

January 16, 2008

## **Northern Nevada Adult Guardianship: A Plan for Justice**

The need for guardianship reform has been established at both the national<sup>1</sup> and county<sup>2</sup> levels. This proposal represents a local multi-disciplinary professional community effort to develop a workable system addressing concerns raised at all levels. Those concerns include:

1. Possible overuse of emergency guardianships, many of which become permanent;
2. lack of independent investigation of the need for guardianship;
3. incapacity assessments based upon non-standard and poorly defined criteria;
4. failure to provide due process to adult wards;
5. lack of adequate guardian training, planning and reporting;
6. lack of court monitoring; and
7. lack of systematic data collecting needed to evolve successful change.

The Monitoring and Investigation Committee formed out of the Guardianship Roundtable sponsored by the Washoe County Public Guardian, the Second Judicial District Court, held April 16-17, 2007, has cooperatively developed the following responses to these challenges. The focus of the committee's work has been provision of due process for every adult ward through professional third-party investigation and ongoing quality control through court monitoring, though the report touches on some peripherally related topics. The committee is also considering direct and indirect costs of reform on an ongoing basis, and desires to balance the seven concerns with the need to minimize obstacles to appropriate emergency, non-professional, and cash poor guardianships. This is a proposed blueprint for the ongoing development of the Washoe County guardianship system.

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<sup>1</sup> The author refers specifically to the outcome of the National Guardianship Network's National Wingspan Implementation Session: *Action Steps on Adult Guardianship Progress* (2004); and to Naomi Karp (AARP Public Policy Institute) and Erica Wood's (ABA Commission on Law and Aging) *Guardianship Monitoring: A National Survey of Court Practices* (June 2006).

<sup>2</sup> The author refers specifically to Judge David A. Hardy's (Second Judicial District Court, Washoe County, Nevada) 2007 article, "*Who is Guarding the Guardians? A Localized Call for Improved Guardianship Systems and Monitoring*"; and to Terry W. Hammond's *Report on the Washoe County Guardianship System and Community Satisfaction Regarding the Washoe County Public Guardian's Office* (2006).

## DUE PROCESS FOR EVERY WARD

### *Pre-guardianship investigation*<sup>3</sup>

Sixty-four percent<sup>4</sup> of Washoe County guardianships begin as emergency temporary guardianships requested in order to solve an immediate problem. Initially, temporary guardianships are granted with or without notice to the ward and family members and last no more than ten days<sup>5</sup>. If continuing guardianship is desired, the temporary guardian gives statutory notice to the ward and family members within the second degree of consanguinity, and a hearing is held to determine whether the guardianship should continue on a temporary basis until a hearing on permanent guardianship is held<sup>6</sup>. The court excuses many of the proposed wards from attending temporary guardianship hearings based on a letter from a medical provider or other care provider articulating a medical reason why a person cannot attend<sup>7</sup>. Often the medical reason is pain and/or a degree of disorientation that may cause the ward to be confused or distressed in a court setting.

Every court case starts with a story about people. However, the ward's tale is rarely told during the temporary proceeding<sup>8</sup>. Even if the ward appears, he or she may not be able to communicate effectively with courts and others trying to determine the need for a guardianship. Wards are vulnerable and, while a few state their grievances to everyone within earshot, others are afraid to complain to the people closest to them for fear of losing needed assistance.

The ward is not the only party with a story to tell. Guardians and caregivers provide an important perspective of the ward's situation. Neither the guardian nor the ward will be all "right" or all "wrong", begging the need for an independent third party investigator to provide a more objective perspective. All parties must tell their uncensored story, acting as check and balance to the others, in order that the parties themselves or the court may fashion an appropriate legal solution.

The United States legal system is an adversarial system. The philosophy behind an adversarial system is consistent with reconciling the three perspectives described above. The adversarial system contemplates that each party will have, or act as, an advocate for his or her version of the truth and that the truth will become evident to the non-partisan judge through the presentation of the case by each party. The adversarial process is undermined if a party cannot advocate for his or her position, if an attorney represents more than one party to the action, or if the judge is connected with one of the parties in such a way as to give an appearance of bias.

