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Statutory Reform is Associated with Improved Court Practice: Results of a Tri-State Comparison

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Abstract

Purpose—This study investigates the impact of statutory reform in adult guardianship on court practice.

Methods—Case files for 298 cases of adult guardianship were reviewed in three states with varying degrees of statutory reform: MA (no reform), PA (major amendments in 1992), and CO (full re-enactment of statute per UGPPA in 2000). Five court practices associated with progressive statutory reform were studied: (1) diversion to less restrictive alternatives; (2) minimal and appropriate use of emergency procedures; (3) presence of the alleged incapacitated person at the hearing; (4) use of functional evaluation; (5) use of limited orders.

Results—CO more frequently utilized all five practices, whereas PA used diversion to less restrictive alternatives and less frequent emergency procedures, but not other practices. MA files rarely showed evidence for use of any of these reforms.

Implications—Statutory reform may improve court practice. More study of the effects of reform on court practices, and the vulnerable adults served by these courts, is needed.

INTRODUCTION

Guardianship is an intervention by the state in which one person (a guardian) is given the duty and powers to make personal, medical, and/or financial decisions for another person (an individual determined to have diminished capacity). While guardianship is intended to be protective, it results in substantial losses of individual autonomy and rights. Therefore, the utmost attention must be given to the procedures by which guardians are appointed and monitored, and to limiting the scope of a guardian's authority. This is a particular concern

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for older adults with neurocognitive and neuropsychiatric illness, who are increasingly subject to guardianship proceedings (Quinn, 2004).

Problems in Adult Guardianship

Concerns about guardianship have been raised since the 1970s including limited due process, lack of protection of rights, poor interface between medical providers and the court, and overly paternalistic interventions (Horstman, 1975; Mitchell, 1978). There is limited empirical study of adult guardianship. In several early studies (Alexander & Lewin, 1972; Blenkner, Bloom, Nielson, & Weber, 1974) concerns were raised that guardianship, although at times well meaning, often benefited the guardian more than the ward, and could hasten institutionalization for the protected person. Later study (Lisi, Burns, & Lussenden, 1994), involving observation of hearings and examination of court files, noted continuing concerns that hearings were extremely brief (less than 15 minutes), did not rely upon medical testimony, and often resulted in plenary orders. These problems were also found in investigations by the Associated Press in 1985 (Bayles & McCartney, 1987) and by the *Los Angeles Times* in 2005 (Fields, Larrubia, & Leonard, 2005).

Reform in Adult Guardianship

Concerns about limited due process, overly paternalistic intervention, and a lack of accountability have resulted in recommendations for guardianship reform and accompanying statutory change. A number of multidisciplinary panels have offered recommendations for improving the process of adult guardianship. For example, in 2001, the Second National Guardianship Conference, known as “Wingspan” (Wingspan Conferees, 2001), resulted in 68 recommendations to improve practice in a variety of areas. In 2004, the National Academy of Elder Law Attorneys, the National Guardianship Association, and the National College of Probate Judges convened an implementation session to develop a blueprint for guardianship reform at the national, state, and local levels (National Guardianship Network Members, 2004). Some recommendations concern statutory reform, and others concern education, data collection, and procedural changes. Many of the recommendations for statutory reform also are included in The Uniform Guardianship and Protective Proceedings Act (UGPPA) (National Conference of Commissioners on Uniform State Laws, 1997; National Guardianship Network Members, 2004), a model statute for adult guardianship.

The past 20 years have seen a substantial trend toward statutory reform across the United States. From 1988 to 2006, 28 states enacted major guardianship reform, as shown in Table 1. New laws sought to enhance procedural due process and made important related changes, five of which are the focus of this paper and are summarized below.

