

New York State Senate Guardianship Roundtable 2018

An Exploration of the Current Guardianship System
in New York

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Introduction

The New York State Senate held a roundtable in Albany, New York to explore how to improve the state's Article 81 guardianship system on January 8, 2018. The guardianship system assigns legal responsibilities to an individual or agency to protect the interests and well-being of vulnerable adults with physical and mental disabilities who are unable to care for themselves. The roundtable sought to explore whether the guardianship system in New York is effectively serving those who need it.

Senator Kemp Hannon, Senate Health Committee Chair, and Senator John Bonacic, Senate Judiciary Committee Chair, convened the event. Participants* included senators from all over New York State, including Senators Diane Savino, Gustavo Rivera, Leroy Comrie, and Roxanne Persaud from districts in New York City. Also in attendance were New York judges, lawyers, and elder law and elder care practitioners and agencies.

The Big Issues

Although guardianship is not only for older people, almost 60 percent of people currently under Article 81 guardianship are 65 years or older. Roundtable participants expressed concerns that the current system will not be able

to handle a significant rise in the older population that is anticipated with the aging of the baby boomers.

By 2030, there will be more 80-year-olds than five-year-olds, and the high costs of caring for people in nursing homes will soar. Participants also questioned whether the legal system, social service system, and the legislature are prepared to care for and handle the wave that is coming relatively soon.

The legal framework is important in understanding how the current statute and current guardianship practices came to be. In 1993, the current guardianship statute was codified at Article 81 of the New York State Mental Hygiene Law, requiring that judges grant powers to a guardian for services and care that are narrowly tailored to the individual needs of each incapacitated person. The law requires that the “least restrictive form of intervention” always be considered prior to an imposition of guardianship – so an individual can exercise the greatest degree of independence and self-determination in all the decisions affecting their life.

In some cases, however, the least restrictive mandate has created significant challenges and burdens to the courts. For example, the court may initially grant limited guardianship powers to

This publication is a summary intended to convey the essential elements discussed at the roundtable and does not necessarily reflect the views of The Guardianship Project or Vera Institute of Justice.

assist someone solely in the area of finances. Then in time, if, for example, the individual gets dementia or Alzheimer's, a return to court will be required to expand the guardian's responsibilities and powers. A balance must therefore be found between the expense and burdens to the court related to the potentiality of multiple court appearances and filings over the duration of a guardianship, the efficient delivery of guardianship services to the person in need, and the preservation of a person's civil liberties.

Members of the court expressed significant concerns about finding competent, qualified guardians because not all of those in need have a family member or friend to care for them. Guardians are paid from the assets of an incapacitated person. Because most guardian clients are low-income (with median assets of less than \$55,000), the low compensation profile of most cases is a deterrent to securing guardians. This is especially true in cases when an enormous amount of time will be required to take care of a person with Alzheimer's or dementia.

Of additional concern to the court is the ability to monitor compliance with the law. Court personnel are entrusted to watch over a most vulnerable population, but limited staffing and resources often prevent courts from reviewing guardianship reports in a timely manner. Without adequate monitoring, the financial abuse of elderly people is a continuing problem. A guardian who has control of a person's bank account can cause much harm without the courts knowing about it for years.

Exploring Different Models

The roundtable participants discussed the pros and cons of the current guardianship models

under Article 81 of the New York State Mental Hygiene Law.

For people with physical or mental limitations, the road to guardianship is a multi-step progression and guardianship is not always an appropriate option. The nature of the person's limitations, disabilities, or incapacities must be carefully determined. Other available resources that could meet the person's limitations should be explored – for example, is there a Power of Attorney (POA) or a representative payee (“rep payee”) for bill paying, or a healthcare proxy to make medical decisions? Sometimes an individual will be appointed a guardian even though a less restrictive alternative would have served them well.

