

Guardianship Reform

by Kathleen Harris

Reform initiatives in guardianship have recently been generated from the Michigan Supreme Court and the Legislature. These initiatives have resulted mostly from highly publicized abuses of wards by a professional guardian operating in Wayne County first reported in 1996. However, guardianship reform in Michigan began long before these publicized abuses and for a wider range of problems. Questions have been raised since the 1970s about the way our society has in general viewed and treated individuals who have disabilities. To understand the current efforts in guardianship reform, it is important to recognize the history of service and support systems that have been provided to people with disabilities, the problems identified, and the philosophical, legal, and support system changes that have taken place as a result of those identified problems.

Until the 1970s, public institutions often presented the only treatment or service choice for individuals with disabilities. This resulted in mass institutionalization, which subjected individuals to extraordinary overcrowding, neglect, and abuse. Even those who remained with their families at home were excluded from schools and meaningful social and community services. Nursing homes presented the only options to older adults who needed more care than their families could provide.

The 1970s saw the first class-action lawsuits filed regarding the deplorable conditions in institutions. In Michigan, the Association for Retarded Citizens filed a suit against the state over conditions at the Plymouth State Home.¹ The suit ended in a settlement that included the closure of Plymouth and placement of the individuals residing there into small, community-based homes. This case and other such legal actions highlighted the general abuse of the rights of individuals with disabilities. As in the *Plymouth* case, courts all over the country began ordering community-based services and concerning themselves with the enhancement of dignity, self-determination, and the protection of basic civil and human rights of individuals with disabilities.

New laws were passed in recognition of the need to integrate citizens with disabilities into our communities. Title V of the Rehabilitation Act was amended in 1973 which prohibited discrimination based on a disability.² In 1975, Congress passed the Developmental Disabilities Assistance and Bill of Rights Act (DD Act).³ The DD Act mandates the establishment of a state protection and advocacy system and guarantees rights of individuals with developmental disabilities. This act contains a Bill of Rights, which states that individuals have the right to treatment, services, and habilitation that are designed to maximize the developmental potential of the individual.

The Protection and Advocacy for Mentally Ill Individuals Act (PAMII)⁴ provides for protection and advocacy services of individuals labeled mentally ill. The PAMII Act, like the DD Act, mandates the establishment of a state protection and advocacy system. Its purpose is to ensure that the rights of individuals with mental illness are protected and to investigate incidents of abuse and neglect as reported to the system. The Protection and Advocacy of Individual Rights Act (PAIR),⁵ covers the rights of people with disabilities who do not fall under either the DD or PAMII Act.

Michigan passed the Michigan Persons with Disabilities Civil Rights Act (MPDCRA) in 1977.⁶ This law prohibits discrimination on the basis of disability in employment, housing, access to public buildings, transportation, or admittance to programs. The Michigan Mandatory Special Education Act (MMSEA)⁷ was passed in 1979, which guarantees education to all Michigan citizens with disabilities through the age of 26. The corresponding federal law, the Individuals with Disabilities Act (IDEA), was also passed in the mid-70s, guaranteeing a free, appropriate, public education to students with disabilities under the age of 22.⁸ Later, in 1988, the Fair Housing Act was amended to prohibit discrimination against people with disabilities in the sale or rental of housing.⁹

The Americans with Disabilities Act, (ADA) the most significant civil rights legislation for people with disabilities was passed in 1990.¹⁰ The ADA prohibits disability-based discrimination in employment, public services and accommodations, and telecommunications. All these laws have promoted inclusion of individuals with disabilities into their own communities and brought new awareness of the abilities and contributions of people with disabilities to our society.

Guardianship, at one time seen as a benign way to "protect" people with disabilities, began to be seen more often as an intrusion into a person's basic civil and human rights and to be avoided if at all possible. In 1974, a Michigan guardianship statute was passed as part of the Mental Health Code specifically for individuals with developmental disabilities. This law stated as its purpose, "to encourage the development of maximum self-reliance and independence in the person."¹¹ (A developmental disability is generally defined as a disability that is manifested before the age of 22, is likely to continue indefinitely, and limits three or more major life activities.)¹²

A list of safeguards for people facing the imposition of guardianship was put into place including the right to counsel, independent evaluations, a hearing, and a jury trial.¹³ A legal preference was established for partial guardianships for specific decisions rather than full guardianship over all possible life decisions.¹⁴ It specified that guardianship "shall be utilized only as is *necessary* to promote and protect the well-being of the individual."¹⁵ (Emphasis added.)

