Objective analysis of conflicts of interest and authority in Florida's guardianship system

. A White Paper by Americans Against Abusive Probate Guardianship

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As if the for-profit Guardianship system was not complex enough on its face, there are certain legalistic issues that confound attempts at reform. The tripartite system of state government which creates the executive, legislative and judicial branches of government, creates inevitable crossovers in responsibility and authority which confuse the administration of the law and promulgated rules and procedures that are at odds with one another from time to time. This is the situation in guardianship. The reason there are so many words spent in the statutes, probate rules and other legal documents that deal with the ability of government through the concept of Parentis Patriae to seize individuals from their full and legitimate status as citizens with civil rights into a system of guardianship-- which is in theory at least governed by a minimum of three state governmental divisions –

- the executive branch which appoints agency directors,
- the legislature which creates the instructions to judges known as guardianship statutes,
- the judiciary which interfaces with the public to in theory execute the legislatures wishes and other investigatory and enforcement agencies (DOEA, DCF, APS) as well as a host of other state functionaries who are stakeholders in the guardianship system and provide some level of input into its operations.

Add the fact that the statutes clearly demand that guardianship statutes conform to Florida bar rules and it is easy to understand why there is confusion even at the highest levels of who and what agency is responsible for oversight and accountability in guardianship. It is more like a 3 to 5 ring circus each with their own agenda each following their own rules and each with only minimal ability to effectively influence the other.

This clear eyed and straightforward explanation underscores the vexation encountered by families trapped in guardianship who literally do not have any authoritative entity to address to lodge complaints about guardians in any meaningful way. Further, the judiciary takes umbrage at those who oppose its godlike status and appears to either take pleasure in or at the very least not concern itself with the retaliation suffered by those families from the guardianship system.

We have been voicing our exasperation that the only person who has oversight of the court-appointed guardian is currently the very judge that appointed her and has a favorable relationship with her, particularly when the Guardian is accused of misdeeds by strangers who been labeled as evildoers by the Guardian.

Now all of these evildoer Advocates and families come along and would like to create or identify an agency or at least a process or pathway that will be able to supervise, investigate, reprimand, suspend or remove a guardian who does not adhere to acceptable standards, and then enforce through this agency. The judge's reaction is totally protectable.

Consider this typical scenario faced by families in the classic for-profit guardianship crisis:

Someone (almost anyone) comes into probate court and files a paper alleging that that you, the alleged incapacitated person, are no longer *sui juris*. The judge goes through a ritual that may or not be rigged, and then issues a decision that you are no longer *sui juris*-- *you have instantly and without due process, become a ward*. What to do then? You are now similar to an infant, but you don't have your mother and father to take care of you, so the court has to take care of you. You have become a piece of property owned and controlled in total by your for-profit Guardian.

Despite having the ability to create wards, the judicial system has absolutely no resources to care for these wards of the state. The judge can't go to your house and help you open your mail, pay your bills, and get you to the dentist, so the judge punts. He has to appoint a "court officer"-- someone he knows and trusts-- to help the court take care of its newly minted WARD. The judge reviews an application of someone who is willing to assist the court, and then appoints that person as the judge's assistant to help take care of the WARD for the court. The assistant is called a guardian. The Guardian has responsibilities follow certain rules and interacts with the judge on a regular basis , including asking the judge or money to do their jobs. Every time guardian is not sure what to do, the guardian goes into the court again with lots of motions for instructions, and makes money every time they do. The court gives specific instructions to the the judges trusted assistant the guardian, and the guardian resumes taking care of the WARD on behalf of the judge. A very cozy and profitable relationship.

Now comes along aggrieved family members and friends, who are convinced that the court has entirely too much exclusive authority and misplaced confidence in the guardian, who in the judge's mind is a wonderful person doing great things for society and is beyond suspicion. And we have the temerity to seek a government agency other than the court to have at least part of the authority over the guardian!?!? Chutzpa!!

