duty is to preserve the person or property of the ward;
- (2) Therapeutic model - guardianships would be broadened to provide protection for anyone who can not make reasonable decisions, regardless of mental capacity;
- (3) Substituted Judgment model - decisions of the guardian are imputed to the ward. Ideally, the ward has expressed opinions on a number of issues but if not, the court applies a reasonable person standard.

Frolik, *supra* note 23, at 605-25. See also Quinn, *Probate Conservatorships and Guardianships: Assessment and Curative Aspects*, 1 J. ELDER ABUSE & NEGLECT 91, 93-96 (1989).

within a specifically-named category, such as mental retardation or advanced age, and the proposed ward must be unable to care for himself or his property because he is a member of the category.<sup>42</sup> The Uniform Probate Code standard requires insufficient understanding and inability to make and communicate reasonable decisions.<sup>43</sup> Finally, the therapeutic or functional approach reflects the thinking of many gerontological and mental health professionals.<sup>44</sup> Rather than finding incompetency, functional approach practitioners find "incapacity" as measured by person's ability to "secure and maintain proper food, clothing, shelter, health care or safety."<sup>45</sup> Despite the apparent clarity of these three standards, statutory definitions and criteria for incompetency are so vague that professionals working within the system described the definitions as having "no psychiatric meaning" or "ambiguous as hell."<sup>46</sup>

### *Reform Movements Respond to Guardianship Abuses*

Vague competency standards and inadequate procedural safeguards are the major shortfalls of guardianship statutes.<sup>47</sup> Consequently, during the 1970's, The American Bar Association Commission on Mentally Disabled and other advocates advanced model due process statutes to address the deficiencies.<sup>48</sup> At the same time, states enacted adult protective services acts.<sup>49</sup> In some states, adult protective

<sup>42</sup> Kapp, *Common Concern: Legal Guardianship*, 2 GERIATRIC NURSING 366 (1981). Ohio retains a causal link standard but "advanced age" and "improvidence" were stricken from the statute as categories. Ohio Rev. Code Ann. §2111.01(D) (Anderson 1990).

<sup>43</sup> Nolan, *supra* note 41, at 213 (citing Utah Code Ann. §75-1-201(18) (1978)). Nolan suggests that defining the terms "sufficient understanding" and "responsible decisions" leads to highly subjective value judgments. *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> Quinn, *supra* note 41, at 95 (quoting N.H. Rev. Stat. Ann. §464-A:2 [VII], [XI] (1983)). Regan charges that the New Hampshire statute, the Uniform Probate Code, and similar statutes unnecessarily intrude into the lives of the elderly by requiring only functional disability without a corresponding finding of mental incapacity before a guardian is appointed. Regan, *supra* note 22, at 1126.

<sup>46</sup> Schmidt, *Guardianship: Public and Private*, in LEGAL AND ETHICAL ASPECTS OF HEALTH CARE FOR THE ELDERLY 198, 201 (M. Kapp, H. Pies & A. Doudera eds. 1985) (quoting R. Allen, E. Ferster, H. Weihofen, *Mental Impairment and Legal Incompetency* 39-40 (1968)). Regardless of how incompetency is defined or how vague a standard is applied, courts find individuals incompetent and guardians are appointed in 95 percent of the cases. Rosoff & Gottlieb, *supra* note 22, at 16.

<sup>47</sup> Regan, *supra* note 22, at 1114.

<sup>48</sup> *Id.* at 1115-16. Elements in the 1979 Model statute included:

(1) right to counsel, (2) adequate notice, (3) presence of the alleged incompetent at the hearing, (4) higher standard of evidentiary proof about hearsay evidence, notably regarding letters from physicians, (5) use of professional screening teams to assist the court in assessing the needs of the alleged ward, (6) periodic review of need for a guardian, and (7) adequate access to appellate review.

*Id.* See also Frolik, *supra* note 23, at 638-42. The Model followed the "principle of least restrictive alternatives" which dominates guardianship literature. The principle holds that "while protecting the client, the state must select means which least restrict the client's independence and freedom." *Id.* at 618. The Model State Law on Civil Commitment advanced by the American Psychiatric Association contains similar elements. Rosoff & Gottlieb, *supra* note 22, at 35-36.

