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GUARDIANSHIP OVER THE ELDERLY: SECURITY PROVIDED OR FREEDOMS DENIED?

HEARING

BEFORE THE

SPECIAL COMMITTEE ON AGING
UNITED STATES SENATE

ONE HUNDRED EIGHTH CONGRESS

FIRST SESSION

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GUARDIANSHIP OVER THE ELDERLY: SECURITY PROVIDED OR FREEDOMS DENIED?

TUESDAY, FEBRUARY 11, 2003

U.S. SENATE,
SPECIAL COMMITTEE ON AGING,
Washington, D.C.

The committee met, pursuant to notice, at 10 a.m., in room SD–628, Dirksen Senate Office Building, Hon. Larry E. Craig (chairman of the committee) presiding.

Present: Senators Craig, Collins, and Carper.

OPENING STATEMENT OF SENATOR LARRY E. CRAIG, CHAIRMAN

The CHAIRMAN. The Special Committee on Aging of the U.S. Senate will come to order.

My colleague and ranking member, John Breaux, anticipates being here. There is a lot of activity going on on the Hill this morning, so I am not expecting a large turnout of Senators.

What is important about this committee is that it is called a "nonauthorizing committee" but it is an investigative committee that builds a record for Senators to look at in the shaping of public policy. So your presence here today even in the absence of a large crowd attending is extremely important for this committee and for the Senate as we grapple with an aging population in this country and their responsibilities and their rights. That is what this is all about this morning.

Today we are going to explore the issue of guardianship imposed over the elderly. This committee originally addressed abuses of the guardianship system in the early nineties through roundtable discussions that produced a series of recommendations. It is now time to take a close look at how far we have come on this issue of great importance to our Nation's seniors.

Guardianships are a judicial intervention allowing for the management of an elderly adult's personal affairs and property. When used correctly in very extreme cases, guardianship can be an important tool in securing the physical and financial safety of an incapacitated elder. At the same time, guardianship can divest an elderly person of all of his or her rights and freedoms that we consider important as citizens in this great country.

When full guardianship is imposed, the elderly no longer have the right to get married, vote in elections, enter into contracts, make medical decisions, manage finances, or buy and sell property. They cannot even make decisions on where they want to live. All

these rights are taken away from the elderly and vested in a surrogate decisionmaker—the guardian.

Our investigation has confirmed that some guardianships can have onerous effects on the elderly. For example, guardianship may drain the elder's estate, result in protracted legal proceedings, and substitute the judgment of a total stranger for those of the elder and their family.

A recent case has come to my attention where a court actually terminated a marriage pursuant to a guardianship.

Sine people are now living longer, we can expect a significant increase in the number of vulnerable elders potentially harmed by the guardianship process. In addition, the financial management of a significant amount of wealth is at stake. Studies indicate the baby boomers are expected to inherit $10.4 trillion in assets in the next 40 years. I am interested in this issue because our Constitution ensures that all citizens shall not be deprived of liberty or property without due process of law.

Also, substantial sums of Federal money, including Social Security and SSI payments, disability and survivor benefits, Federal pensions, and welfare benefits, are administered and potentially misused by guardians. For this reason, I will be asking the GAO to study the accountability of guardians who are charged with managing these funds on behalf of the elderly.

Ironically, the imposition of guardianship without adequate protection and oversight may actually result in the loss of liberty and property for the very persons whom these arrangements are intended to protect.

In our effort to provide protection for our seniors, we must be cautious that our well-intentioned interventions do not do more harm than good. We have one such case before us here today. Our first panel is going to visit with us about that case.

So I welcome Jane Pollack and Michael Kutzin to the committee to tell us what happened to Mollie Orshansky. We will play an interview providing background on this case, and then I will turn to Jane and Michael to discuss the case in testimony with us.

So if we could start the video at this time, I think it is very self-explanatory.

Thank you very much. That certainly is a bold introduction into the issue that this committee is tackling today.

Before I turn to our panel, let me turn to my colleague Susan Collins for any comments and opening statement she would like to make.

STATEMENT OF SENATOR SUSAN COLLINS

Senator COLLINS. Thank you very much, Mr. Chairman.

First let me thank you for calling this morning's hearing to raise public awareness about guardianship issues and to educate seniors and their families about the potential misuse of guardianships.

When an individual becomes mentally or physically incapacitated and can no longer look after his or her own health and financial interests, it may very well be appropriate for the court to appoint someone to serve as his or her guardian. We should keep in mind, however, that once an individual is judged incapacitated and a guardianship imposed, the individual loses most of his or her fun-

damental rights. They cannot write a check or use a credit card. They no longer have control over where they are going to live. They lose their right to vote and to marry, and their guardianship assumes control over how much contact they can have with family and friends. They even lose the right to refuse medical care or social services.

Moreover, while the reason that the court appoints a guardian in the first place is to ensure that sound decisions about money and care are made, there is considerable potential for abuse in the current system since the guardian assumes complete control of their ward's finances. We have seen a lot of examples of those, and I know the chairman is going to get into that today.

Again I want to thank the chairman for shedding light on this issue.

I would ask that my complete statement be included in the record.

The CHAIRMAN. Without objection, and thank you very much for joining us this morning.

[The prepared statement of Senator Collins follows along with prepared statement of Senator John Breaux:]

PREPARED STATEMENT OF SENATOR SUSAN COLLINS

Mr. Chairman, thank you for calling this morning's hearing to raise public awareness about guardianship issues and to educate seniors and their families about the potential misuses of a guardianship system that critics say is too often overzealous and paternalistic, and sometimes even downright abusive.

When an individual becomes mentally or physically incapacitated and can no longer look after their own health and financial interests, it may very well be perfectly appropriate for the Court to appoint someone to serve as his or her guardian. We should keep in mind, however, that once an individual is judged incapacitated and guardianship is imposed, they lose most of their fundamental rights. They can't write a check or use a credit card. They no longer have control over where they are going to live. They lose the right to marry, and their guardian assumes control over how much contact they will have with family and friends. They lose the right to refuse medical care or social services. They even lose their right to vote.

Moreover, while the reason the court appoints a guardian in the first place is to ensure that sound decisions about money and care are made, there is considerable potential for abuse in the current system since the guardian assumes complete control of their ward's finances.

For example, an article in the January 2000 edition of *California Lawyer* details the case against an employee of the Riverside County public guardian's office who admitted skimming $100,000 from her charges. That's just what she admits to taking. Sources familiar with the case say that the actual amount stolen could well add up to millions.

What I find particularly troubling is the fact that the imposition of guardianships appears to be growing rapidly. In New York, for example, 32,000 guardianships were granted in 1997, up from just 15,000 in 1992. Moreover, this number will only increase exponentially as the Baby Boom generation ages.

Mr. Chairman, there are alternatives to guardianship for an incapacitated person. Today's hearing gives us an opportunity to discuss these less restrictive alternatives, such as living trusts and durable powers of attorney. It also gives us the opportunity to determine the extent of any abuses in the system, and whether reforms are needed. Perhaps most important, it gives us an opportunity to impress upon all Americans the importance of advance planning for a future in which they may no longer be capable of managing their own affairs.

Again, I want to commend the Chairman for calling this important hearing.

PREPARED STATEMENT OF SENATOR JOHN BREAUX

I would first like to thank Chairman Craig for holding this vital hearing on guardianship and some of the pitfalls associated with it. I would also like to thank all of our witnesses who have taken time from their busy schedules to testify before us today. Your testimony will assist the Committee greatly in determining how best to address some of these issues of concern that currently exist in the world of guardianship.

Let me begin by saying that guardianship is not a new issue to those of us working with and for America's seniors. A National Guardianship Symposium , which became known simply as "Wingspread", was held fifteen years ago, resulted in 31 landmark recommendations to better safeguard the rights of incapacitated and allegedly incapacitated individuals. A decade later in 2001, a follow-up conference, "Wingspan", showed us that while progress has been made, we still have much to do.

Abuse, neglect or exploitation of our nation's elderly will not stand. Whether it be in the form of physical or sexual abuse, financial exploitation or abuse of the guardianship processes it must end. To this end, Senator Hatch and I, introduced the Elder Justice Act yesterday. Our bill builds upon Wingspan's recommendations by providing for education of all actors in the guardianship system and by developing research to determine how to improve this system and the lives it affects.

Thank you once again, Mr. Chairman for holding this important hearing. I look forward to hearing from our witnesses.

The CHAIRMAN. Now let us turn to our first panel.

You have already met Jane Pollack through the video as the niece of Mollie Orshansky. Jane is accompanied by Michael Kutzin, the attorney for Jane Pollack.

So with that, Jane, please proceed with your testimony, and welcome to the committee.

STATEMENT OF JANE M. POLLACK, NEW YORK, NY

Ms. POLLACK. Thank you.

Good morning, Senators. Thank you for the opportunity to appear before this committee.

I come here to testify about the nightmares my family endured to protect my elderly aunt, Mollie Orshansky. Mollie is best known for developing the Federal poverty line formula in 1963. During her 46-year public service career, Mollie received many prizes and honors. However, Mollie has said that her proudest accomplishment was her testimony in 1964 which helped to end the poll tax.

Mollie did everything possible to plan for her future. She executed a health care proxy naming me as her agent. She also established a trust which held all of her assets and designated her sister Rose as co-trustee so that her money and assets could be used on her behalf in the event of incapacity.

She purchased a New York apartment in the same building as Rose, four blocks from her sister Sarah, my mother, and near her nieces. Mollie planned to move there when the time was right. Her plans were designed to let her family—not strangers—care for her and make the necessary health and financial decisions should she be unable to do so.

In 2001, Mollie's building management contacted Adult Protective Services. One day, without notifying the family, the caseworker ordered an ambulance and took Mollie against her will to the hospital. Although the caseworker and the hospital were aware that Mollie had interested family, the hospital instituted guardianship procedures.

Once notified, I arrived in Washington and presented the proxy. I found Mollie in four-point restraints. Her speech was slurred, and

she was disoriented. I was told that she had to be restrained and was heavily medicated because she kept trying to leave for home.

As her agent, my requests to obtain Mollie's release were denied because of the pending guardianship hearing 7 weeks' hence. I was told that she was there only for custodial reasons, and they were waiting for an opening in a nursing home.

In informed the administrator and the social workers of Mollie's wishes, plans, and financial arrangements. However, her discharge was denied, and she remained a prisoner.

During my visits, Mollie often said: "I did not know they could do this to me. I cannot live like this." Mollie received little attention. Her physical and mental condition deteriorated. Mollie was forced into incontinence. Her muscles atrophied and she could no longer stand or walk. When I was not there, Mollie was deprived of mental stimulation and social interaction.

Mollie's rights were trampled, and her health was dangerously put at risk with each moment in captivity.

I relied upon my legal authority to remove her. It was the eve of Martin Luther King Day at 7:40 p.m. With a lump in my throat and my heart pounding furiously, I wheeled Mollie out of her room and into the lobby. I prayed the guard would not notice. I took Mollie to a side door and pushed the door open. Aunt Mollie was free at last.

At 10:15 p.m., I notified the nurses' station to advise them that Mollie was all right and they need not worry. However, after 2½ hours, they did not realize that Mollie was gone.

In an emergency hearing, the judge voided Mollie's health care proxy, froze her account, and ordered the temporary guardian to enlist the New York Police to have Mollie immediately returned to Washington. Our family lived in fear that the police would storm Mollie's apartment and drag her away. Fortunately, we were able to obtain a court order prohibiting Mollie's removal from New York.

I lost my counterbid for guardian-conservator at the February hearing in Washington, DC Mollie's court-appointed attorney supported the court in voiding Mollie's health care proxy and replacing Mollie as co-trustee of her trust. Incredibly, Mollie's attorney has never even spoken to her, and she fought the appeal in Mollie's name.

Her guardian and conservator has done nothing to benefit her. However, he diverted money from Mollie's trust and has run up astronomical fees.

In August, the appeals court vacated all the decisions of the lower court. However, this is not over. A judge still must decide whether to dismiss the case entirely and whether to grant requests for reimbursement of expenses and legal fees from the DC guardianship fund or from Mollie, forcing her to pay for the errors of the court.

Our family, including Mollie, has so far incurred over $160,000 in expenses and bills. That is just the money; the emotional and physical toll is incalculable.

I am hopeful that Congress will enact legislation to guarantee that the wishes of seniors and their families are respected so that no other family will suffer the travails that our family did.

Thank you.

The CHAIRMAN. Jane, thank you very much.
[The prepared statement of Ms. Pollack follows:]

WRITTEN STATEMENT OF JANE M. POLLACK
BEFORE THE UNITED STATES SENATE
SPECIAL COMMITTEE ON AGING

FEBRUARY 11, 2003

Good morning, Honorable Senators. Thank you for the opportunity to appear before this committee. I come here to testify today, in the midst of many trials and tribulations, with the hope that no other family will have to endure the nightmare that we did on behalf of my elderly aunt, Mollie Orshansky.

WHO IS MOLLIE ORSHANSKY?

Mollie Orshansky is a national treasure. My Aunt Mollie is renowned in the areas of statistics and economics. She is best known for her genius in envisioning and developing the federal poverty line formula in 1963, which has enabled millions of the nation's poor to obtain the benefits and the means to sustain themselves and their families. Her own roots in a poor immigrant family served as the inspiration for her efforts. Mollie has been sought out and mentioned by other authors and by Members of Congress. She has appeared on Meet the Press and been interviewed on National Public Radio. Most recently, Mollie and the poverty line were a subject of the television program, The West Wing. During her outstanding 46-year public service career, Aunt Mollie was the recipient of many prizes and honors, including the Distinguished Service Award, in 1976, the highest honor bestowed by what was then known as the Department of Health, Education and Welfare. After retirement, she continued in public service. She served on the Board of the United Seniors Health Cooperative, in order to protect the elderly. However, Mollie has said that her proudest accomplishment was her testimony in 1964, at the request of the Department of Justice, which helped to end the Poll Tax. She showed that a poor family would have to choose between eating and exercising their right to vote.

Mollie was always very strong-willed and fiercely independent. However, Aunt Mollie was a devoted, loving and affectionate sister and aunt, with a special fondness for children.

MOLLIE'S PRECAUTIONS

Aunt Mollie did everything possible to plan for her future. She executed a Health Care Proxy, naming me as her agent. She also established a trust in 1981, which held all of her assets. Aunt Mollie designated her sister Rose as co-trustee, so that her money and assets could be used and administered on her behalf, in the event of incapacity. She purchased an apartment in the same building as Aunt Rose, which is also four blocks from her sister Sarah, my mother, and near her nieces. Aunt Mollie planned to move there when the time was right. This planning was to ensure that she would be able to live at home, near her family, in the event of poor health or diminished capacity. It was designed to let her family, not strangers, care for her and make the necessary health and financial decisions should she be unable to do so.

Aunt Mollie took the recommended steps to plan for her future but she never anticipated that a hospital, court and lawyers could or would overturn all of her carefully made plans.

MOLLIE'S DECLINE

Aunt Mollie's decline began gradually, in mid-2000. The family noticed she was having difficulty keeping track of her mail and paying bills on time, and we intervened. During frequent visits, family members noticed some decline in her personal care, and her apartment was no longer neat and organized. Despite this, Mollie stubbornly refused live-in or part-time assistance, and she did not feel the time was right to move to her apartment in New York City.

Because of her sometimes-disheveled appearance, and rambling conversations, her building management contacted Adult Protective Services. The caseworker told the family that she would be making arrangements for homecare, but this fell through and she failed to notify us. One day, without notifying the family, the caseworker ordered an ambulance and took Mollie, against her will, to the hospital. Although the caseworker and the hospital were aware that Mollie had interested family, the hospital instituted guardianship proceedings.

Upon finally being notified of Aunt Mollie's hospitalization, the family took action to honor her wishes. We prepared her apartment and hired experienced 24-hour homecare, in anticipation of Mollie's arrival. As her health care agent, I arrived in Washington a few days later and presented the proxy. I found Aunt Mollie sitting in the dark, forlornly staring into space, with a large contusion on her forehead, due to a fall in the hospital. She was in four-point restraints. Her hands and feet were strapped to her chair and a sheet wrapped around her waist tied her body to the chair. Her speech was slurred. She was disoriented, confused, and obviously traumatized. I was told that she had to be restrained and was heavily medicated because she did not want to be in the hospital and kept making a fuss and trying to leave for home.

My requests to obtain Mollie's release into my care as her health care agent were denied because of the pending guardianship hearing. I was informed that she was not there for medical reasons, but for custodial reasons, until her scheduled hearing, seven weeks hence. I was also told that they were waiting for an opening in a nursing home, which was against Mollie's specific wishes and arrangements.

I informed the administrator and the social workers of Mollie's wishes, her carefully made plans and her financial arrangements. However, although the Health Care Proxy gave me legal authority to direct that Mollie be released to me and Aunt Mollie had certainly not committed any crime, her discharge was denied and she was held against her will, a prisoner in the hospital. During my visits she often said, "I didn't know they could do this to me. I can't live like this."

MOLLIE'S INCARCERATION AND ESCAPE

Each day of her incarceration in the hospital compromised Mollie's health. A hospital is an unsafe place to stay for a person who is not ill. Aunt Mollie's risk for infection, disease and illness greatly increased and I had to plead for routine healthcare and vaccinations for the flu and pneumonia (refused). She received little attention. Mollie's physical and mental condition deteriorated. She fell twice, developed a bedsore, sustained two urinary tract infections, her appetite suffered and she became dehydrated. Mollie was forced into incontinence. Her muscles atrophied and she could no longer

stand or walk. In addition, when I was not there, Aunt Mollie was deprived of mental stimulation and social interaction.

Mollie's rights were being trampled and her health was put dangerously at risk, each moment she remained captive in the hospital. Despite the repeated refusal of the hospital to officially release Aunt Mollie to me, I relied upon my legal authority as her health care agent to remove her. On the eve of Martin Luther King Day, at 7:40 PM, I rescued Aunt Mollie. With a lump in my throat and my heart pounding furiously, I wheeled Mollie out of her room, past the nurse's station to the elevator and down to lobby. I avoided the security desk and prayed the guard would not notice. I took Mollie to a side exit and pushed the door open. Aunt Mollie was free at last. At 10:15 PM I called the nurse's station to advise them that Mollie was all right and they need not worry. However, 2 1/2 hours after Mollie left the hospital, they had not even realized that she was gone.

PRESSURE TO RETURN

I was fearful of how the D.C. court would react – and my fears were justified. I retained New York and D.C. counsel. The D.C. court was advised that I would commence a guardianship proceeding in New York, so it could be assured of Mollie's continued well-being. However, before my attorneys could file the guardianship petition in New York, the court appointed attorney initiated an emergency hearing.

There, he persuaded the judge to switch his role to Mollie's temporary guardian, telling her there was a large pension and a sizeable account at a brokerage firm. The judge then replaced him as "Mollie's attorney". The court voided Mollie's Health Care Proxy and froze her account. This caused her bill payments to bounce. The judge also ordered the temporary guardian to enlist the New York City Police to have Aunt Mollie immediately returned to Washington D.C.

Our whole family was petrified that Mollie would be kidnapped and brought back to Washington. We lived in fear that Police Officers would storm into Aunt Mollie's apartment and drag her away. We dreaded her fate upon return, of loneliness, isolation and exile from her family.

Fortunately, we were able to obtain an order from the New York court prohibiting Aunt Mollie's removal from the jurisdiction. However, for several very tense days, we were still so fearful that the temporary guardian and the police would arrive at Mollie's door to drag her away, that our lawyer was on-call 24 hours a day to run to Aunt Mollie's apartment with the court order in hand.

THE COURT CASE

I testified regarding Mollie's wishes and carefully made plans and told of the excellent medical and personal care Mollie was receiving at home in New York. However, I lost my counter-bid for guardian/conservator at the February hearing in D.C. Her temporary guardian, a stranger, was appointed as her permanent guardian/conservator and put in charge of Mollie's trust. Not only did Aunt Mollie's court appointed attorney fail to provide her with zealous representation, she failed to represent Mollie at all. Instead, she chose to represent the guardian and supported the court in voiding Aunt Mollie's Health Care Proxy and replacing Aunt Mollie with the guardian as co-trustee of her own

trust. Incredibly, "Mollie's attorney" has never met with her or even spoken to her on the phone. She never advised Mollie of the hearing or the results, never told Mollie she could appeal and, in fact, fought the appeal in Mollie's name. Her court appointed guardian/conservator has done nothing for her. I, in essence, acted as the guardian and provided and supervised for all of Mollie's care. Her sister Rose, in essence, acted as the conservator, paying Mollie's bills from the trust. However, the guardian/conservator diverted money from Aunt Mollie's trust and has run up astronomical fees, without benefiting her. In addition, the guardian/conservator and the attorney have hectored and harassed the family.

Fortunately, in August, the appeals court vacated all of the decisions of the lower court, and charged the judge with abuse of discretion. The judge's decision was so egregious and filled with folderol, that the appeals court overturned every aspect of it in a fifty-page decision.

However, this is not over. A judge still must decide whether to dismiss the case and whether to grant requests for reimbursement of expenses and legal fees from the D.C. guardianship fund or from Mollie, as her "attorney" advocates in her name. This means that Mollie would pay for the errors of the court, despite her "attorney" previously stating that there would be no irreparable harm. Our family (including Mollie) has, so far, incurred over $160,000 in expenses and bills. This includes almost $50,000 claimed by the guardian for "services" rendered, over $18,000 for the colleague he hired to fight the appeal, over $6,000 already paid to the guardian as Mollie's original court-appointed lawyer, about $13,000 already paid in guardianship administrative expenses and my legal fees for Mollie's rescue, which are at least $75,000, covering Washington and New York. And the costs are still mounting. That's just the money. The emotional and physical toll is incalculable.

CONCLUSION

My grandparents emigrated from Russia, where they faced poverty and persecution. They truly believed the words of the Declaration of Independence that all people have the "inalienable rights to life, liberty and the pursuit of happiness." Last year, on his trip to China, President Bush declared that, "All the world's people...should be free to choose how they live ...worship...and how they work." My grandparents would feel much deceived and dismayed by the trampling of Mollie's rights and disregard of her wishes and carefully made plans. How ironic that this would happen to someone who devoted most of her life to assisting the helpless.

If you live long enough, infirmity will eventually catch up with you. It is ludicrous to think that any hard working American would want strangers to appropriate their savings or make decisions about their personal care. I am hopeful that Congress will enact legislation to guarantee that the wishes of seniors and their families are respected, so that no other family will suffer the travails that our family did.

Thank you.

Appendixes A – H follow.

APPENDIX A: Mollie's Wishes and Plans, should she need help

Mollie Orshansky had thoughtfully and carefully made plans and legal arrangements for the eventuality that she might need significant help. She never wanted to be a burden on her family, but she did want the same hands-on loving treatment and management of her care as she and others had provided for some of her sisters in the past, when they became severely and even terminally ill.

Wishes regarding financial affairs:

1. To protect her financial assets, property and personal possessions from encroachment by strangers.
2. To give access and authority to manage her assets and pay her bills, to a trusted family member.

Arrangements:

1. Created a Revocable Trust naming her sister as Co-Trustee and another sister as successor Co-Trustee.
2. Opened a Trust account at a brokerage firm, with full checking privileges.
3. Transferred her assets into her Trust.
4. Upon retirement in 1982, arranged for direct-deposit of her monthly pension into the Trust account.

Wish regarding where she would reside and receive care:

To change her domicile to her New York apartment in close proximity to her family, for her comfort, happiness and ease of mind and for their convenience to visit frequently and act as her caregivers or direct her care.

Arrangements:

1. Purchased cooperative apartment in 1988 in same building as her sister, in New York.
2. Furnished the New York City apartment and kept it ready for occupancy by her and an aide, at a moment's notice.
3. Never rented out the apartment, to ensure it was available.

Wish regarding personal care and medical decisions:

To have personal care arrangements and health-related decisions made in accordance with her wishes, by a trusted relative, in the event she could not make them herself.

Arrangements:

Anticipated that her wishes and arrangements with regard to change of domicile to New York would be honored.

1. Signed a New York State Health Care Proxy (NY's equivalent of a Durable Power of Attorney for Health Care) in July, 2000 and asked her niece, who lives in New York and had recently helped her, to be her Health Care Agent.
2. Signed a New York State Living Will.

APPENDIX B: Help Provided by Mollie's Family

Starting well over a year before APS became involved, members of Mollie's family, all of whom live hundreds of miles away and have other responsibilities, such as full-time jobs and other family members they are providing care for, had gone out of their way to help her on an ongoing basis and were actively continuing to try to implement homecare.

- Mollie's various delinquent bills and taxes were painstakingly researched and arrangements were made to bring them up to date and keep them current.
- With great effort, like pulling teeth, she was taken to the doctor for checkups in mid-2000 and again in 2001, just a few weeks before APS claimed she was malnourished, dehydrated and weak. (The doctor had not found any of these conditions.)
- Podiatrists, eye doctors and eyeglass stores in DC were researched and attempts were made several times to take her, but to no avail.
- In addition to frequent lengthy phone calls to check on her, and periodic calls to building staff to obtain their opinion about her status, relatives took off extended periods from work (weeks at a time) and made several trips to Washington, DC to see Mollie first-hand and assist her.
- Cash and items of clothing were sent and brought to her. Arrangements were worked out with the supermarket management to deliver groceries and let her buy on credit as contingency plans, in case of bad weather or if she misplaced her credit card or cash.
- Homecare agencies and individuals working as home aides were researched. Ladies were even hired and brought to Mollie's apartment under the ruse that Mollie would be helping them out by giving them a job, and that they were college girls who could benefit from her knowledge, but she would not let them in. Despite this, research into agencies and care managers continued (until APS stated on November 29, 2001 that they had gotten Mollie to agree to a homemaker for 12 hours a day and they would be making the arrangements, thus solving the problem).

Emotional, physical and financial management assistance was provided and family members greatly extended themselves. We did not just stand by. We tried our best and never gave up. (We were also determined to rescue her and obviously persisted in that, as well, and succeeded, although at unimaginably great personal sacrifice.)

We had felt great concern over Mollie's gradually deteriorating condition and her refusal to acknowledge it and agree to accept even some form of minimal help that would have sufficed to enable her to continue living somewhat independently and maintaining her routine. We were very frustrated and knew that eventually the issue would have to be forced, but Mollie was clinging to her independence and was still, although just barely, "managing" in her own routine, going to her supermarket, eating, and

spending her days as she wished. The dilemma we faced was that there was no way of forcing Mollie to accept help without literally having to tie her up, dope her and ruin her life.

APPENDIX C: The Human Toll, on Mollie, of the "Intervention"

The devastating impact on Mollie Orshansky:

She was **severely traumatized** by her forced incarceration, **held down with "4-point restraints" with both wrists and both legs tied to the corners of the bed**, and **doped into submissiveness and oblivion** by being **pumped full of heavy sedation** (a combination of Haldol and Ativan) so strong that she was given oxygen "as a matter of protocol," due to the danger of respiratory depression. **Permanent mental, emotional and physical harm was sustained.**

• Mental, Emotional and Social Impact

1. **Precipitous irreversible decline in mental state; severe progression of dementia.**
2. **Suffered depression** from traumatization and from sense of loss of identity as an independent person in control; felt that her rights and her Trust were taken away from her and all her assets were gone. Now recovered from depression and happy to be in close contact with family, but says, "I used to have money. Now it's gone."
3. **Her way of life is gone.** Could this have been avoided? We'll never know.

• Physical Impact

1. Rendered **permanently incontinent** due to restraints; catheterized, then diapered; not allowed to go to toilet.
2. **Permanently wheelchair-bound**, despite 2 rounds of physical therapy.
3. Suffered 2 falls including a head injury, 2 severe urinary tract infections requiring intravenous antibiotics, and a bedsore on heel from neglect during forced imprisonment in hospital; lost weight due to depression and foreign environment in hospital; recovered from these injuries, infections and effects soon after rescue.

• Financial Impact

A Conservator is supposedly appointed to prevent waste and dissipation of assets. Quite the opposite happened here.

1. **Monthly pension payments** had been the primary source of funding and income to the Trust, from which all bills are paid. These **were diverted from the Trust to a non-Trust "fiduciary" account** under the sole control of the Guardian/Conservator, for 8 months until the family finally got this reversed after winning the Appeal.
   Of the $57,616 of pension diverted from the Trust, at least $36,631 has been spent by the Guardian/Conservator. Of this, the only worthwhile payments that normally would have been made anyway from the Trust, had there been no Guardianship, are $176 for a handful of utility bills and $250 to drill open the safe deposit box, which some day would have had to be done by the family. **Mollie Orshansky and her Trust may never recover the majority of the unnecessarily and wastefully spent funds.**

2. **$75,000 was boldly wire-transferred out of the Trust account into the non-Trust "fiduciary" account** under the sole control of the Conservator. He has asked the Court to rule that **almost $68,000 of this hoarded amount be paid to him and to his own lawyer** as fees for their "services," even though the Guardian/Conservator's appointments were reversed and vacated. **Mollie Orshansky and her Trust may never get any of this money back.**

APPENDIX D: The Human Toll on Mollie's Family

A profound impact on niece Jane Pollack and other close family members:

- **Emotional and Social Impact**

1. **Fear; unrelenting severe stress;** constant utter **frustration and exasperation** for over a year. **A seemingly never-ending nightmare.**
2. Several weeks of **time lost from job.**
3. **Disruption of normal family life.** No time for interaction. Loss of time that should be spent with child, husband and elderly mother. **Tremendous drain on time, to work on legal case.**

- **Physical Toll**

1. Unhealthy **stress.**
2. **Sleep deprivation and impairment** for over a year.
3. **Exhausting and draining.** Long hours **(probably about 2,000 hours)** spent by Jane and family in planning and participating in the hearings, researching and drafting points for the appeal, and responding and objecting to numerous seemingly never-ending reports, petitions for fees and untrue statements of the illegitimate Guardian.

- **Financial Burden**

Jane Pollack, in order to rescue her aunt and extricate her from deterioration in a dangerous and neglectful environment while involuntarily imprisoned in the hospital, and save her from the outrageous violation of her rights by greedy parties and an arrogant, abusive judge, courageously, yet with full authority of the law, removed her aunt from the hospital where she was held captive. In following her aunt's previously expressed wishes and plans, Jane brought her to New York. Because the DC Court insisted on continuing its Intervention Proceeding and illegitimately issued orders appointing a stranger as Guardian, Conservator, and Co-Trustee, voiding all valid and legitimate powers of attorney executed by Mollie Orshansky and mutilating her Trust agreement, **Jane Pollack filed suit in New York for Guardianship and had a restraining order issued that was of critical importance. She then participated in the DC case to attempt to get justice for her aunt. Failing that, she appealed the astoundingly erroneous, abusive and illegitimate decisions of the DC Superior Court. Her efforts paid off. The Appeal was won and all decisions of the Court were reversed. The appointments of the greedy stranger-Guardian/Conservator/Co-Trustee were voided. Mollie will be allowed to stay in her New York apartment and be cared for by her niece and family, as she had wanted.**

However, **all of this took money. Neither Jane Pollack nor her family had any idea just how much money would be involved for legal fees.** The astounding bill, with the meter still running, has exceeded **$75,000 and can be expected to reach or exceed $85,000** before the legal cases are over! Mollie Orshansky would never have wanted her relatives to be out even one cent on her behalf. She saved her money and managed it, and thought it was protected and would be sufficient to pay for all of her needs. **Mollie never anticipated** that there would be **any legal fees** involved in providing care for her, least of all that anyone else would pay them.

APPENDIX E: The Cost in Dollars

CT.-APPOINTED ATTORNEY/GUARDIAN'S FEES AND PAYOUTS:

Original Court-Appointed Attorney's Fees (had asked for $7,800 for 31 hours of work "for services rendered") Note: Original Court-appointed Attorney asked Attorney for the Petitioner (a hospital) to file for an Emergency Hearing, the purpose of which was to appoint him as Temporary Guardian/Conservator and replace him as Mollie's Attorney. The Court-appointed Attorney claims Attorney for the hospital urged him to volunteer to be the Guardian.	**$ 6,240**	
Temporary, then Permanent Guardian/Conservator's Fees (for claimed 256 hours of work "for services rendered"; primarily to prepare for/attend hearings to ask to be appointed Gdn./Consvtr., oppose DC Appeal, influence/attempt to dismiss NY case; divert monthly pension and Trust acct. funds to "fiduciary" acct., prepare Inventory, Gdn./Consvtr. reports and Accounting rept., and prepare/submit requests for his own fees)	**$ 49,102**	
Fees paid by Guardian to Law Firm he's "of counsel" to	**$ 638**	
Guardian's filing, copying, phone, postage, process server	**$ 3,769**	
Fees for Lawyer representing the Guardian (for colleague hired to fight the Appeal and preserve appointments)	**$ 18,015**	
Second Court-Appointed Attorney's Fees (no bill, nor for 2 colleagues in DC and NY enlisted by her to fight the Appeal in DC and try to get NY case dismissed "on behalf of client Mollie Orshansky" without any of them ever contacting her)	**$?** not billed	
Guardian's premium for surety bond	**$ 2,610**	
Guardian's claimed expenses for property appraisals	**$ 1,754**	
Wire transfer fees to siphon $75,000 out of Trust account	**$ 93**	
Guardian's alleged expense to clean 1-bedroom apartment	**$ 1,714**	
Guardian's payment to CPA for tax prep. (family had done for free)	**$ 1,152**	
Guardian's travel expenses	**$ 1,675**	
		$86,762

NIECE'S LEGAL COST OF RESCUE:

Fees for niece's attorney in DC through 12/20/02	**$ 39,180+**	
Filing, copying, postage for niece's attorney in DC	**$ 1,410+**	
Niece's travel to Court hearings in DC	**$ 400**	
Fees for niece's attorney in NY through 1/3/03	**$ 34,208+**	
+Probable additional fees for niece's DC and NY attorneys and Court costs to complete pending cases	**$ 10,000** (estim.)	**$85,198**

GRAND TOTAL: $171,960

Additional fees may be required for further DC Appeal re Guardian's fees and for litigation to recover expenses.

APPENDIX F: Mollie's Life and Financial Affairs Today

Her health and mental status
Mollie recently celebrated her 88th birthday.
Her health is stable and although she is wheelchair-bound despite physical therapy, she has no serious physical ailments requiring frequent medical visits. She is under the care of a doctor with a geriatric subspecialty.

Mollie's dementia is far worse than it had been before her traumatic forced incarceration that ended a little over a year ago. However, although she is confused and the illness is progressive, she has not appreciably deteriorated in the past year, since being in New York.

Her life
Mollie is living in the Manhattan apartment that she purchased and furnished in 1988 just for this purpose, to be near and be cared for by her family. She has 24-hour homecare. The attendants (one 5 days a week, the other 2 days a week) have been with her for a year and she is used to them.

Mollie is anything but independent, yet she believes she is in total control and does everything herself.

Mollie sees her sister, who lives in the same building, every day and spends Sunday afternoons in that sister's apartment. She sees her other sister, who lives nearby, at least twice a week. She also has 5-7 visits a week from her nieces and their husbands.

Mollie enjoys eating out with her aide. In good weather, they sometimes sit in nearby Central Park. Mollie also attends a social day program 5 days a week, where she participates in a variety of activities for seniors like herself and exercises her mind.

Her care
The director and staff of the social day program and Mollie's doctors state that she is thriving and is in the best hands, with the appropriate level of homecare and very attentive and excellent hands-on care and supervision by her family.

All care for the past year, including living arrangements, clothing purchases, homecare, medical appointments, the social day program, and special transportation services, has been implemented by her niece, Jane Pollack, who in essence has been her "guardian", even while someone else officially but needlessly and illegitimately held the title. (He was a guardian in name only and was not involved in any aspect of the care.)

Her finances
Bills and taxes had been and continue to be handled by Mollie's sister, who is her designated Co-Trustee. This sister, in essence, has been her "conservator", even while someone else officially but needlessly and illegitimately held the title. (His only accomplishment as conservator was to divert close to $133,000 away from the Trust into a "fiduciary" account. His appointment only served to waste and dissipate a lot these funds and he is hoping to keep a good chunk of the remainder as his fee "for services rendered as guardian and conservator.")

APPENDIX G: Key Issues to Consider

- **Jurisdiction**

Families are often physically separate due to college, marriage, jobs, and retirement. Nowadays, there may be more than one possible and reasonable jurisdiction for Guardianship, if an Intervention Proceeding is to be held. One Court should not force someone to be held captive by its jurisdiction if another jurisdiction makes more sense or is better for the Subject. If the likely caretaker is in another jurisdiction and it would be more feasible for the Subject to be there as well, or if the Subject expressed a desire to relocate if care us needed, then the Court should make every effort to transfer the case or dismiss the case in deference to another jurisdiction's Court. Judges should not be power-hungry or territorial in making such determinations. An individual in need of protection should be assumed to be afforded a proper assessment and decision by another Judge.

- **Hidden voiceless victims: How many? How can we stop this?**

How can anyone know how many victims there are of abuses and injustice in the Guardianship system? These individuals, who are likely to be limited by nature of their physical and mental frailty to begin with, have no way of speaking up, making themselves and their plight visible, or seeking redress or help out of the situation.

These individuals are stripped of their rights. They are not even allowed to sign their own names. Almost always, especially if a Court-appointed stranger-Guardian is in charge, the individual will be locked away, out of the public eye and without access to the outside world, unable to get the word out, confined to a nursing home. (That's the easiest way of hands-free management of a Ward's living arrangements and personal and medical care, with others responsible for the details and implementation.) If the Guardian visits and the Ward wants to file an action in Court to remove him or file an Appeal, and tells this to the Guardian, what will happen to the request? If not going through the Guardian, then through whom? The individual may not even know that he has the right to request that the Court consider removal of a Guardian or Conservator and will most definitely not know how to go about it. The person certainly couldn't file himself. He would need a lawyer. How would he get one? Big Brother, the Guardian who wants to preserve his own job, for which he gets paid, is the Ward's only spokesperson. **Perhaps something can be done about this.** It is unlikely that putting an ombudsman in each nursing home would solve the problem, because the nursing home will have its own interest in mind, namely keeping its beds full. Maybe some centralized examiner or ombudsman needs to travel to all Wards, wherever they may be, and interview them outside of the presence of their Guardians.

Another approach to seek out victims of inappropriate Guardianships, and perhaps a better one, would be for an audit of Court records by an independent agency, meaning an agency independent of the Court, independent of the Petitioner and Guardian, and independent of APS. The auditor may have to be an attorney in order to insure that the law has been followed to the letter. It would be akin to someone searching the record to see if there are any grounds for appeal due to abuse of discretion, legal errors, or ineffective counsel. (If anyone reads the transcripts of the Mollie Orshansky hearings, the abuses and errors are astoundingly evident. In other cases, they may exist but be more subtle and require a trained mind.)

What about friends and family? Certainly, if they know about erroneous judgments or railroading of the Subject, that information could help pinpoint cases to review. (However, we caution that a review should really be done of all cases.) In any event, how many friends and family members will be willing to put up a fight in Court, at their own out-of-pocket expense of perhaps $20,000 - $50,000 to intervene? Regardless of how much they may love the victimized individual and feel sorry for them, they may be unwilling, or at least very likely to be unable to afford, to mount an appeal and a rescue.

Mollie, as victim, is just the tip of the iceberg. How broad and how deep might it be? How many helpless souls were broken and lives taken away by abuses in the Guardianship process? How many are yet to follow?

APPENDIX H

Recommended Safeguards in Guardianship "Interventions"

Adult Protective Services

APS can play an invaluable role in investigating self-neglect, neglect or abuse by others and financial exploitation and in assessing the condition of the frail or mentally incapacitated elderly and taking steps to improve the situation and arrange for needed care and assistance. However, they must be mindful of the rights of the elderly to reject help and decide how they want to live their lives. A fine line exists between the point where help and generally-recognized improved living conditions should be forced on someone or they must be allowed to make their own choices, whether one approves of those choices or not, just as a fine line exists between when medical procedures can be forced on any individual and when that person has a right to say no, and even between when a homeless person can be forced into a shelter or must be allowed to remain on the street if he so chooses. One size does not fit all, and living conditions do not have to be ideal, merely sufficient. Independence and decision-making must not be wrested from individuals unless absolutely necessary.

