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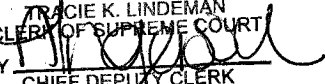
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Commission to Study the Creation & Administration of Guardianship
Nevada Supreme Court
701 Carson Street
Carson City, NV 89701

FRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY 
CHIEF DEPUTY CLERK

Dear Chief Justice James W. Hardesty and Commissioners:

Overview

It is estimated that by 2035 there will be over 7,000,000 elderly persons in the United States and, because of the great recession of 2009, the percentage of the elderly requiring surrogate decision-making will increase. In Washoe County, this recession caused a serious increase in the pre-senior and senior populations. The Age cohorts of 55- 64 and 65-74 have greatly increased. (Table 1, Chart 1). This phenomena also is evident in Carson City County.

The population of individuals with developmental disabilities residing in mental hospitals, and the number of individuals with chronic mental illness living outside mental institutions is unknown, but national estimates are that from 25% to 40% of persons living on the street or in boarding homes and shelters are persons with chronic mental illness. Most of these individuals require surrogate decision making for personal and financial affairs.¹ There is no continuing network of social and legal services being extended to these populations in Nevada.

I. Adult Guardianship

In 1987 the Associated Press commenced a nation-wide study of guardianship. This study culminated in its Report, Guardians of the Elderly: An Ailing System. Many, if not all, of the shortcomings should be added to any analysis this commission identifies. They include:

1. Due Process Rights are lacking
2. Standard for determining incapacity are unclear
3. Civil rights violations
4. Lack of Training for Guardians and court personnel
5. Lack of Awareness of Alternatives to Guardianship.

¹ William H. Frey, Mapping the Growth of Older America: Seniors and Boomers in the Early 21st Century. The Brookings Institute, May 2007.

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Petitions often seek basic information (data sets) such as:

1. Description of limitations of the ward
2. Reasons for the guardianship
3. Steps taken to find less restrictive alternatives
4. Powers requested
5. Qualification requested

However, the interrelation between these basic data sets must be understood.

In 1989 the American Bar Association continued the investigation and published its report, Guardianship an Agenda for Reform Recommendation of the National Guardianship Symposium and Policy of the American Bar Association. Authors of this report, Sally Balch Hurme and Erica Wood, have written that adult guardianship can be viewed as having a front end, determining incapacity and appointment of a guardian, and a back end, accounting for the guardian conduct and court monitoring of that conduct. There is much more in between. We must be concerned with the entities that are involved in the interstitial ribs of the guardianship. What about monitoring the Wards' activities and her attorney's and, the activities of the health care facilities that have contact with the Ward?

Funding levels are completely inadequate for the management of guardianship. That needs to be addressed after we decide on how the program is to function.

We need to start with the "Wingspread" conference² and incorporate into the Commissions work the 1987 Associate Press series, Guardians of the Elderly: An Ailing System.

How can we still, almost 30 years later still be facing a legal 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."³

In the "front end" we do not have uniformity in determining the level of a ward's mental capacity. This part of the guardianship process is not a cookie cutter evaluation, but rather a collaborative process that must be reviewed with regularity. Our Courts do not do well with being monitors, but they must they must become so and understand that they are part of a continuing process that is ever vigilant of a Ward's Procedural and Substantive Due Process and Civil and Human Rights.

There is not enough involvement by all of the stakeholders in this determination and there is never enough involvement in having the ward participate by herself/himself or her/his legal counsel. As a point in fact we do not have consistency in using words such as "capacity or competency". Is it a mental, physical, or multidimensional social-environmental issue? Guardianship must have access to resources to remedy the cause of mental incapacity.

² ABA Commission on the Mentally Disabled & Commission on Leg Problems of the Elderly, Guardianship: An agenda for Reform-Recommendations of the National Guardianship Symposium and Policy of the American Bar Association (ABA 1989).

³ Fred Bayles & Scott McCartney, Guardians of the Elderly: An Ailing System, ASSOCIATE PRESS series (Sept 1987).

