

Remarks
Before the
U.S. Senate Special Committee on Aging
By
Judge Mel Grossman
17th Circuit, Florida

Mr. Chairman and Members of this Committee:

Thank you for inviting me to inform you as to how the State of Florida is handling guardianship issues affecting the elderly.

For the last 40 years Florida has been on the leading edge of a demographic wave of aging that has swept across the sunbelt and increasingly impacts every community. Because Florida has the longest history in dealing with issues resulting from the frequent occurrence of diminishing capacity, we have had the opportunity to develop systems of protection for those individuals who become vulnerable as a result of aging. This year our Legislature enacted and our Governor signed the second major rewrite of Florida's guardianship laws in less than 20 years.¹ While this legislation resulted in significant changes with regard to the process of guardianship, the intent to protect those subject to guardianship proceedings has not changed.

The principle goal in Florida was and is both the protection of individuals who find their capacity questioned as well as protecting those who have been determined to be partially or fully incapacitated and had a guardian appointed for them.

To these ends Florida has provided clear due process protections for someone alleged to have lost his or her capacity. There has also been created a system of significant and continual review of the personal and property issues affecting the individuals who have had some, or all, of their rights removed and are wards of the court.

The initiation of proceedings to determine an individual's capacity results from the filing with the Circuit Court a petition seeking a determination of the person's incapacity. This begins an adversarial proceeding wherein the court appoints an attorney to represent the individual

¹ See, Ch.744, Florida Statutes (2006).

<http://www.flsenate.gov/statutes/index.cfm?StatuteYear=2006&Tab=statutes&Submenu=1> .

as well as a three person examining committee. The attorney and the members of the examining committee must have a background and education in elder issues.² My Circuit requires that each attorney and examining committee apply and be accepted by the Court. The attorney and examining committee are appointed on a rotating basis for each case. After the appointed attorney and the examining committee have met with the alleged incapacitated person, there is an evidentiary hearing before a Judge or General Magistrate, and based upon the evidence, the Court will find the individual is incapacitated or that the individual has capacity in which case the matter is dismissed. If an individual is determined to be incapacitated, the Court must decide in what areas the individual needs the protection of a guardian. The Court can make a determination that all rights or only some rights are removed from an individual. Before the Court appoints a guardian, a determination is made as to whether any less restrictive alternates may be in place that would provide sufficient protection for the individual. Less restrictive alternative may include health care surrogates, durable powers of attorney, and trusts. If any of these documents are in place, even where there is an incapacity, either no guardian will be appointed or a limited guardianship will be created to cover those areas that are not covered by the documents. The goal in Florida is not to appoint a guardian if there are less restrictive alternatives in place to protect an individual.

Should there be a need for a guardian; another set of protections exists for his or her appointment. If a professional guardian is appointed (a frequent occurrence since so many of our residents are retirees whose families live elsewhere), a background check of criminal and credit history,³ is required as well as for any of their employees having a fiduciary obligation to the ward. Further, professional guardians must be registered with the Florida Office of Statewide Public Guardianship.⁴ A professional guardian cannot be registered unless he or she has passed a competency exam, posted a bond in the amount of \$50,000.00, and completes continuing education.⁵

My circuit was the first to rigorously employ criminal and credit checks for appointment of guardians and our methodology is now the standard for professional guardians.

² See, s. 744.331, Florida Statutes (2006).

³ See, s. 744.3135, Florida Statutes (2006).

⁴ See, <http://elderaffairs.state.fl.us/english/public.html>.

⁵ See, ss. 744.1083-744.1085, Florida Statutes (2006).

Non-professionals, such as family members, are not statutorily required to have criminal and credit investigations, but in my circuit and a few others, the investigations are mandatory. My circuit also requires an annual criminal and credit investigation.

After the adjudication of incapacity and the appointment of a guardian, there are, essentially, three levels of protection. First, every guardian in Florida must be represented by an attorney;⁶ and while the attorney is hired by and represents the guardian, Florida's position is that the attorney has a fiduciary duty to the ward.⁷ Nor is Florida alone in this position. The Supreme Court of Alaska in July of this year, held that an attorney for the ward has a duty to investigate the actions of the guardian and protect the ward.⁸

The second level of protection is the statutory requirement that annual reports are filed and reviewed by the Court to ensure that the ward's care⁹ is appropriately managed and his or her assets¹⁰ protected.

Finally, my Circuit has developed a robust monitoring function, including in-house personnel. Whenever concerns are raised about a ward, be it in a formal pleading, or just a letter (sometimes unsigned), we appoint a Court Monitor, under a statutory grant of authority, who will immediately investigate and file with the Court a report. The presiding judge will then take action, based upon the report, to protect the ward.¹¹

We have spent a lot of time and effort in my Circuit and the 6th Circuit (the St. Petersburg, Florida area), to ensure that a ward's needs are met during the guardianship administration. The reason for this is simple: If we, as judges, are to exercise one of the most awesome powers available to any court, that is the removal of rights that all of us in this room enjoy, and we place someone in charge to protect the ward, it seems to me that the Court has both a legal and a moral obligation to insure that the ward is being truly protected. If we do not take measures to insure that, then what point is there in removing those rights?

There are two new tools on the horizon that will assist the Court in

⁶ See, Fla. Prob. R. 5.030.

⁷ See, Fla. Op. Att'y Gen. No 96-94 (2006).

<http://myfloridalegal.com/ago.nsf/Opinions/EC4BB94C5106D5B5852563F60052F39A> .

⁸ See, Pederson v. Barnes, 2006 Alas. LEXIS 112 (Alaska 2006) .

⁹ See, s. 744.36.75, Florida Statutes (2006).

¹⁰ See, ss. 744.365, 744.367, Florida Statutes (2006).

¹¹ See, ss. 744.105 - 744.1076, Florida Statutes (2006).

improving our protection of wards. Legislation passed this year provides an opportunity to use digital fingerprints so that at anytime a guardian is arrested, the information will be sent by the Florida Department of Law Enforcement to the supervising court.¹²

The other tool is based upon the move toward electronic filing and a paperless court. As of now, only Pasco County has implemented e-filing in probate and guardianship cases but we see more and more of this occurring in States like Colorado, Texas and Washington. My Circuit will begin beta testing of e-filing for probate and guardianship cases in January, 2007. An important and exciting difference between what currently exists and our plan is that we will not only be receiving imaged documents for our Court's records, but will also receive an XML data envelope that will allow data the Court wants to track be placed into a relational data base. The result of this will be the ability of the Court to be more productive and accountable, and perform better case management. It will also provide an ability to quantify information such as changing demographics and needs which will allow the judicial, legislative, and executive branches to plan prospectively for future needs based upon quantifiable information.

While I have been fortunate to obtain enough funds to create the software for developing a system which will be available to all the circuit courts in my state, other jurisdictions dealing with these issues may well need some assistance from the Federal Government in dealing with the increasing size and scope of this area of law. This could well be done with modest infusions of matching fund grants and I would hope that this committee sees its way clear to recommend such a plan.

Thank you for your attention and consideration.

¹² See, s. 744.3135 (3), Florida Statutes (2006).