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GUARDIANSHIP: CONSIDER THE ALTERNATIVES

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Most state statutes have two requirements for ordering a guardianship: a finding the person is incapacitated and a finding guardianship is necessary. If a guardianship petition is filed and fees paid, the presumption begins. A medical report supports the fact the person meets the criteria of being incapacitated. The court visitor or investigator reports may not make any mention of alternatives. Substantial attorney's fees, expense and time have been incurred by the time of the court hearing and there will be disappointment if the appointment is not ordered in the next five minutes. The person probably needs some protection and it's too late for the Court to ask questions. Risk management by the Court becomes an issue. Under this presumptive and non-adversarial system, what can the Court do? Exploring the alternatives to guardianship is not an easy road for the Court to take. It is in the analysis of the "necessity" requirement that you find the alternatives to guardianship.

Evaluating alternatives to guardianship should begin before the petition is filed. It starts with education and re-education about the role of the guardian and guardianship and the resources available to meet the needs of individuals. The players to be educated include attorneys, physicians, social workers, judges, Adult Protective Services, mental health and healthcare providers and family.

There should be on-going promotion of guardianship alternatives, some of which are unique to each community. Several alternatives are by state statute and other guardianship alternatives involve some creativity by the players in the system. The players in the guardianship system need to have correct information about guardianship and the role of the guardian. Let's start with what should not be the role of the guardian. A guardian is not:

A companion.

A therapist.

A reformer-guardian does not change lifestyles.

A warden-guardian is not appointed to control a person.

A savior.

A surrogate family member.

A caregiver.

A healthcare provider.

Although guardians are often called upon to coordinate the above services or roles, the guardian's main responsibility is to (1) be a surrogate decision maker and (2) be an advocate for the incapacitated person. A guardian is to encourage maximum self-reliance and independence and arrange placement for the incapacitated person in the least restrictive setting. Some states such as Arizona have statutes that state the guardian "shall actively work toward limiting or terminating the guardianship and seeking alternatives to guardianship" A.R.S. §14-5312(7).

The guardianship alternatives include medical, community, legal and financial options.

Many of the alternatives below must be planned before one loses capacity, while others may be used to help someone who lacks some capacity. Because the terminology varies throughout the country, the term guardianship of the estate is equivalent to conservatorship for purposes of this article.

Healthcare Surrogate Laws

Healthcare Surrogate or Consent laws exist in about half the states. These statutes authorize family members and next of kin to authorize medical decisions. Some states even allow two physicians to make the medical decision. It is surprising how often social workers in the healthcare community are unaware of these statutes. These statutes are useful when the major reason for the guardianship petition is to make medical decisions.

Medical Or Healthcare Power Of Attorney

It is usually too late when a guardianship petition is filed for a person to knowingly sign a Medical Power of Attorney. However, a person may not be capable of making medical decisions, but understand enough to appoint a surrogate decision-maker. It is important for this alternative that the person nominated be a trusted family member or close friend who is geographically near the person to be protected.

Medical Advance Directives

Persons who execute advance directives for medical care often do not let family members or friends know about them. The advance directives are usually located in the physician's file or with hospital records. A guardianship focusing on medical decisions may be avoided with these documents. It should be noted that with the new HIPAA regulations, it may be difficult to access these records without the patient's consent.

Living Will

A Living Will is provided by most state statutes. It is a form of advance directive usually related to providing instructions about the withholding of life sustaining treatment if one is terminally ill or unconscious. A person terminally ill may in some cases still be capable of making medical decisions.

Community and Social Services Assistance

The arrangement of services will often avoid the need for guardianship. These services include home delivered meals, homemaker assistance, transportation services, companion services, counseling services and the various services at senior centers. It is important that attorneys, court investigators and others who are part of the guardianship system have a working knowledge of these community services.

Adult Protective Services

Many states have a protective services agency to assist in preventing elder abuse, neglect and financial exploitation. A case referral to these agencies may prevent the need for a guardianship in situations where the person in crisis needs short-term protection and assistance.

Family Assistance

Provided there is reasonable family harmony, encouraging family members to assist with bill paying and coordination of medical and social services is a good alternative. Even when there is some disharmony in the family relationships, the protected person may prefer renewing the family relationships over formal court intervention.

Financial Durable Power Of Attorney

The Financial Durable Power of Attorney can be a very useful tool when there is a small estate and trusted family members. It may not be an option to avoid guardianship if the person is already incapacitated. However, a person may not be able to handle their financial affairs, but be capable of making the decision as to who they want to handle their finances. The disadvantage with the Durable Power of Attorney is the dishonest agent abusing the powers without any accountability or court supervision.