Once brought in on a case, if there is some action that legitimately rises above the fine line threshold and must be taken to protect the Subject, then APS should be held accountable for taking appropriate action.

Although they may have broad powers, APS must also be held accountable for providing notification and information to the Subject and the Subject's family at every step of the way. APS is not the secret police. Their powers are not, nor should they be, unlimited, and they must be prevented from ruining lives out of an abuse of power or a misconception of the extent of their power; also from making assertions that are not facts and have no evidentiary grounding, that are then automatically viewed as the truth by attorneys, judges, evaluators, etc. just because the assertions come from APS.

A Subject has the right to know who the APS caseworkers are and that they are from APS, who called them in, what they are investigating, and their intent and plans. If action is contemplated by APS, the Subject also has the right to know about this and when the action would be taken. Requests for information and notification of actions should be both verbal and in writing and should include deadlines for providing APS with information or implementing steps that could avoid the need for invasive actions by APS. All requests for information and notifications should also be provided to known family members, whom APS should be required to seek out, even if they live far away or are perceived to be disinterested, adverse to APS's intervention, or neglectful.

Following are specific requirements that should be imposed on APS, in order to protect the rights of the frail or incapacitated elderly and their families. It is entirely possible that through these additional requirements imposed on APS,

beneficial outcomes may in many cases be achieved to improve dangerous situations and arrive at resolutions that might avoid Guardianship Intervention Proceedings, which should always only be the last recourse.

APS must tell the Subject, verbally and in writing, why they have come, who called them in, and what they will be investigating.

2. APS must attempt to identify and locate family members and maintain contact with them as well, verbally and in writing, throughout the process, even if the family is outside of the geographical jurisdiction.
3. APS must advise the family, verbally and in writing, why they were brought in, who called them in, and what they will be investigating.
4. Regarding any information that APS requests, the request must be verbal and in writing, with a date certain deadline. The request must go to the Subject and family and must include the purpose of the request, the intended use of the information provided, and the authority by which APS is requesting the information. It is not good enough to say that "APS has broad powers" and "needs to know everything about the individual; personal and family history, education, employment, financial, medical." If the requested information is not provided, can it be subpoenaed or obtained via a warrant? Why is each requested piece of information needed? To what use will it be put? What will the difference be with or without the specific information sought?
5. If the requested information is not provided by the deadline, verbal and written notification must be provided by APS to the Subject and the family, giving them an opportunity to meet one more deadline or perhaps to indicate that they did send the information.
6. APS should seek to determine whether the Subject has executed a Power of Attorney for Health Care, Health Care Proxy or similar document, a Living Will, and a general Power of Attorney, and if the Subject has a Trust and a Will. The appointees of the Subject can be indicative of who the Subject might want to provide assistance to him in the present situation.
7. The family should be given the opportunity to describe any actions they had taken in the past, or are undertaking at present, to assist the Subject. Such description could be verbal but should be documented by the family and provided to APS in writing, as well, with a copy to the Subject.
8. If APS believes there may be or may have been financial exploitation or physical or emotional abuse or neglect, they must advise the family of their suspicions. However, ultimately there must be factual evidence to support such conclusions or else the suspicion or intuition must not be mentioned, as ungrounded defamation and innuendo, to anyone, nor included in any reports nor in any testimony in order to try to influence a Petitioner to file, or to influence a Judge or Evaluator.
9. If APS determines that they will implement care as a course of action, such as to bring in homecare or Meals on Wheels, they must advise the Subject and family of this, verbally and in writing.
10. If APS changes the plan, for whatever reason, and will implement different care, not implement care, or take a different action, they must notify the

Subject and family, verbally and in writing, of the change in plans, the reason for the change, and what the new plan is.

11. If APS determines that no effective plan can be implemented successfully to improve the situation sufficiently to the extent that filing for Intervention and Guardianship can be avoided, they must notify the Subject and the family, verbally and in writing, of their determination and reasons. A deadline should be given for implementation of specified improvements, past which the more invasive action, spelled out, will be taken. Such a final warning could potentially shock the Subject into agreeing to accept help, or prompt the family into implementing care, or could spur the family to file for Guardianship to protect the Subject from a proceeding being filed by a stranger, such as by a hospital. (Family may be reluctant to do this to their loved one unless their hand is forced.)
12. APS must never dump a Subject in order to force him or her into a Guardianship proceeding without zealously exploring other more benign and less invasive alternatives.
13. APS must not make a decision to dump a Subject and force him or her into a Guardianship proceeding based on the knowledge that the Subject has significant assets and can well afford to pay Court costs and Attorney's, Examiner's, Visitor's/Evaluator's, Guardian ad litem's, and Guardian's fees. The Subject's net worth must not have a bearing on whether an invasive action is or is not undertaken.
14. If APS brings a Subject to a hospital or other institution to institute an Intervention Proceeding, APS must provide evidence to the Petitioner before the Petition is filed.
15. Individual APS caseworkers, as well as their superiors and the APS agency, must all be held accountable for their work and their actions and liable if they do not follow the requirements pertaining to information and notification.
16. APS caseworkers must only cite facts based on evidence and must not cite suspicions or opinions without a factual basis.

Hospitals and other institutions, and Attorneys representing them, as Petitioners for Intervention Proceedings

1. Hospitals and other institutions into which allegedly incapacitated persons (AIPs) or IPs are placed "for custodial reasons, pending a hearing in an Intervention Proceeding," must not serve as mills for "granny-snatching" nor for offloading of APS cases without due cause and documentation. A representation by APS must be grounded in material facts that are presented up front, including a file showing all proper notifications, and not just to be furnished at a later point, when they may not materialize.
2. The civil, constitutional and legal rights and legitimate interests of the AIP or IP must be honored. AIPs and IPs must not be involuntarily incarcerated for custodial reasons pending a hearing, as if they were being held without bail pending trial. Commitment Orders or Protective Orders may be sought, but only for cause, which must be based on facts and not on innuendo, opinion or suspicion

3. If a Petition for Intervention is to be or has been filed, that fact should not preclude the release of the AIP or IP unless detailed reasons for endangerment exist and can be provided. If a Durable Power of Attorney for Health Care or a similar device of another jurisdiction exists, and the Attorney-in-Fact or Health Care Agent is willing to take care of the individual and requests that the individual be released into his or her care, and the individual is in agreement, and the individual is not in need of protection from said agent due to harm or abuse, of which factual evidence exists, then the discharge from the institution into the hands of the agent must take place.
4. Even if an Attorney-in-Fact or Health Care Agent resides in a different jurisdiction and there is reason to believe that the AIP or IP might be removed from the present jurisdiction if discharged into the agent's care, the requested discharge must still take place.
5. The AIP or IP who is in a hospital or other institution must not be physically restrained or heavily sedated unless this is medically warranted. The determination must be made on the side of not using restraints, sedatives, tranquilizers or antipsychotic drugs to quiet the person and make him or her less combative and more submissive if there is any doubt.
6. Official visits and meetings of attorneys, a Guardian ad litem, a Visitor or Evaluator, and an Examiner with the Subject of an Intervention Proceeding must occur while the Subject is not under heavy tranquilizers, sedatives, or antipsychotic drugs and the Subject must be free of any medication that renders him or her drowsy or with reduced mental acuity, so that the Subject can understand and participate in the discussion to the maximum extent possible.
7. The Subject must not be asked to sign any document turning over powers or assets, agreeing to representation, or agreeing to having had a meeting or discussion with an attorney or Guardian ad litem if he is under heavy tranquilizers, sedatives, or antipsychotic drugs or any other medication that renders him or her drowsy or with reduced mental acuity.
8. While hospitalized or institutionalized, the Subject may not be denied any test, medication, examination or treatment that can reasonably be provided somewhere within the overall general facility, if the test, medication, examination or treatment would be of benefit to someone who was not a resident or inpatient of the facility. For example, pneumonia vaccine may not be withheld because it is not normally given to inpatients, while forcing the Subject to be an inpatient for custodial reasons, to await a hearing.
9. Every effort must be made to protect the Subject who is held in a hospital or institution for custodial reasons, pending a hearing, from exposure to infectious agents, the development of pressure sores, the onset or worsening of incontinence due to catheterization, diapering, or infrequent change of diapers, other kinds of neglect or negligence, and mental decline due to traumatization, forced residence and disorientation.
10. If the hospital or institution is the Petitioner in a Guardianship proceeding, it must not have anything to gain, financially, from the outcome.

11. A hospital or other institution may not bill the Subject for his or her stay, for custodial purposes, pending a hearing. This provision is necessary to ensure that hospitals and other institutions do not file as Petitioners, or refuse to discharge the Subject, merely to pay for vacant beds or make filing Petitions a profitable enterprise.

Court-appointed attorney to represent the Subject of an Intervention Proceeding

1. Must never be permitted to be appointed as a Temporary, Emergency, General or Permanent Guardian, Conservator, or Trustee.
2. Must be selected in strict descending order from a list of approved attorneys who are candidates for this role.
3. Must meet stringent requirements, such as specific training and a test for attorneys to represent the Subject of an Intervention Proceeding, and preferably have an active practice in Estate Planning and Elder Law. (Other than having passed the Bar exam, attorneys in other areas of practice, such as Real Estate, Commercial Litigation, Personal Injury, Malpractice, and Computer Law, have no training that qualifies them to effectively perform the required functions of a Court-appointed attorney and achieve justice and good results for their client, the Subject.)
4. Must have, and must have previously had, no personal or work affiliation or business with any of the parties in the Intervention Proceeding, including but not limited to the Petitioner, the attorney for the Petitioner, the Guardian ad litem, the Visitor or Evaluator, the Examiner, APS or the APS caseworkers associated with this case, or the proposed or eventually appointed Guardian or Conservator.
5. Must have no conflict of interest with the Subject (the client).
6. Must personally represent the Subject. Must not delegate the representation to colleagues and other members of his or her law firm or hire another attorney to perform the functions.
7. Must meet with the Subject on multiple occasions and identify himself as the Subject's Court-appointed attorney, advise that a Petition for Intervention has been filed and what that is, and state his role as the Subject's attorney.
8. Must advise the Subject that he will be submitting a request for compensation at a later point, and the bill will be based on the time spent on the case.
9. Must provide the Subject with his telephone number and ensure that the number and the attorney are readily available to the Subject.
10. Must inquire of the Subject if he has another attorney whom he would prefer to represent him. If so, must contact that attorney to discuss whether that attorney would be interested in representing the Subject. Either way, must advise the Judge regarding the existence of the other attorney. (An attorney

who is familiar with the Subject and past dealings and family history might be preferable to a stranger.)

11. Must explain to the Subject the circumstances of the filing for Intervention, who the parties are, and why the Petition had been filed.
12. Must actively and thoroughly research the Subject's legitimate interests, including identifying, validating, and entering into evidence any Powers of Attorney, Proxies, Trust Agreements, or other legal instruments executed by the Subject.
13. Must assess the likely outcome and discuss it with the Subject.
14. Must ascertain from the Subject how he or she wishes to proceed.
15. Must ask the Subject if there is anyone he or she would choose to be the Guardian or Conservator, and why.
16. Must attempt to locate the candidate requested by the Subject to determine whether they would be interested in the role. Must investigate the background, relationship and history.
17. Must identify and meet or at least converse with family members of the Subject, even if they reside in another jurisdiction, to determine whether they could effectively be proposed to be the Guardian/Conservator.
18. Must make every attempt to devise a solution, agreeable to the Subject, which would be less invasive and which might cure the situation that prompted the need for intervention. For example, the Subject might agree to accept homecare and might agree to unofficial supervision by a friend or relative or to hire a Care Manager to arrange for and manage a suitable level of care.
19. If the Subject does not appear to understand, must ask the Court to appoint a qualified and independent Guardian ad litem, with no affiliations with any of the parties or attorneys.
20. If an interim or Temporary Guardian is appointed, the attorney for the Subject must continue to directly deal with and represent the Subject and not the Temporary or Permanent Guardian in his or her stead.
21. The attorney for the Subject must advise his client and explain all events in the proceeding, including the findings of fact, conclusions, and orders issued.
22. The attorney for the Subject must advise his client and explain the right to file a Motion for Stay Pending Appeal and the right to appeal. The cost of an appeal and likely timeframe before it was heard and ruled upon must also be discussed, as well as the odds of success.
23. The attorney for the Subject must advise his client each time any party submits a Petition for Award of Fees and must zealously and actively review each such submission and file whatever objections are suitable and in his client's best interests. He should try to keep any judgments for payment from his client's funds to a minimum.
24. The Subject must also be advised when his own attorney's Petition for Fees is filed and must be given a reasonable opportunity to respond to the Court and object if he so desires. (Question: Who does this for the Subject? His attorney cannot write the objection lest it be less than effective.)

25. The attorney must ensure that the Subject is not heavily drugged to the extent that his understanding of what the attorney is telling him, and his capacity to comprehend what he is being told and to respond and be able to effectively participate in the planning for his case, is not compromised.
26. A checklist with all points to be covered by the attorney with his client, at the initial meeting or meetings, as detailed above, including the introduction, reason why appointed, reason for Intervention and fact that there will be a hearing in Court, asking if the client has another attorney whom he would prefer to represent him, describing the likely outcome, discussing how client wants to proceed, asking the client about family, plans, powers of attorney, existence of a Trust or joint account, etc., must be completed by the attorney and signed by both the attorney and the client, in front of impartial witnesses, at the time the discussions actually took place, so that the client would have the best chance of remembering that they had taken place and understands what he's signing. The lawyer must also complete, and sign under oath, a checklist that states that he made all of the contacts and inquiries, described above, that were required of him. The checklists must be presented in Court at the hearing and become part of the record.

Judge

- The Judge has the ultimate responsibility for ensuring that the letter and spirit of the law are followed.
- The Judge must determine and ensure that there is no illegitimate affiliation between any of the parties, including the Petitioner, the attorneys, and the Guardian ad litem, Visitor/Evaluator, and Examiner. They must be independent.
- The Judge must determine and ensure that appointees such as a Guardian ad litem, Visitor/Evaluator, and Examiner are experienced and qualified to perform in their roles, and that expert testimony is brought in, as needed, so that inexpert opinions are not given undue weight.
- The Judge must ensure that the Subject is enabled to participate in the proceeding to the fullest extent possible and is heard and not silenced, and that the Subject is viewed as a person with rights which must be protected by the Judge and not allowed to be minimized, disregarded, or violated.
- The Court-appointed attorney must be selected sequentially from the list.
- The Court-appointed attorney must never be appointed the Temporary, Emergency, General or Permanent Guardian, Conservator or Trustee.
- The Subject must be given the opportunity to have an attorney of his choosing if he indicated this preference instead of having a Court-appointed attorney.
- The Judge must appoint a Guardian ad litem if one is needed, to assist the Subject in comprehending the situation and in determining his preferences and best interests.

- The Judge must ensure that undue credit is not given to the testimony of APS, if they are involved, merely by virtue of the fact that they are APS caseworkers, and must require that their reports be based on material evidence and fact and not suspicion, innuendo, intuition, prejudice against the Subject or the family, vengeance, frustration, ego, or the like.
- The Judge is responsible for keeping a watchful eye to see that the Court-appointed attorney provides effective counsel and zealously and competently represents the Subject and that the required checklists with proper remarks and signatures are on file, indicating that the Court-appointed attorney performed all of his required functions.
- There should never be a rush to judgment or an a priori decision.
- "Favorites" of the Judge must not be given undue weight or credence.
- The Subject must not be subjected to any Court orders restricting his rights and appointing persons to have control over him and his assets, who can make far-reaching decisions as to where and how he resides, what treatment he receives or is denied, and who will be paid from the Subject's funds, which might deplete them, unless such orders and appointments are entirely necessary. The Judge should always seek to arrive at less restrictive solutions, if possible, and should inquire as to why they would not suffice. (For example, allow homecare; accept assistance; hire a Care Manager.) Any solution which, had it been in place, would have avoided the need for Intervention, should be viewed as not too late to implement if it could be done and the Subject was now willing to comply. The Judge could keep the case open and call for status hearings one, two and three months later to ensure that the solutions were implemented and remained in effect and were working satisfactorily. The case could then eventually be dismissed.
- Unless there is actual evidence of abuse or financial exploitation by the family or by the designee of the Subject in a Power of Attorney, Proxy, or Trust Agreement, the Judge should seek to honor the legal designees of the Subject and give preference to them and then to family members. Even if the designees or family reside in another jurisdiction and would likely relocate the Subject to that jurisdiction, that should not be a deterrent to selecting them and giving them preference. Even if family from outside of the jurisdiction had provided little or no assistance to the Subject in the past, that might reasonably been excusable and understandable based on geographic distance, inconvenience, lack or knowledge of the seriousness of the situation, the Subject's unwillingness to accept help, and other reasons. The Court should always view with favor the willingness of family to step up to the plate and assist the Subject in his time of need, and the likely best care of the Subject that would occur at the hands of the family rather than a Court-appointed stranger whose actions are performed solely for remuneration.
- If there is any affiliation or conflict that the Judge has with any of the parties, witnesses or institutions, the Judge should recuse himself, even if the conflict occurs while the case is in progress.

Court-appointed Guardians selected from a list

- Must never start out as the Petitioner or Court-appointed Attorney.
- Preferable that the list consist of experienced and skilled Care Managers rather than attorneys. An attorney (even an Elder Law attorney) has no special expertise regarding care options, management of homecare attendants, social activities and programs, paratransit arrangements, selection of a nursing home, etc.
- If attorneys, should undergo guardianship training by a Care Manager.
- Must try to come up with a care plan that provides the most independence and closest environment to the previous home and social environment as is feasible and that finances allow. For example, should try to have the Ward cared for in his own home and familiar environment. Should try to provide an environment with outside activities, such as shopping, eating in restaurants, and attending a senior center or special adult day program. Assisted living should be considered. Placement in a nursing home should be the last solution rather than the first.

Court-appointed Conservators selected from a list

- Must never start out as the Petitioner or Court-appointed Attorney.
- Preferable that the list consist of accountants rather than attorneys. An attorney (even an Elder Law attorney) has no special expertise regarding tax preparation or producing an accounting.

The CHAIRMAN. Michael, do you have testimony?

Mr. KUTZIN. Yes, I do, Senator.

The CHAIRMAN. Please.

STATEMENT OF MICHAEL S. KUTZIN, ATTORNEY AT LAW, GOLDFARB & ABRANDT, NEW YORK, NY

Mr. KUTZIN. Good morning, and thank you for inviting me to testify.

My name is Michael Kutzin, and I am a partner in the New York law firm of Goldfarb & Abrandt. In the audience is my colleague, George Teitelbaum, who represented Jane in the D.C. proceedings.

The ordeal that my client, Jane Pollack, and her family have endured in carrying out the wishes of her aunt, Mollie Orshansky, demonstrates many of the problems that seniors and their families often face after falling into the guardianship whirlpool.

Guardianship statutes generally recite lofty principles of honoring the wishes of an incapacitated person where possible and call for a myriad of protections of due process rights. In addition, so-called modern guardianship statutes such as those found in New York call for judges to provide flexible solutions to meet the needs of an incapacitated person, such as limited guardianships, and to honor the senior's wishes regarding whom she wants to care for her.

In practice, however, once a guardianship proceeding is brought against someone, machinery begins that often presumes that a guardianship is required and runs roughshod over the wishes of the senior and his or her family.

This is particular true where, as in the case of Mollie Orshansky and her family, the proceeding is commenced by a hospital or nursing home, and family members live in another State. A similar disregard for the wishes of the senior and her family often occurs where the senior has significant assets. Both of these factors were present in the Orshansky case.

In this case, once the petition was filed by the hospital, the judge sought to retain control over the case even though (1) Mollie Orshansky's family all lived in New York; (2) Mollie Orshansky owns an apartment in New York City in the same building as her sister; (3) Mollie Orshansky had established years before a revocable trust naming her sister Rose as a trustee to handle her assets if she could not do so herself; (4) Ms. Orshansky had executed a health care proxy naming her niece, Jane Pollack, as the person to make medical decisions for her if she could not do so herself; and (5) Jane Pollack commenced the guardianship proceeding in New York to assure the D.C. court that no one was attempting to avoid court scrutiny.

When Mollie Orshansky had been removed from the hospital and transported to her New York City apartment, the judge named one lawyer as Mollie's temporary guardian and appointed another attorney from a large firm as "Mollie's attorney." This judge also ordered the temporary guardian to take all steps necessary, including bringing the police, to have Mollie Orshansky brought back to the District of Columbia.

In other words, the judge asserted that the mere fact that someone filed a guardianship petition presumptively made

Ms. Orshansky incapacitated and made her a captive of the District of Columbia.

In addition to these infringements of Ms. Orshansky's due process rights, Mollie Orshansky's court-appointed attorney never bothered to visit or to speak with her and even represented herself to me as representing the temporary guardian.

It was in the temporary guardian's financial best interest to keep the guardianship in the District of Columbia in order to earn large fees from Mollie Orshansky's assets and, not surprisingly, Ms. Orshansky's "lawyer" acted accordingly.

Fortunately for Ms. Orshansky and her family, the U.S. Court of Appeals for the District of Columbia in a unanimous 50-page decision reversed the trial court for its myriad failures to protect Ms. Orshansky's due process rights and for its abuse of discretion.

Senators, there is a role for guardianship proceedings, but where seniors and their families are working together for the senior's best interests, the State must defer to the family.

In light of time restraints, I will refer you to my written comments where I have made a two-pronged legislative proposal which I call "Mollie's Law," and I will just have to hope that you ask me about it.

Thank you.

[The prepared statement of Mr. Kutzin follows:]

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WRITTEN STATEMENT OF MICHAEL S. KUTZIN
BEFORE THE UNITED STATES SENATE
SPECIAL COMMITTEE ON AGING*

FEBRUARY 11, 2003

Good morning, and thank you for inviting me to testify. My name is Michael Kutzin, and I am a partner in the New York law firm of Goldfarb & Abrandt.

The ordeal that my client, Jane Pollack, and her family has endured in carrying out the wishes of her aunt, Mollie Orshansky, demonstrates many of the problems that seniors and their families often face after falling into the guardianship whirlpool.

Guardianship statutes generally recite lofty principals of honoring the wishes of an incapacitated person where possible, and call for a myriad of protections of due process rights. This includes requiring the party who is petitioning for the appointment of a guardian to demonstrate, by the legal standard known as "clear and convincing evidence" that such a drastic step is required. While the "clear and convincing" standard is below the standard required for a criminal conviction, namely, "beyond a reasonable doubt," it is a significantly higher burden of proof than the usual standard of proof in civil cases, namely proof by a preponderance of the evidence.

So-called "modern" guardianship statutes, such as those found in New York, call for judges to provide flexible solutions to meet the needs of an incapacitated person, such as limited guardianships, and to honor the senior's wishes regarding who she wants to care for her.

In practice, however, once a guardianship proceeding is brought against someone, machinery begins that often presumes that a guardian is required, and runs roughshod over the wishes of the senior and his or her family.

This is particularly true where, as in the case of Mollie Orshansky and her family, the proceeding is commenced by a hospital or nursing home, and family members live in

* I would like to publicly thank the following persons for their helpful comments to these remarks: my partners, David Goldfarb, Esq. and Jeffrey G. Abrandt,, Esq., and my colleagues, Ira Salzman, Esq., Ronald A. Fatoullah, Esq., Batya Levin, Esq., and Barbara Kislak, Esq. The opinions expressed herein are mine, however, and I take full responsibility for them.

another state. A similar disregard for the wishes of the senior and her family often occurs where the senior has significant assets. Both of these factors were present in the Orshansky case.

THE MOLLIE ORSHANSKY GUARDIANSHIP PROCEEDINGS

In this case, once the Washington, D.C. petition was filed by the hospital, the D.C. Judge sought to retain control over the case, even though (1) Mollie Orshansky's family all lived in New York, (2) Mollie Orshansky owned an apartment in New York City in the same building as her sister, (3) Mollie Orshansky had established, years before, a revocable trust naming her sister, Rose, as a trustee to handle her assets if she could not do so herself, (4) Ms. Orshansky had executed a health care proxy naming her niece, Jane Pollack, as the person to make medical decisions for her if she could not do so herself, and (5) Jane Pollack commenced a guardianship proceeding in New York to assure the D.C. Court that no one was attempting to avoid court scrutiny.

There was no need for a guardianship proceeding in the District of Columbia. Jane Pollack was Mollie Orshansky's duly appointed health care agent under both New York and D.C. law, and Ms. Orshansky's revocable trust was a functioning vehicle for the management of her assets. Moreover, Ms. Orshansky had purchased the New York City apartment not as an investment property to rent to others, but for her to reside in, near her family, in the event that she could not care for herself.

In other words, Mollie Orshansky had taken all of the appropriate legal and practical steps to avoid a guardianship proceeding – yet the hospital and the D.C. Superior Court insisted upon continuing down the guardianship path.

To make matters worse, the hospital refused to permit Mollie Orshansky to leave, even though Mollie Orshansky was not receiving medical care, but rather was receiving custodial care pending what the hospital anticipated to be Ms. Orshansky's placement in a nursing home.

In short, Mollie Orshansky was being held captive in the hospital pending an involuntary nursing home admission, despite the fact that her duly authorized health care agent, Jane Pollack, had requested her discharge.

As a result of Ms. Orshansky's status as a custodial care patient, she received inadequate care from the hospital. Jane Pollack was not going to permit her aunt to be treated in such a manner, so she transported Ms. Orshansky, at Ms. Orshanksy's request, from the hospital, to her New York City apartment. Ms. Pollack and her family immediately arranged for 24-hour homecare for Ms. Orshansky, and for her medical needs.

Ms. Pollack notified the hospital that Ms. Orshansky was no longer present in the hospital, at which point the hospital's counsel informed the D.C. court. The judge responded by naming one lawyer as Ms. Orshansky's temporary guardian and appointed

another attorney from a large firm as "Mollie's attorney." This judge also ordered the temporary guardian to take all steps necessary, including bringing in the police, to have Mollie Orshansky brought back to the District of Columbia.

In other words, the judge asserted that the mere fact that someone filed a guardianship petition presumptively made Ms. Orshansky incapacitated and made her a captive of the District of Columbia. Mollie Orshansky was not a criminal, and she, her family and her health care agent had the right to remove her from the hospital and transport her to her own apartment.

In addition to these infringements of Ms. Orshansky's due process rights, Mollie Orshansky's court-appointed attorney never bothered to visit or to speak with her, and even represented herself to me as representing the temporary guardian. It was in the temporary guardian's financial best interests to keep the guardianship in the District of Columbia in order to earn large fees from Mollie Orshansky's assets, and Ms. Orshansky's "lawyer" acted accordingly.

Fortunately for Ms. Orshansky and her family, the D.C. Court of Appeals, in a unanimous, 50 page decision, reversed the decision of the lower court. In that decision, the actions of the lower court and its appointed agents were sharply criticized.

THE NEED FOR REFORM

The Orshansky matter and cases like it demonstrate dangers that seniors and their families face when family members live in another state or where courts are eager to assert control over seniors and the lucrative guardianship appointments that result.

Too often, the wishes of seniors, as manifested by their legal documents and their lifetime planning, are ignored by courts on the basis of being ill-advised. In a recent case in which I represented an incapacitated person with no living relatives, the court was unwilling to let my client name longtime, caring friends to supervise her finances on the grounds that my client was incapable of deciding who she could trust, even though there was absolutely no basis for such a conclusion. The stated rationale of the Court, as well as the two attorneys who petitioned for the guardianship, was that when a person knows only a few people, the person will simply choose from among that limited group.

Instead, a lawyer "on the judge's list" in New York will be in charge of this client's finances.

The freedom to make choices, even "bad" ones, is what we as a society have always valued. It is what we fight for, and what our foes seek to take from us by force. Self-determination is at the heart of freedom, and the right to choose family and friends to care for us rather than an institution or a court must be jealously guarded. When people either plan in advance, as Mollie Orshanksy did, for her needs in the event of her incapacity, or, as the other person to whom I have alluded, expresses her wishes as to

whom she wants to assist her, then, in the absence of compelling reasons to the contrary, these plans and wishes must be honored by our legal system.

Aside from the obvious emotional and financial turmoil that institutional disregard for individual rights causes for seniors and their families, there are other important issues that must be considered. Many seniors retire from their cold weather homes to warm weather states that are hundreds, or even thousands, of miles away from their families. It cannot and should not be used as an excuse by overreaching courts and their minions for the appointment of non-family guardians simply because family members live far away, or because the family is not immediately available when seniors require medical care.

Cases like that of Mollie Orshansky will, in the absence of reform, make seniors far more reluctant to move to states such as Arizona, Florida, or North Carolina if they fear that courts will ignore their wishes.

PROPOSED LEGISLATIVE REMEDIES – MOLLIE'S LAW

I do not believe that it would be appropriate or helpful to take guardianships from the hands of state courts. Congress and the Federal government, however, may properly impose conditions upon the receipt of Medicare or Medicaid funds on institutions. This provides an opportunity for Congress to require that hospitals and other institutions respect the wishes of seniors and their families.

I refer to these legislative proposals as "Mollie's Law," in honor of Mollie Orshansky and her family, in the hope that no family in the future will have to endure the nightmare that Ms. Orshansky's family lived through.

There are two parts to my proposal. I propose that hospitals, adult protective services, and other recipients of federal funds must not be permitted to commence guardianship proceedings if there are properly executed advance directives (health care proxies, trusts or powers of attorney) unless there is a good faith belief that (1) such documents were not duly executed, (2) there has been a breach a fiduciary responsibility, or (3) the advance directives do not give the donee of the power sufficient authority to act where necessary.

Moreover, even where the institution commences the guardianship case in good faith, the institution must be required to withdraw its action if and when it discovers that adequate advance directives are in place.

Violations of this standard must result in a sanction significant enough to deter such behavior, such as loss of Federal Medicare and Medicaid funds.

The second part of my proposal is that, even where no advance directives exist, in the event that an institution brings a guardianship proceeding, Federal law should require that such case be withdrawn or dismissed in the event that family members commence a

guardianship proceeding in another jurisdiction. This would again place the preference where it belongs, namely with the family over an institution, and would recognize the fact that seniors and their families often reside in different jurisdictions – at least until a senior requires assistance.

There is a role for guardianship proceedings. To the extent possible, however, they should be avoided, as they result in extraordinary expenses in the form of legal fees and compensation paid to guardians (especially in states that do not use nonprofit organizations to serve in that capacity), as well as the trauma of court proceedings when seniors and their families are most vulnerable. Too often, the notion of self-determination gets lost in guardianship proceedings.

Mollie's Law will not solve all of the problems that occur in guardianship proceedings, but it will provide important safeguards to seniors that their wishes will be carried out.

Thank you.

The CHAIRMAN. Well, Michael, you set us up pretty well for that one, but I do thank you for your testimony. Jane, certainly your testimony and the difficulty of giving it, we understand, and we appreciate you being here today.

Senator Collins, what is your time line?

Senator COLLINS. I am fine. Thank you.

The CHAIRMAN. OK. Let me proceed, then, with a short series of questions, and then I will yield to my colleague.

Jane, do you feel that Mollie is being cared for now the way she originally intended when she started planning for her own care years ago?

Ms. POLLACK. This is exactly what she had originally intended, Senator. Mollie saw the way her sisters Ann and Bernice were cared for by the family—and by the way, both of them lived in the same building that Mollie is living in now.

The CHAIRMAN. That is where Mollie is now?

Ms. POLLACK. That is correct.

The family was there to care for them, to rally around them, to visit them, and this was very important to my Aunt Bernice and my Aunt Ann, and it was very important to us to be able to do that. This is exactly what Mollie wanted for herself.

The CHAIRMAN. Can you tell us about the financial cost—you mentioned it—that your family has endured in this battle, and to what degree was Mollie's estate depleted by the guardians appointed to manage her assets?

Ms. POLLACK. The amount that it will eventually be depleted is at this point still being ruled upon. We have a hearing in March. Thus far, between amounts that have been paid and amounts that have been billed, it is approximately $160,000; and I can give you some examples, and I will read from my written statement if you do not mind.

Our family, including Mollie, has so far incurred over $160,000 in expenses and bills. This includes almost $50,000 claimed by the guardian for services rendered; over $18,000 for the colleague he hired from his law firm to fight the appeal; over $6,000 already paid to the guardian as Mollie's original court-appointed lawyer; approximately $13,000 already paid to the guardian in administrative expenses; and my legal fees for Mollie's rescue, which are at least $75,000, covering Washington, DC, and New York.

That is just the money, Senator. The emotional toll and the stress on the family is just incalculable.

The CHAIRMAN. Absolutely.

Michael, let me turn to you and ask the question that you have asked of us, because it is important in building a record. Do you see a Federal role here, and what might that be?

Mr. KUTZIN. Thank you, Senator.

Yes, I do. As I said in my written statement, I have made a two-pronged proposal which I have suggested be called "Mollie's law," because frankly, it was this case that inspired me to even think of it. Again, I understand and I recognize the fact that guardianships by their nature are State proceedings, and they should remain State proceedings, and we have to be careful about where the Federal Government intervenes in things that are properly State Government activities.

However, there are two appropriate things that the Federal Government can do, one of which is, because of the fact that most institutions are in fact Medicare or Medicaid recipients, hospitals and nursing homes and other such institutions that do receive these Federal funds should be precluded by Federal law from seeking guardianships where they are aware of or should be aware of the fact that there are these sorts of legal instruments out there called "advance directives," such as durable powers of attorney, health care proxies, or the person has assets in a revocable trust.

The other prong of the suggestion is that where there are "dueling jurisdictions," such as what happened here in the Mollie Orshansky case, where the family members have brought an action in a different jurisdiction—and we are not talking, by the way, Senator, about disputes in the family where a brother is with mom and the sister and another brother are somewhere else, fighting within the family; I am talking about a united family versus the institutions—there should be deferral to where the family is. In that case, the District of Columbia court in my example would have dismissed its case in favor of the New York court.

The CHAIRMAN. Well, I thank you for making those recommendations, because you obviously preface them in a way that is appropriate, and that is where does the responsibility currently lie. I would err on the side of that, of State law at this moment; at the same time, there is a Federal nexus as it relates to care and Federal dollars, and that is where we may well explore what might be done here to avoid or attempt to avoid something like Mollie's situation.

Was there any basis at all for the Superior Court's decision to disregard the prior planning that Mollie had in place?

Mr. KUTZIN. Are you asking me, or——

The CHAIRMAN. Yes, I am asking you.

Mr. KUTZIN. I do not believe so. I believe what happened here was the fact that the District of Columbia court was trying to "punish" Jane. I use that in quotes again because I think it is a highly inappropriate way to even look at guardianship proceedings. In fact, the judge on a number of occasions said, "I am not going to reward Jane Pollack. . . ," blah, blah, blah, because she felt that Jane had acted in a cavalier manner—I do not agree with that, but I think the judge felt that way—by removing her from the hospital and in fact removing her from the judge's jurisdiction.

I think there is a perception that the judge had about this being a reward for Jane Pollack, and I would like to dispel that right now. Being someone's guardian is not a reward for a loved one. It is a responsibility, and it is a very serious responsibility. When you take care of a senior citizen, especially someone you really love and care about, it means your whole life is disrupted.

Jane Pollack has been in and out of courts, she has been in and out of attorneys' offices, she has been in and out of hospitals, she has been in and out of all kinds of facilities. Her life has revolved instead of around her own family—and when I say "her own," her husband and her teenage son—she has been running around as the caretaker for Mollie Orshansky. That is not a reward. It is a responsibility that family takes seriously, and it should not be looked at as a reward.

The CHAIRMAN. I thank you.

Let me turn to my colleague, Senator Collins.

Susan.

Senator COLLINS. Thank you, Mr. Chairman.

First, I want to thank both of you for your extremely compelling and very troubling testimony. What bothers me most is that this is not a case where the senior citizen did not look ahead, did not plan, did not file the documents. Instead, it looks to me as if Ms. Orshansky did everything right—she had established a revocable trust naming her sister as the trustee to handle her assets if she could not do so; she executed the health care proxy naming her niece as the person to make medical decisions for her if she could not do so.

So, Mr. Kutzin, I would ask you, is there anything else that Ms. Orshansky and her family could have done to avoid the very unfortunate situation that developed?

Mr. KUTZIN. I guess not getting sick, but seriously——

Senator COLLINS. I mean legally.

Mr. KUTZIN. Yes. The only document that could have been signed in addition would have been a durable power of attorney. In this case, though, it really was not an impediment to managing her financial affairs because she did have a revocable trust, all of her assets were in that trust, and what is more, she had assigned all of her pension rights to that revocable trust.

So no moneys were ever escaping the control of either Mollie, when she was well, or later, her sister Rose, when her health was failing.

Senator COLLINS. That is what is most shocking to me. This is not a case where the court stepped in because there was not clear legal guidance from the person affected, and that is what makes it all the more troubling to me.

Mr. Kutzin, I would ask you how common is it for a hospital or a nursing home to file this kind of proceeding on behalf of a patient, particularly when there were clearly family members who were ready and willing to assume responsibility for the care of the loved one?

Mr. KUTZIN. Senator, I have not seen it in my practice that often, and certainly not where there are these sorts of prophylactic measures. I practice in New York, so obviously, I cannot speak for what goes on in DC or other jurisdictions.

But it is commonly understood that the courts, certainly in New York, will not even entertain a case like this where there are these sorts of advance directives, or they will only do so when there is some sort of compelling reason to override those advance directives. So I find it to be quite unusual.

Senator COLLINS. If Ms. Orshansky had not had significant financial assets, do you think that the institution would have stepped in to file a petition?

Mr. KUTZIN. I do not believe so, Senator.

Senator COLLINS. The reason I ask you that is because I was struck by a quote from a USA Today article that was included in the written testimony of Diane Armstrong, who will be appearing on our second panel today. It says: "For every $100,000 in a given estate, a lawyer shows up; for every $25,000, a family member

shows up; and if there isn't any money, then nobody shows up." Are financial motives what are driving this problem?

Mr. KUTZIN. I think to a large measure that is true. Now, as I have stated earlier—or at least I believe I stated earlier—there are times when guardianships are in fact called for and where it is needed for someone's finances or to make sure that they are properly being taken care of. But often, you will see people jumping into the guardianship fray when they see someone who is either a senior citizen or who may be frail or may have some sort of incapacity, and they will jump into the fray because there is a lot of money there.

I had a case recently in New York where that was exactly what happened. The person was dull normal to possibly being somewhat mildly retarded, and two lawyers jumped in, started a guardianship proceeding, and eventually guardians were appointed. I represented the alleged incapacitated person and tried to fight it. There is no question what motivated it here.

Senator COLLINS. Thank you very much.

The CHAIRMAN. Senator, Thank you.

Jane, we will give you the last word. You have been through a very difficult time, and we thank you for your persistence in behalf of a loved one.

If you had to recommend one change in the way the guardianship system treats the elderly, what might that be?

Ms. POLLACK. I believe that it would have to be that something has to be put in place to assure that the wishes and the plans of the senior or the incapacitated are honored, unless there is some extremely compelling reason why they should not be.

I think that when organizations such as Adult Protective Services get involved, before they are allowed to—how can I put this—before they are allowed to initiate or instruct the initiation of guardianship proceedings, that they have evidence instead of innuendoes, that they have proof that there is some reason to disregard a person's wishes, that if there is a family that is willing to take charge, that they have proof, not innuendo, not suspicion, that there is some wrongdoing, that this person is in danger in being in the family's care.

In Mollie's case, this was not there, and this is really what started the whole proceedings, because APS was very knowledgeable and had been speaking to my sister Eda. APS knew about the family, knew about the family's involvement, knew about the family's interest. In fact, the first time the APS worker came to Mollie's house, my brother-in-law was there.

I think there should be some oversight and some reining in of the authority that APS has and some mandate that they must have proof before they interfere in the way they did in Mollie's case.

The CHAIRMAN. Thank you both very much for your testimony. It is extremely value, and we appreciate it.

Mr. KUTZIN. Thank you, Senator.

Ms. POLLACK. Thank you.

