UNIVERSITY LEGAL SERVICES
Protection & Advocacy Program
for the District of Columbia

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Before the Council of the District of Columbia
Committee on the Judiciary and Public Safety

Public Hearing Regarding Bill 20-107:
Charles and Hilda Mason's Elder Abuse Clarification Act of 2013
July 8, 2013

Guardianship is the government's highly restrictive means of protecting an individual with diminished decision-making capacity. Under guardianship, which has been characterized as a "civil death," individuals lose most of the rights other citizens take for granted, including control over personal healthcare decisions, living arrangements, and finances.[1] Across the country and internationally, jurisdictions are reforming guardianship practices to prevent abuse and encourage the maximum possible autonomy for individuals with diminished capacity. Unfortunately, the District's guardianship system lags behind other reform efforts, placing individuals under guardianship at greater risk of abuse and neglect, and often unnecessarily restricting their freedom.

University Legal Services (ULS) supports the Charles and Hilda Mason's Elder Abuse Clarification Act of 2013's proposed amendment to § 21-2049 of the Guardianship Act, guaranteeing an individual under guardianship the following rights: to be present at any proceedings to remove an existing guardian or conservator unless good cause is shown for the absence; to be represented by counsel at such a proceeding; to present evidence and to cross-examine witnesses, including any court-appointed examiner or visitor, at such hearings; and to request that the hearing be closed. These

[1] Michael Perlin, ''Striking for the Guardians and Protectors of the Mind": The Convention on the Rights of Persons with Mental Disabilities and the Future of Guardianship Law, 117 Penn St. L. Rev. 1159 (2013).

amendments would expand the rights of individuals under guardianship. ULS does not support the Bill's other proposed amendments as they are currently drafted.

ULS represents hundreds of D.C. residents with mental illness each year in their pursuit of appropriate mental health services provided in the least possible restrictive setting.[2] Through individual representation and outreach and education, we meet with thousands of mental health consumers every year in mental health institutions, correctional facilities, core service agencies, and community locations. We know of many individuals who remain in nursing homes and at St. Elizabeths hospital because their guardians will not explore the available supports for a home in the community. We have observed the Department of Mental Health (DMH) push for a guardian when an individual refuses to go to a nursing home or assisted living facility. And we have listened to many individuals with mental illness who have guardians describe the feelings of powerlessness and isolation that stem from the complete lack of control over their lives.

We commend City Council for initiating this public dialogue about improving our guardianship system. Below are recommendations for statutory amendments meant to ensure a guardian is only appointed when absolutely necessary and that a guardian's powers are as narrowly defined as possible to ensure maximum autonomy.[3] These recommendations are geared toward aligning the realities of the D.C. guardianship system with the intent of the law: "When the court appoints a guardian, it shall appoint the type of guardianship that is least restrictive to the incapacitated

[2] University Legal Services (ULS) is the designated protection and advocacy program for people with disabilities in the District of Columbia.

[3] Reform of the guardianship system is a ULS long-term goal. To achieve this end, ULS has interviewed individuals with mental illness, legal advocates, service providers, court employees, policymakers, and national leaders in guardianship reform. We have also dedicated resources to observing probate court hearings and researching best practices in other jurisdictions and scholarly literature. The knowledge gained from this initiative informs the recommendations listed below.

individual in duration and scope, taking into account the incapacitated individual's current mental and adaptive limitations or other conditions warranting the appointment."[4]

Background

At any time, any person may file a petition for appointment of a guardian in the Probate Division of D.C. Superior Court.[5] Once a petition is filed, the court schedules a hearing on the issue of incapacity.[6] After an evidentiary hearing, the court may appoint a guardian if it finds, by clear and convincing evidence, that the individual is incapacitated and a guardianship is "necessary as a means of providing continuing care and supervision" for the "incapacitated" individual.[7] The guardian can have temporary, limited, or plenary (general) powers.[8]

Recommendations

Often, the issues guardianship is meant to address could be resolved with a more limited guardianship or alternatives such as a power of attorney, family engagement and involvement, and/or better mental health services. Guardianship should be a last resort and should provide the minimum necessary restrictions on an individual's autonomy.[9] However, in the cases we have reviewed, when the allegations of incapacity are based on a mental illness diagnosis, guardianships are rarely limited in scope and duration. We recommend amending the statute to ensure the petitioner and decision-maker carefully consider whether any alternatives to guardianship are available or whether a limited guardianship is sufficient.

