

## REFORMING GUARDIANSHIP REFORM: REFLECTIONS ON DISAGREEMENTS, DEFICITS, AND RESPONSIBILITIES

Marshall B. Kapp\*

At the age of thirteen, a Jewish male ordinarily celebrates a Bar Mitzvah ceremony, and a Jewish female celebrates a Bat Mitzvah ceremony. This event symbolically signifies the individual's entry into the adult community.<sup>1</sup> The modern era of guardianship reform in the United States recently celebrated the functional equivalent of a Bar or Bat Mitzvah, as a broad array of legal academicians, practitioners, and judicial experts in the field gathered for two days at the end of 2001 at Stetson University College of Law for Wingspan — The Second National Guardianship Conference.<sup>2</sup> We met for the assigned purpose of reviewing and revising the recommendations made exactly thirteen years prior at the National Guardianship Symposium, convened in 1988 and known as Wingspread.<sup>3</sup> The 1988 Wingspread Symposium was organized in reaction to revelations of the Pulitzer-Prize winning Associated Press initiative on guardianship in the mid-1980s.<sup>4</sup> By undertaking this event at Stetson, the current

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\* © 2002, Marshall B. Kapp. All rights reserved. Professor of Community Health and Psychiatry and Director, Office of Geriatric Medicine & Gerontology, Wright State University School of Medicine. Adjunct faculty member, University of Dayton School of Law. B.A., Johns Hopkins University, 1971; J.D., with honors, The George Washington University Law School, 1974; M.P.H., Harvard School of Public Health, 1978.

1. Rabbi Joseph Telushkin, *Jewish Literacy: The Most Important Things to Know about the Jewish Religion, Its People, and Its History* 611–613 (William Morrow & Co. 1991).

2. Primary sponsors of the Wingspan Conference were the National Academy of Elder Law Attorneys, Stetson University College of Law, host of the Conference, and the Borchard Center of Law and Aging. Co-sponsors were the ABA Commission on Legal Problems of the Elderly, the National College of Probate Judges, the Supervisory Council of the ABA Section on Real Property, Probate and Trusts, the National Guardianship Association, the Center for Medicare Advocacy, the Arc of the United States, and the Center for Social Gerontology, Inc.

3. The Johnson Foundation's Wingspread Conference Center in Wisconsin hosted the National Guardianship Symposium, which was sponsored by the ABA Commissions on Legal Problems of the Elderly and on Mental Disability.

4. *Guardians of the Elderly: An Ailing System*, AP Special Report (Sept. 1987) (copy

guardianship-reform movement attempted to continue its evolution from an adolescent to an adult endeavor, understanding and accepting both the satisfactions and the responsibilities that the latter entails. Like the dreaded great uncle who later grades the performance of the Bar-or-Bat-Mizvah-celebrant in reading from the Torah<sup>5</sup> during the ceremony, I accept this opportunity to offer a few brief reflections on the discussions that I heard during the 2001 Wingspan Conference, during which participants struggled with the challenge of a contemporary movement's entry into the adult community of law and social policy.

My most striking observation concerns the extent of vigorous disagreement among conference participants regarding the fundamental nature, goals, and methods of the contemporary guardianship system in this country, at what should be a rather mature stage in the development of that system. Specifically, the 2001 Wingspan Conference assembly as a whole appeared uncertain about the basic purpose of the legal structure encompassing guardianship. Some argued that the basic purpose was to protect the autonomy rights of heroically independent individuals struggling valiantly against the unwelcome, paternalistic intrusions of either self-interested or well-meaning, but frequently misguided, family members, health-care providers, financial institutions, or other third parties. Others argued that the basic purpose was to protect and promote the well-being of seriously disabled persons who cannot fend for themselves in a perilous world, and to do so at the smallest economic and psychological cost possible. The former model emphasizes and embraces the adversarial, due-process<sup>6</sup> aspects of the legal system, in which allegations of opponents are hotly contested until the ultimate available level of review has been exhausted, and a presumption of impermissible conflicts of interest encourages a multiplying of layers of protection. One example of this protection is separate legal counsel for the guardian, the guardian ad litem, the alleged incapacitated person, family members, and other petitioners. The latter model, by contrast, proposes that the guardianship system serves a therapeutic role, both in terms of facilitating the benevolent provision of helpful services to the incapacitated

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on file with the *Stetson Law Review*).

