

The Long and Winding Road of Guardianship Reform: A National Perspective

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ABA Commission on Law and Aging
Kentucky Guardianship Conference
May 2009

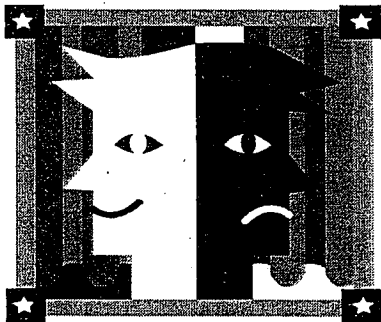


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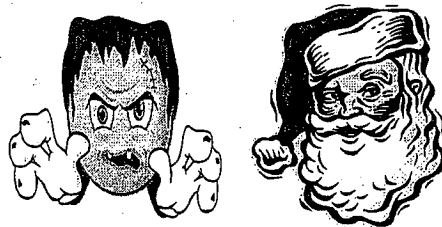
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Guardianship –
A double-edged sword



Guardianship – “Part ogre and part
Santa Claus”



Ancient Roots

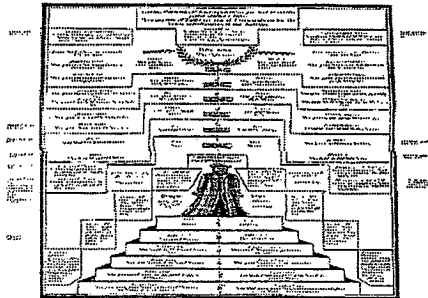
- Before Golden Age of Greece
- Hippocrates
- Story of Sophocles



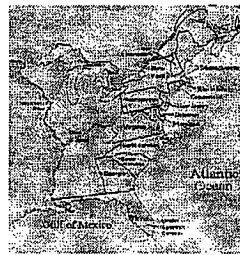
Early History – *Twelve Tables of Rome*



Early History – 14th Century England *De Praerogativa Regis – “Parens Patriae”*



Colonial America



- Parens patriae
- Mental disabilities – jails, workhouses
- Mental institutions
- Guardianship statutes enacted in states
- Emphasis on protection of property

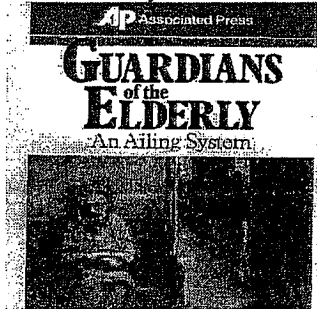
Two Protective Procedures

- *Mental commitment* – state police power to protect society
- *Guardianship* – State parens patriae power to protect individual/property
- Reform hit mental commitment first

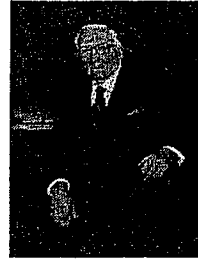
Early Guardianship Reform

- Uniform Probate Code – 1960s
- Professor John Regan – Procedural due process – 1970s
- National Public Guardianship Study, Schmidt – 1981
- Judicial Practices Conference 1986

1987 Associated Press Report:
Guardians of the Elderly: An Ailing System



Response to the AP Report



- U.S. House Hearing Sept 1987, Rep. Claude Pepper
- Triggered statutory change, trainings, models & standards

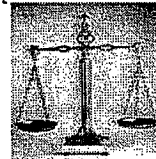
Rush to State Statutory & Practice Reform

- Since 1988, revisions in almost all states
- About 2/3 of states enacted new or substantially revised code
- State skirmishes, task forces, debates
- New laws marked by five key trends



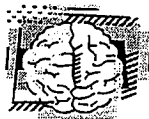
Procedural Due Process

- Notice
- Presence of Respondent
- Representation by Counsel

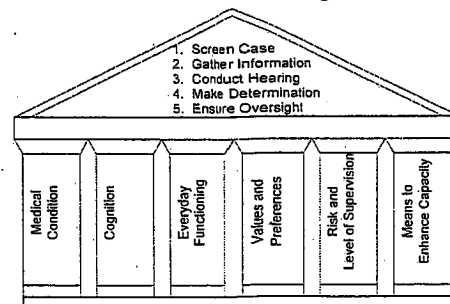


Changing Perceptions of Capacity

- Not global; task specific
- Not "all or nothing"
- Never put a period after "capacity" . . .
- Four elements in state guardianship law; mix 'n match
 - Medical condition
 - Cognitive element
 - Functional element
 - Risk of harm



