

Legal Guardianship: Issues for Providing Services to Adjudicated Incompetent Elderly*

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This paper will identify a number of major issues that in our experience were found to be extremely important in providing legal guardianship through a family service agency. At the time of this writing the guardianship project (Guardianship Program for the Elderly of Dade County) has been operational for almost one year. In this time we have been appointed guardian of the person and property of 82 persons.

Background

The State of Florida is one of 34 states which has specific statutes providing guardianship for persons found to be legally incompetent.¹ Though Florida has statutory procedures for the adjudication of incompetency and the appointment of a guardian, no structure exists within the public sector to provide guardianship where needed. In 1973, Jewish Family and Children's Service, Inc., recognizing the need for such services, undertook to have the statute changed to allow private non-profit corporations to become guardian of the person and property of adjudicated incompetents. As a result of these efforts, the statutes governing guardianship were changed and the amended law became effective in the fall of 1973. In February, 1974, Jewish Family and Children's Service, Inc. began offering guardianship services on a limited sectarian basis to adjudicated incompetent elderly.² In the succeeding seven years Jewish Family and Children's Service, Inc. has accepted over 250 cases for evaluation and has been named guar-

dian in twenty-three (23) cases. As a direct result of this very successful program, Jewish Family and Children's Service was invited by the Area Agency on Aging to sponsor a non-sectarian countywide (Dade County) guardianship project. Federal funds for this demonstration project are provided through the Older Americans Act. It should be noted that due to Jewish Family and Children's Service's successful efforts to change the Florida statute to allow non-profit corporations to act as guardians, four other guardianship programs have come into being in different parts of the state.

In considering such a service, it is important to be mindful of the unique needs of Dade County, Florida. Miami and particularly Miami Beach have disproportionately large populations of elderly who come from other parts of the country to retire. According to 1978 estimates,³ there are over 310,000 persons 60 years and older in Dade County, representing approximately 21 percent of the total population. A statistic which is particularly relevant for potential guardianship resulting from age related disability is the number of persons of advanced age. Dade County has over 18,000 persons 85 or older. In spite of the significant size of the aged population, resources and community services have not

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¹ Winsor C. Schmidt, Kent S. Miller, William G. Bell and B. Elaine New, *Public Guardianship and the Elderly*, Cambridge: Ballinger Publishing Company, 1981, p. 25.

² Leon D. Fisher, Marvin Najberg, and David Soyer, "Social Agency Guardianship," this Journal, Vol. LIV, No. 1 (1977), pp. 54-61.

³ Division of Population Studies, Bureau of Economic and Business Research, University of Florida, February, 1979. Statistics reported in abstract of published material.

been adequately developed to answer the needs of these elderly. For a number of years the need for legal guardianship for incompetent elderly has been demonstrated in Dade county. However, no agency or organization has provided this service on a non-sectarian basis. The Jewish Family and Children's Service sponsorship of a demonstration project therefore was designed to determine the feasibility of a corporate guardian providing guardianship on a non-sectarian county-wide basis.

Rationale Underlying Provision of Service

The issue of competency and guardianship has long been a hotbed of controversy in the legal community. Declaring a person incompetent and therefore incapable of governing his own affairs raises a myriad of legal, ethical and moral issues. Jewish Family and Children's Service's interest in providing guardianship was in recognition that the behavior of some individuals, from various causes, demonstrates significant deterioration in functioning, putting them at risk in the community. As the person's ability to function goes below a minimal level someone has to step in or the consequences can be disastrous. In the past, family and neighborhood community could offer support incrementally, often offsetting the functional limitations. In our contemporary society, particularly in communities like Miami with large transplanted elderly populations, families and neighborhoods have lost their ability to render support, due to mobility and other social and environmental pressures. Given this predicament, the Board of Jewish Family and Children's Service saw intervention through legal guardianship as an appropriate concern of a family service agency. The multifaceted problems of the incompetent, without question, require a diversified and multi-disciplinary approach.

