Clearinghouse Review

NATIONAL CLEARINGHOUSE FOR LEGAL SERVICES, INC.

Volume 28 ■ Number 6 October 1994

ELDER LAW

Limited Guardianship: Its Implementation Is Long Overdue

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Mr. S was 88 years old, and he wanted to give his property to friends rather than to his family. Mr. S's son filed a petition for guardianship based on the frequently used grounds that family members should be given priority in the transfer of property, even if it is against the wishes of the elder. The guardian ad litem reported that Mr. S had a good understanding of what was going on around him but that he "suffered from a lack of judgment." Mr. S thought he should be able to give away his own money to anyone he wanted. He was able to converse at length with the guardian ad litem, waive his own presence at his hearing, and make his preferences known concerning selection of a guardian. Nonetheless, the court deemed Mr. S incompetent and awarded full guardianship to his son. /1/ Mr. S no longer has the right to choose where he lives, how his money is spent, where he travels, with whom he associates, and what medical treatment he receives. He has lost his rights to vote, testify in court, and change his marital status. He cannot contract, borrow money, write a check, sell his car, or sign his tax return.

I. Introduction

Because a grant of full or plenary powers to a guardian results in a drastic loss of a ward's rights, substantial attention needs to be given to the appropriateness of limiting the powers granted to the guardian. /2/ As one author has commented, "[U]se of guardians who are limited in their powers would promote the values of autonomy, self-determination, and individual dignity, and discourage the overreach of societal interference and manipulation." /3/ Logic compels that limiting the deprivation of a ward's rights through a tailored guardianship order that matches the particular disabilities of the individual ward is preferable to the wholesale removal of rights through plenary orders.

This article reviews the status of legislative authority for courts to tailor guardianship orders, the frequency that courts actually impose limited orders, and some possible reasons why the use of limited orders falls short of the legislative mandate. It also suggests steps that advocates can take to make more certain that if a guardianship is necessary the order is limited so as to enable the protected person to retain as many civil and personal rights as possible.

II. Historical Call for Tailored Orders

Advocates have called for limited guardianship for more than a decade. A 1979 study by the American Bar Association Commission on the Mentally Disabled recommended that state laws be changed to avoid an asserted "overkill" that is implicit in standard guardianship proceedings. /4/

One of the key reasons the National Conference of Commissioners on Uniform State Laws adopted the Uniform Guardianship and Protective Proceedings Act (UGPPA) in 1982 to amend the Article V guardianship provisions of the Uniform Probate Code (UPC) was to include the concept of limited guardianships. /5/ Following the ABA Commission's recommendation, the UGPPA recognized the need for

> more sensitive procedures and for appointments fashioned so that the authority of the protector would intrude only to the degree necessary on the liberties and prerogatives of the protected person. In short, rather than permitting an all-or-none status, there should be an intermediate status available to the courts through which the protected person will have personal liberties and prerogatives restricted only to the extent necessary under the circumstances. The court should be admonished to look for a least-restrictive protection approach. /6/

Seven years later the National Guardianship Symposium called for limited guardianship orders that are "as specific as possible with respect to the guardian's powers and duties." /7/ The symposium reformers predicted that such specificity would help the courts limit guardianship and tailor orders to the ward's circumstances.

The newly issued National Probate Court Standards joins in directing probate judges to "detail the duties and powers of the guardian, including limitations to the duties and powers, and the rights retained by the respondent." /8/ The commentary to this standard notes that

> [b]ecause the preferred practice is to limit the powers and duties of the guardian to those necessary to meet the needs of the respondent, the court should specifically enumerate in its order the assigned duties and powers of the guardian. . . . By listing the powers and duties of the guardian, the court's order can serve as an educational roadmap to which the guardian can refer and use to help answer questions about what the guardian can or cannot do in carrying out the guardian's assigned responsibilities. /9/

III. Legislative Efforts

Most state legislatures have taken major strides in recognizing the need for and appropriateness of limited orders. /10/ Limited orders, as used in this context, means more than just differentiating between a guardian of the person and a guardian (or conservator) of the estate. /11/ Every state that has implemented major guardianship reform in the past few years has incorporated provisions for limited orders or even mandated limited orders that enumerate the specific personal and financial powers given to the guardian and assign the guardian only those duties and powers that the ward is incapable of exercising.

