

**UNITED STATES SENATE
SPECIAL COMMITTEE ON AGING**

**Senator Larry E. Craig, Idaho, Chairman
Senator John B. Breaux, Louisiana, Ranking Member**

**HEARING ON GUARDIANSHIPS
February 11, 2003**

**ISSUES RELATING TO DUE PROCESS PROVIDED ALLEGED
INCAPACITATED PERSONS IN GUARDIANSHIP
PROCEEDINGS**

**By
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OUTLINE OF TESTIMONY²

I. STATE STATUTORY REFORM RELATED TO DUE PROCESS

A. Statutory Reform of Due Process Since the Late '80s .

1. Guardianship Folly - Reform in the Context of Culture and Misgovernment
2. A Mask of Virtual Reality – Reform in the Context of Illusion Scrolled Across the Books
3. The Lantern on the Stern – Reform in the Context of Historical Guidance

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² This outline will be substantially expanded in the written supplemental materials offered for the record on the date of the hearing.

B. Has There Been Any Benefit From Statutory Reform of Due Process in Guardianship?

1. From Wingspread to Wingspan, and all the empirical research and hearings in between, the answer is clear – there is too little, if any, current reliable data from which to draw any conclusion, but one.
2. The one conclusion that is clear is that any application of reform requires re-education and training of the judiciary and the social agencies that support it. Professor Lawrence A. Frolik surmised:

No matter how many reforms or counter-reforms are enacted, no matter how the system is modified, there is no perfection this side of paradise. Rather [than focusing on reforming the guardianship system]...those concerned [should focus on] the actors in the guardianship system, and how the actors' behaviors might be improved.³

II. WINGSPAN AND THE RECOMMENDATIONS RELATED TO DUE PROCESS

A. Wingspan: The Second National Guardianship Conference

In July of 1988, the American Bar Association Commission on Legal Problems of the Elderly and Commission on the Mentally Disabled convened a National Guardianship Symposium that became known as "Wingspread," after the conference center of that name in Racine, Wisconsin. Wingspread produced a set of landmark recommendations for reform of the nation's guardianship system. Wingspan, the Second National Guardianship Conference, was convened November 30 through December 2, 2001, more than a decade after the original Wingspread conference, to examine what progress has been made in the interim, and what steps should be recommended for the future.

Wingspan utilized a select, multidisciplinary cadre of experts in a working meeting of plenary and small group sessions. Conferees were appointed by several collaborating groups, including: the National Academy of Elder Law Attorneys (NAELA); the

³ See Lawrence A. Frolik, *Guardianship Reform: When the Best is the Enemy of the Good*, 9:2 Stanford Law and Policy Review 347, 351 (Spring 1998).

Borchard Foundation Center on Law and Aging; Stetson University College of Law; the ABA Commission on Law and Aging (a/k/a ABA Commission on Legal Problems of the Elderly), the ABA Section on Real Property, Probate and Trust Law, the American College of Trust and Estate Counsel (ACTEC), the National College of Probate Judges, the National Guardianship Association, the Center for Medicare Advocacy, the Arc of the United States, AARP, and the Academy of Florida Elder Law Attorneys. In addition, six commissioned papers provided an analytical starting point and framework for discussions, each addressing different aspects of guardianship reform and current practice across America.⁴

B. Wingspan's Specific Recommendations Related to Due Process.

1. Summary of Changes in Statute and Regulation (Numbers follow published recommendations)
 27. Respondent's mandatory right to appear and be heard.
 28. Appointed counsel for the respondent always as advocate
 29. Role of counsel as zealous advocate (strong minority position)
 30. Pre-hearing process include a separate court investigator/visitor
 31. Term investigator/visitor used instead of ad litem
 32. State guardianship courts given full plenary powers.
 33. Respondent's right to closed hearing for determining incapacity; confidentiality and privilege of medical records and testimony and records sealed.
 34. Emergency proceedings must have same due process elements as permanent hearing.
 35. Emergency guardianships be limited to the emergency; termination on showing that emergency no longer exists.
 36. Special guardianship procedures for single transactions.
 37. Hearing mandatory for guardian seeking consent to civil commitment, electric shock, or dissolution of marriage.
 38. Appropriate limited guardianship orders expressly declared in statutes and developed in forms.
 39. Plenary guardianship requiring proof of its need

⁴ Excerpted from A. Frank Johns and Charles P. Sabatino, *Introduction and Recommendations, Wingspan – The Second National Guardianship Conference*, 31 Stetson L. Rev. 573 (Spring 2002)(Footnotes omitted).

2. Summary of Changes in Practice Precepts or Guidelines
 40. Adequately fund courts for investigation at the inception of the guardianship action, and oversight during the guardianship.
 41. Prompt hearing on a guardianship petition after service on respondent.
 42. Substituted judgment standard in making decisions on behalf of the person with diminished capacity.
 43. Best interest standard when selecting guardian.

III. LINKAGE TO FEDERAL PROTECTIONS

A. Social Security, Pension Benefits and Veterans Benefits

1. Social Security
 - a. Representative Payees and Guardianship
2. Pension and other deferred retirement benefits under federal oversight
3. State Veterans Guardianship Acts and the Department of Veterans Affairs Oversight under State Statutory Schemes
 - a. State statutes mandate the Department of Veterans Affairs policies for guardianship over veterans

B. Federal Oversight and Revenue Sharing

1. Elder Justice Act
 - a. Guardianship's good – Public and private guardians are a source of leadership, a conduit for resources and a linkage to protection and advocacy of vulnerable older Americans of modest means.
 - b. Guardianship's evil - Abuse, neglect and exploitation is often at the hands of the public and private guardians sworn to protect the vulnerable older Americans against the risks of life.
 - c. The Elder Justice Center – a center for research, training and mandating standards and ethics

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- d. The National Guardianship Network – currently in existence and made up of the primary professional organizations dealing with guardianship.
2. Medicaid as a source for advocating rights of older Americans with Diminished Capacity
 - a. Constitutional and statutory mandate as interpreted in case law
 - (1) *Rudow v. Commissioner of Division of Medical Assistance*, 707 N.E.2d 339 (Mass. 1999)
 - b. Federal regulatory directives to the states as oversight and intervention in protecting older Americans with diminished capacity from abuse, neglect and exploitation
 - c. A funding source for the Elder Justice Center
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