Divert to Less Restrictive Alternatives—The constitutional principle of the least restrictive alternative was first articulated by the U.S. Supreme Court (*Shelton v. Tucker*, 1960) and was applied to mental health in *Lake v. Cameron* (1966), in which the court said that a person could not be subjected to a mental health commitment of unspecified time without an exploration of all alternatives. Accordingly, the Wingspan conferences recommended that courts review whether the presenting problem in the petition could be addressed with an alternative to guardianship, such as durable powers of attorney, advance

health-care directives, or other legal or social service interventions, prior to the hearing. In tandem, by mid-2001 48 states had passed living will statutes, and all 51 jurisdictions had provisions for the appointment of healthcare proxies or agents (Wood, 2004). All states enacted provisions for the appointment of agents for financial affairs. Many guardianship laws acknowledged these less restrictive alternatives by providing that the petition should state what alternatives had been examined and that the court should find that no less restrictive alternatives would suffice before the appointment of a guardian.

Restrict Use of Emergency Procedures—A guardianship case may come before the judge as a petition for emergency guardianship: for example there is need for an urgent medical procedure and no one to provide informed consent, or there is a family dispute and someone is seeking to “kidnap” the respondent to an unknown location. An emergency petition may be filed in connection with a request for permanent guardianship. Most states, as well as the UGPPA and the National Probate Court Standards (Commission on National Probate Court Standards and Advisory Committee on Interstate Guardianships, 1993) have provisions for emergency guardianship. Generally, because time is of the essence, procedural requirements for emergency guardianships are less stringent than for permanent guardianship. Because of this, Wingspan cautions that the emergency guardianship should not become an automatic doorway to permanent guardianship, recommending a hearing on permanent guardianship as soon as possible. Similarly, states enacted statutes that require courts to clearly establish the nature of the respondent’s emergency, and confirm it presents a true emergency according to state law—that the respondent’s health, safety or welfare will be substantially harmed over the time it takes for compliance with regular guardianship procedures.

Encourage the Presence of the Alleged Incapacitated Person at the Hearing—The alleged incapacitated person has always had a right to be present at the hearing, and today about half of the state laws require that the respondent be present unless good cause is shown. The UGPPA recommends that “the respondent shall attend and participate in the hearing” (§308a). The presence of the individual allows his or her involvement in the proceedings. Often, people may want their “day in court” and feel more satisfaction from the hearing if they are present and involved, whether a guardian is appointed or not. Further, when the individual is present it allows the judge an opportunity personally to observe the individual and may shed a different light on the case. By 2006, close to 40 states required presence and 37 states included provisions concerning hearings at convenient locations (Hurme & Wood, 2006).

Obtain Functional Evaluation—In recent years, the concept of capacity in guardianship has moved away from a global, “all or none,” construct toward a more finely tuned, functional definition (Moye, 2003). For example, a person may lack the capacity to handle financial affairs, but still retain the capacity to make health care decisions or to vote in elections. Therefore, there is increasing emphasis on functional evaluation of the individual—that is, evaluation that considers what the person can and cannot do more than just the diagnosis and its symptoms. The UGPPA recommends detailed functional evaluation by physicians, psychologists, or other qualified professionals, as do the Wingspan

recommendations. Currently 30 states require clinical evaluation prior to guardianship proceedings, 15 leave this decision to the discretion of the court, and five states have no statutory direction (Mayhew, 2005). Of those that require evaluation, 16 states require functional assessment.

Increase Use of Limited Orders—While the underlying aim of guardianship is to protect the well-being of vulnerable incapacitated individuals, the reality is that the appointment of a guardian results in the partial or complete loss of liberty and a potential litany of legal rights that other adults enjoy, including the right to contract, marry, divorce, vote, travel at will, and decide where to live. The potential loss of these rights may be further exacerbated by ageist stereotypes that still arise in the ways elders are perceived. The ethical and conceptual preference for limited guardianship has been a core element of guardianship reform for a quarter century (Frolik, 1981). Limited guardianship seeks to attain an optimal balance of care and protection with autonomy and dignity. Most state laws now recognize that capacity is not always an all or nothing phenomenon, and have enacted language allowing for “limited guardianship”, in which the guardian is assigned only those duties and powers that the individual is incapable of exercising.

