Chapter Three

Guardianship

A. Current Law

Guardianship is a legal procedure by which a court seeks "to protect those who, because of illness or other disability, are unable to care for themselves."[1] The statute uses the term "disabled person" to refer to an adult who has been judged by a court "to be unable to manage his property," and therefore needs a guardian of the property, or "to be unable to provide for his daily needs sufficiently to protect his health or safety," and therefore needs a guardian of the person.[2] Although we lack data on the number of active guardianships in Maryland,[3] surely many involve people with AD.

As a prerequisite to a judicial determination of guardianship, Maryland law requires adherence to detailed procedures for notice and a hearing, designed to protect an individual's due process rights. The heart of a petition for guardianship of the person is a statement of the "reasons why the court should appoint a guardian ..., allegations demonstrating an inability of [the] person to make or communicate responsible decisions concerning ... health care, food, clothing, or shelter, ... and a description of less restrictive alternatives that have been attempted and have failed."[4] If the alleged disabled person lacks counsel, the court appoints an attorney for that purpose.[5] The alleged disabled person has a right to be present at a hearing, unless unwilling to attend or upon a showing of good cause, and, through the attorney, to present evidence and cross-examine

witnesses.[6] A guardianship order may be entered only if the court finds that it is justified by clear and convincing evidence.[7]

When a court determines that an individual is unable to manage property or assets effectively, the court may appoint a guardian of the property[8]A guardian of the property may, among other things, retain assets, sell property, borrow money, negotiate with creditors, perform contracts, and pay claims.[9] These powers are to be exercised "for the best interest of the ... disabled person ...."[10] Hence, a guardian of the property owes a fiduciary duty to the disabled person and must act in an honest and good faith manner to preserve the disabled person's assets. For estates with a value greater than $10,000, courts may order the guardian of the property to pay a bond with the court as an assurance against the guardian's mishandling of funds.[11] A guardian of the property must file an inventory of all property within one year of being appointed a guardian, and then an annual accounting (and may receive a nominal fee for services).[12]

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Kircherer v. Kicherer, 285 Md. 114, 118, 400 A.2d 1097 (1979).

A finding that a guardianship of the property is needed does not presage the need for a guardianship of the person.[13] Even if the latter is judged necessary, however, Maryland law favors limited guardianship orders, in which a court grants "a guardian of the person only those powers necessary to provide for the demonstrated need of the disabled person."[14] Nevertheless, a Maryland circuit court has authority to, and often does, vest in a guardian sweeping power over a disabled person – "[t]he same rights, powers and duties that a parent has with respect to [a] ... child ..." and the broad duty "to provide for care, comfort, and maintenance" of the ward.[15] Perhaps the most significant guardianship power is the ability to consent or withhold consent to medical care. A guardian may employ and discharge a disabled person's health care providers; make discharge and transfer decisions from

a hospital or related institution; and consent to the provision, withholding, or withdrawal of health care, including, under circumstances specified in the statute, life-sustaining procedures.[16]

When a disabled person has no family member or friend to serve as a guardian, a court may appoint a public guardian to serve as a guardian of the person (not of the property)For disabled persons younger than age 65, a court will appoint the director of the Maryland Department of Social Services to serve as guardian; for disabled persons age 65 or older, the Secretary of Aging or an area agency on aging.[17]

The guardianship statute identifies two familiar standards for the court's approval of a request for the withholding or withdrawal of a life-sustaining procedure: "substituted judgment" and "best interest," either of which is sufficient if supported by clear and convincing evidence.

A public guardian ensures that a disabled person's basic food, health, and housing needs are met. By statute, each Maryland county operates an Adult Public Guardianship Board that assesses each public guardianship case in the county twice a year. The board evaluates the level of care provided to the guardian, suggests methods of dealing with potential problems, and recommends to the court whether the guardianship should be continued, modified, or terminated.[18]

B. End-of-Life Decisionmaking by Public Guardians

Public guardians, like most guardians, must obtain specific court authorization prior to consenting to a medical procedure, or the withholding or withdrawal of a procedure, that "involves, or would involve, a substantial risk to the life of a disabled person ...."[19] A decision to withhold or withdraw a life-sustaining procedure falls within this description and, consequently, is subject to court authorization.[20]

The guardianship statute identifies two familiar standards for the court's approval of a request for the withholding or withdrawal of a life-sustaining

procedure: "substituted judgment" and "best interest," either of which is sufficient if supported by clear and convincing evidence. Only rarely, we surmise, would a public guardian have enough information about the ward's preferences, beliefs, and background to present clear and convincing evidence of a substituted judgment basis to forgo a life-sustaining procedure.[21] Hence, as a practical matter, if a public guardian is to propose forgoing a life-sustaining procedure, usually the basis would be that doing so – opting for less medical intrusiveness in favor of greater patient comfort – would be in the ward's best interest.[22]

Very little is known about the actual practice of public guardians in carrying out their end-of-life decisionmaking responsibilities.