Capacity Assessment Model – ABA/APA Handbook for Judges



Least Restrictive Alternative

- Constitutional doctrine
- Growing use of alternatives to guardianship
- Enactment of limited guardianship provisions
- Use of "substituted judgment standard of decision-making"

Guardian Accountability



- Reports, Accounts & Plans
- Court Actions to Facilitate Reporting
- Protection of Assets
- Court Review of Reports & Accounts
- Investigation, Verification & Sanctions
- Databases, Technology
- Court Community Links
- Guardian Training/ Assistance
- Funding for Monitoring

Volunteer Guardianship Monitoring: A Win-Win Solution



Road to Reform: National Perspective



- National Guardianship Association – Standards; Ethics Code



- UGPPA
- Mediating Guardianship Disputes – TCSG



- Wingspan Symposium

In RE Mollie Orshansky

804 A2s 1077 (2002)



- Advance planning ignored
 - Appellate court finding – trial court
- "abused its discretion in appointing a guardian and conservator by not giving the wishes of Mollie Orshansky the consideration to which they were entitled by law."*

More National Reform



- 2003 Senate Hearing & 2004 GAO Study



- 2007 National Monitoring Study



- 2007 Senate Report



- 2008 National Public Guardianship Study

Growing Multi-State Problems



- Recognition: authority in one state recognized or enforced in another
- Transfer: moving case from one state to another
- Initial jurisdiction: Where to begin case when more than one state involved

Matter of Glasser (2006)

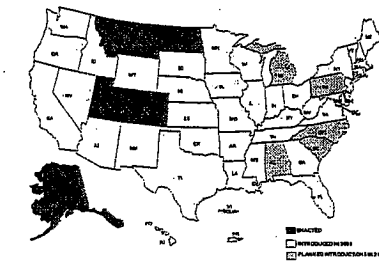


- Texas vs New Jersey
- Mother lifelong resident of NJ
- Daughter – “Come to TX for visit.”
- Filed for temporary guardianship
- Two years later case resolved in NJ
 - Huge litigation expenses
 - Delay of mother’s return home

Uniform Guardianship and Protective Proceedings Jurisdiction Act

- ❖ Recognition of guardian authority
- ❖ Transfer of guardianship cases
- ❖ Fix initial jurisdiction in one state
- ❖ Court communication & cooperation
- ❖ Jurisdictional guideposts; not change substantive guardianship law
- ❖ Uniform Law Commission www.nccusl.org
- ❖ ABA Commission on Law and Aging www.abanet.org/aging/guardianshipjurisdiction/home.html

UAGPPJA Progress: 2009 Legislative Status



Gap Between Law and Practice: Bends in the Road

The New York Times "In the Hands of a Troubled System" 2004

Los Angeles Times "Guardians for Profit" 2005

The Boston Globe "Courts Strip Elders of the Independence" 2008

The Washington Post "Under Court, Vulnerable Became Victims" 2003

THE WALL STREET JOURNAL "Latest Custody Battle: Who Gets Mom" 2006

Lack of Data: Through a Glass Darkly



- Number of adults under guardianship in U.S. – unknown
- Number of adults under guardianship in states – unknown in most states
- Percent elderly; percent with mental illness – frequently unknown
- Percent plenary vs limited orders, reports timely filed – frequently unknown
- Percent and number family, public, nonprofit, for-profit guardians – frequently unknown

Computerized Databases – Revolutionizing Monitoring

- Development of unified guardianship case databases
 - iCIS in Maricopa County AZ
 - MNCIS in Hennepin County MN
 - Data dictionary in Broward County FL
- Use of database to:
 - Make queries
 - View case documents
 - Send out notices
 - Identify “red flags”



What Do We Need?

- Support for promising practices
- Training
- State & local interdisciplinary working groups
- Court/aging/disability network partnerships
- Funding \$\$\$\$
- Continued advocacy
- Lets put guardianship on the RADAR SCREEN!!

What Does Kentucky Need?

- YOU ADD