



NATIONAL GUARDIANSHIP ASSOCIATION

174 Crestview Drive
Bellefonte, PA 16823-8516
Toll-free: 877-326-5992
Fax: 814-355-2452

Email: info@guardianship.org
Website: www.guardianship.org

**BEST PRACTICES IN AMERICA FOR
GUARDIANSHIP/CONSERVATORSHIP CASES:
EMERGING TRENDS AS SHOWN IN
THE MEDIA AND CASE LAW**

Presented to the

16th Annual Probate Bench/Bar

in conjunction with

The University of South Carolina School of Law

Columbia, South Carolina

September 12, 2008

Presented by

Terry Hammond
Executive Director
National Guardianship Association
ngaexecutivedirector@guardianship.org
2207 Hancock Drive
Austin, Texas 78756
915-203-2520

Paper originally prepared by

By Steven D. Fields, 2008 NGA President
ngapresident@guardianship.org
sfields@tarrantcounty.com
817-884-1049

**BEST PRACTICES IN AMERICA FOR
GUARDIANSHIP/CONSERVATORSHIP CASES:
EMERGING TRENDS AS SHOWN IN
THE MEDIA AND CASE LAW**

INTRODUCTION

Every year the National Guardianship Association teams with highly-skilled attorneys to develop a guardianship/conservatorship case law update to assist its members in understanding best practices and emerging trends in guardianship. We have summarized below, with some narrative, recent cases that highlight these best practices and emerging trends. Additionally, we have attached the National Guardianship Association’s Standards of Practice for Guardians, which are increasingly being adopted into state law around the country, as they are the cornerstone of ethical and responsible guardianship in the United States.

**TREND ONE:
THE RELATIVES ARE RESTLESS**

Most professional guardians are appointed because there are either no relatives to serve or there is something wrong with the relatives who are willing to serve. The laws in most states prohibit courts from appointing the follow relatives as guardians: felons; those indebted to proposed wards; those involved in lawsuits with proposed wards; those asserting adverse claims to proposed wards; or those whose conduct is notoriously bad. I don’t know about you, but that just about describes the attendees at my latest family reunion. State laws, however, don’t prohibit these same disqualified relatives from griping about everything the professional guardian does or charges to “their loved one” and “their expected inheritance.”

A. ANTI-GUARDIANSHIP GROUPS.

Disaffected family members and litigants have banded together to complain about what they perceive to be unjust treatment from guardians. These first two sites list under the category of “victims” about a dozen stories of incapacitated people who have been financially “abused” by guardians.

1. National Association to Stop Guardianship Abuse. www.stopguardianabuse.org Mt. Prospect, IL – Robin C. Westmiller, JD, founder, who has now left NASGA to start - ANGER

2. Advocates for National Guardianship Ethics and Reform
www.angr.us Thousand Oaks, CA – Robin C. Westmiller, JD, founder

Also Blood Tastes Lousy with Scotch – by Robin C. Westmiller, JD, (a.k.a. Raven West) (Star Publish 6/22/06) “compelling memoir of how she rescued her father from greedy cousins, thieving attorneys, and the Florida Guardianship System.”

3. ElderAbuseHelp.Org – a Blog on which “Guardianship Costs” was a hot topic on August 6, 2008. Go to www.elder-abuse-cyberray.blogspot.com for more info.

4. Obama '08 Platform Meeting – “National Guardianship Reform Desperately Needed,” hosted by Latifa Ring, National Delegate, in Houston, TX, on 7/12/08 with 11 participants.

B. GUARDIAN V. POA CONFLICTS

1. Using Guardianship to Stop Financial Exploitation under POA.

Guardianships are often sought to stop financial abuse by an agent/relative under a POA. Here is a typical case of a relative trying to exploit an incapacitated person using a POA, and how a guardianship petition was filed to revoke the POA and stop the financial exploitation.

