

ELDER LAW

BY DANIEL G. FISH

Reports on Fiduciary Appointments: Future of Guardianship Practice

THE SEDATE world of guardianship practice in elder law is not accustomed to the glare of the recent tabloid media attention it has received, typified by *The Daily News* headline of May 21, 2001, "System's Exploiting the Helpless."

Two official judiciary reports have been issued whose recommendations are likely to have a profound impact on the guardianship practice through administrative rule making and/or legislation. The reports are very extensive, covering all fiduciary appointments.

This Elder Law column restricts itself to the guardianship appointments. The goal is not to analyze each recommendation, but to identify the main underlying themes of the reports, to assist in guiding the debate about the future of guardianship appointments. There will be ongoing activity on this topic such as the anticipated report from a special committee of the New York State Bar Association.



members of the campaign staff of judges. One county political leader received nearly 100 appointments. A small firm of a county political leader received over 200 appointments. A former appellate judge received nearly 250 appointments. A former Supreme Court Judge received over 60 appointments. The spouse of a law secretary received over 100 appointments. The spouse of a high level managerial employee received nearly 250 appointments.

A long and disturbing history of biased fiduciary appointments and attempts to control the problem is chronicled in the commission report:

The remedies proposed in the past were basically stringent reporting requirements, but the current reports find that the reforms have basically been ignored. The Inspector General Report contains a chart of noncompliance with the reporting requirements of Part 36 of the Chief Judge, concluding that "...even in counties with the best rate of filing compliance, forms were filed in less than half of the cases."

The reports themselves make it clear that biased appointments have been a serious problem for many years, have evaded control despite repeated efforts and have undermined public confidence in the legal system. Despite its own findings, the commission ends up recommending the continuation of the concept of judicial autonomy to make appointments, the very principle that created the current problem. The sole justification given for this position is the need to match the particular needs of the ward with the skills of the appointee. As a remedy, the commission calls for a ban on the appointment of individuals who are members of the classes that have been identified as problematic (State and county political leaders, immediate relatives of high-level nonjudicial employees, former judges, disbarred attorneys, suspended attorneys, those convicted of felonies and those convicted of misdemeanors). There is a recommendation that those adjudicated bankrupt be required to disclose that fact. As a further remedy, the commission calls for more stringent requirements for inclusion on the OCA appointment list, biennial re-registration, the creation of specialized lists and authority to appoint off of the list only with a written explanation.

There is an elegantly simple solution for biased appointments, a blind selection process. If a totally random selection process were implemented, there would be no temptation or opportunity for patronage or favored appointments. If a rigorous qualifying examination were required for inclusion on the random list, quality representation could be preserved. Such an examination already exists. The National Elder Law Foundation is an organization that is already accredited to administer the test for a Certified Elder Law Attorney (CELA) designation in New York State.

'Self-Immolating' Letter

The catalyst for this attention to fiduciary appointments was the self-immolating letter of two politically active Brooklyn attorneys. They were incensed that a court-appointed receiver with no political connection had removed their firm as his counsel. They wrote to the chairman of the Kings County Democratic Party Law Committee (and copied the letter to 43 judges and elected officials) directly linking their 25 years of party loyalty with a perceived entitlement to the appointment. Arrangements that were once guessed at now were openly and flagrantly acknowledged.

Following the distribution of the letter Chief Judge Kaye made two appointments. She appointed a Special Inspector General for Fiduciary Appointments (Sherrill Spatz). She also appointed a Commission on Fiduciary Appointments (commonly referred to as the Birnbaum Commission after the chair, Sheila L. Birnbaum).

Despite the length and detail of the reports, they can be summarized in two sentences. Judges made hundreds of fiduciary appointments based upon special relationships and not merit. Judges failed to monitor the fees they awarded. The response to the reports should also be summed up in two sentences. Appointments based upon special relationships with judges should be ended. Guardianship appointments should be considered separately from all other appointments because the practice is qualitatively different.

