

Adult Guardianship in Michigan Moving from First Response to Last Resort

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I. THREE PROBLEMS

A. Large number of adults who have guardian or conservator

1. Loss of independence and dignity
2. Possibility of inappropriate institutionalization
3. Financial wrongdoing

B. Lack of oversight

1. Professional fiduciaries
2. Family

C. Indefinite perimeters of guardian's powers

II. CONTRIBUTING FACTORS – BY ACTOR

A. Michigan Supreme Court / Lower Courts

1. Data collection

2. Failure to administer courts
3. Ill-defined common law right of substituted consent
4. Liability climate

B. Probate Courts

1. Restriction on “legal advice”
2. Non-compliance with letter or spirit of statute
 - a. Allowing petitioner to nominate guardian ad litem
 - b. Refusal to move site of hearing
 - c. Ignoring “necessity” requirement
 - d. Bias toward full guardianship
 - e. Refusal to conduct periodic review
3. Dependence on interested persons to object to reports/accounts
4. Attitudes of judges
 - a. Stereotypic notions
 - b. Safety v. independence
 - c. Deviance
 - d. Caseload concerns
5. Corruption – perverse financial incentives
 - a. Kickbacks
 - b. Campaign contributions

C. Legislature

1. Alternatives to guardianship
 - a. Retarded development of advance directive legislation
 - b. Family consent statute applicable to relatively few individuals
2. Guardianship statute / Revised Judicature Act
 - a. Relatively low filing fee
 - b. No physician or mental health report required
 - c. Presence of respondent not required
 - d. Ill-defined perimeters of power
 - 1?. No fine line between guardianship and conservatorship
 - 2?. Life-sustaining treatment

3. Broad definition of abuse and neglect
4. No-fault insurance law
 - a. More than \$100,000 per year per resident of rehab facility
 - b. Need for guardian demonstrates extent of injury
 - c. Guardian's services are covered benefit

D. Health Care Providers

1. Nursing Homes
 - a. Historical push for guardianship
 - b. Lack of awareness of alternatives
2. Hospitals
 - a. Misunderstanding of "legal capacity"
 - b. Lack of awareness of alternatives
 - c. Liability concerns
 - d. Reimbursement concerns

E. Government Agencies

1. Health Care Financing Administration
 - a. Medicare reimbursement system – DRGs
2. Social Security Administration
 - a. Require guardian to become representative payee
3. Community Mental Health
 - a. Throw everything at them; see what sticks
4. Family Independence Agency
 - a. Closing AP case once guardianship is established
 - b. Fee for guardian under Medicaid; no fee for advocate
 - c. Re-penalizing the victim of fraud or abuse
 - d. Durable power of attorney presented as barrier to Medicaid eligibility
5. Licensing and Regulation
 - a. Evaluate nursing homes based on all residents having a surrogate
6. Department of Community Health
 - a. 1990 "white paper" on surrogate decisionmaking
 - b. Closing in-patient psychiatric hospitals

7. Attorney General
 - a. System of public administrators

F. County Commissions

1. Refusal to honor statute re due process costs

G. Financial Institutions

1. Refusal to honor durable powers of attorney

H. Guardianship Corporations

1. Cause or effect?
2. Role of standards as legitimizing

I. Petitioners

1. Little knowledge of alternatives
2. Confusion between physical and mental incapacity
3. No knowledge of distinction between guardianship and conservatorship
4. Misunderstanding perimeter of guardian's power – mental health treatment
5. Perception of guardianship as planning device
6. Magic wand theory

III. ALTERNATIVES

A. New Mechanisms

1. Living will
2. Family consent
3. Universal health insurance

B. Expand Breadth / Uniformity of Existing Mechanisms

1. Durable power of attorney for health care – mental health treatment
2. Do not resuscitate declaration – hospital and nursing home settings
3. Durable power of attorney for finances- statutory form

C. Increase Use of Existing Mechanisms

1. Person centered planning
2. Durable powers of attorney
3. Protective orders through probate court
4. Amenities trusts
5. Budgeting skills education
6. Patient representatives
7. Advocates and advisors