Reform for Florida's Probate Guardianship System

Recommendations for Progress

A White Paper by Americans Against Abusive Probate Guardianship

Introduction

To deny people their human rights is to challenge their very humanity.

Nelson Mandela

> ***"In our present day paternalistic society we must take care that in our zeal for protecting those who cannot protect themselves we do not unnecessarily deprive them of some rather precious individual rights." McJunkin v. McJunkin, 896 So.2d 962 (Fla. 2D DCA 2005).***

For those participating in only an intellectual exercise regarding issues in guardianship it might be very difficult to imagine the impact that guardianship-- particularly when wrongfully instituted or executed or managed-- can have on an individual, a family and society. Only under the most exceptional circumstances should an innocent individual's basic human rights be taken by government.

Yet Florida, in part at least because of demographics, has seen continuous growth in the state's population of "wards of the state". Sadly, the state has no interest or resources to care for wards and delegates this huge responsibility to individuals referred to as guardians. These guardians are designated as court appointed officers with special judicial standing and for practical purposes own the body life and assets of their Wards who have been stripped of their rights and made legally dead.

Great problems with Florida's probate guardianship system have been well known since the 1980s. After numerous exposés and the public outcry that followed, the legislature realized that attempts at reform were needed.

During the 2003 session, a Guardianship Task Force was established by the legislature to review the guardianship laws to ensure that the due process and the rights of individuals were properly protected and that the laws were being applied consistently and effectively. The final report of the Guardianship Task Force was presented in 2004 and recommended changes to Chapter 744 passed in 2006. A comprehensive review the activities of this task force can be found at http://elderaffairs.state.fl.us/doea/pubguard/Guardianship%20Taskforce%20Report.pdf

For many years since, the Florida legislature has made intermittent attempts to reform aspects of statute 744-- one of the very longest of all Florida statutes-- and its associated probate rules in response to issues raised by the task force, the bar, the public, aggrieved family and victims and by the media.

For 35 years the public has waited patiently for reform. During that time statewide print media have exposed scandalous problems in the probate guardianship process. Recently investigative reporters in electronic media have joined in exposing egregious abuses that occur throughout the state of Florida in the guardianship process.

Statutes and Probate Rules that govern guardianship are incredibly complex and daunting. The quality and standards of jurisprudence in these matters varies dramatically from county to county. What happens in one probate court in one county may be totally different in another county. This inconsistency and the opacity of the laws and rules make a deep understanding the guardianship process extremely difficult to attain and even more difficult to enforce.

Reform is needed.

Before true reform can be accomplished it is necessary to understand the components of the system that are most severely broken and that have resulted in repeated patterns of abuse by stakeholders in the system.

In a comprehensive white paper the Elder Law Section of the Florida bar performed an analysis of the state of guardianship (http://www.eldersection.org/pdf/SB1124WhitePaper.pdf),

The report outlined concerns about the multiple shortcomings of the guardianship system in a presentation which can be found at

http://elderaffairs.state.fl.us/doea/pubguard/Guardianship%20Taskforce%20Report.pdf

Response to the Taskforce Report

For years legislature has entertained bills to modify aspects of guardianship. In 2014 alone 8 changes in statute 744 were legislatively mandated. The statute has been tweaked countless times, but these efforts to nibble around the edges of the underlying problem have never resulted in serious reform.

The number of guardianships and guardians in the state of Florida is at an all-time high and expected to rise even further. Despite repeated efforts by dedicated individuals government has failed to produce effective reforms, indictments, or changes in the probate process of consequence.

Following is an analysis of the factors that drive the guardianship process in Florida.

Statute 744

The clearly stated overriding legislative intent of the statute from its inception was to protect vulnerable people in the least intrusive manner possible. The statute was intended to be applied to indigent individuals who need the government's help to survive. It was never intended to be used as often as has been the case and it was not intended for use against middle and upper-class individuals with significant assets. The fact that the statute has been turned on its head by a small group that can be found in probate courts across the state while government is looking the other way is a violation of the trust between government and its citizens.

Numerous subsections of the statute have been perverted by stakeholders of the system to their personal advantage. Vagaries within the system abet this self dealing. The very term *"incapacity"* has no hard meaning or definition other than a difficult to define and easy to conflate "functional definition" that is scientifically unsound. As well, selection, supervision and monitoring of so-called experts comprising examining committees are nothing short of preposterous insults to the citizens of Florida.

Even further complicating this maze is the fact that this statute applies to at least four varieties of guardians including family guardians, corporate guardians, nonprofit guardians and of course professional for-profit Guardians. It is irrational and foolhardy to think that all four categories of Guardian could possibly be properly ruled by the exact same statute given the enormous disparity of their job descriptions and the status of the wards or estates they serve.