In the Matter of Mildred Ruth Duvall, 178 S.W.3d 617 (Ct. App. MO, W. Dist. 2005)

- Lynn, nephew of Ruth, has Ruth’s POA since 1993
- In 2002, when Ruth was 90 and in a NH, he had Ruth sign Revocable Trust whereby she exchanged her \$57,000 fully paid home in exchange for a 98% interest in Lynn’s \$350,000 home mortgaged to the hilt, and Lynn was the trustee and beneficiary of the trust
- Ruth still thought she owned her home
- In 2002, DHSS receives a call that Ruth is being exploited by Lynn
- DHSS files for guardianship by public administrator
- Lynn objects and petitions that he be appointed
- In 2004, the court finds good cause not to appoint Lynn and appoints public administrator
- Lynn appeals and Ruth dies prior to appellate hearing
- App Ct rules that case not moot because if they find for Lynn GS would be revoked

- Lynn was using the house scheme to claim that the court didn't have jurisdiction because Ruth's new house was in another county, but court didn't buy it

2. Danger of Guardianship with Volatile Family Involvement.

Everyone should be aware that there is an element of danger in serving as a guardian.

State of Minnesota v. Susan Rae Berkovitz, 705 N.W.2d 399 (MN 2005)

- Hyman and Anna Berkovitz had three children
- Richard and Sherilee arrange for Sherilee to get a POA from Hyman after he shows signs of dementia
- They don't tell the third child, Susan, because they fear her reaction
- Sherilee moves Hyman and Anna into apartment for seniors and Susan calls APS because she is living in parents house too
- Susan discovers POA and files for CS of Hyman
- Richard and Sherilee hire attorney to oppose CS by Susan
- Anna opposes Susan as CS because she constantly harasses family
- Court finds Hyman is incapacitated & appoints Hyman's niece, Kordell as CS
- CS moves Hyman and Anna to CA as Susan keeps harassing them
- Susan files a harassment petition against Kordell and Hendrickson
- At courthouse for harassment hearing, Susan shoots both Hendrickson and Kordell
- Officers ask Susan if she is the shooter and she says "yes, they've been taking Dad's money for the last three years" and later says "they're not going to take Daddy's money any more, they're not."
- Kordell died and Hendrickson survived with a paralyzed vocal chord
- Susan is charged with first degree murder of Kordell and attempted first degree murder of Hendrickson
- Jury finds Susan guilty of both counts and sentences her to life in prison
- Susan appeals stating her counsel refused to allow her to testify, but App Ct. affirms trial court
- Susan then filed in Federal District Court for habeas relief claiming that she did not knowingly and voluntarily waive her constitutional right to testify at trial because of undue influence and coercion by her appointed counsel. The District Court denied her petition, and then Susan appealed to US 8th Circuit Court of Appeals which affirmed the

- District Court's denial of her petition. Berkovitz v. Minnesota, 505 F.3d 827 (US Ct. App. 8th Cir. 2007)
- Susan then filed for a writ of certiorari to the US Supreme Court which was denied. Berkovitz v. Minnesota, 128 S. Ct. 1454 (S.Ct. 2008)

See also a website asking people to contribute to Ms. Berkovits' defense fund at <http://www.angelfire.com/mn3/deadbydiabetes2/>

**TREND TWO:
THE PRESS IS IMPRESSIONABLE**

The following are anti-guardianship articles cited at www.angr.us.

1. Key West, FL - 4/18/08 - **Elder Abuse Hits Home: The Clara Fernandez Story** by Rhonda Linseman-Saunders in Key West Blue Paper
2. New Haven, CT - 8/2/07 – **Losing Control: Bringing Maydelle Home** by Betsy Yagla for the New Haven Advocate
3. Palm Beach, FL – 10/26/07 – **After Death, Control of Life at Issue** by Susan R. Miller for PalmBeachPost.com
4. Hartford, CT - 1/19/07 – **Probate Court: Offering Unequal Protection Under the Law** by Rick Green for the Hartford Courant
5. Los Angeles, CA – 11/13-16/05 – **Guardians for Profit** – 4 part series by Robin Fields, Ellen Larubia and Jack Leonard for LA Times
6. National – 1/04 – **Stolen Lives** by Barry Yeoman for AARP The Magazine

These articles, and the stories focus on how good things were before the guardians and the attorneys got involved and how the wards are now all out of money. The stories seem to gloss over the crises that gave need to the guardianship and why family members were not appointed as guardians initially. They arouse sympathy for the incapacitated person and depict the professional guardians and their attorneys as opportunistic villains. The family members are depicted as unwitting victims who could have prevented

this tragedy if only they had either been appointed as guardians themselves or left alone to craft their own solution to the crisis. The articles seem to suggest that the solution is for professional guardians and their attorneys to work for free. The articles do not attempt to report the perspective of professional guardians, their attorneys or the courts. Because of the increased litigiousness in contested guardianship cases, NGA has endorsed a **liability policy offered by Dominion Insurance** which is exclusively available to NGA members which can be found at www.guardianship.org.

