

I. GUARDIANSHIP - A FORM OF CIVIL COMMITMENT - CAN BE DANGEROUS TO THE HEALTH AND IS DANGEROUS TO THE WEALTH OF ALL AMERICANS

Historically, protective proceedings were described as "lunatic" proceedings. "Guardianizing" an innocent vulnerable person for nefarious purposes is becoming increasingly easier due to the generally vague and incomplete language of the law. "Incapacitated" now replaces "incompetent" in a number of state statutes, thereby exposing even persons with minor or temporary physical disabilities to a complete and potentially permanent loss of life, liberty and property, most often to the day they die.

There are recent new stories of aberrations: in Arizona a shattered knee became a guardian trap. In Texas, a man broke his hip, requiring surgery, and the state declared both he and his wife incapacitated and confined them in a nursing facility against their will while planning to auction their home. More of these cases of unjust and unnecessary guardianship are making their way into the media; and the citizenry, now increasingly aware of the problem, is growing outraged.

In addition to the elderly and disabled, dependent adults and even minors with special needs (sometimes recipients of large monetary injury awards) are drawn into guardianships. Their families are frequently rejected as guardians, even though they may be eminently qualified. This may be the result of unproven conclusory statements of financial misconduct or other misdeeds, freeing the court to replace them with professional fiduciaries whose own misconduct may eventually exceed any such unfounded allegations.

Less fortunate individuals - homeless and others - who really would benefit from judicially initiated "protection" are frequently neglected by the system, as they have no financial estate worthy of attention, although more and more we see cases where Social Security income alone is attractive enough to invite a guardianship. It is also alarming to learn that the VA guardian program, in addition to managing service benefits and pensions, is taking Social Security benefits as well, leaving veterans without sufficient funds to manage month to month, which is also a common problem in many guardianships.

Bad guardianships operate under the radar and have proliferated, despite being loaded with "red flags" neither acknowledged nor followed. Not watching red financial flags is what brought America to its present sad economic state.

Our members represent wards who are not abandoned persons without family to care for them; these wards have worked long and hard for something of value - a lifetime of savings for their retirement and their intended bequests to children and others.

The original intent of guardianship is best summed up as follows:

“The legislature hereby finds that the needs of persons with incapacities are as diverse and complex as they are unique to the individual. The current system of conservatorship and committee does not provide the necessary flexibility to meet these needs. The legislature declares that it is the purpose of this act to promote the public welfare by establishing a guardianship system which is appropriate to satisfy either personal or property management needs of an incapacitated person in a manner tailored to the individual needs of that person, which takes in account the personal wishes, preferences and desires of the person, and which affords the person the greatest amount of independence and self-determination and participation in all the decisions affecting such person's life.”⁹

This is simply not happening: guardians become jailers and wards are deprived of liberty, property and even life.

The types of guardianships we are addressing are only those which constitute unlawful seizure of person and property – akin to piracy and “shanghaiing.” Without necessary controls and enforcement, an increasing number of guardians are free to treat their victims like chattel, even issuing DNR orders, with total disregard of family concern for their loved ones.

Rights Violations and Lack of Due Process

Guardianship/conservatorship, as practiced today, involves major rights violations and lack of due process, thus exposing vulnerable Americans to physical and/or emotional abuse and financial plunder rather than protection. While it is impossible to cover every issue and instance involving guardianship abuse, the vast majority of infractions contain a common theme: lack of due process.

Total and Absolute Control of Life, Liberty and Property

Wards of the state are stripped of all rights involving self-determination, including:

- The right to complain;
- The right to contract (including the right to choose and pay for a lawyer);
- The right to control their assets and make financial decisions;
- The right to choose where to live;
- The right to protect their homestead from sale;
- The right to protect and enjoy their personal property;
- The right to accept or refuse medical treatment, including psychotropic drugs;
- The right to decide their social environments and contacts;
- The right to vote, to drive, to marry; etc.

⁹ NYS legislative findings and purpose, unchanged since the promulgation of New York's Mental Hygiene Law Art. 81 in 1992.

They are also deprived of the ability to make prompt payment of taxes and liabilities, and to assure that their guardians do so.

After being stripped of all their rights, wards are left defenseless and subject to exploitation by the very people appointed to protect them, with no right even to complain. They become, for all purposes, invisible and voiceless.

Failure to Conserve (Preserve) Estate

Many professional fiduciaries appear intent only on how much profit they can generate in the guardianship business (and that includes so-called "nonprofit" guardian organizations). The "fiduciaries" may not make investments, prudent or otherwise; and they may not pay taxes or other liabilities, all in order to protect their own income stream. The word "conserve" is disregarded and the concept and purpose of conserving the wards' assets has been all but forgotten.