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<sup>3</sup> While pre-guardianship investigation should lead the guardianship process, the committee does not propose that it be the starting point for change. The committee would implement court monitoring prior to pre-guardianship investigation, for reasons stated in the court monitoring section below.

<sup>4</sup> Hardy, Judge David A., "Who is Guarding the Guardians", *supra* at FN2, page 2.

<sup>5</sup> NRS 159.0523 and 159.0525.

<sup>6</sup> NRS 159.0525(5)-(8).

<sup>7</sup> *See*, NRS 159.0535(1).

<sup>8</sup> Legal representation of every ward would fill this void in the process and lessen, but not eliminate, the need for third party investigation. What the ward wants, and what the ward's best interest requires, may be entirely distinct and both should be presented for the court's consideration.

In guardianship cases, the proponents of this plan believe that a trained third party investigator, independent of the judiciary, should be appointed to investigate and report findings in open court prior to non-emergency guardianship. The order of appointment may pose specific questions for factual investigation; but recommendations, or expert opinions, should only be permitted as the rules of evidence allow. Scope of investigation may include:

1. interviewing caregivers and medical providers regarding their observations of the ward;
2. reporting facts tending to confirm or refute medical evidence that a ward cannot or should not attend hearings;
3. confirming or refuting allegations forming the basis of the petition for guardianship;
4. reporting facts tending to confirm or refute appropriate cognitive assessment;
5. reviewing medical, social service and financial records;
6. confirming that the proposed guardian meets all statutory requirements;
7. interviewing family, friends and neighbors;
8. interviewing represented parties directly with attorney permission;
9. site visits in private homes or facilities with or without attorney permission;
10. discovering facts supporting or rebutting special guardianship v. plenary guardianship;
11. reporting a ward's statements given for purposes of investigation<sup>9</sup>; and
12. discovering facts in response to other questions posed by court order of appointment.

The initial investigation will be focused on proving or disproving the allegations contained in the petition for guardianship and may cover significantly less than the twelve elements. As soon as the investigator is satisfied that he or she can substantiate a recommendation to the court, the investigator should file a report and await further direction from the court. In this manner, a petitioner and loving spouse of a fifty year marriage can avoid the cost and delay of prolonged investigation, and those resources can more appropriately be applied to a more complicated guardianship circumstance.

For protection of ward privacy from the public, investigator inquiries should be limited to the authority granted by the court to accomplish the appropriate balancing of interests between the state's need to protect vulnerable persons in its indirect care and the ward's right to privacy in their medical and financial affairs. Investigators should not publicize information other than verification or rebuttal of information previously provided on the public record or in response to a request for information by the court.

Investigators should be assigned when a guardianship petition is filed or when an emergency temporary guardianship is ordered. The investigator must produce a written report and serve the report on all parties no later than five days prior to a hearing to

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<sup>9</sup> Where a ward is unrepresented, a judge may order the investigator to seek information regarding the ward's preferences in order to provide a more user-friendly venue for the ward's voice.

extend the temporary or ten days prior to imposing permanent guardianship. The investigator must testify pursuant to said report and be available for cross-examination by all parties at the hearing. The investigator role should automatically terminate upon appointment of a permanent guardian unless the court orders otherwise and assigns additional investigation tasks. The investigator should be re-appointed where the court monitor<sup>10</sup> or a party raises the question of continuing need for guardianship.

Investigators must maintain offices outside of the courthouse in order to be perceived as truly independent voices in the adversarial process. The court should designate a pool of trained independent contractor investigative resources representing social work, medical, mental health, financial and legal disciplines. Those investigators should be rotated and appointed according to their varying expertise. The proponents agree that investigators could be volunteers, but that the appointment of an investigator to every guardianship in Washoe County may necessitate use of paid investigators, paid from community resources.

