

**IN PLAIN SIGHT: VARIANCE IN PRACTICE IN MICHIGAN
PROBATE COURTS**

**ADULT GUARDIANSHIP PROCEEDINGS UNDER THE
ESTATES AND PROTECTED INDIVIDUALS CODE**

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A.

Perhaps no civil proceeding has greater impact upon an adult than guardianship. An individual can lose the right to choose where and in what setting to live, to make choices concerning health care, and to handle her or his own finances.

With passage of the Guardianship Reform Act in 1988, Michigan was in the vanguard of states acting to ensure guardianship was ordered appropriately, powers of a guardian were limited to the demonstrated needs of the individual, and there was adequate court oversight of guardians' performance.

According to data collected by the State Court Administrative Office, approximately 54,000 adults have a guardian under the Estates and Protected Individuals Code or the Mental Health Code.

The 77 probate courts in Michigan operate under the same statutes, court rules and jury instructions, and use standard court forms issued by the State Court Administrative Office. The Michigan Constitution elegantly calls for "one court of justice."

Yet for adult guardianship proceedings brought under the Estates and Protected Individuals Code there is a wide variance in practice from county to county, and sometimes, judge to judge within a single county. Some differences among the courts are explainable and beneficial. Others cause unnecessary confusion at best; exploitation and violations of due process at worst.

Shortly after the Guardianship Reform Act was passed, a judge intoned at a probate judges conference that guardianship reform would not come until all the sitting judges were dead. Twenty-five years later, this paper is provided with recognition "there is a difference between optimism and wishful thinking." (Bouton, J, *Ball Four*.)

B.

Statutory reform has not been sufficient to prevent scandals within the guardianship system, scandals which might involve misappropriation of money and property, Medicaid fraud, kickbacks, tax evasion, and inappropriate institutionalization.

Reported misdoings have occurred in Washtenaw County, Wayne County, Eaton County, Macomb County and Genesee County. The largest in scope involved Guardian, Inc. of Wayne County, a professional guardian responsible for more than 600 individuals. A leading advocate characterized the actions of Guardian, Inc. as "financial rape."

A court appointed receiver, John Chase, Jr., conducted an extensive investigation of the financial actions of Guardian, Inc. of Wayne County. (He was not asked to determine how the start-up organization obtained so many court appointments so quickly, nor whether individuals suffered non-financial consequences.)

The Chase Report is available electronically, and remains important reading. The report reveals the perverse financial incentives that can drive the guardianship system. Respondents, ostensibly the subjects of beneficent protective action, instead become pawns in a criminal enterprise. Great sums were made off the backs of individuals with very modest incomes.

The three principals of Guardian, Inc were sentenced to federal prison. The victims were each granted about \$760 in damages (and could be charged \$760 by the successor guardians as their fee to obtain the award).

The scandal led to a resolution of the State Bar of Michigan calling upon the Michigan Supreme Court to convene a task force. The Court heeded the resolution. The Michigan Supreme Court Task Force on Guardianship and Conservatorship, which included three probate judges, unanimously issued 11 recommendations. With one significant exception, the Court took no action.

The chief justice appointed an appeals court judge (a former probate judge) as Guardianship Ombudsman for the state. This innovative and potentially effective initiative was soon quashed by petty, internecine warfare within the Court.

Other branches of government did respond. For instance, the legislature passed a law prohibiting a guardian or conservator from selling real property without a specific court finding, after a hearing, that the sale was for fair market value and in the best interest of the individual.

The Governor's Task Force on Elder Abuse discussed aspects of guardianship as elder abuse. Resultant legislation required a guardian ad litem to give a respondent written information about her or his rights. This may reduce the possibility of inappropriate guardianships or unnecessary powers given a guardian.

C.

A first step in addressing variances among the courts is to identify the practices that differ court to court, or judge to judge. This project began as a presentation to a class at the University of Michigan Law School in 2008, and has been expanded since.

Information has been garnered through observation; a past survey of the courts; and statements by lawyers, judges, community mental health staff and adult services workers.