The CHAIRMAN. We will now proceed to our second panel. While they are coming up and the table is being prepared for them, let me introduce them to the committee for the record.

Thank you, Susan.

Frank Johns is a preeminent guardianship reform scholar and author of numerous articles addressing the abuse of guardianship.

Dr. Diane Armstrong, as Senator Collins mentioned, is author of "The Retirement Nightmare: How to Save Yourself from Your Heirs and Protectors." Penelope Hommel is co-director of the Center for Social Gerontology, and she will discuss the alternatives to guardianship proceedings, including durable power of attorney, living trust, representative payees and extra-judicial mediation.

Robin Warjone from Seattle, WA was the subject of a guardianship petition filed by her three children. She was forced to spend her entire retirement nest egg, $300,000, to successfully retain her independence.

Robert Aldridge is an attorney from Boise, an elder law attorney and one of Idaho's foremost guardianship reforms. He will discuss Idaho's progressive laws and practices in these areas. We appreciate all of you being here this morning. With that, I will follow that order, and Mr. Johns, we will allow you to proceed.

STATEMENT OF A. FRANK JOHNS, ATTORNEY AT LAW, GREENSBORO, NC

Mr. JOHNS. Thank you, Mr. Chairman. Thank you for the opportunity to testify on these issues relating to due process provided alleged incompetent older persons in guardianship proceedings.

The focus of my remarks is on the areas that involve due process within the function of the courts and by the judges sitting in those courts. Mr. Chairman, I do want to mention that I appear before the committee with 25 years litigation experience in guardianship and in writing and research. I am also a member of the National Academy of Elder Law Attorneys, of which I am past president and a fellow, and a charter board member of the National Guardianship Association, two national organizations, along with the ABA Commission on Law and Aging, and sections of AARP which have for years given careful attention to the problems that occur in guardianship and how they might be remedied.

Mr. Chairman, I ask unanimous consent that my written statement and the supplemental materials that I have appended be a part of this hearing.

The CHAIRMAN. All of your full statements will be a part of the record, and I thank you for that.

Mr. JOHNS. Thank you, Mr. Chairman.

I will forego discussing the history, although it is noteworthy and might help staff members and committee members to look at some of the historical comments I give in the appendix, because guardianship can actually be tracked back through five different cultures going back to Greece and the Athenian times.

In this era, however, Senator, let me address the question: Have all of the statutory reforms that have occurred in the last 12 years had an impact that benefits those who are caught in the process?

Quite frankly, the simple answer is "No," and that is why we are here before you this morning.

In the experience that I have had in the time that I have dealt with guardianship, what I have found is that there is both good and evil in the process. The evil comes from—not to grab a sound bite that is already out there—but there is an axis of three primary

pools of actors arbitrarily dealing with the process. It is judges, who violate the rule and the spirit of the law of guardianship. It is social agencies that intervene when intervention is not focused on the protection of the best interests of the persons to be served, but only on their own objectives in the process; and those many family members knowing nothing of the process and using and abusing it, of course, when the dollars are more.

I will make one point, however, Mr. Chairman, if you please. That is that social agencies are going to have to serve elder citizens of modest means when they are on Medicaid and incompetent, when they are so vulnerable and at risk in nursing home environments. Those public agencies are going to be the ones to whom we look for serving this rather huge volume of people who are going to need protection. The demographics show us that those numbers of vulnerable elderly citizens are going to increase monumentally.

As those numbers increase, budgets of agencies may well be benefited by the numbers of people served. The problem is there is no accountability or monitoring within any agency or over any guardian that well serves the interests of the ones to be protected.

Careful attention is drawn this morning, Mr. Chairman, to the judge and to other judges who have arbitrarily exacted what is called "parens patriae," that is, being the benevolent protector of us all, and they do it in a way that circumvents the law and takes issue with what they think is the right thing to do, but in the wrong way.

The truth of the matter, Mr. Chairman, is that many judges tend to believe that the ends justify the means, and they are willing to circumvent the laws that are right there on the books to deal with those being served in ways that contravene of the law.

I direct your attention to two primary areas that need attention. One primary area is that training of judges and the social agencies that support the guardianship system. This are absolutely necessary. The second primary area comes from the literature and the testimony of 1992 and 1993 before this very committee, when the late Professor John Regan asserted that we have to pay attention to the demographics, and another speaker noted that there is no empirical data from which any of our opinions might be well-grounded.

The research that is most recent only comes from 1994 and the data, Mr. Chairman, that that research comes from comes from 1989 and 1990. There is nothing among the States that even shows how many guardianships are out there.

In the difficulties that occurred in the State of Michigan 3 years ago when the Detroit Free Press did its expose, it provided documentation of 100,000 guardianships in the State of Michigan alone. If it were possible to count the guardianships in California, or New York, or Texas, the numbers, I believe, Mr. Chairman, would shock this committee. To believe that 90 percent of those who are guardians have no experience, no capability of dealing with it, and are not monitored or called to account is a very difficult proposition.

These propositions were addressed, Mr. Chairman, in the second National Guardianship Conference called Wingspan which was held in late 2001. I identify the recommendations that deal sole with due process, and then I highlight three of those recommenda-

tions that are critical to this committee's attention in terms of investigating where it should go with what it finds to be problems in the system. I address those three recommendations, the first one being the funding of a major grant narrowly focused on research that would be nationwide, giving us a primary database in guardianship for the first time.

The second recommendation is to identify Federal assistance that is already out there, and refocusing it to investigate of ways to implement accountability and monitoring by the very public agencies that are in the States that are receiving Federal funding as we speak.

The third recommendation is to investigate ways by which judges might be trained to know that the due process components of the law must be scrupulously exacted in every courtroom, for every case.

Mr. Chairman, I suggest that the National College of Probate Judges, an august group of probate judges from around the country, would be a wonderful partner in designing ways by which training and the implementation of their standards could take effect in every county across the country.

The CHAIRMAN. Frank, thank you very much for that testimony. It is valuable and important, and we do appreciate it.

Mr. JOHNS. Thank you, Mr. Chairman.

[The prepared statement of Mr. Johns follows:]

UNITED STATES SENATE
SPECIAL COMMITTEE ON AGING

Senator Larry E. Craig, Idaho, Chairman
Senator John B. Breaux, Louisiana, Ranking Member

HEARING ON GUARDIANSHIPS
February 11, 2003

ISSUES RELATING TO DUE PROCESS PROVIDED ALLEGED INCAPACITATED PERSONS IN GUARDIANSHIP PROCEEDINGS

By

A.Frank Johns, JD, CELA, R-G

WRITTEN TESTIMONY

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By
B. Frank Johns, JD, CELA*, R-G[1]

WRITTEN TESTIMONY [2]

Mr. Chairman and members of the Committee, thank you for the opportunity to testify on issues relating to due process provided alleged incapacitated older persons in guardianship proceedings. My remarks and opinions are forged from 25 years of legal advocacy and trial practice in guardianship, and from 15 years of academic writing and research. My appearance is due in large measure to my membership and extensive work with the National Academy of Elder Law Attorneys (NAELA), in which I am a Fellow and past president, and the National Guardianship Association (NGA), of which I was a founding Board member.

The supplemental material I have appended addresses I. History; II. State Statutory Reform; III. The Wingspan Recommendations Relating to Due Process; and IV. Federal Linkage to Funding Protection, Research, Training and Monitoring. I will forego discussing the history in these written remarks.

I. STATE STATUTORY REFORM RELATED TO DUE PROCESS

A. Has There Been Any Benefit From Statutory Reform of Due Process in Guardianship?

An examination of the recommendations from Wingspread and Wingspan, and all the empirical research and hearings in between, will find unanimity and clarity in the first part of answer – too many judges arbitrarily adjudicate guardianship proceedings contrary to the

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[2] These written comments are expanded in Appendix I, supplemental material, and Appendix II, Wingspan Recommendations, offered as part of the record of the hearing.

requirements of statutory due process mandates, while providing nominal judicial attention to the quality of the lives of the persons over whom they have jurisdiction and control.

Three years before he died, professor John J. Regan, Jack and Freda Dicker Distinguished Professor of Health Care Law at Hofstra University, spoke before this Committee's 1992 roundtable discussion on guardianship.[3] The first area of judicial administration of guardianship in which he noted major problems was guardianship adjudications and the arbitrary way by which judges waive adversarial rules and routinely exercise their powers for convenient purposes that relegate adversarial quality to little more than *parens patriae* administrative bureaucracy.

On Regan's premise, the current assessment of statutory reform may be more accurately represented by guardianship crises or flash fires that have burned across America over the last several years. Many are judge-made flash fires. One flash fire in 2002 flared in the heat of the District's summer, spreading Mollie Orshansky's private life across the pages of the Washington Post. Another judge-made flash fire in 2001 sparked appellate criticism of a trial judge injecting personal opinion as evidence. In a series of flash fires in 2000, the Detroit Free Press highlighted the guardianship sagas of Frank Jackson, Lydia Alexander and Burton Hawn. In 1998, the Colorado Court of Appeals scolded a probate judge for privately exercising protective benevolence over Lettye Milstein that was contrary to law.

It is clear that any attempt at reform requires re-education and training of the judiciary and the social agencies that support it. Professor Lawrence A. Frolik surmised:

> No matter how many reforms or counter-reforms are enacted, no matter how the system is modified, there is no perfection this side of paradise. Rather [than focusing on reforming the guardianship system]...those concerned [should focus on] the actors in the guardianship system, and how the actors' behaviors might be improved.

The second part of the answer is supported by the same unanimity and just as much clarity - there is too little, if any, current reliable data from which to draw conclusions.

Ingo Keiltz, previously associated with the National Center of State Courts, commenting at the 1992 round table of this committee, raised the need for a national database on guardianship. He commented that Associated Press reporters were astonished to find that there was no data on state guardianship, and nothing existed on a nationwide basis. Keiltz made the obvious point that neither the federal government, nor each state knows how many individuals are subject to guardianship proceedings annually, what guardianship case loads correlate with population, whether or not they correlate with an elderly population and how they compare when adjusted for the population in different states, different jurisdictions and according to different

[3] *See* John J. Regan, *Comments Before a Roundtable Discussion on Guardianship*, Special Committee on Aging, U.S. Senate (102d Cong. 2d Sess. 1992)(Serial Number 102-22), pp. 21-31.

administrative structures. Keiltz also asserted, as was found by professor Windsor Schmidt and other researchers, that there is insufficient research on social, economic, legal and systemic factors affecting the rates at which guardianship files are created in the courts.

A database for each state or for the federal government would provide empirical data by which caseloads could be more carefully forecasted. If the number of wards is known, then necessary funding would provide for sufficient staff, and the cost of training and enforcement. A national database could provide consistency and uniformity in the data entry and retrieval forms of the courts, requiring the same kinds of facts and circumstances that would be gathered across the country. After ten years since the first roundtable, I believe funding of such a database may only be realized through a national effort because so many states are near bankruptcy while still in the dark when it comes to statistics regarding guardianship.

II. WINGSPAN AND THE RECOMMENDATIONS RELATED TO DUE PROCESS

A. Wingspan: The Second National Guardianship Conference

In July of 1988, the Wingspread National Guardianship Symposium produced a set of landmark recommendations for reform of guardianship across the country. In November of 2001, more than a decade later, Wingspan: the Second National Guardianship Conference, was convened to examine what progress had been made in the interim, and what steps should be recommended for the future.

Wingspan conferees produced more than 75 recommendations considered by the full conference under procedures that permitted time-limited discussion and floor amendments. Recommendations that received more than 50 percent support of the conferees became the official recommendations of Wingspan.

B. Wingspan's Specific Recommendations Related to Due Process.

1. Summary of Changes in Statute and Regulation
(Numbers follow published recommendations)

27. Respondent's mandatory right to appear and be heard.
28. Appointed counsel for the respondent always as advocate
29. Role of counsel as zealous advocate (strong minority position)
30. Pre-hearing process include a separate court investigator/visitor
31. Term investigator/visitor used instead of ad litem
32. State guardianship courts given full plenary powers.
33. Respondent's right to closed hearing for determining incapacity; confidentiality and privilege of medical records and testimony and records sealed.

34. Emergency proceedings must have same due process elements as permanent hearing.
35. Emergency guardianships be limited to the emergency; termination on showing that emergency no longer exists.
36. Special guardianship procedures for single transactions.
37. Hearing mandatory for guardian seeking consent to civil commitment, electric shock, or dissolution of marriage.
38. Appropriate limited guardianship orders expressly declared in statutes and developed in forms.
39. Plenary guardianship requiring proof of its need

2. Summary of Changes in Practice Precepts or Guidelines

40. Adequately fund courts for investigation at the inception of the guardianship action, and oversight during the guardianship.
41. Prompt hearing on a guardianship petition after service on respondent.
42. Substituted judgment standard in making decisions on behalf of the person with diminished capacity.
43. Best interest standard when selecting guardian.

C. Three Paramount Recommendations Above All Others

There are three recommendations that need the committee's support at the inception of any attempts to correct the wrongs inflicted on vulnerable older adults under guardianships. The first priority recommendation is to fund a major grant that has the single mission of conducting empirical research in all states and the District of Columbia from which there would be developed a primary national guardianship database.

The second priority recommendation is to fund federal assistance needed to investigate and study ways to implement accountability and monitoring in all states and the District of Columbia.

The third priority recommendation is to fund court investigations at the inception of adjudication processes, infusing guaranteed due process protection into the judicial process. I believe that such funding could be linked in partnership with the National College of Probate Judges (NCPJ), assisting NCPJ in delivering its published uniform standards to courts across the country and thereafter providing education and training grants to NCPJ and participating local probate courts as a catalyst for implementation.

III. LINKAGE TO FEDERAL PROTECTIONS

Are there current federal programs available to the states that could provide advocacy and protection for older Americans under guardianship?

The answer is yes. Implementing such protections through current federal systems that regulate Social Security, Pension Benefits and Veterans Benefits could be efficient and immediate. Social Security could be linked through the Representative Payees Program; pension and other deferred retirement benefits could be linked through federal oversight of qualified retirement plans; and the Department of Veterans Affairs may already be linked through its oversight of state veterans statutory guardianship laws that are in place in most states.

Federal oversight and revenue sharing to train and educate the judiciary and social service agencies supporting it could also be a component of a proposed initiative like the Elder Justice Act. Such creative federal initiatives could address Guardianship's good by training, educating and mandating standards for public and private guardians, targeted as a source of leadership, a conduit for resources and a linkage to protection and advocacy of vulnerable older Americans of modest means.

Additionally, current federal programs and prospective initiatives could coordinate the confrontation with Guardianship's evil, mounting a national attack through the states, and through a volunteer corps of national advocates, pursuing abuse, neglect and exploitation. This will not be easy when such degradation is often at the hands of the very public and private guardians that are sworn to protect the vulnerable older Americans against such risks.

One final source of protection may not be currently attractive, but it may be constitutionally required.[4] Federal regulatory directives through Medicaid to the states as oversight and intervention in protecting older Americans with diminished capacity from abuse, neglect and exploitation may be necessary to meet and implement due process protections requirements for vulnerable older adults in the adjudication stage of guardianship and throughout the administration and monitoring processes under the guardianships. In time, this may also be imposed on Medicare as well.

[4] *Rudow v. Commissioner of Division of Medical Assistance*, 707 N.E.2d 339 (Mass. 1999)

UNITED STATES SENATE
SPECIAL COMMITTEE ON AGING
HEARING ON GUARDIANSHIPS
February 11, 2003

APPENDIX I
To
ISSUES RELATING TO DUE PROCESS PROVIDED ALLEGED INCAPACITATED OLDER PERSONS IN GUARDIANSHIP PROCEEDINGS
By
A. Frank Johns, JD, CELA*, R-G[1]

This appendix elaborates on comments given to the committee, providing supplemental material and comment on I. History; II. State Statutory Reform; III. The Wingspan Recommendations Relating to Due Process; and IV. Federal Linkage to Funding Protection, Research, Training and Monitoring.

I. ACKNOWLEDGING GUARDIANSHIP FROM AN HISTORICAL PERSPECTIVE

A. The Lantern on the Stern -- Reform in the Context of Historical Guidance

A better understanding of where guardianship is may be found in where it has been - its history is as telling as Historian Barbara Tuchman's lantern on the stern.[2]

Tuchman laments

> "learning from experience is a faculty almost never practiced... 'If men could learn from history, what lessons it might teach us,' quoting Samuel Coleridge, 'But passion and party blind our eyes, and the light which experience gives us is a lantern on the stern which shines only on the waves behind us.' The image is beautiful but the message misleading, for the light on the waves we have passed through should enable us to infer the nature of the waves ahead."[3]

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[1] Copyright © 2003 All Rights Reserved by A. Frank Johns, J.D., Florida State University College of Law; CELA, *certified as an elder law attorney by the National Elder Law Foundation; partner in the firm of Booth Harrington & Johns, L.L.P., Greensboro and Charlotte, North Carolina, concentrating in Elder Law; Fellow and past president of the National Academy of Elder Law Attorneys; charter board and president-elect National Guardianship Association; past Charter Chair, Elder Law Section of the North Carolina Bar Association; Fellow in American College of Trust and Estate Counsel (ACTEC).

[2] *See* Barbara W. Tuchman, *Epilogue - A Lantern on the Stern, The March of Folly, From Troy to Vietnam* [hereinafter TUCHMAN] (1984).

[3] *Id.* at 383.

The lantern on the stern of guardianship shows that it is primarily built on the doctrine of *Parens Patriae,*[4] mandating that the State (the King) is the benevolent protector.[5] In those state jurisdictions where the doctrine of *Parens Patriae* continues as the common law or statutory foundation, edicts and reasoned dictates of probate and guardianship judges control. In recent decades, however, competing views of how guardianship laws should function have emerged, operating from opposite ends of the legal spectrum – from the historical view based on *parens patriae* and informality, to the contemporary view based on the adversarial process and formality. Each has strong support.[6]

B. Guardianship Folly - Reform in the Context of Culture and Misgovernment

1. Through the Ages

As a function of law, guardianship is ancient. Over 2500 years ago, guardianship law's ancient precursors patterned taboos and tribal customs.[7] Guardianship policy has been chronicled through the collective governments[8] of the Greeks, the Romans, the

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[4] *See* L. Coleman, T. Solomon, *Parens Patriae Treatment: Legal Punishment in Disguise*, 3 Hastings Const. L.Q., 345-362 (1976).

[5] *See* Terry Carney, *Civil and Social Guardianship for Intellectually Handicapped People*, 8 Monash L. Rev. 199 (1982); *Parens Patriae* has been defined as the crown as ultimate parent of all citizens. *Id.* at 205, n. 30, citing *Eyre v. Shaftsbury*, 2 P. Wms. 103, 24 E.R. 659 (1722).

[6] *Compare* Lawrence A. Frolik, Melissa C. Brown, *Advising the Elderly or Disabled Client*, Chp. 17 - Adult Guardianship and Conservatorship, 17-8, 9 (Warren Gorham and Lamont 1992) (Cumm. Supp. 1998):

> . . . [A]n experienced judge may have been exposed to a great deal of unusual or odd behavior and consequently be less prone to interpret it as a lack of incompetency. In most instances, you should advise the client to waive his right to a jury trial . . . few states require the alleged incompetent to be represented by counsel . . . as a result, many guardianship hearings proceed with no counsel for the alleged incompetent. The court is expected to act in his or her best interest, however, and ensure that the hearing is conducted fairly.

with John J. Regan, *Tax Estate & Financial Planning for the Elderly*, Chp. 16 - Guardians and Conservators, 16-1, 16-23 (Matthew Bender and Co. 1992) (Cumm. Supp. 1995):

> The proper function of defense counsel in a guardianship proceeding is to defend the client against the proposed order as vigorously as if the client were on trial in a criminal proceeding. A guardianship proceeding is as much a part of the adversarial system of justice as the criminal trial.

[7] *See* American Bar Foundation Report on the Rights of the Mentally Ill, the Mentally Disabled and the Law (Samuel J. Brackel and Ronald S. Rock, eds., Univ. of Chicago Press rev. 2d ed. 1971) [hereinafter Brackel and Rock]. The revised edition by Brackel and Rock adds quantitative and qualitative dimensions that compromise a seminal work further examined later in this article. *See id.* d xiii. For example, Egyptian rituals took mentally disabled persons to the temples for restoration where they endured incantations, threats, and such physical remedies as herbs and oils, administered by priest-physicians.

[8] "Collective governments" is applied in two equally appropriate ways in this context: (1) the multiple regimes controlling a country over the centuries; and (2) the several countries to which the principle is being applied in this text.

English and the Americans, spanning continents and the centuries, and functioning under monarchy, oligarchy and democracy. In these cultures, the concept of guardianship to protect the individual rights of their citizens was pursued in ways that were actually contrary to their citizens' own self interests. This witness has asserted that these cultures so misgoverned the individual rights of their citizens that it amounted to guardianship folly.

Misgovernment of guardianship amounting to folly occurs when the three elements of Tuchman's definition of folly are met:

> (1) it must have been perceived as counter-productive in its own time, not merely hindsight. This is important because all policy is determined by the mores of its age...
> (2) a feasible alternative course of action must have been available; and
> (3) the policy in question should be that of a group, not an individual ruler, and should persist beyond any one political lifetime (to remove the problem from personality).

II. STATE STATUTORY REFORM RELATED TO DUE PROCESS

A. Statutory Analysis of Due Process Since the Late '80s .

1. A Mask of Virtual Reality – Reform in the Context of Illusion Scrolled Across the Books

True reform may be measured by chronicling the gains in procedural and substantive due process made across the states in their guardianship statutes.[9] This is an easy task thanks to Erica Wood, American Bar Association Commission on Law and Aging, and her annual review of state legislative changes in guardianship statutes for the benefit of the elder law bar and the aging network;[10] and to Sally Balch Hurme, AARP, and her graphs that track the spectrum of guardianship from beginning to end.[11]

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[9] Like many other notes, comments and articles, the words "guardian" and "guardianship" in this written testimony include the broad spectrum of words and language used across the country to describe surrogate decision-making for another person through court appointment that transfers the power over an individual's rights, liberties, placement and finances to another person or entity. These words and language include, but are not limited to, conservatorship, interdiction, committee, curator, fiduciary, visitor, public trustee and next friend.

[10] *See* A. Frank Johns, *Tens Years After: Where is the Constitutional Crisis with Procedural Safeguards and Due Process in Guardianship Adjudication?*, 7 Elderlaw J. 33, 78-88 (Fall, 1999)(a summary of the ten years from 1988 to 1998 that Wood followed state legislative statutory reform).

[11] *Id.*, at 33, and 110-152, Exhibits "C" - "H" (Hurme's 1998 graphs of the 50 states and DC guardianship statutes from beginning to end).

However, are the state statutory changes a true measure of guardianship reform, or just a mask of virtual reality? When this witness examined the twenty most significant empirical research projects and studies over thirty years from the '60s through the '90s, they comprised a striking composite of how far changes in the laws have gone, and how implementation of those changes may have gone virtually nowhere.

It is analogous to the technological wizardry of virtual reality. Once you have the mask over your eyes, you see where you are going as if you were actually there - but you have gone nowhere. If seeing is believing, then you believe that you have gone as far as the images in the mask have taken you. The changes in the guardianship laws over the past several decades may only be a mask of virtual reality. The changes in law mask the real world reality, and provide for those looking through the mask the opportunity to see where they are going as if they were actually going there - but they have gone nowhere. However, since seeing is believing, they believe that real world implementation of rights, procedures, public and private programs, monitoring and enforcement benefits vulnerable and unprotected older Americans who because of intrusive intervention have been placed in the guardianship process. However, they have gone only as far as the mask of images of changes in guardianship laws has taken them.

2. Adjudications and the Arbitrary Way of Judges

The benevolence of the King is imparted to the subjects whether they want it or need it. In their fiefdoms, probate judges, and other judges and officials having jurisdiction over guardianship oftentimes sit as despots on thrones exercising their powers under the doctrine of *parens patriae.*[12] Those judges who have been on the bench for many terms believe that they have seen enough of guardianship ajudications and appointment of guardians to know it all, and with that knowledge dictate the process or adjudication arbitrarily, exercising nonconformity with statutory mandates and procedural rules. As the "parent of all citizens," this is done in the nature of advocating the best interests of the alleged incompetent person.[13]

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[12] From what is known of history, they should have every right to believe that *parens patriae* is time honored and a grant to them of broad powers to intervene in the lives of respondents and wards (maybe there is no difference in this context) in order to protect the afflicted. The often cited words of Justice Lewis Brandeis are as important today as when they were delivered in 1928:

> Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repeal invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning but without understanding.

See Olmstead v. United States, 227 U.S. 438, 479 (1928) (Brandeis dessenting).

[13] Many probate court judges, or judges in courts having jurisdiction over guardianships and conservatorships, serve for all the right reasons, with a heartfelt, dedicated interest in those being adjudicated in their courtrooms and subsequently being protected under their statutory duties and jurisdictional boundaries. Many are so well known that they are often named in studies and writings, or identified on panels, committees and task forces that address the issues. They include,

Three years before he died, professor John J. Regan, Jack and Freda Dicker Distinguished Professor of Health Care Law at Hofstra University, spoke before this Committee's 1992 roundtable discussion on guardianship.[14] The first area of judicial administration of guardianship in which he noted major problems was guardianship adjudications and the arbitrary way by which judges waive adversarial rules and routinely exercise their powers for convenient purposes that relegate adversarial quality to little more than *parens patriae* administrative bureaucracy.

On Regan's premise, the current assessment of statutory reform may be more accurately represented by guardianship flash fires that have burned across America over the last several years. One flash fire in 2002 flared in the heat of the District's summer, spreading Mollie Orshansky's private life across the pages of the Washington Post. Another judge-made flash fire in 2001 sparked appellate criticism of a trial judge injecting personal opinion as evidence.[15] In a series of flash fires in 2000, the Detroit Free Press highlighted the guardianship sagas of Frank Jackson, Lydia Alexander and Burton Hawn. In 1998, the Colorado Court of Appeals scolded the probate judge for privately exercising protective benevolence over Lettye Milstein that was contrary to law.[16]

The Honorable John Kirkendall, Probate Court Judge in Ann Arbor, Michigan, The Honorable Thomas E. Penick, Jr., Judge, Circuit Court, Clearwater, Florida, The Honorable Kristin B. Glen, Justice, Supreme Court, New York, New York, The Honorable Isabella H. Grant, Judge, Superior Court, San Francisco, California, The Honorable John R. Maher, Probate Court Judge, Kingston, New Hampshire, The Honorable Mary Sheffield, Probate Court Judge, Rolla, Missouri, and The Honorable Field Benton, Probate Court Judge, Denver, Colorado. Countless other probate court judges are included. Many are similar to Judge Nikki DeShazo, a Probate Court Judge in Dallas, Texas who described her reasons for seeking a probate judgeship:

> . . . I found I really wanted to be where people could find a friend and get help. . . . I wanted to help people. I wanted to work in an area that would enhance people's feelings of self-worth. Probate Court can really be a pleasant, rewarding place to work. . . . I am distressed that societal changes have isolated people, so that they do [not] know their neighbors. There is no one to care about and look out for neighbors. Situations seem to have become very bad before any kind of help is obtained. . . . We need to learn again how to care for people. We need to develop more concern for our fellow humans.

D.M. Alford, *A Probate Judge's View*, 13 J. of Gerontological Nursing 32 (1994).

Even as altruistic as the above judges may be, there are those judges who oftentimes make up their minds before examining any evidence. Depending upon whom petitioners have for attorneys, or what bent guardian *ad litems* take, some judges habitually respond with no further inquiry before they benevolently order the AIP to the guardianship gulag. Anything more would be considered wasteful and judicial in-economy.

[14] *See* John J. Regan, *Comments Before a Roundtable Discussion on Guardianship*, Special Committee on Aging, U.S. Senate (102d Cong. 2d Sess. 1992)(Serial Number 102-22), pp. 21-31.

[15] *See Guardianship of Elsa Marie Borden-Moore*, Case No. 5D01-816 (Fla. 5th DCA 2002)(The trial judge also conducted an *in camera* interview of Elsa. The *in camera* interview is itself problematic. A trial judge's personal opinion about an alleged incapacitated person's capacity is a non-expert opinion entitled to no evidentiary weight. "While the trial court may, indeed must, determine the credibility and weight of the evidence, it is not empowered to create that evidence from the whole cloth." *LeWinter v. Guardianship of LeWinter*, 606 So. 2d 387, 388 (Fla. 3d DCA 1992)).

[16] *See Estate of Milstein v. Ayers*, 97 CA 1150, 955 P.2d 78 (Colo. Ct. App. 1998).

It is clear that any application of reform requires re-education and training of the judiciary and the social agencies that support it. Professor Lawrence A. Frolik surmised:

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B. Has There Been Any Benefit From Statutory Reform of Due Process in Guardianship?

From Wingspread to Wingspan, and all the empirical research and hearings in between, the answer is clear – there is too little, if any, current reliable data from which to draw conclusions.

Ingo Keiltz, previously associated with the National Center of State Courts, argued before the same 1992 round table of this committee for a national database on guardianship.[18] He commented that Associated Press reporters were astonished to find that there was no data on state guardianship, and nothing existed on a nationwide basis. Keiltz made the obvious point that neither the federal government, nor each state knows how many individuals are subject to guardianship proceedings annually, what guardianship case loads correlate with population, whether or not they correlate with an elderly population and how they compare when adjusted for population in different states, different jurisdictions and according to different administrative structures. Keiltz also asserted, as was found by Windsor Schmidt and other researchers,[19] that there is insufficient research on social, economic, legal and systemic factors affecting the rates at which guardianship files are created in the courts.

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[17] *See* Lawrence A. Frolik, *Guardianship Reform: When the Best is the Enemy of the Good,* 9:2 Stanford Law and Policy Review 347, 351 (Spring 1998).

[18] *See* Comment of Ingo Keiltz, Roundtable Discussion on Guardianship, *supra* note 14, at 35. (In their book *Reinventing Government: How the Entrepreneur's Spirit is Transforming the Public Sector,* Osborne and Gaebler assert that governments, including the courts, are in deep trouble today largely because there are huge entrenched bureaucracies that impede the very things that are likely to get them out of trouble: creativity, experimentation, risk taking, innovation, consumer orientation - what a strange concept in government - and future forecasting. *Id.,* at 34.

[19] *See* Windsor Schmidt, *Guardianship - The Court of Last Resort for the Elderly and Disabled* (Carolina Academic Press 1995); *see also* L. Barritt Lisi, A. Burns, and K. Lussenden, *National Study of Guardian Systems: Findings and Recommendations* (Center for Social Gerontology 1994). The study initially proposed the funding of the construction of a national database, and was modified to only research and analysis.

A database for each state or for the federal government would provide empirical data by which caseloads could be more carefully forecasted. If the number of wards is known, then necessary funding could be calculated and provided for sufficient staff, and the cost of training and enforcement. A national database could provide consistency and uniformity in the data entry and retrieval forms of the courts, requiring the same kinds of facts and circumstances that would be gathered across the country. After ten years since the first roundtable, I believe funding of such a database may only be realized through a national effort because so many states are near bankruptcy while still in the dark when it comes to statistics regarding guardianship.

C. Training, Monitoring and Accountability

If the judiciary is educated and trained, then judges may be more attentive to and critical of the court personnel, professionals working in the judicial system and guardians. Education of the administrators and other state personnel managing the statewide function of the courts would convince those at the top of each state's judicial management that guardianship needs to be tracked and followed throughout the state.

III. WINGSPAN AND THE RECOMMENDATIONS RELATED TO DUE PROCESS

A. Wingspan: The Second National Guardianship Conference

In July of 1988, the American Bar Association Commission on Legal Problems of the Elderly and Commission on the Mentally Disabled convened a National Guardianship Symposium that became known as "Wingspread," after the conference center of that name in Racine, Wisconsin. Wingspread produced a set of landmark recommendations for reform of the nation's guardianship system. Wingspan, the Second National Guardianship Conference, was convened November 30 through December 2, 2001, more than a decade after the original Wingspread conference, to examine what progress has been made in the interim, and what steps should be recommended for the future.

Wingspan utilized a select, multidisciplinary cadre of experts in a working meeting of plenary and small group sessions. Conferees were appointed by several collaborating groups, including: the National Academy of Elder Law Attorneys (NAELA); the Borchard Foundation Center on Law and Aging; Stetson University College of Law; the ABA Commission on Law and Aging (a/k/a ABA Commission on Legal Problems of the Elderly), the ABA Section on Real Property, Probate and Trust Law, the American College of Trust and Estate Counsel (ACTEC), the National College of Probate Judges, the National Guardianship Association, the Center for Medicare Advocacy, the Arc of the United States, AARP, and the Academy of Florida Elder Law Attorneys. In addition, six commissioned papers provided an analytical starting point and framework for discussions,

each addressing different aspects of guardianship reform and current practice across America.[20]

B. Wingspan's Specific Recommendations Related to Due Process.

1. Summary of Changes in Statute and Regulation (Numbers follow published recommendations)

28. Respondent's mandatory right to appear and be heard.
29. Appointed counsel for the respondent always as advocate
30. Role of counsel as zealous advocate (strong minority position)
31. Pre-hearing process include a separate court investigator/visitor
32. Term investigator/visitor used instead of ad litem
33. State guardianship courts given full plenary powers.
34. Respondent's right to closed hearing for determining incapacity; confidentiality and privilege of medical records and testimony and records sealed.
35. Emergency proceedings must have same due process elements as permanent hearing.
36. Emergency guardianships be limited to the emergency; termination on showing that emergency no longer exists.
37. Special guardianship procedures for single transactions.
38. Hearing mandatory for guardian seeking consent to civil commitment, electric shock, or dissolution of marriage.
39. Appropriate limited guardianship orders expressly declared in statutes and developed in forms.
40. Plenary guardianship requiring proof of its need

2. Summary of Changes in Practice Precepts or Guidelines

41. Adequately fund courts for investigation at the inception of the guardianship action, and oversight during the guardianship.
42. Prompt hearing on a guardianship petition after service on respondent.
43. Substituted judgment standard in making decisions on behalf of the person with diminished capacity.
44. Best interest standard when selecting guardian.

[20] *Excerpted from* A. Frank Johns and Charles P. Sabatino, *Introduction and Recommendations, Wingspan -- The Second National Guardianship Conference,* 31 Stetson L. Rev. 573 (Spring 2002)(Footnotes omitted).

C. The Rest of the Wingspan Recommendations

The scope of the Committee's focus goes beyond an examination of due process protections, addressing accountability and monitoring as well. The Wingspan Recommendations are as expansive and are attached as Appendix II to assist the committee in achieving its task to investigate and study the problems of older people caught in the throes of the guardianship gulag.

D. Three Paramount Recommendations Above All Others

There are three recommendations that need the committee's support at the inception of any attempts to correct the wrongs inflicted on vulnerable older adults under guardianships. The first priority recommendation is to fund a major grant that has the single mission of conducting empirical research in all states and the District of Columbia from which there would be developed a primary national guardianship database.

The second priority recommendation is to fund the federal assistance needs to investigate and study ways to implement accountability and monitoring in all states and the District of Columbia.

The third priority recommendation is to fund court investigations at the inception of adjudication processes, infusing guaranteed due process protection into the judicial process. I believe that such funding could be linked in partnership with the National College of Probate Judges (NCPJ), assisting NCPJ in delivering its published uniform standards to courts across the country and thereafter providing education and training grants to NCPJ and participating local probate courts as a catalyst for implementation.

IV. LINKAGE TO FEDERAL PROTECTIONS

Are there current federal programs available to the states that could provide advocacy and protection for older Americans under guardianship?

The answer is yes. Implementing such protections through current federal systems that regulate Social Security, Pension Benefits and Veterans Benefits could be efficient and immediate. Social Security could be linked through the Representative Payees Program; pension and other deferred retirement benefits could be linked through federal oversight of qualified retirement plans; and the Department of Veterans Affairs may already be linked through its oversight of state veterans statutory guardianship laws that are in place in most states.

Federal oversight and revenue sharing to train and educate the judiciary and social service agencies supporting it could also be a component of proposed initiative like the Elder Justice Act. Such creative federal initiatives could address Guardianship's good by training, educating and mandating standards for public and private guardians, targeted as a source of leadership, a conduit for resources and a linkage to protection and advocacy of vulnerable older Americans of modest means.

Additionally, current federal programs and prospective initiatives could coordinate the confrontation with Guardianship's evil, mounting a national attack through the states, and through a volunteer corps of national advocates, pursuing abuse, neglect and exploitation. This will not be easy when such degradation is often at the hands of the very public and private guardians that are sworn to protect the vulnerable older Americans against such risks.

One final source of protection may not be currently attractive, but it may be constitutionally required.[21] Federal regulatory directives through Medicaid to the states as oversight and intervention in protecting older Americans with diminished capacity from abuse, neglect and exploitation may be necessary to meet and implement due process protections requirements for vulnerable older adults in the adjudication stage of guardianship and throughout the administration and monitoring processes under the guardianships. In time, this may also be imposed on Medicare as well.

[21] *Rudow v. Commissioner of Division of Medical Assistance,* 707 N.E.2d 339 (Mass. 1999)

APPENDIX II

WINGSPAN — THE SECOND NATIONAL GUARDIANSHIP CONFERENCE, RECOMMENDATIONS[1]

I. OVERVIEW

CHANGES IN STATUTE OR REGULATION

The Conference recommends that:

1. Standard procedures be adopted to resolve interstate jurisdiction controversies and to facilitate transfers of guardianship cases among jurisdictions.

   Comment: State legislatures can look to the model legislation proposed by the National College of Probate Judges.[2] Guardianship portability, including adoption of a formal validation process for legal recognition of surrogate authority (*e.g.*, healthcare and financial powers) in other countries, should be addressed nationally and internationally.

2. Functional and multi-disciplinary assessment be used in determining diminished capacity. The terms "incapacity," "incapacitated," and "incompetent" should be rejected and in place, the term "diminished capacity" should be used.

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1. Wingspan — The Second National Guardianship Conference, meeting in plenary session, adopted these Recommendations on December 2, 2001. Primary sponsors were the National Academy of Elder Law Attorneys, Stetson University College of Law, host of the Conference, and the Borchard Center of Law and Aging. Co-sponsors were the ABA Commission on Legal Problems of the Elderly, the National College of Probate Judges, the Supervisory Council of the ABA Section on Real Property, Probate and Trusts, the National Guardianship Association, the Center for Medicare Advocacy, the Arc of the United States, and the Center for Social Gerontology, Inc. The Recommendations, authored by the Wingspan Conferees, do not purport to have the endorsement of the Wingspan Conference's individual sponsor organizations. To view commentary or dissenting opinions, as well as the Recommendations on-line, visit the National Academy of Elder Law Attorneys' Web site at <http://www.naela.com>.

2. *See* Natl. College of Prob. JJ., *Standards, National Probate Court Standards* Stand. 2.1.1 <http://www.ncpi.org/standard.html> (last revised Feb. 10, 2002) (providing that the final judgments of probate courts in one jurisdiction should be "afforded comity and respect in other jurisdictions").

3. Medicare and Medicaid laws be amended to cover the cost of respondents' functional assessment.

CHANGES IN PRACTICE PRECEPTS OR GUIDELINES

The Conference recommends that:

4. A uniform system of data collection within all areas of the guardianship process be developed and funded.

   Comment: Although significant legislative revisions have been adopted, little data exists on the effectiveness of guardianship within each state or across the states, and less information is available about how the system actually affects the individuals involved.

5. Dialogue between the legal and medical professions on the determination of diminished capacity and all aspects of guardianship be encouraged.

6. State and local jurisdictions have an interdisciplinary entity focused on guardianship implementation, evaluation, data collection, pilot projects, and funding.

   Comment: This entity would be charged with responsibility of monitoring the implementation of guardianship and surrogacy laws.

RECOMMENDATION FOR EDUCATION, RESEARCH AND FUNDING

The Conference recommends that:

7. Innovative and creative ways be developed by which funding sources are categorically directed to guardianship. States and organizations should be informed about these sources.

8. Funding be supported for multi-disciplinary assessments that must be linked to the least restrictive criteria throughout the judicial process.