The functional deterioration that results in incompetent behavior can be seen from a number of perspectives: first, as a medical

problem which is simply the process of normal aging. It can also be seen as the result of trauma or as a pathological state. Further, it may be seen as the product of a society's inability to provide effectively for its members who have reached a particular developmental stage. Regardless of how it is conceptualized, when a person becomes functionally incompetent and does not have family or friends available or able to act in his or her behalf, outside intervention becomes necessary. Given available resources in Dade County and the needs of the severely dysfunctional elderly, one effective solution, at present, is that of legal guardianship through the courts. Recognizing both the medical and legal aspects of this situation one must then acknowledge the social nature of incompetency. It is in fact society that determines competent levels of functioning and it is the person's interrelationships which demonstrate an appropriate or inappropriate level of functioning. When one views the issue of incompetency as a medical-psychosocial problem the efficacy of social casework as a vehicle for providing guardianship becomes more evident. The agency's contention that guardianship could be effectively provided through the casework modality has been clearly demonstrated both in the agency's pioneer work and in the present project.

While acknowledging the significant deficits of the incompetent and the legal designation of incompetency, one must keep in mind that the matter of incompetency is an issue of degree rather than an absolute static condition. Accepting this, it behooves the service provider to view the "incompetent" as a person with strengths and abilities as well as limitations. A concerted effort must be made to see the incompetent as a "client" and not simply as "the ward." Seen in this light, the "incompetent" then shares the responsibility for and takes an appropriate part in plans and decisions which are related to his or her person and property. The level at which the

incompetent becomes involved is obviously dependent upon his or her level of awareness and functioning. Given the legal designation of incompetency the temptation is great to approach the individual simply as an irrational troublesome child. The potential for excessive intrusion is indeed great. In an effort to minimize excessive intrusion, intervention is approached from a position of least intrusiveness. As a matter of practice it is often easier to add additional support and services than to remove them once in place. This is particularly the case when dealing with dependent personalities. It is interesting to note that the need for emergency-type decisions and intervention is rather rare, even within the vulnerable population we serve. The need for overly responsible intervention often comes as a result of the needs of the service provider and not the urgency of the incompetent's situation.

"Intrusive Casework" within the Context of Legal Guardianship

It cannot be overstressed that we are dealing with a legal designation which in effect strips the civil and legal rights from the person adjudged incompetent. By definition, the incompetent is in need of a guardian to act in his or her best interest. The intrusion which results is difficult to comprehend fully. In effect, at the stroke of a pen, an adult becomes legally an irresponsible child. All those activities we take for granted as an adult are taken away, e.g. the right to vote, hold a driver's license, hold a checking or savings account, enter into contracts, manage, acquire and dispose of property and so forth. The guardian must therefore act as a *sensitive* proxy for the incompetent. The casework involved in providing guardianship can best be described as "intrusive." The adjudicated incompetent does not have a choice in the matter since guardianship is imposed by the court. Adapting the traditional ethical concepts and practice skills is not without

its difficulties. However, given the real needs of the individual and the social nature of the situation, this "intrusive casework" becomes an extremely effective approach in carrying out the responsibilities of the guardianship. In our experience, it may well be the best approach when augmented with a functional understanding of applicable legal principles and practice. With the intertwining of casework and the law, one recognizes the legal realities and at the same time attempts to provide a structure for dealing with the complicated psychosocial nature of the incompetent predicament.

Case Examples

Mr. D. is a man in his mid-80's who has suffered considerable loss of hearing over the past 10 years. Once an independent, self-sufficient person with a well-developed stubborn nature, he now deals with his growing physical limitations and social isolation by contacting agency after agency with appeals for help which when offered is criticized and rejected. As a result of this behavior he managed to frustrate and infuriate all who came in contact with him thus further isolating himself. The inability to utilize service coupled with a steady physical decline finally led to the adjudication of incompetence. At the time of the appointment of our program as guardian several attempts had been made to utilize attorneys in this capacity without success. The difficulty, therefore, was in the caseworker being able to establish a trusting relationship with an individual who had exhibited rejection of all help offered in the past. By allowing Mr. D. to ventilate and listening to his repetitious complaints, the caseworker gave him the opportunity to retain a sense of control while at the same time taking necessary steps to safeguard his well being. Even though Mr. D. continues to be outwardly indignant and hostile, he has indicated by some of his actions that he is beginning to accept the fact that the program caseworker is acting in his own best interest. For example, Mr. D. required hospitalization. However, at first he refused it because he feared that once he left his own home he would never return. Also, he had a

dog that he cherished and feared for the dog's safety. After the hospitalization Mr. D. was returned to his own home and also saw that his dog was well taken care of during his absence. Although Mr. D. would never openly admit that the caseworker was acting in his best interest he did ask to see only the program's caseworker as soon as he returned home.