The two issues should be kept separate. The allegation of improper appointments is such a charged issue that it tends to overshadow the second issue like a single drop of ink spoils a glass of milk.

The first finding, if the allegations are proven correct, is an abuse and in need of correction. When persons are unable to manage their own assets and the court is called upon to appoint someone to manage the assets for a fee, the potential for abuse exists. The risk is heightened by the fact that the fees of the appointed fiduciaries are paid out of the assets of the impaired person. The court, in approving appointed fiduciary fees, is spending some one else's money.

The official reports create a strong implication that fiduciary appointments were the result of a biased appointment process. The reports identify statistically significant numbers of appointments to political party officials, former judges, relatives of nonjudicial employees and high-ranking

Fiduciaries' Compensation

The second broad area of the reports related to compensation received by fiduciaries in guardianship proceedings. The most controversial recommendations involve secondary appointments and a \$25,000 cap on fees received within a 12-month period. These proposals raise serious questions about the resulting restriction upon access to counsel. In addition, individuals may be reluctant to serve as guardian under this restriction because they cannot delegate their ultimate financial responsibility. In upholding the authority of

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firm for a \$1.2 million special needs trust, the court in the *Matter of Arnold O*, 719 N.Y.S. 2d 174 (3rd Dept., 2001) stated, "Surely, it cannot be reasonably argued by anyone, including respondent, that petitioner would not be liable for any trust losses caused by a breach of his fiduciary duties."

The receiver in a foreclosure proceeding and the guardian for an Alzheimer's patient facing eviction should operate under different rules. The former has purely financial responsibilities and the latter has financial and tremendous personal responsibilities as well. Trying to make both answer to a single set of rules is ill advised. The opinion in *Matter of Arnold O* (supra) supports the proposition that guardianship cases are qualitatively different from other fiduciary appointments. The attorney in that case was appointed guardian of a paranoid schizophrenic and recovered \$1.8 million in a personal injury suit against the State. The personal care provided included securing an 800 number for his ward because his calls to the guardian were so numerous, visiting the facility to assist in medical decisions, sleeping in his car on one occasion when the ward faced an amputation the next day to be sure that he would be available to give consent if it were required, and dealing with threats from a family member of the ward. The Appellate Court recognized the unusual nature of the guardianship practice and reversed the Supreme Court that had rejected fees for these services.

The 'Ilyomade' Case

The recent opinion *In the Matter of Ilyomade*, 2002, WL 257662 (Sup. Court Kings Co. Feb. 4, 2002) involved an indigent 54-year-old man with a psychiatric disorder. On a pro bono basis, the attorney for the impaired person and the court evaluator repeatedly visited the AIP and his family, gave him money to try to assure his appearance in court and finally arranged for a free funeral and burial and engaged the services of a Nigerian priest to preside at the funeral. The court made special note of their efforts "Most recently the media has selected a few cases to use in criticiz-

ing the way the Courts and attorneys handle guardianship matters. The case sub judice is much more representative of the majority of the guardianship cases." To provide the personal services at the most cost-effective rate, the courts should look to innovative programs such as the one in Westchester County that uses a social service agency to provide the personal services needed. The more pressing problem in guardianship appointments may be the lack of funds by certain wards and the absence of a public funding mechanism for their representation.

The Elder Law practitioner is frequently consulted in a time of crisis so late in the process that voluntary planning strategies are no longer available and only the guardianship route is available to protect the older person. When a person suffers a sudden

stroke, traumatic brain injury or is in the advanced stages of Alzheimer's disease and is incapable of comprehension, it is too late to think of power of attorney, joint bank account; inter vivos trust agreement, health care proxy or living will. Article 81 of the Mental Hygiene Law has been an indispensable tool for the protection of vulnerable elderly.

Conclusion

There is a danger that the court or the Legislature will implement such stringent restrictions that attorneys will refuse to serve as court evaluators, counsel to the allegedly impaired person or as guardian. It is imperative that any changes be made only with a full appreciation of the unique characteristics of the guardianship practice.

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