NGA has been successful in turning negative guardianship media articles somewhat positive. A reporter in Missouri contacted the NGA prior to writing her follow-up story on a public administrator in Joplin, MO, who the reporter had been criticizing in a number of previous articles. A previous article by the same writer stated that the public administrator and her husband, a former MO state legislator, were going to bring a libel suit against the newspaper for these stories. The public administrator was defeated in a recent election, so the alleged damages could be significant.

Probate Courts Monitor Guardianships – 7/12/08 by Susan Redden for The Joplin Globe

Here are some quotes from this article:

- Lead sentence: “It’s a little-known county procedure, but one that can have a personal, profound and sometimes permanent effect on the lives of individuals and their families. The Jasper County public administrator is a guardian and conservator for more than 350 people who have been put under county supervision by the probate court.”
- “A public administrator normally is appointed because there is no other person, normally a family member, to act on behalf of the person.”
- “Reporting to the court, and the court’s monitoring, are essential parts of the process,” said Terry Hammond, executive director for the National Guardianship Association. The group offers training and certification for guardians, and promotes a code of ethics and standards for those who serve as guardians.
- “Some family members can be unhappy when a third-party guardian such as a public administrator is named,” Hammond said, “especially if a public administrator is chosen over a family member. They can have a thankless job and be criticized by family members. **Typically, when a judge appoints a public administrator rather than a family member, there is a reason.**”

- “Three case managers shouldn’t be expected to handle more than 100 cases each,” Hammond said, “it’s a statewide and national problem; funding sources have failed to anticipate and meet the needs of public guardianship offices.” Giving funding limitations, Hammond said public administrators “are doing the best job they can with very limited resources.”

Members of an organization such as NGA dealing with such news can and should rely on NGA for assistance when put under media scrutiny. It is not usually advisable to comment on the specific fact situations due to lack of information and client confidentiality issues, but it is important to point out the difficult decisions that guardians have to make, and the reason why they were appointed in the first place was because family members weren’t willing, suitable or able to make these difficult decisions. It is also important to stress, like NGA did above, that guardianship needs more local and national funding so that courts are better able to monitor their guardianship cases.

For more substantive reading on guardianship issues, please see:

Guardianship for the Elderly: Protecting the Rights and Welfare of Seniors with Reduced Capacity issued by Senator Gordon H. Smith, Ranking Member United States Senate Special Subcommittee on Aging, and Senator Herb Kohl, Chairman, United States Senate Special Committee on Aging, dated December 2007 (does not represent findings of recommendations formally adopted by the Committee). This is the most comprehensive report issued on guardianship by members of US Congress and denotes a positive trend: “The Feds are Listening or perhaps Curious.” NGA’s Executive Director was invited to be one of five witnesses to testify before the US Senate Special Committee on Aging which led to the production of the above report.

**TREND THREE:
THE STATES ARE CERTIFYING**

In response to newspaper articles out of El Paso and Dallas in 2003 and 2004, the 2005 Texas legislature required certification of all professional guardians by September 1, 2007. In response to the LA Times articles mentioned above, the 2007 California legislature require certification of all professional guardians by July 1, 2008. Texas and California now join Florida, Arizona, Alaska, Nevada and Washington as states with mandatory

certification for professional guardians. The emerging trend is for states to contract with the Center for Guardianship Certification (CGC) to credential guardians. Requiring profession guardians to be certified is a common political response for state legislatures. Most states have “grandfathered” guardians certified by CGC and have only required them to take a state specific test. More information on guardianship certification is available at www.guardianshipcert.org.