Mrs. R. was a woman in her mid-70's with terminal cancer. The guardian was appointed in order to make appropriate plans for treatment and nursing home placement. Though severely disoriented and confused, Mrs. R. was keenly aware of her dependence and deteriorating health. The awareness of a guardian became a focal point and an outlet for anger. With the regular visit of the program's caseworker came an outpouring of frustration and hostility. It was learned, however, from the nursing home staff that as Mrs. R. became more active in her ventilation with the worker her acceptance of and cooperation with nursing home and medical staff improved. As a result, though no cure or remission was possible, care could be provided with Mrs. R.'s cooperation which effectively dealt with her pain and allowed death without undue suffering.

When a person chooses a physician, an attorney, a dentist, a mechanic or a plumber, the ultimate effectiveness of that person's services will depend upon trust and the development of an effective working relationship. The critical importance of a trusting relationship is one of casework's cornerstones. Even when dealing with a client who, by all outward appearances, may be severely disoriented and confused, one sees consistently that it is what happens *between* the worker and client rather than what happens *for* the client that really counts.

Case Example

Mr. B. had been adjudicated incompetent after being brought to an emergency room in an extreme state of physical and mental deterioration. After considerable treatment and care he was again able to function adequately physically. He was unable, however, to

accept that a guardian had been appointed and he responded to the worker with hostility and constant abuse. This situation continued for several months during which time the worker provided service which ran the gamut: shopping, emergency preparation of food, arranging for repairs to the apartment, payment of bills, filing for insurance reimbursement, letter writing, arrangement for medical care. Signs of growing trust were well concealed and exhibited almost grudgingly. During this period it became clear that Mr. B. would need an operation. For the first time Mr. B. openly asked the worker to make arrangement and to accompany him to the hospital. With the operation over and Mr. B. on the way to recovery, his attitude had changed dramatically to the point where the hostility all but disappeared.

The initial period of interaction between the "incompetent" and the guardian can often be conflictual. Commonly the adjudicated "incompetent" holds strongly to the conviction that "there's nothing wrong with me." Then the adjudicated incompetent is informed that he or she may no longer function without at least the supervision of the court-appointed guardian, more often than not this news is met with indignation and outright hostility. Needless to say, working through this period and the feelings it engenders requires considerable skill and patience. It is particularly at this point where the worker must establish in his or her mind that the incompetent is the *client* and not simply an irrational confused *ward* who legally is dramatically dependent upon the guardian. The desire to respond in an arbitrary manner is extremely tempting when a person responds with hostility instead of what we expect or would like. The task for the worker is to prove that his interest and intervention are consistent with the incompetent's best interests; particularly in this regard, actions speak louder than words.

Case Example

Every attempt is made to develop a relationship which focusses on strengths. Mrs. M. is a

woman in her late 80's who has retained considerable verbal ability. Though repetitious, her stories of family and Jewish tradition which she shares with the caseworker help to maintain a link to a positive force in her past which is now transferred to the relationship with the worker. It was only after Mrs. M. found the worker willing to listen and *share* in her reminiscence that she began to accept and follow through on medical and dental care as well as personal hygiene and nutrition.

Given the complicated and demanding task of acting as a person's guardian, specific training is clearly required. To our knowledge, the Guardianship Program of Dade County is the only program of its kind where the direct service staff all hold MSW degrees. In addition to the MSW, all staff have had previous clinical experience with the elderly. A solid clinical background is an absolute necessity not only in dealing with the incompetent but, of equal importance, in negotiating the professional and community systems which affect the incompetent's life. It is worth emphasizing that as a legal guardian one is called upon to make decisions and to interact on a face-to-face basis with all those providing service to the incompetent.

Therefore, the worker's ability to establish priorities, to act with self-confidence and with professional bearing become important factors in providing effective guardianship. The role of advocate and mediator are without question primary in serving the needs of the incompetent.

Some Issues for Administration and Practice

The field of legal guardianship represents a relatively small area of practice for the legal profession. As an area of practice for social service agencies it is just beginning to emerge. In the almost 12 months of operation we have identified some practice-related issues which bear noting.