For example, Florida's comprehensive revision of its guardianship provisions in 1989 requires that the order state the guardian's specific powers and duties and that "the guardian may exercise only those delegable rights which have been removed from the incapacitated person." /12/ Further, the order "must be consistent with the incapacitated person's welfare and safety, must be the least restrictive appropriate alternative, and must reserve to the incapacitated person the right to make decisions in all matters commensurate with his ability to do so." /13/ The massive revision of the New York conservatorship statute requires that guardians have only those powers necessary to assist the incapacitated person to compensate for any limitations. The guardianship should be "tailored to the individual needs of [an incapacitated] person, which takes into account the personal wishes, preferences and desires of the person, and which affords the person the greatest amount of independence and self-determination and participation in all the decisions affecting such person's life." /14/ The concept of limited guardianship is considered the cornerstone of both the Florida and New York statutory schemes.

Other states have followed the trend to provide for limited guardianship by stating a preference for limited guardianship, mandating specific findings of incapacity, and stressing that the least restrictive intervention be chosen. The following sampling of statutory provisions illustrates the variety of provisions found in recent legislative efforts.

- Illinois -- "Guardianship shall be ordered only to the extent necessitated by the individual's actual mental, physical and adaptive limitations." /15/

- North Dakota -- "[T]he court's order must state whether the guardian has no authority, general authority, or limited authority to make decisions on behalf of the ward in each of the areas of residential, education[al], medical, legal, vocational, and financial decisionmaking." /16/

- Pennsylvania -- "Upon finding that the person is partially incapacitated and in need of guardianship services, the court shall enter an order appointing a limited guardian of the person with powers consistent with the court's findings of limitations." /17/

- Rhode Island -- "Absent a finding, based on the functional assessment, that an individual is totally incapacitated, the court shall limit the scope of powers and duties of a guardian to the terms best suited to allow the individual found partially incapacitated to participate as fully as possible in decisions affecting him or her." /18/

- Texas -- "If it is found that the person lacks the capacity to do some, but not all, of the tasks necessary to care for himself or herself or to manage the individual's property, the court may appoint a guardian with limited powers and permit the individual to care for himself or herself or to manage the individual's property commensurate with the individual's ability." /19/

- Utah -- "The court shall prefer a limited guardianship and may only grant a full guardianship if no other alternative exists. If the court does not grant a limited guardianship, a specific finding shall be made that nothing less than a full guardianship is adequate." /20/

IV. Appellate Court Endorsement

A review of reported decisions finds appellate courts approving the use of tailored orders and enforcing the legislative mandates to limit the powers delegated to a guardian because of the serious deprivation of civil rights resulting from full guardianship. As early as 1963, the Louisiana Court of Appeals recognized that full interdiction (Louisiana's term for guardianship) is "a pronouncement of civil death without the dubious advantage of a tombstone." /21/ More recent Louisiana decisions have found error when trial courts ordered full interdiction or restrictive placement authority. In In re Interdiction of F.T.E., /22/ the lower court ordered a full interdiction with authority to place the respondent in a nursing home. The appellate court found that respondent was capable of managing his own financial affairs and able to be cared for properly at home. "The court is not required to order placement in a setting which doctors consider ideal or which friends and family consider most convenient. A legally appropriate placement is one which is least restrictive of the individual's personal liberty considering his demonstrated needs." /23/ Full interdiction was inappropriate when the respondent was able to manage his own financial matters. Similarly, the Louisiana Court of Appeals agreed that the curator in In re Heard /24/ should have some authority over Miss Heard to help her find and maintain appropriate housing but held that the order restricting placement to approved and accredited supervised settings was more restrictive than necessary.