Our principal reason for advocating such investigations at the outset is to preserve the civil rights of proposed wards. We also hope that careful cost/benefit analysis over time will show that the increased expenditure of resources at the front end of the process will actually save money over time in lowering expenditure of resources in the long run. Saved long-term resources may include improved planning and conservation of guardianship and/or public resources, fewer contested hearings, and lower attorney fees. Funding guardianship investigation poses a challenge, and the plan proponents are interested in working with the community and court to realize this ideal in phases.

### ***Legal representation of wards***

Independent investigation of guardianships at the earliest feasible opportunity provides a check against inappropriate guardianships. Even so, if the problem-solving equation is to balance, the voice of the ward must be heard in court. Due process is fundamental fairness in law. The ward, exposed to loss of liberty, is entitled to prior notice and a fair hearing. The proponents of this plan agree that if a criminal defendant is entitled to attorney representation to protect against loss of liberty, then a ward is also entitled to attorney representation to protect against the greater loss of liberty in the capacity determination phase of guardianship. A fair hearing must include a professional advocate having the right to hear the ward's story in confidence and to tell that story to the court. If *pro per* litigants on average struggle to effectively advocate for their legal position, then a person suffering from potentially diminished physical and mental capacity cannot be expected to effectively advocate for themselves in a foreign and formal forum. The attendees of the Guardianship Roundtable supported the concept that all proposed wards should have legal representation; however, to save cost where necessary, the appointment of counsel could be limited by court order to the capacity determination/guardianship formation phase<sup>11</sup>.

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<sup>10</sup> For a description of the proposed court monitor role, see page 5 below.

<sup>11</sup> Other guardianship events should trigger a re-appointment of counsel, such as a request by the ward for termination of the guardianship, see NRS 159.1905(2).

Independent investigators and counsel for wards not only achieve cost savings over time by doing more and better work up front, but also facilitate early identification of possible alternatives to guardianship. The process of guardianship should acknowledge that guardianship is the last, and not the first resort. In many cases, once an emergency situation is stabilized and a ward has regained some degree of mental capacity, a less restrictive form of assistance may be viable but unknown to the non-professional guardian. Eliminating unnecessary guardianships will result in the greatest savings of ward, judicial, and other public resources.

### ***Assessment of the need for guardianship***

Plan proponents believe that all wards are entitled to a functional capacity evaluation according to the facts alleged in support of guardianship, performed by professionals. Consistency and reliability in the capacity assessment process protects due process rights and simplifies investigation and monitoring. Proponents support the development of a public resource analogous to mental health court doctors, but using psychiatrists, psychologists and professionally supervised social workers. Plan proponents support a multidisciplinary standardized assessment form linked to least restrictive guardianship criteria. A form offered by the committee for future discussion is attached to this proposal<sup>12</sup>. The Committee on Guardianship Investigation and Monitoring is exploring, among several options, coordination with UNR to provide a professionally supervised volunteer assessment clinical program.

## **QUALITY CONTROL IN THE GUARDIANSHIP SYSTEM**

### ***Court Monitoring***

Whereas the proponents of this plan envision investigation at the front end accomplished by third party investigators with no connection to the court outside of court appointment, an in-house court monitor should take over after the issues have been determined and the order of permanent guardianship fashioned. The relationship of the in-house counterpart to the external investigator is primarily one of detection versus investigation. That relationship suggests that monitoring is the logical priority in a multi-phased implementation of this proposal. The in-house monitor assists the court in discharging its monitoring duties described at NRS 159.176<sup>13</sup>.

One version of the monitoring role, recognizing room for variance based on funding and opportunity, would be an employee of the court systematically auditing the statutorily defined annual reports<sup>14</sup>. Absence of mandatory reporting will also trigger the monitor's involvement. For example, if the monitor or monitoring software detects lack of reporting in a particular case file, the monitor will bring the deficiency to the court's

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<sup>12</sup> Moye, Jennifer Ph.D.; Butz, Steven W. Psy.D.; Marson, Daniel C. J.D., Ph.D.; Erica J.D.; and the ABA-APA Capacity Assessment of Older Adults Working Group, *A Conceptual Model and Assessment Template for Capacity Evaluation in Adult Guardianship*, **The Gerontologist** Vol. 47, No. 5, 591-603 (2007) at Appendix A.

