The Time Is Now: Guardians Should BeLicensed and Regulated Under the ExecutiveBranch, Not the Courts

BY MARGARET K. DORE

With increasing numbers of Americans living longer, many are finding themselves under guardianship. The guardian appointed may be a family member or friend, or a “professional” guardian or guardianship company.

In many cases, the guardian is honest and hardworking for his ward. In other cases, the guardian abuses or exploits the ward. The exact magnitude of this problem is not known, but the names of articles in the popular press tell the story.

See: Jack Leonard, Robin Fields and Evelyn Larrubia, Guardians for Profit: Justice Sleeps While Seniors Suffer; and Barry Yeoman, Stolen Lives: Thousands of Older Americans Are Being Robbed of Their Freedom, Dignity, and Life Savings by a Legal System Created for Their Protection. How Can This Happen?

The Courts Respond

The issue of guardianship abuse has also caught the attention of the courts. The Washington State Supreme Court now oversees the “Certified Professional Guardian Program.” Under this program, there are two entities that directly supervise professional guardians: the Certified Professional Guardian Board, which reports to the Supreme Court, and the superior court in each county.

The premise of this article is that this well-meaning effort to increase guardianship accountability is misplaced. Although courts have traditionally been responsible for guardianship oversight, they are ill-suited for this function. Guardians should be licensed and regulated under the executive branch, not supervised by the courts.

The Board’s Role

The Certified Professional Guardian Board “adopts and implements regulations governing certification, minimum standards of practice, training, and discipline of professional guardians.”

The Board does not, however, interfere with the traditional role of the superior court. The superior court continues to be the “main venue” for making a complaint against a guardian.

For this reason, the Board will not ordinarily accept a complaint about a guardian unless it has first been reviewed by the superior court. The Washington Courts website states:

[C]omplaints to the Certified Professional Guardian Board (Board) that have not been reviewed by the court will ordinarily not be accepted for review . . . .

If the superior court finds that the guardian “has failed in some way,” the finding can be forwarded to the Board with a grievance for further proceedings. Otherwise, the complaint will ordinarily be dismissed. The Board’s 2005 annual report provides the following example:

The family member had already addressed these concerns to the superior court, which had found the guardian’s actions to be appropriate. Therefore, the complaint was dismissed by the Standards of Practice Committee (SOPC).

The Traditional Role of the Superior Court

With the traditional role of the superior court, the court supervises guardianship administration by supervising the guardian, its “agent.” Cf. In Re Gaddis’ Guardianship, 12 Wn.2d 114, 123, 120 P.2d 849 (1942) ("The guardian is in effect an agent of the court, and through him the court seeks to protect the ward’s interest.")

How this works in practice is that the guardian petitions the court for approval of its management of the ward’s affairs. In King County, this is done on the motions calendar in the ex parte department. The court might be asked whether a bill should be paid or the guardian’s care plan approved. The superior court also approves the guardians’ accountings and investment strategies.

A Contrast to Other Activities

The “job” of a guardian is to manage the affairs of an incapacitated person. Other entities with similar jobs are not “supervised” by courts. An example would be a nursing home. Nursing homes manage the affairs of persons not able to care for themselves. Nursing homes are regulated by the Department of Social and Health Services.

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The Department of Social and Health Services is under the executive branch.

Guardians also function as financial institutions. The larger guardianship companies provide trust and financial management services similar to a bank or trust company. For example, Guardianship Services of Seattle (GSS) describes its trust and financial management services as follows:

* The following describes the more common trusts managed by Guardianship Services of Seattle . . .
* Financial Management Assistance involves helping an individual . . . manage investment portfolios . . .

(Emphasis added).

Like a bank or trust company, the larger companies also handle large sums of money. GSS manages in excess of $44 million. Banks and trust companies are not "supervised" by courts, but regulated by the Department of Financial Institutions. The Department of Financial Institutions is also under the executive branch.