<sup>49</sup> Regan, *supra* note 22, at 1116. Kapp defines adult protective services as "a system of preventive, supportive, and surrogate services for the elderly living in the community to enable them to maintain

services legislation bypassed guardianship proceedings. The legislation allowed the court to order protective placement or emergency services to be provided by public social service agencies.<sup>50</sup> Some legal writers have condemned government intervention for the elderly as staunchly as they condemn guardianship abuses.<sup>51</sup> They charge that the proceedings often fail to incorporate adequate due process protections, that few limits are imposed on the social service agencies once a court order is obtained, that no explicit fiduciary obligation or periodic reporting is stipulated, and that institutionalization is often the preferred remedy.<sup>52</sup> Critics charge that the "movement that promised to foster independence for the frail elderly client may become the vehicle for creating abject dependence on the public agency and its caseworkers."<sup>53</sup> Further, the critics charge that most adult protective service acts have become, "instruments of oppression."<sup>54</sup> Conversely, protective service professionals argue that many elderly persons are neglected, abused, and need protection. The professionals also believe that they are duty-bound to protect them, even if the protection restricts the older person's freedom.<sup>55</sup>

During the 1970's and 1980's, many states revised their guardianship laws.<sup>56</sup> A 1987 Associated Press guardianship study triggered extensive reform.<sup>57</sup> Although the proposed remedies vary, most agree on the need for "increased due process protection, increased concern for the use of least restrictive alternatives, and increased awareness of competing interests in guardianship."<sup>58</sup>

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independent living and avoid abuse and exploitation." Kapp, *Adult Protective Services: Convincing the Patient to Consent*, 11 LAW, MEDICINE & HEALTH CARE 163 (1983) (quoting Regan, *Intervention through Adult Protective Services Programs*, 18 GERONTOLOGIST 250, 251 (1978)). Few argue with this aspect of adult protective services. Critics object to the transfer of decision-making authority which often accompanies protective service intervention. *Id.*

<sup>50</sup> Regan, *supra* note 22, at 1117.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 1117-20.

<sup>53</sup> *Id.* at 1127. Frustrated with the perceived due process failures of protective service models, some commentators advocate an Abolitionist Model which "opposes not only protective service programs but guardianship itself." *Id.* at 1128. Unfortunately, proponents of this extreme view would abolish present services without offering alternatives to remedy severe cases of self-neglect and abuse. *Id.* at 1129.

<sup>54</sup> Quinn, *Elder Abuse & Neglect Raise New Dilemmas* 10 GENERATIONS, Winter 1985, at 22 (quoting Regan, *Adult Protective Services: An Appraisal and a Prospectus* (paper presented at the National Law & Social Work Seminar, Proceedings & Prospects, Portland, Maine)).

<sup>55</sup> *Id.*

<sup>56</sup> Surrogate Decisionmaking, *supra* note 10, at one-13.

<sup>57</sup> Parry, *supra* note 1, at 398. The Associated Press report was the catalyst for the ABA National Guardianship Symposium, *id.*, and the U.S. Select Committee on Aging hearings on guardianship abuse. Surrogate Decisionmaking, *supra* note 10, at IV.

<sup>58</sup> W. SCHMIDT, *supra* note 20, at 18. Schmidt summarized major reform recommendations from the guardianship literature, including:

(1) full due process protections . . . .

(2) separation of guardianship and the delivery of direct services. . . .

(3) court [must] verify the search for less restrictive placement alternatives and encourage the use of devices less restrictive than guardianship . . . .

