VERA INSTITUTE OF JUSTICE

The Guardianship Project Issue Brief
A demonstration project of the Vera Institute of Justice

Guardianship Practice: a Six-Year Perspective

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DIRECTOR'S LETTER

Nearly seven years ago, the Vera Institute of Justice created The Guardianship Project—a new model of institutional guardianship for incapacitated people in Brooklyn, New York—as a response to a number of studies documenting flaws in guardianship policy and practice, and a spate of horrific guardianship abuse cases in the news that captured the public's interest. Since then, despite mounting evidence that current systems are in many states failing to sufficiently protect this vulnerable population, policymakers have paid only intermittent attention to guardianship issues.

Anyone who *has* paid attention is familiar with the tragic circumstances that too often befall the voiceless victims who rely upon unscrupulous or negligent guardians, and the needless cost—to humanity and government—that inevitably results. And in many states, including New York, financial disincentives inherent in guardian compensation frameworks are causing countless people with complex needs and low assets to languish in institutions for years, simply because a willing guardian cannot be found to effectuate a discharge home.

By 2030, the number of people in the United States aged 65 and over will nearly double, reaching 71 million, according to U.S. Census data. And by 2050, the National Center on Elder Abuse projects that as many as 16 million people may be afflicted with Alzheimer's disease unless a cure is found. These demographic realities of an aging society grappling with incurable disease and disability spell a steadily growing demand for guardianship services, making the need for reform more urgent than ever before. As the director of The Guardianship Project, I am pleased to be able to contribute our experience and expertise to this significant challenge.

Our goal in this issue brief is to bring together what we know about current practice and the opportunities for reform. We offer this document to further our aspiration that, at least in our state, these persistent injustices will soon become a thing of the past, and that all people in need of a competent, trustworthy guardian will receive the care and support necessary to live with dignity and autonomy.

It should be noted that our work would not have been possible throughout the years without the assistance and commitment of our government partners, and private and public funders. In this regard, I would like to specially recognize the invaluable support we have received from the New York State Office of Court Administration, for which we are deeply grateful.

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Director, The Guardianship Project

Introduction

As people age or suffer the debilitating effects of illness, injury, or a disabling condition, they frequently lose the ability to care for themselves or manage their affairs, and may not have a friend or family member willing or able to assist. To protect the interests of people in these circumstances, state judicial systems have developed the practice of legal guardianship, whereby a court with jurisdiction can deem a person incapacitated and appoint a third party to act on his or her behalf. A guardian can be a friend or family member, or a professional—often an attorney—or an agency, that takes responsibility for the incapacitated person's financial, medical, legal, and other affairs.

There is no national model for guardianship. State or local courts determine the form that a guardianship takes, in accordance with their state governing statutes. Although the contours of guardianship vary by state, overwhelming evidence indicates that in many places the practice is fraught with flaws and service gaps and is badly in need of reform.

This issue brief provides an overview of current guardianship practice generally, followed by a description of guardianship services in New York State. The latter analysis describes the challenges facing New York's system, along with recommendations for how officials could make the state's guardianship practices more just, equitable, humane, and cost-effective.

Background

A guardianship case begins when a family member, friend, other interested party, or even a hospital or nursing home petitions the court to appoint a guardian for a person who may need such assistance. If a court determines, after a hearing, that the person is incapacitated and in need of a guardian, one will be appointed and granted specific powers and responsibilities. Because each person in need of a guardian has unique functional abilities and limitations, courts must shape—and limit—the scope of the guardianship accordingly.

Although conceptually simple, guardianship, in practice, is extremely complex, as are the provisions that have been established to govern these services. Nationally, there are varying courts with jurisdiction over guardianship, including the district court, orphan's court, probate court, court of common pleas, and state supreme court, as examples.

People needing guardianship services may require an array of support, or very little. They may, for example, need help paying their bills, assistance resolving legal disputes, require someone to make crucial medical or end-of-life decisions, or simply need help selling a house. There is, therefore, variance in the scope and duration of guardianships, as seen in person and property guardianships; temporary, special, or limited appointments; co-guardianships; and even successor guardianships.