TREND FOUR:

PEOPLE UNDER GUARDIANSHIP/CONSERVATORSHIP ARE MOBILE

Many incapacitated adults have “points of contact” in multiple states. Many have vacation properties in states other than their home state, and many have children in multiple states. These facts increase the possibility that a guardianship contest between relatives will involve multiple states. Summarized below are some seminal cases that have led to the need for all states to adopt the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act. The NGA is advocating for adoption of UAGPPJA. The liaison with the Uniform Law Commission is Eric Fish at NCCUSL by email at eric.fish@nccusl.org

In re Guardianship of Jane E.P., 700 N.W.2d 863 (WI 2005)

Case identifies a lot of the interstate guardianship issues

- Jane is a 47 yr. F with Wernicke’s encephalopathy
- She lived in a nursing facility in IL for 5 years prior to case
- Sister Deborah is G appointed by IL court
- Relatives live in WI across the WI/IL border
- Relatives want to move Jane to WI
- WI Dept of Social Services applies for GS in WI with Deborah to remain as G
- WI court orders Unified board to evaluate Jane
- Unified moves to dismiss for lack of jurisdiction (Jane is IL resident)
- Circuit court dismisses case
- WI Dept appeals
- App Ct reverses citing an unconstitutional burden on Jane’s right to travel
- WI Sup Ct reverses App Ct & says that court was ignoring the existence of the IL GS

- Sup Ct says “current laws are insufficient to assist courts and litigants in resolving multi-jurisdictional issues stemming from interstate guardianship.”
- Sup Ct strongly encouraged legislature to work with NCPJ and NCCUSL to remedy this situation
- In the meantime, court suggested that lower court apply NCPJ standards
- Sup Ct suggests that “a little cooperation between the different states might have solved this problem and avoided the constitutional issue altogether
- Neither WI or IL gave full faith and credit to the GS of other states

Matter of Glasser, 2006 WL 510096 NJ Super. Ch. (NJ 2006)

- Lillian Glasser was a long time resident of NJ
- Visits daughter in TX on 2/05
- Glasser’s behavior causes daughter to become TG in TX
- Nephew from NJ opposes GS in TX and suggests NJ has jurisdiction
- Nephew claims daughter abusing POA
- Nephew and NJAPS file for G in NJ
- Glasser returns to NJ
- TX appoints successor TG who opposes NJ guardianship
- NJ court finds that it didn’t need to defer to TX court under “Comity” doctrine because Glasser had far more contacts in NJ than TX and no evidence that she intended to change domicile to TX
- NJ asks that the TX court dismiss its action to avoid conflict
- \$3 million in attorney fees from Glasser’s estate

In the Matter of: Steven Prye, 169 S.W.3d 116 (Ct. App. MO, E. Dist., Div. One 2005)

- Steven Prye is 52 yr initially diagnosed with Pick’s disease then bipolar schizoaffective disorder
- He has degrees from Yale, Harvard Law and NYU Law
- Was law professor at Vermont and UIL where lost job due to MI
- Moved to TN and committed 5 times for MI
- Returns to IL and is committed
- IL court appoints OSG as G for Prye
- Prye is violent and sexual and gets placed in MO
- MO hospital applies for MO public administrator

- MO court finds Prye has not changed domicile to MO; IL guardian had no legal authority to admit Prye to MO facility
- MO court finds Prye meets criteria for G in MO but refuses to appoint MO public administrator because Prye's presence in MO was artificially created by IL G
- MO court orders OSG to move Prye back to IL
- OSG appeals, but moves Prye back to IL anyway
- MO App Ct reverses saying lower ct depended on '82 case that G powers are local, but that G statutes revised in '83 to recognize foreign GS which indicates willingness to recognize GS without regard to location of G or ward
- IL GS was entitled to Full Faith & Credit in MO

TREND FIVE:

THE COURTS ARE PROTECTING

The courts are starting to protect the rights of incapacitated adults. Recent cases where courts have found a right to a certain standard of care, a right to privacy, and a right to counsel even after incapacity is determined.

A. RIGHT TO A CERTAIN STANDARD OF CARE

Cawood v. Rainbow Rehabilitation Centers, Inc., 711 N.W.2d 754 (Ct. App. MI 2005)

- Jennifer has a brain injury and her parents are her co-conservators
- Jennifer resides at a group home run by Rainbow
- Harry, an employee of Rainbow, and Jennifer have a sexual encounter
- Parents sue Rainbow for vicarious liability for Harry's actions
- Trial court grants summary judgment for Rainbow because parents failed to show Rainbow had a duty to staff the home with a female staff person and no evidence to show Rainbow knew or should have known that Harry would take advantage of Jennifer
- App Ct. affirms
- Dissent argues for a heightened duty of care for long-term care facilities that assume the care, custody and control of incapacitated individuals
- "As the population rapidly ages, and the time for many to enter long-term care facilities approaches, the citizenry of this state

should have a reasonable expectation that the civil laws of this state will protect them from sexual exploitation at the hands of a health care worker.”