## OHIO'S GUARDIANSHIP REFORM BILL

[O]ur society values greatly the right of individuals to make health care and other personal life style decisions for themselves. Yet, when the elderly are involved, a different standard seems to apply, making it significantly more likely that individual self-determination will be compromised.<sup>59</sup>

After extensive lobbying, substitute Senate Bill 46 passed unanimously on June 20, 1989.<sup>60</sup> One of the bill's champions, Judge W.F. Spicer, Probate Division, Summit County Court of Common Pleas, has implemented model guardianship reforms.<sup>61</sup> Although not required by prior law, Judge Spicer hired court investigators, established a public guardian's office, developed a periodic review process, and initiated a volunteer guardianship program.<sup>62</sup> In his words, he fashioned "a system that cares enough to be sensitive to the individual, with concern as the driving force."<sup>63</sup> The Guardian Reform Bill adopted many of Judge Spicer's measures. Key elements of the revised statute include employment of court investigators, an expanded powers section, reporting and revalidation mechanisms, and an Indigent Guardianship Fund.<sup>64</sup>

### *Court Investigators Gather Evidence for Active Court*

Ohio's legislative debate centered on whether counsel must always represent wards.<sup>65</sup> Two different reform bills were submitted to the legislature: one was

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- (4) use of functional assessments based upon behavioral competencies rather than diagnostic terms. . . .
  - (5) use of partial guardianship, specifically related to the competencies of the individual . . . .
  - (6) ward has a voice in the selection of a guardian and in the decisions being made on his behalf . . . .
  - (7) prohibition of the appointment as guardian of anyone who has a business relationship with the ward . . . .
  - (8) limited duration of guardianship, with mandated periodic reviews. . . .
  - (9) separation of guardianship of the person and of the estate.

*Id.* at 18-19.

<sup>59</sup> Rosoff & Gottlieb, *supra* note 22, at 2.

<sup>60</sup> Ohio Rev. Code Ann. §2101 (Baldwin Supp. 1989).

<sup>61</sup> Nano, *Guardians of the Elderly: An Ailing System: Summit Court's Process Among Most Progressive*, Akron Beacon J., Sept. 23, 1987, at A10, col. 4.

<sup>62</sup> *Id.* at cols. 4-6.

<sup>63</sup> Interview with The Honorable W. F. Spicer, Judge, Probate Division, Summit County Court of Common Pleas, Nov. 27, 1989.

<sup>64</sup> *Id.* Judge Spicer suggested which elements of the Bill might be described as "key" in this Comment.

<sup>65</sup> Nano, *Guardians of the Elderly: An Ailing System: Ohio's Debate: Should Wards Have Attorneys?*, Akron Beacon J., Sept. 25, 1987, at A6, col. 1.

written by a statewide committee of advocates for the elderly, the disabled, and the mentally retarded, who insisted that an attorney must always represent a ward;<sup>66</sup> the other was drafted by the Ohio Association of Probate Judges.<sup>67</sup> The Probate Judges insisted that providing attorneys for each ward would be prohibitively expensive and would “create an adversarial situation out of a primarily family matter.”<sup>68</sup> The Ohio legislature accepted the Probate Judges’ reasoning and adopted the court investigator system.<sup>69</sup> Judge Spicer believes the investigator system is the least expensive and most effective method of preventing unnecessary guardianships and supervising those already granted.<sup>70</sup>

California is the only other state that employs the court investigator model in which the investigator serves notice, informs proposed wards of their rights, investigates the circumstances of the ward, and follows the guardianship after it is established.<sup>71</sup> Although most states have adopted the “reformed traditional method” in which an attorney is appointed, Judge Spicer noted that a large part of any court’s guardianship docket consists of individuals in a near-vegetative state, who obviously need a guardian.<sup>72</sup> Not only would an adversarial approach diminish assets that could be used for the ward’s care, but the average attorney does not have the geriatric training and psychological background to effectively assist the potential ward.<sup>73</sup> Under Ohio’s plan, “the court investigator . . . becomes the eyes and ears of the court, thus giving it direct contact with, and an extended ability to protect the rights of, an incompetent.”<sup>74</sup>

Although the traditional adversarial model is the dominant method of choice, it is laden with role-confusion for attorneys.<sup>75</sup> In one project in New York, attorneys appointed as guardians ad litem defined their role as that of independent fact finder

<sup>66</sup> *Id.* “Since 1981, Ohio probate courts have been forced to provide an attorney for people facing civil commitment for mental illness.” *Id.* at A6, col. 2. Advocates for the elderly argued that guardianship proceedings required the same protections. *Id.* Mandatory right to counsel is required in two-thirds of the states and was supported by the ABA House of Delegates at their 1988 Annual Meeting. Parry, *supra* note 1, at 400. The ABA Commission on Mentally Disabled’s Model Statute called for “a nonwaivable right to counsel.” Rosoff & Gottlieb, *supra* note 22, at 43.

