

**GUARDIANSHIP ABUSE OF THE ELDERLY:
A VIOLATION OF CONSTITUTIONAL RIGHTS
PRECIPITATING AN EXTREME PUNITIVE CIVIL PENALTY**

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INTRODUCTION

Every year thousands of Americans are subjected to court appointed guardians because allegedly they are not competent to function on their own.¹ With apparently few procedural protections in place, a profit-driven professional guardianship industry has developed that enriches itself at the expense of the elderly who have been designated for its protection.² There have been many attempts at reform; however, most states have made little effort to monitor professional guardians and prevent guardianship abuse of the elderly.³

Guardianship is for individuals who lack the ability to care for themselves and who lack the support of family and friends.⁴ However, in many jurisdictions, there is an apparent lack of due process and the standard for proof that a petitioner for guardianship must show the court varies – i.e., in some states, a petitioner is only required to show that the proposed “incompetent” elderly person was more likely than not incapable to manage her own affairs;⁵ in Massachusetts, until recently, medical documentation has been limited with perhaps just a sentence describing the medical condition; whereas in other states, a petitioner must submit clear and convincing evidence of a proposed incompetent person’s incapacity.⁶

The end of an authorized guardianship occurs when one of the following events happens: the “incapacitated” elderly person dies, regains competency or a determination is made that there is no valid reason to continue guardianship; the elderly person’s entire estate has been spent down by the guardian such that bills are no longer able to be paid; or the guardian has engaged in some form of misconduct upon which hopefully the court takes action.⁷

In 1987, Bayles and McCartney found that guardianship was becoming a business with “plenty of opportunities for accountants, lawyers, and banks to earn money...”⁸ “Professional guardianship does not come cheap;” and “[i]n many situation, once the money is gone, professional guardians petition the court to end their service, leaving the ward... in a legal no-man’s land.”⁹ The AP report found that incapacitate people “[h]ave more protection from someone putting a roof on [their] house than [they did] from someone who [could] put [them] in a nursing home.”¹⁰

¹Guardians of the Elderly, An ailing System, Special Report 4, Associated Press, 1987.

² Id.; Fields, Larrubia & Leonard, Guardians for Profit When a Family Matter Turns into a Business, LA times, 11/13/05.

³ A. Franks Johns, Charles P. Sabatino, Wingspan- The Second National Guardianship Conference: Introduction, 31 Stetson L. Rev. 573 (2002).

⁴ Robert D. Fleischner, Guardianship, Extraordinary Treatment and Substituted Judgment (2000).

⁵ See supra note 1; Kelly, Kowalski & Novak, Courts Strip Elders of Their Independence, Boston Globe, 1/13/08; Massachusetts Probate & Family Court Explains New Medical Certificate Form, Massachusetts Lawyers Weekly, 4/7/08.

⁶ See supra note 1.

⁷ See supra note 4; Guardianship of Zaltman, 65 Mass. App. Ct. 678 (2006); see supra note 1.

⁸ See supra note 1.

⁹ Id.

¹⁰ Id.

This paper will attempt to show how the existence of few procedural safeguards has resulted in the elderly being victimized in many states due to a failing guardianship system unable to provide the necessary oversight and needed regulations to stem the tide of guardianship becoming a profit driven business. Then, after perusing these broad issues on the national landscape, this paper will focus on pivotal indicators highlighting a failed probate court system in Massachusetts and needed guardianship reform.

FEW PROCEDURAL SAFEGUARDS

Since there is no national system of guardianship,¹¹ state guardianship laws are inconsistent and usually deprive “incompetents” of all their decision-making rights. Such abuses within the probate court system came to the forefront with an investigation done by the Associated Press in 1987.¹² This investigation highlighted the fact that alleged “incompetents” were receiving “ cursory evaluations by doctors not trained to assess capacity, [and] ineffective due process protections, poor advocacy . . . , and [being subjected to the] inability of overworked courts to monitor existing guardianships. . . .”¹³

In 1988, the ABA convened the Wingspread Conference to produce guardianship reform recommendations.¹⁴ In 1997 a Uniform Guardianship and Protective Procedures Act (UGGPA) was finalized and approved by the National Conference of Commissioners on Uniform State Laws to function as a statutory model for state guardianship law consistency;¹⁵ but without a federal statute to impose certain federal standards concerning guardianship, states failed to improve their guardianship systems and safeguard the rights of the elderly subjected to these systems.

In 2001, a second national guardianship conference, Wingspan, was convened to again address guardianship reform issues,¹⁶ proposing a change from “zealous advocate for the client” with “hurtfully scorched-earth, zero-sum tactics that multiply financial and economic costs” “to a recommended requirement of responsible advocacy.”¹⁷ The goal was to create a blueprint for local, state, and national action.¹⁸

However good the intentions, in reality the implementation of these proposed safeguards has been slow in coming and actually practiced in the courtroom. In many jurisdictions, appointing a lawyer to represent proposed incapacitate elderly who cannot afford representation, is not required nor is the

¹¹ Eleanor M. Crosby and Rose Nathan, *Adult Guardianship in Georgia: Are the Rights of Proposed Wards Being Protected? Can We Tell?* 16 *Quinn. Prob. Law Jour.* 249, 250 (2003).

¹² *Guardians of the Elderly, An Ailing System*, Special Report 4, Associate Press, 1987.

¹³ *Id.*

¹⁴ Commission on Mentally Disabled and Commission on Legal Problems of the Elderly, *Guardianship: An Agenda for Reform – Recommendations of the National Guardianship Symposium and Policy of the American Bar Association*, 12 *A.B.A.* 1989 [Wingspread Recommendations].

¹⁵ *Uniform Guardianship and Protective Procedures Act (UGGPA)*, 8A *U.L.A.* 137 (Supp. 2001).

¹⁶ *Symposium, Wingspan- The Second National Guardianship Conference*, 31 *Stetson L. Rev.* 573 (2002).

¹⁷ Marshall B. Kapp, *Reforming Guardianship Reform: Reflections on Disagreements, Deficits, and Responsibilities* 31 *Stetson L. Rev.* 1047, 1050 (2002).

¹⁸ *Guardianship for the Elderly: Protecting the Rights and Welfare of Seniors with Reduced Capacity*, U.S. Senate Special Committee on Aging (2007).

requirement that the proposed incapacitated person be present at the hearing followed.¹⁹ Not until 2009 did the Massachusetts probate code require “the court to appoint counsel on behalf of the [incapacitated person] if the [incapacitated person or someone on his or her behalf [requested] counsel, or if the court [determined] that the [incapacitated person] may be inadequately protected;” and indicated that “the court shall give consideration to the [incapacitated person’s] choice” in appointing counsel.”²⁰

“The typical ward has fewer rights than the typical convicted felon – [he] can no longer receive money or pay [his] bills [or access his property to retain a lawyer]. By appointing a guardian, the court entrusts to someone else the power to choose where [he] will live, what medical treatment [he] will get and, in rare cases, when [he] will die. It is, in one short sentence, the most punitive civil penalty that can be levied against an American citizen...”²¹

Any government action, such as guardianship, depriving an individual of liberty or property interest within the meaning of the Fifth and Fourteenth Amendment Due Process Clauses, must provide procedural due process safeguards pursuant to Mathews v. Eldridge.²² Yet, in a study of probate court proceedings in ten states, guardianship petitions were granted in 94 percent of the cases involving individuals aged 60 or older with guardianship authority limited in only 13 percent of those cases.²³ Such unlimited guardianship authority enhances the danger that the alleged incapacitated person may be deprived of fundamental rights without due process.²⁴

Whatever happened to proper notice and a hearing, a mandated standard of proof, appointment of counsel, the right to be present at any hearing, the right to exclusion of hearsay, and every other protection afforded in criminal, juvenile, or civil commitment cases? In 92 percent of guardianship cases filed, the respondent was absent;²⁵ and only recently was the Massachusetts probate court system mandated to require medical certification regarding guardianship and appoint of counsel for alleged incapacitated individuals.²⁶ Thus, the court does not hear the voice of the alleged incapacitated person because the guardian is ignoring it.²⁷

AN AILING, FAILING US GUARDIANSHIP SYSTEM

Guardianship abuse runs the gamut from theft of a ward’s assets, charging excessive fees, selling property without permission, violating SJC Rule 1:07 (7) and paying themselves without court approval, failing to file accounts, failing to turn over needed financial information so that other fiduciaries could file

¹⁹ Haines & Campbell, Defects, Due Process, and Protective Proceedings: Are Our Probate Codes Unconstitutional, 14 Quinn. Prob. Law Jour. 57 (1999).