There are also different kinds of guardians. Ideally, a court can assign a trust-

ed family member or friend to serve as an incapacitated person's guardian. But when such a person is not available, the court must appoint someone else, either an individual—in most instances, a private attorney—or an institution. Institutional guardianships may take many forms: some states have public or community guardians, others provide guardianship services within an agency; and still others provide a combination of these options.

Because the provision of guardianship services can be time-consuming and requires a broad spectrum of expertise, private guardians are compensated for delivering these services, but there are varying state frameworks for doing so. In most cases, payment is derived from the client's assets. Generally, courts arrange a fee-for-service model of payment in which the appointed guardian bills for each action taken on the client's behalf, or takes a monthly fee, with the court retaining discretion for approving or denying a portion or all of the expense.

NATIONAL CONCERNS. The existence of such myriad and diverse guardianship forms ultimately makes it difficult to compare and evaluate the different approaches to delivering services. Moreover, state data collection on guardianship cases, guardian performance, and outcomes is neither systematic nor comprehensive, further obscuring comparison. As a result, the exact scope of unmet human need and systemic deficiencies remains largely unclear.

What is clear, however, is that poor vetting and training of guardians, insufficient efforts to match guardian appointments to meet clients' specific needs, and guardians' unfettered access to client assets has too often yielded catastrophic results.

A 2004 report by the U.S. Government Accountability Office (GAO) showed that poor government oversight and a lack of cooperation between federal and state government agencies left a vacuum in which physical or emotional abuse, financial exploitation, and neglect of incapacitated persons by their guardians occurred, largely without court scrutiny.[1] The GAO documented several egregious examples of financial abuse: a New York guardian and employee of the guardian's law firm who purchased and delivered flowers and cake to an institutionalized client on her birthday and billed the client $850 in legal fees, an Arizona Public Fiduciary who embezzled or misused $1.2 million in public funds, and a West Virginia foundation head who pilfered more than $300,000 in client Social Security benefits, to cite just three examples.[2]

Sadly, the problems identified in 2004 persist. After a year-long inquiry into allegations of fraud and abuse by court-appointed guardians in 45 states and the District of Columbia, a second GAO report, published in 2010, produced still more evidence of exploitation, neglect, and elder abuse.[3] Investigators examined 20 cases in which guardians collectively misappropriated at least $5.4 million in assets from 158 incapacitated, mostly elderly people who were ostensibly in their care.[4] Many had been certified as guardians despite criminal histories and past financial misdealings.[5]

GAO investigators found negligible standards for selecting guardians across

the country, and little oversight of them once they were appointed. "In 12 of our 20 case studies," investigators wrote, "state courts failed to oversee guardians after their appointment, allowing the abuse of vulnerable seniors and their assets to continue. Courts ignored criminal and/or financial problems of guardians who served multiple roles with conflicting fiduciary interests. They also failed to review irregularities in guardians' annual accountings or sanction delinquent guardians." [6]

And as recently as July 2011, the GAO issued yet another report underscoring the continuing deficiencies in court and federal agency oversight of court-appointed guardians, and the need for greater collaboration and funding to evaluate promising models that address this critical problem. [7]

All told, the GAO findings consistently reveal inadequate safeguards and an absence of professional standards in a field about which there has been only sporadic public discussion and limited scrutiny in most states, beyond the niche community of practice. Nevertheless, there is reason to hope that this state of affairs may soon change.

RECENT DEVELOPMENTS. There has been some promising movement at the federal level: U.S. Senator Amy Klobuchar of Minnesota, who chairs the Judiciary Subcommittee on Administrative Accountability and the Courts, recently introduced the Guardian Accountability and Senior Protection Act (S. 1744). The bill seeks to provide funding for state courts to assess and improve proceedings related to adult guardianships and authorizes the Attorney General to implement a pilot program to conduct background checks on prospective guardians and conservators, as well as to promote the use of information technology for monitoring, reporting on, and auditing guardianships. [8]