One decision clearly demonstrates an appellate appreciation for why and how to limit guardianship. The North Dakota's legislative mandate is to protect an incapacitated person's autonomy whenever possible by appointing a limited guardian, finding no alternative resource plan, and selecting the least restrictive form of intervention. In In re Guardianship of Braaten, /25/ the lower court appointed family members as guardians and conservators with unlimited general powers for a woman with mild mental retardation who lived in a supervised shelter and participated in a vocational workshop. The supreme court found clear and convincing evidence that, except for medical matters, the woman was capable of making responsible decisions concerning her residence, education, legal affairs, vocation, and finances. The decision held that the lower court erred in relying on the woman's mental condition to find incapacity and in not limiting the powers specifically to those needed to address the ward's mental and physical limitations.

"A limited guardianship for medical purposes will continue to give a loving family power to aid its daughter again when the need arises, while leaving her largely free to pursue her own life. . . . We see no reason why the trial court cannot fashion an appropriate order that leaves no doubt about the conditions and extent of the guardians' limited powers and duties." /26/

A Pennsylvania trial court also has set aside a guardianship order that failed to specify the powers granted to a temporary guardian. In In re Sylvester, /27/ a temporary guardian was appointed because of allegations that the attorney-in-fact was abusing general fiduciary duties. The appeals court held that the order appointing a temporary guardian should have been limited only to investigating the allegations of abuse. The temporary guardian should not have been given power to revoke the power of attorney and take control over the principal's assets.

The New Jersey Supreme court has called upon its trial courts to limit guardianships even without a clear statutory mandate. The court recently reiterated that guardianship can be a "drastic" restraint

on personal liberty. /28/ Even though the New Jersey code "has not yet adopted the section [of the Uniform Probate Code] concerning limited guardianship," the court "suggest[s] that trial courts consider appointing limited, rather than general, guardians in appropriate cases." /29/

V. Implementation of Limited Guardianships

The state legislatures and appellate courts have been willing to follow the advocates' lead on the importance of limited guardianships. However, actual implementation by the trial judiciary and bar has lagged far behind. It is one thing to put provisions into a statute extolling the principles of autonomy, self-determination, and least restrictive intervention; it's another to put them into practice.

The commentary on the National Guardianship Symposium recommendation on limited guardianship noted that

> while many jurisdictions have statutory language requiring courts to use limited guardianships, implementation of this requirement is spotty. The additional time and resources required to tailor a guardianship to the respondent's specific needs and provide ongoing supervision, when combined with the reality of overcrowded dockets, results in substantial judicial resistance to this concept. /30/

In 1980 the ABA Probate and Trust Division surveyed attorneys and judges about their concerns with some of the first-enacted limited guardianship statutes. The survey found that criticisms of tailored orders centered on cost increases, confusion about how to implement the law, fear that the provision would reduce the availability of guardians, concern that the guardian's ability to meet emergency circumstances would be limited, and increased burden on judges. /31/

A 1990 survey of guardianship practices asked respondents to select the phrase that best described the powers given to guardians in their local jurisdictions. /32/ Eighty-one percent of respondents described the powers given to guardians to be "always" or "usually" plenary. Less than 20 percent indicated that every effort was made to limit the guardian's powers or that the powers were often limited. All respondents were from states that provide for limited guardianships.

A new survey of guardianship practitioners was conducted in preparation for this article. One practitioner was contacted from each state who presumably was familiar with actual guardianship practice because the practitioner was a legal services developer or a member of the National Guardianship Association or the National Academy of Elder Law Attorneys. The respondent was asked to give an opinion (or educated guess) as to the frequency that the court most familiar to the respondent tailored the powers given to a guardian or conservator. The survey defined "tailoring" to be when the judge granted the guardian or conservator specific powers that were less than the full powers of a guardian of the person or conservator of the estate. The respondent was also asked if this percentage was typical, higher, or lower than other courts the respondent was familiar with, if the state or locality had a standard form order, and if the petitioner's attorneys usually drafted their own orders. The respondents were requested to send copies of sample guardianship orders and to elaborate or explain their answers.