- App Ct says they are sympathetic, but Leg should make the change

Madison, through her guardian, Brenda Bryant v. Babcock Center, Inc., 638 S.E.2d 650 (SC 2006)

- In 1995, Madison was 21 yr F with mild MR
- Voluntarily admitted to Babcock Center group home run by a private non-profit contract provider for SC Dept of Disabilities
- Madison had maturity of 7-10 yr old, can read, write and math 1st or 2nd grade level
- Madison can't cook, wash clothes, or bathe without adult supervision
- Madison slips out around 1 am with 2 men and has sex with both men
- Madison claims to be virgin when entering Babcock but contracted herpes while staying there
- In 1997, Brenda Bryant, mother of Madison, is appointed G and CS
- G files suit for gross negligence v. Babcock and SCDD alleging breach of duty to supervise residents
- Circuit court grants SJ to Babcock and SCDD finding no legal duty to maintain constant watch over Madison and that proximate cause of damages was due to Madison's voluntary acts
- G appeals and SCT of SC certifies case for review
- SCT states that under common law, a business entity which accepts the responsibility of providing care, treatment or services to a MR or DD client has a duty to exercise reasonable care in supervising the client and providing appropriate care and treatment to the client
- SCT finds Babcock had a common law duty to Madison but that the precise extent and nature of that duty, grounded in relevant standards of care, and whether the duty was breached must be determined by a jury on remand to trial court
- SCT finds that SCDD owes a common law duty of care directly to Madison and the fact that an independent contractor provided the services or that a third party may have committed a criminal act in harming Madison does not affect the existence of SCDD's duty
- SCT finds that circuit court erred in reasoning that Madison was competent to make her own decisions because she was not adjudicated incompetent until 1997 and the event occurred in 1995

- SCT finds that the issue of proximate cause is and issue of fact for the jury and that circuit court erred in granting SJ to Babcock

Montejo Gaspar Montejo, guardian of the person of Luis Alberto Jimenez v. Martin Memorial Medical Center, Inc., 935 So.2d 1266 (Ct. App. FL, 4th Dist. 2006)

- Luis Jimenez is undocumented native of Guatemala living in FL
- Luis suffers brain injury in auto accident in FL in 2001
- Luis transported to Martin Memorial
- Montejo appointed as G for Luis
- In 2003, Martin intervenes in GS action stating that G has failed to ensure that Luis was in the best facility to meet his medical needs and hospital is not appropriate facility to provide long term rehab care
- Martin seeks court permission to discharge Luis to Guatemala at hospital expense and to prevent G from frustrating this plan
- Court grants permission and G appeals and files for stay
- Before 7 am the next day, Martin flies Luis to Guatemala
- Ct of App reverses and says insufficient evidence to show Luis would receive adequate care in Guatemala and because trial court lacked subject matter jurisdiction to authorize deportation
- G files suit against Martin for false imprisonment of Luis in ambulance and on airplane
- Martin files to dismiss claiming immunity due to court order
- Ct of App says court order w/o subject matter jurisdiction is void and that Martin was seeking to vindicate a private right by flying Luis to Guatemala and as such has no immunity from a claim for damages

B. RIGHT TO PRIVACY OF MEDICAL RECORDS

In the Matter of the Application of Phillip MARSHALL for the appointment of a Guardian for the Person and Property of Brooke Astor, An Alleged Incapacitated Person , 824 N.Y.S.2D 755 (S.Ct. NY, NY Cty. 2006)

- Trial court issued and order to seal the records in this G matter
- AP and other news orgs argue that public has a legitimate interest in the trial and record as Ms. Astor is a well known public figure; awareness of elder abuse among all classes of people; constitutional right to accessibility of civil court proceedings; assurance that civil order is respected in all cases

- AP argues that embarrassment to parties involved does not overcome the rights of the public and the press
- App Ct vacates the interim sealing order but keeps personal medical information and specific account identification information sealed

C. RIGHT TO SELECT LEGAL COUNSEL

Guardianship of Danny Holly, Mulinix, Edwards and Nicks, Nominated Attorneys v. Sartin and Marshall, Court-Appointed Attorneys, 164 P.3d 137 (OK 2007)