Some observers believe that, for the most part, public guardians are very reluctant to seek court approval for the withholding or withdrawal of a life-sustaining procedure. The "safer" course, it is said, is for public guardians to consent to these procedures without seriously examining whether the benefits of an intervention can realistically be expected to outweigh its burdens. Whether this belief about public guardians is correct or not, however, has not been explored. Indeed, very little is known about the actual practice of public guardians in carrying out their end-of-life decisionmaking responsibilities.

Ethical administration of a public guardianship program requires that guardians have an opportunity to become generally familiar with the clinical evidence that bears on their decisionmaking and that of the reviewing court. A public guardian who is confronted, for example, with the issue whether insertion of a feeding tube is in the best interest of a person with advanced AD should be aware of the growing body of evidence about the questionable benefits and possible complications of this procedure (Finucane, Christmas, and Travis 1999; Meier, Ahronheim, Morris et al. 2001). One can readily envision a case in which insertion of a tube would not be in the best interest of an AD patient.

In the absence of data about current practices, however, we are reluctant to frame a substantive recommendation. We note that researchers from the Johns Hopkins University have begun a project that seeks to explore how public guardians make end-of-life decisions for persons with late-stage dementia. The researchers will interview public guardians across Maryland to determine their methods of decisionmaking, the effect of current law and court supervision, the nature of interactions with nursing home staff and physicians, and any changes in the approach to these matters based on experience (P. Rabins and L. Fogarty, personal communication).

RECOMMENDATION 3-1: The Departments of Aging and Human Resources and local agencies and departments should (i) support the data-gathering by researchers at the Johns Hopkins University and (ii) when the research findings are made available, consider whether additional continuing education or other efforts are appropriate to improve end-of-life decisionmaking on behalf of wards with AD.

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C. Alternatives to Guardianship

In Maryland, guardianship is designed as an option of last resort, after all less restrictive alternatives have been exhausted. There are good reasons to impose this limitation. Guardianship is a public declaration of incompetency. It is expensive, costing up to $5,000 for an uncontested guardianship and much more if contested (Crowley 1999, at Z15) The petitioner generally must hire an attorney to draft and file appropriate papers with the court. The reviewing court then appoints another attorney for the defending person. In some parts of Maryland, it takes several months for a guardian to be appointed (O'Sullivan 1999, at 16). Moreover, statistical projections suggest that the next decade will see a serious shortage of qualified individuals willing to

serve as guardians (Whitton 1996, at 880). These concerns about guardianship, which are far from unique to Maryland, have prompted proposals and initiatives aimed at establishing community-based alternatives to guardianship.

Pilot mediation programs are currently underway in several states, including Ohio, Oklahoma, and Wisconsin. Courts in Hawaii, California, and Oregon have created mediation programs to resolve guardianship and probate disputes (Gary 1997, at 400). Mediation is a voluntary, informal process in which the key actors meet in a private, confidential settings to find a mutually acceptable solution with the help of a neutral mediator. Mediation provides an alternative framework to outcome-based legal judgments, and is less costly than judicial proceedings. Private and religious agency volunteers, drawn from the same community as a disabled senior, could prove to be productive mediators. For instance, a program in Dallas sponsors and trains volunteers to assist disabled senior citizens who do not have willing or suitable family or friends. The volunteers offer a money management program for low-income disabled elderly who cannot manage their financial obligations. A volunteer helps sort mail and organize bills, balances the checkbook, sets up a monthly budget, assists in check writing, and notifies the program director if the client needs additional help. A representative payee maintains accurate records of all financial transactions, signs all checks, and reports to the Social Security Administration on how benefits were spent.

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For certain health care decisions, New York has an active statewide surrogate committee program. The New York Legislature, declaring that “timely access to health care for people who are mentally disabled is an important [public policy] objective,” found that “the exclusive utilization of judicial authorization to obtain consent for medical care for the mentally disabled has

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(Karp and Wood 2003, at 49).

in some cases resulted in undue delay in the provision of necessary care, needlessly jeopardizing the health of the mentally disabled."[23] Consequently, the legislature authorized "a statewide quasi-judicial surrogate decision-making process, which would determine patient capacity to consent to or refuse medical treatment and assess whether the proposed treatment promotes the patient's best interests, consistent with the patient's values and preferences. The process will assur[e] that those individuals without available family members have access to medical care." Volunteer attorneys, medical professionals, and other citizens serve on these four-person panels. Iowa has a similarly conceived, though so far underutilized, program.

Although these and similar community-based alternatives to guardianship have intuitive appeal and may merit consideration for pilot testing in Maryland, we are reluctant to offer a recommendation in the absence of evidence about the efficacy of these alternatives. We note that the American Bar Association's Commission on Law and Aging recently released a report describing the most promising of these alternatives (Karp and Wood 2003). Yet, exercising appropriate caution about embracing alternatives ahead of the data, the ABA Commission urged that the "existing statewide surrogate decision-making programs should have a thorough and objective evaluation to identify the strengths and weaknesses of current practice, and effect on the lives of patients" (Karp and Wood 2003, at 49). We consider it prudent to defer any recommendation about initiatives in Maryland until a fuller assessment of the experience elsewhere becomes available.

