

STATEMENT

BEFORE THE

COMMITTEE ON GOVERNMENT REFORM

OF THE

U.S. HOUSE OF REPRESENTATIVES

ON

THE OPERATIONS AND CASE MANAGEMENT OF THE  
D.C. SUPERIOR COURT

APRIL 23, 2004

2154 RAYBURN HOUSE OFFICE BUILDING  
WASHINGTON, D.C.

For further information, contact:

Rhonda Dahlman  
Legal Counsel for the Elderly  
(202) 434-2155

Good morning Chairman Davis, Ranking Member Waxman and Delegate Norton. My name is Rhonda Dahlman and I am an attorney with Legal Counsel for the Elderly (LCE) in the District of Columbia. LCE receives Title IIIB funding under the Older Americans Act to provide free legal representation to older Washington, D.C. residents. We are also supported by AARP. On behalf of AARP, LCE and the incapacitated and vulnerable clients I represent, thank you for inviting us here this morning to discuss D.C. guardianship law and practice. LCE and AARP have long been concerned about the court process to protect our most vulnerable residents and have been active in D.C. and across the nation to improve the guardianship system.

Guardianship, the most intrusive civil intervention in the lives of persons with diminished capacity, is sometimes necessary. However, it must be imposed only with full protection of the individual's due process rights, with a commitment to finding the least restrictive intervention that will meet the needs of the individual, and with due respect for each individual's rights to privacy, independence and self-autonomy. As Judge Glickman of the D.C. Court of Appeals said, "The appointment of a guardian and a conservator is an extraordinary intervention in a person's life and affairs, and the [D.C. Code] lays out standards and procedures that are designed to ensure careful consideration and respect for the rights of the subject of the proceeding."<sup>1</sup> The only reason to create a guardianship is to protect the personal and financial well-being of an incapacitated person. It is the court's responsibility not only to determine whether and how much guardianship is warranted, but also to appoint the most qualified individual to serve and to monitor the guardian or conservator to ensure that the purpose of guardianship is being fulfilled. In short, the ward must be better off, not worse off, because of the court's actions.

The Associated Press, in its landmark 1987 series *Guardians of the Elderly: An Ailing System*, called attention to a long list of deficiencies in the guardianship process. It charged at that time that guardianship "regularly puts elderly lives in the hands of others with little or no evidence of necessity, then fails to guard against abuse, theft and neglect." Significant strides have been taken in the District of Columbia and across the country to rectify many of the glaring abuses within the guardianship system. In December 2001, a multidisciplinary cadre of guardianship advocates from across the country<sup>2</sup> convened the Second National Guardianship Conference (called the Wingspan Conference) to examine the progress made during the 1990's to best take care of persons and their property when they are not able to do so, and to ensure that society steps in only when necessary and only to the extent necessary.<sup>3</sup> The Conference participants discussed many reforms that have been implemented across the country, but noted that problems remain with ill-trained guardians failing to perform their basic responsibilities, wide variances in funding, inadequate monitoring, and failure of available alternatives to obviate the need and

---

<sup>1</sup> In re Orshansky, 2002 D.C. App. LEXIS 488, 488 (2002).

<sup>2</sup> The approximately seventy-five conference participants included representatives from AARP, the National College of Probate Judges, National Academy of Elder Law Attorneys, National Guardianship Association, Borchard Foundation Center on Law and Aging, Stetson University College of Law, American Bar Association Commission on Legal Problems of the Elderly, its Section on Real Property, Probate and Trust Law, American College of Trust and Estate counsel, Center for Medicare Advocacy, Arc of the United States, and Academy of Florida Elder Law Attorneys.

<sup>3</sup> Opening Remarks of Richard Van Duizend, Executive Director of the National Center of State Courts, in Introduction, 31 STETSON L. REV. 573, 575 (2002).

demand for guardianships and conservatorships.<sup>4</sup> I will reference several of the recommendations coming out of the Wingspan Conference that support the remarks I will be making today.