<sup>13</sup> "Every guardianship established pursuant to this chapter must be reviewed by the Court annually."

<sup>14</sup> NRS 159.081 (report of person required), NRS 159.177 (accounting required), and NRS 159.179 (contents of accounting).

attention and the court may issue an order to show cause. Depending on the outcome of the order to show cause, the judge may decide to appoint or re-appoint an external investigator to gather additional information and report to the court. Likewise, if court monitoring of accountings and reports of person detects false reporting of information, that information would be brought to the court's attention and an appointment of an external investigator made.

The scope of court monitoring should include:

1. compliance with statutory requirements and court rules;
2. procedural compliance;
3. screening and systematic verification of report contents;
4. flagging problematic issues or content for judicial consideration;
5. consideration of continuing need for guardianship;
6. facilitation of referrals to external investigator<sup>15</sup>; and
7. more frequent monitoring during the first year of guardianship and after significant changes or events in guardianship (as described by court rules).

A pre-formatted internal monitoring report noting compliance, non-compliance, significant changes or events, or other red flags should be served on all parties and become part of the court file. Court monitoring should be limited to verification of information provided in public documents. The court monitoring role terminates only when the guardianship terminates.

Court monitoring may be appropriate material for a grant-funded study of guardianships or pilot study. It involves building a data collection system, which could serve multiple purposes including court monitoring and local and nation-wide guardianship research. For example, the AARP Public Policy Institute and ABA Commission on Law and Aging have published a study entitled *Guardianship Monitoring: A National Survey of Court Practices* (June 2006), relying on data collection about court practices through state survey. As needed reforms are further defined in successive studies, case-by-case data collection will be necessary to verify that certain assumed causal relationships are as hypothesized. To support that effort, funds may be available for data collection that furthers guardianship research.

### ***Training and legal support of non-professional guardians***

Neither the court, the court monitor, the investigator, nor the ward's attorney will be in a position to respond to the unrepresented well-meaning family guardian needing legal support and training. This proposal recommends that mandatory prospective personal care and financial plans be filed within the first sixty to ninety days after an order of permanent guardianship. Said plans will give the court monitor a basis for more intensive scrutiny during the first year of guardianship and will also help prevent expensive mistakes before they occur.

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<sup>15</sup> Proponents envision that "flags" may be raised internally by the court monitor or externally by a party to the case. In either event, the matter must be brought to the judge's attention by the internal monitor or the external party and the judge will determine whether to make a referral to the external investigator.

Plan proponents are investigating pro-bono or low fee-based options for training and supporting non-professional guardians. The development of a trained volunteer guardian of the person program is also under consideration. This appears to be an area where the private bar, guardianship professionals, and other volunteers may be able to organize behind a non-profit referring agency in exchange for pro-bono credit, reduced fees, and the pleasure of volunteering.

## CONCLUSION

This plan represents the outcome of an appropriate creative tension between guardianship entities filling distinct roles in the guardianship process. We come from different agencies having different goals, all of which have a role in a balanced system<sup>16</sup>. It also assumes adequate funding. Despite today's fiscal constraints, the committee expects that the ideal presented will be phased in over time. A known opportunity to begin the process will occur when the county works up the budget to staff the two new state-funded family court judges taking office in January 2009.

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<sup>16</sup> Anngela, Linda Ph.D., M.S.W.; Svare, Gloria Messeck, Ph.D.; and Rice, Travis, M.S.W. Candidate, *Report to Washoe County Senior Law Project, Phase II Study: Legal Representation and Quality of Life* (May 1, 2007 Update at page 24). "The findings of this evaluation suggest that the agencies that participated in this study each fill a niche in the system of service delivery for this population of elderly in Washoe County. Because of the distinct philosophy, mission, organizational culture, and resources, each agency can respond best to a segment of this client population."