References

Bayles, F. & S. McCartney 1987. “Guardians of the Elderly: An Ailing System.” *San Diego Union-Tribune* C1.

Crowley, C.H. 1999. “How I Became My Mother’s Guardian: It’s a Tough Job - and a Tough One to Sign Up For - But in Certain Cases It’s the Only Thing To Do.” *The Washington Post* Z15.

Finucane, T E., C. Christmas, and K. Travis 1999. “Tube Feeding in Patients with Dementia: A Review of the Evidence.” *Journal of the American Medical Association* 282: 1365-1370.

Gary, S.N. 1997. “Mediation and the Elderly: Using Mediation to Resolve Probate Disputes Over Guardianship and Inheritance.” *Wake Forest Law Review* 32: 400.

Hurme, S.B. 1995. “Current Trends in Guardianship Reform.” *Maryland Journal of Contemporary Legal Issues* 1995-1996: 182-183.

Karp, N. and E. Wood 2003. *Incapacitated and Alone: Health Care Decision-Making for the Unbefriended Elderly*. Washington: American Bar Association Commission on Law and Aging.

Leary, J.L. 1997. “A Review of Two Recently Reformed Guardianship Statutes: Balancing the Need to Protect Individuals Who Cannot Protect Themselves Against the Need to Guard Individual Autonomy.” *Virginia Journal of Social Policy and the Law* 5: 245.

Maryland Judiciary 2001. *Annual Report of the Maryland Judiciary – 1999-2000*. Annapolis: Administrative Office of the Courts.

Meier D.E., J.C. Ahronheim, J. Morris et al. 2001. “High Short-Term Mortality in Hospitalized Patients with Advanced Dementia.” *Archives of Internal Medicine* 161: 594-599.

O’Sullivan, J.L. 1999. “The Guardianship Handbook: A Guide to Adult Guardianship and Guardianship Alternatives in Maryland.” *Maryland Institute for Continuing Professional Education of Lawyers, Inc.*, 16.

O'Sullivan, J.L. 2001. "Role of the Attorney for the Allegedly Incapacitated Person." Unpublished Manuscript (forthcoming 2002).

Qiu, F. and S. Lu 1994. "Guardianship Networks for Rural Psychiatric Patients: A Non-Professional Support System in Jinshan County, Shanghai." *British Journal of Psychiatry* 165: 114.

Whitton, L.S. 1996. "Caring for the Incapacitated - A Case for Nonprofit Surrogate Decision Makers in the Twenty-First Century." *University of Cincinnati Law Review* 64: 882.

Endnotes

1. *Kicherer v. Kicherer*, 285 Md. 114, 118, 400 A.2d. 1097 (1979).

2. Estates and Trusts Article, §13-101(e).

3. In fiscal year 2000, nearly 3,800 cases were filed under the category of "adoption/guardianship" (Maryland Judiciary 2001, at CC-8). In 1994, over one-half million elderly persons were under the guardianship system in the United States, in 2,500 courts nationwide (Leary 1997, at 245; Crowley 1999, at Z15).

4. Maryland Rule 10-201(c)(4).

5. Estates and Trusts Article, §13-705(d).

6. Estates and Trusts Article, §13-705(e).

7. Estates and Trusts Article, §13-705(b).

8. Estates and Trusts Article, §13-201(c).

9. Estates and Trusts Article, §§13-213 and 15-102.

10. Estates and Trusts Article, §13-206(c).

11. Estates and Trusts Article, §13-208.

12. Maryland Rule 10-706.

13. Estates and Trusts Article, §13-205.

14. Estates and Trusts Article, §13-708(a)(1).

15. Estates and Trusts Article, §13-708(b)(1) and (3).

16. Estates and Trusts Article, §13-708(b)(8) and (c).

17. Estates and Trusts Article, §13-707(a)(10).

18. Family Law Article, §14-404.

19. Estates and Trusts Article, §13-708(c)(1). In the rare instance of a ward with an advance directive declining life-sustaining procedures, the guardian (public or otherwise) need not obtain court authorization. Estates and Trusts Article, §13-708(c)(2)(i). "The responsibility of the guardian under such circumstances is that of any other decision maker when an individual has executed an advance directive – to carry out the wishes of the individual as expressed in the document." 78 Op. Att'y Gen. 208, 222 (1993). A public guardian would never be able to act independently of specific court authorization, however, under a second exception, applicable only to individuals who would qualify as surrogates. Estates and Trusts Article, §13-708(c)(2)(ii).

20. 78 Op. Att'y Gen. at 221.

21. The criteria for a substituted judgment are set out in Estates and Trusts Article, §13-711(d).

22. The criteria for a best interest determination are set out in Estates and Trusts Article, §13-711(b).

23. New York Mental Hygiene Law § 80.01.