²⁰ Commentary: Guardianship Reform Under New UPC Nearly Here, Massachusetts Lawyers Weekly, 6/22/2009.

²¹ Susan G. Haines, John J. Campbell, Defects, Due Process, and Protective Proceedings: Are Our Probate Codes Unconstitutional,? 14 Quinn. Prob. Law Jour. 57, 60 (1999).

²² Mathew v. Eldridge, 424 U.S. 319, 332 (1975).

²³ National Study of Guardianship Systems, Center for Social Gerontology, 1994.

²⁴ See supra note 11.

²⁵ In Guardianship of the Elderly, An Ailing System, Special Report 4, supra note 1.

²⁶ Commentary: Guardianship Reform is Overdue, Massachusetts Lawyers Weekly, 1/ 21/ 08; Commentary: Uniform Probate Code, at Last, Massachusetts lawyers Weekly, 3/30/09.

²⁷ Joan O’Sullivan, Role of the Attorney for the Alleged Incapacitate Person, 31 Stetson L. Rev. 687 (2002).

their accounts, blocking contact with loved ones, taking wards out of their home and placing them elsewhere against their will, using chemical restraints, etc.²⁸

In September, 2010, the U.S. Government Accountability Office (GAO) issued its report on Guardianships, Cases of Financial Exploitation, Neglect, and Abuse of Seniors.²⁹ In this report, it “identified hundreds of allegations of physical abuse, neglect and financial exploitation by guardians in 45 states and the District of Columbia between 1990 and 2010.”³⁰ It then looked at closed cases and found that \$5.4 million in assets was “stolen or improperly obtained” from 158 incapacitated individuals by their guardians.³¹

Such cases involved a for-profit guardian in Missouri who embezzled more than \$600,000 and physically neglected the ward; a for-profit agency in Alaska that victimized approximately 78 individuals by stealing at least \$454,000 over four years; and a for-profit guardian couple in Kansas (licensed social worker and a registered nurse) who victimized 20 individuals of various ages with mental incapacities by subjecting them to physical and sexual abuse and filthy living conditions.³²

Based on its research, the GAO found that state courts failed to (1) adequately screen potential guardians, (2) oversee guardians after their appointment and step in to prevent the continued abuse of vulnerable seniors and their assets, and (3) communicate with federal agencies once aware of abusive guardians.³³

Many of these courts fail to track the number of guardianships for which they have monitoring responsibility.³⁴ Many jurisdictions do not have records of guardianship appointments readily available (e.g., online).³⁵ State courts and federal agencies fail to “notify other oversight entities when they declare an individual to be incapacitated,” and fail to “share information with each other in instances in which a guardian or a representative payee has abused a ward.”³⁶ Furthermore, though some federal agencies identify guardians who function as representative payees and screen the names against a list of felons, they do not maintain a list of all court appointed guardians.³⁷

The GAO “could not locate a single Web site, federal agency, state or local entity, or any other organization that compiles comprehensive information on [the] issue [of guardianship abuse].”³⁸ Many

²⁸See supra note 1; Abuses in Guardianship of the Elderly and Infirm: A National Disgrace, H.R. Comm. Print 100-639 (Dec. 1987).

²⁹U.S. GAO Report, Guardianships, Cases of Financial Exploitation, Neglect, and Abuse of Seniors, Sept. 2010.

³⁰Id.

³¹Id.

³²Id.

³³Id.

³⁴Id.; see GAO-06-1086T and GAO-04-655.

³⁵Id.

³⁶Id.

³⁷Id.

³⁸Id.

more abuse cases have been presented at a Hearing before the Subcommittee on Crime, Terrorism, and Homeland Security of the Committee on the Judiciary, U.S. House of Representatives.³⁹

Compounding the problem of guardianship abuse is the fact that some judges seem more concerned with protecting the guardians at the expense of the wards. This issue was highlighted in the Washington Post article where a guardian, removed several times from the D.C. guardian appointment list for failing to appear at hearings, continued to receive new assignments because certain judges bypassed the official list; her caseload accounted for 15 percent of all D.C. guardianship cases.⁴⁰ This practice of protecting guardians was defended by a former chief probate judge who stated that “[y]ou have to be careful about barring someone from cases. It may be the lawyer’s only source of practice.”⁴¹

NATIONAL GUARDIANSHIP SYSTEM POORLY REGULATED AND PROFIT DRIVEN

Unfortunately, elder abuse and elder abuse by guardian are a national problem. In 1991, approximately 2.5 million people were victims of a given type of elder abuse.⁴² This is an underreported crime and it is estimated that for every reported case, there may be as many as 14 unreported cases.⁴³ Underreporting notwithstanding, elder abuse complaints have increased 150 percent from 1986 to 1996,⁴⁴ and by 2030 there will be more than twice the 1990 census of elderly – i.e., 70 million older individuals.⁴⁵

It appears that approximately 5 percent of the elderly in the United States are victims of abuse each year.⁴⁶ Another source cites 10 percent annually abused.⁴⁷ The categories of elder abuse are as follows:⁴⁸

- 1) neglect/breach of fiduciary duty: ~ 55-58%
- 2) physical abuse: ~ 14-15%
- 3) financial exploitation: ~ 12%

³⁹ H.R. 3040, Serial No. 111-137, May 25, 2010.

⁴⁰ Carol D. Leonnig, Lena H. Sun and Sarah Cohen, Misplaced Trust: Special Report, The Washington Post, (Jun 15-16, 2003)

⁴¹ Id.

⁴² T. Tatar, L. M. Kuzmeskus, Types of Elder Abuse in Domestic Settings, National Center on Elder Abuse (Mar. 1999).

⁴³ Id.

⁴⁴ Id.

⁴⁵ Martha Ridgway, Civil, Criminal and Administration Remedies in Cases of Abuse, Neglect, and Financial Exploitation of the Elderly, Colorado Gerontological Society & Senior Answers & Services (2010).

⁴⁶ Elder Abuse, The National Center for Victims of Crime (2008).

⁴⁷ See supra note 45.

⁴⁸ See supra note 42; the following updated information was provided by the National Center on Elder Abuse (2006): neglect: 20%, physical abuse: 11%, financial exploitation: 15%, emotional abuse: 15%, sexual abuse: 1%.

- 4) emotional abuse: ~7-8%
- 5) sexual abuse: ~ 0.3%
- 6) all other types of abuse: ~ 6%

It appears that approximately 13-18% of elder abuse is perpetrated by individuals serving as a fiduciary – i.e., guardian/attorney/conservator/trustee, personal representative, insurance agent, financial agent, etc.⁴⁹ Approximately 4-7% of the abuse is done by private/voluntary service providers such as caregivers unrelated to the elder.⁵⁰

A 2010 report indicated that there are about 6 million elder abuse cases each year;⁵¹ with Massachusetts having 133,346 elder abuse cases out of an elder population of 1,207,231.⁵²

Anyone can be appointed as a guardian. Many are lawyers, but as one professional guardian admitted, “[he] could be a shoe salesman at a five and dime store one day and a professional guardian the next.”⁵³

Guardianship based on an economic motive traces back to feudal England where landholders were required to make payments to the king; and when these landholders were disabled by some infirmity, payment was made through an appointed individual “not for the benefit of the [landholder], but for the benefit of the king.”⁵⁴ “The notion of money has always been a motivating factor behind guardianship law.”⁵⁵ Then, as now, to obtain a guardianship, there must be assets; and “without the existence of assets, nobody [cares].”⁵⁶

These so-called guardians are driven by an economic motive and not concern for an incapacitated person; they cultivate relationships with hospitals, clinicians, government agencies responsible for the elderly, attorneys, and courts; and capitalize on an economic opportunity resulting from the infirmity of others to compensate themselves from the assets of these vulnerable individuals for services they may or may not have provided. They are repeat participants in a broken guardianship system and are masterful at manipulating said system to the disadvantage of the incapacitated individual.⁵⁷

⁴⁹ See supra note 42; the National Center for Elder Abuse (2006) cited an updated value of 16%.

⁵⁰ Id.

⁵¹ Data and Statistics, Elder Abuse, Elder Abuse Daily, 2/15/10.

⁵² Id.

⁵³ Barry Yeoman, Stolen Lives, AARP: The Magazine (Jan.-Feb. 2004).