The roundtable participants noted that a variety of for-profit and non-profit guardianship models have been explored – using geriatric social workers, social work graduate students, law students, and young lawyers. With these models there exist challenges of supervision, liability exposure, and substantial insurance costs. In most of the state, the typical professional guardian is an attorney who takes the role as part of his or her for-profit law practice.

In analyzing different models and approaches for guardianship, many voiced the difficulty in estimating resource requirements and creating adequate cost analyses for guardianship care under the state's current compensation structure. The circumstances of each guardianship appointment are unique and prior to each appointment there are many unknown variables – what will be the specific needs and services required by the individual, and how long will the guardianship appointment endure (most

appointments will typically cease upon a person's passing).

Guardianships are dynamic rather than static in nature and change over time. For younger adults, who may have mental illness and who may require a guardian over a 20 to 30-year timeline, it is very difficult to create time and resource profiles for such long-term appointments.

For a new client in the community, or to return a client home to the community from a hospital or nursing home, guardianship providers stated that much of the guardian's work is performed in the first six to 12 months; this time period is usually the easiest to quantify. Providers also tried to quantify how many staff hours it takes to get a person home. Some estimated it took 50 to 100 hours for services such as finding home care, drawing up a will, filing a Medicaid application, hiring a deep cleaning service, etc. However, from that point forward, after the initial settlement period, time and resource projections become more variable and less predictable. A guardian may continue to maintain the person in their home and ensure that their daily needs are met, until that time that the client may need to be institutionalized in a hospital or nursing home because they require acute care or they are reaching the end-of-life and cannot be adequately cared for at home.

With the institutionalization of a person, time and resource expenditures are much easier to predict and manage. Because of the current guardianship compensation structure in New York State, and because much less time and effort are expended to keep someone in an institution, there is a disincentive for a guardian to work to return or keep a client home in the community. However, this may be less desirable for the client

and costlier to the state because of Medicaid considerations.

Many guardianship experts believe strongly that there is much less likelihood for an admission or stay in a nursing home or long-term facility with guardianship providers that provide comprehensive services. This has significant implications for Medicaid spending. The cost of placing and keeping a person in a nursing home is quite high. It is likely the person's assets will be spent down quickly, and he or she will then need to go on Medicaid where they are likely to remain.

By contrast, adherence to the guardianship requirement for placement in the least restrictive setting – at home in the community whenever possible – can lead to cost savings. In the community, a person may never need to go on Medicaid or have their assets spent down. This potential win-win argues for some type of public funding for guardianship. “Public guardianship” is not a new concept, and New York is one of the few states that does not have any official public guardianship system. Most other states have county by county initiatives or some form of statewide public guardianship.

Some Recommendations

As the New York State Senate roundtable on guardianship drew to a close, Senator Bonacic asked the group for their recommendations to solve the problems surrounding guardianship. Participants responded with their ideas for better alternatives and solutions as follows:

- More support from the state for the guardianship system. Also the majority of active guardianship cases are in New York City compared to the rest of New

York State, causing the issue of strained resources to be less apparent upstate and outside of New York City.

- Because it is difficult and cheaper to keep people in the community, the funding of expanded community services can ultimately be less expensive than nursing home care and should be explored as a systemic alternative to guardianship.
- Additional funding should be available to support comprehensive, multi-disciplinary services to individuals that range from social services to property management – this would be a big jump from the current state of services today.
- Pilot projects that would be models for a public-private guardianship system should be tested in different parts of the state.
- More and diverse voices are needed for better policy and practice discussions related to guardianship. (It was cited as an example and a rationale for greater inclusion that lawyers, who made up a large part of the roundtable panel, do not know all the best solutions in the realm of healthcare.)
- Many healthcare providers, such as hospitals and nursing homes, struggle with the care and discharge of incapacitated persons when there is no caretaker or guardian to assume responsibility. Guardianship reform discussions would benefit from the voices of these impacted providers, including the exploration of a

guardianship compensation model through the healthcare system.