As an example, two statutes were recently introduced in the Nevada legislature, both of which required that a person be determined to be competent before choosing an end of life treatment or her/his right to try an experimental drug.⁴

II. Due Process

With regard to Due Process, the right to counsel must be closely examined. It must be remembered that the right to an attorney means more than just the initial appointment. It must also mean constant evaluation of performance and possible replacement of counsel. Due Process also permits a Ward to replace a court-appointed counsel. (See In Re Guardianship of Holly, 164 P.3d 157 (Okla. 2007)). All guardianship proceedings must be particularly afforded Due Process and proceedings must comport with constitutional notions of substantial justice and fair play. In summary, the appointment and continuance of representation by counsel must be periodically reviewed. All proceedings to address a ward's right to counsel must have appropriate witnesses available, and determinations must be based on clear and convincing evidence. All proceedings to maintain and, if necessary to restore rights, must be with expedited settings. Wards must also be allowed expedited appellate proceedings.

III. Civil Rights

A Ward will have his or her civil rights challenged at every phase of the guardianship. The most crucial time will be when questions arise regarding government payee issues under Medicare, Medicaid, Social Security and Veteran benefits.

Under NRS 159.079 (5), a guardian can by petition request a change in the residence of the Ward outside the state. One reason for this transfer is when there is no "appropriate residence" available in the State. No "appropriate residence" can be found when a Ward demonstrates violent tendencies which makes them not suitable to any facility in the state. There is a clear collision here between what is in the Ward's best interest and the public's best interest. This area is fertile for civil rights violations, especially when the finding of "no facility is available" is made because the cost of the bed and associate medical services exceeds the public reimbursement dollars.

The court will retain jurisdiction unless the guardian files for termination of the guardianship pursuant to NRS 159.1905 or 159.191. This is a standard paragraph found in a request to transfer. Termination should be delayed until the new state accepts the Ward and initiates guardianship. Overlapping jurisdiction should always be favored.

Marital relationships and partnerships is another area where a Ward's civil rights are jeopardized. Guardians do not have carte blanche to terminate a marriage.⁵ There is no modern case law in Nevada that addresses the power of a Guardian to file and maintain a divorce action.

⁴ Assembly Bill 164 passed and allows a competent terminally ill patient to be able to use an investigational drug biological product or device. Senate Bill 336 did not make it out of committee would have allowed a competent terminally ill person to take a lethal prescription to end life.

⁵ "But I Love what's his name": Inherent Dangers in the Changing role of the Guardian in Divorce Actions on Behalf of Incompetents, 16 J. Am. Acad. Matrimonial Law 527 (1999-2000).

In fact, not until the advent of no-fault divorce, and other changes in societal beliefs – such as withdrawal of life support and end of life option choices – has there been a change in the absolute rule that guardians had no authority to seek a dissolution. It was deemed that this was not in the public interest and the guardian had no authority to seek divorce or dissolution.

These matters also raise serious constitutional issues regarding infringement to first amendment and liberty interests.

It is disturbing that Medicaid rules may require that a guardian seek a divorce on behalf of his Ward in order for the Ward to qualify for needed medical care.⁶ As one Court has noted, it is fundamentally wrong for a government agency to force people to impoverish themselves because the government has established a rule that poverty is a prerequisite to receiving government assistance in order to defray ruinous costs of absolutely essential medical treatment. It is wrong for any guardianship process to promote this policy through divorce and dissolution proceedings.⁷

IV. Collaborative or Supportive Decision Making Processes

In the July-August issue of *Bifocal*, The Journal of the American Bar Association Commission on Law and Aging discussed Health Care Decision-Making Authority of Guardians and Agents.⁸ A Collaborative approach suggests a court should allow both. However, Nevada statutes provide that the appointed guardian trumps a health care agent whose appointment by a power of attorney appears to express the Wards wishes. Nevada's statutes that need to be reviewed are NRS 449.691-697 (POLST), NRS 162A. 800(2) and NRS 169.079(b). These considerations will become progressively important given end of life consideration legislation such as right to die and right to try experimental drugs.