⁵⁴ See supra note 1.

⁵⁵ Id.

⁵⁶ Id.

⁵⁷ Id.; Robin Fields, Evelyn Larrubia, Guardians for Profit: When a Family Matter Turns into a Business, LA Times, Nov. 13, 2005; see supra note 1; see supra note 29; see supra note 39.

In the process of seeking clients, these so-called guardians look for individuals with money. As Los Angeles' busiest conservator so aptly stated her objective, she set a minimum of \$300,000 which she felt was enough money to "guarantee her paycheck for at least a few years, if the client lives that long."⁵⁸

Once the client has been identified, it's an easy matter to invoke the procedural loopholes for an emergency guardianship. Between 1997 and 2003, in Southern California, more than half of the guardianship petitions filed by so-called professional guardians were granted on an emergency basis.⁵⁹ Fifty-six percent of these appointments were granted without notice to the proposed incapacitate person; and granted without a lawyer selected as a representative in 64 percent of the appointments; and granted without a mandatory court investigator's report in at least 90 percent of the appointments – i.e., before a judge even decided that a conservator/guardian was needed.⁶⁰

In California, there are approximately 500 professional conservators, overseeing 1.5 billion in assets and controlling 4,600 vulnerable adults, who have their needs ignored, who have been isolated from family and friends, who have their estates despoiled, who are subjected to excessive billing, and who find it quite difficult to extracted themselves from the grasp of these unwanted guardians – paying for their own legal fees and those of the unwanted guardian.⁶¹

Public guardianship in California is not a better alternative to for-profit guardianship. There is a lack of funding, lack of staff, and a long waiting list of seniors seeking help.⁶² When the LA Public Guardian's Office was asked about its backlog, the "agency adopted a new policy: it started rejecting people faster."⁶³ The agency now rejects more than four of five citizens referred for help."⁶⁴

Massachusetts is faced with similar guardianship abuses which will be delineated in the next section. Furthermore, as of 2008, judges were not authorized to appoint counsel in guardianship cases except in rare circumstances, and limited in appointing guardians ad litem due to budget restrictions.⁶⁵

PIVOTAL INDICATORS HIGHLIGHTING A FAILED PROBATE COURT SYSTEM IN MASSACHUSETTS

Firstly, the Probate Court System is flawed at every level. The following four functional parameters illustrate the overall decay and dysfunction within the Massachusetts Probate Court system.

(1) Personnel Problems

(a) Since 2001, there have been lay-offs of at least 123 court employees.⁶⁶

⁵⁸ Robin Fields, Evelyn Larrubia, Guardians for Profit; When a Family Matter Turns into a Business, Los Angeles Times, Nov. 13, 2005.

⁵⁹ Id.; see supra note 29; see supra note 39.

⁶⁰ Id.

⁶¹ Id.

⁶² Guardians for Profit; For Most Vulnerable, a Promise Abandoned, LA Times, Nov. 16, 2005.

⁶³ Id.

⁶⁴ Id.

⁶⁵ Commentary: Guardianship Reform is Overdue, Massachusetts Lawyers Weekly, 1/21/08.

- (b) Since approximately 2004, documentation regarding First Justice, Middlesex Probate Court, Edward J. Rockett has been generated indicating that he apparently spent “good chunks of time away from the courthouse.”⁶⁷ He was suspended for two weeks,⁶⁸ and then in 2005, Robert W. Langlois became Acting First Justice.⁶⁹ This action resulted in certain friction between these justices until J. Rockett was allegedly forced to retire in 2007, in part for misusing state resources.
- (c) Since 2008, four judicial vacancies have occurred in Middlesex Probate Court system, with 15 judicial probate court vacancies state-wide.⁷⁰
- (d) Middlesex Register of Probate, John R. Buonomo, pleaded guilty in October, 2009 to more than 30 felony charges resulting in a 2 ½ year sentence and a \$100,000 fine.⁷¹

(2) Infrastructure

- (a) The Middlesex Probate Court building opened in 1898. Over the years upkeep has been neglected such that there is peeling paint; chipped steps; fissures across floor surfaces; decrepit and unclean restrooms; old, broken oak benches; limited accommodations for disabled visitors; faulty HVAC system(s); work space not conducive to efficiency; and environmental concerns – e.g., lead paint, asbestos.⁷²
- (b) More than 26,000 cases are filed a year in a facility that is antiquated, crowded and chaotic. Middlesex Probate & Family Court’s jurisdiction encompasses 54 cities and towns which necessitates four separate satellite sessions.⁷³
- (c) The Middlesex Probate Court’s filing system consists of a “hole in the wall” with a “chute used for delivery of files from a third-floor storage area.”⁷⁴
- (d) Files are missing on a regular basis. “There’s a 50-50 chance [that] the papers [in the case] are not where they’re supposed to be.”⁷⁵ Each time that I have had to access a file, it has taken me a minimum of 2 hours to locate it. Even when a file was in their

⁶⁶ Massachusetts Probate Court Chief Says Some Sessions May Close, Massachusetts Lawyers Weekly, 4/7/2003; At Year End, Court Challenges Continue in Massachusetts, Massachusetts lawyers Weekly 12/28/09.

⁶⁷ Furious Judges Can Only Punch a Clock, Massachusetts Lawyers Weekly, 12/13/04.

⁶⁸ Id.

⁶⁹ Bar Laments Session Lost at Middlesex Probate & Family Court, Massachusetts Lawyers Weekly, 3/7/05.

⁷⁰ At Year End, Court Challenges Continue in Massachusetts, Massachusetts Lawyers Weekly, 12/28/09; Muddle in Middlesex, Massachusetts Lawyers Weekly, 3/24/08; Time to Focus on Critical Issues at Probate & Family Court, Massachusetts Lawyers Weekly, 5/5/08.

⁷¹ Massachusetts Courts Missing Out on Potential Income from Copy Machine Vendors, Massachusetts Lawyers Weekly, 5/25/09; Former Register of Probate Gets 2 ½ Years in Prison..., Boston Globe, 11/19/09; Plug Pulled on Middlesex Probate Court Website, Massachusetts Lawyers Weekly, 1/26/09.

⁷² Barbara Rabinovitz, On the Record[s];, Massachusetts Lawyers Weekly, 7/31/06.

⁷³ Id.

⁷⁴ Id.

⁷⁵ Id.

possession, I have had clerks tell me that they didn't know the location of the file.

- (e) The Middlesex Probate Court has “long [been] plagued by delays in case processing and shoddy recordkeeping.”⁷⁶

See articles entitled “Courthouse Building Spree in Massachusetts Continues Despite Economy,” dated 12/12/09, for more information on the crumbling court buildings in that State; and “Frustrated Probate Lawyers Request Task Force on Court’s Filing System,” dated 3/3/08 for administrative mismanagement.

(3) **Budget Cuts**

- (a) Due to economic difficulties, the Massachusetts Probate Court system has faced and faces possible closing of nine satellite sessions and lay-offs of court employees, and reduction in funds to retain interpreters and appoint guardians ad litem.⁷⁷

(b) Staff reduction, inability to hire, and increased number of filings [65 to 75 contested hearings on each of a judge’s motion and contempt days] extend the time to get a court date. It can take 3 to 4 months to have something placed on a docket because of insufficient staff to process the paperwork.⁷⁸

(c) The website for the Middlesex County Probate and Family Court was discontinued due to lack of funds.⁷⁹

(d) Loss of ten staffers in 2009 left the Middlesex Probate Court “unable to effectively staff both the Concord and Cambridge sessions.”⁸⁰

(e) Due to “slow trickle of judicial appointments issuing from the Governor’s Office,” the Middlesex Probate Court “redistributed docket numbers among its sitting judges [based on] judges’ productivity” – i.e., more efficient judges receive more cases; but efficiency doesn’t guarantee that cases are not rubber-stamped.⁸¹

(4) **Massachusetts Lawyer Misconduct encompasses such issues as**

- (a) mishandling of guardianship estate and failing to file accounts;⁸²

⁷⁶Barbara Rabinovitz, Family Law Bar in MO Applauds Working of “New Chief,” Massachusetts Lawyers Weekly, 8/25/08

⁷⁷Some Sessions May Close, Massachusetts Lawyers Weekly, 4/7/03

⁷⁸Concord Probate Court Closure Reveals a System on the Brink, Massachusetts Lawyers Weekly, 11/16/09; Family Law Bar in MO Applauds Work of “New Chief,” Massachusetts Lawyers Weekly, 8/25/08.