Joint Property Arrangements

For persons with small uncomplicated estates that have a few trusted family members, a joint property arrangement may prevent the need for the guardianship of the estate. Otherwise, it is not recommended.

Representative Payee

When a person's income is largely social security or other government benefits, a representative payee may substitute for a guardianship of the estate. A representative payee also works well for a person who has mental capacity, but physically cannot manage day to day financial affairs.

Money Management Alternatives

Persons without immediate family nearby are often referred for guardianship and conservatorship because of forgetting to pay utility bills, taxes, or rent that may cause a legal action for eviction or foreclosure. Direct deposit of benefit and income checks, as well as automatic payment of regular bills, may prevent the need for a guardianship proceeding. Community and volunteer programs can assist with these services. Persons with a substantial estate may hire a bill paying service or other professionals to assist.

Trusts

The use of trusts is frequently advertised as a means to avoid probate. It is also a very effective way to avoid guardianship of the estate. Trusts prevent court intervention and gives direction under what terms the estate should be managed. A trust must be established by one with capacity, but the standard test in most states would be that the person has testamentary capacity.

Limited Guardianship and Single Transaction

If a one-time medical decision is needed, a limited guardianship could be ordered to consent to medical treatment only. The authority of the guardian would end once the medical treatment was completed. Some states have a “single transaction” statute where a protective order may be issued without a guardian appointment. An example of the single transaction would be the approval to sell real estate.

While most states do not have the “single transaction” statute, I do not see why you could not use a limited guardianship of the estate action to achieve the same purpose as the single transaction statute. The limited guardianship would of course be more costly and not as expedient as the “single transaction” process, but would still be the least restrictive alternative for the person.

At Wingspan, the second national guardianship conference held on December 2, 2001, the following recommendations related to limited guardianship and single transactions were made:

“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.”

Mediation

Mediation should not be overlooked in helping families explore alternatives to guardianship. Mediation helps preserve family relationships and focuses on finding a mutually agreeable solution. Mediation may reduce contested court hearings and works toward least restrictive alternatives or a limited guardianship. Mediation is probably not available to most probate courts, but I expect there will be a growing trend in the use of mediation to avoid guardianship. As for the training and qualification of mediators, the recommended policy for probate courts is set forth in Wingspan recommendations numbers 22 and 24:

“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 . . . Mediators should adhere to such standards even if not statutorily required.”

“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.”

Some problems cannot be solved by guardianship or the above alternatives. Some social ills like excessive drinking, use of other drugs or unsafe sexual practices cannot be solved through a guardianship or alternative means. An adult who has legal capacity to manage his or her personal or financial affairs has the right to make decisions that others view as risky or unwise. There are eccentric individuals who choose to live in cluttered and/or squalid conditions. These individuals have what is described as the “right to folly” provided they are causing no significant risk or harm to themselves or others. Being poor, eccentric, homeless or a street person alone is not enough to justify a guardianship.

If you as a probate judge wish to make wider use of alternatives to guardianship in your community, here is a recommended action plan:

1. Establish an educational effort promoting alternatives to guardianship targeted at hospitals, nursing homes, and medical or psychological professionals. A starting point would be distribution of print materials and putting information on the court website.

2. Court investigators or visitors should be trained to explore the alternatives to guardianship and make separate findings of guardianship alternatives in their reports to the court.
3. Assist in establishing a separate program or resource to assess the need for guardianship of the person or estate that will resolve issues outside the probate court system.
4. Amend the guardianship forms to provide for separate allegations in the petitions to address the exploration of alternatives and the necessity for guardianship. Medical diagnosis alone is not enough to justify a guardianship.
5. Explore legislation to address statutory provisions for medical treatment decisions and single transactions.
6. Assist in setting up a guardianship mediation program.

The National Probate Court Standards provides excellent guidelines regarding guardianship alternatives. Standard 3.3.2 states that the probate court should establish a process for screening all guardianship petitions and diverting inappropriate petitions. By providing an early screening of petitions, the court can minimize the expense, inconvenience, and possible indignity incurred by the individual and conserve the resources of the court.

Standard 3.3.10 entitled “Less Intrusive Alternatives” encourages the use of limited guardianships and taking into account the wishes of the respondent, and “maximizing coordination and cooperation with social service agencies in order to find alternatives to guardianships.” The *Commentary* in this standard addresses the impact the imposing of a guardianship may have on a person: “Scientific studies show that the loss – or perceived loss - of a person’s ability

to control events can lead to physical or emotional illness. Indeed, complete loss of status as an adult member of society can act as a self-fulfilling prophecy and exacerbate any existing disability. Allowing persons potentially subject to guardianships to retain as much autonomy as possible may be vital for their mental health.” This is a compelling reason for courts to consider and encourage the use of alternatives before establishing a guardianship.

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