

**WRITTEN STATEMENT OF MICHAEL S. KUTZIN
BEFORE THE UNITED STATES SENATE
SPECIAL COMMITTEE ON AGING***

FEBRUARY 11, 2003

Good morning, and thank you for inviting me to testify. My name is Michael Kutzin, and I am a partner in the New York law firm of Goldfarb & Abrandt.

The ordeal that my client, Jane Pollack, and her family has endured in carrying out the wishes of her aunt, Mollie Orshansky, demonstrates many of the problems that seniors and their families often face after falling into the guardianship whirlpool.

Guardianship statutes generally recite lofty principals of honoring the wishes of an incapacitated person where possible, and call for a myriad of protections of due process rights. This includes requiring the party who is petitioning for the appointment of a guardian to demonstrate, by the legal standard known as “clear and convincing evidence” that such a drastic step is required. While the “clear and convincing” standard is below the standard required for a criminal conviction, namely, “beyond a reasonable doubt,” it is a significantly higher burden of proof than the usual standard of proof in civil cases, namely proof by a preponderance of the evidence.

So-called “modern” guardianship statutes, such as those found in New York, call for judges to provide flexible solutions to meet the needs of an incapacitated person, such as limited guardianships, and to honor the senior’s wishes regarding who she wants to care for her.

In practice, however, once a guardianship proceeding is brought against someone, machinery begins that often presumes that a guardian is required, and runs roughshod over the wishes of the senior and his or her family.

This is particularly true where, as in the case of Mollie Orshansky and her family, the proceeding is commenced by a hospital or nursing home, and family members live in another state. A similar disregard for the wishes of the senior and her family often occurs where the senior has significant assets. Both of these factors were present in the Orshansky case.

THE MOLLIE ORSHANSKY GUARDIANSHIP PROCEEDINGS

In this case, once the Washington, D.C. petition was filed by the hospital, the D.C. Judge sought to retain control over the case, even though (1) Mollie Orshansky’s

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family all lived in New York, (2) Mollie Orshansky owned an apartment in New York City in the same building as her sister, (3) Mollie Orshansky had established, years before, a revocable trust naming her sister, Rose, as a trustee to handle her assets if she could not do so herself, (4) Ms. Orshansky had executed a health care proxy naming her niece, Jane Pollack, as the person to make medical decisions for her if she could not do so herself, and (5) Jane Pollack commenced a guardianship proceeding in New York to assure the D.C. Court that no one was attempting to avoid court scrutiny.

There was no need for a guardianship proceeding in the District of Columbia. Jane Pollack was Mollie Orshansky's duly appointed health care agent under both New York and D.C. law, and Ms. Orshansky's revocable trust was a functioning vehicle for the management of her assets. Moreover, Ms. Orshansky had purchased the New York City apartment not as an investment property to rent to others, but for her to reside in, near her family, in the event that she could not care for herself.

In other words, Mollie Orshansky had taken all of the appropriate legal and practical steps to avoid a guardianship proceeding – yet the hospital and the D.C. Superior Court insisted upon continuing down the guardianship path.

To make matters worse, the hospital refused to permit Mollie Orshansky to leave, even though Mollie Orshansky was not receiving medical care, but rather was receiving custodial care pending what the hospital anticipated to be Ms. Orshansky's placement in a nursing home.

In short, Mollie Orshansky was being held captive in the hospital pending an involuntary nursing home admission, despite the fact that her duly authorized health care agent, Jane Pollack, had requested her discharge.

As a result of Ms. Orshansky's status as a custodial care patient, she received inadequate care from the hospital. Jane Pollack was not going to permit her aunt to be treated in such a manner, so she transported Ms. Orshansky, at Ms. Orshansky's request, from the hospital, to her New York City apartment. Ms. Pollack and her family immediately arranged for 24-hour homecare for Ms. Orshansky, and for her medical needs.

Ms. Pollack notified the hospital that Ms. Orshansky was no longer present in the hospital, at which point the hospital's counsel informed the D.C. court. The judge responded by naming one lawyer as Ms. Orshansky's temporary guardian and appointed another attorney from a large firm as "Mollie's attorney." This judge also ordered the temporary guardian to take all steps necessary, including bringing in the police, to have Mollie Orshansky brought back to the District of Columbia.

In other words, the judge asserted that the mere fact that someone filed a guardianship petition presumptively made Ms. Orshansky incapacitated and made her a captive of the District of Columbia. Mollie Orshansky was not a criminal, and she, her

family and her health care agent had the right to remove her from the hospital and transport her to her own apartment.