Also, in October 2011, the National Guardianship Network convened the Third National Guardianship Summit in Salt Lake City, Utah, where delegates, observers, scholars, and others from across the country met to discuss guardian performance issues, and to craft and recommend national standards to guide states in best practices reform. [9] Among discussion topics that arose were some of the very problems cited in the GAO reports, including guardian malfeasance with impunity, exacerbated by court systems that are overburdened and under-funded; limited access to guardianship services, resulting from a dwindling supply of competent guardians and excessive court delays in processing payments for services; and a paradigm of guardianship predicated on clients' ability to pay that has left too many indigent people unnecessarily institutionalized for years as they await someone able to take their case. This promising event, which yielded a comprehensive set of recommended actions to be taken by state courts and legislators, could—amidst evidence of growing interest in guardianship issues—portend a nationwide wave of reform that can certainly be instructive for New York State.

Vera's Innovative Response: The Guardianship Project

The goal of providing just, equal treatment under the law for elderly incapacitated people spurred the Vera Institute of Justice to develop a new way to respond to an aging society's growing problem.

Early in 2004, in the wake of studies and news reports documenting abuses committed by ill-trained, predatory guardians in New York State—including a Queens guardian who stole approximately $2.1 million from 17 clients—Vera identified guardianship as a top-priority reform initiative. Working in collaboration with the New York State Office of Court Administration, Vera designed and launched the project in 2005 to test a new collaborative, cost-effective model of institutional guardianship.

The project's multidisciplinary team is divided into three main task-based departments: finance; legal; and case management. Each employee undergoes a multistate criminal background, credit history, and bankruptcy check. Project staff members are experts at navigating systems that incapacitated people have to deal with: Medicaid, health care, vendors, courts, and public benefits. Consistent with Article 81's mandate requiring guardians to maintain clients in the least restrictive environment, the project strives to move clients out of institutions and back to their homes and communities whenever possible. But for project services, many clients would be languishing in hospitals and nursing homes, at great financial cost to the state and immeasurable cost to their humanity.

For more information about The Guardianship Project, contact Laura Negrón at (347) 296-1874 or lanegron@courts.state.ny.us.

Guardianship in New York State

New York State's guardianship system shares many of the characteristics and failings that apply nationally. In its details, however, New York is unique—both in terms of the structure of its guardianship policies and practices, and the problems these engender.

The governing statute for guardianship is Article 81 of the New York Mental Hygiene Law.[10] When a petition is filed, the Supreme Court—which has jurisdiction over "Article 81" guardianships—holds a hearing to determine if the person in question is incapacitated and in need of a guardian. If so, where no family member or friend is willing or able to serve as guardian, the court often appoints a private attorney, or in some cases, turns to agency guardian programs.

A significant problem is the projected rising need for guardianship services amidst a limited supply of "good guardians" willing to assume such a sobering and often life-long responsibility when friends and family cannot. Community agency guardians, of which there are few in New York, accept appointments only for clients residing in the community, typically when Adult Protective Services has been involved. For the incapacitated population in facilities, there are even fewer alternatives.[11]

Slow-moving court procedures and bloated dockets frequently aggravate this problem. In some counties, it can take six to nine months for the internal court review and signing of a final order by a judge. During this time, it is unlikely that people in need of guardianship will receive services unless the court has established a temporary guardianship—some have even died waiting for a guardian to be appointed.[12]

To understand the scale of the problems with guardianship in New York State, it is instructive to consider demographics. Between 2010 and 2030, New York's population of adults over 65 is projected to increase by 43 percent—from 2.55 million in 2010 to 3.64 million in 2030, according to Cornell University's Program on Applied Demographics.[13] While aging is not necessarily correlated with incapacity, the projected rise in the number of people afflicted with Alzheimer's disease, coupled with a burgeoning elderly population, can be reasonably expected to increase the state's guardianship docket.