Inadequacy of probate court systems

Probate court is not an appropriate venue for complex litigated guardianship cases. As the following shows, judge's complaints of being overworked and understaffed appear to be valid.

In Miami-Dade – on average – each probate judge took on 2,848 NEW cases in FY 2012-13, in Broward the figure was even higher at 3,105/judge, with Palm Beach scoring the lowest at 1,871/judge. Keep in mind these figures don't take into account each judge's EXISTING case load or other administrative duties. These stat's may be appropriate for uncontested proceedings, which likely represent 99% of the matters handled by a typical probate judge, but when it comes to that 1% of cases that *are* litigated, these same case-load numbers make it glaringly clear that there are severe structural limitations inherent to an overworked and underfunded state court system. These limitations drastically reduce the likelihood that a judge will actually read briefs and invest the time and mental focus needed to thoughtfully evaluate the complex tax, state law and family dynamics underlying these cases. Judges consider it a luxury that's all but impossible in a state court system that forces judges to juggle thousands of cases at a time with little or no support.

FY 2012-13 Probate Court Filing Statistics

Type of Case	Miami-Dade (11th Cir)	Broward (17th Cir)	Palm Beach (15th Cir)
Probate	3,864	3,839	4,531
Baker Act	4,882	3,845	1,319
Substance Abuse	835	805	696
Other Social Cases	917	345	246
Guardianship	835	413	482
Trust	58	68	211
Total	11,391	9,315	7,485
# Judges	4	3	4
Total/Judge	2,848	3,105	1,871

Source FLORIDA Probate & Trust Litigation *Blog*

Essentially all abusive guardianships are contested and place great strain on an already crippled state court system. It is unrealistic to expect overworked judges to actually read briefs and invest the time and mental focus needed to thoughtfully evaluate the complex dynamics underlying these cases. This may explain the frustration experienced by family members who are disappointed by unfathomable knee-jerk decisions in the probate court almost uniformly favoring lawyers and guardians who make their livings in probate court defending guardians. These issues are real and predispose to denial of due process when a state court system forces judge juggle thousands of cases with little or no support. This is not an excuse, just an observation.

Importantly, the sequestration of probate court records is a monumental impediment to transparency in these proceedings. While maintaining the confidentiality of the Ward's identity is important, maintaining the rights and protections our country promises is far more relevant than protecting his identity. Probate court secrecy is the enabler for all variety of impropriety. It allows the system to litigate, medicate and take the estate with impunity.

The judges --A Cold Judge

A defining characteristic of Florida probate litigation is that these cases are decided by judges--no jury trials here. If the judge is prepared and understands the facts and law of

your case, all is well. But when a judge is not prepared, or simply doesn't "get" it, he's what Denver, Colorado litigator Peter Bornstein refers to as a "cold" judge in *Persuading a Cold Judge*, an article he published in the ABA's Litigation magazine.

Having your case decided by another human being who may rule against you out of ignorance is to stare into the abyss**.** The reason for this truism is often the "cold" judge —the judge who hears and rules without knowledge, understanding, depth, or concern.

Given their ponderous caseload, probate courts are especially prone to cold judging. Not because our probate judges don't want to do the right thing (we are hopeful they all do), but because Florida's state court system is so starved for resources they simply don't have the luxury of preparation. Contested probate proceedings can be just as complicated and difficult as the issues at play in large complex commercial cases. To make matters worse, the natural tendency to believe people you know as supposed to strangers with whom you have no familiarity or trust, further tilts the already uneven playing field in favor of lawyers and guardians familiar to the court and appointed by the court as trusted court officers whether they are wrong or right.

The cases --Administrative civil courts should not be hearing criminal complaints

Abusive probate court cases typically start with allegations of crimes took place a vulnerable adult at peril. An underfunded, understaffed and overworked Administrative probate court judge should not be burdened or expected to deal with the challenge of adjudicating matters of a criminal nature for which he is not qualified or trained.

Probate court rules especially when loosely enforced or poorly understood or ignored altogether often allow judges in probate to shortcut their decisions by making rulings that involve allegations of theft, diversion, illegal conveyance and other criminal matters by ruling with their gut or by the seat of their pants. Absent jury trials or the ability to effectively defend against specious charges places family members at an unfair disadvantage in probate court and allows stakeholders of the system to demonize them, color the court, and achieve highly questionable rulings that would be best handled in a more appropriate setting such as criminal court with full due process and access to hearings testimony and juries.

The first tier takeholders

The Professional For-Profit Guardians

Other than attorneys the only profession that is not regulated by the Department of Business and Professional Regulation is that of guardian. Even the leadership of the Florida State Guardianship Association, a trade group, agrees that professional guardians should be licensed. Without licensure, guardians need answer to only one individual, the judge that appointed them. Given the relationship between the two parties is very easy to see how the temptation to help oneself to the assets of individual whom you actually own would be overwhelming. The continued absence of any checks and balances on court-appointed professional guardians is a glaring and incomprehensible shortcoming of the guardianship system in Florida. The obvious self-interest and self-dealing that pervades a significant portion of all professional for-profit Guardianships, would be dramatically reduced by a licensure requirement or other effective monitoring and control system. This is a problem that has been well recognized for at least a decade and has yet to be effectively addressed in any way.