5. The Torah is comprised of the first five books of the Hebrew Bible. Telushkin, *supra* n. 1, at 23.

6. A state may not deprive any person of life, liberty, or property without due process of law. U.S. Const. amend. V.

individual and doing so with a minimum of unnecessary hassle and expense. In this model, courts are therapeutic agencies rather than neutral referees of disputed facts and technical points of law. Attorneys for the parties are more like the caregiving team for the ward than combatants in search of decisive legal victory. Diversion of individuals to alternative arrangements short of formal guardianship proceedings, including advocating on the basis of trust and goodwill among the parties, is part of the therapeutic theme. Although the term was not specifically mentioned during the 2001 Wingspan Conference, this consequentialist<sup>7</sup> approach to guardianship is consistent with viewing this area of law through the analytical lens of therapeutic jurisprudence. Legal scholars such as David Wexler,<sup>8</sup> Bruce Winick,<sup>9</sup> and others<sup>10</sup> have begun to use this lens to view the practical effects of various aspects of mental-health law on the real lives of intended beneficiaries. In addition, I have suggested that the lens of therapeutic jurisprudence be used to analyze certain legal developments, such as guardianship reforms, aimed at the older population.<sup>11</sup>

The chasm between the adversarial and therapeutic conceptions of guardianship was most prominently illustrated by the 2001 Wingspan Conference participants' spirited disagreement over a proposal to recommend changing one particular 1988 Wingspread Symposium recommendation, formally titled, *Guardianship: An Agenda for Reform — Recommendations of the National Guardianship Symposium*.<sup>12</sup> The proposal suggested

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7. A consequentialist, also called a teleological or utilitarian, inquiry focuses on the results or outcomes of particular actions or practices. Edmund L. Erde, *A Method of Ethical Decision Making*, in *Health Care Ethics: Critical Issues for the 21st Century* 527, 532 (John F. Monagle & David C. Thomasma eds., Aspen Publishers, Inc. 1998).

8. David B. Wexler, *Therapeutic Jurisprudence: The Law as a Therapeutic Agent* (1990).

9. Bruce J. Winick, *Psychotropic Medication in the Criminal Trial Process: The Constitutional and Therapeutic Implications of Riggins v. Nevada*, 10 N.Y.L. Sch. J. Hum. Rights 637 (1993).

10. Michael L. Perlin, Keri K. Gould & Deborah A. Dorfman, *Therapeutic Jurisprudence and the Civil Rights of Institutionalized Mentally Disabled Persons: Hopeless Oxymoron or Path to Redemption?*, 1 Psychol., Pub. Policy & L. 80 (1995).

11. Marshall B. Kapp, *The Law and Older Adults: Is Geriatric Jurisprudence Therapeutic?* (Carolina Acad. Press forthcoming 2003); Marshall B. Kapp, *Therapeutic Jurisprudence and American Elder Law*, in *Aging: Culture, Health, and Social Change* 83, 83 (David N. Weisstub et al., eds., Kluwer Acad. Publishers 2001).

12. Comm. on Mentally Disabled & Commn. on Leg. Problems of Elderly, *Guardianship: An Agenda for Reform — Recommendations of the National Guardianship*

changing the recommendation that the attorney always act as a zealous advocate for the client to a recommended requirement of responsible advocacy instead.<sup>13</sup> This proposal for change was predicated on the contention that the currently prevalent adversarial system too often entails scorched-earth, zero-sum tactics that multiply financial and economic costs and ultimately hurt, rather than help, the allegedly incapacitated person. Defenders of the status quo<sup>14</sup> successfully countered that it is the proper responsibility of the court, as decider of cases and controversies, rather than the attorney representing the alleged incapacitated person,<sup>15</sup> to evaluate objectively the conflicting evidence presented by a guardianship petition. The court also is responsible for determining the needs, if any, of the alleged incapacitated person for unconsented-to external interventions. Otherwise, the argument went, a meaningful presentation of the alleged incapacitated person's real capacities and values would never be made to the court. A trampling of those values would be inevitable were courts to pretend to be social-service agencies at the time of adjudication.