Perhaps the New York State guardianship system's greatest challenge is its obligation to provide care to all people, regardless of the scope of their assets. Despite this obligation, New York has elected not to establish a public guardianship office paid with public money and staffed by government employees. Instead, it relies almost exclusively on a fee-for-service model of guardian compensation, where funds are drawn from the incapacitated person's resources. This compensation framework results in a grave injustice: those with the least resources—indigent incapacitated people—have the least likelihood of receiving the protection and help that they need. Inordinate delays in court review and payment of requested fees and commissions further dissuade even the best-intentioned private guardians from taking on

appointments that may generate little or no payment, because client resources are often depleted by costly hospitalizations, home care, property repairs, and other expenses during the intervening years.

In addition to problems of access to services, poor-quality guardianship care results when there is a mismatch between an incapacitated person's complex needs and the capacity and skill of the assigned guardian. Guardianship requires knowledge across a variety of fields, such as Medicaid and other public benefits, discharge and home care planning, financial and property management, and litigation, among others. While many private guardians are extremely competent, some who work alone lack the range of expertise that makes it possible to address the varied needs of incapacitated seniors and adults with disabilities. They may be excellent litigators, for example, but they may not have the case management skills needed to help an elderly client remain at home.

Extended, unnecessary institutionalization is yet another example of the myriad types of neglect or abuse that incapacitated people may suffer because the system is unable to connect them with a guardian having requisite skills. Institutionalized clients with meager assets, in particular, may spend years in a facility simply because a suitable, willing guardian cannot be found to plan a discharge, repair a property, purchase furniture, negotiate debts, and set up home care. Meanwhile, mounting institutional costs during this time serve to erode the client's assets and thereby foreclose any future opportunity to afford a move home.

Finally, in New York, as in the rest of the country, corruption among guardians is all too common. Both the 2004 and 2010 GAO reports document instances of guardianship abuse and neglect in New York State, attributing these instances to inadequate certification requirements for prospective guardians and insufficient monitoring of appointed guardians. New York State guardian certification does not require background checks; it consists, instead, of a one-day training with no evaluation to determine if the trainee absorbed the material. This perfunctory vetting was blamed in the 2010 report for allowing a New York attorney who had declared bankruptcy three years earlier to be appointed guardian of an 82-year-old with Alzheimer's disease from whom he misappropriated at least $327,000.[14]

Effective monitoring could have flagged drastic decreases in this victim's estate. But in oversight, too, New York's current system is remiss. Minimal and inconsistent monitoring continues to allow vulnerable people to suffer at the hands of unscrupulous guardians. As recently as 2011, a roughly $700,000 wrongful life settlement awarded to a young Brooklyn boy with severe physical disabilities was misused by his guardian for nine years while the boy remained in non-accessible housing without as much as a wheelchair.[15]

While stories such as this illustrate the kinds of abuse that can occur, it is currently impossible to gauge the extent of guardian malfeasance because New York State—like many others—does not systematically collect sufficient data on this population. As a result, while it is clear that injustice is occurring all

around us, it is unclear exactly how many people in need of a guardian enter and remain in the system each year, how many actually receive needed assistance from their guardians, or how long they may be waiting, without critical services, for the court to act.

Nevertheless, New York State should have an incentive to address these challenges quickly. In New York City, more than 1,000 new guardianship petitions are filed each year, adding to an already heavy caseload: In Brooklyn alone, there are more than 2,000 existing cases.

Recommendations for reform

In New York State, the Vera Institute of Justice regards this as an auspicious moment to turn policymakers' attention to innovative approaches that can address the challenges of legal guardianship. Both the recent guardianship summit and the legislative initiative in the U.S. Senate, discussed earlier, signal that national attention may be coalescing around an interest in finding sustainable solutions to the problems.

MONITORING AND OVERSIGHT. The GAO findings drive home how important it is for guardians and courts alike to adhere to the highest standards of fiduciary practice. In addition to more stringent oversight, however, a true solution requires changing the way guardians operate. Given guardians' broad responsibilities for their clients' finances, legal issues, property, home care, and medical treatment, it is crucial that prospective guardians undergo thorough scrutiny by the court, are subject to criminal and financial background checks, and receive ongoing supervision throughout their term of guardianship. Promising legislation such as that introduced by Senator Klobuchar could, if enacted, help catalyze much needed federal support to promote and develop effective state practice models of monitoring and evaluation.