Cases from nearly every county in the state have demonstrated that while there may be a large number of honest ethical and competent guardians in the state, a significant number abuse their positions and privilege, engaging heinous practices, egregious overbilling, abuse, neglect, and exploitation of wards and their families. While there have been a handful of convictions for these crimes over the last three decades, even one Guardian who acts in this fashion is one too many.

Currently the benefits of this type of egregious behavior pose minimal or no risks to the perpetrators. Until the risk outweighs the benefits it is reasonable to expect that these types of abuses will continue unabated.

The attorneys

Most attorneys are fine upstanding people who work hard to uphold the law. Sadly some are not.

In every contested guardianship the first action of the Guardian is to hire an attorney to represent them. Of the 2000 attorneys who work Florida only a tiny percentage engage in probate work on behalf of guardians. This self-admitted incestuous fraternity has unfettered access to unlimited funds of the Ward through the submission of hourly billings which are almost uniformly rubberstamped by the overworked, underfunded and undermanned court. Even more so than Guardian fees, legal fees in abusive guardianship are tantamount to legal extortion, the so-called “Legal Abuse Syndrome”, and closely resemble the situation in SLAPP lawsuits. When entire teams of lawyers attack a single individual or family in probate, their tenacity and resources and the fact that they're being paid from the Ward's estate essentially guarantee that they prevail in any matter. Moreover it is usually not a single attorney hired by the Guardian but an army of attorneys and specialists who, paid for by the Ward, mount and insurmountable offensive against individuals who just want to see the right thing done to their loved one.

Another interesting disadvantage that accrues to anyone opposing a guardianship is the issue of representation. Guardianship companies have a policy of hiring as many top-rated attorneys in that field to represent them as possible even smallest matters. Consequently when an individual who is fighting a guardianship seeks representation, conflict of interest issues arise which prevent the protesting family member from hiring from among the best attorneys. The net result is that representation for family members is usually performed by attorneys who were not intimately familiar with such cases and who are not court insiders and are thereby significantly disadvantaged. Court insiders also have an inside track to the judge since they actively contribute to his reelection campaigns and thus are favored whether intentionally or unintentionally.

The second tier takeholders

Professional for-profit guardianship is an incredibly lucrative industry. The second tier stakeholders in this industry profit directly from their relationships with and services to guardians and lawyers. Among the stakeholders are real estate agents, appraisers, insurance companies. Home health companies, nursing homes, assisted-living facilities, pharmacies, antique and jewelry stores, used car salesman, physicians, hospitals, home health aides, durable equipment dealers and a host of others. Each of these stakeholders are freed from market forces and as a guardians preferred vendor, guaranteed payment at top levels by the court since their appointment is preapproved by guardian's motion to the probate judge. Hours are inflated, billing rates padded and inflated. Services that have been authorized and paid for may or may not be performed. Providers made duck the need for proper insurance or licensure knowing that they are protected by the Ward. Particularly if the Ward has been chemically restrained the amount of care actually needed by the Ward is minimal since they have been reduced to a vegetative state chemically. Additional insults such as feeding tubes which have become outrageously common form of guardianship abuse, further reduce the need and cost of feeding individuals. When profit is the primary motivator and there is no risk involved is human nature to take advantage of the vulnerable. That is the ultimate explanation for the abuses in guardianship when one human being actually owns another, a form of human trafficking.

The self-dealing act of flipping a wards home is particularly egregious and has been demonstrated time after time in the state. After gaining permission from a judge, the Guardian is authorized to sell the Ward's home on the plea that more money is needed for the care of the Ward. The Guardian arranges a straw man sale to an associate for a fraction of the home's value and reports that sale to the court. But the Guardian does not report that the straw man then turns around and sells the home for full market value realizing an enormous profit in one day. Similar such incredible transactions take place routinely in abusive guardianships

Another stakeholder in guardianship is government. Numerous investigations have proven that taxes that might've been collected from the estate of the Ward are never collected because the funds and profits from the Ward's asset devolved to the

guardianship stakeholders who do not report that income. The government is cheated regularly and is prevented from collecting its fair share of taxes.

The victims and their families

After prolonged probate court litigation, civilian participants are injured and damaged. The term legal abuse syndrome has been used to describe the repeated failure of expectations of justice in court that lead to depression, mental illness, physical illness and despair among those who attempt to stand up to the for-profit guardianship industry. This now recognizable condition is a variant of posttraumatic stress syndrome.

