



Deciding to Let Others Decide

Judging the Need for Guardianship and Conservatorship

By Edie L. Greene

The headline read: “The Probate Pit: Busted System, Broken Lives.” The story, featured in the April 7, 2001, edition of Denver’s *Rocky Mountain News*, described 74-year-old retired Air Force Colonel Farrell Hupp, a former comptroller once responsible for handling billions of dollars for NATO. But on a recent spring day, according to the article, Hupp had “stepped through the looking glass and into the world of Colorado’s probate system.” He had reportedly become confused while driving in familiar territory, ran over some curbs, and argued with his wife. Before long, he had lost everything—his wife, home, possessions, and, most importantly, his

Edie L. Greene is a professor of psychology at the University of Colorado in Colorado Springs, Colorado.

dignity, as he became a ward of the probate court with control of his life turned over to a caregiver. Although the article acknowledged that most routine cases involve family members who assume guardianship of loved ones no longer able to care for themselves, it also described instances in which family disputes or lack of relatives make that situation impossible and of the horrors that ensue:

[P]rofessionals take charge, and people such as Hupp can find themselves plunged into a world of upside-down justice . . . a world in which citizens can lose their freedom at hearings they don’t attend, then pay the bills of lawyers arguing against their release . . . a world in which guardians spend the money of the

people in their care to take actions that may be against their will . . . a world where simply shopping for shoes or scheduling a dental appointment can cost hundreds of dollars.

Lou Kilzer & Sue Lindsay, *The Probate Pit: Busted System, Broken Lives*, Rocky Mountain News, Apr. 7, 2001, available at www.rockymountainnews.com/drmn/local/article/0,1299,DRMN_15_246760,00.html.

The focus of this article is on the judicial decision that an older adult lacks capacity and needs a guardian or conservator to make decisions on his or her behalf. It covers the recently changing landscape of state guardianship statutes, briefly outlines the nature of guardianship hearings and the roles of multiple professionals who provide input to probate courts, then

describes research findings about the diversity of opinion among these professionals and ponders the reasons for those discrepancies.

Whether the story of Farrell Hupp is a representative portrayal or an inflammatory and extreme example of a system gone awry, there is little doubt that a finding of incapacity or incompetence can have very profound effects on older adults. Such a determination rescinds the right to make fundamental choices about living arrangements; health care; the purchase, use, or disposal of property; travel; making or revoking a will; getting married or divorced; spending money; and driving. The loss of any one of these rights can have a significant negative effect on an older



No national standards govern the appointment of guardians in the United States.

adult's well-being, but taken together, their effects can be devastating. Indeed, the loss of decisional autonomy that occurs in the context of guardianships and conservatorships can have very serious consequences, affecting mental health, sense of personal control, and physical well-being.

These are difficult issues for judges to confront: on the one hand, older adults may apparently lack the capacity to care for themselves or handle their finances; yet, on the other hand, the imposition of surrogate decision makers may reduce their faculties even further. So judges must carefully weigh the costs and benefits to a proposed ward (and to others who may be affected by that person's behavior) of removing decisional autonomy and assigning a guardian or conservator.

But assessing whether older adults lack the capacity to live independently or to manage their affairs is a highly discretionary judgment; no bright lines demarcate competence and no absolute degree of functional insufficiency signals incompetence.

In the words of one commentator: "When people start sliding downhill, they often slide slowly, almost imperceptibly. They have good days and bad days. They can manage some things and not others." Lawrence M. Friedman & June O. Starr, *Losing It in California: Conservatorship and the Social Organization of Aging*, 73 Wash. U. L.Q. 1501, 1523 (1995). And yet probate courts must make a finite decision about a constantly fluctuating situation. How they do that is of interest here.

Many adults who are made wards of guardians and conservators (hereafter referred to collectively as "guardians") fare better with some assistance than they would without.

At best, guardians can function as an important advocate for a mentally compromised older adult and can ensure that decisions are made in accordance with the ward's preferences. Guardianships undoubtedly improve the quality of life in cases in which abuse, neglect, or exploitation precipitated the petition. Unfortunately, guardians do not always make the same decisions as their wards might, even when they explicitly attempt to mirror those wishes, and some evidence suggests that wards have felt angry, resentful, agitated, and upset by guardianship proceedings.

Guardianship Statutes

No national standards govern the appointment of guardians in the United States. Rather, each state enacts laws and regulations outlining the establishment of guardianships and the duties and responsibilities of both the court and the guardian. In general, states have moved from statutes in which the mere presence of a mental or physical disability was enough to justify the finding of legal incompetence and the assignment of

a guardian to more specific and functional standards that emphasize a respondent's ability to manage the tasks of daily living.