V. Incompetent or Incapacitated adult

At a hearing for a finding of incapacity, which will affect fundamental personal and property rights, full adversarial proceedings must be guaranteed with expert witnesses for the Ward to be provided at public expense. Attorneys must be trained to identify the lack of competence and how to work with psychologists and psychiatrists.

Given the determination of mental incapacity or mental competence is currently in a state of investigation in medical science each hearing must include current certified medical evaluative practices and definitions. Labels such as suffering from eccentricities, homeless, and schizophrenia must be eliminated.

Nevada continues to use terminology in its definition of competent that is subjective and uses undefined standards such as inability to properly manage and take care of oneself. This continues to affect the process with possibilities for abuse by those seeking to take advantage or seeking to take decision-making powers away from elderly or otherwise disabled adults.⁹

⁶ *In re Lamb*, 173 Wash. 2d 173, 265 P. 3d 876 (2011).

⁷ *In the Matter of Shah*, 694 N.Y. S. 2d 82 (App. Div. 1999).

⁸ Dara Valanejad, *Health Care Decision-Making Authority of Guardians and Agents: An Update*, BIFOCAL, July-August 2015, at 125-127.

⁹ *Supra*, note at 5.

Collaborative methodology is especially critical in assessing mental capacity. Examination of the mental status in adults, evaluation of cognitive impairment and dementia, and comprehensive geriatric assessment all emphasize collaborative methodologies and comprehensive team assessments.

The medical profession has recognized there are a number of definition for dementia, but not the legal profession. The medical profession understands that detecting dementia is a problem as it may not be readily visible. At a minimum it requires historical observation and collaborative assessments. The widely accepted definition of Dementia found under the Diagnosis and Statistical Manual of Mental disorders (DSM-IV) looks for "Evidence from the *history* and mental status examination that indicates major impairment in learning and memory".

VI. Conclusion.

This paper asks the Commission to incorporate all references contained herein and requests a county by county investigation of all guardianship cases, a review of all state (including statutory) and county agency funding of guardianship, and governmental policies and procedures.

Before any cases are scrubbed all courts should collect basic information including demographic characteristics; age, gender, race, martial and financial status. All procedural motions, petitions and court decisions made by courts, guardians and recommendations should be independently collected, reviewed and reported. All information should be published and used for quality assurance, and to develop monitoring methods, learning needs assessments and for program development and research.

Privatization is not an answer and any attempt to bring profit into the equation must be eliminated. The Supreme Court is also not an institution that should be involved in the administration of the process.

Private guardianship agencies should not provide housing, medical care or social services. They should not have any financial interest in a private agency that provides these services and there cannot be any inter-board of director management relationship.

The Commission should investigate all guardianship cases, review all state and county agency funding, and review their policies and procedures.

The Ward's constitutional and civil rights should never be compromised. Collaborative methodology must be emphasized. And finally, current methodologies in assessments of mental capacity must be defined and regularly reviewed.

TABLE 1

Source: Washoe County Senior Service Plan

TABLE 1

Population by Age	2010		2011		2016	
	Number	Percent	Number	Percent	Number	Percent
0 - 4	27,998	6.6%	27,867	6.5%	29,267	6.6%
5 - 9	27,063	6.4%	27,228	6.4%	28,106	6.3%
10 - 14	27,635	6.6%	27,851	6.5%	29,055	6.5%
15 - 19	29,346	7.0%	29,449	6.9%	28,588	6.4%
20 - 24	32,023	7.6%	32,450	7.6%	32,486	7.3%
25 - 34	56,469	13.4%	57,228	13.4%	60,701	13.6%
35 - 44	55,353	13.1%	55,557	13.0%	55,458	12.5%
45 - 54	61,322	14.6%	61,464	14.4%	58,446	13.1%
55 - 64	53,319	12.7%	54,542	12.8%	60,678	13.6%
65 - 74	30,455	7.2%	31,569	7.4%	39,987	9.0%
75 - 84	14,873	3.5%	15,026	3.5%	16,055	3.6%
85+	5,551	1.3%	5,615	1.3%	6,343	1.4%

CHART 1

Source: Washoe County Senior Service Plan

CHART 1

WASHOE COUNTY DEMOGRAPHICS

Population by Age