Prior to looking at the survey replies, the persons taking the survey categorized the strength of the legislative mandate to tailor guardianship orders in each state. (See tbl. A.) Those states having statutes that clearly mandate to limit the powers delegated to a guardian were grouped in the "strong" category. /33/ Tailored orders and selection of the least restrictive alternative are an integral part of the overall guardianship scheme. States with "moderate" tailoring mandates contain language permitting the court to limit the guardian's powers. These statutes typically contain the phrase "the court may make appointive and other orders only to the extent necessitated by the incapacitated person's mental and adaptive limitations." /34/ States with "weak" language were those with the typical Uniform Probate Code statement that "a guardian of an incapacitated person has the same powers, rights and duties respecting his ward that a parent has respecting his unemancipated minor child" and then lists the powers a guardian has "except as modified by the court's order." /35/ In the remainder of the states, either no legislative language authorizing the courts to limit the guardian's powers were found or the authority to tailor the guardianship was limited to certain categories of wards, such as those with mental retardation.

The hypothesis of the persons taking the survey was that judges in states with clear authority to tailor orders would write tailored orders more frequently than judges in states with lesser legislative direction. Table B illustrates that while states with strong authority to tailor guardianship tend to write more tailored orders, even in those states where the concepts of tailored orders and least restrictive alternatives are an integral part of the guardianship scheme, the percentage of limited guardianship orders remains low. However, in some jurisdictions with moderate or weak tailoring language, limited orders are more prevalent than in states with the strongest mandates to tailor. Eight reporting jurisdictions indicate that more than 50 percent of the guardianship orders are tailored; it is hoped that this is an indication of an upward trend.

Readers should be cautioned that the number of practitioners sampled for this brief survey was extremely low. The survey asked respondents only to guess the frequency of tailored orders in a single jurisdiction within a state. No accompanying study of court records verified the respondents' answers. Accordingly, the actual frequency could be very different from that reported. Opinions about how the respondent's local jurisdiction compares to other jurisdictions were just that -- opinions. A much more elaborate study, examining court files in many jurisdictions, would need to be conducted to obtain a precise picture of the frequency of limited orders.

Nevertheless, other more scientific studies support the findings of the minisurvey. A 1991 study of guardianship reports in Ohio and Washington found that only 7 percent of the orders were limited. /36/ Pat M. Keith and Robbyn R. Wacker studied 766 petitions for guardians from Iowa and Missouri both before and after those states had amended their guardianship statutes to include stronger requirements to tailor orders. They found that a request for a full guardianship was tantamount to receiving one; least restrictive alternatives were seldom employed, and few petitions were denied. "Ironically, . . . a request for a limited guardianship was more likely to result in the appointment of a full guardianship than the request for a full one." /37/

VI. Barriers to Implementation

Why is the concept of tailored guardianship orders so difficult to implement? Each reader probably has heard a wide variety of reasons. One respondent to the recent survey noted that he had done a significant amount of guardianship work, both before and after his state's guardianship code was amended to incorporate specific limited guardianship provisions. He summed up many of the frequently voiced concerns:

[A]ttorneys, judges, doctors, and social workers either do not understand the concept of limited guardianship or they choose to ignore it completely. . . . [D]octors and judges only pay lip service to limited guardianship in most cases. They say that the respondent only has a limited incapacity, but the judge either signs an order granting plenary powers or signs an order attempting to grant limited powers that in essence conveys plenary powers. . . [They] often have a paternalistic attitude and appoint a plenary guardian for the following reasons: (1) it is too difficult for the guardian to work with the ward on a limited level; (2) it is too expensive to run back into court to get the additional powers if the incapacities worsen over time; and (3) it is more important to err on the side of protecting the estate rather than protecting the ward's personal autonomy. /38/