[4] D.C. Code § 21-2044(a). See also D.C. Code 2047(a)(7)-(8): a guardian shall include the ward in the decision-making process to the maximum extent of the ward's ability; and encourage the ward to act on his or her own behalf whenever he or she is able to do so, and to develop or regain capacity to make decisions in those areas in which he or she is in need of decision-making assistance, to the maximum extent necessary.
[5] D.C. Code § 21-2041.
[6] Id.
[7] D.C. Code § 21-2044(b); see D.C. Code §21-2003 for standard of proof.
[8] D.C. Code § 21-2044(a).
[9] Id.

A. Using Probate Court's Mediation Program to Limit and Prevent Unnecessary Guardianships.

The Probate Division offers an Elder Mediation Program for individuals fifty years of age or older, but only after the court has made a finding of incapacity. Council should amend the law to make the Probate Division's mediation program available to parties *before* a guardian is appointed. Mediation provides a "unique opportunity for families and others concerned about the welfare of an incapacitated adult to discuss and resolve issues… [including] whether a particular person should or should not be appointed a guardian or conservator, [and] whether limitations should be placed on the fiduciary's powers …."[10] After the filing of the petition, the parties could request or the court could order them to engage in mediation prior to the initial hearing. Mediation provides a forum for the parties to discuss the allegations in the petition, an opportunity to determine whether a guardianship is necessary or if the parties would consent to other options, and/or a chance for the parties to develop the terms of a limited guardianship to propose to the court.

B. Instituting a Petition that Requires More Specific Information and Encourages Limited Guardianship.

The petition is the first step in the appointment process and the court's introduction to the case. Completing a petition should demand the time and consideration worthy of the very serious deprivation of civil liberty that it proposes. The statute currently requires that the petition include the name, address, and interest of the petitioner; the name, age, residence, and address of the individual for whom a guardian is sought; and reasons for which guardianship is sought with particularity so as to enable the court to determine what class of examiner and visitor should examine the person alleged

[10] The Elder Mediation Program Handbook, April 2013 (distributed by the Office of the Registrar of Wills, Probate Division).

to be incapacitated.[11] Despite the statute's preference for "particularity," the petition form merely requires that the petitioner check off a series of boxes related to capacity and the guardian's powers.[12]

In contrast, Rhode Island's form, Petition for Limited Guardianship or Guardianship, requires the petitioner to provide comprehensive reasons for filing the petition.[13] Even the petition's title indicates the state's commitment to assigning limited guardianships. Rhode Island's petition requires the petitioner to explain what kinds of services the subject needs in specific categories such as health, financial, and residential matters. The petitioner has to indicate which less restrictive alternatives to guardianship have been considered and why those alternatives will not meet the needs of the subject.

In Michigan the petitioner is required to provide specific facts about the allegedly incapacitated individual's condition and *specific examples* of the individual's recent conduct that necessitate the appointment of a guardian. Mich. Comp. Laws Ann. § 700.5303(1). Furthermore, the court is required to provide the petitioner with information about alternatives to guardianship:

> The court shall provide the person intending to file the petition with written information that sets forth alternatives to appointment of a full guardian, including, but not limited to, a limited guardian, conservator, patient advocate designation, do-not-resuscitate declaration, or durable power of attorney with or without limitations on purpose, authority, or time period, and an explanation of each alternative.

Mich. Comp. Laws Ann. § 700.5303(2).

We recommend replacing D.C. Code § 2041(b) with the following language, which has been adapted from the Uniform Guardianship and Protective Proceedings Act of 1997/1998, Art. 3 § 304(b):

[11] D.C. Code § 21-2041(b).
[12] See attached Petition for a General Proceeding #6 (Attachment A).
[13] See attached Petition for Guardianship or Limited Guardianship (Attachment B).