9. All guardians receive training and technical assistance in carrying out their duties. Organizations, including the National Guardianship Network,[3] should develop and offer specially designed introductory and continuing guardianship courses for judges, court personnel, families, guardians, proposed fiduciaries, and attorneys practicing in the guardianship area, including training on minimum guardianship standards and ethics.

10. Attention be given to the need for mandatory education for all judges in courts hearing guardianship cases, with special attention to the educational needs of general jurisdiction judges.

11. The Internet and other technology be used to educate and communicate with lawyers, judges, guardians, and other professionals in the guardianship arena.

12. Multi-disciplinary tools be developed and used in educating all professionals involved in guardianship matters, including family guardians.

13. Research be undertaken to measure successful practices and to examine how the guardianship process is enhancing the well-being of persons with diminished capacity.

    Comment: The research should examine how the system is working. The Conference co-sponsors to should work together to identify increased funding for research, court operations, and training for the bench and bar.

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3. The National Guardianship Network is an informal coalition of associations interested in improving guardianship services for individuals as they age and for those with disabilities. The National Guardianship Network was formed in 2000 and its membership includes the ABA Commission on Legal Problems of the Elderly, the American College of Trust and Estate Counsel, the National Academy of Elder Law Attorneys (NAELA), the National Center for State Courts, the National College of Probate Judges, the National Guardianship Association, and the National Guardianship Foundation. For more information about the National Guardianship Network, contact NAELA at its address, 1604 North Country Club Road, Tucson, Arizona 85716, by telephone (520)881-4005, by facsimile (520)325-7925, or through its Web site at <http://www. naela.com>.

14. Further study be conducted to determine whether states should adopt statutes and regulations to provide for separate guardianship procedures for persons with developmental disabilities.

15. The National Guardianship Network provide leadership in research and advocacy for guardianship reform.

16. The National Institute on Aging and other federal agencies fund research on guardianship.

    Comment: The federal agencies could include, for example, the Agency for Healthcare Research and Quality, the Administration on Aging, the Assistant Secretary for Planning and Evaluation of Health and Human Services, and the Center for Medicare and Medicaid Services. Areas of research might include the appropriate placement of wards by guardians, end of life decision-making by surrogates, and how any universal health-care system would affect guardianships.

II. DIVERSION AND MEDIATION

CHANGES IN STATUTE AND REGULATION

The Conference recommends that:

17. States adopt statutes requiring agents under durable powers of attorney to maintain fiduciary standards.

18. Statutes give preference to the person nominated in the advance directive, power of attorney, or other writing in appointing the guardian.

19. States adopt surrogate medical consent statutes.

    Comment: Such statutes will reduce the need for guardianship of the person for medical decision-making where the person with diminished capacity does not have an advance health-care directive.

20. Statutes require that guardianship petitions include a review of alternatives and a statement as to why none are appropriate.

    Comment: Information should be available at the courthouse on each alternative, including mediation and counseling. The court visitor or other investigator should verify that available alternatives to guardianship have not been overlooked or underutilized.

CHANGES IN PRACTICE PRECEPTS OR GUIDELINES

The Conference recommends that:

21. Practice precepts or ethics rules should provide that lawyers drafting powers of attorney represent and meet with the principal rather than solely with the prospective agent.

22. Standards and training for mediators be developed in conjunction with the Alternative Dispute Resolution community to address mediation in guardianship related matters.

    Comment: Standards and training should include identification of issues appropriate for mediation, participants in the mediation, use and role of legal representatives, and procedures to maximize self-determination of individuals with diminished capacity. The development of standards should take into consideration the recommendations of the 2000 Joint Conference on Legal and Ethical Issues in the Progression of Dementia[4] on dispute resolution, and of The Center for Social Gerontology,[5] and study whether these recommendations should be extended to all types of disability. Mediators should adhere to such standards even if not statutorily required.

23. Multi-disciplinary diversion programs be developed with collaboration among financial institutions, law enforcement,

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4. *Recommendations of the Joint Conference*, 35 Ga. L. Rev. 423, 423–450 (2001).

5. Susan J. Butterwick, Penelope A. Hommel & Ingo Keilitz, *Evaluation of Mediation as a Means of Resolving Adult Guardianship Cases* (Ctr. for Soc. Gerontology 2001). Copies of the study are available for a fee by contacting The Center for Social Gerontology by telephone at (734) 665-1126 or by e-mail at <tcsg@tcsg.org>. A copy in PDF format is available through its Web site at <http://www.tcsg.org>.

and adult protective services as an early intervention process to avoid the need for guardianship.

RECOMMENDATIONS FOR EDUCATION AND ADVOCACY

The Conference recommends that:

24. Awareness of risks and benefits of guardianship and planning alternatives to guardianship be raised, and the use of mediation for conflict resolution and as a pre-filing strategy alternative be increased.

    Comment: Conference co-sponsors should develop model educational curricula to be implemented by the bench, bar, and medical profession on the state level. Education efforts should be targeted to financial and healthcare institutions, aging and disability advocates, legal and medical professionals, and the public.

RECOMMENDATIONS FOR FURTHER STUDY

The Conference recommends that:

25. Research be undertaken to identify alternative payment sources to expand the availability and affordability of mediation services.

    Comment: Such study should include an examination of the following:

    (1) allocation of costs among all parties;
    (2) court fees to cover costs;
    (3) medicaid reimbursement;
    (4) sliding fee arrangements, with courts paying costs for those lacking economic means; and
    (5) mediators on court panels taking pro bono cases along with referred fee-paying cases.

26. Study be undertaken on the extent and nature of the abuse of powers of attorney and trusts, and on statutory options to permit the court to review agents' performance.

III. DUE PROCESS

CHANGES IN STATUTE AND REGULATION

The Conference recommends that:

27. Respondents always have a mandatory right, which can be waived, to appear in court and be heard.

28. Counsel always be appointed for the respondent and act as an advocate rather than as a guardian *ad litem*.

29. The Wingspread Recommendation regarding the role of counsel as zealous advocate[6] be amended and reaffirmed as follows: *Zealous Advocacy* — In order to assume the proper advocacy role, counsel for the respondent and the petitioner shall: (a) advise the client of all the options as well as the practical and legal consequences of those options and the probability of success in pursuing any one of those options; (b) give that advice in the language, mode of communication and terms that the client is most likely to understand; and (c) zealously advocate the course of actions chosen by the client.

30. The pre-hearing process include a separate court investigator or visitor, who must identify the respondent's wants, needs, and values.

31. States hold guardianship proceedings in courts with full plenary powers.

    Comment: Some states allow guardianship matters to be heard by non-judges. Those states need to provide those hearing personnel with the judicial powers necessary to protect the due process rights of the respondent.

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6. Recommendation II-C of the 1988 Wingspread Symposium, titled "Role of Counsel Defined." Commn. on Mentally Disabled & Commn. on Leg. Problems of Elderly, *Guardianship: An Agenda for Reform — Recommendations of the National Guardianship Symposium and Policy of the American Bar Association* 12 (ABA 1989). In 1988, the Johnson Foundation's Wingspread Conference Center in Wisconsin hosted the National Guardianship Symposium, which was sponsored by the ABA Commissions on Legal Problems of the Elderly and on Mental Disability.

32. The term "investigator" or "visitor" be used instead of guardian *ad litem*.

    Comment: The term "guardian *ad litem*" often is confused with the term "guardian," thus resulting in misunderstanding of roles and responsibilities.

33. The respondent have the following rights: the right to request a closed hearing for determining diminished capacity; the right to have medical functional evaluations by someone who is not the respondent's treating physician; the right to have the treating physician's privilege recognized and confidentiality maintained; and the right to have medical records automatically sealed at the end of the hearing.

34. Emergency proceedings require the following: actual notice to the respondent before hearing; mandatory appointment of counsel; establishment of the respondent's emergency; conduct of a hearing on the permanent guardianship as promptly as possible; and placement of limitations on emergency powers.

35. Guardianships be limited to the circumstances giving rise to the petition for emergency or temporary guardianship, and be terminated upon appropriate showing that the emergency no longer exists.

36. There be special procedures for single transactions.

37. The guardian not have the power to consent to civil commitment, electric shock treatment, or dissolution of marriage without obtaining specific judicial authority

38. Statutes be adopted and forms developed to enable courts to fashion the appropriate limited guardianship orders.

    Comment: Consistent with the Uniform Guardianship and Protective Proceedings Act, the initial petition should include the reasons why either a limited or plenary finding of diminished capacity is being sought.[7] This requirement will promote the concept of limited guardianship and preserve

7. Unif. Guardianship & Protective Proc. Act § 304(b)(7), (8), 8A U.L.A. 137 (Supp. 2001).

individual rights.

39. Orders establishing a plenary guardianship rather than a limited guardianship require proof of why the guardianship should be plenary.

    Comment: Responsible advocacy includes advising the court with respect to material aspects of the ward's financial and health-related circumstances that will promote autonomy (*i.e.*, the right to choose one's residence, vote, medical consent, participation in research).

CHANGES IN PRACTICE PRECEPTS OR GUIDELINES

The Conference recommends that:

40. Courts have adequate funding for investigation at the inception of the guardianship action and for oversight for the duration of the guardianship.

41. The hearing on a guardianship petition be held promptly after service upon the respondent.

42. The guardian use a substituted judgment standard in making decisions on behalf of the person with diminished capacity.

    Comment: Using this standard entails determining what the person with diminished capacity would decide if he or she had capacity.

43. The court consider the best interest of the person with diminished capacity in selecting the guardian.

    Comment: Among those persons the court should consider when selecting guardians should include nominees, family, and agencies qualified to serve.

IV. AGENCY GUARDIANSHIP AND GUARDIANSHIP STANDARDS

CHANGES IN STATUTE OR REGULATION

The Conference recommends that:

44. States provide public guardianship services when other qualified fiduciaries are not available.

    Comment: This function may be provided through independent state agencies, contracts with private agencies, or by other means.

45. States adopt minimum standards of practice for guardians, using the National Guardianship Association *Standards of Practice*[8] as a model.

    Comment: Lawyers should not be exempt from those standards. Lawyers and courts should be educated and trained in the standards.

46. Professional guardians — those who receive fees for serving two or more unrelated wards — should be licensed, certified, or registered. They should have the skills necessary to serve their wards. Professional guardians should be guided by professional standards and codes of ethics, such as the National Guardianship Association's *A Model Code of Ethics for Guardians*[9] and *Standards of Practice.*

CHANGES IN PRACTICE PRECEPTS OR GUIDELINES

The Conference recommends that:

47. Guardians and guardianship agencies not directly provide services such as housing, medical care, and social services to their own wards, absent court approval and monitoring.

RECOMMENDATIONS FOR EDUCATION AND ADVOCACY

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8. Reprinted at 31 Stetson L. Rev. ____, ____–____ (2002).

9. Michael D. Casasanto, Mitchell Simian & Judith Roman, *A Model Code of Ethics for Guardians* (Natl. Guardianship Assn. 1991). A copy of this work in PDF format is available through the National Guardianship Association's Web site at <http://www.guardianship.org/ngamembership/index.htm#modelcode>.

The Conference recommends that:

48. The public guardianship function include broad-based information and training.

    Comment: Broad-based education and training about guardianship and alternatives can divert pressure from the public guardianship system.

RECOMMENDATIONS FOR FURTHER STUDY

The Conference recommends that:

49. The National Guardianship Network identify and generate funding for development and improvement of public and private guardianship services from sources including (a) grants, (b) donors, (c) Interest On Lawyers Trust Accounts, (d) Medicaid, (e) increased filing fees, and (f) public-interest litigation.

50. A study be undertaken of successful professional guardianship agencies to identify features that might be used as a model for other programs.

V. MONITORING AND ACCOUNTABILITY[10]

CHANGES IN STATUTE OR REGULATIONS

The Conference recommends that:

51. There be mandatory annual reports of the person and annual financial accountings to determine the status of the person with diminished capacity. The report and the accounting should be audited as frequently as possible.

52. To provide effective monitoring, the following are required: (a) a functional assessment of the abilities and limitations of the person with diminished capacity; (b) an order appropriate

10. See Section IV for Recommendations concerning standards to which guardians should be held accountable.

to meet the needs of the person with diminished capacity (with preference given to as limited a guardianship if possible); (c) an annual plan based on the assessment and an annual report, appropriately updated, based on the plan; and (d) inclusion of any other mandated reports which are the guardian's responsibility, such as reports to the Social Security Administration or the Department of Veterans Affairs.

CHANGES IN PRACTICE PRECEPTS OR GUIDELINES

The Conference recommends that:

53. States maintain adequate data systems to assure that required plans and reports are timely filed, and establish an electronic database to house these data while preserving privacy.

54. Courts have the primary responsibility for monitoring.

55. Monitoring is appropriate regardless of who is the guardian — family member, professional guardian, or agency guardian.

56. Guardianship issues be delegated to judges who have special training and experience in guardianship matters.

Comment: Judicial specialization should be encouraged. There is a need to increase expertise of the judiciary and the support staff in guardianship matters. This recommendation should be communicated to legislatures and chief judges who organize court systems.

RECOMMENDATIONS FOR EDUCATION AND ADVOCACY

The Conference recommends that:

57. The National Guardianship Network take the lead in a public information campaign to emphasize the importance of

monitoring and the need to adequately fund monitoring efforts.

RECOMMENDATIONS FOR FURTHER STUDY

The Conference recommends that:

58. Recognizing the ultimate responsibility of courts to monitor guardianships, a study be conducted as to whether the court should be permitted to delegate or contract out guardianship monitoring to other public or private organizations, and, if monitoring is delegated, on the nature and extent of the oversight responsibility in the court or judicial system for such alternative arrangements.

VI. LAWYERS AS FIDUCIARIES OR COUNSEL TO FIDUCIARIES

CHANGES IN STATUTE OR REGULATION

The Conference recommends that:

59. The American Bar Association (ABA) and the states adopt the ABA Ethics 2000 proposed revisions to the Model Rule of Professional Conduct 1.14.[11]

    Comment: This proposed rule gives the lawyer representing a client with diminished capacity greater flexibility to take protective action.

60. All persons, including lawyers who serve in any guardianship capacity, be subject to bonding requirements. Further, lawyers who serve as guardians should have professional liability insurance that covers fiduciary activities.

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11. At its Midyear Meeting in February 2002, the ABA House of Delegates adopted amendments to Model Rule 1.14, which was proposed by the Commission on Evaluation of the Rules of Professional Conduct, known as the ABA Ethics 2000 Commission. ABA Ctr. Prof. Resp., *Report 401 as Passed by the House of Delegates February 5, 2002* <http://www.abanet.org/cpre2k-report_home.html> (Feb. 2000). The revised Model Rule 1.14 is reprinted at 31 Stetson L. Rev. ____, ____-____ (2002).

61. The lawyer for the fiduciary of a person with diminished capacity who knows of neglect, abuse, or exploitation, as defined by state law, be permitted to disclose otherwise confidential information per Model Rule of Professional Conduct 1.6 to the extent necessary or appropriate to protect the person with diminished capacity.[12]

CHANGES IN PRACTICE PRECEPTS OR GUIDELINES

The Conference recommends that:

62. A lawyer petitioning for guardianship of his or her client *not* (a) be appointed as the respondent's counsel, (b) be appointed as the respondent's guardian *ad litem* for the guardianship proceeding, and (c) seek to be appointed guardian except in exigent or extraordinary circumstances, or in cases where the client made an informed nomination while having decisional capacity.

63. The lawyer for a client with diminished capacity not attempt to represent a third party petitioning for guardianship over the lawyer's client.

64. The lawyer who serves in the dual roles of both lawyer and court-appointed fiduciary ensure that the services and fees be differentiated, be reasonable, and be subject to court approval.

65. Lawyers serving as guardians look to the National Guardianship Association *Standards of Practice* and *A Model Code of Ethics for Guardians*, in absence of mandatory minimum standards.

66. When the lawyer represents a fiduciary, the lawyer take reasonable steps to ensure that the fiduciary understands his or her responsibilities and good practice standards, using the

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12. The ABA House of Delegates adopted amendments to Model Rule 1.6, which were proposed by the ABA Ethics 2000 Commission, at its Annual Meeting in August 2001 and let the amendments stand at its Midyear Meeting in February 2002. ABA Ctr. Prof. Resp., *supra* n. 11. The revised Model Rule 1.6 is reprinted at 31 Stetson L. Rev. ____, ____ (2002).

National Guardianship Association standards and materials as models.

67. Practitioners be informed of state law provisions regarding estate-planning responsibilities that might impose a duty on the lawyer and/or guardian to engage in such planning.

RECOMMENDATIONS FOR FURTHER STUDY

The Conference recommends that:

68. Further study be conducted on the role and responsibilities of the lawyer for the fiduciary and his or her duty to a ward with regard to any fiduciary actions that could result in the diminution of the estate while the ward is alive.

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The CHAIRMAN. Now let me turn to Dr. Diane Armstrong, author of "The Retirement Nightmare." Doctor, welcome before the committee.

STATEMENT OF DIANE G. ARMSTRONG, CONSULTANT AND AUTHOR, SANTA BARBARA, CA

Ms. ARMSTRONG. Thank you, Mr. Chairman. Thank you for inviting me to testify today.

In discussing the motives that drive these involuntary conservatorship and guardianship proceedings, I am speaking for the hundreds of thousands of men and women whose retirement years have been destroyed by them.

Our States designate these proceedings as "nonadversarial" in nature, brought out of the goodness of the petitioner's heart to help an elderly person in distress. It is a powerful term, and it is almost always incorrect. These are court battles fought over money, power, and control. Sadly, the elderly lose almost 94 percent of the time, often in proceedings that take only 4 minutes. Their cases are rarely appealed.

Let us begin with a brief discussion of the motives guiding family members. The majority of these petitions are filed by adult children who are seeking some form of control over the personal or financial affairs of their aging parents. They are sibling battles rooted in issues of inheritance and control, often described as "thinly veiled will contests performed before death." Anyone who reaches 62 with coveted assets is at risk. As one forensic psychiatrist noted about these so-called protective proceedings and was quoted a moment ago: "For every $100,000 in a given estate, a lawyer shows up; for every $25,000, a family member shows up; and if there is no money, nobody shows up." I have time to present only one case, although five more are contained in the appendix you have before you. I have chosen a typically bizarre family battle. Motive? Follow the money.

After the death of her husband, Delphine Wagner of Nebraska decided to lease some of her land to a professional alfalfa company rather than continue to let her son and son-in-law farm the land. In so doing, she generated a 160 percent increase in her income from the leases.

Four of her six children filed conservatorship petitions against her and testified in court that she could no longer properly manage her affairs. Their proof? Because she had generated a 160 percent increase in income, Mrs. Wagner would have to pay more in taxes; and what person in their right mind would want to pay Uncle Sam more taxes?

The court agreed with the petitioners and appointed a conservator over Delphine. Although already 79 years of age, Delphine had the energy and the money to battle through two more courts, year after year after year, and her freedoms were finally restored.

Over 25 percent of the cases I describe in "The Retirement Nightmare" involve proceedings that are initiated by social workers and members of the social welfare community. What motives drive these individuals and agencies to file petitions? A desire to control the increasingly independent elders and their money, and a need

to expand the number of persons "helped" by the agency in order to increase agency funding.

What motives drive members of the court? Judges and their favored professional conservators and guardians, expert witnesses and court investigators have unspoken agendas of money, power, and control.

When an elderly individual is brought into court and forced to prove his or her competence, we soon see that the system does not work. We have a system rife with court-sanctioned elder abuse. Why? Judges override protections that have been put in place in the codes. It happens every day. Judges disregard durable powers of attorney—the single most important document each of us can create to determine our care should we become incapacitated. We have seen the health care proxy overturned in the Orshansky case. Judges ignore our lists of preselected surrogate decisionmakers.

The current system does not work. This reality is most apparent when a wealthy individual falls victim to these involuntary proceedings and his or her wealth becomes a ripe plum to be shared by the judge's favorites.

The cost of my mother's 18-month conservatorship battle in Los Angeles Superior Court exceeded $1 million because no court appointee would let the matter end until my mother agreed to settle out of court and pay every bill of every person involved on both sides of the case.

Money is a lure. Once the hook is set in a wealthy potential ward, courts have a feeding frenzy. All of Riverside County in Southern California was held hostage by the collusion between a single probate judge and his favorite professional conservator.

Third parties such as nursing homes, hospitals, and continuing care facilities often require conservatorships or guardianships over their patients to ensure payment of bills or to evict the elderly from one setting and place them in another. In many cases, nursing homes will refuse admittance to adults who are not represented by court-appointed surrogate decisionmakers. This practice, while not legal, is often the price of admission in the face of an increasing demand for the limited space available in private convalescent centers.

Families are destroyed by these proceedings. The hundreds of thousands of unfortunate men and women who have been placed in the velvet handcuffs of contested conservatorships and guardianships in America are without hope. Their conservatorships and guardianships end only when they die—or when the system spends their assets down to $10,000 or less and spits the wads out into a harsh world of poverty.

Sibling battles rooted in issues of inheritance and control, social welfare petitions driven by hidden agendas of power and control, nursing homes that quietly require financial guarantees, and court actions that create the very abuse they are tasked to address—our country's involuntary conservatorship and guardianship system is out of control. It is no longer a morally permissible option.

I now pose a final question: Is the present hearing merely a 10-year revisiting of an ongoing problem last discussed by the Senate in 1991, 1992, and 1993; or are we here to see, for once and for

all, that this court-sanctioned abuse of the elderly finally comes to an end?

I thank you.

The CHAIRMAN. Dr. Armstrong, thank you very much. We will get back to that provocative ending question in a few moments.

[The prepared statement of Ms. Armstrong follows:]

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"Motives of Petitioners in Contested Conservatorships and Guardianships"

Prepared for the Senate Special Committee on Aging, February 11, 2003

In discussing the motives that drive these involuntary conservatorship and guardianship proceedings, I am speaking for the hundreds of thousands of men and women whose retirement years have been destroyed by them. Our states designate these proceedings as "non-adversarial" in nature, brought out of the goodness of a petitioner's heart to help an elderly person in distress. It is a powerful term, and it is almost always incorrect. These are court battles, fought over money, power and control. Sadly, the elderly lose almost 94% of the time, often in proceedings that take only four minutes. Their cases are rarely appealed.

Let's begin with a brief discussion of the motives guiding family members. The majority of these petitions are filed by adult children who are seeking some form of control over the personal and/or financial affairs of their aging relatives. They are sibling battles rooted in issues of inheritance and control, often described as "thinly veiled pre-death will contests." Anyone who reaches 62 with coveted assets is at risk. As one forensic psychiatrist noted about these so-called protective proceedings, "For every $100,000 in a given estate, a lawyer shows up; for every $25,000, a family member shows up; and if

there isn't any money, then nobody shows up" (quoted in Harold T. Nedd's "Fighting over the care of aging parents," **USA Today**, July 30, 1998).

I have time to present only one case, although five more are contained in the Appendix you have before you. I have chosen a typically bizarre family battle. Motives? Follow the money. After the death of her husband, Delphine Wagner of Nebraska decided to lease some of her land to a professional alfalfa company rather than continue to let her son and son-in-law farm the land. In so doing, she generated a 160% increase in her income from the leases. Four of her six children filed conservatorship petitions against her and testified in court that she could no longer properly manage her affairs. Their proof? Because she had generated a 160% increase in income, Mrs. Wagner would have to pay more in taxes; and what person in their right mind would want to pay more taxes to Uncle Sam? The Court agreed with the petitioners and appointed a conservator over Delphine. Although already 79, Delphine had the energy and the money to battle through two more courts—year after year after year--and her freedoms were finally restored.

Over 25% of the cases I describe in THE RETIREMENT NIGHTMARE involve proceedings that are initiated by social workers and members of the social welfare community. What motives drive these individuals and agencies to file petitions? A desire to control the increasingly independent elders and their money, and a need to expand the numbers of persons "helped" by the agency in order to increase agency funding. [See Cases #1 and #2 in Appendix]

What motives drive members of the court? Judges and their favored professional conservators and guardians, expert witnesses and court investigators have unspoken agendas: money, power and control. When an elderly individual is brought into court and forced to prove his or her competence, we soon see that the system does not work. We have a system rife with court-sanctioned abuse of the elderly. Why? Judges override protections that have been put in place in the codes. It happens every day. Judges disregard durable powers of attorney—the single most important document each of us can create to determine our care should we become incapacitated. Judges ignore our lists of pre-selected surrogate decision-makers. The current system does not work. This reality is most apparent when a wealthy individual falls victim to these involuntary proceedings and his or her wealth becomes a ripe plum to be shared by the Judge's favorites. The cost of my Mother's18-month conservatorship battle in Los Angeles Superior Court exceeded one million dollars because no court appointee would let the matter end until my mother agreed to settle out of court and pay every bill of every person involved—on both sides of the case. Money is a lure. Once the hook is set in a wealthy potential ward, courts have a feeding frenzy. All of Riverside County in Southern California was held hostage by the collusion between a single probate judge and his favorite professional conservator. [See Cases #3 and #4 in Appendix]

Third parties, such as nursing homes, hospitals, and continuing care facilities often require conservatorships or guardianships over their patients to insure payment of bills or to evict the elderly from one setting and place them in another. In many cases, nursing homes will refuse admittance to adults who are not represented by court-appointed

surrogate decision-makers. This practice, while not legal, is often the price of admission in the face of an increasing demand for the limited space available in private convalescent centers. [See Case #5 in Appendix]

Families are destroyed by these proceedings. The hundreds of thousands of unfortunate men and women who have been placed in the velvet handcuffs of contested conservatorships and guardianships in America are without hope. Their conservatorships and guardianships end only when they die—or when the system spends their estates down to $10,000 or less and spits the wards out into a harsh world of poverty.

Sibling battles rooted in issues of inheritance, control and care; social welfare petitions driven by hidden agendas of power and control; nursing homes that quietly require financial guarantees; and court actions that create the very abuse they are tasked to address—our country's involuntary conservatorship and guardianship system is out of control. It is no longer a morally permissible option.

I now pose a final question. Is the present hearing merely a ten-year revisiting of an ongoing problem, last discussed by the Senate in 1991? Or are we here to see—for once and for all—that this court-sanctioned abuse of the elderly finally comes to an end?

Thank you.

APPENDIX: FIVE CONTESTED CONSERVATORSHIP/GUARDIANSHIP CASES

CASE #1. Glen Hawkins ran into trouble when he angered a social worker at his Leisure World condo in Orange County, California. The social worker had transferred Mr. Hawkins' wife of 63 years into a nursing home against both of their wishes. Thinking her husband had betrayed her, his wife stopped eating and soon died. When pressed by the social worker to discuss his personal and financial affairs with her, Mr. Hawkins refused. He learned of the consequences of this refusal when, after bicycling two miles to his bank to speak with his investment counselor, he was told that he no longer had control of his $380,000 portfolio. He had been placed under the control of a court-appointed professional conservator, found in absentia to be "too feeble and addled to manage his financial and personal affairs." Without legal notice to him or to his relatives and without a chance to appear in court, all as required by law, Mr. Hawkins had become a ward of the Court. The social worker had gone to a Long Beach firm of caretakers who filed the conservatorship petitions against Mr. Hawkins in Los Angeles County. Why Los Angeles rather than Orange County, the county in which Mr. Hawkins lived? Because Los Angeles County judges permit professional conservators to charge $75 an hour for their services rather than the $35 an hour limit imposed by judges in Orange County.

S. Emmons, "Conservators' Reach Can Be a Surprise," ***Los Angeles Times****, November 23, 1997, pp. A.3, A29.*

NOTE: MARY CONNORS WILL ATTEND THE HEARING ON FEBRUARY 11.

CASE #2. Mary Connors moved with her aging mother from Pennsylvania to California. She took excellent care of her mother, and enrolled her in Alzheimer's day care centers when she was not able to watch her. It is important to note that Mary, who holds a durable power of attorney for her mother, also maintains the payments on her mother's Long-Term Care insurance. On one memorable day not too long ago when Mary went to pick her mother up from the Alzheimer's day care center, she learned that her mother was gone. A cousin in Pennsylvania had forged a second durable power of attorney and spirited Mrs. Connors back to Pennsylvania. Mary followed this trail of broken dreams and tried to regain control. Although agreeing that the second durable power was fraudulent, Pennsylvania's Area Agency on Aging and the State Department of Aging told Mary that they could provide better care of her mother than she could—thanks in part to the convenient Long-Term Care policy Mary continued to pay for. Mary asked, "Where is the $15,800 that is missing from my mother's bank account?" "It is no longer any of your business," she was told. "Can I see my mom?" "No, your visits are not in her best interest." When Mary was finally permitted to visit her mother, she learned that her mother had been told Mary had betrayed her and was selling her house. Indeed, Mary's mother's house in Pennsylvania *is* being sold—sold by the State to feed the system. They are also selling the property Mary bought in California because she had added her mother's name to the title. This case is a very typical (and ongoing) Retirement Nightmare. Mary is giving up hope.

Personal communication with Mary Connors—ONGOING CASE.

CASE #3. In Riverside County, California, the entire system of probate conservatorships was held hostage by its single judge, William H. Sullivan, and his favorite professional conservator, Bonnie Cambalik. Eighty-eight-year-old Lucille Olsen was one of the many victims of this abusive court system. Lucille Olsen had checked herself into a hospital following complications from a fall. Bonnie Cambalik found out about the elderly woman and filed conservatorship papers over her with no notice to Lucille's family as required by law. Cambalik subsequently confined Lucille Olsen to a nursing home, confiscated her mail, refused her a telephone or stationery, and made plans to sell her home. Lucille Olsen was a prisoner at her own expense. She died before her niece forced an investigation. Nothing changed in Riverside County until two investigators and one attorney from San Francisco's Elder Angels began their pro bono probe of the county-wide corruption. Only when attorney Barbara Jagiello found records proving that Judge Sullivan had purchased one of his conservatee's homes from the conservatorship estate at below market value did anything shift. Judge Sullivan was permitted to retire. Professional conservator Barbara Cambalik and her attorney are now in prison.

Entire copy of the January 2000 cover article from ***California Lawyer*** *featuring this case will be included in materials submitted to the Senate Special Committee on Aging.*

NOTE: ROBIN ADAIR WARJONE WILL ATTEND THE HEARING ON FEBRUARY 11.

CASE #4. Robin Adair Warjone is a college friend of mine whose life was turned upside down by an unwanted "protective proceeding" initiated by all three of her adult children. Robin was only 56 at the time, living quite nicely on her $10,000 alimony check every

month. Her children wanted the state to step in and control their mother's money. At the request of the children's attorney, the Court appointed a guardian ad litem to represent the proposed ward. Robin hired a major legal firm to represent her best interests, leaving the guardian ad litem with little to do. Unfortunately, Robin had to fight the maneuverings of the court-appointed guardian ad litem for almost an entire year until her children finally withdrew their petitions. The unwanted and unnecessary guardianship never went beyond the initial appointment of the guardian ad litem and into the court, yet Robin's entire retirement nest egg of $300,000 was consumed by her struggle for freedom.

Personal communication with Robin Adair Warjone—CASE SEALED.

CASE #5. Florence Peters' husband secured a guardianship over his wife in order to place her in a nursing home to convalesce. Florence recovered, and managed to reverse her unwanted guardianship. Unfortunately, she died before being released from the nursing home. Neither her husband nor her guardian attended her funeral. They were honeymooning together in upstate New York.

Described in J. E. Rein, "Preserving Dignity and Self-Determination of the Elderly in the Face of Competing Interests and Grim Alternatives: A Proposal for Statutory Refocus and Reform," ***George Washington Law Review*** *60 (1992): 1871 (footnote).*

Grabbing Granny's Goodies

Make sure your clients are protected against involuntary conservatorships

Robert Casey

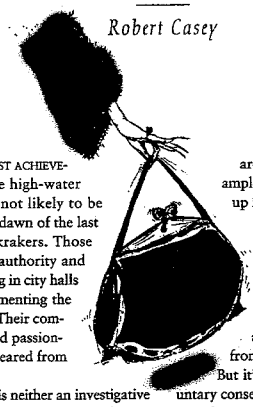


Illustration by Beatrice McDonald

MANY OF AMERICA'S GREATEST ACHIEVEments lie ahead. But the high-water mark for journalism is not likely to be among them. Its crest came at the dawn of the last century with the age of the muckrakers. Those crusading journalists wrote with authority and conviction, uncovering wrongdoing in city halls and corporate boardrooms, documenting the evidence, and demanding reform. Their combination of exhaustive research and passionate presentation has largely disappeared from American journalism.

But not quite. Diane Armstrong is neither an investigative reporter nor a felicitous writer. Yet her new book, *The Retirement Nightmare: How to Save Yourself From Your Heirs and Protectors* (Prometheus Books), is as close as you'll get to a first-rate piece of modern-day muckraking. The book's title seriously undersells what Armstrong has accomplished here. This is a painstakingly documented and frightening exposé of the spread of involuntary conservatorships (guardianships in some states) wrongly imposed on the elderly.

Once judged incompetent and placed under a conservatorship, a citizen becomes a nonperson, with fewer rights than a convicted felon in a penitentiary. Your income goes to the conservator, who also controls your assets. You can't write a check, use a credit card, or make an ATM withdrawal. You live where the conservator says and eat what he or she provides. The car keys are taken away. You even lose your right to vote.

This happens only to really old people who've lost their marbles, right? Hardly, as Armstrong thoroughly demonstrates. The imposition of conservatorships or guardianships is spreading rapidly, and people as young as their early 60s are being subjected to them. In New York, for example, 32,000 guardianships were granted in 1997, up from 15,000 in 1992.

Greedy relatives are the primary force behind this trend. Writes Armstrong: "A majority of the involuntary conservatorship/guardianship proceedings in our country are thinly disguised predeath or antemortem will contests during which angry heir-petitioners, aided and abetted by the courts, secure their inheritances from vulnerable elderly relatives."

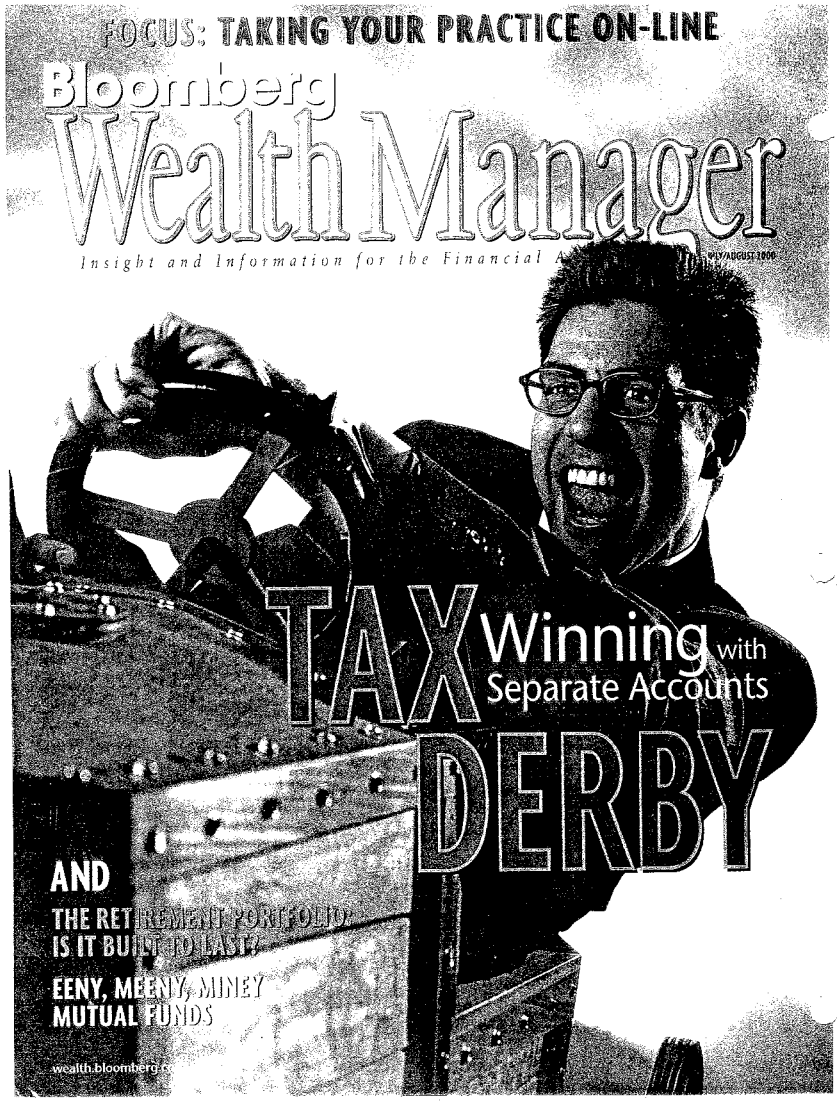
But it's not always relatives. A quarter of the involuntary conservatorships cited in the book were brought by outsiders such as social workers or even neighbors. Nursing homes may demand to be appointed as conservators before they will admit elderly patients. There has even emerged a shadowy industry of professional conservators who collect stiff fees from their wards' bank accounts.

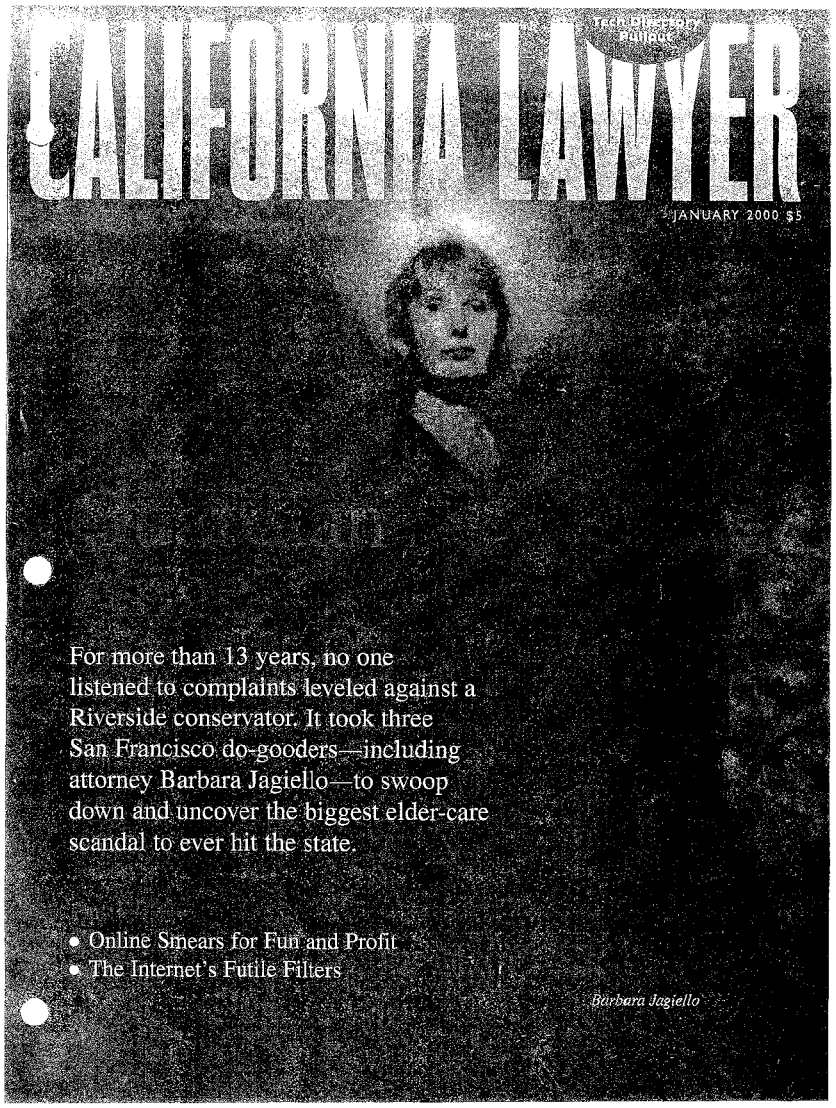
Congressional hearings are warranted, based on the evidence of abuse presented in this book, and reforms to establish due process are surely needed at the state level. How can an adviser help protect aging clients from these outrages?