- The assessment of good guardianship practice should not be reduced to making sure a guardian faithfully executes their fiduciary duties. Equally critical to good guardianship is whether a guardian is attentive to and managing an individual's quality of life. This includes maximizing an individual's autonomy. However, these factors are difficult to measure with the reporting metrics used in New York State to measure a guardian's performance.
- Better, comparable and more comprehensive data related to guardianship is needed – to track and to analyze the effectiveness of the current guardianship system and to fully understand its challenges and gaps. This would assist policymakers in creating possible solutions to address shortcomings.
- The general public should be educated about guardianship alternatives. There are protocols and documents such as a Power of Attorney that are available to proactively address concerns earlier on in a person's life. This is especially critical for the many in need who are underserved and without the same access to educational information that others may have.

Senator Hannon shared that there is work being done to improve the Power of Attorney and advance directives forms (an example of an advance directive is a living will whereby an

individual can legally appoint another person to make future medical treatment and healthcare decisions on their behalf), and to make them nuanced enough to convey good information to a future caregiver. The Senator said the easiest thing for a guardian to do is to place a person in a nursing home paid for by Medicaid – the most expensive care model apart from an acute care ward in a hospital. Costs to the whole system for such a placement are great. To understand the bigger picture, a review of the actual state expenditures of care for an individual may provide some direction.

Senator Bonacic stated that this was the first time a group of lawyers or judges had come to speak to him about Section 81 in all his years as Judiciary Committee chair. He said that one of the many take-aways of the day was the need to find guardians that are adequately compensated for the work they do. He said he would like to see nonprofits and social service and public agencies get more money earmarked to address these needs, noting that these problems will only worsen with an inadequate supply to meet the demand.

*Roundtable Participants:

In addition to Senator Kemp Hannon, Senate Health Committee Chair and Senator John Bonacic, Senate Judiciary Committee Chair, who convened the event, other senators also in attendance were:

- Senator Leroy Comrie (14th District)
- Senator Betty Little (45th District)
- Senator Roxanne Persaud (19th District)
- Senator Patty Ritchie (48th District)
- Senator Diane Savino (23rd District)
- Senator David Valesky (53rd District)
- Senator Chris Jacobs (60th District)
- Senator Terence Murphy (40th District)
- Senator Elaine Phillips (7th District)
- Senator Gustavo Rivera (33rd District)
- Senator James Tedisco (49th District)

Participants from the court and other participants included:

- Hon. Arthur Diamond, New York State Supreme Court, Nassau County
- Hon. David Guy, Broome County Surrogate Court
- Sheila Harrigan, Executive Director, New York Public Welfare Association
- Alan Lawitz, Director, NYS Office of Children and Family Services, Bureau of Adult Services
- Tara Anne Pleat, Vice Chair, Elder Law and Special Needs Section, NYS Bar Association
- Michele Gartner, Special Counsel for Surrogate & Fiduciary Matters, Office of Court Administration
- Jean Callahan, Attorney-in-Charge, The Legal Aid Society, Brooklyn Neighborhood Office
- John Holt, Director of Legal Services, The Guardianship Project, Vera Institute of Justice
- Karen Nicholson, CEO, Center for Elder Law and Justice, Western New York

For more information

The Guardianship Project (TGP) of the Vera Institute of Justice was created to address elder abuse, financial exploitation, and inadequate care that are pervasive problems for older adults. TGP seeks to shine a light on the current gaps in the guardianship and elder services safety net by educating decision makers at the local, state, and federal levels. As a change agent, TGP seeks to influence policy and promote practical approaches that impact a growing population of older people across the nation and to address their critical needs while saving public dollars.

TGP also serves as a guardian to clients (many of them older adults) who have no friends or family to care for them and face a wide range of challenging issues. TGP assists these individuals with both preventative and restorative measures for their overall health and welfare. Staff attorneys, social workers, and finance and property managers safeguard the physical, mental, and financial well-being of TGP guardianship clients while maximizing their autonomy and independence.

For more information about this report or The Guardianship Project, contact Susan De Maio at sdemaio@nycourts.gov, or (347) 404-9350.

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