In summary, incapacity and the associated use of guardianship proceedings is a rising concern for older adults with neurocognitive deficits or neuropsychiatric illness. Historically, guardianship procedures have been criticized for lacking basic due process protections and removing too wide a range of individual rights. In the past 20 years there has been significant statutory reform, with some states completely re-enacting statutes, frequently according to progressive model statutes, other states making major amendments to existing statutes, and some enacting only minor changes. There is however almost no data on the effect of statutory reform on guardianship practice. Experts have maintained that there may be a troubling gap between the legal reform and the judicial and legal practice. One key source observed that “the changes in laws are a mask of virtual reality, hiding what is actually being done in the process” (Johns, 1997). Another stressed “the absence of hard data” to evaluate the changes that have occurred, and suggested that statutory changes face “powerful inertia” in implementation (Frolik, 1998). Empirical evidence concerning implementation of the new laws has been lacking.

Accordingly, this study examined selected effects of statutory reform in the five key areas (diversion to less restrictive alternatives, minimal and appropriate use of emergency procedures, respondent’s presence at hearing, functional evaluation, and limited orders) in three states with varying degrees of statutory reform. We predicted that Massachusetts, a state with minimal reform, would show lower utilization of procedural reforms and limited orders. Conversely, we predicted that Colorado, a state with a guardianship code based on the UGPPA, would demonstrate more utilization. Finally, we predicted that Pennsylvania, a state with moderate reform, would rank in between Massachusetts and Colorado on these outcome measures. The study provides empirical exploration of the potential impact of statutory reform on practice.

METHODS

Study States

We selected three states with different levels of statutory reform: Massachusetts (MA), Pennsylvania (PA), and Colorado (CO). In MA, guardianship statutes have seen little modification in the past 30 years, with only minor amendments such as to allow guardianship for “physical incapacity” and to permit nurses as examiners. There are no provisions for clinical evaluation. The adult guardianship statute contains archaic language; it is titled for “insane persons” and “spendthrifts.” By comparison, Pennsylvania amended its code in 1992 to include many progressive provisions such as notice in large type and simple language, presence of the individual at the hearing unless good cause is shown otherwise, and annual reporting. PA does not state what is required for clinical evaluations, although its incapacity standard cites the presence of a medical condition and incapacity to make and communicate decisions. Importantly, PA law states that “the court shall prefer limited guardianship” (§5512.1). In 2000, Colorado replaced its statute with one based substantially on the UGPPA, enhancing procedural due process, strengthening evaluation (to include evaluation of cognitive and functional limitations), providing for limited orders, and boosting accountability.

Criteria for Case Selection

Cases were pulled from four courts in MA and two courts each in PA and CO involving guardianship of adults age 55 and older with a hearing date between January 1, 2002, and December 31, 2005. The time frame was chosen to begin after initiation of new guardianship statutes in CO up through the period of data collection (September–December 2005). Cases where the identified diagnosis included mental retardation or developmental delay were excluded, as some states have special provisions for guardianship of individuals with MR/DD.

For cases that met inclusion criteria, petitions, clinical evaluations, and orders were scanned and de-identified. After data cleaning there were 298 cases in the study file, 154 from MA, 74 from PA, and 70 from CO. More files were pulled for Massachusetts because the funding agency for the study was located in Massachusetts, and emphasizes local projects.

Coding

A team of researchers in the three states coded the files for content following training to establish inter-rater reliability ($r = .90$) of the coding process. As coding progressed, if coders were unsure how to categorize symptom descriptions, the PI issued a decision, which was added to the coding books at each site. If emergency procedures or limited orders were utilized, the specific reason for the emergency procedure was recorded verbatim, and similarly the specific limitations to the order were recorded. Clinical evaluations were coded for the presence of information including (1) diagnosis, (2) cognitive or psychiatric symptoms, (3) functional abilities, and additional facts described in detail elsewhere (Moye et al., in press).