Traditional guardianship statutes were criticized for casting a very wide net as any older adult who suffered from a particular mental or physical condition could be considered appropriate for guardianship. The laws also failed to recognize the variability in individual reactions to illness; clearly, an older adult with ample social and financial support can cope with physical and mental infirmities better than a person who lacks such support. Finally, because these statutes offered only vague standards for determining competency, they gave judges wide discretion in deciding what evidence was admissible and resulted in varying outcomes for persons with similar disabilities.

In response to these concerns, some states adopted so-called "decisional statutes" that emphasized the link between mental and physical conditions, on the one hand, and decision-making ability, on the other. Under these guidelines, older adults were deemed incapacitated if, as a result of mental or physical illness or disability, they lacked sufficient understanding or capacity to make or communicate responsible decisions. But these statutes have been criticized along the same lines; because the key cognitive processes on which they focus (the capacity to make or communicate responsible decisions) are so vague, judges are likely to make competency determinations in accordance with their own beliefs or with deference to evaluators' conclusions.

The most recent innovation in guardianship standards involves the promulgation of "functional statutes" that emphasize the prospective ward's actual behavioral and functional abilities—what a person is capable (and incapable) of doing in terms of managing his or her affairs. The focus is no longer on diagnosis as the sole determinant of legal incompetence; although mental or physical illnesses may increase the likelihood that individuals will be unable to perform important life

tasks, these conditions do not necessarily render a person legally incompetent.

Statutes now generally require that several elements be proven before guardianship is initiated: (1) a disabling condition such as a mental illness or infirmity; (2) cognitive impairment; (3) impairment in functional abilities (those abilities widely recognized in the gerontology literature as ADLs, activities of daily living, such as feeding, bathing, toileting, and mobility; and IADLs, instrumental activities of daily living, such as managing medications, shopping for necessities, and managing one's finances); and (4) the lack of feasible alternatives to guardianship.

These statutes require courts to examine, among other things, the behavioral evidence of functional limitations in a person's daily life and to assess whether those limitations are serious enough to warrant surrogate management. The intent is that guardians would be appointed only when the functional consequences of disability are extreme. Indeed, these statutes recognize the possibility of partial incapacitation and so-called limited guardianships: a probate judge (or, in some venues, a judge of general jurisdiction), after assessing different realms of an older adult's functioning, could decide that the proposed ward is incapable of performing some tasks but not others and can appoint a guardian to assume some roles in that person's life but not others.

Guardianship Proceedings

All adults are presumed to be competent to make decisions for themselves unless and until a judge has determined that they are no longer able to do so. Guardianship proceedings for older adults tend to follow a well-established pattern. A formal request for guardianship is usually filed by a family member of the older adult, although petitions also come from public and private agencies, hospitals, nursing homes, doctors, attorneys, and accountants. A specific triggering event such as a health emergency, financial mismanagement, acute mental health problem, or the need for nursing home placement often prompts the filing of a petition. After a petition is filed, a physician or mental health pro-

fessional typically conducts an evaluation of the older adult and a report of that evaluation is provided to the court, along with input from other sources, including social workers, home health care workers, attorneys, nurses, court investigators, guardians ad litem, other family members or friends, and the respondents themselves.

On the basis of this input, judges typically make one of three decisions: (1) the respondent does not lack capacity and an arrangement short of guardianship is implemented; (2) the respondent is deemed partially incapacitated and limited guardianship is instituted; or (3) the respondent is determined to be incapacitated, plenary (full) guardianship is deemed appropriate, and a guardian is appointed to make decisions on behalf of the ward. Importantly, although only judges have the authority to make formal determinations of capacity, elder law attorneys routinely make de facto assessments when they agree to make changes to a will, draft contracts, and

All adults are presumed to be competent to make decisions for themselves unless and until a judge has determined that they are no longer able to do so.

provide other legal services to older adults. Given the profound effect of these decisions on the lives of older adults, it is important to understand how they are made.

Opinions About Guardianship Among Different Professional Groups

Some data show that elder law attorneys who typically lack formal training in capacity assessment may evaluate their older clients' capabilities by relying on inaccurate and incomplete information. Other data show that members of different professions apparently rely on dissimilar criteria to reach conclusions on the question of a respondent's capacity. For exam-

ple, when compared with professionals such as attorneys and social workers, who have little daily contact with respondents, informal caregivers such as home health care workers focus more on respondents' interpersonal problems and on difficulties that older adults experience performing daily tasks.