⁷⁹Plug is Pulled on Middlesex Probate Court Website, Massachusetts Lawyers Weekly, 1/26/09.

⁸⁰At Year End, Court Challenges Continue in Massachusetts, Massachusetts Lawyers Weekly, 12/28/09.

⁸¹Muddle in Middlesex, Massachusetts Lawyers Weekly, 3/24/08.

⁸²Massachusetts Board of Bar Overseers Admonitions: SJC No. BD-2006-056, 8/27/07.

(b) failing to conclude the administration of an estate, or file or complete guardianship applications; failure to provide a timely accounting; and failure to communicate with clients;⁸³

(c) failing to provide an accounting of the client's funds promptly upon request; failing to deliver itemized bill and provide written notice of withdrawal and statement showing balance of client's funds per Mass. R. Prof. C. 1.15 (d)(1)-(2);⁸⁴

(d) charging excessive fees;⁸⁵ and

(e) charging "outrageous fees" and "engaging in egregious conduct".⁸⁶

Secondly, the Massachusetts guardianship system is littered with abuse cases involving such issues as chemical restraint, insufficient medical justification for guardianship, and breach of fiduciary duty as manifested in the guardian's overall conduct concerning the "incapacitated person" which will be discussed in the following paragraphs.

Chemical Restraints

Cases addressing the abuse of chemical restraints go back to at least 1970. In one such case, institutional clinicians were enjoined "from forcibly medicating committed...patients except in emergency circumstances, and ordered [to adhere to] strict compliance with laws prohibiting the use of seclusion for treatment."⁸⁷ The court held that Mass. Law Ann. ch. 123, §25, which states that an institutionalized patient has the right to receive "treatment suited to his needs which shall be administered skillfully, safely, and humanely with full respect to his dignity and personal integrity,"⁸⁸ created a presumption that a committed person was presumed competent, including competency regarding his ability to make medical decisions and that said patients had a right to refuse medication in non-emergency situations.⁸⁹

The Massachusetts court in *Mills et al. v. Rogers et al.* stated that said patients "had a protected liberty interest in deciding for himself whether to submit to the use of antipsychotic drugs,"⁹⁰ which have a significant risk of adverse, irreversible side effects.⁹¹ The District Court stated that this liberty interest could only be overcome by "an overwhelming State interest."⁹² The state created liberty interest, exceeding the minimum requirements of the Fourteenth Amendment, derived from the "inherent power of

⁸³ Massachusetts Board of Bar Overseers Admonitions: SJC No. BD-2007-066, 10/29/07.

⁸⁴ Massachusetts Board of Bar Overseers Admonitions: SJC No. BD-2007-048.

⁸⁵ Massachusetts Board of Bar Overseers Admonitions: SJC No. 2010-067, 9/27/10.

⁸⁶ Judge: Lawyers' Conduct Was 'Egregious,' Fees 'Outrageous,' Massachusetts Lawyers Weekly, 2/1/10.

⁸⁷ *Rubie Rodgers, v. Robert Okin, M.D., Commissioner of the Dept of Mental Health of the Commonwealth of Mass.*,...478 F. Supp. 1342, 1979.

⁸⁸ M.G.L.A. ch. 123, §25.

⁸⁹ *Id.*

⁹⁰ *Mills et al. v. Rogers et al.*, 457 U.S. 291; 102 S. Ct. 2442; 73 L. Ed. 2d 16, 1982.

⁹¹ *Id.*

⁹² *Id.*

the court to prevent mistakes or abuses by guardians, whose authority comes from the Commonwealth,⁹³ and the “common law” right of individuals to determine what will be done with their bodies.⁹⁴

The U.S. Supreme Court held that the 14th Amendment due process rights “may depend in part on the substantive liberty interests created by state as well as federal law.”⁹⁵ The case was remanded to determine the state law rights.⁹⁶

It is a sad commentary that patients in Massachusetts were being abused by the state Dept. of Mental Health, as well as in nursing homes, and other noninstitutionalized settings; and this still presents as a problem in some situations.⁹⁷ In *Roe*, the court held that a non-institutionalized, incapacitated individual had a protected liberty interest to decide for himself whether to take antipsychotic medications.⁹⁸ However, should “an overwhelming State interest” materialize, the state’s intrusion upon a person would be allegedly for public safety and not to implement substituted judgment nor to administer treatment.⁹⁹ The antipsychotic medication so given would function as “chemical restraints forcibly imposed upon an unwilling individual”¹⁰⁰ with such an infringement at least equal to involuntary commitment.¹⁰¹

In a class action pertaining to the aforementioned situation, the Supreme Judicial Court of Massachusetts indicated that “even if [a patient] lacked the capacity to make his treatment decisions at the time, his expressed preference must be treated as a critical factor in the determination of his ‘best interests,’ since it is the patient’s true desire that the court must ascertain.”¹⁰² In *Rodgers*, the court found that in non-emergencies there was no state interest sufficient to overcome an incapacitated person’s decision to refuse antipsychotic medications.¹⁰³ Furthermore, the court stated that prior to forcibly medicating someone, competency and substituted judgment findings were needed; however, no medical expertise is required to make such a determination.¹⁰⁴ Moreover, if continued use of such medication were requested, a court order and “substituted judgment treatment plan” would be necessary.¹⁰⁵ Here, the nine questions certified by the First Circuit to the Massachusetts Judicial Court were addressed.¹⁰⁶

In the U.S. Court of Appeals decision regarding *Rodgers v. Okin*, the court stated that the “state supreme court’s declaration which recognized plaintiff’s substantive and procedural rights created a

⁹³ *Guardianship of Roe*, 383 Mass. 415, 433; 421 N.E. 2d 40, 51 (1981).

⁹⁴ See *supra* note 90.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Guardianship of Roe*, 383 Mass. 415 (1981); *Rodgers v. Commissioner of the Department of Mental Health*, 390 Mass. 489 (1983); *supra* note 1; Kelly, Kowalski, and Novak, *Courts Strip Elders of their Independence: Within Minutes, Judges Send Seniors to Supervised Care*, *Boston Globe*, Jan. 13, 2008.

⁹⁸ See *supra* note 93.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Rubie Rodgers & others v. Commissioner of Dept of Mental Health & others*, 390 Mass. 489; 458 N.E. 2d 308, 1983; *Doe v. Doe*, 377 Mass. 272, 277-279 (1979).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

liberty interest protected by the Fourteenth Amendment.”¹⁰⁷ Antipsychotic medication used as a chemical restraint must comply with Mass. Code Regs. Tit. 104, §3.12, and Mass. Gen. Laws Ann. Ch. 123, § 21,¹⁰⁸ which states in part that no chemical restraint may be used without advanced written authorization...¹⁰⁹

Though the Rodgers cases pertained to institutionalized individuals, the Massachusetts courts are regularly issuing “Rodgers Orders” directed against non-institutionalized individuals.¹¹⁰ The Rodgers case, intended to set a high bar before forced medication can be given, has “become a vehicle for assembly line involuntary psychiatric drugging orders,”¹¹¹ because in part, of a lack of adequate representation for the incapacitated person in combination with a judicial system that allows dishonest testimony “purposely distort[ed]... to achieve desired ends,”¹¹² and subverted statutory and case law standards, and raises insurmountable barriers “to insure that the allegedly ‘therapeutically correct’ social end is met.”¹¹³ Often such harmful medications are used as a threat against incapacitated individuals.¹¹⁴

These aforementioned alleged safeguards notwithstanding, chemical restraint cases continued. In the Guardianship of Linda, the Supreme Judicial Court of Massachusetts “limited the guardian’s authority to administer [antipsychotic drugs] on the ward’s voluntary acceptance thereof.”¹¹⁵

In the Guardianship of Edward B. Weedon, the Middlesex Probate Court refused to act on the ward’s motion requesting revocation of a substituted judgment order which authorized forcible administration of antipsychotic drugs.¹¹⁶ On appeal the Massachusetts Supreme Judicial Court remanded the case to Middlesex Probate Court for correction allowing the ward’s motion. This court disapproved treatment orders, issued pursuant to G.L. c. 201 §6, which lacked a termination date and provisions for periodic reviews, and which were based on conjecture regarding future circumstances concerning the patient.¹¹⁷

Side effects of antipsychotic drugs “are frequently devastating and often irreversible,”¹¹⁸ thus individuals have “the right to refuse to submit to invasive and potentially harmful medical treatment such

¹⁰⁷ Rubie Rodgers, et al...v. Robert Okin, M.D., etc., et al..., U.S. Court of Appeals for the First Circuit, 738 F. 2d 1, 1984.