In 1988, the Michigan Legislature followed this trend by enacting the Michigan Guardianship Reform Act covering the appointment of guardians for "legally incapacitated persons."¹⁶ This law covers any adult who does not fall under the label of "developmental disability" and would include people with mental illness and older adults. The changes made in this law were similar to the DD Guardianship Statute in the Mental Health Code and included provisions that guardianship appointments be made only to encourage "self-reliance and independence in the person."¹⁷

Despite these efforts to ensure that no one had a guardianship imposed unnecessarily, Michigan's guardianship numbers increased steadily. In a 1990 national study of 22 states, Michigan far exceeded the other states in numbers of guardianship petitions filed.¹⁸ Furthermore, there have been reports of serious improprieties and abuses connected to guardianship and conservatorship proceedings in Michigan.¹⁹ The principals of Guardianship, Inc., a corporate guardianship program in Wayne County were convicted of federal felony charges in relation to fraud and abuse of their wards and received prison terms.²⁰

As a direct result of these reports, the Elder Law and Advocacy Section of the State Bar drafted a resolution

requesting the Supreme Court to create a task force on guardianships and conservatorships. In September of 1996 the Representative Assembly of the State Bar of Michigan unanimously adopted the resolution. In November of 1996, the Michigan Supreme Court officially created the Task Force on Guardianships and Conservatorships.

Its mission was stated as the following:

The Task Force on Guardianships and Conservatorships will examine how the judiciary, legislature, and executive branch agencies can better protect the interests of those for whom guardianship or conservatorship is sought. The Task Force will initiate its work with a review of the recommendations of the Michigan Adult Services Task Force. The Task Force will recommend changes in court rules and management policies, statutes, and make other recommendations as appropriate to improve the ability of trial courts to protect the rights and interests of those unable to protect themselves, while maximizing the independence of individuals in need of protection.

The Court appointed 25 people to the task force with the Honorable Phillip E. Harter, Chief Judge of the Calhoun County Probate Court, as chairperson. Represented on the task force were probate court judges, probate court registers and staff members, both houses of the Michigan Legislature, relevant executive branch agencies, several advocacy groups, the State Bar of Michigan, academia, and members of the probate bar. In July of 1998, the task force published its following final 11 recommendations, adopted unanimously. (See sidebar.)

The recommendations are geared toward reducing the number of guardians appointed as well as providing more protection for the disabled from abuse, and more opportunity for independence from those who are appointed their guardians.

While the task force was meeting, other legislative changes that reflected attitude and public policy changes about individuals with disabilities and guardianship were taking place. In 1996, person-centered planning was written into the Mental Health Code as a requirement for all recipients of mental health services.²¹ Person-centered planning is defined as "a process of planning for and supporting an individual that honors the individual's preferences, choices and abilities."²²

The person-centered planning process assumes that all people have preferences, regardless of their level of disability. Through this process, the person's preferences are determined by any method possible. In some cases, observations of the individual's behavior by those closest to them are used to determine preferences. Such preferences are then honored as long as they are not harmful to the individual.²³

Person-centered planning is also considered a guiding principle for the elderly and disabled. (See Michigan's Long Term Care Work Group Report and Recommendations, June 2000.)²⁴ The Public Health Code has long mandated that people who are elderly and disabled take part in their own treatment plans.²⁵

It is now the policy of the Michigan Department of Community Health that

services need to be consumer-driven and may also be consumer-run. This policy supports the broadest range of options and choices for consumers in services. It also supports

*consumer-run programs which empower consumers in decision-making of their own services.*²⁶

As the law established person-centered planning and individuals' rights to make decisions about their treatment options, Self-Determination Initiatives began developing in conjunction with this decision-making process. The Robert Wood Johnson Foundation provided funding to 19 states, including Michigan, for Self-Determination Initiatives demonstration projects.

The projects sprung from reforms that question the almost total control public funders and providers have over the life choices of individuals with disabilities and their families. In that system, funds and decisions are allocated to providers. Individuals with disabilities and their families have little or no say about which providers are to supply services or what those services should be.

Changing this imbalance of power and control is the goal of self-determination. Decision-making by the consumer is key to this effort. Obviously, appointing a guardian to make decisions for the consumer can defeat this process. However, asserting that each individual should make their own decisions doesn't mean that each individual doesn't need help, assistance, and support.

Although Michigan courts have not considered this issue, the Iowa Supreme Court has recognized that outside supports for an individual may negate the need for guardianship.