As examples, a judge told of ignoring the restriction on giving a guardian the powers possessed by a patient advocate. A judge lectured to an audience that in his years on the bench he had never changed the site of a hearing. A lawyer revealed that he obtains guardianship without a court hearing "all the time." In a survey conducted as part of the Supreme Court Task Force on Guardianships, two courts readily admitted that they do not conduct any periodic review, although required by statute.

It should be noted that even when there is near uniformity of practice, the practice might violate a statutory provision. At least since the

1830's - for more than 175 years - state law has required every guardian to account to the court for property within the guardian's control. The requirement is usually honored in its breach, allowing one commentator to characterize guardianship as "a license to steal."

D.

It is important to consider the different nature of court variances.

First, a court might exceed statutory requirements. Some courts take on the task of mailing notices of hearing. A number of courts provide educational material to each new guardian, or require training for guardians ad litem. These can be exemplary practices.

Second, a statutory provision may be deliberately vague, granting to the court latitude to devise a means to honor it. An example is the requirement for periodic review without a delineated method to accomplish it.

Third, a statute might grant discretion to a judge. For instance, a judge can order a medical or psycho-social evaluation of a respondent when the judge deems it necessary.

Fourth, an issue might not be addressed in statute; judges struggle on the issue of the perimeters of a guardian's power concerning the withholding or withdrawal of life sustaining care.

A court can develop a local court form when no statewide form exists. One court drafted a form for a guardian to complete to satisfy her or his duty to inform the court of a change in the individual's or the guardian's address.

Finally, there are differences in attitude and bias among judges which can be unacknowledged or unperceived.

Putting these types of variances aside leaves those actions when courts or judges do not hew to statutory or court rule direction.

E.

Why do those variances from statutory requirements continue, with apparent impunity? Perhaps the following factors contribute to inaction.

- * Although a respondent has a right to a jury trial, there are years when none occur throughout the state.
- * A respondent has the right to appeal a judge's decision. But very few appeals are taken, and appeals are to the circuit court.
- * There is lack of local "oversight," as the press pays little heed to probate court proceedings.
- * Incumbent judges are not often challenged successfully in re-election campaigns.
- * One does not hear of peer pressure among the judges to conform.
- * Guardians ad litem and appointed counsel, dependent on continued appointments, may censor themselves.
- * The Supreme Court, directly and through the State Court Administrative Office, has authority but appear disinclined to address the issues.

Several years ago, the Supreme Court proposed a rule to disconnect campaign contributions from court appointments. It is not unheard of for jurisdictions to ban "pay to play." But the Court withdrew the proposal, no doubt after howls of protest from the bench.

A subsequent Supreme Court proposal to mandate annual, public disclosure of court appointments by each judge met with a similar fate.

F.

There are a number of possible remedies to issues surrounding our guardianship system.

Certain steps with potential impact lie outside the purview of the court system. To the extent an individual stays out of the system, she or he will not be affected by vagaries within it.

Most guardianship petitions are triggered by the need or perceived need to make health care decisions, e.g., surgery, chemotherapy, nursing home care.

There is good reason to promote the use, portability and acceptance of advance directives as an alternative to guardianship.

About 15 states have general family consent statutes. If an individual is unable to participate in medical treatment decisions, and does not have a patient advocate or guardian, a family member - in a priority order set by statute - is authorized to make the decision. One Michigan probate judge has opined that a family consent statute would reduce the number of guardianships by one-third.

The legislature should also amend the Estates and Protected Individuals Code to address the perimeters of a guardian's powers, both in the context of life-sustaining treatment and as to civil rights retained by an individual under guardianship. Past legislative efforts on the latter issue have met with failure due to objection by some probate judges.

G.

Other remedies to our conundrum lie within the control of the Supreme Court.

First, the State Court Administrative Office should conduct a county-by-county, manual count of the number of adults who have a guardian. The data can include whether the guardianship is full or limited, and whether the guardian is a family member or a professional entity.

Computer-generated data has been subject to error over the years due to coding and compatibility issues. For example, the number of individuals with a guardian in a county on December 31 of a year may vary considerably - greater or fewer - than the number on January 1 of the subsequent year.

Establishing an accurate baseline will be helpful in evaluating future reform efforts. And radical variances in the incidence of guardianship county by county can be explored.