The adversarial-versus-therapeutic-model debate also was highlighted by discussions regarding the proper role of continuing judicial monitoring of guardianships after their creation. Participants who supported retaining the zealous advocacy requirement for attorneys also tended to support an aggressive policing-and-enforcement role for the courts regarding oversight of guardians and their fiduciary duties to their wards. This position was based on an image of widespread, incompetent, or even unscrupulous conduct by untrustworthy guardians who, left solely to their own devices, would take advantage, or at least seriously endanger the

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*Symposium and Policy of the American Bar Association* (ABA 1989) [hereinafter *Wingspread Recommendations*].

13. *Wingspread Recommendations*, *supra* n. 12, at 12. "Zealous Advocacy — In order to assume the proper advocacy role, counsel for the respondent and the petitioner shall: . . . (c) zealously advocate the course of actions chosen by the client . . ." *Id.*

14. For one of the most famous defenses of the adversarial system, see Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference of the ABA and AALS*, 44 ABA J. 1159 (1958).

15. On the propriety of attorney paternalism, compare Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 Human Rights 1 (1975), which argues that lawyers' paternalism toward their clients is at best morally problematic, and at worst indefensibly dismissive of individual dignity and autonomy, with David Luban, *Paternalism and the Legal Profession*, 1981 Wis. L. Rev. 454, 466-472, which contends that attorney paternalism can be justified to protect a client's long term values or objective best interests.

well-being, of the wards whom the courts had placed at the guardians' mercy. By contrast, most proponents of responsible advocacy favored a more collaborative, counseling role for ongoing post-appointment judicial involvement, concentrating on the courts trying to help guardians perform their functions better, rather than catching and punishing fiduciary miscreants. A pejorative characterization of this disagreement might be as a battle between extreme cynicism, on one hand, and hopeless naïveté, on the other.

One contentious piece of the monitoring debate was the question of the degree, if any, to which the courts, which were universally acknowledged to operate with grossly inadequate financial and human resources, should be allowed to delegate some of their specific post-guardianship appointment duties to public or private social-service agencies or other suitable entities. Participants all agreed that ultimate legal and moral responsibility for assuring proper conduct of the guardian rests with the court having jurisdiction over that guardianship. There also was fairly widespread acceptance of the idea that most probate court systems today are considerably more skilled and prepared to oversee the financial aspects, as opposed to the personal aspects, of guardianship, employing professionals with accounting expertise, rather than social-work expertise. Advocates of a therapeutic, collaborative role for the courts wanted to grant courts considerable discretion in contracting out some of their monitoring tasks to agencies who might be better equipped than the judiciary to evaluate and attend to a ward's ongoing health- and human-service needs and choices. Proponents of a policing-and-punitive-enforcement paradigm, however, would severely limit or completely deny the courts such leeway, on the grounds that oversight of behavior and punishment for transgressions are tasks for which the judiciary is uniquely well-suited. For these participants, the remedy for current monitoring deficiencies is a massive infusion of additional resources directly into the infrastructures of the overworked court bureaucracies.

In sum, the world in 1988 was a much simpler place for the 1988 Wingspread Symposium participants, collectively in their infancy, contemplating the appropriate, respective roles of the attorney for the alleged incapacitated person and the courts dealing with guardianship petitions. In that world, individual autonomy was constantly at risk. Older and disabled people needed zealous legal protection against the unwanted paternal-

ism of overzealous health-care and human-service professionals, who often sought to intrude as co-conspirators with self-interested family members. Thirteen years older and wiser, the modern American guardianship-reform movement is not quite so sure about the accuracy and adequacy of that vision.