New York State lawmakers should ensure the availability of resources and technology to help improve judicial oversight. They should also establish and enforce standards requiring the routine evaluation of guardians and the removal of those who violate their fiduciary mandate to serve the best interests of their clients. These reforms should include the development and implementation of interagency data collection systems drawing together information on elderly and incapacitated New Yorkers to create a reliable mechanism for systematically tracking the scope of and response to the problem.

There is also a need for increased support and guidance for guardians. Not all guardian misdeeds or failures to act are the result of unscrupulousness, but rather may stem from a lack of knowledge or experience, and inadequate training. Given the high level of fiduciary care involved in guardianships, more comprehensive state certification requirements or licensure should be required of professional guardians. Court procedures for obtaining emergency assistance, particularly during evenings and weekends, should be established and made clear.

ACCESS TO GUARDIANSHIP CARE FOR ALL NEW YORKERS. New York lawmakers must address problems of limited guardianship options for indigent clients, particularly those who are institutionalized. Presently, for clients with limited means who are in need of guardianship services, there are few private guardians who can afford to take such cases, and even fewer agency guardian options, amidst a rapidly increasing elderly population in need.[16]

To remove the systemic inequities in access to services based on clients' assets, state officials should pursue a variety of mechanisms to ensure sustainable funding for guardianship services. First, the state should establish some form of public guardianship for people who cannot afford it. This will reduce both financial disincentives to accept guardianships for indigent incapacitated people, as well as the perverse incentives such as the expectation and billing of exorbitant fees. Second, to protect guardianship funding from economic vicissitudes, the state should diversify funding sources, introducing public/private grant partnerships and innovative financing mechanisms such as social impact bonds.[17] Other options may include the possibility of drawing upon federal Medicaid dollars, and the adoption of a Request for Proposal process whereby state funding can be competitively allocated to public-style, independent guardians.

While the economic climate remains difficult, guardianship services can in fact save the state money in both the short and long term. Programs and services that move people out of costly institutions, back to their homes and community, help reduce state Medicaid expenditures, because Medicaid institutional care is generally far more expensive than is Medicaid-funded home care.

How Effective Guardianship Saves New York State Medicaid Dollars

The elderly and people with disabilities comprise 24 percent of Medicaid enrollees in New York State yet account for 74 percent of spending, according to the Citizen's Budget Commission. One reason for the steeply skewed figure is that so many of this population end up in institutional care, which is extremely expensive: the average annual cost in Medicaid dollars to keep an indigent incapacitated person in a nursing home in New York City is approximately $112,000.

Effective guardianship that allows people to remain in their homes and maintain their independence is both more humane and more cost-effective: our data, based on case-specific analysis of each client, shows that living at home can roughly double the time it takes for someone to need Medicaid.

Since its inception, The Guardianship Project has maintained one-third of its clients in deinstitutionalized settings, thereby saving New York State more than $2.5 million in Medicaid expense annually, serving only about 100 clients per year. If scaled to serve additional clients in New York City and beyond, the project could potentially generate many more millions of dollars in savings for New York State's Medicaid program.

OPERATIONAL REVIEW OF GUARDIANSHIP COURT PROCEDURES. To combat the problem of administrative delays in the assignment of guardians that result in people languishing without care or services, and the inordinate delays in fee payment and guardian discharge from cases, New York State should conduct an operational review of guardianship court procedures from the time of petition to discharge to identify chokepoints and make recommendations for improving their efficiency with the aim of identifying more efficient procedures that will help conserve guardianship resources, retain competent guardians in the field, and serve clients more expeditiously.[18]

HOLISTIC APPROACH TO GUARDIANSHIP. For complex cases involving the need for a broad spectrum of expertise, agency guardianship models, funded with a range of professionally skilled, salaried staff and imbued with strong internal checks and balances, including background checks on all employees, could play an important role in improving the integrity of an ailing system and assuring that incapacitated elderly and people with disabilities are not victimized or neglected by the very guardians entrusted to protect them. Such models can be especially useful in cases involving institutionalized patients whose move home will require extensive time, staff resources, and labor-intensive tasks that may not be possible for small firms or solo practitioners.