Second, the Supreme Court should conduct a statewide survey of judges and probate court administrators/registerers as to present practice, and make the findings public. Embarrassment might provide motivation for change. A supplemental survey of practitioners and petitioners might yield useful information, if respondents are granted anonymity.

Third, the Court should promote best practices and innovation. Steps should include in-service presentations to health care providers; training for guardians, guardians ad litem and judges. Mediation and screening of petitions have been shown to be effective. A program of peer guardianships has promise. Direct court access to fiduciary bank accounts could improve oversight.

Finally, The Supreme Court should consider superintending control of those courts that continue to deny due process and violate major tenets of the law.

H.

This section lists approximately 100 ways in which the practice of judges and courts vary across the state. They are arranged by stages in a guardianship proceeding. There is no pretense the list is inclusive.

VARIANCE IN PRACTICE IN MICHIGAN PROBATE COURTS - ADULT GUARDIANSHIP PROCEEDINGS

PETITION STAGE

1. Are potential petitioners given information by the court on alternatives to full guardianship?
2. Does court require petitioner be represented by a lawyer as condition of accepting the petition?
3. Who petitions for guardianship for a client of community mental health client - adult protective services or CMH?
4. Do court staff answer questions on which petition is appropriate and how to properly complete a petition?
5. Does the court accept the initial petition through mail?
6. Does the court accept petitions electronically?
7. In what circumstances, if ever, does court waive filing fees?

8. What definition of "developmental disability" does the court use to determine whether the guardianship provisions of the Mental Health Code are appropriate?

9. Is there a requirement a petition includes a nomination as guardian?

10. Is there a requirement that a doctor's statement or form completed by a doctor accompany the petition?

11. Does the court ask for a picture ID from the petitioner?

12. Who serves notice on interested parties, the petitioner or the court?

PRE-HEARING STAGE

13. Is a criminal record check done on a nominated guardian or conservator?

14. Is notice to interested persons mailed by petitioner or by court?

15. In what circumstances does the court deem a guardianship petition an "emergency" for purposes of scheduling a hearing?

16. Is a hospital wanting to discharge a patient considered an emergency?

17. Does the court appoint a guardian ad litem before or after a hearing on an emergency guardianship?
18. If court appoints a temporary guardian in an emergency, is the next court hearing always scheduled with 28 days?
19. In non-emergent situations, what is the average time period between a petition being filed and a hearing held on the petition?
20. Does the judge or the court staff appoint a guardian ad litem?
21. Does the judge or court staff use a revolving list, appoint a guardian ad litem with particular expertise, or use some other method?
22. Does the court use a court employee to serve as guardian ad litem?
23. Can a petitioner nominate a guardian ad litem?
24. Is the guardian ad litem always a lawyer?
25. Does the court keep a record of how many times a particular individual is appointed as guardian ad litem?
26. Is a guardian ad litem required to undergo in-person training by the court before serving as guardian ad litem?

27. If not, does the guardian ad litem receive any written information on how to perform her or his duties?

28. Who pays for the guardian ad litem?

29. Is a guardian ad litem paid by hour or my case?

30. If the respondent has a lawyer, does the court still appoint a guardian ad litem or appoint an additional lawyer for the respondent?

31. What is the role of the guardian ad litem or second lawyer in such case?

32. Is the guardian ad litem always required to visit the respondent?

33. When visiting the respondent, does the guardian ad litem give written and oral information to the respondent on her or his rights?

34. Must a guardian ad litem file a written report with the court?

35. When is the guardian ad litem's written report due?

36. If the respondent objects to guardianship, or objects to the individual nominated as guardian, or wants limits placed on guardian's powers, is a lawyer always appointed by the court?

37. In such circumstances, how often is the guardian ad litem appointed as attorney?

38. Does the role of guardian ad litem end if the court appoints an attorney?

39. How often does judge order a psychological evaluation of respondent?

HEARING STAGE

40. Does court ever skip notice or a hearing if emergency guardianship requested?

41. Does court schedule a hearing time for each case, or is there a general case call for all cases on the docket?

42. Does guardian ad litem appear at hearing?

43. Does guardian ad litem appear even if attorney has been appointed / retained and appears?

44. Does judge ever clear the courtroom of spectators at her or his motion, for her or his own "convenience?"

45. Who is responsible for getting respondent to hearing?

46. Does the court ever move the site of the hearing to accommodate a respondent who wishes to be present?

47. If yes, how many times in the past year has the court moved the site of a hearing?

48. In what percentage of cases is the respondent present at the hearing?

49. Are accommodations made under the Americans with Disabilities Act, such as a sound system for an individual with a hearing-impairment?

