

Elder Law: Not Just a Local Issue

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SHUTTERSTOCK

In Nevada, there has been very recent focus on the “criminal acts” of certain for-profit guardians. A multitude of stories and articles have stirred families across the nation to outrage and criticism of the practices taking place under the guardianship of our increasingly-elder citizens.


There are many, within and without the legal community, who may have a misconception regarding guardianship. Guardianship involves a severe loss of civil rights and liberty; it is not the appointing of a “guardian angel” to take care of someone. Some of the current criticism relates to the complete autonomy of the person appointed as guardian, seemingly without care or concern for the elderly person in question. Other issues of controversy relate to vague statutes, prejudicial attitudes towards seniors and allegedly neutral third parties with their own agendas.

While debate surrounding guardianship and elder law issues continues on a local level, examination of all potential global resources should be reviewed. Around the world, the population is getting older, and every country anticipates a large increase in

the elderly population during the next ten years.

In 2014, Washington, D.C. hosted the World Congress on Adult Guardianship, a conference featuring presentations from other countries, inter alia Japan, Sweden, England, Germany, Australia and South Korea. The international community is dealing with the same issues as can be found in the U.S. regarding their own increasingly elderly populations. The viewpoint in other countries focuses more on the elderly, and their personal wishes, with full family support.

Internationally, there has been more formal and stringent standardized testing to determine competency (overall condition) and capacity (ability to act). Full medical reports, and in some jurisdictions more than one, are required before any formal, legal action



in guardianship may take place. There is a predominant use of specific or special power of attorneys (Enduring POA), for the purposes of asset management, health care and other decisions. Court intervention and/or adversarial proceedings are minimal, and in some jurisdictions, act more in an informal supervisory role. Formal court appointments of guardians are time-limited. Many international jurisdictions have a number of judicial officers who are specifically assigned to “senior” court.

In Germany, there is a very informal relationship between a guardian, the family, the judge and physicians/

mental-health professionals. They all meet regularly to review an elder’s current status, quality of life and financial situation. It is non-adversarial with a focus on providing quality-of-life care to the elderly person. In 1992, the German guardianship law was modified to completely separate the issue of appointing a guardian and the declaration of legal capacity to act. Legal capacity is a question of current capability and not a status conferred as the result of a court decision. Nevertheless, a guardian functions as a representative regarding selected tasks prescribed by the court. The guardian may not interfere with the elderly person’s rights, except in cases of severe necessity.

Prior to 2000, the law in Japan was a statutory incompetence or semi-incompetence, with a guardian chosen after legal proceedings had begun, akin to the process in Nevada. Japanese

society is very family-centric. The Adult Guardianship Law enacted in 2000 was a new system for supporting those possibly in need of protection, stressing the theories of normalization, respect of right to self-determination and an emphasis on protecting livelihood. Again, as in many European countries, the system is implemented with specialized (limited) powers of attorney at its heart, with the legal system working as a supplementary or subsidiary system.

In South Korea, the full guardianship substituted model has been replaced with a four-tier system (full, limited, specific and contractual guardians), on a case-by-case basis, to be utilized depending upon the capacities of an individual.

In England/Wales, as in most of the European Economic Union, the emphasis is on the Enduring POA premise, with the Court of Protection there to make orders on single-act situations.

It rejected the substituted judgment model in favor of less-restrictive alternatives. Capacity is presumed until lack of capacity is established and all practical steps have been previously taken; before any formal matters are undertaken, it must be ensured that the purposes of the guardianship cannot be achieved in any other less-restrictive manner. It recognizes the necessity of respecting an elderly person’s wishes and taking his or her feelings into consideration.

Australia follows the Enduring POA and Enduring Guardian premise, together with a financial manager/administrator. Any appointment by a court/tribunal is time-limited and periodically reviewed for status. The preference is for informal management, with court intervention

utilized only as a last resort. Because of its expanding over-65 population, Australia enacted National Disability Insurance in 2013. The ultimate goal is for those with disabilities to exercise choice and control over their lives for as long as possible.

Sweden abolished the adjudication of total incapacity in the late 1980s, and a “godman” is considered an assistant to an elderly person; similar in ideology to a power of attorney, this system also seeks minimum intervention in an elderly person’s life. When circumstances call for a person with more power than the godman to make decisions, an administrator with specific, limited duties

is temporarily appointed. At issue is not competency or capacity, but rather the inability of the elderly person to manage his or her financial affairs.

Overall, the international community has evolved to the supported decision-making doctrine, which allows the elderly, so long as they are able,

to continue as the masters of their own destinies and to maintain their dignity, even if they make some mistakes along the way. Some countries have also legislated “death with dignity,” providing for assisted suicide.

The perfect balance seems to be a combination of a guardian’s watchful eye and an elderly person’s rights of self-determination. Maybe a lesson should be taken from the international community prior to putting any substituted judgment into play—if and when, an elderly person has succumbed to a medical condition that has completely robbed them of their capacity.

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One jurist in Nevada, when asked about estate planning and avoidance of guardianship, responded:

“Absolutely, and we had a saying for years in estate planning that guardianship is a failure to plan. If you document an appropriate plan you should never have to come in contact with the legal system. One of the defenses to a guardianship is that the ward doesn’t need a guardian because they have an adequate estate plan that would obviate the need for court and guardian involvement. That is an absolute defense to a guardianship.”

Unfortunately, this theory has not been put into practice across multiple guardianship matters in Nevada. There have been many abuses of the system by various individuals, and it has been left to the Nevada Supreme Court and the Nevada Legislature to clean house and to promote awareness regarding those whom the law is intended to protect.

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In Nevada as in other states across the country, the outrage has been heard; the Nevada Supreme Court created a Commission to Study the Administration of Guardianships in Nevada’s Courts, and numerous public meetings took place between July 2015 and September 2016. After reviewing how other states handled various issues,

the commission filed its final report. It provides various recommendations as to best practices, changes to statute, continuity of matters, forms, a bill of rights and the like, suggesting a less-restrictive alternative (supported decision-making) to stripping elderly citizens of their civil rights.

Based upon the commission’s report, the Nevada Legislature has put forth at least five bills as of March 2017. All of these bills deal with various issues under Nevada’s guardianship system, which has for years adopted a substituted judgment model, stripping elderly of their civil rights, rather than a supported decision-making model, which allows elderly to retain both their civil rights and dignity in their final years.

The proposed legislative changes include:

SB 158: Regarding, inter alia, replacing the term “ward” with “protected person,” interaction with relatives;

SB 168: Establishing a protected person’s Bill of Rights;
SB 229: Relating to nomination of guardians and guardian registered agents;
SB 360: Further criminalization of certain acts of abuse or exploitation, and establishing a protected person’s right to have his or her own attorney in guardianship proceedings; and
SB 433: Regarding appointment of attorneys and filing fees.

Respect for elders in society had been passed down to all prior generations, whereas we have become a society in which the elderly are often disrespected, poorly provided for and taken care of, or simply seen as a nuisance.

World-wide, there is an ethical imperative toward rethinking guardianships. Hopefully, Nevada is one of many states in the nation making the future protection of and care for some of its most vulnerable citizens a priority; even so, we must never stop making improvements. **NL**

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