¹⁰⁸ Id.

¹⁰⁹ Id.

¹¹⁰ James Gottstein, Opposing Forced Drugging (Rodgers Orders), Psychrights Law Project for Psychiatric Rights, Inc., Feb. 1, 2004.

¹¹¹ Id.

¹¹² Id.

¹¹³ Id.

¹¹⁴ Id.

¹¹⁵ Guardianship of Linda, Supreme Judicial Court of Mass., 40 Mass. 783; 519 N.E. 2d 1296, 1988.

¹¹⁶ Guardianship of Edward B. Weedon, SJC of Mass., 409 Mass. 196; 565 N.E. 2d 432, 1991.

¹¹⁷ Id.

¹¹⁸ Id., citing Guardianship of Roe, 383 Mass. 415, 438 (1981); Rodgers v. Comm. Of the Dept of Mental Health, 390 Mass. 489, 501 n. 16 (1983).

as the administration of antipsychotic drugs.”¹¹⁹ This right applies to competent as well as incompetent individuals “because the value of human dignity extends to both.”¹²⁰

Insufficient Medical Justification for Guardianship

Cases addressing the abuse of placing someone under guardianship without proof of such need go back to at least 1827 when there was no medical documentation or adjudication regarding non compos, no guardianship decree, or record of notice to the person of interest.¹²¹ There, the court declared the guardianship void.¹²²

The courts over time expanded the function of guardianship beyond merely financial to personal protection; but, it wasn’t until 1956 that a nexus between a person’s disability and their incapacity was required by the courts.¹²³ That requirement was first interpreted in *Fazio v. Fazio*.¹²⁴ Said case marks the beginning of significant changes in guardianship law in Massachusetts over the next several decades.¹²⁵ There the court delineated the legal standard for guardianship. The petitioner had to prove that a person was mentally incapacitated and that his “inability to think or act for himself as to matters concerning his personal health, safety, and general welfare, or to make informed decisions as to his property of financial interests,”¹²⁶ was directly related to his mental incapacity.¹²⁷

In *New England Merchants National Bank v. John W. Spillane*, the Massachusetts Probate Court appointed a guardian where no one had petitioned for the attorney’s appointment and there was no evidence presented concerning his suitability. The Massachusetts Court of Appeals found that this appointment was an error.¹²⁸ Here, the judge acted on his own motion, allegedly under G.L c. 201 § 14 to appoint a temporary guardian, but failed to met the statute’s procedural requirements – e.g., finding that the proposed ward’s welfare requires immediate appointment of a guardian, and that the proposed ward was incapable of handling her own affairs due to mental illness.¹²⁹ The medical certificate referenced “mental weakness” which is not sufficient under G.L. c. 201 § 14 to warrant the appointment of a temporary guardian.¹³⁰ The record contained no information regarding an emergency situation or the

¹¹⁹ *Id.*, citing *Roe*, supra note 97 at 433.

¹²⁰ *Id.*, citing *Rodgers*, supra note 97 at 499-500; quoting *Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. 728, 745-746 (1977).

¹²¹ *Isaac Hathaway, in error, v. Joseph Clark* 3d, SCT of Mass., Plymouth, 22 Mass. 490, 1827.

¹²² *Id.*

¹²³ John Cross, Robert Fleischner, Jinanne Elder, *Guardianship and Conservatorship in Massachusetts*, 2d Edition (Lexis Law Publishers) (2000).

¹²⁴ 375 Mass. 951 (1978).

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *New England Merchants National Bank v. John W. Spillane*, 14 Mass. App. Ct. 685; 442 N.E. 2d 421, 1982.

¹²⁹ *Id.*

¹³⁰ *Id.*

suitability of the temporary guardian.¹³¹ Said guardian exceeded his authorization pursuant to the court order; and the actions taken by the Worcester Probate Court were vacated on Appeal.¹³²

In *William L. Lane v. Sandra Fiasconaro*, “[t]he only opinion on competence in the district court’s findings was that of a physician who believed that the patient was mentally ill, but competent.”¹³³ Here, the court was authorizing electroconvulsive therapy (ECT) without a Section 8 B (G.L. c. 123, § 8 B) determination where a “distinct adjudication of incapacity to make treatment decisions (incompetence) must precede any determination to override patients’ rights to make their own treatment decision.”¹³⁴ The patient requested a second medical opinion resulting in the doctor finding that she improved with medication; that she was competent and presented no immediate danger to herself; and that ECT was “overkill.”¹³⁵ Thus, the court order authorizing ECT pursuant to G.L. c. 123, §8B was reversed and vacated.¹³⁶

Massachusetts statutory law contains no single test of competency, but case law contains helpful guides:

- *Fazio v. Fazio*¹³⁷ - neither a finding of mental retardation or mental illness nor institutionalization is enough for a finding of legal incompetency.
- *Lane v. Candura*¹³⁸ - not acting rationally in one’s own best interest, alone is not enough to establish incompetence.
- *Guardianship of Bassett*¹³⁹ - one may be competent for one purpose, but not for another.
- *Superintendent of Belchertown State School v. Saikewicz*¹⁴⁰ - a person with severe mental retardation,
- *Matter of Dinnerstein*¹⁴¹ - senility, or
- *Brophy v. N.E. Sinai Hospital, Inc.*¹⁴² – unconsciousness, coma, or persistent vegetative state may be incompetent.

It appears that the legislature and the Massachusetts courts are leaning toward analyzing competency as a functional assessment of a person’s ability to understand information conveyed, to evaluate options, and to communicate a decision.¹⁴³

¹³¹ Id.

¹³² Id.

¹³³ *William L. Lane v. Sandra Fiasconaro*, 1995 Mass. App. Div. 125

¹³⁴ Id.

¹³⁵ Id.

¹³⁶ Id.

¹³⁷ 375 Mass. 394 (1978).

¹³⁸ 6 Mass. App. Ct. 377 (1978).

¹³⁹ 7 Mass. App. Ct. 56 (1979).

¹⁴⁰ 373 Mass. 728 (1977).

¹⁴¹ 6 Mass. App. Ct. 466 (1978).

¹⁴² 398 Mass. 489 (1983).

¹⁴³ See supra note 123.

In the Guardianship of Jane Doe, the order by the Massachusetts Probate Court appointing the ward's father "temporary guardian with the authority to treat and commit the ward to a mental health facility" was executed based solely on a medical certificate provided by her previous clinician and her mother's affidavit.¹⁴⁴ The ward received no notice of the hearing. Another hearing was held on March 15, but was continued due to scheduling problems. However, the judge granted a petition for temporary guardianship on March 15th and permanent guardianship on April 8th nunc pro tunc to March 15th. On April 26th the two orders were revoked and a de novo hearing ordered, which was continued until no later than June 24th. Then a hearing was held on June 20th and June 21st resulting in a temporary guardianship order extended until a decision could be rendered. A permanent guardianship order was issued on August 17th with the right to commit and the right to authorize the administration of Prolixin.¹⁴⁵ On appeal, the court stated that the orders of temporary and permanent guardianships were not issued pursuant to Mass. Gen. Laws ch. 201, §§ 7, 14 (i.e., there was no notice, and § 14 is not a substitute for G.L. c. 123, § 12 procedures for civil commitment) and thus were invalid.¹⁴⁶

The aforementioned cases involve the Massachusetts courts engaging in a substituted judgment doctrine, a legal fiction,¹⁴⁷ which easily leads to a judge imposing rather than substituting judgment,¹⁴⁸ and after the decision in the Guardianship of Brandon,¹⁴⁹ where the court ignored underlying evidence of a significant change in the ward's circumstances, implementations of the probate review process "indicate a tendency toward unconsidered, rubber-stamp approval of severe medical treatments,"¹⁵⁰ replacing a substituted judgment standard with an undefined substantial change in circumstances standard.¹⁵¹ This lack of guidance has left the application of the substantial change in circumstances standard to the individual trier of fact to establish his own criterion with no protection from individual bias.¹⁵²

Right to Retain Counsel

In addition to the issues discussed above, there are four other issues that impact guardianship in Massachusetts. Allegedly "[t]he order of guardianship did not deprive the ward of the ability to retain counsel in the future if the guardian faced a conflict with the ward;"¹⁵³ however, the statute allowing such appointment did not go into effect until April, 2009 for non-indigent individuals,¹⁵⁴ which negatively

¹⁴⁴ Guardianship of Jane Doe, 391 Mass. 614; 463 N. E. 2d 339, 1984.