These findings underscore the need for a clear understanding of statutory requirements among all persons involved in guardianship issues so that their input can have a common purpose. Partially for this reason, the ABA Commission on Law and Aging recently teamed with the American Psychological Association to produce two documents—one intended for attorneys and a second for judges—on standards for assessing diminished capacity in older adults. Yet it is unclear to what extent these groups (as well as professional guardians) apply standards and make reasoned judgments about the balance between individual rights, on one hand, and safety and well-being, on the other. See Jennifer



Moye, *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers* (2005), and *Judicial Determination of Capacity of Older Adults in Guardianship Proceedings: A Handbook for Judges* (2006), available at www.abanet.org/aging.

Guardianship Decisions by Probate Judges, Elder Law Lawyers, and Professional Guardians

The Borchard Foundation Center on Law and Aging funded a study of this nature in 2005. (Full results of the study were published in the May/June 2007 issue of *Behavioral Sciences and the Law*.) The purpose

was to assess the extent to which different professionals adhere to the requirements of guardianship statutes when making decisions about older adults' capacity and the need for guardianship. Data came from attendees at a joint meeting of the National College of Probate Judges, The National Academy of Elder Law Attorneys, and the National Guardianship Association in fall 2004. (Supplementary data were collected by Internet survey.) Participants were given a generic statute, modeled loosely on the definition of an incapacitated person in the Uniform Guardianship and Protective Proceedings Act of 1997, which read:

An incapacitated person is an individual who a) for reasons of mental or physical illness or disability or substance abuse b) lacks sufficient understanding or capacity to make or communicate responsible decisions c) to such an extent that the individual lacks the capacity to meet essential requirements for health and safety. The appointment of a guardian may be necessary or desirable to provide care and supervision.

They then applied this definition to two vignette-portrayals, the first describing an older woman who was not eating well and was losing weight (an ADL) and the second describing an older woman who was mismanaging her finances (an IADL). The vignettes varied in the extent to which the evidence supported the appointment of a guardian, and evidence variations were additive (that

is, one-third of the vignettes included only evidence of *functional impairment*, one-third had evidence of *functional and cognitive impairments*, and a final one-third had evidence of *functional and cognitive impairments and lack of feasible alternatives to guardianship*). Respondents were to gauge, in response to each of the two vignettes, the appropriateness of three options: full guardianship, limited guardianship, or further evaluation only.

According to the statute provided, full guardianship would be appropriate only in response to the last version of the vignettes and not to the first two, whereas interventions short of full guardianship (further evaluation, limited guardianship, for example) would be appropriate in response to those other versions. Judges were expected to be most likely to adhere to the requirements of guardianship law and appoint guardians only when the evidence warranted (that is, only when all statutory elements were present). Because elder law attorneys possess specialized legal knowledge that professional guardians do not, judgments of the former were expected to be more correct than those of the latter.

But the data showed otherwise. In general, full guardianship was not widely endorsed even when all legal requirements were met. (On a 1-7 scale of appropriateness, the average rating for full guardianship when the complete complement of evidence was provided was 3.59 for the ADL vignette and only 2.87 for the IADL vignette.) Limited guardianship was deemed somewhat more appropriate and further evaluation was deemed more appropriate yet. Importantly, none of the professional groups was especially eager to appoint a guardian, even when the evidence warranted. This may be an auspicious finding because earlier analyses indicated that older adults were sometimes deemed incapacitated when requisite proof was lacking. Conceivably, the newer finding is related to the increased advocacy for older adults and support for their autonomy that has characterized the

last two decades of policy and legislation in elder law. That may be good news.

But there was some bad news as well. There were differences in ratings by different professional groups. Elder law attorneys were *least* likely to endorse full guardianship, perhaps because they sometimes represent older adults in guardianship hearings. Professional guardians who have more hands-on experience with issues of impairment were *most* likely to endorse the appropriateness of further evaluation. (Obviously, these findings come with some caveats: in actual guardianship hearings the case files are extensive and decision makers have the opportunity to ask questions of all interested parties.) Apparently, one's professional orientation may play a role in the perception of older adults and in decisions about the appropriate course of action. This means that individuals who come together to assess older adults' abilities to live independently and to care for themselves may bring to the table quite different objectives, points of view, and biases.

Conclusion

All adults are presumed to possess capacity unless adjudicated otherwise in guardianship or conservatorship proceedings. This decision is ultimately a judicial one, though judges get significant input at these hearings from other professionals involved in the lives of older adults. Although all states have modified their guardianship statutes in recent years to define more precisely the bases for judgments of capacity and to include more specific and functional standards that emphasize a respondent's ability to manage the tasks of daily living, differences linger among legal professionals in their judgments of older adults' capacity and ability to care for themselves. Awareness of this situation can and should lead to increased dialogue among professionals about their common interests in protecting both the autonomy and the safety of older adults. ■

The *Journal*
is online!

www.abanet.org/rpte/journal