Questions:

- Where is the "protection" and "conservation" required by law?
- Where are the "investments" required for "CONSERVATION"?
- Where are the "prudent investments" on behalf of the ward?

Instead of conserving wards' property and assets, fiduciaries are free to engage in defalcation or unnecessary "services" and excessive billing, when the judges do not comply with law.

Needless Warehousing - Real Property Quickly Sold

Many of our members have been denied the opportunity to provide care to their loved ones, despite the wishes of both parties and the growing trend toward home care. Instead, their relatives are needlessly warehoused in nursing facilities at exorbitant cost compared to home care, and spouses and other family members, including caregivers, are turned out of their homes. These warehousing costs are then passed on to the taxpayers, after the estates are fully depleted by unnecessary "services" and billings.

Abuse, Isolation and Chemical Straightjacketing

When a ward is needlessly warehoused in a facility, he or she is subject to neglect and abuse (emotional, physical and sexual), forced psychotropic drugging; and often, premature death.

Many guardianship victims experience the cruelest and deadliest weapon of an abusive guardian's arsenal: isolation from spouses, family, friends and even ministers/priests in the facility.

Isolation will occur when family expresses concern over lack of proper care or what they consider inappropriate action of the guardian. Often, a guardian will work with the facility to enforce the isolation.

Families are told they “upset” the ward; visitation is limited to a strict schedule, with supervision or a guard usually paid by the ward or family. The nursing facility treats the family as second-class citizens or interlopers. If drastic steps are taken to prohibit all visitation, the ward languishes in the nursing facility, deprived of the love and care of his/her family and other social interaction in general. This inhumane treatment inflicted upon helpless wards leads to untimely death hastened by thoughts of desertion and accompanied by total, abject fear, anxiety and depression – for which they are drugged.

Deliberate, planned isolation is readily managed with the use of dangerous and controversial psychotropic drugs functioning as chemical straitjackets. It is now known that these drugs cause symptoms of dementia-related illness in a “normal” person and a further downward spiral of depression and accelerated mental decline in a person suffering with memory impairment and debilities of aging.^{10/}

In these situations, there is apparent disregard for the Nursing Home Bill of Rights.^{11/}

Retaliation

The greatest fear of most of our members before or after complaining regarding mismanagement of the ward’s person or finances is retaliation. Members who have suffered retaliation have shared their experiences with others who become fearful of the same treatment, leaving guardians and facilities free to engage in abuse, using their untrammelled power.

Complaints often result in family being completely omitted from decision making; left in the dark, uninformed, and deprived of any medical information.

Complaints to the court regarding the guardian’s inappropriate actions, or issues about care, are often met with judicial retaliation, with the judge giving the guardian even more power to wield against the family. NASGA believes this occurs because the guardian has successfully convinced the court that the family has evil intentions, which creates a judicial bias against them. Our members complain that when they attempt to speak up, they are quickly silenced by the judge. Family ends up watching the tragic decline of their loved one, helpless to intervene.

DNR as Punishment for Wife’s “Interference”

The Public Guardian in Chemung County, New York, has restricted ward Gary Harvey’s wife to limited visitation, under guard. She has been battling in court for medical information and records. This spring, her husband was transported from the county nursing facility to a hospital for reasons which were not disclosed to her. Her husband was clearly in crisis, yet the hospital staff was informed to withhold information from Mrs. Harvey.

¹⁰ *Appropriate Use of Psychotropic Drugs in Nursing Homes* <http://www.aafp.org/afp/20000301/1437.html>

¹¹ 42 CFR 483.10

Shortly thereafter, she was called to a meeting and informed that the hospital ethics committee determined her husband's method of nutrition was no longer viable; and that the guardian sought court approval to remove his feeding tube and put him on DNR status.

Mrs. Harvey asked again for her husband's medical records and a second opinion, both of which requests were denied. She took her husband's plight to the media and continues to receive considerable coverage. Mr. Harvey rallied. The County withdrew their motion to terminate his life, but left the DNR in place.

This case has languished in court for over three years, diminishing Mr. Harvey's estate and threatening Mrs. Harvey's financial welfare, based on legal fee expense. Sadly, Mr. Harvey remains under the control of the very people who attempted to end his life, while his wife continues to fight for justice and the right to bring him home.

Mr. Harvey is hospitalized while the litigation continues. With swine flu on the rise in the county, Mrs. Harvey fears her husband will be inadvertently exposed to the virus which could be deadly to him in his compromised condition. She recently learned her husband has been infected with MRSA while under County care. If Mr. Harvey were allowed to go home, he would not be subjected to unnecessary exposure to viruses and germs. His medical expenses would decrease – a valuable savings to the taxpayers as well.