¹⁴⁵ Id.

¹⁴⁶ Id.

¹⁴⁷ Saikewicz, 370 N.E. 2d at 431-32; Louise Harmon, *Falling Off the Vine: Legal Fictions and the Doctrine of Substituted Judgment*, 100 Yale L. J. 1, 59 (1990).

¹⁴⁸ *In re Willoughby*, 11 Paige Ch. 257, 260-261 (N.Y. Ch. 1844); Jeremy Bentham, *Preface Intended for the Second Edition of the Fragment on Government*, in *Collected Works of Jeremy Bentham* 509 (J. H. Burns and H. L. A. Hart, eds 1977) (1823).

¹⁴⁹ Guardianship of Brandon, 677 N.E. 2d 114 (Mass. 1997).

¹⁵⁰ *In re Elly*, No. 70P0353-MR (Bristol Co. Probate Ct., Sept. 23, 1998); *In re Andrew*, No. 87P1411-GI (Bristol Co. Probate Ct, Sept. 17, 1997).

¹⁵¹ See Brandon, *supra* note 149 at 120; John H. Cross ET AL, *Guardianship and Conservatorship in Mass* 6-23.1 (1997).

¹⁵² Id.

¹⁵³ Guardianship of Lon Hocker, 439 Mass. 709; 791 N.E. 2d 302, 2003.

¹⁵⁴ Guardianship of Dominic F. Grzybowski, 2010 Mass. App. Unpub. Lexis 578.

impacted non-indigent, non-institutionalized persons in their pursuit of ridding themselves of unwanted, unsuitable guardians.

Compliance/Non-Compliance with SJC Rules

Concerning the Rules of the Supreme Judicial Court,¹⁵⁵ its goal is to ensure that its fee generating court appointments are fair and impartial; that there is compliance with its rules; that certain data is collected; that a guardian does not make payments to herself without court approval; that guardian removal procedures are implemented as needed, etc.¹⁵⁶ See *In the Matter of the Trusts Under the Will of Lotta M. Crabtree*, where such rules as SJC Rule 1:07 (7) were violated by trustees paying themselves large fees, resulting in the appointment of a guardian ad litem.¹⁵⁷

Court's Obligation to Ascertain Ward's Wishes

In the Guardianship of Zaltman,¹⁵⁸ two social workers at Massachusetts General Hospital filed a petition for permanent guardianship; and the only medical evidence submitted at the hearing was an affidavit by Dr. Cullinane. The probate court appointed a permanent guardian. However, “[n]either the substituted judgment order nor the treatment plan order provided for periodic review of Ms. Zaltman’s circumstances.”¹⁵⁹ Furthermore, the probate court granted the motion to strike the appearance of counsel representing Ms. Zaltman.

Ms. Zaltman filed a petition to discharge the guardian based on lack of proper care and the determination that she no longer needed a guardian.¹⁶⁰ Ms. Zaltman’s attorney (Laura Sanford) filed a motion for reconsideration in reference to the motion to strike her appearance for the following reasons: the guardian failed to see that Ms. Zaltman received proper care; the guardian failed to take any further action regarding Ms. Zaltman’s wishes to terminate the guardianship; the probate court failed to address issues scheduled for the 8/17/05 hearing, and failed to give Ms. Sanford notice of the motion to strike and a hearing date for said motion.¹⁶¹ Then the probate court denied Ms. Sanford’s motion for reconsideration “without findings, a hearing, or an opposition.”¹⁶²

On appeal, the appellate court found that the probate court had denied Ms. Zaltman’s “right to petition for removal of the guardianship, a right explicitly provided for and protected by statute [G.L. c. 210, § 13];”¹⁶³ and that the probate court judge abrogated his obligation to personally ascertain Ms. Zaltman’s wishes. “An individual’s stated preference has traditionally been considered a ‘critical factor’

¹⁵⁵ ALM Sup. Jud. Ct. Rule 1:07 (2010).

¹⁵⁶ *Id.*

¹⁵⁷ *In the Matter of the Trusts Under the Will of Lotta M. Crabtree*, 440 Mass. 177; 795 N.E. 2d 1157, 2003.

¹⁵⁸ *In the Guardianship of Zaltman*, 65 Mass. App. Ct. 678; 843 N.E. 2d 663, 2006.

¹⁵⁹ *Id.* At 666; see *Guardianship of Weedon*, 409 Mass. 196, 200-202, 565 N.E. 2d 432 (1991).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

by courts in determining matters of guardianship.”¹⁶⁴ Furthermore, the denial of an evidentiary hearing violated Ms. Zaltman’s rights under Mass. Cons. Decl. Rights art. I.¹⁶⁵

An Additional concern is raised by the actions of Dr. Cullinane who then supported Ms. Sanford’s efforts to remove the guardian and generated an affidavit attesting that Ms. Zaltman was now competent and rational.¹⁶⁶ Dr. Cullinane’s association with Massachusetts General Hospital (MGH) is not mentioned; however, if Dr. Cullinane was an employee of MGH, then there was perhaps a conflict of interest regarding PrimeCare/Ms. Wooldridge as MGH owns PrimeCare and Ms. Wooldridge’s conduct concerning Ms. Zaltman came into question.¹⁶⁷

The appellate court reversed the decision of the probate court and remanded the case for an evidentiary hearing on the issues presented.¹⁶⁸ It is the interests of the ward that must be served. “Neither the convenience of the State nor the interests of [guardians] are material to the ultimate decision to be made.”¹⁶⁹

Court’s Obligation to Oversee Guardians and Prevent Egregious Conduct

Regarding egregious conduct and outrageous fees by lawyer guardians, the case of *In re Guardianship of Kenneth E. Simon*¹⁷⁰ epitomizes guardianship abuse in Massachusetts. “These two lawyers were motivated by greed and had no problem engaging in bullying tactics aimed at dissuading [Simon’s] wife from retaining counsel...”¹⁷¹ These lawyers used “the legal process to intimidate anyone who got in the way of their agenda...[and] were far less concerned with the ward and his health than they were with getting rid of [his wife] and the ward’s money.”¹⁷²

According to Judge Steinberg, the goals of these two lawyers were to spend “every last dime” until Simon’s assets were no longer under their control; to make “litigation unnecessarily hostile, which increased fees; ¹⁷³ “to remove Mrs. Simon from the picture; and to increase their hourly rate because “[they] figured [they] could get away with it” and “the estate could afford it.”¹⁷⁴

In their efforts to remove Mrs. Simon, these lawyers tried to have her arrested and thrown in jail; then they tried to “blackmail or bribe [her] lawyer into abandoning a defense that is in the best interest of the client...” “They’re telling a lawyer, in essence, that they’re willing to pay him for no work if they

¹⁶⁴ *Id.*; *Guardianship of Roe*, 383 Mass. At 445; See *Allis v. Morton*, 70 Mass 63, 4 Gray 63, 64 (1855); *Guardianship of Smith*, 43 App. Ct. 493, 499, 684 N.E. 2d 613 (1997).

¹⁶⁵ *Id.*

¹⁶⁶ 65 Mass. App. Ct. 678, 682.

¹⁶⁷ See *supra* note 158.

¹⁶⁸ *Id.*

¹⁶⁹ *In the Matter of Mary Moe*, 385 Mass. 555; 432 N.E. 2d 712, 1982.

¹⁷⁰ See *Mass. Lawyers Weekly* No. 15-001-01, 2/1/2010; and *The National Law Journal*, 2/4/10.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

agree to settle...¹⁷⁵ These lawyers were able to pay themselves \$500,000 in fees, yet were unable to pay the nursing home where Mr. Simon was receiving care.¹⁷⁶ In this case, these lawyers were ordered to repay more than \$328,000 to the Simon estate.¹⁷⁷

Such professional misconduct “is against society as a whole (see Matthew Cobb, 445 Mass. 452),” and weakens public confidence in a judicial system that is failing and decaying at virtually every level.

Thirdly, the Boston Globe has documented the shortfalls of the Massachusetts Probate Court system.