<sup>67</sup> Nano, *supra* note 65, at A6, col. 1.

<sup>68</sup> *Id.* at col. 3. Research studies suggest that “family matters” might be more adversarial than generally believed. Older adults are usually neglected and abused in their own homes, “often at the hands of their adult children or other caregivers.” Quinn, *supra* note 54, at 22.

<sup>69</sup> Ohio Rev. Code Ann. §2101.11(A)(2)(a) (Anderson 1990). Judge Spicer outlined the advantages of an investigator system: “First, it is less expensive than other methods suggested for improved protection of rights. Second, it is less abrasive and impersonal than the traditional method. Lastly, it provides a basis for providing assistance in solving the underlying human-social problems of incompetence.” Spicer, *Summit Co. Probate Court Guardianship Program: Using Court Investigators As the Eyes & Ears of the Court*, 5 AGING NETWORK NEWS, Dec. 1988, at 1, 12.

<sup>70</sup> Spicer, *supra* note 69, at 1.

<sup>71</sup> Quinn, *supra* note 41, at 92-93.

<sup>72</sup> Spicer, *supra* note 69, at 12.

<sup>73</sup> Interview, *supra* note 63.

<sup>74</sup> Spicer, *supra* note 69, at 12.

<sup>75</sup> Dubler, *Introduction: Coercive Placement of Elders: Protection or Choice?*, 11 GENERATIONS, Summer 1987, at 6.

for the court, thus leaving the ward without real representation.<sup>76</sup> The New York statute confused guardians ad litem by expecting them to “act as officers of the court, independent evaluators of patient interests, and, at times, as representatives of patients’ preferences and desires.”<sup>77</sup> Trying to discharge all three roles often required attorneys to follow opposing dictates.<sup>78</sup> The ABA Model Statute clearly distinguishes between the role of counsel and of a guardian ad litem: “The role of counsel is to serve as a zealous advocate of the legal interests of his or her client but not to determine those interests. The function of the guardian ad litem is to assist individuals to determine their interests . . . [or] of acting in their stead.”<sup>79</sup>

In Ohio, although counsel does not automatically represent a prospective ward, prospective wards interrelate with a qualified and experienced investigator who is interested in their welfare and who evaluates their living situation.<sup>80</sup> Prospective wards may request counsel or the court investigator might assist in obtaining counsel.<sup>81</sup> In sum, court investigators, and the court’s search for information have produced, at a minimal cost, a system that has increasingly protected the rights of potential wards.<sup>82</sup>

### *Reform Bill Clarifies Powers*

Probate court is the “superior guardian.”<sup>83</sup> It may limit powers of the appointed guardian, may make any decision for the ward that the ward could make himself, if competent, and may approve giving of gifts from guardianship funds.<sup>84</sup> Probate court may also appoint three new types of guardianship, in addition to the previous guardianships of person, or of estate, or of both.<sup>85</sup> The three new types of guardianship are limited, interim and emergency.<sup>86</sup>

Limited guardianship may represent one of the more significant accomplishments of the Guardianship Reform Bill. “The concept of limited guardianship recognizes that mental competence is not an all-or-nothing proposition but is, rather, a barely differentiated continuum.”<sup>87</sup> With a limited guardianship, the court

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* The confusion is noted elsewhere. See also Iris, *supra* note 16, at 43-44; and See Comment, *supra* note 22, at 439.

<sup>79</sup> Frolik, *supra* note 23, at 634 (quoting ABA Comm. on Mentally Disabled, Model Statute §3(19) (1978)). Commentators have concluded that the role of “adversarial advocate rather than . . . a promoter of the best interest of the client” is the “proper role of Counsel at a guardianship hearing.” *Id.*

<sup>80</sup> Spicer, *supra* note 69, at 12. Judge Spicer reviewed his eight years of positive experience with the court investigator system in the National Association of Area Agencies on Aging publication.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> Ohio Rev. Code Ann. §2111.50 (Anderson 1990).