*In making a determination as to whether a guardianship should be established...the court must consider the availability of third party assistance to meet a...proposed ward's need for such necessities...*²⁷

Tom Nerney, executive director of the Center for Self-Determination has stated:

*We have to reject the very idea of incompetence. We need to replace it with the idea of "assisted competence." This will include a range of supports that will enable individuals with cognitive disabilities to receive assistance in decision-making that will preserve their rights...*²⁸

Stanley S. Herr, Professor Law, University of Maryland School of Law has studied guardianship laws over the world. He states:

A number of countries have adopted new legislation in recent years to minimize the use of guardianship, to impose only its least restrictive alternatives, and to introduce other innovations...The imposition of guardianship posed important ethical, legal and practical problems for the disability rights community...The ethical questions involve ideas of paternalism, liberty, prevention of harm and exploitation, beneficence, and the power relationships between guardian and ward. Finding better answers will implicate vital principles of self-determination, including freedom, authority, support and responsibility.²⁹

Thus, support systems in Michigan, as well as most other states are exploring alternative means to guardianship and ways to restrict the effects of guardianship imposition on the choices of individuals with disabilities.

Other Michigan legislative efforts have continued this trend. The Estates and Protected Individuals Code

(EPIC) was adopted, effective April 1, 2000, replacing the Revised Probate Code. This effort was begun by the Probate and Estate Planning Section of the State Bar. This section spent eight years to simplify, modernize, and ensure interstate uniformity of the Probate Code, culminating in Senate introduction of "The Estate Settlement Act."

The Elder Law and Advocacy Section of the State Bar, joined by other disability organizations, suggested language changes to ensure that recent reforms were protected and promoted. Specifically, they wanted to ensure consistency with the 1988 Guardianship Reform Act. Also, in light of the recent guardianship scandals reported by the media and the resultant Supreme Court Task Force, they wished to assure the new law reflected consistency with the task force's recommendations.

Finally, EPIC was passed, and its changes regarding guardianship help to promote dignity of adults who are subject to guardianship or conservatorship. One provision provides that a guardian consult his or her ward about major decisions whenever meaningful communication is possible.³⁰ The act also establishes a clear and convincing evidence standard for the imposition of a conservatorship.³¹ (Although this standard has existed for guardianships, it has never been established before for conservatorships). EPIC establishes the right to the same due process protections for conservatorship proceedings as exist for guardianship.³² It also includes provisions for a limited conservatorship.³³

In October, 2000, two senate amendments to House Bills 5919 and 5921 were passed. These amendments were the first legislative response to the Michigan Supreme Court Task Force recommendations.

These bills provide:

- Two separate findings must be made on the record to grant a guardianship under EPIC: that the individual is an "incapacitated individual" and that imposition of guardianship is necessary to provide for the individual's needs.
- A guardian cannot be granted powers by a court that have already been designated to a patient advocate, if the court is aware of the designation and there is no allegation that the patient advocate is not fulfilling his or her duty.
- If a court grants a guardianship not knowing of a patient advocate, the powers of the patient advocate supersede those same powers of the guardian.
- A bond or other restrictions of the letters of guardianship may be ordered by a court as necessary to protect the individual's property.
- A guardian shall serve a copy of the annual report on the ward and all other interested persons.
- A conservator shall serve a copy of the inventory on the protected person, regardless of the individual's presumed mental capacity to understand it, and upon all other interested persons.
- A conservator shall serve a copy of the annual account on the protected individual and all other interested persons.

Proposed Court Rules are being considered as of this writing that promote more protections of people who

have guardians and/or conservators. These rules include a 14-day mandatory notice to interested parties of the sale of real estate, accountings must be reviewed every three years, and a conservator has an obligation to encourage maximum independence (as a guardian must do). The rules also provide that a health care power of attorney takes precedence over a guardianship. (For a complete list of proposed rules, *see Proposed Amendments to MCR 5.405, 5.407, 5.409, and 5.784*).

A number of legislative efforts are still underway to implement the recommendations of the Supreme Court Task Force. One notable bill, SB 863, sets staff ratios and visitation requirements for professional guardians. It also outlaws officers of professional guardians from making campaign contributions to judges, prohibits commingling of funds and all transactions constituting conflicts of interest, bans kickbacks by nursing homes and funeral homes to professional guardians for purchasing goods or services, and bans kickbacks by professional guardians to individuals recommending them as guardian or conservator.

The trend in all these reform efforts is twofold: to stop unnecessary guardianships from being imposed, thus maximizing independence and self-determination of all Michigan citizens; and to ensure that vulnerable people who have had guardianship imposed are not subject to financial and emotional abuse as evidenced by cases reported in Michigan in recent years.

Just as supports have evolved since the 1970s to assist people with disabilities to participate in education, employment, housing, and other community opportunities, supports are now evolving to assist people in decision-making. "Assisted living" has replaced institution living, and "supported employment" has provided more job opportunities. The concept of "assisted competence" is now continuing the evolution that gives people with disabilities the dignity and freedom to develop and participate in the lives they choose.