As of January, 2009, elder abuse in Massachusetts is up by 20 percent, and budget cuts are affecting protective service agencies.¹⁷⁸ In the year ending 2009, there were approximately 16,000 reports of elder abuse or neglect investigated by case workers in Massachusetts for individuals 60 years of age and older, living in private homes or apartments.¹⁷⁹ Massachusetts agencies in charge of investigating elder abuse complaints are “all running fairly high deficits in that program” and have to prioritize.¹⁸⁰ Thus, some cases fall through the cracks, especially, if there is a guardian who is allegedly caring for an individual.¹⁸¹ Then, often these agencies defer to a guardian with little if any inquiry.¹⁸²

In 2008, the Boston Globe ran an investigative article concerning guardianship and associated abuses in Massachusetts.¹⁸³ It cited that the most pronounced system flaws were in Middlesex, Suffolk, and Worcester counties.¹⁸⁴ System failures include the following:

- (1) “wholesale indifference to court rules requiring guardians to file an inventory of a ward’s assets within 90 days, as well as an annual financial accounting;”¹⁸⁵ no filing at all in 262 cases out of 308 cases reviewed in Suffolk Probate Court;¹⁸⁶
- (2) “fast-track[ing] elderly into [guardianship] with little evidence to justify such wrenching decisions”¹⁸⁷ - e.g., Dawn Cromwell. “The Cromwell case typifies an everyday practice in Massachusetts probate courts. Too many judges, as Merrill..., award custody of elders to guardians without insisting on the minimal medical documentation required by court rules; without asking about the patient’s long term prognosis; and without considering whether an

¹⁷⁵ Id.

¹⁷⁶ Id.

¹⁷⁷ Id.

¹⁷⁸ Steve Adams, Elder Abuse Complaints on Rise in Massachusetts, *The Patriot Ledger* (9/4/10).

¹⁷⁹ Id.

¹⁸⁰ Id.

¹⁸¹ Id.

¹⁸² Id.

¹⁸³ Kelly, Kowalski, and Novak, Courts Strip Elders of their Independence: Within Minutes, Judges Send Seniors to Supervised Care, *Boston Globe*, Jan. 13, 2008.

¹⁸⁴ Id.

¹⁸⁵ Id.

¹⁸⁶ Id.

¹⁸⁷ Id.; supra note 140.

independent fact-finder should conduct an inquiry before such a life-altering judgment is rendered. And those whose lives are so radically affected are given no legal representation;”¹⁸⁸

- (3) limited oversight of guardians, many of whom are lawyers and social workers; said guardians are “virtually unregulated;” and ignore court rules, filing requirements, and the needs of the “incapacitated” person;¹⁸⁹
 - (4) “judges who rubber stamp [guardianship] cases just to clear the docket” – statement given by Laura A. Sanford, elder law attorney;¹⁹⁰
 - (5) denial of due process rights – e.g., lack of proper notice and the ability to be heard, and failure to appoint counsel;¹⁹¹ and
 - (6) failure to prevent administration of an antipsychotic drug used as a chemical restraint.¹⁹²
- The aforementioned problems were also cited in *Massachusetts Lawyers Weekly*.¹⁹³

Again, I reiterate that such professional misconduct “is against society as a whole (see *Matthew Cobb*, 445 Mass. 452),” and weakens public confidence in a judicial system that is failing and decaying at virtually every level.

GUARDIANSHIP SYSTEM REFORM

Nationally, the present guardianship system lacks uniformity; the probate courts are unable or refuse to monitor guardians; and the legislatures provide little or no oversight.¹⁹⁴

These issues were addressed by a New York Grand Jury in 2004, when it stated that notwithstanding the alleged protections in Article 81 of the New York Mental Hygiene Law, the evidence before it “[demonstrated] that the system had gone horribly wrong. Because of the existence of a number of loopholes and deficiencies in both the existing statutory provisions and court rules relating to guardianships and the enforcement of those provisions and rules, as well as the laxity of those appointed to oversee the guardianships themselves, instead of serving to protect the assets of incapacitated persons, the existing guardianship system presents the opportunity for unscrupulous guardians to deplete the assets of their wards and enrich themselves with impunity.”¹⁹⁵ The attorney being tried in this case testified that “[n]obody looks at anything. You can just file your papers with the court... There is nobody who watches

¹⁸⁸ *Id.*; supra note 183.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Commentary: Guardianship Reform is Overdue*, *Massachusetts Lawyers Weekly* (1/21/08); see supra note 15; In *Guardianship of Roe*, 412 N.E. 2d 40 (Mass. 1981); *Mills v. Rogers*, 457 U.S. 291, 102 S. Ct. 2442, 73 L. Ed. 2d 16 (1982).

¹⁹⁴ See supra note 28.

¹⁹⁵ Report of the Grand Jury of the Supreme Court, Queens County, Issued Pursuant to Criminal Procedure Law § 190.85(1)(c) Concerning Theft from Guardianships (3/3/04).

over you, no watchdog agency.”¹⁹⁶ Said attorney was being tried for taking more than \$2 million dollars from 14 different guardianship estates over a five year period.¹⁹⁷ The Grand Jury report reflected that such crimes occurred because court examiners failed to exercise adequate vigilance in their review of work generated by attorneys in conjunction with other systemic guardianship oversight weaknesses.¹⁹⁸

Investigative bodies appointed by Chief Justice Judith Kaye found that the citizens of New York perceived “[t]hat the court system and its representatives are not available to answer questions and investigate complaints that ordinary citizens have about the fiduciary process.”¹⁹⁹

In 2004, during its announcement of a Wingspan Conference, the National Academy of Elder Law Attorneys (NAELA) stated that “[i]n many states... little is being done to ensure the necessary funding, training, accountability and monitoring of guardians that could prevent the horrific abuse that continues to occur against our older Americans...”²⁰⁰

In a GAO report in 2004, the GAO indicated that the federal involvement regarding the protection of incapacitated individuals should encompass:

- (1) an interagency/state court group to study options for immediate and systemic information sharing; and
- (2) assistance from HHS to state and national organizations engaged in guardianship programs engaged in compiling a national data base of abuse of incapacitated individuals with and without appointed guardians or representative payees and reviewing state policies for recognition of guardianship appointments and interstate transfers.²⁰¹ The SSA disagreed with these findings, but such agencies as HHS and the VA concurred.²⁰²

In 2006, the GAO testified before the Senate Special Committee on Aging to reflect that little had changed regarding protection for incapacitated individuals.²⁰³

In 2007, the ABA and AARP issued a joint report again stressing the critical need for guardianship monitoring; however, to date there is still no uniform national standard pertaining to guardianship issues²⁰⁴ even though the Elder Justice Act was introduced in the U.S. congress in 2002, and then again in 2007.²⁰⁵ Said legislation would be the first comprehensive bill to address and take steps to prevent and treat all forms of elder abuse by (1) providing federal leadership on these issues

¹⁹⁶ Id.

¹⁹⁷ Id.

¹⁹⁸ Id.

¹⁹⁹ Report of the NYS Commission on Fiduciary Appointments, December 2001.

²⁰⁰ National Wingspan Implementation Session: Action Steps on Adult Guardianship Progress (2004); National Groups Address Guardianship Reform to Protect Older Americans (11/11/04).

²⁰¹ U.S. government Accountability Office, Guardianships: Collaboration Needed to Protect Incapacitated Elderly People, GAO-04-655, Appendix VII: Comments from the Social Security Administration (6/10/04).

²⁰² Id.

²⁰³ 2006 GAO Report: Guardianships, Little Progress in Ensuring Protection for Incapacitated Elderly People (Sept. 2006).

²⁰⁴ AARP/ABA, Guarding the Guardians: Promising Practices for Court Monitoring (Dec. 2007).

²⁰⁵ 2008 Bill Tracking S. 1070; 110 Bill Tracking S. 1070.

through an Advisory Board on Elder Abuse and a coordinating Council of federal agencies; (2) improving collaboration among local, state, federal, and private entities; (3) developing expertise to better detect exploitation, neglect and abuse of the elderly individual through training health professionals in geriatrics and forensic pathology; and (4) increasing training and research in the aforementioned areas of abuse.²⁰⁶

The last action on the Elder Justice Act was in 2008.²⁰⁷ Senator Hatch commented that “[i]t astounds me the small percentage the Government is willing to dedicate to ending elder abuse.”²⁰⁸

In Massachusetts, lawyers have stated that the guardianship system lacks oversight.²⁰⁹ The courts lack “[a]n automated case management system;” yet, allegedly they can “[t]rack when accounts are due,”²¹⁰ but often fail to do so.