The D.C. Guardianship and Protective Proceedings Act is a good law and compares favorably to other states' laws. The majority of the provisions in the law are taken from the Uniform Guardianship and Protective Proceedings Act approved by the American Bar Association (ABA) in 1983. Other provisions are based on the Model Guardianship and Conservatorship Statute drafted by the ABA Commission on the Mentally Disabled. The statute offers the full panoply of due process rights to the alleged incapacitated persons we expect to see in all guardianship or conservatorship statutes. These include notice of the proceedings, including personal service on the subject of the proceedings,<sup>5</sup> appointment of a guardian ad litem to prosecute or defend the individual's interests, when necessary,<sup>6</sup> pre-hearing investigation by a court examiner,<sup>7</sup> a court visitor's interview,<sup>8</sup> appointment of counsel with a statutory duty to zealously represent the individual's interests,<sup>9</sup> and, of course, the right to a hearing.<sup>10</sup>

The D.C. law recognizes the varying degrees of incapacity that exist and provides a wide range of alternatives to ensure that any loss of liberty can be limited to the actual needs of the individual. An individual found to be incapacitated retains all legal rights and abilities not expressly taken away.<sup>11</sup> Before appointing a guardian, the court must find by clear and convincing evidence<sup>12</sup> that the guardianship is necessary to provide care and supervision of the person<sup>13</sup> and make all orders only to the extent necessitated by the individual's limitations.<sup>14</sup> Respect is accorded to the individual's right to plan for his or her own autonomy, by giving preference to the agent selected in a power of attorney or other expressed choice for a guardian.<sup>15</sup> Before appointing a conservator, the court must find that the individual has property that will be wasted or dissipated unless property management is provided or money is needed for the support, care and welfare of the individual.<sup>16</sup> Guardians and conservators are required to report back to the court on the ward's condition and provide accountings on the management of the individual's finances.<sup>17</sup> On its face, the D.C. statute is structured to provide justice to D.C. residents with diminished capacity who require a guardian or conservator.

In addition to the statutory provisions for pre-hearing investigations, examinations, and reports by a variety of guardians ad litem, visitors, and examiners, D.C. also has an Adult Protection Arrangement Panel. This interdisciplinary group of health care, social work and legal

---

<sup>4</sup> *Id.*

<sup>5</sup> D.C. CODE §§ 21-2031, 21-2053 (2004).

<sup>6</sup> D.C. CODE § 21-2033(a) (2004).

<sup>7</sup> D.C. CODE § 21-2041(d) (2004).

<sup>8</sup> D.C. CODE § 21-2033(c) (2004).

<sup>9</sup> D.C. CODE §§ 21-2033(b), 21-2043(a) (2004).

<sup>10</sup> D.C. CODE §§ 21-2041(d), 21-2054(a) (2004).

<sup>11</sup> D.C. CODE § 21-2004 (2004).

<sup>12</sup> D.C. CODE § 21-2003 (2004).

<sup>13</sup> D.C. CODE § 21-2004 (2004).

<sup>14</sup> D.C. CODE §§ 21-2044(a), 21-2055(a) (2004).

<sup>15</sup> D.C. CODE § 21-2043(b) (2004). *See In re Orshansky*, 2002 D.C. App. LEXIS 488 (2002).

<sup>16</sup> D.C. CODE § 21-2051(b) (2004).

<sup>17</sup> D.C. CODE §§ 21-2047(a)(5), 21-2065 (2004).

professionals with experience in senior services was created by LCE and other community organizations and has been in operation for many years. The panel meets monthly (or more frequently, if needed) to assess the individual and complex nature of a particular client's situation. We work together strategizing ways to implement the least restrictive protective options and to keep an individual out of guardianship if at all possible. Cases are brought to the panel by community social workers, families and sometimes housing providers who are working with persons whose capacity is in question and who face a health and/or safety risk. In many instances, the panel is able to determine a less restrictive alternative, such as a power of attorney, or representative payee. We are also able to assist people in locating and utilizing support services for the incapacitated person so they can continue to live independently as long as possible.

A number of jurisdictions across the country have found success in using similar multi-disciplinary programs to avoid the need for guardianship. One Wingspan recommendation calls for the increased reliance on such multi-disciplinary panels, recognizing that in the most difficult cases there may be a full range of medical, financial and social needs that must be addressed.<sup>18</sup> It is critical that all social workers who handle self neglect cases bring them before this panel so that cases are not needlessly brought into the court system.