Footnotes

¹. *Mich Assoc for Retarded Citizens et al. v Donald C Smith, MD, et al.*, Civil Action 78-70384 (ED Mich, Aug. 30, 1979).

². 29 USC 791 *et seq.*

³. 42 USC 6012.

⁴. 42 USC 10801.

⁵. 42 USC 6041.

⁶. MCL 37.0010 *et seq.*

⁷. MCL 380.1701 *et seq.*; MSA 15.41701 *et seq.*

⁸. 20 USC 1400 *et seq.*

⁹. 42 USC 3601 *et seq.*

¹⁰. 42 USC 12101 *et seq.*

¹¹. MCL 330.1602; MSA 14.800(602).

12. MCL 330.1100(19); MSA 14.800(100)(19).
13. MCL 330.1615, 1617; MSA 14.800 (615), (617).
14. MCL 330.1612(2); MSA 14.800(612)(20).
15. MCL 330.1602(1); MSA 14.800(602)(10).
16. MCL 700.5301 *et seq.*; MSA 27.15301 *et seq.*
17. MCL 700.5306(2); MSA 27.15306(20).
18. National Center for State Courts Statistic Project, 1990.
19. *Preliminary Report of Receiver, John M. Chase, Jr. to the Wayne County Probate Court, In the estate of Alice M. Esper*, File N. 90-845330-CG, 1996.
20. *US of America v Paulette Horton*, USDC ED Mich, S Div, #99-80508.
21. MCL 330.1712; MSA 14.800(712).
22. MCL 330.1700(g); MSA 14.800(700)(g).
23. *Michigan Department of Community Health, Person-Centered Planning Practice Guideline*.
24. *Michigan's Long Term Care Work Group Report and Recommendations*, June 2000 at 21.
25. MCL 333.20201(3)(d); MSA 14.15(20201).
26. *Michigan Department of Community Health, Consumerism Guideline*.
27. *In the Matter of Hedin*, Iowa Supreme Court, (1995).
28. *Common Sense, Issue 6-1999; a Publication of the National Program Office on Self-Determination, University of New Hampshire, Institute on Disability, funded by the Robert Wood Johnson Foundation*.
29. *Id.*
30. MCL 700.5314(1); MSA 27.15314(1).
31. MCL 700.5406(6); MSA 27.15406(6).
32. MCL 700.5406(2), 5406(4); MSA 27.15406(2), 27.15406(4).
33. MCL 700.5419(1); MSA 27.15419(1).

Sidebar

Recommendations to Reduce Unnecessary Petitions for Guardianships and Conservatorships

Recommendation 1:

Each county should establish a local resource for citizens to help assess the need for guardianships and conservatorships, to share resources, to resolve issues outside the probate court system, and to assist in

developing alternatives to guardianships and conservatorships.

Recommendation 2:

Existing statutory provisions for medical treatment decisions are inadequate or not recognized by many, and therefore, legislation should be explored.

Recommendation 3:

A broad education effort emphasizing the presumption of competency and alternatives to guardianship should be targeted particularly at hospitals, nursing homes, and other medical or psychological personnel.

Recommendation 4:

Statutes and court rules should be changed to clarify that decisions of patient advocates have priority over all other substantive decision makers.

Recommendations to Reduce Unnecessary Appointments of Guardians and Conservators

Recommendation 5:

Probate Court forms used for petitioning the court for, and ordering the appointment, of a guardian or conservator should be amended to provide for, respectively, more screening information and separate findings on functional capacity and the necessity for the appointment.

Recommendation 6:

Guardians *ad litem* should include information evaluating functional capacity in their investigations and reports to the court, and should recommend the use of mediation services to resolve disputes, which may come up over the terms of a prospective guardianship.

Recommendation 7:

Judges should have their initial mandatory training supplemented with instruction on cognitive and physical impairments, mental illness, and the aging process, and should periodically be required to receive subsequent training, which both refreshes old standards and introduces new issues.

Recommendations to Better Manage Guardianships and Conservatorships

Recommendation 8:

Minimum ethical standards for professional guardians and professional conservators should be promulgated and enforced.

Recommendation 9:

Those courts failing to follow statutory and court rule requirements should be compelled by the Supreme Court to comply.

Recommendation 10:

Statutes, court rules, forms, and practice should be changed to require the court to review the annual accountings of guardians and conservators, order bonds or restrictions in relation to property and estates, and confirm both the decisions to sell real estate and the sale price.

Recommendation 11:

Courts should increase the recruitment of volunteer guardians, and more guardians who are state agency funded and monitored should be provided as guardians of last resort.

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