- Danny Holly, age 58, suffered a head injury in an auto accident in 1999 in which his wife died and his daughter was injured
- Holly's daughter, Goodner, was appointed his guardian
- Guardian obtains \$6 million in settlement from accident
- In 2003, Holly retains the services of attorneys Sartin and Marshall (court appointed attorneys) with court approval to apply for restoration and resume control of his assets
- In 2005, Holly and Goodner reach court approved settlement that gives Holly control and appoints Houchin as a limited guardian over Holly's person and contracts over \$10,000
- In 2006, Holly becomes dissatisfied with Sartin and Marshall and Houchin, and retains Mulinix, Edwards and Nix (nominated attorneys) and refuses to speak to his court appointed attorneys
- Nominated attorneys and court appointed attorneys begin to fight over who is entitled to Holly's medical records, whether a special guardian is needed, which attorneys have a conflict of interest, etc.
- S.Ct. of OK rules that a ward, whether prospective or under guardianship, is entitled to an attorney of his own choice unless the trial court concludes after an evidentiary hearing that the attorney is not independent or has a conflict of interest, and that a court's refusal to allow the attorney to present evidence and witnesses is, by itself, a denial of the ward's fundamental right of due process
- OK Stat 30.3-107 provides that a ward is entitled to an attorney of his own choosing and mandates the continuation of the procedural safeguards of the ward's rights after a guardian is appointed
- SCT rejects court appointed attorneys argument that requiring the trial court to conduct a full hearing regarding Holly's desire to replace his court-appointed attorneys would mean that the parties have to fight this battle repeatedly at great expense because Holly may want to

- change attorneys often and say **“Messiness has never been a valid reason for dispensing of one’s fundamental rights.”**
- Court notes that only previous time Holly wanted to change attorneys was when the court appointed attorneys were appointed.
 - SCT reminds the parties and lower court that **“Guardianship proceedings are conducted for the benefit of the ward, not for the convenience of the court, the attorneys or the guardians.”**

**TREND SIX:
THE FACILITIES ARE ARBITRATING**

Summarized below are eight cases decided in 2006 & 2007 where a person without authority to do so is allowed to sign an admission agreement with a nursing facility admitting a relative, sometimes incapacitated – sometimes not, to the nursing facility. Allowing people to admit relatives to the nursing facility usually comes back to haunt the facility when the guardian or administrator of the admitted person later sues the facility for negligence, and the facility tries to enforce the arbitration agreement stated in the admission documents.

Eugenia Sikes on behalf of Estate of Joel Sikes v. Heritage Oaks West Retirement Village, 238 S.W.3D 807 (Ct. App. TX, 10th Dist, Waco 2007) reh. den.

- Eugenia Sikes signs her husband Joel Sikes into Heritage Oaks
- Eugenia signs on the line “POA/Guardian’s Signature” but she is neither (no actual authority)
- Joel Sikes dies, and Eugenia and daughter bring malpractice claim against Heritage Oaks
- Heritage Oaks claims it is bound by arbitration agreement and trial court agrees and Eugenia appeals
- App Ct reverses and says Eugenia is not bound by the arbitration agreement
- Affidavits show that Joel was not incapacitated when he entered Heritage Oaks and was capable of signing the documents at that time
- No evidence is shown that Joel took any action to induce people to believe that Eugenia was his agent and so no apparent authority here
- Heritage Oak argues that Eugenia was equitably estopped to deny she signed the documents

- Equitable estoppel fails because Eugenia was acting without authority and any misrepresentation on her part cannot be imputed to the ostensible principal Joel

Kindred Hospitals v. Susan Luttrell, as administratrix of the estate of Altha Duncan, 2007 Ky. App. LEXIS 236 (Ct. App. KY 2007) **reh. den.**

- Luttrell is an eighth grade drop-out who has trouble reading
- Luttrell didn't believe her mother, Duncan, would understand the admission documents to Kindred, so she tells Debra at Kindred that she, Luttrell, will sign the admission documents
- Luttrell doesn't read the documents, nor believes she could have read them, but signs them anyway as Duncan's daughter
- Debra testified she read the arbitration agreement in the documents to Luttrell
- Debra knows that Luttrell doesn't have POA
- Duncan dies at Kindred
- Luttrell as administrator of Duncan's estate brings wrongful death claim against Kindred
- Kindred brings motion to dismiss and tries to enforce arbitration agreement, but circuit court doesn't believe Luttrell had the authority to waive a jury trial on behalf of her mother, Duncan
- App Ct finds no actual or apparent authority of Luttrell to sign for Duncan
- App Ct finds that health care decision act does not authorize agents to enter ADR agreements because they are not health care decisions and so no statutory authority