RESULTS

Alleged Incapacitated Persons (AIPs)

The AIPs were similar in age and diagnosis. As shown in Table 2, the mean age of the AIPs ranged from 76 to 80 across states. Most participants were women, with variability across states. A majority of AIPs in MA lived in a nursing home setting, whereas the majority in PA and CO were community dwelling. Information on race, ethnicity, marital status, and income was not available in most files.

Summarizing across states, the majority (82.8%) of AIPs were described as having a DSM-IV (American Psychiatric Association, 1994) diagnosis, the most common of which was dementia (59%), followed by mood disorder (13.8%) and other neurological disorders, such as Parkinson's disease (11.4%). The most common mental impairments were problems with cognition, including poor orientation, confusion, memory, reasoning, or judgment. Psychotic or mood disturbance was described in about one-fifth of the cases.

Petitioners

In most cases, the petitioner was a family member or a friend (MA, 81.2%; PA, 58.1%; CO, 55.7%). Of interest, 33.8% of the petitioners in PA and 38.6% of the petitioners in CO were agencies, which was higher than in MA (7.8%; $\chi^2 = 36.09$, $p < .001$).

Diversion to Less Restrictive Alternatives to Guardianship

Orders stated that less restrictive alternatives had been considered in 51.5% of the cases in PA and 75.0% of the cases in CO (and none in MA); however, the language was *pro forma* in nature for most of these cases. Six cases in CO described specific examples of less restrictive alternatives attempted prior to guardianship.

Use of Emergency Procedures

A high number of emergency appointments were provided overall, more in MA, where 58% of all files used emergency procedures, compared with PA (28%) and CO (24%) ($\chi^2 = 39.28$, $p < .01$). When emergency procedures were used, the facts supporting the nature and extent of the emergency were rarely documented in court orders. In 16.5% of the cases a clear emergency or some condition with medical urgency was noted, while in other files the reason for the emergency parroted statutory language (8.4%), gave facts but did not describe an emergency (33.0%), cited placement pressures (21.2%), or did not provide any facts at all (19.7%).

Documentation of close follow-up with a permanent hearing was found in less than half the case files. Of 127 cases (as noted above, most from MA), 60 had a second order. Of these, 78% were for permanent (at least one year) guardianship. The majority (70.4%) of cases in which the reason for the emergency guardianship was placement did not have further information in the case file. About half (52.4%) of cases in which the reason for emergency guardianship appeared to be a true emergency had no further documentation in the case file.

Presence of Alleged Incapacitated Persons at Hearings

The alleged incapacitated person was much more likely to attend his or her own hearing in CO. Of 154 cases, the AIP was present at the hearing in only one case in MA (<1%). It was not possible to determine the respondent's presence based on information in the order for 55.7% of the cases in PA and 33.8% of the cases in CO. For those cases in PA and CO where the AIP presence was determinable, the respondent was present in 1 case in PA and 27 cases in CO (i.e., 60% of determinable cases).

Functional Evaluation

As shown in Table 3, the diagnosis and symptoms of the mental disorder were provided in the majority of the cases. In terms of functional evaluation, activities of daily living (ADLs, i.e. eating, toileting, dressing, bathing, grooming, walking, and transferring) were described in more cases in CO (35.7%) than in PA (19.3%) or MA (9.3%) ($\chi^2 = 22.76, p < .001$). Similarly, instrumental activities of daily living (IADLs, i.e. problems with money, home care, health care, transportation, meals, and mail or telephone communication) were described in more cases in CO (52.2%) than in PA (21.1%) or MA (18.3%) ($\chi^2 = 28.91, p < .001$).

Evaluations were almost always signed by physicians in MA (98%) and PA (88%), whereas in CO clinical reports were submitted by physicians (57%), psychologists (27%), other professionals (9%), or a multidisciplinary team (6%), consistent with UGPPA provisions.