In July, 2009 there was some “[g]uardianship reform – i.e., the medical documentation requirement was modified with additional guardianship changes effective in July, 2011.”²¹¹ Yet it appears that many attorneys, like Francis X. Small, “[s]uppose [that] it’s a good thing in protecting people’s constitutional rights,” but complain that such reforms are “[a] lot of work” and that it’s not profitable.²¹²

Is it not interesting that such entities as the Lynn Neighborhood Legal Services find that “[u]ntil the Uniform Probate Code was signed in January of 2009, Massachusetts was in the dark ages in terms of guardianship,”²¹³ yet for-profit guardians are complaining about needed safeguards and about having their revenue stream crimped. Perhaps it may now prove more difficult to despoil an estate as in the Simon case.

Yet, whether real change concerning protection for incapacitated individuals will be ascertainable in 2011 is debatable. There is still legislation pending to establish multidisciplinary teams with District Attorneys to investigate elder abuse.²¹⁴

The fact that courts “[r]outinely take the word of guardians and attorneys without independent checking or full hearings,”²¹⁵ and “[i]gnore their ward”²¹⁶ still happens.

²⁰⁶ Guardianship of the Elderly: Protecting the Rights and Welfare of Seniors with Reduced Capacity, U.S. Senate Special Committee on Aging (2007).

²⁰⁷ See supra note 160.

²⁰⁸ Elder Justice Act, 154 Cong Rec S4430, 5/20/08 (Congress was spending \$6.7 billion for child abuse but only willing to spend \$153.5 million for elder abuse).

²⁰⁹ Jason Scally, The Guardian Crisis: Lawyers Struggle With Court-Appointed Cases, Mass. Lawyers Weekly, Sept. 20, 2004.

²¹⁰ Id.

²¹¹ Julia Reischel, Guardianship Reform in Mass. Proving Unpopular, Mass. Lawyers Weekly, Mar. 22, 2010.

²¹² Id.

²¹³ Id.

²¹⁴ MA H.B. 542, An Act Relative to Establishing MultiDisciplinary Teams With District Attorneys To Investigate Elder Abuse, 186th General Court—Regular Session, 2009.

Unfortunately, “[m]oney makes the guardianship world go round”²¹⁷ due to the expense associated with needed adequate reform to protect the rights of incapacitated individuals and due to the failure of a guardianship system that allows exploitation of these vulnerable people. If such exploitation were not so lucrative, most of these for-profit guardians would shift their attention elsewhere as indicated in the aforementioned Massachusetts Lawyers Weekly report. Presently, the system is driven by “[u]nwanted paternalism of overzealous health-care and human-services professionals [and financially motivated, for-profit guardians] who often [seek] to intrude as co-conspirators with self-interested family members.”²¹⁸ To correct for “[r]outine circumvention of due-process guarantees, ill-trained guardians failing to perform basic responsibilities, inadequate public services, wide variances in funding for services [intra and inter state], inadequate [court] monitoring of guardianships and conservatorships, and the failure of available alternatives to obviate the need and demand for guardianships and conservatorships,”²¹⁹ one could completely overhaul the existing system with active specialized judges for guardianship hearings, reviewing procedures and audits, guardian monitoring, etc.²²⁰ or abolish guardianship, “[a] state-sponsored, preemption-of-individual-rights model”²²¹ for “[a] disability-accommodation-and-support model.”²²² Tinkering with a broken system is not an option. Immediate change is imperative.

ADDENDUM

The Simon and Zaltman cases have close parallels to the Eklund case where the guardian ignored SJC Rule 1:07 (7) paying herself every month without court approval; engaged in accounting irregularities; ignored the ward’s wishes on every level; ignored the ward’s request to remove the guardian; violated such constitutional rights as notice and the right to attend hearings; left the ward without funds for medication and clothing; failed to remove less than adequate caregivers; failed to repair leaks from around the chimney into the living room and failed to address other home maintenance issues;

²¹⁵ Fred Bayles & Scott McCartney, Declared “Legally Dead” by a Troubled System, in *Guardians of the Elderly: An Ailing System*, AP Special Report, in *Abuses in Guardianship of the Elderly & Infirm: A National Disgrace*, H.R. Comm. Print 100-639, at 13 [hereinafter Bayles & McCartney, *Lack of Safeguards*] (Dec. 1987).

²¹⁶ Bayles & McCartney, *Lack of Safeguards*, supra note 215.

²¹⁷ Marshall B. Kapp, supra note 17 at 1055.

²¹⁸ *Id.* at 1052.

²¹⁹ A. Frank Johns, Charles P. Sabatino, Wingspan-the Second National Guardianship Conference: Introduction, 31 *Stetson L. Rev.* 573 (Spring 2002).

²²⁰ Sally Balch Hurme & Erica Wood, Guardian Accountability Then and Now: Tracing the Tenets for an Active Court Role, 31 *Stetson L. Rev.* 867 (2002).

²²¹ A. Frank Johns, Charles P. Sabatino, supra note 219 at 576.

²²² *Id.*

removed the ward from her home and forced her to travel twice a week for 1 ½ months in the winter between non-ergonomically suited lodging in Tyngsboro and Woburn causing her severe emotional distress which exacerbated her heart conditions, and put her at risk by placing her in a home with an individual who was on medication for depression and who was mandated to undergo counseling for child abuse; authorized a chemical restraint because Mrs. Eklund was distraught at being removed from her home and then placing Mrs. Eklund back into her home 1 ½ months later because the chemical restraint did not work and her cardiac issues were difficult to regulate; threatened family members who objected to the guardian's "care" of Mrs. Eklund; filed baseless contempt charges against these family members; engaged in unnecessary court actions to increase fees; used PrimeCare as a liaison to protect herself from liability; and depleted estate assets to the extent that Mrs. Eklund was forced to stay in rehabilitation facilities from December, 2009 until her death in March, 2010. During said stay, Mrs. Eklund lost more than 20 pounds and succumbed to a systemic infection that was less than adequately addressed in two of the three facilities.

Mrs. Eklund's guardian was always threatening to throw her into a nursing home and file a Medicaid application. Once the liquid assets were depleted, the guardian started to liquidate real property. The guardian's goal from the beginning, as stated to Mrs. Eklund's daughter, was to pay herself every month and see that Mrs. Eklund learned to live without family and friends. Said guardian also documented that her goal was to see that there was no money left for heirs. This guardian's conduct parallels that of the lawyers in *re* Guardianship of Kenneth E. Simon, Lawyers Weekly No. 15-001-10 – i.e., she used "the legal process to intimidate anyone who got in the way of [her] agenda...[and was] far less concerned with the ward and [her] health than [she was] with getting rid of [family who objected to her conduct] and the ward's money." "[She apparently] figured [she] could get away with it" and that "the estate could afford it."

Approximately two weeks prior to Mrs. Eklund's death, this so-called guardian told a clinician at Newton-Wellesley Hospital that she did not appreciate how ill Mrs. Eklund was until that conversation with that clinician. Mrs. Eklund paid the price for the failed Middlesex Probate court system.

Had state legislation establishing multidisciplinary teams with District Attorneys to investigate elder abuse been in place, then perhaps there would have been somewhere to seek help. There was, however, no assistance provided by any state agency mandated to assist the elderly.

When violations of SJC Rule 1:07 in the Eklund case were presented to the Judge with said oversight, there was no response. When state agencies were contacted about other abuses in the Eklund case, these agencies deferred to the guardian. The Middlesex Probate court in 2009 did not appreciate that it was required to appoint counsel on behalf of Mrs. Eklund when said counsel was requested, requiring repeated attempts to deal with ill informed probate clerks. Mrs. Eklund was subjected to a guardian who went to court to argue to increase the dosage of a chemical restraint, which was counter indicated based on cardiovascular parameters, by stating to the judge that she and her hired physician had conducted drug experimentation on Mrs. Eklund while she was in a rehabilitation facility without the apparent knowledge of her attending clinician. When said attending clinician was queried about the guardian's drug experimentation, the attending physician emphatically stated that that rehabilitation facility did not engage in experimentation on patients and that she, as the attending, was the only person who determined

medication and the respective doses. Only in this instance did the judge have pause concerning the guardian's request. The dose increase was denied; and furthermore, the guardian's current dosage was not adhered to because medical parameters dictated otherwise.

Mrs. Eklund was forced to stay in a rehabilitation facility against her will and waste away because allegedly there was no money for her to return home while the guardian cashed an annuity in December, 2009 for apparently reasons other than the benefit of Mrs. Eklund.