50. Does court require testimony at the hearing?

51. Does court require evidence beyond guardian ad litem report?

52. Does the court consider a doctor's letter?

53. How often does a doctor testify?

54. How often does judge refer case for mediation?

55. In the past 5 years, has there been a jury trial?

56. What is the median time a hearing lasts?

DISPOSITION STAGE

57. What is judge's view of the "balance" of safety v. independence? Is that affected by the age of the respondent?

58. Does court make separate, specific findings on the record concerning the respondent's incapacity **and** the necessity of guardianship?

59. Beyond check-boxes, are the court's findings part of written record?

60. What percentage of petitions result in an order establishing guardianship?

61. In those cases when a guardianship is established, in what percentage does the court establish a limited guardianship?

62. Does the court appoint a guardian with power to make medical decision when the individual already has a patient advocate who is performing her or his duties?

63. Does the court give a guardian, upon appointment, information or resources about how to perform her or his duties?

64. Does the court give priority to the respondent's choice as to who will serve as guardian?

65. How often does the court appoint a professional guardian when there are family members suitable and able to serve?

66. In such cases, does the court put on the record why it is by-passing statutory priorities?

67. Does the court require a professional guardian to have undergone training? If so, of what type?

68. If there is more than one professional guardian in a county, how does the judge decide which professional guardian to appoint?

69. Does the court keep a record of which judge appoints which professional guardians? Is the record public?

70. Does the court require bond of a guardian when a conservator is not appointed?

71. What is the asset or income threshold used by the court in requiring appointment of a conservator in addition to a guardian?

72. Does the court require restricted bank accounts in guardianship and conservatorship proceedings?

73. What is the maximum duration of a temporary guardianship ordered by the court?

74. Does the court charge for the initial letters of guardianship?

POWERS

75. Are the powers of a full guardian listed on letters of guardianship or merely the term, "full guardian."

76. What powers does a full guardian have in restricting the rights granted to nursing home residents in federal and state law?

77. Is the power to authorize a do-not-resuscitate order explicit in the letters of guardianship?

78. Does guardian have authority to withhold or withdraw life-sustaining treatment?

OVERSIGHT

79. Are a guardian's annual reports on the condition of the ward reviewed by court staff when filed?

80. Are annual reports "audited" for accuracy?

81. What is the court's level of tolerance toward late or absent reports?

82. Does the guardian continue to have powers when the guardian is suspended?

83. Is a guardian with control of individual's money required to file any accounting to accompany the annual report?

84. If an accounting is required it, is the guardian who is also representative payee required to include Social Security or SSI funds?

85. Are accountings "audited," e.g., are receipts for expenses requested?

86. Does the court require a hearing before approving claimed guardianship fees?

87. Does periodic review occur one year after the initial order and every three years thereafter?

88. Who conducts the periodic review - appointed lawyer or social worker, agency, court officer?

89. Who pays for periodic review - court or individual, or both?

90. In what circumstances are hearings held after periodic review is conducted?

MODIFICATION

91. How often does court include in an initial court order a prohibition on requests for modification or termination (without special leave of court) for 182 days?

92. Can the individual hire her or his lawyer to petition for modification or termination?

93. Does court require retained counsel to prove incapacitated individual made a knowing choice of counsel, when individual petitions for modification or termination of guardianship?

94. Does the court accept an informal letter from ward to initiate a request for modification?

95. Does the court charge a filing fee to a respondent seeking modification or termination?

96. Upon an informal letter or petition from the ward, does the court appoint a guardian ad litem or appoint an attorney?

97. Does the court require a ward to show "changed circumstances" to justify modifying a guardianship?

98. Does the statutory priority for who serves as guardian remain after the initial appointment of a guardian?