As an attorney who has worked full time for over two decades as a faculty member in a medical school, I was struck, during the 2001 Wingspan Conference discussions about the attorney's proper role as either a zealous or a responsible advocate for an alleged incapacitated person, by the parallel between the conflicting responsibilities of the attorney in this context and the challenges faced by primary-care physicians when a patient's decisional capacity is unclear.<sup>16</sup> Both the elder-law attorney and the primary-care physician must decide when, if ever, to breach the usual principles of client<sup>17</sup> or patient<sup>18</sup> confidentiality, to call the diminished decisional capacity of a client or patient to the attention of authorities, such as an adult protective services (APS) agency<sup>19</sup> or the courts, who may rely on the state's *parens patriae* authority<sup>20</sup> to initiate various kinds of interventions without the consent of the client or patient.<sup>21</sup>

In many respects, elder-law attorneys function as the primary-care providers of legal services for a unit comprised of the older person and that person's family, just as family physicians are taught that the family must be their unit of care and frame of reference. For both legal and medical primary-care

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16. See generally Warren L. Holleman & Baruch A. Brody, *Ethics in Family Practice*, in *Textbook of Family Practice* 148 (Robert E. Rakel ed., 6th ed., W.B. Saunders Co. 2001) (discussing how concern for patient rights and patient autonomy has transformed the practice of medicine).

17. ABA Model R. Prof. Conduct 1.6 (2000). On February 5, 2002, the ABA House of Delegates, at its Midyear Meeting in Philadelphia, Pennsylvania, completed its review of the recommendations of the ABA Commission on Evaluation of the Rules of Professional Conduct (the ABA Ethics 2000 Commission), revising and amending the Model Rules. For a complete summary of the revisions, see *Report 401 as Passed by the House of Delegates February 5, 2002* <[http://www.abanet.org/cpr/e2k-report\\_home.html](http://www.abanet.org/cpr/e2k-report_home.html)> (Feb. 2002). Revised Model Rules 1.6 and 1.14 are reprinted at 31 *Stetson L. Rev.* 791, 856-866 (2002).

18. Judy E. Zelin, *Physician's Tort Liability for Unauthorized Disclosure of Confidential Information about Patient*, 48 *A.L.R.4th* 668, 693 (1986).

19. *E.g.* Ohio Rev. Code Ann. § 5101.60 (Anderson 2000).

20. Marshall B. Kapp, *Key Words in Ethics, Law, and Aging: A Guide to Contemporary Usage* 51-52 (Springer Publg. Co. 1995). The *parens patriae* power is the inherent authority of a state to take action to protect people who cannot or will not protect themselves from harm. *Id.*

21. ABA Model R. Prof. Conduct 1.14 (2000).

providers, the ambiguity of a client's or patient's decisional capacity may raise legal and moral questions about real and potential personal and financial conflicts of interest between that client or patient and particular family members. These questions, in turn, may require a more basic inquiry into who is the lawyer's client or the physician's patient to whom a fiduciary obligation is owed.<sup>22</sup> At the 2001 Wingspan Conference, participants expended a good deal of energy attempting to determine at what point a real or potential conflict of interest between an older person and the family becomes so troublesome that the attorney should recommend, or even insist, that separate legal counsel for each party be retained.<sup>23</sup>

An additional parallel between elder-law attorneys and primary-care physicians concerns the reactions of each to the discovery of improper conduct by a guardian who has been appointed by the court to act as a fiduciary on behalf of an incapacitated ward. Several small working groups at the 2001 Wingspan Conference tackled the question of when, if ever, the attorney who is aware of a guardian's significant departure from fiduciary principles has an obligation to draw the guardian's misconduct to the attention of the court or some other entity, such as an APS agency or the police, with the authority to intervene effectively to protect the ward from further harm. This is an especially perplexing dilemma for the attorney who is representing the errant guardian. Primary-care physicians confront a similar reporting conundrum when they believe that a guardian of the person, perhaps driven by selfish personal motives, is making medical, or other major life, decisions in a manner that deviates from the best interests of an incapacitated patient. For instance, how should a physician react when a guardian refuses to consent to the treatment of an infected tooth abscess in his mother, who is moderately demented and otherwise in good physical health?<sup>24</sup> At what point do a guardian's decisions

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22. Marshall B. Kapp, *Who's the Client? Complex Conundrum in a Context of Conflicting Interests*, 5 J. Ethics, L. & Aging 95, 95 (1999).