Use of Limited Orders

Most orders were for guardianship of person and estate (70.8% MA, 95.6% PA, 89.7% CO). Only one case in either MA or PA had a limited order compared with 34% of the cases in CO. In examination of the content of limited orders, the wards' rights were reserved in various ways, including reserving the right to choose social activities, or limiting the guardian's authority to move the AIP, sell property, or consent to medical treatment, as shown in Table 4.

DISCUSSION

This study provides compelling preliminary evidence that guardianship statutory reform is associated with improved procedures for appointment and limited orders. We compared five areas of practice: (1) diversion to less restrictive alternatives; (2) minimal and appropriate use of emergency procedures; (3) presence of the alleged incapacitated person at the hearing; (4) use of functional evaluation; (5) use of limited orders. Colorado, a state with substantial guardianship reform, was superior to Massachusetts, a state with no reform, in all five areas. Pennsylvania, a state with a moderate degree of guardianship reform, was superior to MA in two areas.

Limitations to This Study

Limitations of this study include sampling of only three states and sampling of only a small number of courts within these states. Further, since we only sampled a small number of courts, we cannot say that our sample is representative of the state or whether it reflects local

court practice. Finally, it is possible, for example, that some courts in CO and PA had better practice even prior to changes in the guardianship statute. A pre–post design would allow us to conclude more definitively that it is the legislative reform that is driving the procedural improvements.

Commentary

The study found diversion to less restrictive alternatives in half the cases in PA, three-quarters of the cases in CO, and none in MA, suggesting statutory reform may result in greater attention to alternative mechanisms in some cases. It was not clear why, in PA and CO, some mention of less restrictive alternatives having been explored or being noted to be inappropriate was not present in all case files. Further, we noted that the same language about having considered less restrictive alternatives appeared in many orders without supporting facts, causing us some lack of confidence about the extent to which less restrictive alternatives actually had been considered.

Emergency procedures were used less frequently in PA and CO than in MA, similarly supporting the view that statutory reform may result in a decreased use of emergency procedures. However, we were concerned to see emergency procedures still used in one-quarter of the cases in PA and CO, and more than half in MA, that few case files provided convincing facts of a true emergency, and that less than half had documentation of follow-up hearings. This is similar to a recent *LA Times* investigation (Fields et al., 2005), which found more than 50% of cases examined in Southern California used emergency procedures, sometimes as a route to short shrift the procedural safeguards of regular guardianship proceedings. Clearly more study is needed to determine why petitioners and courts are finding it favorable to use emergency procedures in adult guardianship.

It was not always possible to determine the presence of the alleged incapacitated person at the hearing. We suggest that court records routinely record this in the case file; in MA it was recorded in the order. We found the AIP present at the hearing very rarely in MA or PA, despite the fact that presence is required unless good causes is shown. In contrast, where we could determine presence, it was so noted in more than half the cases in CO, suggesting that in some states statutory reform can increase presence, and, importantly that it is often possible to have respondents present in court.

An emphasis on functional evaluation is central to guardianship statutory reform, although functional evaluation itself is not clearly defined in most statutes. In this study we operationalized it as inclusion in the written clinical testimony of activities of daily living or instrumental activities of daily living. We found most written testimony to have a description of the mental disorder and associated cognitive or psychiatric symptomatology, but functional assessment lagged behind. In CO, half the cases described IADLs and only one-third described ADLs, with other states providing even less functional data. Most written testimony did not specify whether the IADL and ADL information was based on impression, observation, or direct evaluation. Clearly, much more work is needed to educate healthcare practitioners about how to conduct functional evaluations, and to educate legal practitioners about what sort of evaluation to request and from whom. For example, CO, a state with more

functional evaluation, showed greater use of non-physician evaluations such as by psychologists, social workers, and other professionals.