Let's put on the judge's hat for a moment and try to predict the judge's response ...

THE COURT: I am doing everything in my power to take the best possible care of my WARD, who can no longer take care of himself. I have carefully checked all the qualifications of the applicant before appointing her as guardian, to assist me in doing my job. I have worked with this person before and like them because they know how to play this game and make my life little better because they get these cases off my desk so I can concentrate on other things. The guardian is my personal representative at the home of the WARD, similar to my court MONITOR or my court BAILIFF. The guardian is an officer of this court and deserves much the same respect as you would show to me, the judge. Questioning the authority or the competence of the guardian whom I appointed to assist me is almost the same as contempt of court. Now, on top of that, you want to strip me of my power and give it to an outside agency. Well, that would be a violation of the SEPARATION OF POWERS DOCTRINE of the United States Constitution. No other agency of government can tell the judiciary what to do. You are threatening the principle of INDEPENDENT JUDICIARY that has been upheld countless times by the United States Supreme Court. Consider yourself fortunate that I do not try you on treason! For heaven sake don't think I'm ever going to give you the benefit of the doubt in my court.

Perhaps after walking a mile in the probate judge's shoes, you will agree that in order to reduce the judge's exclusive grip on the guardian, you will either have to dismantle the entire body of guardianship Law-- which will never happen---, or you will have to create an agency that exists within the Judiciary itself, much like the Ethics Review Board. However, the problem persists as long as an adult citizen who has been adjudicated sui *juris* can be converted to a WARD of the court. Unless and until the judiciary undertakes an initiative to police itself and provide recourse for acts of elder abuse performed by predatory guardians in their service to the court, the likelihood of meaningful accountability is negligible.

Then, with reference to advance directives, the single most powerful obstacle to becoming the Ward, there is the issue of the executive branch. The Governor appoints the Secretary of Health, the Secretary of AHCA and the Secretary of Elder Affairs. Those three Secretaries decide whether the health industry respects the authority of a designated Health Care Surrogate of a person who has a guardian. Their present policy, under instructions from the Governor, is to completely ignore the Surrogate and to ignore the existence of the entire Advance Directive, in violation of State Law, FS Chapter 765. Consequently, statutes of the legislature and direction of the executive branch are in conflict and create a situation in which a judge can easily justify the instantaneous revocation of carefully prepared and memorialized advance directives. This is a direct and well lubricated pathway to the initiation of additional for-profit guardianships.

Therefore the Governor himself is a large part of the problem with regards to advance directives. The Governor's three Secretaries usurp the power that the Legislature conferred on the Surrogate, and they illegally hand that power via the judge to the guardian. What good does it do to pass more laws restricting the authority of the guardian, if the entire Executive Branch of government is going to defy those laws?

This distinct but parallel issue of advanced directives in guardianship has little to do with the court system. It is all about how the Executive Branch systematically misinterprets a court order appointing a guardian.

As is obvious now, this dyscoordination and conflict between the three branches of government collide to produce vagaries within the administration of the guardianship laws and statutes regarding advance directives in guardianship. These conflicts ultimately result in the creation of excessive numbers of guardianships many of which become abusive. The resulting chaos and lack of accountability are breeding grounds for predation by unscrupulous guardians and those who defend them.

The solutions to this vexing state of affairs are elusive.

The judiciary branch, including the unified Florida bar of which all judges are members, is loath to do anything that might restrict a judge’s Godlike authority in his own court room or to impede the ability of its members to hourly bill for their services. Further the alleged underfunding of probate courts and courts in general in the state of Florida is used as an excuse to explain why judges have to cut corners, ignore certain statutes and depend even more heavily on for-profit guardians that are not paid for by the court, which is already strapped for cash. Hence the reliance on the assets of the Ward to pay for their own abuse neglect and exploitation.