The durable power of attorney, revocable trusts, and living wills are effective bulwarks. Clients should also preselect a list of their own choices for conservator or guardian in the event one is ever needed. Finally, Armstrong recommends, involve a geriatric psychiatrist in all decision-making sessions and document-signings, and videotape everything to provide evidence that the client was competent at the time.

And be wary of agendas presented under the guise of "for their own good."

Robert Casey is editor of Wealth Manager.


FOCUS: TAKING YOUR PRACTICE ON-LINE
Bloomberg
Wealth Manager
Insight and Information for the Financial
TAX DERBY
Winning with Separate Accounts
AND
THE RETIREMENT PORTFOLIO:
IS IT BUILT TO LAST?
EENY, MEENY, MINEY
MUTUAL FUNDS


CALIFORNIA LAWYER
JANUARY 2000 $5
For more than 13 years, no one listened to complaints leveled against a Riverside conservator. It took three San Francisco do-gooders—including attorney Barbara Jagiello—to swoop down and uncover the biggest elder-care scandal to ever hit the state.
• Online Smears for Fun and Profit
• The Internet's Futile Filters
Barbara Jagiello

From left to right: Jean Malbrough, Ann Flaherty, and Barbara Jagiello

How three investigators uncovered a massive conservatorship scandal.

GUARDIAN ANGELS

Something odd has been going on in Department Eight of Riverside's newly refurbished courthouse. There, beneath a series of presidential quotes carved along the cornicework, the name West Coast Conservatorships, Inc. keeps coming up. A professional, private fiduciary, West Coast had served as conservator to more than 300 people, mostly elderly and largely helpless, for 13 years. But now, in case after case, the probate court is stripping West Coast of its responsibilities and appointing new conservators to take over. The process is a tedious one, and on some days it takes up half the court's calendar.

Stranger still: The person issuing these orders is not Judge William H. Sullivan whose staid, taciturn presence has been a fixture in Riverside probate court for more than a decade. Rather, the bench is occupied by either a judge from another county, a commissioner, or even a pro tem.

Pruning West Coast from the Riverside probate docket marks the final phase of one of the worst scandals ever to rock California's conservatorship system—a system that has struggled in recent years to keep up with a growing number of senior citizens who, unable to look after their own financial and health interests, must rely on the integrity of strangers.

Even under the best of circumstances, conservatorships are a tricky business. In no other situation (except prisons) is one person allowed to have so much power over another. And here in California, where so many have immigrated to reinvent themselves, the problem is compounded by a population that is not only getting older but also more isolated from the families they left behind when they came out west. By 2010 it is estimated that the nursing home population will triple, dramatically increasing the need for conservators.

In Riverside, Bonnie Cambalik clearly understood the growth potential. A high-society supporter of the arts with a taste for fine jewelry, she started West Coast in 1986 after working just over a year in the county's public guardian's office. In April 1999 she admitted skimming $100,000 from her helpless charges. She's also implicated her two business associates, Ramona Saenz and Diana Mikol, as well as her attorney, Michael J. Molloy. Meanwhile, no fewer than four investigations have been launched to see how much she *really* stole. Insiders say it could easily add up to millions.

More troubling than how much she stole was how she was able to stay in business so long. Conservatorships, after all, supposedly operate under the watchful eye of the court, the ethical restraints of the probate bar, and in some counties, including Riverside, the public defender's office

By Christopher Manes
Photography by Jona Frank

is also involved. Yet in Riverside the system's checks and balances barely broke Cambalik's stride.

Last April, Riverside Public Defender Margaret Spencer—whose office is supposed to provide legal representation to conservatees—was discharged by the county's board of supervisors in the wake of the scandal. Riverside has also been sued for negligence by family members of at least one victim, the "cliquishness" of the probate bar has come under fire, and a complaint has been filed with the Commission on Judicial Performance against Judge Sullivan.

The hero of this story could easily have been the county's district attorney, Grover Trask. But after so many have been defrauded for so long, the families of the victims aren't rushing to shower him with kudos. Instead, praise is being directed half a state away in San Francisco, where three women—an attorney, a conservator, and a private detective—investigated the matter on a pro bono basis without the encouragement, if not the resistance, of local officials.

Jean Malbrough was the first of these women to get involved. A private conservator herself, she got a phone call in early 1998 from someone she knew at the California Advocates for Nursing Home Reform (CANHR), a nonprofit organization that monitors the treatment of nursing home residents. CANHR had received a box of complaints from another conservator, who suspected that Cambalik was up to no good, and CANHR asked Malbrough to examine the files. Malbrough was the right person to go to. With more than 20 years' experience under her belt, she had worked on numerous elder abuse cases and had the expertise to understand the abstruse minutiae of conservatorship accountings. Indecipherable to laypeople, these accountings are reports conservators such as Cambalik must by law submit to inform the court how they are managing their charges' assets.

The second woman on the team was Malbrough's sister, Ann Flaherty, who as chief investigator at the Rat Dog Dick detective agency knew how to find things out about people. She was also very interested in solving elder-abuse cases, and in 1997 had, in fact, teamed up with another private eye to start Elder Angels. "We created Elder Angels to do investigations," Flaherty explains, "to bring the hard facts to the police so they couldn't just brush the matter aside." No case, however, would test Flaherty's resourcefulness more than the one against Cambalik.

The third member of the team was Barbara Jagiello, a sole practitioner recruited by Malbrough to piece together the paper trail left behind by Cambalik. A graduate of Yale Law School, Jagiello had interviewed with a number of large firms but decided in the end to suffer through a few years of "genteel poverty," as she puts it, to build a practice that she could call her own. Ultimately, she would be the one to write the report that would get Cambalik in trouble.

Malbrough and Jagiello first met when they worked together on a case involving a Buddhist nun who had gotten herself appointed as the temporary conservator of her blind, ailing Zen master. The nun proceeded to rob the monk of just about everything he had, including a twelve-inch-tall gold Buddha.

Christopher Manes is a lawyer and freelance writer in Palm Springs. Cynthia Williams also helped research this article.

After the nun's thievery came to light Malbrough stepped in as the priest's conservator and hired Jagiello to get his money back. But things got a little bizarre when the nun claimed she gave everything she stole to a mysterious "holy man" who, after appearing to her on the street one day, was never heard from again. Largely as a result of the pressure Jagiello exerted, though, the company that bonded the nun's conservatorship made good on the loss. *Estate of Khuu* (SF Super Ct) Civ No. 263080.

In the meantime, Malbrough and Jagiello developed a friendship that had its own Zen-like quality, with Malbrough's quiet optimism acting as something of a cushion to Jagiello's manic energy. "I don't know how many times during the Cambalik case I got discouraged over the mountain of work we had in front of us," says Jagiello. "But Jean was always there saying 'Just write the report and they will come.'"

Jagiello, Malbrough, and Flaherty carried out their investigation on a shoestring budget, with Elder Angels advancing what little funds it had for the research and the rest coming out of their own pockets. "I don't think we knew what we were getting into," Jagiello observes. "We would fly down to Riverside, pull out 40 to 50 West Coast files from the clerk's office, and just start poring over them. I think the clerks thought we were crazy." But crazy or not, by investigating Cambalik's operation these women were delving into the dark side of private conservatorships.

Take, for example, the case of 88-year-old Lucille Olson, whose troubles, according to court documents, began when she checked herself into a hospital after suffering complications from a fall. Somehow Cambalik found out about her and filed papers to take control of her life without giving any notice to Olson's family. Cambalik subsequently confined Olson to a nursing home, confiscated her mail, left her without a phone, denied her writing paper, and made plans to sell the small home she and her deceased husband had built.

"It really is someone else's," Cambalik reportedly told the heartsick woman, and began to use the house to store property from her other conservatorships. Olson, meanwhile, had to smuggle letters out to her family in order to contact them. She was a virtual prisoner—at her own expense.

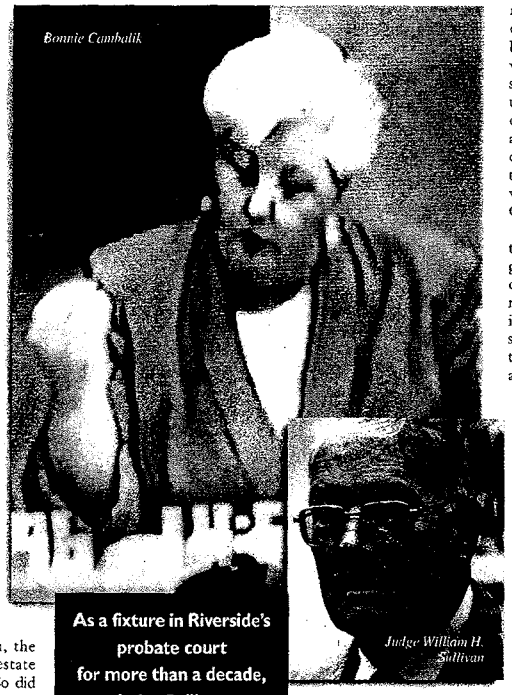
Sensing something was terribly wrong, Olson's niece, Carol Rodgers, sought to pry her aunt loose from Cambalik's clutches. But that wasn't about to happen without a huge fight. Rodgers wrote letters to Judge Sullivan, the public defender, and the Better Business Bureau pleading for help. Nobody listened—except for Cambalik herself, who turned around and sued Rodgers, claiming the letters defamed her. Olson died in 1996. But even after her demise, Cambalik still tried to sell the house and stopped only after Rodgers managed to retain a lawyer outside Riverside who learned that Cambalik failed to report a $7,000 account in Olson's name, as well as a safe deposit box that contained $44,000. *Rodgers v Cambalik* (CD Cal) Civ No. EDCV 99-0282.

JAGIELLO AND COMPANY ALSO BROUGHT TO LIGHT THE CASE of Nelta Bradner. At age 70 Bradner had nominated a friend as conservator in the event that she could no longer take care of herself. Two years later, as Bradner became more seriously impaired by Alzheimer's disease, Cambalik, as Jagiello reports, got her to change her nomination to West Coast, even

though Cambalik was a total stranger. West Coast's attorney, Michael J. Molloy, then arranged for Bradner to change her will, without informing Bradner's attorney.

Included among Bradner's inventoried possessions were several missing pieces of jewelry that Cambalik maintained had been stolen by a nursing home caregiver. But, says Jagiello, the nursing home denied that Bradner ever had those items while she was there. And since she was confined to a bed in what was primarily the fetal position, she hardly had occasion to dress up. In 1993 Cambalik reported that she regularly spent $1,000 a month or more on Bradner's personal needs and in May alone indicated an expenditure of $1,250 just on groceries—an inordinate sum given Bradner's condition.

Similarly, Helen Conrad had the misfortune of running into Cambalik. Once a vibrant woman, she lived in an assisted living facility, owned a grand piano, and had enough savings to be able to live out the rest of her life in dignity. Two years after Cambalik got control of her finances, though, the woman's $300,000 estate had all but vanished. So did her piano. According to Cambalik, $170,000 of Conrad's estate was spent on at-home health care, some of which was provided by Care World Enterprises—a company Cambalik co-owned.



Bonnie Cambalik

Judge William H. Sullivan

As a fixture in Riverside's probate court for more than a decade, Judge Sullivan never seriously questioned Cambalik's integrity.

In the case of Bella Robbins, Cambalik managed to get herself appointed conservator over the objections of the woman's sister, Rose Blum, a retired licensed social worker who was willing and able to act as Robbins's conservator. Blum had to take Cambalik to court to reverse the decision. Bank records indicate that Cambalik wrote more than $6,000 in checks not listed in her accounting. After Blum got control of her sister's estate, she transferred the case to a Los Angeles County court, which found enough evidence of "mismanagement of the whole estate from its inception" to attach a $16,000 surcharge against Cambalik. *Estate of Robbins*, Civ No. EP 3259.

In all, Jagiello, Malbrough, and Flaherty scrutinized only about 40 West Coast conservatorships out of a total of 300. Yet they say they repeatedly found evidence that Cambalik billed for services not provided, stole money and valuables, and isolated clients from family and friends. Most disturbing of all to the three women was the cruelty that Cambalik exhibited.

"If she had just taken the money and given them good care, I guess I wouldn't be so upset," Jagiello explains. "But she didn't. She stole their money and abused them.

"At some point in my life I will probably need someone to take care of me," adds the 55-year-old lawyer, who has no children or any close relations to fall back on, except her husband.

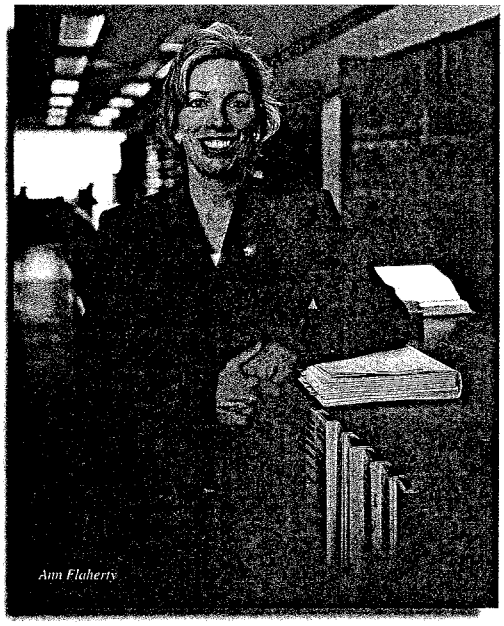
Malbrough and Flaherty express a similar view. In fact, in their family, they have an aunt suffering from Alzheimer's disease who had a brush with a scam artist.

FOR CAMBALIK TO STAY IN BUSINESS AS LONG AS she did, those responsible for ensuring the system's integrity had to ignore a number of warning signs. In their notes the probate examiners responsible for reviewing conservatorship accountings, for example, reported many of the irregularities to Judge Sullivan that Jagiello later discovered. Indeed, one examiner, Betty Zesk, later told investigators that in just one year of reviewing West Coast she determined that Cambalik was defrauding clients. But her notes

went mostly unheeded, and to the extent the court took any notice, Cambalik was able to explain the problems away or correct them without consequences.

Nor did the complaints made by family members to Judge Sullivan, the public defender, and the district attorney seem to be heard, although in one published case a family succeeded in removing Cambalik and challenging an accounting approved by Sullivan. *Conservatorship of Lefkowitz* (1996) 50 CA4th 1310.

In fact, no matter what was discovered, the agencies charged with scrutinizing Cambalik seemed to let things slide as if she had an endless supply of "stay out of jail" cards. How was this possible?



Ann Flaherty

Part of the answer, no doubt, has to do with how well-connected Cambalik was. A short, heavyset woman, she was by all accounts someone who knew how to work a room. She had belonged to the Canyon Crest Country Club, in the most exclusive part of Riverside, until she moved up a notch further to the Victoria Club, a bastion of what some describe as Old Riverside society, the affluent, influential elite of the town. She also served as president of the Riverside Art Alliance, a group that supported the local art museum. She herself owned, among other things, a hand-painted potpourri jar that once belonged to Victor Hugo, and her antiques collection was deemed so good it was included on a local art tour. Friends and enemies alike considered Cambalik a force to be reckoned with.

When it came to business, however, one of the most important rooms Cambalik worked was the Riverside Public Guardian's office. A division of the Riverside Department of Mental Health, the public guardian's office steps in to manage the estates of those deemed incompetent when no one else will. Cambalik started working there in December 1984.

Former Chief Deputy Public Guardian Lucille Lyon remembers Cambalik vividly because of a troubling incident that occurred in 1986, just before Cambalik left to start West Coast. "She wanted me to help her start a new business," Lyon recalls. "She asked me to take five of our biggest cases and give them to her. Of course I refused. We weren't on speaking terms after that."

Still, within just six months of leaving the public guardian's office, Cambalik had, with the help of friends in the public defender's office, managed to wrest two conservatorships from her former boss. "It was as if they suddenly wanted to replace the public guardian with Bonnie Cambalik," Lyon observes.

Among Cambalik's more useful friends was Molloy, a private attorney who occasionally represented the public guardian. By all accounts he is, for the most part, an affable man. But one day, Lyon says, he got into a bitter shouting match over an objection she raised to an accounting Cambalik filed. After that fight, Molloy never worked for the public guardian's office again, and instead represented West Coast.

Cambalik's coworkers, Ramona Saenz and Saenz's daughter, Diana Mikol, were also useful. Both joined West Coast in the early 1990s. Saenz served as conservator in a few cases, and Mikol was West Coast's bookkeeper.

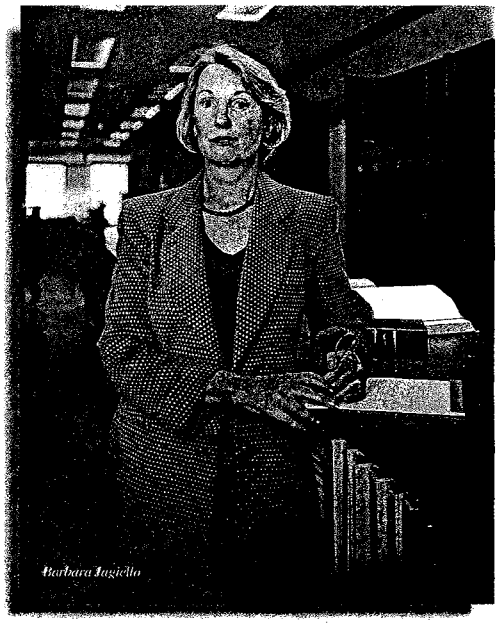
Cambalik could also count on Jennifer Dumitru and Cheryl Thompson for support. They were two deputy public defenders who, according to Jagiello, favored West Coast, even when family members were willing to serve as conservators. In the case of Michelle Miller, for instance, a 17-year-old who suffered brain damage as a result of a car accident, Thompson succeeded in switching the conservatorship over to Cambalik, after the girl expressed a desire to break away from her mother.

James T. Catlow, a Los Angeles attorney who now represents Miller in a lawsuit against Thompson and others, *Miller v County of Riverside,* Civ No. 331909, maintains that Thompson "seemed to be on a crusade to get family members off as conservators." At the same time, the public defender's office seemed at times excessively tough on West Coast's competition.

In one instance, Dumitru objected to the appointment of a conservator who had 20 years' experience in public service and demanded to see evidence of her qualifications. Ironically, had Dumitru scrutinized Cambalik's background, she would have discovered that according to school records Cambalik had never earned the degree in gerontology she claimed she had from the University of Southern California.

WHILE THE PUBLIC DEFENDER'S OFFICE FAILED IN ITS DUTY TO protect Riverside's elderly citizens from West Coast, the probate court hardly did much better.

"Every time the probate examiner or a family member fingered Cambalik, Judge Sullivan would accept her explanation, or let her amend her accounts, without really sanctioning her," says Malbrough. And when the judge found out that Cambalik was farming out work to her own health care company, he merely imposed a surcharge and left it at that.



Barbara Jagiello

Indeed, the further the three women probed, the more they felt that nobody was on their side. "I felt like it was Ann, Jean, and me running around the Riverside courthouse yelling, 'We've got you surrounded,' " Jagiello says. And their biggest fear was that in spite of everything they had found, nothing would come of it. How could they ensure that someone would listen?

Their answer came late in 1998 when Flaherty started looking into Judge Sullivan's real estate dealings over the past decade. As it turns out, they were very extensive. "Like Century 21," Flaherty jokes. But what made these transactions significant is that some of them involved older people who, Flaherty speculated, may have been conservatees under the judge's jurisdiction. One elderly gentleman who sold his house to Sullivan was Harry Dostal. Flaherty passed the name on to Jagiello, who once again flew down to Riverside to rifle through the probate files. The clerk said no file for Dostal existed. Flaherty then put her detective skills to work and traced the transaction through the public records until she found a Riverside court order that authorized the sale. This in turn allowed Jagiello to confirm that Dostal was indeed under a conservatorship when he sold the property. And the judge who presided over the conservatorship was the same man who acquired Dostal's home: William Sullivan.

"Once I found the Dostal conservatorship sale," says Jagiello, "I knew someone had to listen. It's an obvious conflict of interest and a violation of the Probate Code for a judge to buy real estate from a conservatorship he's overseeing."

Jagiello also discovered that the judge had served as a trustee for a trust not connected with his family, which she says is a violation of the Code of Judicial Ethics. Through a partnership, Sullivan also owned an interest in a building whose tenants included a Riverside probate lawyer who often appeared before him. That attorney in one case also represented Cambalik.

Over a two-week period, Jagiello drafted an 18-page, single-spaced report that she called an Indictment of Judicial Misconduct—a document that weaved the Cambalik story in with Jagiello's allegations against the judge. News of this document spread fast, and one day an official in Riverside's mental health department called Jagiello to request a copy. Flaherty and Malbrough flew down to Riverside to personally deliver it. About a week later, this same report made its way to the district attorney's office, and eventually two Riverside district attorneys plus two county counsel flew to San Francisco to talk with Jagiello.

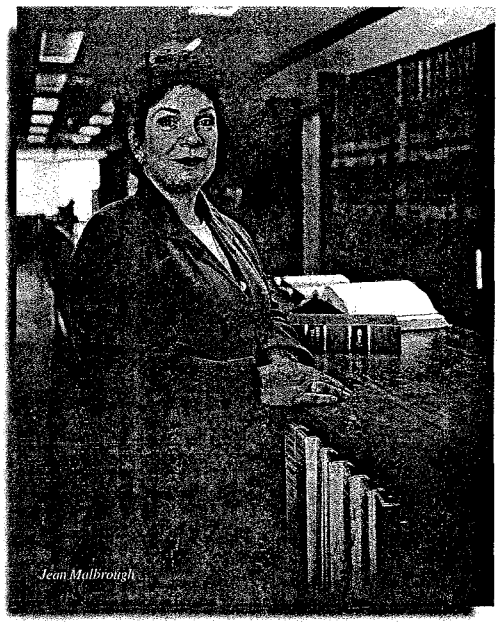
The meeting occurred on March 18, 1999. Soon thereafter search warrants were served on Cambalik, Molloy, and several others involved with West Coast.

IT WAS ON GOOD FRIDAY, WHILE IN THE NORTHWEST PART of France for a much-delayed vacation, that Jagiello received a call on her cell phone. It was Malbrough. "Bonnie's confessed," she told her.

"You're joking," Jagiello responded.

"It's Good Friday. Would I be joking? We're going to win."

Under questioning, Cambalik admitted to investigators that she had taken money from her clients and split it with her business associate, Saenz. In turn, Mikol admitted that she produced false accountings and implicated Molloy in the deception. In all, investigators confiscated 150 boxes of business records. They also recovered a few pieces of jewelry from West Coast's office safe. Among them, according to Jagiello, was a medallion inscribed to Nelta Bradner.



Jean Malbrough

The dominoes were falling fast. When Riverside Public Defender Margaret Spencer was asked by the Riverside County Board of Supervisors to put certain members of her staff who had worked with West Coast on administrative leave, Spencer refused. As an assistant public defender explained it, the office could not afford to lose the manpower. The board responded by firing Spencer and replaced her with Gary Windom, an outsider from Ventura who is also president-elect of the Public Defenders Association.

As for the public defender's office, it continues to deny any wrongdoing. So does Judge Sullivan who, in November, announced his retirement. (The judge did not respond to requests for an interview.) Meanwhile, the DA's office, which for so long seemed to be looking the other way, is now pursuing the matter with zeal, and this was more than underscored on November 9 when Cambalik and Molloy were simultaneously arrested. Cambalik was charged with theft, embezzlement, conspiracy, and perjury. She later pleaded not guilty, as did Molloy, who was charged with grand theft, conspiracy, and subornation of perjury. *People v Cambalik,* Cr No. 88557. The two now face the prospect of serving more than ten years in prison. Also, Mikol and Saenz have both pleaded guilty (Mikol to grand theft and Saenz to accessory to theft) in plea bargains. "This case exposes greed at its worst," District Attorney Trask now says. "These suspects preyed upon defenseless elders in our community. They betrayed a sacred trust, demonstrating contempt for the system designed to protect some of our most powerless citizens."

Left unsaid, though, was what responsibility the system had to more carefully monitor such abuses.

"I don't think there was a conspiracy," Malbrough ventures. "It was politics. Everybody had their hand in it one way or another, and as long as you looked the other way, the system worked. Anyone questioning it got their head cut off."

Flaherty agrees. "The system's checks and balances failed. Basically, I think, everyone was a little bit dirty. They all covered for one another. And that allowed Cambalik to continue to rip off conservatees over and over again right under the court's nose."

Others attribute the lapses to years of underfunding that left the public guardian's office, the county's mental health services, and the courts woefully understaffed. Perhaps also playing a role was the inherent clannishness of the probate bar, in which the same community of attorneys and conservators always appears before the same judge.

In Sacramento, one idea for reform floating around is to issue a statewide registry of conservators. Another proposal would regulate conservatorships by establishing uniform standards for certification—standards that would include a college degree.

Jagiello herself has concluded that the only way to effectively protect the public from people like Cambalik is to institute a regime of outside audits based on the IRS model that would subject conservators to intense scrutiny on a random basis.

But for a system that depends so heavily on the goodwill of others, such reforms will probably never be entirely satisfactory. As Malbrough (who doesn't have a college degree) points out, the most important qualification for conservators is that they care about their charges. And that's hard to regulate. ❑

A Court-Based Volunteer Project Serving Seniors Under or Facing Guardianship

supporting

DIGNITY
AUTONOMY
SAFETY

Helping the Elderly Live Lives of Dignity and Meaning

When a person becomes limited in either or both mental skills or physical abilities, someone may be appointed by the Court to serve as his or her guardian. The guardian may be authorized to make many decisions for the ward's benefit, including where the ward lives, medical treatment decisions, financial matters, applications for aid, and so on.

The Court may appoint a SAFE Volunteer to provide:

Information as to whether or not a guardianship is appropriate;

Additional contact — many seniors are isolated. They have no contact with anyone other than their care giver;

Additional oversight of what type of care the senior receives;

Additional evaluation of whether the senior lives a life with dignity and meaning; and;

Additional input on living arrangements that maximize the elder's autonomy while maintaining the elder's safety.

How an Elder Benefits from a SAFE Volunteer

Depending upon the needs of the elder, a SAFE Volunteer may do one or more of the following:

Regularly visit socially isolated elders, in their homes, in group homes, or in nursing homes and hospitals;

Assist in coordinating community resources that may provide benefits to the elder, and;

Interact with family members, court appointed guardians, care facility personnel and others for the elder's benefit.

However, SAFE Volunteers do not

Determine whether a crime has been committed against an older person Provide financial assistance to the older person.

Provide legal advice to anyone.

Serve as the older person's guardian.

Become a beneficiary of the older person's estate.

Who Is a SAFE Volunteer?

SAFE Volunteers come from many walks of life. They include young adults and elders in their seventies and beyond. Their interest in serving elders come from a variety of experiences, such as;

Having a family member or an important person in their life experiencing isolation, a need for care, or a guardianship;

A strong sense of community and willingness to serve, or;

A desire to provide an older person a voice.

Serving as a SAFE Volunteer contributes to community understanding of how the Courts work in assisting a person who is old, frail, and no longer able to live independently.

SAFE Volunteers receive twenty-four hours of training before they are sworn in and assigned cases. They also receive continuing training while assigned to their cases. Volunteers are expected to serve at least two years.

Make a difference.
Call 775 325-6717
for more information.

How SAFE Was Created

In 1999, a group of professionals working with elders who are in or facing guardianships wondered if they couldn't do more. Under the leadership of Judge Scott Jordan, they began a series of meetings that resulted in SAFE a court-based program of advocacy for elders. The program is a joint effort by many agencies and individuals, including, but not limited to;

- Second Judicial District Family Court
- Washoe County Public Guardian
- State of Nevada Division of Aging
- Washoe County Senior Law Project
- UNR Sanford Center on Aging
- Retired Senior Volunteer Program
- CASA Program
- Fielding Graduate Institute.

And, a special thanks to the first SAFE Volunteer, Virginia Edsall.

For information about Washoe County SAFE, call Deborah Van Veldhuizen at 775 325-6717 or email at *dsvomveld@att.net.*

For information about other chapters, call Dr. Jerry Nims, at 775 329-3030, or email: jnims@fielding.edu.

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The CHAIRMAN. Now let me turn to Penelope Hommel. Welcome before the committee, and please proceed.

STATEMENT OF PENELOPE A. HOMMEL, CO-DIRECTOR, THE CENTER FOR SOCIAL GERONTOLOGY, ANN ARBOR, MI

Ms. HOMMEL. Thank you, Mr. Chairman. It is indeed a privilege to be before you today to discuss the very serious issues of guardianship.

However, what I have been asked to do is not to speak directly about problems with guardianship but rather to talk about two alternative approaches that might provide another way of looking at this very difficult and serious issue.

The two approaches are the use of mediation in guardianship cases and advance planning for alternative mechanisms that might avoid guardianship in the event of later incapacity.

For a couple of reasons—one, because mediation is the one that you are less likely to be familiar with, and two, because we have already heard about some of the alternative mechanisms, both their potential strengths and their weaknesses—I am going to devote the bulk of my comments to mediation.

As background, I would like to explain how we arrived at the idea of mediation. The Center for Social Gerontology, along with others at this table and from across the country, had been working on guardianship reform, trying to improve protections for older people, since the 1970's. As you have already heard, a fair amount of success was achieved, and many of the State statutes were revised so that on paper, at least, many of the concerns were addressed.

However, in the late 1980's, we began to realize two things that made us look for another alternative. First, we realized that while the statutory changes promised greater protections, they also pushed guardianship hearings to become more formal and more adversarial, and we questioned whether for many of the cases, the adversarial model was the best approach. It can result not only in the significant economic and emotional costs we have already heard about, but it can result in the magnification, rather than the resolution, of differences among the parties who are facing very difficult situations.

It typically results in a win-lose situation and may foreclose dialog among the parties at a time when it is most desperately needed.

The second thing we noticed was that as Frank Johns has already mentioned, the implementation of the statutes was nowhere near keeping pace with the written law and that the protections that existed on paper did not exist in reality in many cases. Perhaps most important, older persons at risk of guardianship continued to have little or no role in the process and were not even present at the guardianship hearings which would decide their capacity and their need for a guardian.

Thus, while we continued to work for statutory reform and implementation, we also looked for a nonadversarial alternative process that might be more meaningful in addressing many of the complex needs and disputes in guardianship cases, and we found it in mediation.

While we consider guardianship only as a last resort in all of our work, we particularly felt that in pursuing mediation, it might be helpful in finding less restrictive alternatives. So in 1989, we sought and received funding from the United States Administration on Aging to test the use of mediation, and we have continued to develop it since that time in a number of States across the country.

A recent evaluation that we conducted showed that the parties and the attorneys believe that in appropriate cases, it can be very effective in finding more satisfactory resolution, such as fewer guardianships, and resolutions that preserve family relationships rather than destroy them as often happens with contested court decisions.

What is mediation? It is a facilitated discussion among the parties in an informal and confidential setting that can occur at any point in the process. The mediator serves as a neutral facilitator, not as a judge, not as a decisionmaker. The parties are the ones who decide how the matter will be resolved. It is the mediator's role to guide the process in a way that leads to better understanding among the parties, clarifies issues, draws out ideas for resolution, and builds consensus that can make agreement by all the parties possible.

While a court's response in a guardianship petition is limited to a simple statutory solution to appoint a full or limited guardian or dismiss the case, mediation can focus on other, underlying and important needs and interests of the people at the table and can focus on solving issues that they bring to the table. It can help people explore alternatives and options other than guardianship, because often petitions for guardianship are brought with the idea that guardianship is the only solution, the only alternative ways to go.

Issues in mediation tend to revolve around safety, autonomy, living arrangements, and financial management. Oftentimes, the mediators find that the legal issues presented in the court petition have little to do with the issues that are below the surface that are really causing the family turmoil. For example, while the surface issue and battle may be over who should be guardian, the real issue may be longstanding sibling rivalries and controversies over inheritances. Mediation can help the families identify and talk through some of those underlying issues and try to reach a better understanding and resolution. Often, the primary issue is one of safety versus autonomy—to what extent is an older adult allowed to make what others may consider to be bad decisions? Are family members attempting to control decisions that should not be theirs to make?

For the court, the question is whether there is sufficient evidence to show that the older person needs a guardian. For mediation, the issue is resolving the real underlying issues, needs and problems that present in so many of these cases.

In addition to the potential benefits, however, I want to just mention some of the limitations of mediation. From the moment we thought about this as a possible alternative approach, we recognized that it needed to be approached very carefully and that special policies and procedures needed to be in place, most particularly to safeguard the older person alleged to be incapacitated. So we have made sure that in any mediation programs that go forward,

issues of confidentiality, protection of the respondent, appropriate and inappropriate cases—because certainly not all cases are appropriate for mediation—are carefully considered.

In terms of where we are today, I think we are at a very exciting point. We have found that mediation can be extremely useful. However, what we have also found is that we become aware of with experience is that by the time the people are on the courthouse steps, by the time the guardianship petition has been filed, it can often be too late for the families and interested parties to come together and really resolve their disputes. People are entrenched in their positions and have, in effect, dug in their heels.

We also realized that in addition to trying to get to cases earlier on, many, many of the issues that we were dealing with in mediation were in fact family caregiver issues, and this coincided with the recognition by Congress, as well as by the aging network overall, of the critical importance of family caregivers in providing long-term care and assistance to older persons.

So we have recently applied to the Administration on Aging and received funding to test an expanded version of mediation that goes beyond strictly guardianship cases where the petition has been filed and looks at pre-petition caregiver cases. We are looking to the aging network to identify caregiving families that are in need of some assistance in addressing the very difficult issues that they are confronting and the pressure and the tensions, and as a way of possibly avoiding a future need to petition for guardianship.

So far, the response has been tremendous. In one of the cases that we mediated, a care manager indicated that in 2½ hours of mediation, more was achieved than in over a year of casework in that particular situation. So we see tremendous potential for this.

I do not have time to go into any of the other alternatives. I would just like to conclude by saying that we are so thankful to you, Senator Craig for having this hearing. We look forward to continuing to work with you, not only on the serious issues of this nations' guardianship systems but also on the potential of mediation to help support caregiving families in this family and also, hopefully, to avoid or restrict the use of guardianship for those situations.

Thank you.

The CHAIRMAN. Penelope, thank you, and thank you for focusing on the dimension of mediation. I think that that is important to understand.

[The prepared statement of Ms. Hommel follows:]

Testimony of

Penelope A. Hommel
Co-Director
The Center for Social Gerontology
Ann Arbor, Michigan

on

Mediation: An Alternative Approach and
Advance Planning for Less Restrictive Alternatives to Guardianship

Before the
Special Committee on Aging
United States Senate

Hearing of February 11, 2003

Guardianship Over the Elderly:
Security Provided or Due Process Denied

Mr. Chairman and Members of the Committee, it is a privilege to be able to appear before you to discuss issues of guardianship over older persons and the serious problems that continue to plague the guardianship systems in states across the country. What I've been asked to do today is not to talk directly about the problems with guardianship, but rather to talk about two alternative approaches that can help avoid unnecessary and inappropriate guardianship.

- One is an alternative process -- the use of mediation -- to help older persons, their families and caregivers address problems and disputes that often lead to guardianship and to assist them in exploring options and alternative solutions.

- The second, which is often part of the mediation process, is advance planning for the use of alternative mechanisms such as durable powers of attorney and advance directives for health care. Though not without problems, these are less restrictive of individual rights than guardianship and allow the individual to decide in advance who will make certain decisions for them and how those decisions will be made in the event they later lose capacity to handle their own affairs.

PART I. MEDIATION: AN ALTERNATIVE APPROACH

Because mediation is relatively new to many in the aging network, the following example is provided by way of introduction. It is based on an actual case mediated in one of The Center for Social Gerontology's (TCSG) pilot adult guardianship mediation projects. It demonstrates not only the value of mediation in some cases, but also the significant differences in both process and result that can occur through the court and through mediation.

> *Robert Jones is concerned that his sister, Linda Smith, a single working mother, is not giving their mother, Mary Jones, the care she needs and is wasting her assets. Mary Jones has lived in her daughter, Linda's home for a year.*
>
> *Take One – without Mediation: Robert files a petition requesting that he be appointed guardian of his mother. His mother and sister are extremely angry and upset at this action. The matter escalates into litigation in which harsh accusations are exchanged. The judge appoints a third party non-relative as guardian. The guardian moves Mary into an adult care home. All parties end up angry and hurt.*
>
> *Take Two – with Mediation: The parties meet with a mediator who helps them identify needs and issues. They recognize that Mary enjoys living with her daughter, Linda, but she is lonely while Linda is at work. They acknowledge that Mary is confused about her finances and Robert is willing to help. With the mediator's help, they agree that Mary will continue to live with Linda; Robert will help Mary with her bills, and Mary will attend a Senior Center during the week. They agree to meet in three months to review the situation. The parties end up understanding and respecting each other's concerns. And, an unnecessary guardianship is avoided.*

A. What led us to consider the use of mediation?

The Center for Social Gerontology (TCSG), along with others across the country, had spent nearly two decades working to reform and improve the statutory schemes by which

guardianship is imposed to better protect older persons from inappropriate and unnecessary guardianship. These efforts focused on such concerns as: inadequate notice to the person alleged to need a guardian (the respondent); inadequate due process protections; minimal participation of the respondent in court proceedings, lack of legal counsel to represent respondents; and inadequate assessments / evaluations of capacities and incapacities, with the result being frequent imposition of full guardianship and minimal use of less restrictive alternatives.

A fair amount of success was achieved through these efforts in the 1970s and 1980s; many state statutes were revised and many of the concerns addressed.[1] However, in the late 1980s -- most specifically while preparing a response to an ABA questionnaire about issues that should be addressed at the July 1988 National Guardianship Symposium, now known as "Wingspan" -- we began to realize two things that made us ask if, in addition to statutory reform, we should also be looking for other approaches.

First, while these statutory changes promised greater protection for older persons against inappropriate and unnecessary guardianship, they also pushed guardianship hearings to become more formal and more adversarial proceedings. We questioned whether, for many of these cases, the adversarial model is the best approach. It can result in significant economic and emotional costs to the parties and the magnification rather than the resolution of differences among them. It typically results in a "win-lose" situation and may foreclose dialogue among the parties to explore alternative approaches to the difficult issues and problems underlying the guardianship petition and to reach a mutually satisfactory solution. Guardianship cases often involve disputes that go well beyond the legal questions the courts can decide. For example, siblings may battle over who should be guardian or what is the best plan for the parent, when the real issue may be long-standing sibling rivalries and controversies over inheritances. An adversarial proceeding resulting in the granting or denial of a guardianship by the court typically does little to ameliorate these situations and often does little to address the underlying needs and problems of alleged incapacitated persons and their families.

Second, as we and others watched for implementation of the laws, we realized that the practice in many states was not keeping pace with the written law, and many of the protections for older persons that existed on paper, did not exist in reality. For example, findings from a TCSG study of ten states in the early 90s showed that approximately 94% of all guardianship petitions filed were granted, and the vast majority of these were still for full guardianship. We also found that the person at risk of guardianship -- an older person in over 80% of the cases -- typically had little role in the process and often was not present at the hearing.[2]

B. Testing the Mediation Model.

Thus while TCSG continued to work for statutory reforms and their implementation, we recognized their limitations, and looked for an alternative process that might more meaningfully

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[1] Hommel, Penelope, *Guardianship Reform in the 1980s: A Decade of Substantive and Procedural Change*, Older Adults' Decision-Making and the Law, Smyer, J; Schaie, K.W., and Kapp M. (Eds.) Springer Publishing Co., New York (1996).

[2] *See* Lauren Barritt Lisi et al., *National Study of Guardianship Systems: Findings and Recommendations*, 63-64 and 72-73 (The Center for Social Gerontology, Ann Arbor, MI, 1994).

address the complex needs and issues underlying many guardianship cases. We found such an alternative in mediation -- the entry into a dispute of a third-party neutral facilitator without decision-making or reporting powers, in a confidential and less formal setting than a courtroom

In all of TCSG's work in the guardianship field, we believe that, although guardianship may sometimes be necessary to meet the needs of an incapacitated person, it should be considered only as a last resort when no other less restrictive options are available. Thus our premise in pursuing mediation as an approach is that many cases coming to mediation will find an alternative other than guardianship as a solution to the issues that originally brought the parties to the court.