The petition shall state:

(1) the name, address, and interest of the petitioner; the name, age, residence, and address of the individual for whom a guardian is sought

(2) if different, the address of the dwelling in which it is proposed that the respondent will reside if the appointment is made;

(3) name of spouse, or if the respondent has none, an adult with whom the respondent has resided for more than six months before the filing of the petition; and

(4) name of adult children or, if the respondent has none, the respondent's parents and adult brothers and sisters, or if the respondent has none, at least one of the adults nearest in kinship to the respondent who can be found;

(5) the name and address of any person responsible for care or custody of the respondent;

(6) the name and address of any legal representative of the respondent;

(7) the name and address of any person nominated as guardian by the respondent;

(8) the name and address of any proposed guardian and the reason why the proposed guardian should be selected;

(9) the reason why guardianship is necessary, including a brief description of the nature and extent of the respondent's alleged incapacity;

(10) whether the petitioner requests an unlimited or limited guardianship

(a) If the petitioner requests an unlimited guardianship, the reason why limited guardianship is inappropriate

(b) if a limited guardianship is requested, the powers to be granted to the limited guardian.

We have attached a proposed Petition Form that incorporates all of our recommendations.[14]

C. Providing Notice of Guardianship Hearings in Clear, Non-Technical, and Readily Understandable Language.

After a petition is filed, notice is provided to the subject of the guardianship proceeding. The current notice form is confusing and full of legalese. For example, under the section titled "Your

[14] See Attachment C.

Hearing Rights," the first listed right is "to have your partial or total incapacity proved by clear and convincing evidence…." Even if the subject is familiar with the standard of clear and convincing evidence, the statement is hopelessly convoluted. Presumably this means, "You have the right to a hearing in which the petitioner has the burden of proving your partial or total incapacity by the legal standard of clear and convincing evidence."

The statute should require a notice form with clear and accessible language that informs the individual he is the subject of a guardianship proceeding as clearly as possible. In the attached proposed notice form, we have simplified and abbreviated the content of the current form, as well as changed some of the font and spacing, to create a form that individuals with a wide range of intellectual capabilities and educational backgrounds can read and understand.[15] A sample form could be codified by City Council, much like a sample "Durable Power of Attorney" form has been codified in D.C. Code § 21-2207.

D. Establishing Statutory Guidelines for Clinical Evaluations.

We recommend a uniform clinical assessment tool that can guide the court in crafting limited guardianships. "The need for clinical evaluations in guardianship proceedings is paramount, as they provide a key objective and scientific component of the data needed by the court to make an appropriate determination of the need for capacity."[16] An effective evaluation guides the court in ordering a limited guardianship tailored to the specific needs of the person under guardianship.[17] Most jurisdictions, including the District of Columbia, require some kind of clinical evaluation in a

[15] See Attached Proposed Notice Form (Attachment D).
[16] Michael Mayhew, *Survey of State Guardianship Laws: Statutory Provisions for Clinical Evaluations*, BIFOCAL, Vol. 27, No. 1 Oct. 2005, at 13.
[17] Id.

guardianship proceeding. However, most state statutes, including D.C's, do not provide specific guidance regarding the content of the evaluation.[18]

In the District, a court appointed examiner, defined as a qualified individual in the care, treatment, or diagnosis of the causes and conditions giving rise to the alleged incapacity, completes the clinical examination.[19] The court can waive the examiner's appointment if a satisfactory evaluation was submitted in writing to the court.[20] The court should also consider any current social, psychological, medical, or other evaluation used for diagnostic purpose or in the development of a current plan of treatment or any plan of treatment.[21]

We recommend requiring the submission of a form akin to Rhode Island's Decision-Making Assessment Tool (DMAT) with the clinical evaluation.[22] The individual's treating physician or another professional answers several questions about the individual's physical and psychological status, and then completes an assessment regarding the individual's decision-making abilities in financial, healthcare, relationships, and residential matters, and whether the individual needs a limited or full substitute decision-maker in any of those categories. In the event the court finds it necessary to appoint a guardian, the Rhode Island model ensures that the clinical evaluation is used as a guide for creating a limited guardianship.

We recommend adding the following language to § 21-2041: **The professional completing the clinical evaluation must submit a complete a Decision-Making Assessment Tool. This tool will guide the court in determining whether the guardianship shall be limited or general.**

[18] Id.
[19] D.C. Code § 21-2011(7).
[20] D.C. Code § 21-2041(d).
[21] D.C. Code § 21-2041(g).
[22] See Attachment E.