One focal point of reluctance is the judiciary. Determining a person's functional ability and designing an order that balances that person's need for safety and protection with the need for self-determination and autonomy are difficult. Judges may have had little experience with what persons with disabilities can and cannot do. Clearly, advocates need to assist judges in developing some experience with the continuum of capabilities demonstrated by most respondents and in overcoming stereotypes that anybody with a disability or a certain diagnosis must have capabilities just like anyone else with that disability. A frequent stereotype of older persons is that once they start to go downhill the decline will be rapid. How frequently have advocates heard petitioners and judges state that because Mrs. X has Alzheimer's disease, she might as well have a plenary guardian now or else the guardian will be right back in court? /39/ A corollary concern from the bench is judicial economy. Some judges have expressed a fear that court dockets will be jammed because the guardian will come back frequently for another power.

Judges also may lack information by which to write a limited order because insufficient evidence about the respondent's functional capacity is presented at the hearing. /40/ In some jurisdictions the hearings are so cursory even judges supportive of the limited guardianship concept would be hard-pressed to write a limited order. If judges do not have sufficient evidence presented about functional capabilities, they will have no basis on which to limit an order.

In many instances the attorney drafting the final order represents the petitioner or the proposed guardian. The minisurvey showed that 68 percent of the final orders were drafted by petitioners' attorneys. This puts the responsibility to limit the powers granted to the guardian into the hands of those who may be the least inclined to do so. These attorneys might be concerned that their client seeking the guardianship would challenge the attorney's loyalty if the attorney suggested less than full powers. Some petitioners may prefer having all possible powers to resolve a crisis to limiting those powers to preserve the ward's self-autonomy -- or they would not be filing a petition. An attorney paid for by the family may be reluctant to advocate the ward's rights and suggest that few powers should be given -- considering the trouble the family is going through. One attorney has suggested that limited orders may dissuade guardians from serving because of possible ambiguity in the guardian's authority.

Petitioners may be unaware of services and arrangements that could be used in lieu of guardianship, or that limited powers are available. /41/ They may file guardianship petitions because there are few or no available community services. /42/ Increased awareness and availability of community-based services and planning documents, such as powers of attorney and advance directives, are other ways to limit, or avoid altogether, guardianship cases.

In other instances, the state may have done such a good job in providing other services that by the time the petition is filed for guardianship, there are no other alternatives, and the ward is fully incompetent:

If the order is too restrictive, and the grant of powers too limited, a willing guardian candidate may not be found. Even if a guardian can be found, his position can become untenable. When an ambiguous order provides a ward with arguable rights that are asserted in opposition to a guardian's decisions, how does a third party (such as a doctor or nursing facility operator) decide who has the last word? How does the guardian, particularly the layman guardian, decide without a suit for aid and guidance? /43/

VII. How Limited Orders Work

What is the experience of those courts that routinely limit orders? The 1990 ABA study conducted intensive on-site visits in six jurisdictions to observe guardianship proceedings and interview many of the people involved in guardianship cases. During this study, one jurisdiction clearly stood out as committed to limiting the powers delegated to guardians.

New Hampshire was one of the earliest states to adopt strong legislative endorsement of limited guardianships. Based on the study's observations in Merrimack County, all participants in guardianship cases are comfortable with implementing the New Hampshire statute mandating functional assessment, tailored orders, and least restrictive alternatives. All evidence of inability must have occurred within six months before the hearing, and one incident must have occurred within 20 days of filing the petition. Evidence must be acts, occurrences, or statements that strongly indicate an imminent need for a guardian's assistance and protection. The court must find on the record that (1) guardianship is necessary to provide care, supervision, and rehabilitation of a person; (2) no available alternative is suitable; (3) guardianship is appropriate as the least restrictive intervention; and (4) the appointment deprives the ward only of those legal rights which the order specifically enumerates.