In 1989, we first sought and obtained funding from the US Administration on Aging and began to test the use of mediation in guardianship cases.[3] Since that time, working closely with the courts, particularly the Hon. John Kirkendall in Washtenaw County, Michigan, the state bar, and the aging network, we have continued to test it in a number of states and have trained over 400 experienced mediators from across the US and Canada to expand their skills to include guardianship cases.

In addition, using an outside evaluator, TCSG recently completed a study of four demonstration projects in Florida, Ohio, Oklahoma, and Wisconsin. The results of the study show that when used in appropriate cases, the parties and attorneys believe that mediation is effective in finding more satisfactory resolutions, such as fewer guardianships, less restrictive alternatives, and resolutions to disputes that better preserve family relationships than contested court decisions. Also, in some guardianship cases, mediation can provide the parties a time-, money-, and relationship-saving alternative to the court process.

C. What is adult guardianship Mediation and What Issues are Involved?

Adult guardianship mediation is a facilitated discussion among the parties that can occur before a petition is filed for guardianship of a person and/or estate, while a petition is pending, or after a guardian has been appointed. The mediator serves as a neutral facilitator, not as judge or decision maker. The mediator does not decide how the matter will be resolved; the parties decide. The mediator's role is to guide the process in a way that leads to better understanding among parties, clarifies issues, draws out ideas for resolution and builds consensus and possible agreement by all parties.

For purposes of our discussion today, the following are a few of the most significant features of the use of mediation.

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[3] Throughout this Testimony, I use the word mediation to mean "facilitative" mediation, that is, the intervention by an acceptable, impartial, and neutral third party, who has no authoritative decision-making power, to assist parties in voluntarily reaching their own mutually acceptable agreement. Facilitative or non-directive mediation is distinguished from "evaluative" mediation or a settlement conference model where the focus is on resolving or settling a matter. The focus of facilitative mediation is not on settlement, but rather on helping empower parties to reach understandings that benefit and improve communication, to address very difficult decisional issues, beyond legal issues, and to address conflict in ways that encourage ongoing relationships.

- the setting is much less formal than court proceedings, and thus less confusing and intimidating to parties;

- it provides an opportunity for all parties -- the alleged incapacitated person, family members and caregivers -- to move beyond the presenting legal issues and assists them in identifying, addressing and resolving underlying family issues and problems that may have prompted the idea of or actual filing of a guardianship petition.

- mediations are confidential, unlike court proceedings in many states. Most states have statutes or court rules that preclude the admissibility of information discovered in a mediation and prevent mediators or their notes from being subpoenaed. The exception is where abuse of a vulnerable person is revealed during a mediation and where state statutes require that this be reported;

- it provides a forum and facilitator to help explore options and test possible solutions as to what can and cannot realistically be achieved by appointing a guardian and what alternatives exist, such as money management and bill-paying services, home care, durable powers of attorney, advance directives for health care, etc.

- it allows the parties to work out a solution that addresses the underlying issues in a dispute and one which is acceptable to everyone involved;

- it avoids the polarization and feelings of betrayal that can result from a contentious "win-lose" court hearing and can foster the preservation of relationships; and

- it allows an older person or person with a disability who is subject to a guardianship proceeding to take an active part in the decision-making process and helps maintain her/his maximum autonomy.

A court's response to a guardianship petition is limited to statutory solution -- to appoint a full guardian, appoint a limited guardian, or dismiss the case. As noted above, in the vast majority of cases, the courts grant the petitions and full guardianship is imposed. The emphasis is on determining capacity and naming a guardian, not on resolving the underlying problems. Mediation, on the other hand, focuses on addressing the needs and interests of the people at the table, and solving the problems they identify. It can provide a vehicle for discussion among the parties as to what can and cannot realistically be achieved by appointing a guardian. Further, as many guardianship petitions are filed in the midst of a crisis situation, the parties may not be aware that other alternatives exist; mediation can help the parties explore various options and alternatives -- for example, money management and bill-paying services, home care, durable powers of attorney, advance directives for health care, etc. -- as well as about their availability and costs. Mediation allows the persons involved to search for creative responses to their real needs and concerns. It can allow the needs of the older person or person with a disability to be met without taking away the person's fundamental rights and autonomy. We expected that most cases going through the mediation process would not result in the imposition of a full guardianship, and this has proved to be the case.

The issues involved in guardianship mediation tend to revolve around safety and autonomy, living arrangements, and financial management. Oftentimes, mediators find that the legal issues presented in the court petition or motion are not the underlying issues causing the family turmoil. The parties in mediation may focus on quite different issues from those that would be argued in a legal case. Sometimes there are no contested legal issues, but there are significant family disputes or concerns that need to be addressed. Families facing difficult decisions about care and intervention may be unable to communicate in a positive manner about difficult choices. Family dynamics may be such that old communication patterns block constructive decision-making. Changing roles of parent and child may cause uncertainty in raising issues. Many of the same issues raised in court cases -- safety and autonomy, living arrangements, financial management -- along with others concerning planning for the future, can be resolved in mediation without court involvement.

When the dispute is over the need for a guardian, the primary issue often presents as one of safety versus autonomy. Does this adult have the right to make her or his own choices and decisions if others feel those decisions are unwise and will impact her or his safety? To what extent is an older adult allowed to make what others may consider to be "bad" decisions? Are family members attempting to control decisions that should not be theirs to make? For the court, the question is whether there is sufficient evidence to show that the person meets the legal definition of incapacity. In mediation, a legal finding of capacity or incapacity is not the issue. Rather, the issue may be whether there are ways that a person can reduce risks to health and safety within a context of dignified autonomy. Other issues in dispute may concern the type or level of care and assistance a person might need and should receive, who will provide services/care to the extent they are needed, where a person will live, how money will be spent or invested and who will be involved in decisions about money, or what medical treatment will be given.

D. Essential Policies and Limits for Mediation in Guardianship Cases

While we saw much promise in mediation as we began to test it, we also recognized it needed to be approached very carefully, and special policies and procedures are needed to address the unique issues that guardianship cases present. While time and space do not allow discussion here, major issues are highlighted and several forms which provide more detail are included in the appendices.

Perhaps most important is to recognize what mediation does and does not do. It does help older persons and their families address underlying issues and disputes described in the previous section. It does not address the legal question of capacity or incapacity -- only the court makes that decision. Equally important is to recognize that not all guardianship cases are appropriate for mediation, and not all cases need or can even use mediation. We believe that cases inappropriate for mediation are those where domestic abuse or substance abuse are involved, where an emergency decision is needed by a court, where the parties exhibit volatile or extremely hostile behavior, or when the possibility of coercion or intimidation of a vulnerable party exists. (See appendix for a sample case acceptance and abuse reporting policy.)

There are significant and challenging issues regarding protection of respondents and

respondents' rights that must be addressed in guardianship cases. When a petition is filed, an allegation is made that the respondent is legally incapacitated and unable to fully comprehend or make his or her own decisions about personal and/or financial affairs. This raises questions about the capacity of the respondent to participate and about balance of power in guardianship mediation. This requires addressing two related issues. One is providing necessary support and accommodation for meaningful participation by the vulnerable adult/respondent so that he/she truly has a voice in the process. While this is important in any mediation, it is particularly important where one is alleged to be incapacitated. Second is providing the assistance necessary to protect against undue pressure, and manipulation in the mediation and to assure that vulnerable adults understand the meaning and consequences of any agreement they enter into or that they have adequate advocacy to assure such understanding. Essentially, in the absence of a very clear and knowing waiver, mediation should never be used in a way that will reduce the rights otherwise available to any party, but particularly the vulnerable adult/respondent. (See appendix for a sample policy on protection of respondent rights.)

Another critical issue is that of confidentiality and the sharing of information. It is extremely important to determine what laws/rules exist that apply to mediation in guardianship, and within the parameter of those rules to determine what information can/cannot be shared, by whom, and in what situations. Exceptions to confidentiality also need to be considered, particularly in light of state laws that require reporting of abuse, neglect or exploitation of elders/vulnerable adults and parties need to be notified prior to the mediation of any exceptions to confidentiality. (A sample "agreement to mediate" form which enumerates several exceptions to confidentiality is included as an Appendix.)

E. Family Caregiver Mediation: The Current Initiative

As our experience with guardianship mediation grew, we became increasingly aware of the importance of getting to older persons and their families early, before they are on the court house steps -- before the petition has been filed. In handling post-petition cases, we found that the act of filing a petition can alienate the respondent and/or other family members, and entrench people in their positions. Having received a court paper alleging that he or she is "legally incapacitated" may so anger or upset the respondent that rational discussion is extremely difficult. Once attorneys are a part of the picture, parties may become more confrontational or adversarial. Since the court process emphasizes the legal issues, it can make people less open to discussing underlying issues and needs.

Further in analyzing the kinds of underlying issues and disputes that often lead to a guardianship petition, and that were the issues being mediated, it was clear that many of them are, in fact, family caregiver issues. It seemed that if mediation could be used early on, to assist older persons and family caregivers in addressing problems and disputes that arise as they face the physical, emotional and financial demands of caregiving, later resort to guardianship might be avoided. This coincided with the growing recognition by Congress and all levels of the aging network that more needs to be done to provide support for family caregivers, and that there is a need to test new and innovative support services. Knowing that caregiving is extremely stressful, requires very difficult decisions, and that those decisions often erupt into disputes with the elder and/or other family members, we felt that mediation had great potential for reducing

tension and pressure. It could help families address their disagreements and move beyond them to explore mutually agreeable solutions. We therefore proposed and received funding from the Administration on Aging to test mediation as a support service for elders and family caregivers.

Caregiver Mediation is now being tested in three sites: SE Michigan with our Area Agency on Aging 1B, the Atlanta area of Georgia, and the Champlain Valley area of Vermont. (Brochures on the project have been provided.) One of the greatest challenges is to get mediation recognized as a potentially valuable caregiver support. At this point, it is not on the radar screen for many in the aging network who work with family caregivers and could be referral sources. Our initial efforts have therefore been directed to educating potential referral sources, and generating support and referrals. While we are still in the early stages, the response has been extremely positive. We continue to work with the courts and attorneys because many caregiver cases have already reached the point where guardianship petitions are filed. But based on early learning and input from the aging network and users of the service, we have changed the way we describe the service. Instead of calling it "caregiver mediation," which can sound legalistic and threatening, we now call it "*family caregiver mediation and shared decision making services.*" This puts the focus on person-centered *and* family-centered planning and recognizes the importance of a neutral facilitator helping *all* parties address their needs and concerns. The hope is that this slight shift in focus will make mediation a more valuable and empowering support service for both caregivers and care recipients. An APS worker who was involved in one of the mediated cases stated that, in three hours, mediation accomplished more in bringing the family together and working toward a common goal, than she had been able to accomplish in over a year.

Assuming it succeeds, our long-term goal is to make *family caregiver mediation and shared decision making services* a part of the mainstream caregiver support system. We are delighted at the opportunity to share early news of the project with the Committee. Our hope is that Congress and the administration will recognize the importance of early mediation in caregiver situations and support it, not only as part of the national caregiver support initiative but also in an effort to avoid unnecessary guardianship petitions.

PART II. ADVANCE PLANNING FOR LESS RESTRICTIVE ALTERNATIVES TO GUARDIANSHIP

Beyond considering mediation as an alternative to the court process in guardianship cases, it is extremely important to educate and encourage not only older persons, but adults of any age to plan in advance for the possibility that someone else may need to take over the management of their personal and /or financial affairs. The limited statistics we have indicate that few people do such contingency planning. Yet without it, if one does become incapable of handling their own affairs and making their own decisions, the most restrictive form of surrogate intervention -- guardianship -- is all to likely to be imposed.

The advance planning mechanisms discussed below are divided into two broad categories: (1) Health Care Decision Making Alternatives and (2) Property/Financial Management Alternatives. The various mechanisms falling under each of these categories will be briefly described with a short discussion of the advantages and disadvantages.

A. Health Care Decision-Making Alternatives

A very common trigger for a guardianship petition over an older person is the need for a medical decision maker when a health care provider is concerned that the individual is not capable of making his or her own decisions. In such cases, advance directives offer important alternatives to guardianship. These are formal documents that provide a way for individuals to retain control of health care decision-making in the event of future incapacity or inability to give informed consent. Also, because some states limit a guardian's ability to make certain medical treatment decisions -- especially decisions to refuse life-prolonging treatment -- advance directives may be important even when an individual is already under guardianship.

While the likelihood of accidents or diseases that interfere with decision-making abilities may be greater among our nation's elders, they can occur at any age. And without advance planning, the results can be tragic. A vivid reminder of the tremendous toll this can take on a family, was provided recently with the release of a book, *Long Goodbye: The Deaths of Nancy Cruzan.* It was authored by William Colby, attorney for Nancy Cruzan whose medical treatment case reached the United States Supreme Court. Nancy Cruzan was 25 years old when in January 1983, she suffered severe and permanent brain damage from an automobile accident, and moved into what is commonly referred to as a persistent vegetative state. For eight years, she lay in a Missouri hospital kept alive by a surgically-implanted feeding tube. In 1987, her parents requested that the tube be removed, but the Missouri Supreme Court refused, stating that "*no person can assume that choice for an incompetent in the absence of the formalities required under Missouri's living will statute or the clear and convincing inherently reliable evidence absent here.* The Cruzans appealed to the US Supreme Court asserting the Missouri was violating Nancy's constitutional rights. On June 25, 1990, the high court found that nothing in the US Constitution prohibits a state from requiring "clear and convincing" evidence before allowing a surrogate to discontinue treatment. Nancy Cruzan had talked about her desires if she could not "*live at least halfway normally,*" but she had not written a living will which would have provided the "clear and convincing evidence" demanded.

While the Supreme Court decision did not lessen the Cruzan family's tragedy, it did do a number of other things. It recognized that a *competent* individual has the right to refuse treatment, balanced against the state's interest in preserving the lives of its citizens, basing this right on the liberty interest created by the 14th Amendment. One of the most important messages in Cruzan was the Court's clear recognition of the value of advance directives to ensure that one's wishes regarding treatment are clearly known. And this important message was highlighted for the nation through the publicity generated by this crucial court decision.

1. The Federal Patient Self Determination Act

As you all know, the Cruzan case also led Congress to become concerned about individuals' rights pertaining to medical treatment. In 1990, you passed the Patient Self Determination Act[4] (PSDA) to enhance awareness of the right to make advance directives. The

[4] The PSDA was enacted as §§4206, 4751 of the Omnibus Budget Reconciliation Act of 1990, and went into effect on Dec. 1, 1991. Pub. L. No. 101-508, 104 Stat. 1388 (1990) (codified as amended at 42 USC §§ 1395cc, 1396a).

PSDA was the first significant piece of federal legislation that addresses medical decision-making. It does not dictate individual state law regarding advance directives in any way. It does however, require hospitals, nursing homes, home health agencies, HMOs, and hospices that receive Medicaid or Medicare funds to inform all patients, in writing at the time of admission or beginning of services of their right: (1) to refuse or accept medical or surgical treatment, even if refusal would result in death; (2) to make an advance directive; and (3) not to make an advance directive for health care. In addition, it requires health care providers to document whether the individual has executed an advance directive, but forbids them from conditioning admission or receipt of services on the execution of an advance directive. The PSDA and its requirements received substantial attention at the time the Cruzan case was in the news. It has received much less in recent years, and efforts are needed to highlight, once again, this important legislation.

2. Forms of Advance Directives for Health Care

Advance directives take two basic forms: (1) a living will , and (2) a durable power of attorney for health care, also known as a health care proxy. Neither goes into effect until the person loses the ability to make medical treatment decisions. Executing an advance directive provides an opportunity to make well-considered judgments about end-of-life care and other difficult medical situations. Every state has legislation that authorizes the use of some sort of advance directive, and many have laws authorizing both types. A third source of health care decision-making comes in the form of health care or family consent laws. Because these do not involve advance planning and, in this author's view, have significant disadvantages, they are not addressed here.

Below is an overview of the two types of advance directive. Because state statutes vary in restrictiveness and technical requirements, state-specific laws should always be examined.

Living Will: A living will allows an individual (the principal), while competent, to express in writing his or her wish to have life-sustaining treatment withdrawn or withheld if he or she is in a terminal condition and no longer able to make health care decisions. While some laws are written from the perspective that the principal has the right to direct that medical treatment be withheld/withdrawn, others allow the principal to specify that treatments be provided as well as withdrawn. For a living will to become effective, the principal, in many states, must be in a "terminal condition," and the laws vary considerably in how they define "terminal condition". A typical definition defines it as a condition that "within reasonable medical judgment, would produce death and for which the application of life-sustaining procedures would serve only to postpone the moment of death." Other definitions can be extremely restrictive, maintaining that a terminal condition exists only if death will occur "even with the administration of life-sustaining treatment." Some states, with more liberal laws, may include both terminal condition and persistent vegetative state as qualifying conditions for a living will to become effective. Living will laws also vary in how they define "life-sustaining procedure." Medications and procedures which provide for the alleviation of the patient's pain usually cannot be withdrawn. In addition, some laws explicitly include the right to withdraw or withhold artificial nutrition and hydration, while others do not directly address this issue, and a few statutes prohibit it. Generally, living wills require health care providers to follow the instructions in a living will or to transfer the patient to a provider who will. They also protect health care providers from being

sued or criminally prosecuted for following the instructions in a living will. Although living wills are legally binding only in states that have legislation authorizing them, they are often helpful in decision-making for families or health care personnel in states without such laws.

Durable Power of Attorney for Health Care (DPA-HC): The DPA-HC (also known as "health care proxy" or "appointment of a health care agent," or in Michigan, a "patient advocate") is a durable power of attorney which gives the appointed agent or advocate the power to make health care decisions on behalf of the principal. While it is a variation of the ordinary durable power of attorney ("DPA") discussed below, most states have a separate DPA-HC statute, while a few incorporate it into their general power of attorney statute. A recent legislative trend is to incorporate both the DPA-HC and the living will into a combined advance directive law. The DPA-HC goes beyond what can be accomplished through a living will. It provides the principal with the means of maximizing the right to control medical decision-making by designating another person to act as agent to make his or her health care decisions if he or she becomes unable to do so. The scope of the agent's power can be very broad or limited and specific. This power takes effect whenever the principal loses the ability to make his or her own decisions, thus allowing the agent to direct a range of medical decisions, including, but not limited to, those involving life-sustaining treatment. While some states have no restrictions on who may serve as agent, others do impose limits.

Because the DPA-HC goes into effect upon the principal's incapacity, many states' laws include provisions that mandate a specific method for making the determination of incapacity, *e.g.,* two physicians must testify in writing that the individual is unable to give informed consent. In other states, however, it is important to carefully draft the "trigger clause." If the clause only states that the DPA-HC will become effective upon incapacity of the principal, without other direction, there is the danger that the principal will be declared incapacitated too early, or that it will be necessary to use the court system for adjudication of the issue. The document, therefore, should include both a clear definition of incapacity, and a designation of the individual(s) who will make the determination of incapacity. Not all DPA-HC statutes explicitly allow withholding or withdrawal of life-sustaining treatment, but this does not mean that such an action, if directed by the principal, would not be within the rights of the agent. Additionally, whether or not the statute expressly permits it, the DPA-HC may contain written instructions regarding the manner in which the principal wishes to be treated, *e.g.,* whether life-sustaining procedures should be administered when the patient is in a terminal condition. Because of its flexibility, a DPA-HC is a significant and valuable tool in controlling one's health care in the event of temporary or permanent incapacity.

Executing an Advance Directive for Health Care & Choosing an Agent

For an advance directive to be most beneficial, thought and time must be invested in drafting it so that it can provide clear and appropriate direction. Because medical treatment decisions are based on an individual's beliefs, preferences, and values, these should be seriously considered before writing an advance directive. Individuals need to consider the possibility that their interests while competent may or may not be the same interests as when incompetent. It is important to seriously think about this possible conflict in order to draft advance directives that truly reflect deeply held values. In designating an agent under a DPA-HA, the principal should

thoroughly discuss these wishes and values with that person. To assure that the principal's health care desires are honored it is best if the principal also discusses those directions with family members, friends, clergy, and physicians who will be part of the decision-making process. Any reluctance on the part of the physician to follow the principal's stated desires should be discussed. If the physician is indeed unwilling to comply with the principal's wishes, for ethical or other reasons, the principal should consider his or her options, including changing physicians. If these people are aware of the individual's wishes they are less likely to challenge the living will or the agent's power to make medical decisions. State laws vary considerably in the technical requirements for executing advance directives, and in the form they are to take. While an attorney is not necessary to draft an advance directive, it may be wise to consult an expert in this area who can ensure that it complies with state's technical requirements. In many states the principal must sign and date the advance directive in the presence of two witnesses who must also sign. Some states also require that a living will be notarized and/or recorded. It is important to note that while compliance with legal requirements is crucial, the principal's primary goal should be to create a document that states her wishes and reflects her values. Further, to ensure that the advance directive continues to express the individual's current wishes, it should be reviewed and updated regularly.

The principal should notify family and physician of the existence of the living will and/or DPA-HC and ask to have a copy placed in his or her medical records. In addition, the principal should keep a copy with other important papers, be sure the agent has a copy and consider asking a close friend or relative, and perhaps a lawyer, to keep a copy. Most states provide that implementation of an individual's living will does not constitute suicide under the laws of the state, and therefore does not invalidate life insurance policies.

Enforcement in Other Jurisdictions

Many individuals are concerned about whether an advance directive executed in one state is valid in another state. Because states vary significantly as to what they allow, there is no clear answer. Approximately two-thirds of state statutes include a "portability clause" that specifically provides that advance directives executed in compliance with the law of other states are valid in the principal state. Of these, some states will honor the directives to the full extent allowed by the law of the state in which it was executed, while others honor them only to the extent allowed by the principal state's law. Some states only accept advance directives prepared in compliance with that state's own law, and still others do not address this issue at all. To avoid later complications, individuals who have executed an advance directive in their primary state of residence should review the law of any other state in which they spend considerable time.

Advantages of Advance Directives

Both the durable power of attorney for health care and the living will are valuable tools for retaining control of one's medical care after incapacity. They increase the likelihood that health care decisions will be made privately, not in court, and that the principal's values and wishes will direct the decisions made. Furthermore, the individual remains in control of the decision-making process as long as he or she is competent; his or her decision cannot be overridden. The absence of any legal direction in medical decision-making creates problems

when there is a disagreement among family members or between family and doctors. In addition, some doctors, fearing possible litigation, may refuse to proceed with medical treatment unless a decision-maker has been legally designated which may require adjourning to the courtroom for a judicial determination or appointment of a guardian.

Living Will: The primary advantage of a living will is that it provides written evidence of a patient's preferences, thus giving a measure of control that would not exist if no instructions were left. Further, if properly prepared, it legally binds doctors to respect a patient's wishes, or to find a doctor who can, and it protects medical caregivers from civil and criminal liability for following its instructions. Finally, even if the patient has no close friends or relatives to whom she wishes to give a DPA-HC, a living will provides the opportunity to ensure that one's health care wishes will be followed in those situations covered by a living will.

Durable Power of Attorney for Health Care: The DPA-HC can be a particularly powerful and meaningful document, because it allows the principal to maintain the maximum amount of autonomy. Prior to incapacity a patient is unable to foresee all possible medical circumstances that might arise. With the use of a DPA-HC, the principal may hand pick a trusted friend or relative to act as medical decision-maker, and then thoroughly discuss his or her values and treatment wishes with this person. When called upon to make a medical decision, the agent can talk with the doctors about the alternatives, assess the pros and cons, and make the appropriate decision based upon the principal's wishes.

Disadvantages of Advance Directives

One advantage of advance directives is also a disadvantage. While advance directive laws have provided increasingly complex safeguards to prevent abuses from occurring and to ensure that any grant of authority is voluntary, these laws may also deter individuals from executing a directive because they are so complex and legalistic. In addition, as noted earlier, advance directives valid in one state may not be valid in other states. To prevent this from happening, individuals should review the law of any state in which they spend considerable time before drafting an advance directive.

Living Will: The most significant weakness of many living will laws is that they apply in restrictive circumstances, *i.e.*, the principal must be in a terminal condition. Living will statutes do not provide direction in the frequent situations where the principal is unable to make decisions but is not facing the end of life. Overall, they are static documents, becoming operational only in limited circumstances and cannot be adapted to specific situations. Some recent living will statutes allow the principal to name someone to make life-sustaining treatment decisions if he or she becomes terminally ill or is in a persistent vegetative state. But, again, if this designation is made in a living will, the designated person can only act in limited circumstances. Also, as noted above, some living will laws are also limited in terms of the treatments that may be withdrawn.

Durable Power of Attorney for Health Care: The primary disadvantage of the DPA-HC is that some statutes do not explicitly authorize the withdrawal or withholding of life-sustaining treatment. However, in a properly executed DPA-HC, written instructions to withdraw life-sustaining treatment if the principal is in a terminal condition would likely be given significant

weight. As with the regular durable power of attorney, broad powers may be granted to the agent with a DPA-HC, opening the door for abuse by the agent. However, this risk can usually be controlled with the inclusion of detailed instructions about wanted and unwanted treatments. Finally, the existence of a DPA-HC does not always relieve the physician or other health care provider from the threat of legal action by family members.[5] Some nursing homes and health care facilities may then be unwilling to follow the patient's wishes, as presented in a DPA-HC.

B. Property/Financial Management Alternatives

Beyond health care decisions, another very common trigger for a guardianship petition is an older person's diminishing capacity to handle financial affairs. There are a number of alternative arrangements, short of guardianship or conservatorship, that can be established to handle various types of financial matters. These include: money management alternatives such as bill paying services and utility shut-off protection plans, joint property arrangements, durable powers of attorney, trusts, and Representative Payee. Time and space do not permit discussion of all of these; the discussion here will be limited to the one that is perhaps most important -- the durable power of attorney.

The major caution that applies to any of the alternative arrangements is that, unlike guardianship and conservatorship, there is no court involvement or oversight.

Durable Powers of Attorney

A power of attorney is a written document by which one person (the "principal") appoints another as his agent (or "attorney-in-fact") and confers upon that agent the authority to act in his place for the purposes set forth in the writing. Despite the appellation, the agent/attorney-in-fact need not be a lawyer.[6] The agent is a fiduciary[7] of the principal, and as such, is legally required to act with due care and within the bounds established by the power of attorney. This requirement allows the principal to sue the agent if he breaches his duty. Except in the medical power of attorney context, discussed above, the power of attorney generally gives the agent the power to exert control only over the principal's property, not his person.

For a power of attorney to be valid, the principal must be mentally competent at the time the power is executed; i.e., the principal must have the capacity to contract.[8] Thus, powers of attorney, while potent planning devices, can do nothing to organize the affairs of one who is already incompetent. They must be executed in advance of incompetence. Powers of attorney remove none of the principal's power. As long as the principal is competent, his actions always supersede those of the agent and he may contract or buy and sell things, despite any actions of

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[5] Kathleen H. Wilber and Sandra L. Reynolds, *Rethinking Alternatives to Guardianship*, 35 THE GERONTOLOGIST, 248, 250 (1995).

[6] The term "attorney" originally meant, "one acting on behalf of another." In the power of attorney context, that meaning remains accurate.

[7] A fiduciary is "[a] person having [a] duty, created by [an] undertaking, to act primarily for another's benefit in matters connected with such an undertaking." BLACK'S LAW DICTIONARY 625 (6th ed. 1990).

[8] Mental capacity is the ability to understand the nature and effect of the individual's actions; e.g., the ability to understand the nature of the document and the significance of signing it.

the agent. Similarly, the competent principal is always free to revoke the power of attorney. It is always a matter of good practice, however, to notify anyone who is likely to rely on the power of attorney, such as a bank, pension funds, etc., of the revocation of the power.

Forms of Powers of Attorney

Powers of attorney allow for a good deal of flexibility in determining the boundaries and the duration of the agent's power. Subject to state law, powers of attorney can be limited or general, ongoing or of a fixed duration, springing or already operating. The definitions and descriptions of the various forms of powers of attorney are delineated below.

The **non-durable power of attorney** is based completely on rules of agency. Under the common law rules of agency, the power of the agent ends upon the incompetence or death of the principal. Accordingly, this power of attorney is non-durable, and is automatically terminated upon the subsequent incapacity of the principal. This power is useful in authorizing the handling of short-term financial and business matters when the principal is not available. However, this power is not a useful planning tool for an individual concerned about future incapacity. Because it is limited in this way, the non-durable power of attorney has now been supplemented with the durable power of attorney in every jurisdiction.

As its name suggests, a **durable power of attorney** ("DPA") generally continues to operate after incompetence, or becomes effective upon incompetence (the "springing" power discussed below). Every jurisdiction has a statutory provision that allows for the creation of this device. In the majority of states, a DPA is created by the use of language in the writing which clearly and explicitly manifests the principal's intention to have the power continue after the onset of incapacity or mental disability. It is this power of attorney which provides a viable alternative to guardianship; therefore, the remainder of this discussion will focus on the DPA.

A DPA may be adapted to suit the person's particular needs through the use of general and limited DPAs. A **general DPA** grants the agent very broad powers, allowing the agent to conduct all business which the principal could do herself or himself. Typically, this might include handling bank accounts, paying bills, handling real estate transactions, filing taxes, prosecuting or settling claims, running a business, or handling stock transactions. Some statutes, however, limit the agent's power to perform certain activities. A **limited or special DPA** grants the agent only those powers specifically enumerated in the document. Examples include managing a rental apartment while the principal is out of town, handling the principal's banking matters, and selling a house for the principal.

Differences Among Statutes

The DPA statutes in the 50 states and D.C. are not uniform. Although the majority of DPA statutes are based on the Uniform Probate Code (UPC) (1975) or The Uniform Durable Power of Attorney Act (1979), there are several states with nonconforming statutes. Therefore, while all jurisdictions provide for the creation of DPAs, there is much variance among the laws regarding execution requirements, "springing powers," statutory short forms, and limits on the

authority granted to the agent. Prior to any consideration of implementing a DPA it is important that a person check his/her own state statute and relevant case law.

Establishing a Durable Power of Attorney

In general, DPAs must be executed with substantial formalities. While DPAs, like wills, can be written by a non-lawyer, it is advisable to have them drafted by a lawyer. This will help to ensure that the power addresses the principal's particular needs. and meets state requirements. Generally, the documents must be signed and notarized. Sometimes, they must be witnessed. In drafting a DPA it is important not only to check the law of the state of the principal's residence, but also the laws of any jurisdiction where the power is likely to be used. In this way the drafter can be sure that the power of attorney conforms to the requirements of any jurisdiction in which it may need to be effective.

Finally, it is important to use DPA forms provided by banks and other financial institutions, if there is any probability that the agent will be dealing with them. Failure to do so may result in the bank's refusal to honor the power, defeating the principal's original purpose in granting the power.

Choosing the Agent

The principal may choose the agent. There are generally no qualifications to be an agent; some state laws, however, limit the principal's choice to specific categories of individuals, such as family members. Because there is no court supervision of the agent in many states, it is imperative that the principal make a thoughtful and careful choice. It is a good idea to designate a successor agent, in case the primary one is unable to act. Any compensation that the agent will receive should be determined in advance by the principal and the agent.

Effective Date of Power

Without the inclusion of any provisions to the contrary, it is presumed that the agent's power begins at the time the power of attorney is signed. However, the document may provide for commencement of the power at some future date or event. This is known as a **springing power of attorney**. To our knowledge, although no statute expressly prohibits a springing power of attorney, some are silent regarding this power.

This device can be useful in planning for the possibility of incompetence. An individual who does not wish to give up control over his affairs unless he becomes incompetent can create a springing power of attorney, to become effective only upon the occurrence of incapacity. If this type of DPA is used, the document should specify the meaning of incapacity and who will make the determination that the principal is indeed incapacitated. This "trigger" clause should be drafted with great care. If the clause merely states that the power of attorney shall become effective upon the incapacity of the principal, there is serious danger that control will be removed from the principal too soon or too late, or that it will be necessary to turn to the courts for an adjudication of incompetence, which is what the power of attorney is meant to avoid. The principal should carefully consider what criteria he or she wishes to have used in order to bring

the power into operation. As an example, the power might be triggered when a physician and two other persons designated by the principal agree that the principal is incapacitated. It is probably not a good idea to leave the determination of incompetence up to the individual who will be acting as agent. Whatever the criteria, it is important to carefully consider and draft the trigger provision.

Revocation/Termination

As mentioned above, the competent principal is always free to revoke the DPA. However, the methods of revocation vary among the states and are often unclear. The most common way to revoke a DPA is to destroy the document and then notify parties, who are likely to have dealings with the agent, of the revocation. If original or duplicate copies of the DPA are in the possession of the agent it is advisable to send a certified letter (return receipt requested) to the agent, notifying him or her of the revocation of the DPA. This letter is called a "notice of revocation." It should be signed by the principal and notarized. It is also a good idea to have witnesses. If the original DPA was recorded, the notice of revocation should be recorded as well. Even if the original power was not recorded, it is a good idea to record the notice of revocation; recording is the best way to notify all parties involved of the revocation. Copies of this revocation letter should also be sent to anyone who might be expected to rely on the DPA.

DPAs may also be terminated in at least three other ways. First, the principal's death or the agent's knowledge of the principal's death automatically destroys the power of the agent.[9] Secondly, in some states a DPA is destroyed upon the appointment of a guardian for the principal. Finally, the document itself may specify the time at which the power shall terminate. This can either be upon the occurrence of an event, *e.g.* "this power shall remain in effect until I return to my residence from my trip to Pakistan" or upon a date certain, *e.g.* December 25, 2003.

Advantages of the Durable Power of Attorney

The DPA is probably the simplest and least expensive way to plan in advance to avoid the possible future necessity of a guardian. It affords the individual flexibility and control over the decisions that will be made for him/her. She/he can personally choose the decision maker rather than have that person appointed by the court. She/he can limit or broaden the scope of the decision maker's powers to suit his needs, and choose the time and the method of deciding when the substitute decision maker should take over. The durable (and non-durable) power of attorney also gives the individual the power to override any decisions made by the substitute decision maker while the principal remains competent, thereby insuring the principal retains maximum control over his affairs. In addition, the competent principal can revoke the grant of power at any time. Through the use of a DPA one is likely to avoid costly, time consuming and embarrassing litigation over guardianship.

The DPA offers advantages not found in the joint tenancy alternatives. Because the agent is a fiduciary, there is a greater obligation of due care required of him, and he is less able to use the principal's resources for his own purposes. Secondly, the DPA can allow simple money

[9] Note that many state statutes allow the agent to continue to act until he learns of the principal's death.

management, without establishing any after death distribution presumptions (as might arise with a joint bank account). Finally, DPAs allow the substitute decision maker to handle a greater range of property matters if the principal so wishes. They can be used to buy and sell property (in most jurisdictions), to file and pay taxes, to enter into other contracts, to fund *inter vivos* trusts, and to bring or defend a suit.

Disadvantages of the Durable Power of Attorney

An important limitation of the DPA is that it can only be created before the individual becomes incompetent. A DPA is void if, at the time of signing, the individual does not have the capacity to contract. This may mean that the attorney-at-law drafting a DPA must be very cautious to document his client's (i.e. the principal's) competency at the time of execution. If an attorney-at-law has a client who has periods of lucidity followed by periods of confusion (for example a client with Alzheimer's disease) it is important to have witnesses who can testify to the client's competency at the time the DPA was executed. It would be useful, in some circumstances, if at least one witness to the execution was the principal's physician; however, this is not advisable for durable powers of attorney for health care. Similarly, an audiotape or videotape of the document's signing might be good evidence of the client's competency.

Another problem of which to be wary is that many banks and other third parties will not recognize the power unless it is set out on their own forms. This can cause problems if the principal executes a DPA, becomes incompetent and the agent then tries to transact business with the bank as the agent for the principal. It is very important to be sure you have used the bank's form if the DPA is to include the power to transact banking business. In addition, there may be others, i.e. prospective purchasers of property, who will balk at the idea of transacting business with the agent.

The utility of a DPA may be limited in other ways. For instance, the agent may not possess the power to perform certain acts that later become necessary. Without careful planning, guardianship may be the only possible course of action. Further, if a guardian is appointed, many statutes provide that the DPA terminates automatically, and the guardian retains all decision-making power.

One of the advantages of a DPA is also one of its disadvantages, depending on the perspective taken. Because the principal always retains the power to supersede the agent's actions, the power may be an ineffective safeguard for the individual who, while legally competent, may go through very belligerent phases, such as sometimes happens with an Alzheimer's patient. This principal can override the actions of the agent unless the agent goes to court to have the principal adjudicated incompetent. A different result is possible with the use of a springing power of attorney which clearly states those conditions upon which the principal is deemed incompetent and his authority is overridden.

However, the use of a springing power of attorney also may have disadvantages. For instance, if a springing power is based on incapacity, the process for determining the principal's incapacity may be as burdensome as a guardianship proceeding, and may entail expenditures of time and money that the principal originally sought to avoid. In addition, if capacity must be

determined for the power to take effect, this could delay action that needs to be taken immediately.

Finally and most important, it is essential to note that the DPA is open to possible abuse by the agent, and numerous cases of such abuse have been reported. Although the agent owes the principal a fiduciary duty, that duty will not be put in issue unless raised by the principal or a third party. There is very little formal regulation or monitoring of DPAs. If the principal is incompetent and in the care of the agent, there is always the danger that the agent may abuse the powers granted to him. In practice very few elderly principals are prepared to take the agent (frequently a child or other close relative) to court. One way to guard against the power being abused is to thoroughly explain to the agent all the duties, responsibilities and legal liabilities connected with the power. To impress the responsibilities upon the agent, it might even be good to draw up a second document which enumerates those duties and ask the agent to acknowledge those duties, by signing this document. Also, because the DPA is so flexible, it is possible to write provisions into the document requiring accountings, bonding and insurance.

Conclusion

Although, as noted at the start of this section, there are other important alternatives that exist for property/financial management, time and space do not allow for discussion here.

The CHAIRMAN. Let us now turn to Robin Warjone of Seattle. I mentioned earlier that she was the subject of a guardianship petition filed by her three children.

Please proceed.

STATEMENT OF ROBIN A. WARJONE, SEATTLE, WA

Ms. WARJONE. Hi, everybody.

In May 2000, I was 56 years old with grown children 30, 31, and 26. I lived in my own home with a high yearly income of about $140,000 and a vigorous investing program which included T-bills, IRAs, and a small portfolio.

I would have had $7,000 minimum each month after I was 65. Now I will have less than $2,000.

After my divorce, I left behind an exhausting life as a professional executive wife, and I stopped entertaining, gave up as much cooking and cleaning as I could possibly manage. I was living very happily in my messy house. I had a small antique shop in a large mall. I was gathering items for the shop, which I enjoyed, and that made for dozens of boxes around my house.

I had a new man friend. I remember how often the stars spread in all their glory across the night sky that winter. It was the happiest year I had had in 15 years.

Today, after being nearly destroyed by a financially and emotionally exhausting guardianship law suit which lasted almost 11 months, from May 18, 2000 until March 29, 2001, it cost me nearly all I had.

The first hint that trouble was coming in the spring of 2000, was when my lawyer completed revision of my revocable trust and phoned my three children to come in and sign it. They refused, saying, "Our lawyers advised us against it," and "our lawyers said it will make us responsible for your debts." Wow, I thought, pretty rotten financial advice. Full inheritance, without probate, is not such a bad deal.

On May 18, 2000, a ratty little man rang my doorbell and thrust a lawsuit into my hands. It was a Petition for Guardianship naming me as an "alleged incapacitated person" and listing my three children as the plaintiffs. Of course, I was horrified.

I knew they had not read the statute, and they had not done their homework. They must have had some pretty ruthless lawyers urging them into this extreme, almost violent, action.

Later, the kids said things like: "We did not want to have to take care of you when you were old." One volunteered: "I asked the lawyers how we could get control of our mother, and they said that that it wasn't possible except by one method—the Guardianship Suit."