State lawmakers should also consider the establishment of model guardianship courts that would have the same range of expertise at their disposal. Two known model guardianship courts have been created in New York, one in Suffolk County and another in Queens, but continued funding for these courts in the current economic climate remains uncertain.

Conclusion

Moving forward, New York State officials can no longer afford to ignore the systemic gaps and deficiencies in state guardianship policies and practices—problems which have already taken a great toll on the lives and well-being of some of our most vulnerable citizens. Despite these difficult economic times, an investment now of public resources to support courts and guardians will be well worth the payoff to the people who desperately need and deserve quality guardianship services suited to their needs. In the long run, we all benefit from a system that is more just, efficient, and humane.

ENDNOTES

1 U.S. Government Accountability Office (GAO), *Guardianships: Collaboration Needed to Protect Incapacitated Elderly People* (Washington, DC: GAO, July 13, 2004).

2 Ibid., pp. 8-9.

3 U.S. Government Accountability Office (GAO), *Guardianships: Cases of Financial Exploitation, Neglect, and Abuse of Seniors* (Washington, DC: GAO, September 2010).

4 Ibid., p. 2.

5 Ibid. Despite the fact that GAO testers presented fabricated criminal records, they were certified as guardians in New York State.

6 Ibid.

7 U.S. Government Accountability Office (GAO), *Incapacitated Adults: Oversight of Federal Fiduciaries and Court-Appointed Guardians Needs Improvement* (Washington, DC: GAO, July 2011).

8 Open Congress.org, S.1744 - Guardian Accountability and Senior Protection Act, http://www.opencongress.org/bill/112-s1744/show

9 The 2011 Summit, which was organized into seven interdisciplinary working groups, also focused heavily on standards of decision-making for adults. At its conclusion, Summit delegates voted to adopt comprehensive recommendations for national practice standards and actions by state courts and policy-makers.

10 Guardianship in New York State can also be established pursuant to Article 17A of the Surrogate Court Procedure Act, not covered in this publication. An "Article 17A" guardianship is sought for persons having a developmental disability or mental retardation; it is often used for children under the age of 18.

11 Vera's Guardianship Project is one of few agency guardianship programs in New York State that helps institutionalized clients return home when medically feasible, safe, and consistent with their wishes.

12 One such example was in Queens County, with the death of Etta C. See Joe Rosenberg, "Poverty, Guardianship, and the Vulnerable Elderly: Human Narrative and Statistical Patterns in a Snapshot of Adult Guardianship Cases in New York City," *Georgetown Journal on Poverty Law & Policy*, Volume XVI, Number 2, 3 (2009), p. 316.

13 Report from the National Center on Elder Abuse, at 10, *available at* http://www.ncea.aoa.gov/ncearoot/main_site/pdf/publication/GuardianshipData.pdf (last visited November 10, 2011).

14 GAO Report on Guardianship (2010), p.13.

15 In the Matter of Roy W. Lantigua Jr., 107034/99, NYLJ 1202491051608, at *1 (Sup., KI, Decided March 31, 2011)

16 As an example, Vera's Guardianship Project, an institutional guardian, presently serves about 90 of New York City's thousands of guardianship cases.

17 Social impact bonds offer an innovative way to finance important social programs that achieve measurable outcomes which save the government money. This innovation involves a partnership among an investor, a government entity, and a non-profit organization which commits to achieving the cost-savings results. If the contracted results are achieved, the government will pay, from the cost-savings, a return on investment to the funder.

18 The Vera Institute of Justice has begun a preliminary operational review of its 175 Kings County cases, tracking the time between the procedural steps from petition to discharge. An independent agency or agencies working in collaboration with the Office of Court Administration could expand such efforts to other counties and, resources permitting, could eventually take the study statewide.

The Vera Institute of Justice is an independent nonprofit organization that combines expertise in research, demonstration projects, and technical assistance to help leaders in government and civil society improve the systems people rely on for justice and safety.

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