We identify three critical areas of improvement needed within our current protective services in the court system.

#### **Qualified guardians**

The District of Columbia, as well as states across the country, faces a shortage of qualified guardians and conservators. When there is no available or appropriate family member to serve, the courts must look elsewhere. If there is no spouse, adult child, or relative, the D.C. court may appoint "any other person ... the court deems best qualified to serve."<sup>19</sup> The general practice in the District of Columbia is for the court to appoint members of the bar. In my tenure at LCE, I have had experience with exceptionally conscientious and proactive attorney guardians/conservators. I also have had too many experiences with guardians and conservators who are not attentive to their responsibilities and are ill-equipped to make complicated, or even basic, social and medical decisions on behalf of their wards.

Although recently the court implemented a mandatory training for guardians and conservators — which is absolutely necessary — additional topics should be included in the curriculum. I've encountered attorney guardians who have very little experience in other areas of law in which their wards are involved. For example, I petitioned the Court for a guardianship for Ms. N. who had been committed to a mental health facility. She was then facing eviction from her apartment due to nonpayment of rent. While there was agreement by her health care team that Ms. N would not be able to return to the community, there was no one to collect her belongings and to guarantee adequate placement in the community. The housing provider in this case was quite considerate of the situation and apprised me of the impending eviction. I obtained an emergency guardian for Ms. N given the impending eviction. Unfortunately, the guardian took three months to do anything for his ward and informed me that he did not know what to do in this situation. The fact that Ms. N's personal belongings were not thrown out on the street was due to the housing provider — and not Ms. N's guardian.

---

<sup>18</sup> Wingspan Recommendation 23, 31 STETSON L. REV. 596, 599 (2002).

<sup>19</sup> D.C. CODE § 21-2043(c)(5), (d) (2004).

One simple improvement, with little cost or administrative burden, would be for the court to note on the guardian/conservator list those qualified attorneys who are trained and experienced in other areas of the law, for example landlord/tenant, that relate to the foreseen needs of the ward.

These conservator/guardians should also have a basic understanding on how to obtain Medicaid and other benefits to which their wards may have a right. One way to address this need that would create no added court expense is to mandate that any court-appointed guardian/conservator attend at least two trainings a year offered by the D.C. Bar in the areas of landlord/tenant law, public benefits, consumer matters, etc.

AARP believes that states should enact laws that require all guardians to receive adequate training and information about their responsibility and requirements.<sup>20</sup> A Wingspan recommendation similarly urges that “All guardians receive training and technical assistance in carrying out their duties.”<sup>21</sup> Family guardians, as well as attorney guardians, must have the opportunity to be educated as to their role and responsibilities.

We also recommend that, in addition to receiving training, any non-family guardians be certified.<sup>22</sup> Certification, in general terms, means that the individual has demonstrated, through a written examination, competency to serve as guardian or conservator. Certification is one way to assure the courts and the community that guardians have a basic understanding of their fiduciary duties and grounding in local law and practice. Arizona,<sup>23</sup> Washington<sup>24</sup> and Florida<sup>25</sup> each mandate that all guardians who serve multiple unrelated wards be certified.<sup>26</sup> The National Guardianship Foundation has been certifying guardians on a voluntary basis since 1998. Currently there are over 700 NGF certified guardians across the country, but not one practices in the District of Columbia.<sup>27</sup> NGF-certified guardians are required affirm that they will comply with a national code of ethics and standards of practice and obtain ten hours of continuing education each year. Guardians who are removed for cause, neglect or abuse of their responsibilities, or are found liable in a subrogation action on their bond, lose their certification. In states where certification is mandatory, losing certification prevents their appointment to any new case and the reassignment of their existing cases.

### **Public Guardian**

To further address the availability of qualified guardians, we recommend that the District of Columbia develop a public guardian program. The program would provide guardianship services as a last resort when guardianship or limited guardianship is appropriate but there is no

---

<sup>20</sup> THE POLICY BOOK: AARP PUBLIC POLICIES 2004, 13-10 (2004).