In addition to these infringements of Ms. Orshansky's due process rights, Mollie Orshansky's court-appointed attorney never bothered to visit or to speak with her, and even represented herself to me as representing the temporary guardian. It was in the temporary guardian's financial best interests to keep the guardianship in the District of Columbia in order to earn large fees from Mollie Orshansky's assets, and Ms. Orshansky's "lawyer" acted accordingly.

Fortunately for Ms. Orshansky and her family, the D.C. Court of Appeals, in a unanimous, 50 page decision, reversed the decision of the lower court. In that decision, the actions of the lower court and its appointed agents were sharply criticized.

THE NEED FOR REFORM

The Orshansky matter and cases like it demonstrate dangers that seniors and their families face when family members live in another state or where courts are eager to assert control over seniors and the lucrative guardianship appointments that result.

Too often, the wishes of seniors, as manifested by their legal documents and their lifetime planning, are ignored by courts on the basis of being ill-advised. In a recent case in which I represented an incapacitated person with no living relatives, the court was unwilling to let my client name longtime, caring friends to supervise her finances on the grounds that my client was incapable of deciding who she could trust, even though there was absolutely no basis for such a conclusion. The stated rationale of the Court, as well as the two attorneys who petitioned for the guardianship, was that when a person knows only a few people, the person will simply choose from among that limited group.

Instead, a lawyer "on the judge's list" in New York will be in charge of this client's finances.

The freedom to make choices, even "bad" ones, is what we as a society have always valued. It is what we fight for, and what our foes seek to take from us by force. Self-determination is at the heart of freedom, and the right to choose family and friends to care for us rather than an institution or a court must be jealously guarded. When people either plan in advance, as Mollie Orshansky did, for her needs in the event of her incapacity, or, as the other person to whom I have alluded, expresses her wishes as to whom she wants to assist her, then, in the absence of compelling reasons to the contrary, these plans and wishes must be honored by our legal system.

Aside from the obvious emotional and financial turmoil that institutional disregard for individual rights causes for seniors and their families, there are other important issues that must be considered. Many seniors retire from their cold weather homes to warm weather states that are hundreds, or even thousands, of miles away from their families. It cannot and should not be used as an excuse by overreaching courts and

their minions for the appointment of non-family guardians simply because family members live far away, or because the family is not immediately available when seniors require medical care.

Cases like that of Mollie Orshansky will, in the absence of reform, make seniors far more reluctant to move to states such as Arizona, Florida, or North Carolina if they fear that courts will ignore their wishes.

PROPOSED LEGISLATIVE REMEDIES – MOLLIE’S LAW

I do not believe that it would be appropriate or helpful to take guardianships from the hands of state courts. Congress and the Federal government, however, may properly impose conditions upon the receipt of Medicare or Medicaid funds on institutions. This provides an opportunity for Congress to require that hospitals and other institutions respect the wishes of seniors and their families.

I refer to these legislative proposals as “Mollie’s Law,” in honor of Mollie Orshansky and her family, in the hope that no family in the future will have to endure the nightmare that Ms. Orshansky’s family lived through.

There are two parts to my proposal. I propose that hospitals, adult protective services, and other recipients of federal funds must not be permitted to commence guardianship proceedings if there are properly executed advance directives (health care proxies, trusts or powers of attorney) unless there is a good faith belief that (1) such documents were not duly executed, (2) there has been a breach a fiduciary responsibility, or (3) the advance directives do not give the donee of the power sufficient authority to act where necessary.

Moreover, even where the institution commences the guardianship case in good faith, the institution must be required to withdraw its action if and when it discovers that adequate advance directives are in place.

Violations of this standard must result in a sanction significant enough to deter such behavior, such as loss of Federal Medicare and Medicaid funds.

The second part of my proposal is that, even where no advance directives exist, in the event that an institution brings a guardianship proceeding, Federal law should require that such case be withdrawn or dismissed in the event that family members commence a guardianship proceeding in another jurisdiction. This would again place the preference where it belongs, namely with the family over an institution, and would recognize the fact that seniors and their families often reside in different jurisdictions – at least until a senior requires assistance.

There is a role for guardianship proceedings. To the extent possible, however, they should be avoided, as they result in extraordinary expenses in the form of legal fees and compensation paid to guardians (especially in states that do not use nonprofit

organizations to serve in that capacity), as well as the trauma of court proceedings when seniors and their families are most vulnerable. Too often, the notion of self-determination gets lost in guardianship proceedings.

Mollie's Law will not solve all of the problems that occur in guardianship proceedings, but it will provide important safeguards to seniors that their wishes will be carried out.

Thank you.