Both PA and CO statutes provide for limited orders, but only the courts from CO in this study were using them in one-third of the cases. Examination of the content of the orders suggested that judges were restricting the guardian's authority to the particular financial matters of the petition, and in some cases restricting authority concerning healthcare, recreational, and social decisions. The ability of the court to craft limited orders is closely tied to the availability of functional evaluation, which may specify the specific strengths retained as well as abilities lost. Therefore the low rate of functional evaluation in this study may have restricted the courts' ability to write limited orders.

Conclusions

The results of this study suggest that statutory reform may improve guardianship practice, especially in the area of reviewing cases for diversion to less restrictive alternatives and reducing the use of emergency procedures. In this study, CO, a state with recent significant guardianship reform, was also more successful in having the alleged incapacitated person at the hearing, obtaining functional evaluation, and limiting guardianship orders. Although PA has statutory provisions in most of these areas, resulting changes in practice were not evident in the case files for the two courts we examined. Importantly, MA courts were not practicing any of these procedural reforms, suggesting that states without statutory reform may remain considerably out of step with progressive probate court standards. Continuing study is needed.

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Table 1

States enacting major reform regarding guardianship appointments

Year	State
1988	Oklahoma, Indiana, Michigan
1989	Florida, North Dakota, New Mexico, Ohio
1990	Washington
1991	New York
1992	Pennsylvania, Rhode Island, Tennessee
1993	South Dakota, Texas
1994	West Virginia
1995	Oregon
1996	Washington (more reforms)
1997	Virginia
1998	Wyoming
1999	None
2000	Colorado, Michigan (more reforms)
2001	None
2002	Kansas
2003	Minnesota, Nevada
2004	Georgia, Hawaii
2005	New Jersey, Texas
2006	Wisconsin, California

This table does not include bills enacting reform to public guardianship procedures only. For more information see the work of Wood (1988–2005).

Table 2

Characteristics of alleged incapacitated persons in the study sample

Demographic variable	MA	PA	CO	Test statistic	p
Age					
Range	55–98	58–94	55–98		
<i>M</i> ($\pm$ SD)	77.22 ($\pm$ 10.42)	80.00 ($\pm$ 8.44)	76.17 ($\pm$ 10.01)	$F = 3.03$	.05
Gender					
Females	61.7%	63.5%	47.1%	$\chi^2 = 5.13$	.08
Males	38.3%	36.5%	52.9%		
Setting					
Community	5.2%	44.6%	31.4%	$\chi^2 = 129.38$	
Acute hospital	13.6%	1.4%	34.3%		
Long term care	41.6%	28.4%	24.3%		<.001
Other	7.8%	25.7%	8.6%		
Not indicated	31.8%	0.0%	1.4%		

Table 3

Information available in written clinical evidence for guardianship

Clinical indicator	MA (<i>n</i> = 154)	PA (<i>n</i> = 56)	CO (<i>n</i> = 70)	χ^2
Diagnosis of a mental disorder	85.6%	63.2%	86.6%	9.08
Cognitive or psychiatric symptoms	73.4%	62.2%	90.0%	14.88 **
Functional abilities	25.3%	47.3%	64.3%	32.68 **

* $p < .01$;** $p < .001$.

Table 4

Examples of limited orders

1	The ward shall be permitted to continue smoking and to use his own funds for the purchase of cigarettes.
2	The guardianship is limited for the purpose of establishing a new abode for the respondent.
3	The guardian shall have no authority to change the permanent placement of the ward from her residence without order of the court.
4	Respondent's IRA are not to be liquidated without prior authorization of the court except to the extent that minimum distributions may be required under IRS.
5	The conservator is authorized to withdraw up to \$2,000 per month, non-cumulative, without an order of the court. Any amount above \$2,000 per month, non-cumulative, shall require court order.
6	There may be no sale or encumbrance of real estate without prior court approval.
7	The guardian shall have no authority to make medical treatment decisions or end of life decisions for the ward unless the ward's treating physician determines that she lacks the decisional capacity to provide informed consent to, or refusal of, medical treatment.