

Preface

Guardianship Then and Now

As a legal construct, adult guardianships have existed for centuries. The legal roots of guardianship stretch back to early Greece and Rome. In its earliest forms, guardianship was a method of managing the property of a person who had a mental disability, not to provide care or protection for the person. The focus on property rather than the person continued in Europe through the Middle Ages.

The “royal prerogative” of guardianship was part of English law as early as the Fourteenth Century. The doctrine of “*parens patriae*” – meaning the ruler was the parent of the state and its subjects – became firmly embedded in the common law of England. The King exercised guardianship authority through the Lord Chancellor who initiated “inquisitions” to “inquire into the condition of the mentally disabled person and to appoint a committee for his person and property.” (Mary Joy Quinn, *Guardianship of Adults: Achieving Justice, Autonomy, and Safety* (Springer Publishing 2005)) However, these proceedings were only initiated for people who had significant assets.

The common law doctrine of *parens patriae* carried over to Colonial America and was part of American common law when the nation was founded. The United States Constitution presupposed the authority of the states to place a dependent adult into a guardianship for his or her own safety and care.

Courts of equity assumed jurisdiction over “incompetency proceedings” and eventually were replaced by probate courts. By the mid-20th Century, protective proceedings involved two types of situations: mental commitment which stemmed from the state’s authority to protect society, and guardianship cases which arose from the state’s authority to protect people who could not protect themselves.

Reform efforts started targeting mental commitment proceedings in the 1960s and 1970s. The seeds of guardianship reform were planted in the 1970s and 1980s. State legislatures were being lobbied by political reformists, while courts received legal arguments from civil rights advocates. As legislators were considering the concepts of lesser restrictive alternatives and limited guardianships, judges were beginning to apply due process protections to these proceedings.

However, once the initial wave of reform had caused some basic changes in these protection proceedings, the guardianship system was allowed to operate on “auto pilot” for decades. Problems have been festering, with spurts of reform occurring from time to time, mostly in response to investigative reports by the media.

There has been a growing level of concern with abuses in adult guardianship proceedings – involving adults with developmental disabilities as well as seniors – over the past 10 years. While some reform activities have nibbled around the edges of the guardianship system, a growing chorus of disability rights activists have started to call for the abolition of guardianship. There is pent up frustration in many quarters, both with judicial negligence and governmental overreach.

Although this white paper does not take an outright abolitionist approach, it does call for major systemic reforms. Application of advocacy and training standards under the Americans with Disabilities Act seems like a good place to start. Such standards should be informed by due process requirements and best practices guidelines.

State guardianship systems have ignored the ADA for far too long. With the 25th anniversary of the ADA occurring this year, now is a good time to begin a new era – a time when guardianship proceedings comply with the ADA.