Covenant Health Rehab of Picayune v. Barbara N. Brown, Margaret Grace and Sharon Goss, on behalf of wrongful death beneficiaries of Bernice Brown, 949 So. 2d 732 (MS 2007)

- Sharon Goss signs her incapacitated mother, Bernice Brown, into Picayune Center
- Brown dies and Goss is administrator of estate and sues Picayune for negligence causing her mother's death
- Picayune moves to compel arbitration pursuant to the admission agreement
- Goss argues she signed the agreement in a manner that was not voluntary since the agreement was one of adhesion, the print was small and she didn't understand the terms

- Trial court grants motion to compel arbitration and Gross appeals
- SCT rules that Brown was incapacitated and Gross was a member of the class from which a surrogate could be drawn under the MS Health Care Consent Act, and therefore, the court determined Gross could contractually bind Brown in matters of health care
- SCT finds the arbitration clause was not unconscionable as it was the same as the clause ruled conscionable in a previous case decided by the Court

Grenada Living Center, LLC v. Cephus Coleman, III, as personal representative of Cephus Coleman, Jr., deceased, 961 So.2d 33 (MS 2007)

- Anne Donaldson, half-sister, of Cephus Coleman signed the admission agreement for Cephus to enter Grenada Center
- Cephus was not present at the time Anne signed the agreement
- Cephus is mentally competent at the time he entered Grenada
- Anne did not have a POA and was not G or CS of Cephus
- Cephus dies as a resident of Grenada
- Cephus III is appointed administrator of Cephus' estate and brings negligence and wrongful death action against Grenada
- Trial court says contract not enforceable against a person unless personally entered into, and arbitration not enforceable
- Grenada appeals claiming that Anne was Cephus health care surrogate under MS Health Care Consent Act
- SCT says MSHCCA doesn't apply to competent persons
- Signatories must have authority under a POA, guardianship or under the MSHCCA to bind an estate

Richard Carraway, as executor of the estate of Shirley Carraway v. Beverly Enterprises Alabama, Inc., 2007 Ala. LEXIS 136 (AL 2007)

- Richard signs his sister Shirley into the Foley NH and signs as her "authorized representative."
- 15 days later, Shirley executes a POA naming Richard as AIF
- Shirley dies as a resident of Foley NH
- Richard as executor of Shirley brings wrongful death v. Foley
- Beverly, owner of Foley, moves to compel arbitration
- Trial court compels arbitration, and Richard appeals

- App Ct finds that Richard had apparent authority to sign the agreement as Shirley's agent and POA 15 days later suggest Shirley approved of Richard acting on her behalf
- App Ct finds arbitration agreement not unconscionable as it was in accordance with National Arbitration Forum Code of Procedure

Noland Health Services v. Peter Wright, as administrator of the estate of Dorothy Willis, 971 So.2d 681 (AL 2007)

- Vicky Willis, daughter-in-law of Dorothy Willis who suffered from ALZ, signed Noland admission agreement on Dorothy's behalf as "resident's responsible party"
- Dorothy broke hip and neck and Vicky brought suit as next friend v. Noland
- Dorothy later died and Wright as administrator added wrongful death
- Nolan filed to compel arbitration and trial court denies motion
- Nolan appeals
- SCT says that because Dorothy was incapacitated at time of admission, Vicky's signature as responsible party was ineffective to bind Dorothy or her PR to the arbitration agreement

Owens v. National Health Corp., 2006 Tenn. App. LEXIS 448 (Ct. App. TN, Nashville 2006).