<sup>21</sup> Wingspan Recommendation 9, 31 STETSON L. REV. 596, 597 (2002).

<sup>22</sup> THE POLICY BOOK: AARP PUBLIC POLICIES 2004, 13-10 (2004).

<sup>23</sup> ARIZ. REV. STAT. § 14-5651 (2003).

<sup>24</sup> WASH. REV. CODE § 11.88.020(2003). Washington has yet to implement the examination portion of its certification process.

<sup>25</sup> FLA. CODE § 744.1085 (2004).

<sup>26</sup> Sally Balch Hurme & Erica Wood, Guardian Accountability Then and Now: Tracing Tenets for an Active Court Role, 31 STETSON L. REV. 865, 885-892 (2002). *See also*, Wingspan Recommendation 46, “Professional guardians—those who receive fees for serving two or more unrelated wards—should be licensed, certified, or registered. They should have the skills necessary to serve their wards. Professional guardians should be guided by professional standards and codes of ethics, such as the National Guardianship Association’s *Model Code of Ethics for Guardians and Standards of Practice*.”

<sup>27</sup> The list of NGF Registered Guardians is available at [www.guardianship.org](http://www.guardianship.org).

qualified relative to serve.<sup>28</sup> A good public guardian program would be an effective advocate for quality care in long-term care facilities, an area where we often find neglected wards who do not have involved family. Any public guardian program must be adequately funded, have a limit on the number of wards served, require adequate liability insurance for the wards' protection, and adhere to mandatory conflict-of-interest standards.

### **Court Monitoring**

We need better monitoring of the existing cases. Monitoring is not premised on the assumption that all or most guardians and conservators are abusing or neglecting their responsibilities. It is based on the inherent purpose of guardianship and society's role in protecting the vulnerable. Guardianship exists not to find that a person is incapacitated and then be done with it. Rather, guardianship exists to protect a vulnerable person. The appointment of a qualified guardian or conservator is merely the first step. The court has an ongoing responsibility to oversee that guardian as he or she promotes the welfare of those in his or her care.

The District of Columbia, like all states, requires guardians and conservators to account to the court on a regular basis. Beyond that requirement and compared to other states, the D.C. Code provides little guidance as to how the court is to carry out its monitoring responsibilities. Chief Judge King is to be commended for his recent efforts to tighten the process, but there is still much room for improvement. As just one example, reminder notices of due reports go to the wrong counsel on a regular basis.

The court needs funds to support investigatory personnel qualified to audit accounts, conduct forensic accountings, visit wards in their residences, and investigate complaints from the community. Court staff needs to be augmented so that they are able to do more than put out brush fires. If the court had a separate monitoring team that reviewed cases regularly, there would be much less room for neglect and financial abuse of this most vulnerable population.

There are low-cost options to enhance monitoring that have been successfully employed in other courts. Probate Court #2 in Tarrant County, Texas, uses social work student interns as pre- and post-appointment court visitors. Other courts use trained volunteers, such as retired CPAs, to examine accountings or visit wards. LCE in the past developed a national model project using volunteers to assist courts in their monitoring responsibilities. In Maryland, a volunteer multi-disciplinary committee reviews each public guardianship case at an annual face-to-face meeting with the guardian, ward and ward's attorney present. Virginia guardianship reports are filed with the Department of Social Services, which must review them and inform the court of any report more than ninety days delinquent. Judges in other jurisdictions have suggested sending copies of personal status reports to "interested persons" who would then have the opportunity to notify the court of circumstances not disclosed in the report. Another possible source of help to the court in straightening out bungled accountings is free-lance probate paralegals.<sup>29</sup>

Thank you, Mr. Chairman, for the opportunity to discuss with you ways older D.C. residents who need the protection of the court find the justice they deserve and to which they are entitled.

---

<sup>28</sup> THE POLICY BOOK: AARP PUBLIC POLICIES 2003, 13-10 (2004). *See also*, Wingspan Recommendation 44, 31 STETSON L. REV. 596, 604 (2002), "States [should] provide public guardianship services when other qualified fiduciaries are not available."

<sup>29</sup> Hurme & Wood, *supra* n. 26, at 904-908.