<sup>84</sup> *Id.* As superior guardian, the probate court may initiate a criminal investigation of alleged abuse, exploitation, or theft from a ward. Ohio Rev. Code Ann. §2101.26 (Anderson 1990).

<sup>85</sup> Ohio Rev. Code Ann. §2111.02(B) (Anderson 1990).

<sup>86</sup> *Id.*

explicitly circumscribes the particular types of decisions that the guardian can make.<sup>88</sup> The ward retains all rights that are not specifically granted to the limited guardian.<sup>89</sup> The guardianship is “tailored to the needs and capabilities of the individual.”<sup>90</sup>

The second new guardianship is the interim guardianship. It is limited to 15 days and arises when an appointed guardian has resigned or has been removed and the ward continues to need a guardian.<sup>91</sup> An interim appointment can be extended for an additional 30 days.<sup>92</sup>

Finally, in an emergency, to prevent injury to person or property, the court can appoint an emergency guardian for 72 hours.<sup>93</sup> The emergency appointment can be extended for 30 days.<sup>94</sup>

In addition to creating these three new types of guardianship, the reform bill substantially changed conservatorships.<sup>95</sup> Traditionally, “conservatorship” meant either guardianship of estate or the word was used interchangeably with the word guardian.<sup>96</sup> Now, conservatorship is a voluntary proceeding and has replaced guardianship for physical disability.<sup>97</sup> The petitioner must be a competent adult who

<sup>88</sup> *Id.*

<sup>89</sup> Ohio Rev. Code Ann. §2111.02(B)(1) (Anderson 1990). *See also* Frolik, *supra* note 23, at 653. “No justifiable societal purpose is served by greater interference in the life of an individual than is demanded by the circumstances.” *Id.*

<sup>90</sup> Frolik, *supra* note 23, at 660.

<sup>91</sup> Ohio Rev. Code Ann. §2111.02(B)(2) (Anderson 1990).

<sup>92</sup> *Id.*

<sup>93</sup> Ohio Rev. Code Ann. §2111.02(B)(3) (Anderson 1990).

<sup>94</sup> *Id.*

<sup>95</sup> Ohio Rev. Code Ann. §2111.021 (Anderson 1990).

<sup>96</sup> Frolik, *supra* note 23, at 602. *See also* Kapp, *supra* note 42, at 366.

<sup>97</sup> Spicer, Outline Presentation Sub. Senate Bill No. 46: Guardianship, Deputy Clerks Training Seminar 7 (Nov. 16 & 21, 1989). Conservatorship is one less restrictive alternative to guardianship but it can be granted only by a competent individual. Nationally, far-sighted older adults are adopting comprehensive measures for life services planning that encompass traditional estate and financial planning as well as advanced planning in case they become mentally incapacitated. According to Parry, the planner first selects a substitute decisionmaker and then gives that person legal authority to act on the planner’s behalf. Parry, *Summary, Analysis and Commentary: Life Services Planning for Vulnerable Persons*, 10 MENTAL & PHYSICAL DISABILITIES L. REV. 516, 516-522 (1986). Advanced planning involves the planner making arrangements for control of his person and property before he becomes mentally incompetent. Regan, *supra* note 22, at 1131-32.

In Ohio, advanced planning alternatives to guardianship include:

- (1) *Durable power of attorney for health care* - planner authorizes his agent to make health care decisions on his behalf if the planner becomes legally incompetent. Ideally, the planner sets out his preferences regarding anticipated health care decisions.

*See* Ohio Rev. Code Ann. §§1337.11 to 1337.17 (Anderson Supp. 1989) spells out the particular requirements.

is physically infirm. The petitioner requests the Probate Court to appoint a named conservator to manage his estate or to assume responsibility for his person.<sup>98</sup> The petitioner selects the guardianship duties and procedures for the court to grant to the conservator. The conservator is accountable to the court.<sup>99</sup> After modifying conservatorships and eliminating guardianship for physical disability, the legislature mandated that all present physical disability guardianships remain in place unless someone petitions the court for conversion to conservatorship.<sup>100</sup>

### *Mechanisms for Reporting and Revalidation of Guardianships*

Nationally, courts approve 97 percent of petitions for guardianship.<sup>101</sup> Once the guardianship is granted, followup monitoring is rare. Reporting and revalidation are important and the Ohio reform bill's provisions address documented abuses.<sup>102</sup>

Under Sub. S.B. 46, guardians must report on the overall well-being of their wards, to the probate court every 2 years. This report must include:

- (1) any major physical or mental changes,
- (2) the adequacy of present care,
- (3) the guardian's opinion as to the need for continued guardianship, and

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(2) *Durable power of attorney* - planner delegates broad decisionmaking authority to his agent and agrees that the power will remain effective even if the planner becomes legally incompetent.