- Daniels signed King into NH using a health care POA
- Owens was later appointed G for King and brought negligence action against NH
- NH moved to compel arbitration
- Trial court said Daniels couldn't waive King's right to jury trial
- App Ct reversed, stating that consenting to care at a NH is a health care decision and the health care POA expressly gave that decision to Daniels, remanded for entry of order to compel arbitration

JOSEPHINA FLORES et al., Plaintiffs and Respondents, v. EVERGREEN AT SAN DIEGO, LLC. Defendant and Appellant. 148 Cal. App. 4th 581 (Ct. App. CA, 4th App. Dist., Div. One 2007)

- Husband signs wife suffering from dementia into skilled nursing facility and signed arbitration agreement
- Husband did not have POA and was not wife's G or CS
- Husband later filed negligence claim against SNF
- SNF moved to compel arbitration

- Trial court said H had no authority to agree to arbitration on his wife's behalf and no evidence that wife gave her express or implied consent and agency could not be implied from marriage alone
- App Ct affirms trial court

TREND SEVEN:

THE GUARDIANS AND CONSERVATORS ARE ADVOCATING

The cases summarized below demonstrate best practices wherein guardians and conservators engage in meaningful advocacy on behalf of the person under guardianship.

In re Application of County Collector v. Mary Lowe, 838 N.E.2d 907 (IL 2005) judgment vacated, remanded for further consideration [in light of **Jones v. Flowers**, 126 S.Ct. 1708 (2006)] **Estate of Lowe v. Apex Tax Investments, Inc.**, 126 S.Ct. 2287 (2006)
on remand

Apex Tax Investments, Inc., et al., v. Mary Lowe, Deceased, by Patrick T. Murphy, Cook County Public Guardian and Supervised Adm'r of the Estate of Mary Lowe,
 867 N.E.2d 941 (IL 2007)

- Facts similar to the book and movie House of Sand and Fog
- Apex purchased Mary Lowe's home at a tax sale in 1993 for \$374
- In 1995, Cook County sheriff attempted to personally serve Lowe and "person is hospitalized" is written on the sheriff's return
- In 1996, Court issues tax deed to Apex
- In 1997, Lowe's sons file pro se to restore ownership stating Lowe in and out of various mental facilities for the past 30 years and was hospitalized in 1995 when service was attempted
- In 1997, court appoints Cook County public guardian for Lowe
- Public guardian files to have tax deed set aside as Lowe was hospitalized at Tinley Park on 11/95 when service attempted
- SCT of IL states that requiring tax purchasers to contact MH facilities to see if delinquent taxpayer is a patient would violate privacy rights of patients
- SCTIL holds notice procedures are reasonable and refuses to set aside deed
- Mary Lowe dies sometime during this process
- US SCT vacates judgment of SCTIL for consideration of Jones v. Flowers which states that notice must be such as one desirous of

- actually informing the absentee might reasonably adopt to accomplish it
- SCTIL refuses to repeal IL law on notices and finds no due process concerns despite public guardian now administrator's arguments that further inquiry should have been made pursuant to the note on the sheriff's return
 - Cook County public guardian did a great advocacy job here

Interdiction of Alma Breaux Domingue Rodrigue, 927 So.2d 421 (Ct. App. LA, 1st Cir. 2005).

- Alma has ALZ and her husband was appointed her curator
- They reside at an assisted living facility in LA
- H applies to move Alma to better living facility in Corpus Christi, TX
- H's daughter lives in TX
- Alma's four daughters in LA opposed the move
- Trial ct denies the motion
- H appeals
- App Ct reverses as couple married over 27 years, and H has \$800,000 for long term care needs of both
- Alma's daughters earlier refused to sit with Alma on the weekends, but were worried that H's daughter would use undue influence
- App Ct says there is no evidence to suggest H would cease caring for Alma or his assets if they moved

**You can order a full copy of the
2005, 2006 or 2007 NGA Legal Review and other
guardianship/conservatorship publications and
materials at: www.guardianship.org**

2007 NGA Legal Review

This manual focuses on the legal aspects of guardianship, reviewing the national, regional, and state developments in case law affecting legal guardians.

Non Member Price: \$100.00 Member Price: \$75.00

2005 and 2006 NGA Legal Reviews

Available as a set of two, these manuals focus on the legal aspects of guardianship, reviewing the national, regional, and state developments in case law affecting legal guardians.

Non Member Price: \$50.00 Member Price: \$25.00

Please join the National Guardianship Association.

We would love to have you as a member.

Professionals - \$170

Organizations - \$250

Family Guardians - \$50

Go to www.guardianship.org or call NGA at

877-326-5992 for more details