23. See generally Teresa Stanton Collett, *The Ethics of Intergenerational Representation*, 62 Fordham L. Rev. 1453 (1994); Russell G. Pearce, *Family Values and Legal Ethics: Competing Approaches to Conflicts in Representing Spouses*, 62 Fordham L. Rev. 1523 (1994) (discussing similar issues emanating from the 1993 conference, *Ethical Issues in Representing Older Clients*, co-sponsored by many of the same organizations that co-sponsored the 2001 Wingspan Conference).

24. See generally Jeanie Kayser-Jones & Marshall B. Kapp, *Advocacy for the Mentally Impaired Elderly: A Case Study Analysis*, 14 Am. J.L. & Med. 353, 356-376 (1989)

about personal matters, such as medical interventions, rise to the level of suspected abuse or neglect for which the state either requires or encourages physician reporting to authorities?<sup>25</sup> Few states explicitly list attorneys as mandated reporters in their present elder abuse and neglect statutes, but there was some sentiment at the 2001 Wingspan Conference that more states should do so.

Another general observation about the 2001 Wingspan Conference is that most significant issues regarding the future of guardianship in the United States probably will have to be resolved in the absence of substantial pertinent data. Some of these issues are fundamentally philosophical, such as whether adversarial or therapeutic models should be enshrined in law and practice. Other issues involve fine procedural points, such as how many days before the hearing written notice to the alleged incapacitated person must be given. The state of the empirical research base concerning how the guardianship system actually functions, such as, accurate, national figures on such matters as the number of guardianships extant, the number and percentage of contested guardianship petitions, the extent to which non-family guardians are appointed, and the number of guardians who are removed by the courts for misconduct, as well as the corresponding professional literature, has not grown significantly in the thirteen years since the 1988 Wingspread Symposium. Data collection and analysis on these types of empirical questions have not been very popular activities among scholars or private or public research funders. Many recommendations emerging from the 2001 Wingspan Conference call for more research on specific issues to help guide intelligent public-policy deliberations in the future. It is hoped that these recommendations bear fruit, so that similar observations are not contained in the commentaries about the next major guardianship-reform conference.

I will mention one final observation about the 2001 Wingspan Conference deliberations: money makes the guardianship world go 'round. It should not surprise anyone that financial considerations hovered perpetually above, and powerfully influenced — nay, drove — the discussion of virtually every recommendation

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(discussing the legal implications of this scenario).

25. See generally Seymour Moskowitz, *Saving Granny from the Wolf: Elder Abuse and Neglect — The Legal Framework*, 31 Conn. L. Rev. 77, 77 (1998) (arguing that laws intended to protect the elderly are ineffective).



considered at this conference. Whether the specific topic under the policy microscope at the time was systemic infrastructure shortcomings, the need for professional and public education, data gaps to be filled by further research, less intrusive alternatives to invocation of the formal guardianship process, or the calculation and assurance of fees for the myriad of potentially involved attorneys, financial implications always figured prominently in the discourse. It became increasingly clear that neither autonomy nor benevolence, neither the protection of self-determination rights nor the promotion of best interests, are efficient or inexpensive pursuits. For better or worse, effective attention to the financial issues must be a central component of any successful guardianship-reform program. State legislators and members of the executive branch of state governments who can exert an impact on public budgeting should be featured invitees to the next guardianship-reform conference.

Participants in the current guardianship-reform movement in the United States can take pride in having now graduated from adolescence to the early stage of adulthood. May the maturity that comes with experience lead to wisdom, as this movement continues to address the substantive, administrative, and procedural challenges whose resolution is so important to the potential victims and beneficiaries of the guardianship system.