Not only does the New Hampshire statute provide the tools and process with which to work, but the Merrimack County judge is committed to implementing the statute. During interviews, he stated that, regardless of what petitioner asks for, he routinely restricts the order to what the evidence presented at the hearing has demonstrated. The judge also stated that the typical judicial fear of the revolving case was not a realistic objection -- it was not his experience that parties came back to court frequently or unnecessarily. The state's attorney's office that does much of the mental health petitioning is very conscientious about requesting limited petitions. The public guardian reported that during the annual review hearing his office routinely petitions to reduce the powers that it

delegates as a ward's ability to manage personal or financial matters improves. The office frequently has only one specific power.

VIII. Steps for Advocates

Elder advocates can take several steps to make more certain that courts implement the laudable principle that incapacitated people retain as many personal, civil, and legal rights as possible even if they need some protection by a guardian. Whether the impediments are inertia, resistance, hesitation, confusion, or lack of information, advocates in guardianship cases need to keep in mind that the goals of autonomy and self-determination are worthy of the effort. Now that most states have a clear legislative mandate to apply the principles of least restrictive alternatives and to tailor guardianship orders, the task should be easier.

Advocates who lack familiarity with items typically included in a tailored order should find Florida's categorization of rights useful. The Florida statute groups them as rights the incapacitated person retains, /44/ rights that can be removed, /45/ those that can be delegated to the guardian, /46/ and rights for which the guardian needs specific authorization. /47/ Table C lists a few of the examples of typical specific powers that were found in the sample orders the minisurvey respondents provided. This list is by no means inclusive; it is offered to illustrate how other jurisdictions are successfully tailoring guardianship orders:

- advocates need to contribute to efforts to educate the judiciary, attorneys for petitioners, counsel for the respondents, guardians ad litem, visitors, doctors, and families about the importance of reserving as many of the protected person's rights as possible. Each participant in guardianship proceedings also needs to be educated about what people with disabilities, such as mental retardation, can do to make decisions on their own. The judiciary needs to become familiar with the vacillating nature of many age-related illnesses, such as Alzheimer's disease.

- attorneys representing respondents need to make sure that sufficient information about what respondents may and may not do is presented to the court so that the judge will have the factual basis on which to enter such a limited order. Courts need very specific evidence about a person's capabilities to be able to craft a specific order. Advocates need to stress to the court the appropriateness of limiting an order and be prepared to recommend model terms to limit the order.

- advocates should identify care providers and case managers who are able to assess respondents' functional capabilities. They should assist doctors and care providers in developing the factual reports the courts need.

- attorneys representing respondents should not confuse their role as advocates for the respondents with the far different role of the guardian ad litem. The advocate's role is to represent the respondent's wishes and preserve to the respondent as much self-autonomy as possible.

- petitioning attorneys, whether representing the state or private individuals, need to be sensitive to the legal importance and statutory mandate of seeking something less than plenary orders. Ideally, they should petition initially for as few powers as necessary.

- advocates should assist public petitioners, such as Adult Protective Services or area agencies on aging, to develop new model petitions that ask for limited powers. In those states that use or are developing standard form orders, advocates need to participate in designing sample forms that encourage petitioners and judges to look for ways to craft a tailored order.

- advocates should counsel guardians about the merits and necessity of petitioning to reduce the powers they have been given whenever possible.

IX. Conclusion

Mr. S probably did not need any guardian, but even if he did need some financial protection, appointing a plenary guardian is a prime example of the "overkill" that the ABA Commission warned about 15 years ago. The legislatures have done their part to equip the judiciary with the authority to avoid plenary guardianship. Advocates for the elderly and persons with disabilities now must take an active role in making sure that the powers of guardians are limited in every appropriate circumstance.

Footnotes

/1/ Mr. S's perils were reported in Kris Bulcroft et al., Elderly Wards and Their Legal Guardians: Analysis of County Probate Records in Ohio and Washington, 31 Gerontologist 156 (1991).

/2/ In this article the term "guardianship" is used in the generic sense indicating the process through which a court determines that an adult has sufficient incapacity so that the court needs to take away at least some decisionmaking rights concerning either personal or financial affairs and delegate those rights to another person.