Problems with Court Supervision

Little or no relevant training. A major problem with court supervision of guardians is that the typical judge or commissioner has little relevant training. Accounting, finance, and personal care are not required courses in law school. A judge or commissioner is also unlikely to have time to perform the necessary inquiry. A recent Seattle Times article quotes a local commissioner, as follows:

[The Commissioner], who handles guardian cases in King County, complained that he is expected to master complex accounting, investment strategies and what constitutes proper medical care — all while keeping cases moving. "I read them and I look for the outrageous," he said.

By contrast, agency personnel under the executive branch typically have specialized training. For example, examiners with the Department of Financial Institutions are required to have a degree with course work in accounting or finance (or other commensurate education or experience). Oversight is conducted according to an agency protocol. This is opposed to a busy motion calendar in which a judge or commissioner does the best he can.

Court approval prevents further inquiry. A related problem is that once a guardian's accounting is approved by the superior court, other entities will not usually investigate, although as noted above, there has typically been little investigation by the court. The Board will not ordinarily investigate due to its deference to the superior court. Other entities, e.g., a local fraud unit, will likely not investigate due to the order approving the accounting, which makes it look as if there has already been a full investigation. As set forth above, there has likely been little or no investigation.

The prohibition against ex parte contact interferes with a court's ability to provide effective supervision. In general, successful supervision of an activity requires a close relationship between the supervisor and the person supervised. A good supervisor should also be open to receiving information and complaints from multiple sources.

This does not occur in the context of court supervision of guardians due to the prohibition against ex parte contact. The prohibition prevents courts and guardians from developing the necessary close relationships. It also prevents courts from learning about a guardian's wrongdoing. Persons with information are generally prohibited from contacting the court.

The prohibition against ex parte contact is another factor which acts to prevent courts from providing effective guardianship supervision.

Complaining parties take on the risk of litigation. Another problem with court supervision is that wards or other complaining parties are generally required to make their complaints in the context of a court hearing. Meaningful participation requires the hiring of counsel. The Washington Courts website states:

By far the best way to advocate for a person who is the subject of a guardianship is to hire an attorney . . .

If the guardian contests the complaint, the ward or other party may find themselves in litigation against the guardian. If the complaint is unsuccessful, the ward or other party may be required to pay the guardian's fees. With the inherent cost of litigation, courts are often reluctant to perform an in-depth inquiry.

These factors create "chilling effects" so that complaints are not made and, if made, are not fully pursued. These factors do not exist in the usual regulatory scheme. Instead, complainants generally have immunity from liability; the agency's investigation is usually conducted outside of a litigation context.

How Licensing and Regulation Might Work

In other states, there are emerging programs in which oversight is provided via the executive branch. For example, California recently enacted SB 1550, which establishes the Professional Fiduciaries Bureau within the Department of Consumer Affairs. Idaho has a pilot program in which conservator reports will be reviewed by its Department of Finance.

The advantage to using existing agencies is that they are already set up. On the other hand, some current agencies, such as DSHS, would seem to have a conflict of interest. For this reason, a stand-alone agency could be desirable. Funding could be obtained from licensing fees or from the wards' estates so that the agency would be revenue-neutral. Agencies such as the Department of Financial Institutions are revenue-neutral.

Conclusion

Without effective oversight, abuse of wards by their guardians will only continue. It is time to consider a different paradigm. Guardians should be licensed and regulated under the executive branch, not the courts. Other methods of third-party oversight should be investigated and explored.

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in this article are the author’s and are not official or unofficial positions of the WSBA.

NOTES


7. Id.


10. See e.g., In re Guardianship of Karen Weed, Snohomish County Cause No. 05-4-01493-3, “Order Approving Inventory, Budget, and Disbursements,” April 27, 2006; and In re Guardianship of Marie Charles, King County Cause No. 01-4-02852-6SEA, “Order: Approving Guardian’s Report (Care Plan and Inventory) . . . “, August 18, 2006.

11. Charles, supra; and Weed, supra (approving the guardian’s annuity purchase).

12. See e.g., RCW 18.51.040 Application for License; and DSHS website: www.aasa.dshs.wa.gov/pu-bin/home/housing/other/NH.


15. See GSS’s website (“The aggregate market value of funds held in blocked accounts is $44,564,328.90”), (www.trustguard.org/Services/frequently_asked_