E. Repeated Judicial Evaluation of Guardianships Should be Required.

An annual court hearing to re-evaluate guardianships, particularly when an individual's capacity may fluctuate, would provide a safeguard against unnecessarily prolonged guardianships. In California, Mental Health (LPS) Conservatorships have an annual re-evaluation procedure.[23] The conservatorship expires at the end of each year and is only renewed if the treating medical team makes a formal request to Probate Court and the Judge agrees. In such a case, the conservatee is entitled to a full evidentiary hearing and legal representation for the renewal petition. This allows for continued assessment of the individual's level of capacity, potential adjustment of the conservatorship, and guarantees the individual the opportunity to contest any rights denied or powers granted under the conservatorship. In Michigan, the court has to reevaluate the guardianship one year after it was appointed and a minimum of every three years thereafter.[24]

We recommend adding the following language to the statute:

The court shall review a guardianship no later than one year after appointment and every two years thereafter. The individual under guardianship shall be present at the hearing absent good cause shown. The individual shall have the right to assigned counsel at the hearing, and the right to demand a full evidentiary hearing. The individual may not waive their right to the court's review.

F. Improving the Standards for Court Appointed Counsel

We commend the District on guaranteeing the right to counsel to individuals facing guardianship proceedings. However, the statute and court practices must do more to ensure court appointed counsel provide zealous representation. In February 2013, ULS met with legal advocates from Bread for the City, the Legal Aid Society, Legal Counsel for the Elderly, Quality Trust for

[23] Cal. Welf. & Inst. Code § 5361.
[24] Mich. Comp. Law. Ann. § 700.5309.

People with Disabilities, the Public Defender Service's Mental Health Division, and Washington College of Law's Disability Rights Law Clinic. When we asked what the advocates thought were the biggest issues in the guardianship system, they unanimously answered that the quality of zealous representation was alarmingly low. The group discussed the common practice of counsel hollowly representing their clients' interests, articulating the client's expressed interests while implicitly letting the court know they believed the client needed a guardian.

Counsel is required to act as a zealous advocate for the subject and not as a guardian, independent investigator, or objective finder of fact.[25] It is important to remember that prior to a judicial finding, an individual has only been *alleged* to be incapacitated. Individuals who are the subjects of guardianship proceedings should have access to attorneys who have not already decided that the individual needs a guardian simply because he or she is the subject of the proceeding. Even if an individual has diminished capacity, his or her attorney has a professional duty to maintain a typical client-lawyer relationship.[26] Disability or diminished capacity is not an excuse for counsel, or any other party involved, to act as a surrogate decision-maker for the client.[27]

We recommend adopting the following language from the D.C. Rules of Professional Conduct to add to D.C. Code § 21-2033(b):

Counsel has a duty to "pursue a matter on behalf of a client despite opposition . . . and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor."[28]

[25] D.C. Code § 21-2033(a). See In re Orshansky, 804 A.2d 1077, 1095 (D.C. 2002) (affirming counsel's duty to zealously represent his or her client's legitimate interests and the importance of interviewing his or her client in order to avoid advocating for appointments the client may have opposed).
[26] D.C. Rules of Prof'l Conduct R. 1.14(a) (2007).
[27] D.C. Rules of Prof'l Conduct R. 1.14, cmt. 2 (2007).
[28] D.C. Rules of Prof'l Conduct R. 1.3, cmt. 1 (2007).

We also recommend that D.C. Code § 21-2033(b) be amended to change the language "legitimate interests" to the **"expressed interests"** of the subject. This change would clarify counsel's duty to advocate for the actual wishes of his or her client, rather than substituting what the guardian ad litem, or the counsel himself, determines is in the subject's best interest. Other jurisdictions, such as Wisconsin and Florida, require similar standards.[29]

Conclusion

We hope these recommendations provide a springboard for discussion on how to improve the District's guardianship system. We look forward to working with City Council and other interested parties to improve local guardianship practices, making D.C.'s guardianship system one of the most progressive in the country and protecting the rights of D.C. residents.

[29] See, e.g., Wis. Stat. 54.42(b) and Fla. Stat. § 744.102.