See Parry, *supra*, at 520.

(3) *Springing power of attorney* - planner confers decisionmaking authority that becomes effective only when the planner becomes legally incompetent.

See *id.* at 521.

(4) *Intervivos trust* - planner transfers assets to trustee who manages them for named beneficiaries.

See *id.* at 517.

(3) *Representative payee* - the court rather than the planner authorizes an agent to receive and expend planner's state and federal benefit payments because planner cannot manage the funds.

See Saunders & Simon, *Individual Functional Assessment: An Instruction Manual*, 11 MENTAL & PHYSICAL DISABILITY L. RPTR. 60, 61 (1987).

<sup>98</sup> Ohio Rev. Code Ann. §2111.021 (Anderson 1990).

<sup>99</sup> *Id.*

<sup>100</sup> Spicer, *supra* note 97, at 7.

<sup>101</sup> Pepper, *Guardianship: Friend or Foe of America's Frail and Elderly?* 1 J. ELDER ABUSE & NEGLECT 65, 69 (1989).

<sup>102</sup> *Id.* at 70. Fewer than one-third of the states require any regular review of guardianship. Comment, *supra* note 22, at 440.

- (4) a physician, clinical psychologist, clinical social worker or mental retardation team's opinion as to the need for continued guardianship.<sup>103</sup>

The probate court must reevaluate the continuing need for guardianship every two years and can direct the court investigator to reassess the ward's situation and verify the guardian's report.<sup>104</sup>

In addition, the ward may request a rehearing to terminate his own guardianship.<sup>105</sup> Previously, the ward had to prove his return to competence.<sup>106</sup> Amassing necessary evidence became nearly impossible because the ward no longer managed his own affairs.<sup>107</sup> "[F]or an individual who has been wrongfully found incompetent and wishes to appeal the finding, or an individual who was only temporarily unable to manage his or her affairs, the chances of having control over his or her life restored are slim to none."<sup>108</sup> Thus, most guardianships terminated with the ward's death.<sup>109</sup> Now, Ohio reform requires the guardian to prove incompetence.<sup>110</sup> The standard of proof is clear and convincing evidence.<sup>111</sup>

### *Bill Establishes Indigent Guardianship Funds*

The fourth key element of the Guardianship Reform Bill is the provision for Indigent Guardianship Funds. Indigent respondents may be constitutionally entitled

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<sup>103</sup> Tobin & Smith, *supra* note 3, at 4. The statute requires that the professional examination occur within three months before the report is filed. *Id.*

<sup>104</sup> *Id.* The statute provides penalties for failing to file reports or appear at a hearing, which may include one or more of the following:

- (1) Removal of the fiduciary,
- (2) Reduce or deny the fiduciary's fee,
- (3) Continue the time for filing,
- (4) Fine the fiduciary \$100 and assess costs of \$25.
- (5) Hold the fiduciary in contempt of court.

Spicer, *supra* note 97, at 4-5.

<sup>105</sup> Ohio Rev. Code Ann. §2111.49(C) (Anderson 1990). Ward entitled to a minimum of one hearing a calendar year; the court has discretion to allow more than one. *Id.*

<sup>106</sup> See Comment, *supra* note 22, at 440. See also *In re Guardianship of Breece*, 173 Ohio St. 542, 546-47, 184 N.E. 2d 386, 389 (1962).

<sup>107</sup> Comment, *supra* note 22, at 440.

<sup>108</sup> Pepper, *supra* note 101, at 71.

<sup>109</sup> Comment, *supra* note 22, at 440.

