



Summary Report
First Colloquium: Public Guardianship in Massachusetts

From: Peter M. Macy, Exec. Dir., Guardian Community Trust, Inc.

To: Attendees and Registrants of Colloquium on Public Guardianship

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I. Introduction

The Massachusetts Guardianship Policy Institute (the “Institute”) held its first major educational event, the Colloquium on Public Guardianship, on November 10, 2015, at Suffolk University Law School in Boston, Massachusetts. The Colloquium brought together 61 leaders of public agencies, the judiciary, non-profits, health care organizations, private practice and other stakeholder groups from around the state. The goals were to review the themes of guardianship reform at issue in Massachusetts today; to sharpen the focus of ideas and gain new perspectives through scholarly exchange; and to enlist stakeholders in ongoing work of researching, planning and advocating for reform, including (but not limited to) establishing a public guardian for the Commonwealth. By many standards, all three goals were met.

II. Themes

A. *Scope of Unmet Guardianship Need*

Jennifer Moye, Ph.D., Director of the Geriatric Psychology Department for the Boston VA Healthcare System and Associate Professor of Psychiatry at Harvard Medical School, provided preliminary results of an assessment of guardianship needs in Massachusetts that she has undertaken, specifically with respect to isolated and indigent persons who are incapacitated. Her research identified, first, the numbers of such persons who currently are served by public agencies in Massachusetts:

Provider	No.	Service model or source of payment
DDS	726	Contracts with private individuals and non-profits
EOEA	170	Contract with non-profits
DMH	60	Contract with private individuals and non-profits
Total:	956	

Dr. Moye did not hazard a guess as to how many others may be served by individuals or non-profit agencies either *pro bono*, or on the basis of severely-limited payments that may be

* A COLLABORATION OF:

available under the *Rudow* decision.¹ Other sources have estimated this number to be perhaps 1,500 in total. These numbers suggest that as many as 2,500 isolated and indigent persons (often referred to as “unbefriended”) may receive some kind of guardianship help in Massachusetts today through a variety of public, private and volunteer programs or efforts.

Against this need, Dr. Moye presented a preliminary estimate that there are between 4,312 and 6,229 unbefriended persons (mean = 5,443), who in fact may need a public guardian in Massachusetts today. She derived this number by extrapolating to Massachusetts the average ratio of persons under guardianship in 25 other states that today have public guardianship programs.

Dr. Moye’s qualitative findings included the revelation that 100% of the persons she has interviewed in Massachusetts support a public guardianship agency, if it operated under a reasonable caseload limit. In addition, 95% of respondents favored a default surrogate-consent statute, which would allow medical providers and others to act upon consent by family members or other relations identified by law, without guardianship, durable power of attorney or health care proxy. In addition to conforming the law to a *de facto* reality, such a statute would reduce the number of guardianships that must be filed in order to provide medical care.

B. *Populations in Need*

The clinical foundation of guardianship law was presented by the Institute, following Dr. Moye’s research report. The thesis of this presentation was that diagnosis continues to matter in guardianship law, despite the sharply increased focus upon functional definitions of capacity. Diagnosis is the link between a functional evaluation and an informed prediction that the behavior will continue, and thus an indispensable element of guardianship adjudication.

It was proposed that the clinical profiles of adult incapacity generally fall into three groups: (1) those with conditions that result in progressive loss of capacity; (2) persons who are developmentally disabled from birth or childhood; and (3) persons who suffer mental illnesses that affect cognition. In addition to serving a role in the adjudication of guardianship, these categories may be important to guiding how guardians relate to those for whom they are responsible. Ideally, a public guardian would train and guide both professional and non-professional guardians to incorporate clinical considerations into their approach to the relationship.

C. *The Scope of Proposed Reform.*

Erica Wood, J.D., Assistant Director of the American Bar Association’s Commission on Law and Aging, provided a “bird’s eye” review of aims, or “Key Areas,” upon which guardianship reform is focused nationwide. There were seven such areas:

- #1: Fostering the use of less-restrictive options for decisional support;
- #2: Strengthening procedural safeguards for those subject to guardianship;
- #3: Developing better standards and techniques for determining capacity;

¹ Rudow allows a very limited amount of income – up to \$100 per month – that otherwise must be paid to a nursing home to be paid – under limited circumstances – to a guardian or conservator instead.

- #4: Persuading courts to issue more limited guardianship decrees and orders;
- #5: Developing and implementing higher qualification standards for serving as guardian;
- #6: Improving court monitoring of guardianships; and
- #7: Providing a public guardian for isolated and indigent IPs (the “unbefriended”).