Adding to that awful scenario is the realization their loved one is slowly being killed by a process that is supposed to protect them. The most egregious aspect of this process is the use of off label atypical antipsychotic drugs that are routinely given as “handler drugs” to silence wards so they are not disruptive in their new but terribly strange and frightening environments. Bearing witness to this abuse is horrifically painful.

The combination of the loss of a loved one over a long period of time and the loss of the accumulated assets, home, mementoes and work of a lifetime to a family is often too much to bear. Many families after fighting the system for years simply retreat, give up and try to heal their wounds, usually unsuccessfully. Nearly all family members who have been involved in litigated and contested guardianships become financially insolvent.

In cases where the Ward survives it is common for the Guardian to impose outrageous fees to allow a family member to visit with their loved one. For families that are already stressed financially the burden of paying anywhere from $100-$500 spend a few hours with their loved one is an outrage designed purely to extract retaliation from anyone who tries to defend their loved one. Even worse Guardian retaliation also takes another sinister form in vicious "stayaway orders". These orders are the most painful retaliation when they family member is accused of heinous activities when the Guardian creates the illusion that they could harm the Ward. In almost all cases these are nothing more

than egregious retaliatory actions designed to defame a family member and color the court that he is evil and unworthy to even visit with the loved one.

Other than the awful treatment that wards receive in this system, this blatant abuse of family members is the most reprehensible and egregious form of retaliation imaginable. All of it is based on the unquenchable and unchecked thirst for power, control and money exercised by the stakeholders and permitted by disinterested judges in the for-profit guardianship industry.

Conclusion

Without massive changes to the structure and funding of probate courts throughout the State, it's unreasonable to expect cases that are litigious, as are all abusive guardianship cases, to receive an acceptable level of jurisprudence and due process required. Instead as we have seen, outcomes in litigated probate cases are determined with less than full attention to probate rules or statutory requirements apparently in pursuit of the most expeditious manner possible to dispose of the cases rather than give them full attention. The predictable outcome of such carelessness is that court regulars receive the benefit of inadequately considered judicial decisions at the expense of victims and their families.

The likelihood that such a sea change will occur is extremely low and it is beyond the scope of this presentation to make recommendations regarding reformation of the Florida State Court system. However the fallout from a dysfunctional court system populated by those who would improperly benefit from it at the expense of innocent citizens must be addressed.

What can no longer be denied is that serious abuses have existed and continue to exist in the for-profit guardianship industry and that we must now find solutions expeditiously.

Recommendations

Solving this complex, difficult and dangerous problem set by nibbling around the edges has been a failed strategy. Instead we herein propose an elegant, simple, effective and easy solution. While bills addressing specific deficiencies in the system are welcome, that process has never resulted in the sweeping changes needed today.

We propose a legislative action that would effectively and immediately change the risk reward ratio in abusive probate guardianship cases. Further this solution would require

minimal or no legislative funding which has been a primary roadblock to effective reform.

Florida has been among the worst states in the union for human trafficking. Atty. Gen. Pam Bondi, has taken on the challenge of human trafficking for sex and work crimes. Substantial penalties are already in place for those convicted of human trafficking and law enforcement is aggressively investigating and enforcing violations.

We argue that Abusive Probate Guardianship should be included in the definition of human trafficking in all Florida applicable statutes.

This solution, which would require essentially no funding, would immediately have the effect of discouraging egregious behavior by guardians and lawyers. For the majority of honest lawyers, guardians and judges, the solution should pose no threat whatsoever and should engender no opposition. This solution is apolitical and should not engender partisan bickering. This solution empowers law enforcement to enthusiastically do its job. This solution will be received gratefully by senior citizen constituents. This solution calls attention to the plight of probate judges who require far more assistance from the legislature to run their courts more effectively. This solution calls for no additional changes in the probate rules and no other controversial changes in statute 744 which would surely imperil ultimate passage. This solution will ease the burden of outrageous excessive litigation in probate cases. This solution will be for the benefit of every Ward in the state and every potential Ward. The solution will provide assurances to the public that its government intends to restore faith in the judicial and legislative process.

Historical experience in Broward County indicates that when effective significant penalties are in place, law enforcement is far more likely to pursue vigorous investigations and indictments of wrongdoers. The frustration expressed by law enforcement is that perpetrators often skate with the tiny slap on the wrist and it is therefore frustrating and unsatisfying to work cases against them. This solution eliminates that roadblock and should invigorate law enforcement to actively and aggressively pursue those who engage in the human trafficking associated with abuse in probate guardianship.

Coupled with legislation last year by Rep. Passidomo and Senator Brandes, the State would now be armed with the ability to perform detailed audits of suspected abusive guardianships and back them up with the gravitas of the penalties in existing legislation for human trafficking.

We offer the solution for your consideration and support.

December 26, 2014

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