I call this the "Capone Trick"—they could not get Al Capone on racketeering or murder or prohibition violations, they could get him by income tax evasion.

What does this tell you about the guardianship laws? Diane Armstrong's book, "The Retirement Nightmare," has plenty of horror stories about the "backdoor" approach.

A court appointment was made for the Case Investigator, whom they call the "G.A.L." or "guardian ad litem." I did not get to be the defendant. I called the "A.I.P." alleged incapacitated person.

I hired a topnotch private law firm, because I had just learned that almost no one escapes a guardianship perhaps 6 percent, mostly those who have the time and money to resist.

Diane Armstrong and I went to college together. The day that the petition was served me, my Alumni Bulletin from Scripps College came, and Diane's book about contested guardianship was reviewed. I called her immediately and she worked with my attorneys throughout the almost one year that this system held me up.

If you have not looked at those graphics over there, really, really look now. This can happen to anyone in this room, and that is what you lose. This system is so corrupt—and I do not mean money-under-the-table corrupt the system has no checks and balances; it has no oversight. It is so terribly unorganized that it operates on its own, in a little void. In Seattle it is a department of the Washington State Superior Court, called "Ex Parte and Probate," and it is a law unto itself. We had no appeal system to get me out of it.

In my report, I have little checks, and there are dozens of them here—how disorganized and therefore abusive and corrupt, the system is, I have just gone through this. So take a minute and count those checks.

I do not think you are a person if your legal identity is taken away, which happens under this law. You do not exist under the law without your rights. If you do not exist under the law, you are a slave in ancient Rome or the Old South, or you are somebody in a concentration camp. You do not exist. Therefore, whether you are capacitated or incapacitated does not matter, because you can be abused either way.

When I got the attorneys, I said "The first thing is that the G.A.L., guardian ad litem, cannot talk to me unless one of you guys is there." I had the good sense to do that. The next day, the G.A.L. comes to my door and tried to get in; he was ignoring the injunction.

The G.A.L. had to read me the petition, the law, which had just been served to me. That is required in Washington State. We did it in my lawyers' offices. When he is through reading it, Pam leans forward and says, "Well, tell me, Mr. W., how are you going to go about this investigation? The sole decision on whether you are going to have guardianship or not is based on a single report by this investigator—that is it. There is one other thing, but it does not necessarily work.

OK. She leans forward and says, "How are you going to go about this investigation?"

The G.A.L. is an attorney, but he answers, "Well, by the nature of the report I have to write, I rely almost solely on hearsay and gossip for my information." Everybody's necks at that table went, "What? Did he just say hearsay and gossip? But he is an attorney, and this is supposed to be a legal matter!"

One of leading judges—and they call them "commissioners"—they make nice language one of the commissioners sitting on a panel discussion recently said, "We are not so much a court as a social agency." Wait a minute. You are not a social agency. You are a court.

According to the statute, you are supposed to be heard. There is a hearing 30 days after you are served the petition. Hopefully, a

decision will be made. The G.A.L. canceled that meeting; he was busy. He did not even begin his research on me until August. His research eventually included talking to my accountant, my doctor, the trustee of my revocable trust—all those people. He did not even start until we were mostly through the summer.

I had good attorneys. By the middle of July, I have spent $20,000. In July, I had to sell the first of my major investments. Twenty thousand dollars went to the attorneys, and the rest I used to buy a rental house in a nice neighborhood, I figured that financially, I could recover enough on the rental to make up for the interest income I lost by selling the T-bill.

My children urged the guardian ad litem and their attorneys, to ask for a special hearing to stop me from buying the house. My attorneys did a precedent search, which had to be done by hand, because the stuff was so old that it was not on the computer.

The CHAIRMAN. Robin, you are about 5 minutes over. If we could ask you to shape your time a little.

Ms. WARJONE. I am so sorry. OK, I will.

The CHAIRMAN. Thank you.

Ms. WARJONE. They found a precedent in 1852 which ruled that anyone who has not been convicted of a guardianship still has all their civil rights.

The trial went on in that fashion. The court abused every law, every custom. It is here if you want to read it; and I recommend Diane's book. So thanks, everybody.

The CHAIRMAN. Well, Robin, we do appreciate you being here, and I will have some questions, but I have to believe that you viewed that as a living nightmare.

We thank you very much for that testimony.

[The prepared statement of Ms. Warjone follows:]

United States Senate

Special Committee on Aging

February 11, 2003

Testimony of Robin Adair Warjone
Seattle, Washington

Matter Subject

A very competent person, aged 56, defendant in suit requesting a guardianship be placed on her as an "alleged incapacitated person lacking the capacity to manage her person or estate"; and describing her held as a sort of hostage by the guardianship process for 11 months, totally destroying her financially, and making her ill and 'sleepless' (in Seattle) for almost 3 years, now!!

In May 2000 I was 56 years old with grown children - 30, 31, and 26. I lived in my own home with a high yearly income ($140,000), and a vigorous investing program including T-Bills, IRAs and a small portfolio. I would have had $7,000 each month after I was 65.

After my divorce I'd left behind an exhausting life as a "professional" executive wife and I stopped entertaining, and gave up as much cooking and cleaning as I could possibly manage. And I was living very happily in my messy house, I had a small antique shop in a large mall and it was the gathering items for the shop which I enjoyed_and that made for dozens of boxes of "stuff " piled up ready to label and haul to my shop. I had a new man friend. I remember how often the stars were spread in all their glory across the night sky that winter. I was perhaps as happy as I'd been in 15 years!

Today after being, nearly destroyed financially, emotionally by a guardianship suit which lasted from May 18, 2000 until March 29, 2001 and cost me all I had: Portfolio, IRAs, T-Bills. My income ends in 5 years and I will have nearly nothing after that time.

In my typed Addenda "A" I describe some of the policies of the guardianship court and process, and some of the actions of its agent (the court appointed investigator _ G.A.L. (Guardian Ad Litem)) which caused the wreckage of my life. Here I will discuss even worse abuses of the system against me.

I had the first hint that trouble was coming in spring 2000 when my lawyer completed revision of my revocable trust and phoned my 3 children to come in and sign it. And they refused, saying "Our lawyers advised against it", and "they said it will make us responsible for your debts." Wow_I thought_pretty rotten financial advice! Full inheritance without probate isn't such a bad deal!

On May 18, 2000 A stunning and beautiful Seattle day the nightmare began. A ratty little man rang my door bell and thrust a law suit into my hands. It was a "petition for guardianship" naming me as an "alleged incapacitated person" and listing my 3 children as the plaintiffs!

I was Horrified!!
I knew they hadn't read the statute_hadn't done their homework_and must have had some pretty ruthless lawyers urging them into this extreme, almost violent action. Later they explained: "We didn't want to have to take care of you when you were old." And one volunteered: "I asked the lawyers_How we could get control of our mother? They said that was a constitutionally impossible request_except by one method: A Guardianship Suit!!" [I call this the "Capone Trick"_couldn't get him on racketeering or murder or prohibition violations: but sure could by income tax evasion!!]

What does this tell you about Guardianships? (See Diane Armstrong's book *The Retirement Nightmare* for more !!)

A court appointment was made for the case investigator. I hired a top notch private law firm because I had just learned that almost no one escapes a guardianship suit. Perhaps 6% mostly those who have the time and money to persist! And I learned that anyone may file a suit against anyone else_even if they do not know the other person; they have only to list their "Allegations" (unprovable statements against the defendant) knowing these do not have to be provable.

The guardianship court does not provide attorneys for those who cannot afford one. Now that court will decide whether a person will lose: His legal identity (part of the process the guardianship assumes as its right (ie, suspending all constitutional and civil rights and protections of a convicted defendant by fiat), as well as losing control of his person, and of his goods and assets, of his decisionmaking rights, his health decisions, his right to an Attorney, etc, etc.

See that graphic poster chart - - listing these things in the wording of the guardianship paper work)

That can happen to you - no one is immune!! It happened to me (Robin) and it can happen to you!! Also be aware there is no indictment or screening process - - you get served this paper and you come out of the gate running: There is also no review process, no oversight, and no checks and balances to the system.

Take a minute and count the checks in the margin of page three: And these are only the things you must face before the decision process begins which then determines whether you will become a person without a legal identity and completely at the mercy of others (truely at their mercy: One without a legal identity is no better than a slave in the old south or a prisoner in a concentration camp!!!)

In May I requested my Attorneys restrained the G.A.L. from talking to me without an Attorney present. In spite of this the G.A.L. rushed to my house and demanded entrance to examine my life style. I refused!

Next the G.A.L. had to read me the petition by law. So he came to my lawyers nice offices. After the reading my lawyers questioned him. First question, "Well, Mr. W., you are to write a report (one report) upon which the court will make its decision about the capacity of our client? Yes? And how do you go about doing your investigation for your report? The G.A.L. without missing a beat replied as follows: "Well, by the nature of the report, I have to rely almost solely on hearsay and gossip for my report information". Well as you can imagine all the lawyers and me found their heads snapping to attention at these words!! Can you imagine!! (and the G.A.L. was himself a lawyer!!)

Now began the G.A.L.'s harrassment of me. (See Addenda 'A') He cancelled the 30-day (after the suit was served) hearing [The logical place when the court should have thrown out the suit and apologized to me!]

The G.A.L. didn't begin his "research" on me until August, the fourth month after the law suit had been served. In addition to contacting my trustee, my doctor, my accountant, my brother_all good references. He even called my former husband_no doubt after some of that hearsay and gossip (and he did, finally and he featured it prominately when he finally wrote his first report (November!)

In July I had to sell the first (major) investment but out this unhappy experience my lawyers and I got another view of this miserable excuse for a law court. With the sale money I paid my lawyers $20,000 (2 months fees) and took the rest of the capital and I invested it in a small rental house (which I estimated would earn me an equivalent amount to replace the interest income on the other, sold investment.) But all Hell suddenly broke out!! The G.A.L. rushed to court and scheduled an emergency hearing with 4 days notice to us. The children were trying to stop buying the little house!

My lawyers did a "precedent search" which went far enough back that they found what they needed in 1852! A guardianship case where the defendant had the same problem I did. But the court ruled that an accused person retains all constitutional and civil rights!

When my lawyer explained to the court the judge (commissioner) said: "Very good work Mr. Mindrchio!" But the G.A.L. rushed the bench and yelled "I'm going to go to her mortgage broker and tell her Robin is a defendant in a guardianship case!" The commissioner spoke and enjoined the G.A.L. from doing that! (So one of my daughter's jumped up and shouted "then I'm going to go!") It wasn't a court it was a mad house!!

Do you see: Neither the G.A.L. nor the kids' lawyers knew the law! Some court! At least the commissioner who didn't know the law either made a gracious recovery!

At the end of the summer, after 2 more hearings, my Attorneys realized that the court commissioner(s) [Judges] did not know that I was the defendant: They thought I was one of the defense team! But what this illustrated was: no continuity with this court and its Judges! And without a good presiding judge for my case what protection did I have from this loose-cannon G.A.L?

My lawyers decided to appeal to the regular part of the Washington State Superior Court for a jury trial. But ther superior court sent us back to the "ex parte and probate" court and wait for that court to give its decision first. It was quite a blow!

During all these months the G.A.L. is moving from one thing to another trying anything to convict me! And meanwhile to delay. He decided he had to see my entire 15 years of medical records with my psychiatrist (neurologic disorder). But Dr. B. refused giving only what the law required so he delayed 2 months trying to get them anyway! One of my children wanted to see my sealed divorce papers and held up the proceedings for 3 weeks with the G.A.L.'s help.

The G.A.L. finally produced "his report" 27 pages long! With not one thing right! He misquoted me, the lawyers, even some of the "witnesses." He took 5 pages repeating one of the children's allegations and lecturing me (i.e. that I hadn't paid my income tax in 3 years!) I walked over to the IRS and got a print out and slapped it into the G.A.L.'s hands and asked him why he hadn't asked me? (Idiot!!) We rejected his first report!!

And my attorneys asked the court to stop the children from continuing to add more and more charges against me! And that was granted! The commissioners then the G.A.L. announced he was going to get his own psychiatrist to test me! Another attempt to set me up in a situation he controlled and could use to convict me!!

My lawyers worked for 8 months trying to convince the solution he finally did use my "revocable trust" to convey some control. So he rewrote the trust to make the trustee a "Co-T" (therefore a sort of guardian). 6 long wasted months.

There is more_much more_but this is enough for now!

There is no Jeopardy in these cases. I could be filed again tomorrow and face the same kind of fight!

Testimony of Robin Adair Warjone ---
United States Senate Special Committee on Aging --
February 11, 2003 – Washington

AN INTRODUCTION:

Re: her protracted "trial" resulting from a Law Suit filed against her as the defendant by her 3 children as Plaintiffs, who requested guardianship of their mother as an "alleged incapacitated person lacking the capacity to manage her person or estate". The "trial" lasted from May 18, 2000 to March 29, 2001. The defendant, upon advice, hired the finest private attorneys in Seattle Washington to act on her behalf: having been warned that fewer than 6% of persons sued for a guardianship are not granted a guardianship: A hearing is required 30 days after serving of a lawsuit by Washington State statute and usually provides sufficient time to enable investigator appointed by court to issue report deciding the issue. By Washington State Law the primary means to resolution of guardianship suits by this court is through a report which the court appointed investigator writes making his recommendation for a guardianship, a partial guardianship, no guardianship, etc.). The only alternative way to be .judged is that of requesting a jury trial in the regular Superior Court of Washington State but when that was attempted by the defendant and her attouneys it was denied and she was sent back to the guardianship court (the "Ex Parte and Probate" department of the Superior Court) . This left her in an absolutely "no win" position because it soon became obvious by the behavior of the court appointed investigator that he was going was going to use every technique he knew to prevent her from gaining her freedom: (. His personal antipathy to the defendant seems to have derived from the fact he had formed a relationship with her children (and they had convinced him that what seemed obvious, that the defendant was perfectly capacitated., was not true. Also before he met the defendant he had formed some unusual and personal beliefs regarding her life style. And apparently he was challenged by the caliber of her attouneys) .

The investigator began his harassment with a series of delays and continued that technique for all 11 months of the "trial". The situation became vastly more complicated when the investigator began to demonstrated areas of incompetence and a lack of knowledge about the law and proper procedure (although he was a lawyer). Those who might have exercised some oversight on his behaviors did not do so and the statute did not allow for this eventuality in any case.

The court investigator remained a terrible threat to the defendant : he knew he held all the power because he was the one who would write and decision-making document!

Another extremely important factor in Robin's case (and many other cases) is that while the courts rarely release anyone without a guardianship, it is especially true for someone of means because these courts have the right to seize the assets of someone convicted and use the funds to (first) pay court and lawyer and investigator fees, (

then) the appointed guardian's fees, and (lastly) administer the remaining funds for the benefit of the convicted person.

The defendant informed the court investigator at regular intervals of the huge bill he was causing her ($20,000 in July;$68,000 in November; $ 101,000 in January; etc.) and his response was to complain to the court that her expensive attorneys were grievously over-charging her!!

As the case continued it became more and more apparent that the inadequacy of the statute was actually standing in the way of justice being served. !!!
This introduction does not begin to tell my story --I, Robin have written the abov e. This is only a short introduction into the morass I found myself in for 11 months. I lived through countless sleepless nights lying with the cold tendrils of fear twisting my gut and wondering how I was to survive because this case has cost me my entire pension and all my investments and I have nothing left but my home which is now highly mortgaged. As you will hear in my testimony I had everything ready for my retirement before I was ravaged by this pernicious system!!!
This case and the abuses of the system -- much of it in the person of the investigator -- but all of it really stemming from a system so isolated that it has developed into its own shape and has institutionalized its manifold abuses. It has forgotten it is first and court -- we have a quote from one of the judges saying: "this is not so much a court as a social agency" !! (Wrong!) It has assumed powers it cannot have under the Constitution of the United States of America -- such as claiming the right to deny legal help after you are convicted . (The term used by this court is "granted a guardianship" -- and a nicer name for it does not change its terrible finality and cruelty!!)

BERYL PARKS, FL

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WOMAN FINDS GUARDIAN NOT ALWAYS AN ANGEL THE STATE TOOK HOLD OF BERYL PARKS' UNTIDY LIFE UNTIL A JUDGE INTERVENED

CHARLES SAVAGE, Herald Staff Writer

In the judge's chambers, Beryl Parks smoothed her worn cotton print dress, glared across the polished dark wood table at Ron Espinoza, and exploded in anger. ``If he had a hotel with a thousand rooms, I wouldn't be sorry to find him dead in every single one of them."
Beryl Parks is 86. Espinoza is a caseworker for the **Guardianship** Program of Dade County and incurred Parks' fury during her 11 months as its unwilling ward.
For the crime of living in a cluttered home, she said bitterly, she lost the right to run her own life.
``This makes me mad as hell," Parks said. ``I'm a nervous wreck. I feel harassed and insulted and bed, and I haven't done a thing to deserve this.
They threw away my whole library, including a 30-year collection of autographed hardcover cookbooks that I turned down an offer of $3,000 for from a collector 10 years ago. I was so . . . heartbroken i spent a whole weekend bawling. I'm not kidding you. It's so disgusting."
As America's population ages, the problem intensifies: How does society determine when elderly people can no longer care for themselves? The courts establish who is incompetent and appoint caretakers as legal guardians.
``A **guardianship** is an imperfect solution," acknowledged Frank Repensek, executive director of the **Guardianship** Program of Dade County. ``It's a legal attempt at a solution to a very complicated human problem. Sometimes you can't make the damn thing work. I think that's what happened in regards to Mrs. Parks."

In June, in the middle of her fight to have her rights restored, Parks invited The Herald to attend closed court hearings and read her sealed **guardianship** and mental health files. She wanted her story to come out.
HOW PROBLEM EVOLVED
Theft of guns touched off
chain of circumstances
Beryl Parks was born in 1912, the year the Titanic sank, and she grew up in a relatively affluent dentist's family in Chicago. She was an avid horseback rider and sharpshooter as a girl. She married twice and was widowed twice. She has no children.

In the 1960s, she ran a plant nursery and wrote a horticultural column for The St. Petersburg Times.
For years, she owned a decorative ceramics hobby store in Homestead called Midas Touch, stocked mostly with her own creations.
Just before Hurricane Andrew, Parks bought a one-story home in southwest Miami-Dade. She lled into a life of reading and taking care of her four cats - Penelope, Meisha, Sugar and Sugar's twin, Ditto. Parks has a bad hip but is otherwise energetic and healthy. She cooked for herself and

http://nl.newsbank.com/nl-search/we/Archives?p_action=doc&p_docid=0EB5D381B96E43B7&p_docnum=15&x_orderid=NB010302062244318660&x_dltd=DL010302062245071879 0&x_username=K1KDB265661

hired a neighborhood boy to keep her lawn well clipped.
Then, in the spring of 1998, a burglar stole two .38-caliber handguns from her kitchen. She had bought them years before when she was a fund-raiser for the Disabled Veterans of America.
She wondered if the thief might use them in a crime. ``I didn't want to be held responsible." She called police to report the serial numbers.
That's when her troubles began. Miami-Dade Officer Cathy Brooks visited her house in Leisure City and alerted the Florida Department of Children and Families of her finding: books, papers and clothing everywhere and a strong odor of cats.
``It was messy because a lot of stuff was lying around and I don't walk so well, so everything isn't in what you would call apple-pie order," said Parks, a candid woman who is often slightly profane. ``But I'm the only one that has to live in it," and I don't think it's any of their g--- business."
INSPECTOR SHOWS UP
Cleanup is carried out,
and lawn gets cluttered
The agency launched an investigation to determine whether Parks was capable of caring for herself. On April 23, 1998, a health inspector found parts of her house ``unaccessible because of books and other items piled as high as six feet."

On May 5, the department filed a petition, asking the circuit court to authorize emergency **adult** protective services for Parks. Judge Allen Kornblum granted it and appointed lawyer Sean Perez to represent her.

``Usually when we have a problem with a very dirty house, we call a county program called Homemaker Services and they go clean," said Caridad Planas, a lawyer with the agency. ``She was beyond that. So there is another program called Heavy Chores, which goes out and cleans out heavy messes like this on a onetime basis."
Heavy Chores arrived May 14. ``They insisted on having entrance to my house and threatened me that if I didn't let them in, they were going to break down the door and have a doctor throw me into a mental hospital," Parks said. ``I thought I was in deep Russia."
The cleaners emptied her refrigerator and tossed out loads of clothes, throwing things into the yard in plastic bags - too far back from the curb for trash pickup, she said. The huge pile festered there for a month.
An unsettling sight
Joe Piccini, a friend who came over afterward, confirmed this account. ``Beryl showed me six shoes, either left or right. I don't remember which. They had thrown out their mates.
``Basically, she had to stare at her belongings, which she didn't want to throw out, lying on her lawn for four weeks. The food started rotting, and the neighbors called the county to say rats were coming by. Then Team Metro came out and cited her for the trash pile."
Parks picked through the pile to rescue some of her belongings and rented storage space from Piccini's Florida City Warehouse in June 1998.
``Beryl literally had books piled from floor to ceiling in some rooms," Piccini said. ``She seemed like she was under a lot of stress to get it done."
She eventually filled six bins full of her life's possessions. But she didn't move fast enough.
EVALUATION ORDERED
Committee recommends
a limited **guardianship**
On July 20, 1998, investigator Ricardo Vega filed a court petition to determine whether Parks was incapacitated. Following standard procedure, Judge Arthur Rothenberg appointed an examining committee consisting of a physician, a psychologist and a social worker.

Albert C. Jaslow, Leonard Haber and Lucy Amos McPhaul were on the court's rotating lists to evaluate people. They received $100 to $150 each for paying Parks a visit, records show.
``Just put yourself in her shoes," said Repensek, the director of the **guardianship** program.
``Someone shows up at your door criticizing you. Even though a benefit may come from it, you're still faced with `What the hell are you doing in my life?' "

The committee reported Aug. 20 that Parks ``was quite alert, able to understand fully, but resented the `health people' who threw things out of her kitchen and accused her of living in poor circumstances."
But they said she had ``no real insight into her situation." They
recommended a limited **guardianship**.

On Sept. 9, 1998, Perez submitted a report about his client. He strongly cautioned the court not to remove Parks from her home lest she slip into irreparable depression. He attached to the report about a dozen photographs showing a house full of books such as John Updike's Brazil and a cat litter box with cat droppings in it, and two photos of the pile of trash bags on her lawn. His report failed to mention that Heavy Chores, not Parks, put the trash out.

Ruling of incompetence

The next day, Kornblum declared Parks incompetent. Five days later, he appointed the **Guardianship** Program to handle the state's newest ward.

The **Guardianship** Program of Dade County grew out of a service provided to elderly Jewish residents of South Beach in the 1970s. It is now a private nonprofit agency.

Local programs sometimes catch the attention of the public, most recently in the case of Eunice Liberty, 95, a civil rights activist. On a sidewalk outside the courthouse, protesters denounced a guardian program that closed her home to visitors. A judge reversed the decision in July.
Most of the **Guardianship** Program's 750 clients are in nursing homes and have no children to take care of their business affairs, Repensek said. He estimated that 10 to 15 people such as Parks, whose cases are much more ambiguous, end up in the power of his program every year.

Said Parks: ``If they treated me this way, I know they must be doing the same to other people out there less able to stand up for themselves."
Suddenly, Parks discovered that her mail had been intercepted and rerouted to the **Guardianship** Program. Her checking account was closed. Her monthly $624 Social Security check went to the program. She was told that she could no longer decide on her own medical treatment, sign a contract, decide where she would live, or sue anybody.

PROPERTY EXAMINED

Boxes of clothes, books

slated to be thrown out

In November, the program sent Lo Doughty to inventory her property in the warehouse. Doughty reported that three boxes of Parks' clothes and 11 boxes of books were full of silverfish and needed to be thrown out, although one box of cookbooks was eventually returned to her.

Doughty appraised all of the items she didn't have thrown away at $1,672. After her commission and expenses, Parks would get $552, she wrote.
All the while, Parks proclaimed that she didn't belong in the program and that her rights were being violated.
The program assigned Espinoza to try to straighten her home. But when he came to organize things, she angrily put them back where they had been.
``They intimidated the living hell out of me and made me feel I was not up to it mentally, physically, or anything. They looked down their nose at me. The arrogance was absolutely capital letters."
Guardianship statutes allow a ward to request a hearing to review the adjudication after 90 days. — GOOD
Parks seized the opportunity. On Dec. 14, 1998, the **Guardianship** Program filed a petition on her behalf, taking a neutral stance.

A new evaluation

Miami-Dade Circuit Court Judge Bruce Levy appointed a new attorney for Parks, Michael Swan.
The judge also asked Sanford Jacobson, a University of Miami psychologist, to evaluate her.
Jacobson submitted that evaluation Feb. 1. He found her to be ``quite articulate" and said her ``thoughts were organized." He said he had ``noted nothing to suggest delusional thinking."
He suggested a restoration of all her rights - except the choice of where to travel or live.
But on Feb. 22, despite the ongoing process that might restore Parks' rights, the program asked for permission to sell off or throw out most of her property in the warehouse.
The request, signed by program director Barry Feiger, stated that ``there is no reasonable belief that competency will be restored." The next day, records show, Levy authorized the liquidation.
Today, all that remains of those belongings is the $552.
Feiger said the decision was made in light of Jacobson's reservation about restoring Parks' right to determine her own residence. ``She was paying a fee to a storage company which would not allow her to pay for an [assisted-living facility]," Feiger said.
Over the next few months, things moved slowly. Hearings on the matter were postponed until Parks got her house cleaned up.

TURNING POINT REACHED

Woman's plight reversed

http://nl.newsbank.com/nl-search/we/Archives?p_action=doc&p_docid=0EB5D381B96E43B7&p_docnum=15&s_orderid=NB010302062244431866 0&s_did=DL010302062245071879 0&s_username=KRDB265561

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The CHAIRMAN. Now let me turn to our concluding witness, Robert Aldridge of Boise, ID, an elder care attorney in Boise who has been a strong advocate in Idaho for guardianship reform.

Bob, we appreciate you being before the committee. Please proceed.

STATEMENT OF ROBERT L. ALDRIDGE, ATTORNEY AT LAW, BOISE, ID

Mr. ALDRIDGE. Thank you, Mr. Chairman. It is a great honor to be here.

I believe that one of the defining, fundamental characteristics of any society is how they treat their elderly and their disabled. It is difficult to summarize 14 years and hundreds of bills, so what I am going to go through is merely some tips of what we have done. Each of them tends to come from cases like the Orshansky case. Those cases tend to scar all of the people involved, and each of them then becomes an imperative to change.

The first is that we have greatly changed the definitional concepts in the statutes. The existing Idaho probate code as it was adopted in 1972, and the Uniform Probate Act as it exists tend to put people under labels. One of those labels was "elderly." The mere fact of being old was enough to have guardianship.

So we removed those and went to a question of legal—not medical—disability, and that incapacity was to be measured by function limitations. The question was not what you fit into, especially if it was chronic conditions, but what you could not do and what you needed help with.

We also provided that the evidence and the inability had to be recent and had to be evidenced by actual acts. I have often expressed before the legislature the right of the elderly and all of us to be eccentric and even occasionally stupid. Put more elegantly, we have the right to age, to live our lives with dignity and with individuality. We are not to be put into cookie-cutters of what someone in disinterested status might believe is the only way to do things.

We also greatly strengthened the due process changes and the appointment procedures. First, the guardian ad litem. As has been referred to, the guardian ad litem can be a strong advocate for the person, or they can be merely an instrument for bringing them under the system. So we greatly expanded the requirements, what had to be investigated, representation needed, and especially the ethical duties of the guardian ad litem, those of loyalty.

We have a separate court visitor. That person is to be a completely independent disinterested person. On what I would have thought would have been inherent and built into their structural methods, we finally ended up writing what I am ashamed to admit is a 485-word statement of what is required to be in their report—an exhaustive listing.

But as in many of our laws, we found that we had to create primers. We had to lay out excruciating details of what had to be done so that it had to be followed. We also strengthened the right of the person to absolutely have independent counsel at any point in time.

We also went through the priority appointments. As has been noted in many of the cases here, there is often an outside appointment initially. The question has been raised what happens with

the person's own planning, so we provided that if the person himself cannot give a recommendation, that is the recommendation that the court has before it; if the person cannot give, either orally or in writing, a recommendation, then we look to their lifetime recommendations made through power of attorney, through durable powers of attorney for health care, and so forth, and those are the next layer. Only after we have gone through all of those and found nothing do we go down the list of family and so forth. Family is always looked at next; we do not go to outside persons unless there is simply no one there.

An area of abuse that is often used is temporary and special appointments. Very often, emergency is used as an excuse to place a tremendous amount of restraint on a person without any hearing and without any review. So we almost eliminated that. In order to have a temporary or special appointment, you have to have severely limited powers; it can only be done in extreme emergency and for a limited period of time. There is the required appointment of a guardian ad litem. They have to have hearings within very short time periods, and again, it is to be carried out only as long as necessary to get into the question of whether guardianship is needed at all. In the old days in Idaho, there used to be 6-month appointments which were done without any notice even to the person involved, and they could be renewed indefinitely.

We have also striven and will continue to strive to make sure that guardianship is almost the most limited form possible. It is not to be general unless it is absolutely necessary, and it should be the exception, not the rule.

We have also worked on having coordination between States. We often have cases where someone has contacts both in the State of California, or Oregon, and Idaho. We have set up a method where the judges can work directly with each other, not through the formal court settings but one-to-one.

We have also worked with the question of training of judges and tried to educate them as to what needs to be done.

We also need to preserve the estate plan of the person, so it is literally forbidden for the guardian or conservator to interfere with that estate plan; it must be preserved.

We have also gone into the post-appointment procedures to make sure that after the appointment is done, if it is necessary, that it is correctly carried out.

A lot of the problems are those that have been raised. We found that in the State of Idaho, we could not even find out how many existing or old cases there were. Courts simply would not identify them. So we spent a year and a half reforming that system with the Idaho Supreme Court and then identified cases. We then found that of the approximately 400 open cases in Ada County alone, 90 percent have no recording of any kind of accounting or status reports.

We then formed an independent fiduciary review committee on a voluntary basis—I and several other attorneys and a trust officer—and in about 3 years of purely voluntary proceedings, we recovered in Ada County alone well over $3.5 million of misspent money. I would like to say that that had been outside persons, stranger, but it was not—it was family.

We have also established an ongoing program to create a list in association with the AARP, the Department of Finance, and the Attorney General's Office, to have a pilot program to monitor those on a statewide basis. Many smaller courts simply do not have the time to do so.

We have established another program to do guardianship monitoring and training, again with the assistance initially of the AARP.

We also have to look at court enforcement. As has been noted, courts have laws before them, and if they do not follow them, they are not any good. So we have given two different areas to the court. One is the ability to enforce through fines, surcharges, and so forth; and second, we give training to the courts. We try to get to the magistrates conferences and so forth. We have also created guardianship and conservatorship handbooks which are given to both courts and to all appointed conservators and guardians to walk them through their duties.

There is obviously much more, but I think it would be better to respond to questions.

Thank you.

[The prepared statement of Mr. Aldridge follows:]

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STATEMENT/TESTIMONY
Senate Special Committee on Aging
February 11, 2003
Adult Guardianship

1. General Background

Idaho adopted the Uniform Probate Code in 1972, the first State in United States to do so. The Code covers a multitude of subjects, but primarily deals, on the one hand, with probate and related procedures at death, and, on the other hand, protective procedures. This Code, commencing primarily in 1989, has been substantially revised in its subportions dealing with protective procedures, especially conservatorship and guardianship. The emphasis of the changes has been to provide increased protection to the elderly (and others who are the subject of such actions, normally because of age or disabilities). Most of these changes have not been proposals from the Uniform Code Commissioners; instead, they have been crafted to deal with specific problems in the setting of a State that has few public protections for the elderly and extremely limited budgets for any public protections that do exist.

The primary impetus for the changes has come from the Taxation, Probate & Trust Section of the Idaho State Bar, often in partnership with other interest groups. At the time of the commencement of the changes, I was the chairman of the Section, and I have been the Legislative Committee Chairman for the Section for the last fourteen years. The Legislative Committee now consists of approximately thirty-two members, from a wide range of interests, including law, bank trust departments, governmental and quasi-governmental agencies, social workers, accountants, and others, depending on the exact issue. All participation is voluntary and without pay of any nature, other than one hired law clerk. Funding for expenses, and the law clerk, is provided by the Bar Section.

The Idaho legislature meets annually for approximately sixty days, commencing in the first week of January. The legislature itself has very limited expertise, and essentially no professional staff, in areas relating to the protection of the elderly. The administrative agencies charged with such protection (primarily the Idaho Commission on Aging and the Adult Abuse section of the Department of Health & Welfare) have severely limited budgets and personnel.

The Idaho judicial system hears cases regarding the elderly almost exclusively at the Magistrate level. Only one Magistrate in the entire State of Idaho, in Ada County, works primarily in the probate/protective proceedings area, and that Magistrate is also assigned other cases. In all other counties in the State, assignment of such cases is random among all available Magistrates. Magistrates also have, at most, one staff member.

2. Philosophy of changes to Idaho statutes

Because judges, and practitioners, in Idaho have limited experience in protective proceedings, statutory changes have concentrated in spelling out in detail the procedural steps and necessary findings in protective cases. Additionally, the Bar Section has prepared a detailed Forms book for protective

proceedings, with checklists and procedure charts, to guide practitioners, and courts, through the process. For clarity, it should be noted that Idaho calls those who deal with the financial affairs of the protected person a "conservator" and those who deal with the care issues of the protected person a "guardian", unlike many States which refer to those categories, respectively, as "guardian of the estate" and "guardian of the person", or similar titles.

3. Specific changes to Idaho statutes

a. Definition and concept changes The original Idaho Probate Code defined an incapacitated person by a series of categories – e.g., the person was "elderly" or a "chronic alcoholic", or other such labels. The emphasis was on medical disabilities or status. The changes to the Code completely eliminated this method and made the following rules:

1. Incapacity was a legal, not a medical, disability.

2. Incapacity was to be measured by function limitations, which must threaten substantial harm to the person due to an inability to provide for personal needs for food, clothing, shelter, health, or safety, or an inability to manage property or financial affairs.

3. The inability had to be recent, not in the remote past. Isolated instances of simple negligence or improvidence, lack of resources, or of acts which were made by an informed judgment did not show inability to manage one's own affairs. I have frequently, before the Idaho legislature, and other groups, expressed this as the right of the elderly, and each of us, "to be eccentric and even occasionally stupid".

All of the foregoing changes were supported by extensive detailed definitions.

b. Due Process changes in appointment procedures

The following were added, or greatly expanded:

1. Guardian ad Litem The Guardian ad Litem is, essentially, an attorney appointed to represent the protected person. The roles and duties of the Guardian ad Litem were greatly expanded to require full investigation and representation. Provisions were added to the Probate Code that the Guardian ad Litem could not be a member of the same law firm, or an employee thereof, as the Petitioning Attorney and the ethical duties of the Guardian ad Litem were laid out in detail.

2. Court Visitor The Court Visitor is appointed to fully investigate all circumstances surrounding the protected person and to submit a written report to the Court, with recommendations. Provisions were added to the Probate Code which set forth in detail an exhaustive listing of the qualifications necessary for the Visitor and the requirements for the investigation and the written report by the Visitor. The Visitor was required to be trained in law, nursing, psychology, social work, or counseling, and was to be an officer, employee, or special appointee of the court without any personal interest in the action. Like the Guardian ad Litem, the Visitor could not be a member of the same firm, or an employee thereof, as the Petitioning Attorney. The Visitor also had to be a different person than the Guardian ad Litem and could not be the proposed guardian or conservator.

3. Independent Counsel The protected person was given the right to retain independent counsel at any time.

4. Priority of appointment The Code priority list was substantially changed to provide that, prior to the customary lists of spouse, children, and so forth, the protected person could nominate the conservator or guardian orally or in writing during the proceedings, if capable of doing so. If no such nomination was made, then those that the protected person had previously named to fulfill similar roles (agents named in financial powers of attorney as to conservatorship, and/or agents named in medical directives or medical powers of attorney as guardianship) were the first priority for appointment. Only if none of those choices had been expressed were the listings based on relationship to be used.

5. Temporary and Special Appointments The prior Code allowed ex parte temporary appointments of conservators or guardians for up to six months (but with unlimited renewals) without any hearing, without any notice to the protected person, without appointment of a Guardian ad Litem, without appointment of a Court Visitor, and without any required reporting or notices to the protected person or any other "interested persons" under the Code. This allowed tremendous abuse without any protection. The Code was revised dramatically to severely limit the ability to obtain temporary appointments without showing of extreme emergency and to require notice within forty-eight hours to the protected person and others, and with an extensive listing of the rights of the protected person to obtain immediate hearings and other protections. The maximum time limit for appointment was deceased to sixty days. Only the limited powers absolutely necessary to protect the immediate health and safety of the protected person could be granted. A Guardian ad Litem was required to be appointed and the protected person additionally had the right to independent counsel. On request of any interested person, a hearing must be held within five days and a Court Visitor appointed. Temporary appointments could not be renewed.

6. Limited powers The Code was substantially amended to require that only the most limited form of conservatorship or guardianship be granted, with express listings of the actual powers granted, and that the protected person was to retain the maximum rights possible. General conservators and/or guardians were only appropriate when the protected person was completely incapacitated.

c. Post appointment protections

1. Fiduciary Review Committee, Guardianship Monitoring Initial attempts were made by the Bar Section to determine whether required reporting by guardians and conservators were being filed generally, and if filed, were being reviewed by the Court. Incredibly, the case computer listing system of the State could not even identify which cases were conservatorship/guardianship cases, much less whether reports had been filed. After prolonged work with the Idaho Supreme Court to revamp the system, an analysis was made of existing cases in Ada County, Idaho. The vast majority had no initial inventories or any annual reports. A Fiduciary Review Committee was established, composed of several attorneys (including myself) and a trust officer and an accountant. The Committee attempted to track down non-reporters and then obtain reports. Then, the reports which showed serious violations on their face were assigned to a committee member who pursued correction of the violations, including court action if necessary. All participation was on a pro bono basis, with expenses provided by the Bar Section. In a three year period, in only Ada County, millions of dollars were recovered. The Bar Section has now, with major assistance from the AARP, started building a pilot program through the Idaho Department of Finance and the Idaho Office of the Attorney General to extend this program Statewide and to institutionalize the process, rather than relying on volunteers. The Bar Section has also established a program, in Ada County, to provide a staff person attached to the probate judge to coordinate training and monitoring of guardians, again with AARP assistance and funds from Ada County and from the Bar Section.

2. Guardian ad Litem A program still in its infancy stages is to provide for required participation

by the Guardian ad Litem in assuring that proper post-appointment reports are filed and in reviewing those reports. Currently, I am one of the few, and perhaps the only, attorney in Idaho who continues actively in the case as Guardian ad Litem after appointment of a conservator and/or guardian. Legislative changes to clarify and amplify the role of the Guardian ad Litem will be introduced in the next legislative session.

3. Court enforcement A new section of the Code was created to give the Court clear ability to enforce reporting and proper actions by conservators and guardians. The Court could impose fines and could surcharge the conservator/guardian for misapplied funds.

4. ALTERNATIVES TO APPOINTMENT, OTHER PROTECTIONS

1. Financial abuse of the elderly Through a committee of concerned entities and persons, a statutory method was implemented to give financial institutions, and others, the ability to report potential financial abuse of the elderly and for those reports to be acted upon by law enforcement. Through funds provided primarily by the Bar Section, training sessions were set up for bank officers and bank employees throughout the State.

2. Powers of Attorney A substantial review of the Idaho statutes on financial powers of attorney is currently in progress. Such powers are a major source of financial abuse of the elderly. Major revisions will be submitted to the next legislative session, primarily directed at protection of the elderly.

5. REMAINING NEEDS, PROBLEMS

1. Appointment procedures of Guardians ad Litem and Court Visitors Appointments need to be truly independent, made by the Court from approved lists of trained qualified individuals without influence by the Petitioning Attorney.