/3/ Lawrence A. Frolik, Plenary Guardianship: An Analysis, A Critique, and a Proposal for Reform, 23 Ariz. L. Rev. 599, 654 (1981).

/4/ Melvin Axilbund, Exercising Judgment for the Disabled: Report of an Inquiry into Limited Guardianship, Public Guardianship and Adult Protective Services in Six States, Executive Summary (1979).

/5/ Prefatory Note, Unif. Guardianship and Protective Proceedings Act, 8 U.L.A. 440 (1983).

/6/ Id. at 441.

/7/ American Bar Ass'n, Guardianship: An Agenda for Reform 17, Recommendation III-D (1989) (hereinafter Guardianship).

/8/ National Probate Court Standards 3.3.12(a) (Commission on National Probate Court Standards 1993). The Commission included representatives of the National College of Probate Judges, National Center for State Courts, State Justice Institute, and the American College of Trust and Estate Counsel Foundation.

/9/ Id. Commentary at 70.

/10/ See tbl. A, infra, for the author's categorization of legislative provisions authorizing tailored orders. The author has also prepared a 22-page summary of statutes with citations pertaining to limited guardianships. Copies may be obtained by writing the author at Legal Counsel for the Elderly, 601 E St. NW, Washington, DC 20049.

/11/ One Louisiana judge questions whether the Louisiana code allows an interdiction limited only to the person or the estate, but not a hybrid, or "limited-limited" order. Interdiction of F.T.E., 594 So. 2d 480, 491 (La. App. Ct. 1992) (dissenting); In re Heard, 588 So. 2d 799, 804 (La. App. Ct. 1991) (concurring).

/12/ Fla. Stat. Ann. Sec. 744.344(1) (West Supp. 1994).

/13/ Id. at (2).

/14/ N.Y. Mental Hyg. Sec. 81.01 (1993).

/15/ Ill. Rev. Stat. ch. 755 para. 5/11a-3 (1993). See also Ky. Rev. Stat. Ann. Sec. 387.500 (1984).

/16/ N.D. Cent. Code Sec. 30.1-28-04(5) (Supp. 1993).

/17/ 20 Penn. Con. Stat. Ann. Sec. 5512.1(b) (1975 & Supp. 1994).

/18/ R.I. Gen. Laws Sec. 33-15-4(1) (Supp. 1993).

/19/ Tex. Prob. Code Ann. art. 693(c) (West Supp. 1994). See also Mo. Ann. Stat. Sec. 475.075(10) (1992).

/20/ Utah Code Ann. Sec. 75-5-304 (1993). See also Mich. Comp. Laws Ann. Sec. 700.444(3) (1994).

/21/ Doll v. Doll, 156 So. 2d 275, 278 (La. Ct. App. 1963).

/22/ In re Interdiction of F.T.E., 594 So. 2d 480 (La. App. Ct. 1992).

/23/ Id. at 486 -- 87.

/24/ In re Heard, 588 So. 2d 799 (La. App. Ct. 1991). See n.10, supra.

/25/ In re Braaten, 502 N.W.2d 512 (N.D. 1993).

/26/ Id. at 522.

/27/ In re Sylvester, 598 A.2d 76 (Pa. Super. Ct. 1991).

/28/ In re M.R., 638 A.2d 1274, 1282 (N.J. 1994), citing Klommason v. Washington Trust Co., 53 A.2d 175 (N.J. 1947).

/29/ Id. The authority of a New Jersey court to tailor a guardianship does not need to rely on the dicta in In re M.R.. While N.J. Rev. Stat. Ann. Sec. 3B:12-56 states that the guardian has the same powers, rights, and duties as a parent has respecting an unemancipated minor child; and section 3B:12-36 gives the court full authority over a ward's person and estate if a guardian is appointed, section 3B:12-57 permits the court to modify those full powers and section 3B:12-37 allows the court to limit the powers conferred upon a guardian.

/30/ Guardianship: supra note 7, at Recommendation III-D.