The legislative branch has demonstrated a willingness to create substantial reform legislation, but has no authority to enforce the very statutes it creates. Despite finally recognizing the

existence of predatory guardianships throughout the state, attempts at legislating it away could fail for lack of a pathway to accountability, enforcement and prosecution.

An even more vexing problem is the role of the executive branch. Without a clear-cut direction to the three agencies that interface with the guardianship and advance directives process, the quick and easy annihilation of advance directives will continue unabated. This of course leads to more guardianships and more likelihood of guardians acting badly.

Solutions?

DCF/APS

One solution proposed in house Bill 5, 2015 is to refer individuals with complaints about Guardian misbehavior to the abuse hotline of the Department of children and families. In theory such a complaint would be investigated by:

*The Adult Protective Services Program, **part of the legislative branch of government**, is charged with protecting vulnerable adults from being harmed (Chapter 415, F.S.). These adults may experience abuse, neglect, or exploitation by second parties or may fail to take care of themselves adequately. Florida statutes require any person who knows or who has reasonable cause to suspect any abuse of vulnerable adults to report that information to the Florida Abuse Hotline.*

The Florida Abuse Hotline screens allegations of child and adult abuse/neglect to determine whether the information meets the criteria of an abuse report. If the criteria is met, a protective investigation is initiated to confirm whether or not there is evidence that abuse, neglect, or exploitation occurred; whether there is an immediate or long-term risk to the victim; and whether the victim needs additional services to safeguard his or her well-being.

In addition, Adult Protective Services assists vulnerable adults to live dignified and reasonably independent lives in their own homes or in the homes of relatives or friends so that they may be assured the least restrictive environment suitable to their needs (s. 410.602, F.S.).

These responsibilities are framed from the perspective of the legislature wanting to identify abusers, typically within the family of vulnerable individuals. Consequently the training and experience of adult protective services is not compatible with detecting abuse at the hands of guardians. The idea that guardians are the abusers is foreign to the investigators. The awful experience of families protesting guardians is that the protesters are often accused of the abuse rather than the actual abusers. Indeed, while statute 410.602 guarantees the least restrictive environment, guardianship by definition in FS 744 is the *most* restrictive environment possible. This is an inherent conflict for adult protective services.

Referral to the Department of children and families and adult protective services Central abuse hotline is highly unlikely to result in the intent of currently proposed legislation to direct complaints about Guardian behavior to that hotline as a pathway to accountability for guardians without reorientation training and education of APS officials.

Conclusion:

Meaningful reform of existing guardianship statutes is only one step in the governmental steps needed to alleviate the burden on Florida families posed by abusive predatory guardians.

Only a coordinated effort involving the three branches of government which directly affect the day-to-day real world issues in guardianship can effect desperately needed changes to protect Florida citizens.

The 2003 commission on guardianship authorized by the Supreme Court
http://www.flcourts.org/core/fileparse.php/266/urlt/guardianshipmonitoring.pdf

effectively delineated severe deficiencies in a variety of issues in guardianship in Florida. But importantly it's a very function was simply to advise the court of its findings -- not to initiate reform.

"*The mission of guardianship monitoring is to collect, provide, and evaluate information about the well-being and property of all persons adjudicated of having a legal incapacity so that the court can fulfill its legal obligation to protect and preserve the interests of the ward, and thereby promote confidence in the judicial process.*"

This very statement makes clear the court's position that the court and only court is capable of preserving the interests of the Ward. Sadly, the court has demonstrated over time that it has valued its relationships with professional guardians over the due process and rights of families and wards and over the clear-cut structures found in FS 765.

We propose the creation of a gubernatorial commission constituted with all three branches of government and to include representation from state's attorneys and the office of attorney general. The purpose of the commission would be to coordinate input and authority to effectively lead to a pathway for accountability for unlicensed professional guardians in the state of Florida.

Only by combining all relevant government entities into a cohesive and effective authority can relief and justice to given to the people of Florida.

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