2. Grants for State or private programs Idaho, like many States, is experiencing severe budget deficits, without sources for funds for innovative programs. Existing programs protecting the elderly are being slashed or eliminated. State legislators are reluctant to fund programs until they are proven. Federal grants to establish pilot programs for innovative methods to protect the elderly would enable local volunteers to establish the programs and then, when the worth of the programs is documented, lobby them into existence as State programs.

3. Establishment of basic rights of the elderly as fundamental due process Fundamental rights of the elderly to self determination must be protected. These rights must be enumerated and made a part of the very fabric of protective proceedings. Such rights must be removed from the elderly only as a last resort, only to the extent absolutely necessary, and only after full due process, and with careful examination of all available alternatives. The emphasis must be on protection, not the convenience of others, including the convenience of the judicial system. Dignity of the elderly must be preserved at all costs, in the face of a system which creates justifiable fear in the elderly and which is often indifferent to, or even contemptuous of, their emotional needs when that justifiable fear is expressed. The understandable fear by the elderly is even used as proof of the need for protective proceedings. Far too often, the system strips the elderly of their assets, their comforts, and, ultimately, their human dignity.

The CHAIRMAN. Mr. Aldridge, thank you very much for that testimony and example of what one State has done and I hope others are doing to improve this situation.

Let me ask you all some questions. Mr. Johns, one case came to my attention where an elderly man was forced to divorce his wife pursuant to a guardianship order. I find this highly disturbing. On what possible basis can that be allowed to happen in this country?

Mr. JOHNS. Mr. Chairman, if the facts are carefully studied, such a situation could present itself when, for example, the person presenting as spouse is in a late marriage with someone one-fourth the age of the protected person, who may be described by some as a "golddigger," who in fact takes position in such a way that cuts the rest of the family members off from any access to the elder person, begins diverting assets of the estate in a way that truly brings to the attention of the judge a reason for addressing issues that would include divorce.

However, the focus of your concern and your question may generate more from this scenario, where the person marries late in life; it is a person within 10 or 15 years of his or her own age; the person has some wealth of his or her own; they are truly in love and are in companionship, and the children of one or the other spouse are irate at the fact that mother or dad would remarry, and that would in fact, maybe, move some of what was to be their inheritance to this new love in life. Those children intervene asserting that the marriage is a sham and should be dealt with by divorce exacted potentially by the probate judge if he or she has jurisdiction, or moved to a family court forum in which the issue of divorce is raised, or even some form of annulment.

The CHAIRMAN. Well, I thank you for outlining that, because I find this in a Florida case—I think it was referencing an article in The Orlando Sentinel of 1994 on the Norma and Buford Bonds case in Florida—where I think the latter was true.

Let me ask another question of you; I will complete my questioning of you before I turn to a colleague who has just joined us for any comments that he would wish to make, and then we will move on with further questioning.

Is it typical for guardianship orders to trump prior existing legal arrangements made by an incapacitated individual, and under what circumstances can that occur?

Mr. JOHNS. The answer is yes. Guardianship orders may in fact trump the pre-planning if, on the facts presented before the judge, there is some reason to believe that what had been pre-planned has become something that will in fact do harm to the person who is supposed to be protected.

However, the reality is that—much as happened with Mollie Orshansky—many judges do not pay attention to what pre-planning is there and do not examine whether there are benefits to be gained by simply saying the efficiency of the court's time is best-served by dismissing the case.

The CHAIRMAN. Thank you.

We have been joined by Senator Carper, and I appreciate him as a valuable member of this committee who attends on a regular basis. We are glad that you have taken time to come by this morn-

ing and be with us. Do you wish to make any opening comment before we proceed with additional questions?

Senator CARPER. I do not. I am delighted to be here.

As you know, we serve on a number of committees, and I have just jumped out of one committee with Chairman Greenspan, who is talking to us about the economy and monetary policy, and I am pleased to be able to join you for a bit and I thank you all for coming and testifying before us.

I have a question or two that I would like to ask at the right time.

Thank you.

The CHAIRMAN. Why don't you go ahead and ask questions now, and then I will come back to mine?

Senator CARPER. Thank you, Mr. Chairman.

Mr. Chairman, in reading through the materials that my staff has provided for me for today's hearing and some materials provided by the committee staff, there are several referrals to a State which seems to be doing it right with respect to guardianships and their approach on these issues. The State that kept coming up in the materials I read was Idaho. [Laughter.]

Proceed, and we will see if it is a coincidence or not.

Senator CARPER. When I ran for the U.S. Senate in 2000, I had been Governor of Delaware for 8 years, and I talked a lot on the economy about Delaware as a model for the country and the way we manage our economy, create jobs, overhaul our schools and welfare. But we never thought of trumpeting the way we had overhauled guardianships or addressed alternatives to guardianships. I do notice that Idaho keeps coming up.

"Idaho's statutes and practices are models for emulation." That is a quote right out of my materials.

I am not sure if any of you are from Idaho, but can somebody just tell me what they figured out in Idaho that the rest of us need to emulate?

The CHAIRMAN. Just before you came in, or as you were coming in, Robert Aldridge, who is an attorney from Idaho and very much a long-time reformer in this area, had just concluded his comments, so I will turn to Mr. Aldridge to respond to Senator Carper.

Mr. ALDRIDGE. Senator, what we decided in Idaho was first of all that society has given us as attorneys a lot of gifts, a lot of prerogatives, and that we owed it to give back something to the community. What we can do best, I think, is first, to see problems and second, write bills to correct them.

So in the State of Idaho for now 14 years, we have entered into a very active coalition-building method of going to the Idaho legislature and changing rules, changing laws, when they do not make any sense, when they work incorrectly. We have done that in part looking internally to problems; we have also gone to a lot of other States and attempted to glean from other States what they have done right and then bring that in and incorporate it.

There is no single set of model laws out there that can be used. Even Idaho's laws are in a constant state of flux. I have seven bills in front of the legislature right now, and we are working on some huge bills on the Uniform Trust Act, on special powers of attorney and so forth.

So it is an ongoing procedure and, to paraphrase Robert Frost, we have many promises yet to keep and many miles to go before we sleep.

Senator CARPER. Another way of saying that is: The road to improvement is always under construction, even in Idaho.

I have one more question if I could, Mr. Chairman. Looking over my materials, one of the possible results of this hearing would be to encourage the use of something called the "representative payee system" wherever possible as an alternative to guardianship. I do not understand what a "representative payee system" is, and perhaps one of our witnesses could explain that and tell me why that is a good idea, or not.

The CHAIRMAN. I believe Penelope Hommel might be the person who could respond to that. She certainly has had some experience in observing it and tracking it.

Senator CARPER. Ms. Hommel, would you be willing to tackle that one?

Ms. HOMMEL. I can try. Basically, representative payeeship is a system that applies to a number of government benefit programs, for example, Social Security, Supplemental Security Income. It provides that when an individual is unable to handle the funds that come through that government benefit program, another individual or representative payee can be appointed to handle those funds. In cases where financial estate is small, the income is limited pretty much to the government benefits that we are talking about, it can be a very important alternative to guardianship that does not deprive the person of the basic right to control their other aspects of life and their decisions.

Having said that, it is not one of the alternatives that you plan in advance. It tends to be when you have not done the advance planning and executed a durable power of attorney, then the representative payee program can come into play.

Among the downfalls or potential downfalls of representative payeeship are that it looks the procedural safeguards of a court proceeding; there is not court oversight; and there is clearly the potential for misuse of the funds by the person appointed as representative payee, rather than making sure that they get used for the benefit of the individual. There have been a number of hearings, and substantial work has been done by people in this room and others to try and come up with ways to make sure that necessary protections are in place. So it needs to be done very, very carefully, but it is an alternative to guardianship that maintains the individual's rights.

Senator CARPER. Good. Thanks.

Does anyone else want to add to or take away from that response?

Mr. ALDRIDGE. If I could, Senator, one of the problems that we have had in the State of Idaho is that the representative payee can sometimes tend to be whomever walks in latest to the local office, is 98.6, and can sign their name. So we have had situations in which financial abuse has been coming from a particular individual; we get a conservatorship, we get a new representative payee, and then that same person walks back in and becomes the new representative payee. That is a problem in the system.

Senator CARPER. Good. Thank you all again, and Mr. Chairman, thanks for the opportunity to ask those questions.

The CHAIRMAN. Tom, thank you very much.

Dr. Armstrong, I understand that a member of your family went through a legal battle involving the opposition of a guardianship petition. Can you tell us about it and what you learned from that experience?

Ms. ARMSTRONG. In California, these are call conservatorship hearings. The case began when four of seven children ganged together, approached an attorney and spent 5 months working on their petitions against my mother, who at the time was 72. The petitions claimed also that an emergency existed in the case. Therefore, when she was served with her petitions on a Friday evening, she had 4 working days to organize a case to defend her freedoms.

In that period of 4 days, she arranged for the help of two attorneys; she had a neuropsychiatric evaluation done at UCLA; she had to get testimony from all sorts of individuals; she enlisted the aid of her financial planner, and she appeared in court on a Friday, told by everyone that the court would throw the case out as frivolous and totally unnecessary the moment she said, "My four children are angry at me, and I am angry at them." "This is a family squabble."

But the court did not let her speak. He assigned another date, and we came back a week or two later, and the court again would not let her speak. The court said, out of the blue, at the end of the day: "I think I will assign a conservator of the estate; after all, it will not hurt, and it might help." We had time, though, because he did not have the name of a conservator with him. So my mother had to hire a corporate litigator who, just before Thanksgiving, sued to have an evidentiary hearing held so she could be heard. We spent the entire time before Christmas getting ready for that.

There was finally a hearing on issues of the temporary in December, 2½ days of testimony after Christmas. At the end of that proceeding, the judge announced that obviously, this woman did not need a conservator, but we are going to file a court date 6 months hence to see if she needs a permanent conservator.

At this point, it felt like the Mad Hatter's tea party. Here was a woman battling for her freedoms, for all of those freedoms listed, and the judge was saying, "Oh, she obviously is fine, does not need a temporary, and there is no emergency, but let us put her under this stress for 6 more months and see what happens."

The fees that were generated by this point in time were outrageous. A court-appointed investigator in the role of a guardian from the probate volunteer panel investigated my mother prior to the hearing. They hated one another. When my mother went to court, she fired that woman. She did not need her—she had two attorneys. The woman turned to the judge and said, "I am not needed in this regard, but I can serve as friend of the court and help you." The judge permitted her to be on the payroll as amicus of the court, and that woman made my life, my family's life, just turn upside-down and split down the middle. It went on and on for 18 months.

The CHAIRMAN. So from that experience, what conclusions can you draw that might have put in place from those conclusions a

law that would have protected your mother from this kind of proceeding?

Ms. ARMSTRONG. I think the fundamental change that needs to be made is that these proceedings cannot be brought against any adult whose decisionmaking powers are intact. They do not have to be reasonable, they do not have to be fashionable, they do not have to be like the judge's.

The CHAIRMAN. In other words, in Mr. Aldridge's words, they can be "eccentric" if they wish.

Ms. ARMSTRONG. Absolutely. Why can you not be eccentric at 40?

The CHAIRMAN. Some are. [Laughter.]

Ms. ARMSTRONG. Sure. They can lose all their money at 40, and they do not risk their freedoms. But if this happens when you are 62 and older, you are at risk of losing every freedom you have. I do not think it is correct to require that decisions be "reasonable" or "responsible." If they can make the decisions they have always made, these proceedings should be thrown out of court, and any proceeding that is brought should either be at the wish of that elderly person as a voluntary conservatorship or guardianship, or it should be an incredibly limited one, as are the limited proceedings against the developmentally disabled in the State of California—terribly respectful of the individual's unique way of going through the world.

The CHAIRMAN. In your writings, are there concerns of financial abuses perpetrated by professional guardians, whether it be excessive fees or direct mismanagement of funds?

Ms. ARMSTRONG. It is rife in the system, absolutely.

The CHAIRMAN. You asked a question—Tom, Ms. Armstrong asked a question; she has written on these issues and has spent a good deal of time studying them—what would come of these proceedings. This committee held hearings on this issue in the 1990's, primarily to lift awareness, and while some activity has gone on and some effort is underway, and Ms. Hommel has spoken to that work being done, one of the things that we found in beginning to delve into this is the absence of information and records and realities of the extent to which guardianships are used, and we are beginning to pick up a little of that in the testimony offered here when we hear some of the numbers cited.

Ms. Armstrong, I cannot give you an answer. Obviously, the testimony that you are giving and the record that we are building here is going to be extremely valuable, and the recommendations, for example, that Mr. Johns and Mr. Aldridge have made as to what might be done. Clearly, there is growing evidence that very large problems exist out there and that bad things are happening to good people.

Also, as I said in my opening statement, we are on a very large bubble, if you will, of aging people who are going to and may need to seek these services in their lifetimes, in numbers heretofore that we have certainly not experienced in this country. That is part of what we are doing to build a record to see where we might go with this, and I am going to do some more probing, as I said with Mr. Aldridge's comments—while I want to err on the right and the side of the State in many of these instances, there is a Federal nexus—there is no question about it—and in many instances, there are siz-

able amounts of, if you will, while it is the individual's money, it is derived through the Federal Treasury, if you will, and there is a connection and a responsibility there.

This committee certainly continues to plan to pursue this, and I think it is important that we do, to build a record, to decide whether in fact there are some areas that we can move into to deal in an appropriate fashion and to begin to not only deal with this but certainly lower the level of abuse.

Ms. Hommel, do you think that prior planning alone makes an elderly person guardianship-proof? I say that in relation to Mollie Orshansky as a good example, from her niece and the attorney representing her who were before us. Could you respond to that, because that is certainly something that we are at business preaching in society today—plans, trusteeships, all those kinds of things that relate to an individual's assets.

Ms. HOMMEL. That is an excellent question. Clearly, as we have heard, it does not make an individual guardianship-proof. The Mollie Orshansky case is a prime example where a tremendous amount of planning was done, and the court chose, for a variety of reasons, to ignore that.

We are seeing—and I think Frank John's addressed this a bit—some States beginning to write priority provisions into their guardianship statutes. These provisions may specify that if you have an advance directive for health care, the person that you have appointed to make your health care decisions will take precedence—Michigan is an example of a State that has done that—and that make provisions, if you have done planning for financial alternatives, that those will take precedence over a guardianship.

I think other things that people can do include making sure that when they do that advance planning, it is done in dialog with the family, with other interested parties, so that there is communication about what is going on, what is planned, and so that everybody realizes that these mechanisms are in place.

Often, the reason that an advance directive for health care does not get honored is because the doctor is not aware that it even exists. There are other reasons too. Sometimes the physicians and the medical personnel will not honor it. But sometimes it is as basic as that they do not know about its existence.

So advance planning clearly is not a complete protection. But I think the more people can be educated about it's importances, the more they understand and address its limitations, and the more they recognize the need to make sure that all the other interested parties are on board with the advance planning that has been done, then the more likely it is to succeed in avoiding guardianship.

The CHAIRMAN. If you had to guess, how many court-appointed guardians are handling Social Security money without being appointed as a representative payee? Do you have any feel for that?

Ms. HOMMEL. I'm afraid. I have no idea of the numbers. I would guess that the majority are handling Social Security funds and many without being appointed representative payee, but I really am not aware of data to support that.

The CHAIRMAN. OK. I see a lot of head-nodding out there among the panel.

Mr. Aldridge, you mentioned $3 million recovered in Ada County.

Mr. ALDRIDGE. Yes, Senator. What we did first was find out——

The CHAIRMAN. First of all, you and I know the size of Ada County; compared to Los Angeles County, it is a very small count, respectively, is it not?

Mr. ALDRIDGE. That is true. We are very proud of the fact that the State finally has over a million people, and Ada County is approximately 200,000 to 290,000 today.

The CHAIRMAN. So that is a sizable amount of money in actuality.

Mr. ALDRIDGE. It is a huge amount of money, and I think, Senator, that reflects on what has been mentioned before—the literally trillions of dollars now in the hands of the elderly and getting ready to move to the next generation. That is the kind of money that we are seeing misappropriated. There are also now huge amounts of money coming through such things as life insurance and such that is now up for grabs, literally.

So I think that we are at the tip of a very large iceberg. As I said, "That was just a voluntary effort by approximately four of us in our own time, and we recovered that amount of dollars in that short a period of time."

The CHAIRMAN. Well, you are certainly to be commended for the work that you have done and what you are doing in Idaho as it relates to guardianship reform. What is on the burner now for advanced reform from the work that has already been done?

Mr. ALDRIDGE. There is a series of things yet to be done. First of all, we need to continue to make guardians and court visitors more independent. We are looking at potential licensing, bonding situations, approved lists, truly random appointment. Too often, the person who is the petitioning attorney in essence picks those people, and that is not independence.

Second, we need to create more outside methods. We have talked about trusts and lifetime planning, but those need to be done correctly, and they need to be strong before courts can rely on those. So we are looking at first of all much strengthening of protection of the elderly in powers of attorney, financial powers, and also getting good trust acts in place that will again help protect, so the courts can say instead of doing guardianships, let us use those existing ones.

We also need to clarify a lot of things on how care should be provided. A fundamental problem in the Medicaid area, for example, which I deal with—I think an answer that follows on a question to Mr. Johns—is that the current systems says the best way to do financial planning in Medicaid is to be divorced; you can save much more assets. But we also need to look at home care. We need to let the elderly stay at home. Too many things in our society, from Medicaid to Medicare to tax law to guardianship tend to push people into institutions. We need to have some way to strengthen the ability to stay at home and be independent.

The CHAIRMAN. Thank you for that.

With the experience you have had in Idaho, what might other States gain from that in reforming their laws?

Mr. ALDRIDGE. I think, Senator, two different things. One, they can look at the process. We are able to, essentially with no dollars, just by voluntary efforts, make major changes in the statutes.

No. 2, through sharing of experience, sharing of statistics, States can make better laws. We were able to go to other States. In the case of California, there are pieces of their law that are good; there are pieces of their law that are terrible. By looking at that experience, we were able to judge what we should take and what we should reject.

So I think that that is the major thing to learn, that we need to pool our knowledge and pool our statistics.

The CHAIRMAN. I had asked Mr. Johns, and he made some recommendations for change in Federal law or new Federal law. Let me ask you the similar question. Do you see a Federal role in this, Mr. Aldridge?

Mr. ALDRIDGE. Yes, I think there is a Federal role in all of this. No. 1, Idaho, as you probably know, is for the first time in a long time running deficits, and because of that, we have seen literally the gutting of many of the traditional protections of the elderly through the Commission on Aging, Adult Protection, and so forth.

We need the ability to fund innovative State programs for protection. We need—even through existing programs, the Older Americans Act, Title IIIB funds, and so forth—to be able to get money down to the States to do the things that they cannot necessarily afford.

We are often in a Catch-22 where the legislature says, "We will fund the program if you show that it is successful," but we cannot show that it is successful, because we cannot start it without funds. I think many of those, if they had seed money from the Federal side, would eventually become State programs.

The CHAIRMAN. There are a good many more questions I could ask all of you, but I am running out of time.

Robin, we thank you very much for your testimony. I think everyone gathered from it that you are a very capable, talented, alert woman, and that the attack or the approach to the attack was amazing. We hear of horror stories like this, and when I hear them, I view them in just that context. Certainly, that should not go on through our legal system today, but it does, tragically enough. You were able to fight it with some success but also with substantial injury, and that is tragic.

Again, I thank all of you. I view you as resources to this committee and to our effort here, and we will continue, Ms. Armstrong, to pursue this, to see if there are not some ways that we can nexus the Federal law to cause this to be a finer-tuned process that assures and guarantees the rights of our citizens in a way that obviously is now not being protected and/or guaranteed.

I thank you all very much for that, and the committee will stand adjourned.

[Whereupon, at 11:52 a.m., the committee was adjourned.]

APPENDIX

COMMENTS ON GUARDIAN ACCOUNTABILITY AND MONITORING
By Erica F. Wood, Associate Staff Director
American Bar Association Commission on Law and Aging
Before the
U.S. Senate Special Committee on Aging
Hearing on Guardianships/Conservatorships
February 11, 2003

Mr. Chairman and Members of the Committee: The American Bar Association appreciates the opportunity to submit comments on guardian accountability and monitoring to the U.S. Senate Special Committee on Aging. These comments are supported by extensive ABA policy urging the regular filing and court review of guardian accounts and reports, effective sanctions for failure to comply, training and minimum standards for guardians, and maintenance of adequate court data systems on guardianship (August 1987, February 1989, August 1991, August 2002). Association policy in August 1991 stressed that "the enactment of federal legislation is unnecessary at this time."

The Association's Commission on Law and Aging has played a leadership role in guardianship reform for over 20 years. Much of the Commission's work on guardianship monitoring is based on a landmark 1991study by Sally Balch Hurme, *Steps to Enhance Guardianship Monitoring* (produced jointly by the Commission on Law and Aging with the ABA Commission on Mental and Physical Disability Law). The Commission on Law and Aging continues to partner with Ms. Hurme in its focus on guardianship accountability and monitoring throughout the nation. My comments today are derived in part from a recent article by Wood & Hurme, "Guardian Accountability Then and Now: Tracing Tenets for an Active Court Role," *Stetson Law Review*, Spring 2002.

A. Introduction and Background

Adult guardianship can be viewed as having a "front end" (the determination of incapacity and appointment of a guardian) and a "back end" (accountability of the guardian and court monitoring). The Associated Press in its landmark 1987 series *Guardians of the Elderly: An Ailing System* disparaged both. It charged that guardianship in the United States at that time "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." The guardianship system can't function effectively unless both "ends" are in working order.

1. Why Monitor? The impetus for court monitoring is not an assumption that guardians are doing a poor job, abusing or "misusing" their appointment. On the contrary, although data is lacking, it appears that most individual and agency guardians meet the needs of at-risk, incapacitated persons, sometimes against great odds.

The rationales for monitoring are several. First, monitoring is an elemental component arising out of the guardianship purpose. Guardianship is rooted in the ancient concept of *parens patriae*, in which the state (in ancient England the King) is the father of the country and must care for those unable to care for themselves. In essence, the court is the guardian – "In reality the court is the guardian; an individual who is given that title is merely an agent or arm of that tribunal in carrying out its sacred responsibility" (*Kicherer v. Kicherer*, 400 A.2d 1097, 1100 (1979)). Thus, the court must oversee the guardian as its agent, ensuring that guardians adhere to their duties and promote the welfare of those in their care. This judicial oversight function has been incorporated into state law.

Second, monitoring helps guardians. Guardianship is one of society's most demanding roles. A good guardian must be case manager, advocate, counselor, accountant – and knowledgeable about aging, disability, health care, and the legal and judicial systems. A good guardian sometimes must make wrenching decisions. A guardian must step into the shoes or "live the life of another," making critical decisions on lifestyle, placement, finances, property and medical treatment for individuals who otherwise could fall through societal cracks and be exposed to harm. Guardians owe incapacitated persons a very high duty of care and accountability in an intensely personal relationship. Most guardians want to do a good job, but require support. Monitoring can identify areas in which guardians need guidance and put them on the right track.

Third, monitoring is an essential safeguard. Guardianship can remove basic, fundamental rights and liberties – can virtually "unperson" individuals, transferring critical decision-making authority to the guardian as surrogate. Moreover, unlike with decedents' estates, the incapacitated person is a living being whose needs may change over time, and this requires a more active court role in oversight.

Fourth, monitoring also can be preventive in nature. It lets guardians know they are under the eye of the court and must meet the court's trust in appointing them. Beyond this, monitoring can allow the court to track guardianship practices, identify trends and make any necessary changes in procedure. Finally, monitoring instills public confidence in the courts, demonstrating judicial oversight and scrutiny in the care of society's most vulnerable.

These rationales for monitoring are set against converging societal trends that make the case more urgent. Our population is aging, and chronic illnesses including Alzheimer's Disease and other forms of dementia are more prevalent. Medical choices are more challenging in the face of pervasive and powerful medical technologies and health care delivery systems. Recent years have seen the growth of for-profit, non-profit and public guardianship agencies, sometimes with vast caseloads. The face of guardianship is changing.

2. Where Do We Stand? The September 1987 Associated Press report examined 2200 randomly selected guardianship court files and found that 48 percent of the files were missing at least one annual accounting; only 16 percent of the files had personal status reports on the incapacitated person; and 13 percent of the files were empty but for the opening of the guardianship. The report, replete with poignant anecdotes, contended that "overworked and understaffed court systems frequently break down, abandoning those incapable of caring for themselves," and that courts "routinely take the word of guardians and attorneys without independent checking or full hearings." In short, it claimed that sometimes courts responsible for overseeing guardianship "ignore their wards."

The AP report triggered a 1988 national interdisciplinary "Wingspread" symposium that called for strong guardian training, regular and thorough court review of guardian reports, guardian performance standards, judicial education and public knowledge and involvement in the guardianship process. This in turn launched the groundbreaking 1991 ABA study of guardianship monitoring with support from the State Justice Institute. The report outlined ten recommended "monitoring steps" drawn from a national survey and site visits. At the same time, Legal Counsel for the Elderly of AARP initiated a National

Guardianship Monitoring Project featuring the use of trained volunteers to be the "eyes and ears" of the court and serve as court visitors and auditors. This program no longer exists nationally.

In 1993, the National College of Probate Judges and the National Center for State Courts produced a set of *National Probate Court Standards* including a section on guardian reports and judicial oversight that highlighted the importance of "an independent monitoring system. . . for a court to adequately safeguard against abuses." In 1997, a revised Uniform Guardianship and Protective Proceedings Act called for courts to establish a system for monitoring guardianship, including the filing and review of annual reports. In 2001, a second national interdisciplinary "Wingspan" conference urged annual reports and financial accountings, as well as strong court data systems.

In addition, the National Guardianship Association has developed a *Code of Ethics* and *Standards of Practice* for guardians (www.guardianship.org). Bar associations, state guardianship associations, the aging network and social service programs in many states have produced a host of guardian training manuals, videos, brochures, and attorney and judicial education curricula. Finally, national organizations with an interest in adult guardian recently have joined in a National Guardianship Network to "advance good guardianship law and practices."

All of this reform activity had a striking effect on state law. During the past 15 years, all states have revised their guardianship law and close to half have adopted comprehensive new codes including stronger provisions for guardian accountability and monitoring. (See the legislative chart on guardianship monitoring produced by the ABA Commission with Sally Hurme at the Commission's website, www.abanet.org/aging.) Clearly, effective laws are in place.

3. Monitoring Practices. Despite these advances in state law and the development of standards, a flurry of news articles within the past few years (*Detroit Free Press, Rocky Mountain News, Phoenix New Times, New York Daily News)* shows instances in which

monitoring procedures remain lax and incapacitated persons are subject to risk. Attorney Frank Johns has written that "the changes in laws are a mask of virtual reality, hiding what is actually being done in the process, and done to older Americans caught in it." In truth, we have very little data to refute or substantiate this. Statistics are scant. The paucity of research makes it hard to step back and assess the results of the guardianship reform efforts. However, the press stories are an indication that monitoring practices may be lagging behind statutory standards – there is a gap between the paper and the reality.

At the same time, courts across the country have begun to initiate model practices and procedures to ensure effective monitoring. These range from use of student volunteers as visitors to initiation of a novel guardianship ombudsman program to improved guardianship databases and reporting forms, guardian handbooks, technical assistance and training for guardians, and court links with community groups. In May 2001, the participants at the National College of Probate Judges annual meeting listed "Best Practices in Guardianship Monitoring."

Lets look, then, at where we stand on key elements of guardian accountability and monitoring, and what might be the federal role.

B. Key Elements of Guardian Accountability and Monitoring

Guardian accountability and oversight requires a systemic approach that includes training, standards and certification, use of guardianship plans, reports and accounts to court, judicial review of reports/accounts, sanctions and enforcement, court-community links, and court data. Funding and imagination are key ingredients.

- Guardian Training. All of the national recommendations cited above urge that guardians have ready access to orientation and training. A good guardian video shown at or shortly after appointment, -- and a detailed resource-rich manual -- will give a lot of "bang for the buck" in raising the quality of guardianship services. Many states have them and the ABA Commission maintains a

collection. For example, the Alaska State Association of Guardianship and Advocacy developed a lively video illustrating guardian duties in various settings. The Virginia Guardianship Association, the California Judicial Council, the State Bar of Michigan and many other organizations have developed comprehensive handbooks guiding guardian activity and answering basic questions. Some probate courts such as Tarrant County Probate Court #2 have developed exemplary guardian orientation material. A few states such as Florida and New York have statutorily-required guardian training. The New York Courts recently created a guardianship office to coordinate technical assistance and training of guardians statewide.

It is not enough. In an informal 2000 survey of 90 guardianship practitioners from 25 states (Wood & Hurme) revealed that 60% of respondents reported the availability of some training aids, ten percent reported extensive assistance, and close to 30% said that guardians had no training aids at all. The cost of training is a substantial barrier, especially as states are facing budgetary shortfalls.

- Standards and Certification. An essential component of guardianship monitoring is the standard by which guardian performance is judged. Statutes offer only rudimentary guidance. The 2001 "Wingspan" National Guardianship Conference recommended that "Professional guardians – those who receive fees for serving two or more unrelated wards – should be licensed, certified, or registered." The Center for Social Gerontology developed an early code of ethics for guardians, as did the director of the New Hampshire Office of Public Guardian. These paved the way for the National Guardianship Association (NGA) *Code of Ethics* and *Standards of Practice.* In addition, through its National Guardianship Foundation, NGA has a nationwide process to certify guardians. A Registered Guardian must meet eligibility requirements, pass an examination, and take continuing education courses. For more experienced guardians, the Foundation provides a Master Guardian certification. To date there are 598 Registered

Guardians from approximately 35 states and 28 Master Guardians representing at least 13 states.

A few states have developed guardian registration or certification requirements. California and Texas have registration requirements for "private professional" guardians, and Florida recently enacted legislation providing that professional guardians must register with the Statewide Public Guardianship Office. The state of Washington has developed an extensive certification program that goes further than just registration. It features training requirements, practice standards and disciplinary procedures. Arizona has implemented the most comprehensive state certification program for fiduciaries, including registration, training and an examination.

Certification is potentially the wave of the future, ensuring the courts and community that professional guardians have a basic understanding of their fiduciary duties. It is still in its infancy and needs greater support and visibility. But family guardians and volunteers need the same understanding. They are often called upon in a crisis, with little background, to fulfill a Herculean task. Certification does not address their needs.

- Reports and Accounts to Court. Almost all states require guardians/conservators to submit to court periodic accountings and personal status reports on the welfare of the incapacitated person. Despite this, in 1987 the Associated Press found some files virtually empty. The ABA's 1991 report confirmed that in many instances the reporting requirements were not rigorously enforced.

The Hurme & Wood survey of practitioners in 2000 found that close to half said that personal status reporting was rigorously enforced in their jurisdictions. What of the other half? This survey was small and informal, conducted without funding. There is no recent data on enforcement of guardian reporting requirements. Can we as a nation afford less than full protection for vulnerable

incapacitated people who have lost their liberty? Can we afford not even to know how frequently reports are filed and the situations of elderly wards overlooked?

- Judicial Review. Aside from a sentinel effect, reports and accountings serve little purpose if no one looks at them. The 1991 ABA study of guardianship monitoring identified several components of an effective review process – tracking or tickler systems, designated judges responsible for review, designated financial auditors and examiners of personal status reports, and established review criteria. Yet in reality, once reports are filed, what happens to them is as varied as the number of states, courts and judges. A Florida Supreme Court Commission on Fairness survey of Circuit Courts in 2000 found very little in the way of court review. Public hearings by the Illinois Guardianship Reform Project in 1999-2000 uncovered "frustration with the inconsistency in carrying out statutory monitoring requirements [including] a laxity in closely scrutinizing annual reports."

Beyond this, if initial paper review reveals problems, to what extent do courts send investigatory personnel out to be the "eyes and ears of the judge" and check up on the incapacitated person? Sadly, the answer appears to be "rarely." While most states authorize judges to use investigators when a "red flag" comes to the court's attention, resources are scarce. Only California has a comprehensive statewide system of regular probate court investigators, and Maryland uses a review board for public guardianship.

Court dockets are growing and their resources dwindling. How much review and investigation can they afford? Some courts are beginning to use inventive, low-cost approaches toward review – sending a copy of the guardian report to interested third parties, asking the state public guardianship program to aid in review of private guardianships, or using volunteers and students regularly to visit incapacitated persons and guardians. For example, the probate court in Tarrant County Texas uses social work student interns as court visitors. A

number of courts use trained volunteers. The Michigan Supreme Court pioneered the use of a guardianship ombudsman, but the legislature failed to appropriate funds for the position. Money remains a key stumbling block.

- Sanctions and Enforcement. When guardians violate their fiduciary duty, courts have a panoply of sanctions, including suspension, contempt, removal and appointment of a successor. The court also can withhold the guardian's fees, surcharge the bond or hold guardians accountable for mismanagement of property. If a guardian is certified, removal of certification also is a severe penalty. There is little data indicating the frequency with which these remedies are used, or how effective they are in preventing abuse or exploitation.

- Guardianship Plans. The concept of a "guardianship plan" has been included in every major set of guardianship recommendations, and is incorporated into law in a number of states. For example, the NGA *Standards* required that "the guardian should develop and monitor a written plan setting forth short and long-term goals for the ward's personal care, including residential and all medical/psychiatric concerns. . . ." The idea is that the guardian should be required to submit not only an after-the-fact status report, but a forward-looking document describing to the court the proposed care of the incapacitated person. This provides the judge with a tool to measure the guardian's future performance – a basis against which to compare later status reports. Plans can cause the guardian to sit down early in the game and chart a course of action.

  Little data exists to determine whether such plans are actually in use, are practical and are beneficial. In the informal 2000 survey of practitioners by Hurme & Wood, few respondents commented on use of plans and only 15% said the filing of plans was rigorously enforced. One barrier to the use of guardianship plans may be the added review time for court staff, when resources for any monitoring at all are scant – and the greater difficulty of assessing plans to meet medical and social needs compared with budget plans and financial reports. It

might be helpful to send the plan to individuals listed in the notice. A second barrier may be that plans cannot keep pace with the changing condition and circumstances of the incapacitated person.

- Court Data. The recent 2001 national "Wingspan" conference on guardianship recommended development and funding of "a uniform system of data collection within all areas of the guardianship process." Indeed, we have very little accurate, reliable data about guardianship -- and without this, policymakers and practitioners are working in the dark in assessing what exists and how to improve the system. We don't know the number of persons actually under adult guardianship in the country.

  State court administrative offices keep at least some data on guardianship, and individual courts have widely varying statistics. This information frequently is inconsistent and may be problematic in a number of ways. In many states, guardianship is lodged in probate courts, but in others, it is heard in general jurisdiction courts where it guardianship data easily may get lost in the wide variety of casefiles. In some instances, case information on adult guardianship is not separated from guardianship for minors. Some courts lump guardianship data in with more general probate or decedents' estates data. State differences in terminology also present a real obstacle. There is no uniform method for data collection, or uniform data fields. Moreover, courts and court administrative offices have differing computer capabilities and technical systems.

- Funding. Good monitoring requires sufficient resources. Courts must have funds available for staff, computers, software, training and materials. Financing for guardianship monitoring, however, must compete with other court needs, as well as other county and state needs, in increasingly overstrained budgets. In the informal survey of practitioners in 2000, about 46% of participants reported that "no money was available" for monitoring, and 27% said "some funding" was available. In a 2000 survey of Florida circuit courts, with 18 of 20 circuits reporting, 12 circuits reported "lack of financial resources" as a barrier to monitoring. These surveys were conducted before the current state budget crises that are resulting in cutbacks of some basic court functions.

Most jurisdictions rely on multiple funding sources to finance monitoring – including state appropriations, local monies, the estate of the incapacitated person, filing fees, and grants for special projects. Some courts supplement their monitoring efforts with the use of volunteers as visitors, investigators, auditors or records researchers, although adequate support must be available for ongoing volunteer supervision and training.

C. Federal Role in Guardianship Monitoring?

Guardianship traditionally has been a creature of state law. However, because federal pensions and other funds may be managed by guardians/conservators, and because some aspects of guardianship – including monitoring -- could benefit from federal financial assistance, there may be a role for the federal government in offering funds to assist states in their efforts.

In 1988, 1989 and 1991, Rep. Claude Pepper, Rep. Olympia Snowe, Rep. Edward Roybal, and Sen. John Glenn sponsored federal bills setting out guardianship standards for states, and providing for the withholding of federal funds for non-compliance. The bills addressed procedural safeguards in the adjudication of incapacity, the qualifications of guardians, certification and training – and accountability and monitoring. The bills, none of which were enacted, clearly took a "stick" rather than a "carrot" approach, and their introduction unleashed considerable discussion within the legal and judicial community on the pros and cons of federal intervention and the federal vs. state role.

In 1992, the Senate Special Committee on Aging held a *Roundtable Discussion on Guardianship* to examine the need for federal legislation and the possible federal "hooks" for regulation. The clear consensus of the invited experts at the Roundtable was that coercing state reform under threat of federal sanctions would not be helpful or appropriate. Instead, they said, the federal government might aid states in data collection and offer financial support to test innovative approaches.

It has been over a decade since the 1992 Roundtable by this Committee. As described above, many courts have developed innovative "best practices." These practices require support, visibility, and the opportunity for replication. According to the Roundtable, the federal government could advance guardianship monitoring through

providing funding assistance such as the following. Many different suggestions have been advanced by guardianship experts and concerned organizations. We have summarized some of these below, even though ABA policy does not support the enactment of federal legislation in the guardianship arena and the ABA does not have policy on these funding approaches.

- Provide funding to support monitoring "best practices," encourage their replication and otherwise enhance the monitoring capacity of state courts. For example, the State Justice Institute in past years made available grants to state court to improve court management, which could include a focus on guardian accountability.

- Encourage the development of a uniform data collection system on guardianship nation-wide, so that data collection by state courts is consistent and comparable.

- Support research on guardianship practices. During the past decade, only a handful of small projects have documented guardianship practices. Much of the criticism of guardianship proceedings stems from a few highly publicized, notorious examples of guardian abuse and neglect of wards. Whether these examples constitute the exceptions or the rule of how guardianships actually function is not known. We have tracked exactly what state laws have been passed, but we need to shed light on the implementation of these laws.

- Encourage coordination between the Social Security representative payment system and state courts with oversight of guardianship. A recent ABA study on *State Guardianship and Representative Payment* funded by the State Justice Institute recommended "a better exchange of information, liaison, and continuing education opportunities between the state guardianship and SSA representative payment systems." For example, where an individual serves as both guardian and representative payee, judges could request the guardian to submit his/her SSA report as well. Moreover, SSA records, if accessible through consents for release of information, might help to identify instances in which guardians who are also serving as representative payees have performed improperly to the detriment of beneficiaries. (For your information, ABA policy adopted in February 2002 urges SSA in the case of organizational representative payees to cooperate with courts with guardianship jurisdiction by disclosing to them and members of the immediate family of a beneficiary information about representative payees considered for appointment as guardians, under an appropriate exception to the

Privacy Act.) Finally, coordination between state courts and SSA field offices could foster joint efforts to recruit volunteers and provide public information.

- Encourage state and area agencies on aging, and the long-term care ombudsman programs under the Older Americans Act to coordinate with state courts with guardianship supervision. Knowledge of the aging network and aging service providers could be helpful to judges in assessing guardianship plans and reviewing guardian reports. Agencies on aging could aid courts in judicial education on aging and in identifying potential community volunteers to serve as visitors or court monitors. Long-term care ombudsman could alert the court when long-term care complaints involve guardians and their wards.

- Recognize that guardianship can aid in preventing elder abuse, but also that guardians sometimes can commit elder abuse; and for both of these reasons, some of the technical assistance, clearinghouse, grant-making and data collection activities in the proposed Elder Justice Act should include guardianship.

- Encourage study of interstate guardianship issues. In many instances, incapacitated persons may have ties to more than one state. Questions arise as to the most appropriate jurisdiction for a guardianship hearing, as well as the need to transfer guardianships, including monitoring and supervision of those guardianships, to another state. Interstate aspects are important in effective monitoring.

Thank you for the opportunity to offer comments to the Senate Special Committee on Aging.

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