/31/ Limited Guardianship: Survey of Implementation Considerations, 15 Real Prop., Prob. & Tr. J. 544, 545 n.6 (1980).

/32/ This survey was conducted by the author under a grant from the State Justice Institute to the ABA Commissions on Legal Problems of the Elderly and Mental and Physical Disability Law. A summary of that survey is found in Sally Hurme, Steps to Enhance Guardianship 72-74 (1990).

/33/ For examples of typical language, see text accompanying notes 12 -- 20, supra.

/34/ See, e.g., Ala. Code Sec. 26-2A-105 (Supp. 1993), and Ark. Code Ann. Sec. 28-65-105.

/35/ See, e.g., Ariz. Rev. Stat. Ann. Sec. 14-5312 (1991), and Idaho Code Sec. 15-5-312 (Supp. 1993).

/36/ Kris Bulcroft, supra note 1.

/37/ Pat M. Keith & Robbyn R. Wacker, Guardianship Reform: Does Revised Legislation Make a Difference in Outcomes for Proposed Wards?, 4 J. of Aging & Soc. Pol'y 139, 147 (1992).

/38/ Survey response from James G. Malee, Attorney at Law, Marshall & Associates, Jersey Shore, Pennsylvania (May 5, 1994) (on file with the author).

/39/ Keith & Wacker, supra note 37, at 153.

/40/ Kris Bulcroft, supra note 1, at 161.

/41/ Pat Keith & Robbyn Wacker, Can You Spell "World" Backward? A Study of Older Wards and Their Guardians 184 (1991). This study found that a majority of guardians were not presented with any alternatives to guardianship.

/42/ Nancy Coleman & Jeanne Dooley, Making the Guardianship System Work, 14 Generations, Supp. 47 -- 50 (1990).

/43/ Shawn Majette, Adult Guardianship in Virginia: Some Practice Observations for the Virginia Lawyer, 42 Va. L. 20 (July 1993). Majette points to the problems created in finding a guardian to serve in Guardianship of Wright. When no one could be located to serve as guardian for Mr. Wright three months after a limited guardianship order was entered, the court entered a plenary order because the persons asked to serve had concerns that the "reservation of rights to Mr. Wright are inconsistent with the appointment of a guardian. . . . [T]he concern . . . is that too much uncertainty exists as to the boundary line of the guardians' authority." 19 Va. Cir. 65 (1989).

/44/ The incapacitated persons retains the rights (1) to have an annual review of the guardianship report and plan; (2) to have continuing review of the need for restriction of rights; (3) to be restored to capacity at the earliest possible time; (4) to be treated humanely, with dignity and respect, and to be protected against abuse and neglect; (5) to have a qualified guardian; (6) to remain as independent as possible, including having his preference as to place and standard of living honored; (7) to be properly educated; (8) to receive prudent financial management for his property and to be informed how his property is being managed; (9) to receive necessary services and rehabilitation; (10) to be free from discrimination because of his incapacity; (11) to have access to the courts; (12) to counsel; (13) to receive visitors and communicate with others; (14) to notice of all proceedings related to determination of capacity and guardianship, unless the court finds the incapacitated person lacks the ability to comprehend the notice; and (15) to privacy. Fla. Stat. Ann. Sec. 74.3215(1).

/45/ Rights that can be removed if specified in the order include the rights to marry, vote, personally apply for government benefits, to have a driver's license, to travel, and to seek or retain employment. Id. at Sec. 74.3215(2).

/46/ Rights that can be removed from the incapacitated person and delegated to the guardian include the right to contract, sue, and defend lawsuits, apply for government benefits, manage property, or make any gift or disposition of property and to determine his residence, consent to medical treatment, and make decisions about his social environment or other social aspects of his life. Id. at Sec. 74.3215(3).

/47/ Rights for which the guardian needs special authorization include the right to commit the ward to a facility, institution, or licensed service provider without a formal placement proceeding and to consent on behalf of the ward to the performance on the ward of any experimental biomedical or behavioral procedure. Id. at Sec. 74.3215(4).