The County has just informed Mrs. Harvey that her visitation privileges are terminated as of 11/30/09, claiming that Mr. Harvey cannot afford to pay for the guard. Since the County also claims to be performing its duties "in the best interests of the ward", NASGA questions why the guardian doesn't assume the "guard" function in the terminal ward's best interest? The County, in effect, is divorcing this couple – against their will.

Brainwashing

Brainwashing is frequently a complicating factor, based on vulnerability in an isolation mode. Guardians interfere with family relationships, and can and do arrange marriages, divorces and separation of long-term partners, using brainwashing techniques. NASGA members report that their loved ones have been told that family has left them and "taken all the money," in order to break the ward's spirit and turn them against their own. The possibility of Stockholm Syndrome is suspected.

Anguish and Fear

The suffering of these wards cannot be measured or fully described within this statement. Many die alone and afraid – feeling unloved and deserted by family and friends - unaware of their family’s nonstop struggle to free them from their captors. The emotional anguish affects the entire family, and the fear instilled during captivity can result in post-traumatic stress syndrome. The despair felt by the family is something they may never forget or recover from.

Support Services Could Obviate Need for Guardianship

In an ongoing New York City case, a man and his wife were put under guardianship as “hoarders,” following a landlord/tenant dispute. The husband is gainfully employed, having worked for the US Postal Service for 40 years. The guardian collects his entire salary and gives him and his wife an inadequate “allowance.” The ward would like to retire but refuses to do so to avoid supporting his guardian for life. The apartment was forcibly cleaned out; the victim and his wife were allowed to remain, but their two dogs were removed and destroyed - a traumatizing act! Until NASGA intervened, the ward was deprived of needed hearing aids, but efforts thus far have been unsuccessful in freeing this victim from a totally unnecessary and income-depleting guardianship. (See this victim’s YouTube at <http://www.youtube.com/watch?v=7z2mZUB-Kck>)

THERE IS A GAPING HOLE IN GUARDIANSHIP SERVICES: A LIFETIME OF SERVITUDE COULD BE PREVENTED IF COUNSELLING WERE MADE AVAILABLE FOR EMOTIONAL PROBLEMS CAPABLE OF REMEDIATION, SUCH AS HOARDING!

Victims’ Intended Retirement/Inheritance Plans Ignored

More and more lawyers advertise estate planning, urging the need for legal documents such as trusts, wills, living wills, and durable powers of attorney to establish final wishes and arrangements.

What happens when a guardianship is commenced and the judge is not mandated by statute to call for and examine these documents as to their validity, which finding would obviate the need for a guardianship? The fiduciaries are free to do as they please, ignoring - and even acting in direct conflict with - the carefully thought-out wishes and estate planning of the ward. There are also cases where such documents have been completely altered, rewritten or replaced by fiduciaries.

Devastation – Financial and Otherwise

There are several very disturbing situations in these wrongful guardianships. The proceedings themselves deplete the assets of the victims, who have worked and saved a lifetime for the ultimate American dream. In their important estate-planning goals, they have sought to ensure that their personal, medical and other wishes will be respected if they become disabled; and that upon their death, their intended bequests will be appropriately handled as they have specified.

Wards' families, in addition to being deprived of their loved ones' final distribution of assets and property, frequently fail to recover personal property - jewelry, family heirlooms, and particularly treasured and irreplaceable photographs. One of our members experienced her own property being secreted during her mother's guardianship, and moved around to four different locations. When she finally recovered what was left of her possessions, they had been mostly looted or damaged.

Victims' families are forced into unnecessary and very expensive litigation which drains them emotionally, physically and financially. This extensive litigation depletes family assets, along with those of the ward's estate. It can continue through several generations and eventually resemble Dickens' "Bleak House"! Some of these legal battles involve excessive motion churning (for fee billing purposes), and are generally futile, dragging on for years.

Recovery - Financial and Emotional

People who recover from cancer, heart attack, stroke, or accidents can return to normalcy; but the recovery outlook for victims of bad guardianships is very dismal. Victims rarely escape and may never recover from the financial and emotional devastation, and their families suffer the same consequences. Even when a guardianship is terminated or overturned, there is rarely any financial recovery for victims or their families.

Fees - The Deck is Stacked in Favor of the Fiduciaries

The most disturbing feature of what is not supposed to be adversarial litigation is that families contesting wrongful guardianships become victims along with the AIP or ward. Family is compelled to support the litigation out of pocket, while fiduciaries take their fee awards from the estate, even if they are defending their own clearly inappropriate actions, thereby improperly diminishing the estates they are supposed to conserve.