The concept of incompetency is clearly a matter of degree.⁴ The line that a person

crosses to a state considered incompetent varies depending upon an almost limitless number of variables. Anyone with clinical experience is aware of the multitude of factors which may be involved in relatively benign emotional disturbances. What has been most dramatic in our experience is the positive alteration in functioning when even a moderate amount of stimulation and caring are introduced, even in cases of documented chronic organic brain syndrome. Much of the incompetent behavior we have observed has been the result of isolation brought about either by the withdrawal of social interaction through loss of family and friends or as the result of physical and mental deterioration. Competency and incompetency alike are made up of shifting configurations of abilities and limitations. For many persons who are adjudicated incompetent it is the incapacity to recognize or admit limitations which impairs judgment. When reasonable and effective judgment deteriorates, the person begins making a series of negatively self-reinforcing "mistakes" which puts him at risk in the community. Regardless of other factors involved, if the person is without his own unique support system, isolation and confusion become the order of the day and effective functioning deteriorates.

The time and energy, both physical and emotional, involved in providing guardianship are at times staggering. The demands of providing responsible legal guardianship for a person in a protected setting such as a nursing home are considerable. The problem is compounded enormously when the incompetent, because of functional level, is able to remain in the community. In either case, the demand on time and energy during the first week or two of the guardianship is greatest. In every case we have encountered, the adjudication of incompetency came only after a considerable period of dysfunction. What the guardian is faced with at that point is a rather complex puzzle with many of the pieces missing or distorted. The tasks

⁴ The definition of incompetency also varies from state to state depending upon the statutes involved.

related to simply identifying and organizing the practical matters of a person's life, e.g. change of addresses, notification of social security and utilities, transfer of bank accounts, application of benefits, appropriate placement, and so on, can of themselves take considerable time to accomplish. As demanding as this can be, when questions of medical care are involved, the pressure and responsibility can become tremendous. This is particularly so since specific permission must be given for all medical procedures.

The point to be kept in mind is that as guardian, the person or organization becomes responsible for all aspects of the incompetent's life.⁵ Though this responsibility is under the general supervision of the court, the day-to-day realities of care lie with the guardian. The considerable diversity of activities performed by the caseworker in many respects reduces the effects of "burnout" by allowing variety and change of task. There is also the real sense of doing something, of having control in bringing about change for the clients' benefit which derives from the legal right to act in the incompetent's behalf. Even with this, it is crucial that staff have constant access to supervisory and peer support. In our experience, the workers' effectiveness and well being benefit by a team approach which allows for flexibility in use of time and the opportunity to have someone else handle a problem when a particular worker "has had it." The ability to share the pressure in an open supportive environment is absolutely essential if staff is to function effectively.

One of the deities of the casework agency has been quantitative standards. Given the nature of providing legal guardianship, traditional statistical reporting is not meaningful and in fact would prove to be counterproductive particularly in staff

morale. Interview count and caseload are meaningless due to the variability of time needed in any particular case. In one case it may take hours to accomplish something that in another case is settled with one telephone call. In our experience a range of between 70 and 80 percent of available time in direct service has proven reasonable. A caseload of 30 appears to be a maximum for an experienced worker to handle. Effective and available legal counsel is an absolute necessity for the operation of a guardianship program. Because of the nature of the needs of the incompetent, legal services are continually required in order to carry out the responsibilities of the guardianship. Even though the legal aspect is essential it is important to see it as ancillary to casework which defines the philosophy and approach for the service provided the incompetent. In our opinion it is strongly recommended that an attorney be included as part of the operational staff either on a full or part-time basis.

In Conclusion

The appropriateness and effectiveness of casework as the basis for providing legal guardianship have been demonstrated to us beyond question. The positive response that has come from all segments of the lay and professional community clearly endorses the service. Because of the complexity of providing for every aspect of the incompetent's life, effective relationships have to be developed with countless organizations, agencies, business and individuals. The challenge, therefore, of providing effective guardianship lies in the program's ability to manage effectively a broad spectrum of community systems in the incompetent client's behalf, as well as the capacity to meet the incompetent's personal and emotional needs.

⁵ Many of these responsibilities, particularly those related to guardianship of property, require specific approval of the Court.