<sup>110</sup> Ohio Rev. Code Ann. §2111.49(C) (Anderson 1990). Ohio's standards for restoration to capacity agree with ABA Guidelines. National Guardianship Symposium participants also favored limited over plenary guardianship, use of temporary guardianships, and specifically delegated powers and duties. Parry, *supra* note 1, at 405.

<sup>111</sup> Ohio Rev. Code Ann. §2111.49(C) (Anderson 1990).

to counsel in guardianship proceedings.<sup>112</sup> Most states statutorily require counsel.<sup>113</sup> In Ohio, indigent respondents are entitled to request counsel, to an independent expert evaluation, to a transcript, and to appointed counsel for appeal.<sup>114</sup> It takes much money to operate these due process safeguards.<sup>115</sup> Ohio's Indigent Guardianship Fund will meet these costs.<sup>116</sup>

Each county will establish a fund to pay for any of the guardianship court costs, including a guardian's fees.<sup>117</sup> All state monies earmarked for the fund and thirty dollars of every thirty-five dollar fee collected for the appointment of any fiduciary, executor, administrator, guardian, or trustee will be deposited in this special fee fund.<sup>118</sup>

### CAUTIOUS OPTIMISM AS COUNTIES IMPLEMENT REFORMS

[L]iberty is no less precious when forfeited in a civil proceeding than when taken as a consequence of a criminal conviction.<sup>119</sup>

With the Guardianship Reform Bill, Ohio has addressed major inadequacies in guardianship law and has safeguarded the rights of the vulnerable elderly and mentally disabled. Nevertheless, the real test of the reform bill lies in its implementation in Ohio's eighty-eight disparate counties. Three provisions are of potential concern: the qualifications of court investigators, the role of expert evaluators, and the use of limited guardianship.

Summit County Probate Court has implemented several of the reform bill's provisions. It has utilized social workers as court investigators since 1982 and currently employs three full time investigators.<sup>120</sup> Two of the three investigators hold master's degrees. All of the investigators are licensed social workers and experienced in geriatrics.<sup>121</sup> The Guardianship Reform Bill specifies that investigators need only a bachelor's degree, in "social work, psychology, education, or related human services field." These degree requirements can be waived if the person has "experience in human services work equivalent to the required education."<sup>122</sup> All private social service agencies have required a master's degree for more than 40

<sup>112</sup> Parry, *supra* note 1, at 400. In fact, National Guardianship Symposium participants suggested that it is unfair to require respondents to have to pay for counsel because respondents have not requested to have their own rights limited. *Id.* at 401.

<sup>113</sup> *Id.* at 400.

<sup>114</sup> Ohio Rev. Code Ann. §2111.02(C) (Anderson 1990).

<sup>115</sup> Rosoff & Gottlieb, *supra* note 22, at 44.

<sup>116</sup> Ohio Rev. Code Ann. §2111.51 (Anderson 1990).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> Katz v. Superior Court, 73 Cal. App. 3d 952, 968, 141 Cal. Rptr. 234, 243 (1977) (quoting *In re Gary W.*, 5 Cal. 3d 296, 307, 96 Cal. Rptr. 1, 9, 486 P.2d 1201, 1209 (1971)).

<sup>120</sup> Spicer, *supra* note 69, at 1 & 12.

<sup>121</sup> *Id.* at 12.

<sup>122</sup> Ohio Rev. Code Ann. §2101.11(A)(2) (Anderson 1990).

years, and even public agencies require a bachelor's degree.<sup>123</sup> For this reason, it is difficult to envision a person acquiring "equivalent experience" without formal education. In supporting the court investigator system, Judge Spicer said that most attorneys, even with seven years of formal education, do not have the geriatric training and psychological background to effectively assist the potential ward.<sup>124</sup> Then how does a well-intentioned but ill-trained person more effectively assist a ward? Recall that Ohio traded mandatory right to counsel for the court investigator system. It seems reasonable to expect professional training for these investigators.

Further, the bill allows Probate Courts to contractually delegate the investigations to county human services or welfare departments.<sup>125</sup> Some critics hold that such a contract creates a built-in conflict of interest: the agency investigating the need for guardianship is the agency that would provide any necessary public guardian, and also deliver a number of social services.<sup>126</sup>

The second area of potential concern is the expert evaluators' role. Court investigators can recommend appointment of counsel or expert evaluation.<sup>127</sup> The potential ward can have the independent evaluation introduced into evidence.<sup>128</sup> Unfortunately, the bill does not precisely define an "expert evaluation." Is it a physician dashing off a single sentence judgment of competence? A number of jurisdictions are employing an interdisciplinary team of health care professionals to assess functional status.<sup>129</sup> However, comprehensive functional evaluations require

<sup>123</sup> Interview with Robert Labbe, Executive Director, Family and Children's Services (Jan. 23, 1990).

<sup>124</sup> Interview, *supra* note 63.

<sup>125</sup> Ohio Rev. Code Ann. §2101.11(A)(2)(a)(iii) (Anderson 1990).

<sup>126</sup> W. SCHMIDT, *supra* note 20, at 170.

<sup>127</sup> Ohio Rev. Code Ann. §2111.041(A)(4) (Anderson 1990).

<sup>128</sup> Ohio Rev. Code Ann. §2111.02(C) (Anderson 1990).

<sup>129</sup> Nolan, *supra* note 41, at 211-12. Functional evaluation examines the individual's ability to maintain herself in her environment. Typically the evaluation team includes a social worker, nurse, physician and clinical psychologist. The team determines how the proposed ward is managing her activities of daily living, including:

- (1) ability to manage money,
- (2) ability to feed, clothe and provide safe shelter,
- (3) ability to walk, climb stairs, and get around inside the home,
- (4) ability to see, hear, and react in a safe way to occurrences in her environment,
- (5) ability to use resources in the family and community,
- (6) ability to remember, reason and make judgments.

*Id.*

Summit County Probate Court refers contested guardianship cases to the Geriatric Assessment Center at Akron General Medical Center or to People Care for comprehensive interdisciplinary assessments.

much time of qualified health professionals.<sup>130</sup> Neither the professionals nor the monies for the evaluations may be available in rural, outlying counties. To date, studies indicate that “when an application for guardianship is filed, it is almost invariably granted.”<sup>131</sup> Critics claim that courts rubber-stamp petitions and fail to have experts explore less restrictive alternatives.<sup>132</sup>

Finally, although the bill allows limited guardianships, it is unknown whether courts will grant them. Limited guardianships are individually tailored to the ward’s needs.<sup>133</sup> Nevertheless, studies indicate that “[p]artial or limited guardianships are rarely established.”<sup>134</sup> Limited guardianships require much of the court’s time and money.<sup>135</sup> Although most advocates champion limited guardianships, a few writers are concerned about the uncertainty of transacting business with partially competent wards.<sup>136</sup> It is much easier to view the ward as competent or incompetent.<sup>137</sup>

In sum, the Guardianship Reform Bill represents significant movement toward humane law. The bill: 1) mandates use of court investigators to gather evidence for an active court; 2) clarifies powers and creates limited guardianship; 3) establishes mechanisms for reporting and revalidation of guardianship; and 4) enacts Indigent Guardianship Funds. However, advocates must continue to monitor the system. “Vigorous advocacy is necessary to secure, in practice, the reforms made in statutes.”<sup>138</sup>

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*See also* Parry, *supra* note 1, at 404-5. “Respondents have a right to choose risk-associated lifestyles. Assumption of risk, or refusal of medical treatment or social and community services should not, without more, determine functional impairment or incapacity. *Id.*”

<sup>130</sup> Rosoff & Gottlieb, *supra* note 22, at 44.

<sup>131</sup> W. SCHMIDT, *supra* note 20, at 172.

<sup>132</sup> *Id.*

<sup>133</sup> Frolik, *supra* note 23, at 660.

<sup>134</sup> W. SCHMIDT, *supra* note 20, at 172.

<sup>135</sup> Parry, *supra* note 1, at 405.

<sup>136</sup> Comment, *supra* note 22, at 444.

<sup>137</sup> *Id.*

<sup>138</sup> LEGAL COUNSEL FOR THE ELDERLY, DECISION-MAKING, INCAPACITY, AND THE ELDERLY: A PROTECTIVE SERVICES PRACTICE MANUAL 67 (1987).