The reforms that the Institute currently proposes represent five of these seven key areas of reform:

Institute’s Priority	Key Areas (National)
Support for family & volunteers	Less-restrictive alternatives (Key Area #1) Better qualification of guardians (Key Area #5)
Support Probate Ct. Initiatives	Increase use of limited decrees (Key Area #4) Improve Court monitoring (Key Area #6)
Establish a Public Guardian	Establish a Public Guardian (Key Area #7)

The reason that Key Areas #2 (due process) and #3 (assessment of incapacity) do not factor highly in the Institute’s current agenda is that significant reforms in both areas were achieved with adoption of the Uniform Probate Code in Massachusetts in 2008. The Institute supports, however, continued strengthening of policies in both areas.

D. *Supported Decision-Making*

Robert Fleishner, Esq., Assistant Director of the Center for Public Representation (CPR) in Northampton, Massachusetts, spoke about “supported decision-making” (SDM), which has received significant attention in the developmental disabilities community over the past decade as an alternative to guardianship. He provided details of a pilot project that CPR is conducting with eight individuals in Western Massachusetts to study the effectiveness of SDM. Those in the study have identified family members and advocates to form an SDM “circle,” and have consummated SDM agreements with members of this circle. Such agreements state that the supported individual shall make his or her own decisions, and that these decisions are supported by the other parties to the agreement. Preliminary results show courts willing to accept such an agreement as an alternative to guardianship.

Materials posted by the Institute on its Forum page for the Colloquium include an article that points to concerns about SDM. As great as is the potential of SDM for high-functioning individuals with strong support systems, it carries risks of perpetuating abusive relationships or delaying important legal, financial or health decisions in the wrong circumstances. Much work and research remains to be done with this highly promising alternative to guardianship.

E. *Court Process*

Three current or former Associate Justices of the Probate and Family Court, including former Justices Edward Ginsberg and Susan Ricci, and current Justice Megan Christopher, participated in the Colloquium. A list of current initiatives of the Probate and Family Court was

included in the packet handed out to all attendees of the Colloquium. These initiatives include everything from revising forms, to scheduling Guardianship Sessions, to setting up Court Service Centers in five counties around the state by the middle of 2016.

Much of the discussion of Court process centered on the importance and difficulty of effectively monitoring guardianships. Justice Ginsberg has developed a *pro bono* service in association with the Volunteer Lawyers Project, called Senior Partners for Justice, that is reviewing Guardianship Reports and identifying matters that require follow-up. Justice Ricci is assisting with a detailed, county-by-county review of compliance and the effectiveness of these Reports to ensure best practices by guardians and conservators throughout the state.

Justice Ginsberg spoke of the frustration felt by families of developmentally disabled children, after being advised to petition for guardianship when the child reaches the age of majority. As guardians, they are required for the first time to report to the Court about their relationship with their child, which they experience as pointless and demeaning. Courts, however, are confronted by equally daunting frustrations in obtaining meaningful compliance with reporting requirements of guardians and conservators. There was discussion of an incident in which a report was filed that included whole sections that were cut-and-pasted from a report drafted many years previously. This incident highlights the challenge of relying upon self-reporting of the guardians as the primary means of monitoring these relationships.

F. *Incapacity Issues in Providing Medical Treatment*

Eric Hardt, M.D., and Michael Voisine, M.D., presented three case studies of individuals in need of urgent medical care, all of whom lacked decision-making capacity. These cases explored both the practical and the ethical complexity of surrogate decision-making, and pointed to the difficulty of obtaining timely decisional support through judicial process, especially in emergent medical care situations.

Dr. Hardt mentioned a need in Massachusetts for a default surrogate-consent statute, which would allow medical providers to take direction from designated relatives if there is no guardian, health care agent or other legal representative with formal authority to act. He reasoned that doctors in practice frequently must rely upon such decision-making, and the law should recognize the legitimacy of this practice.

III. Workshops

Three workshops in the afternoon identified priorities in each of the three areas of reform that the Institute currently proposes, including support for family and volunteers who seek to assist loved ones with diminished capacity (Workshop I); support for the initiatives of the Probate and Family Court with processing and monitoring of guardianships (Workshop II); and proposals for a public guardian of last resort for isolated and indigent persons who have no other option (Workshop III).

Recommendations of the Workshops included ---

1. Revising the regulations issued under the *Rudow* decision to allow family members to qualify for payments;
2. Revision of the Guardian's Handbook and other materials to provide information to non-professional guardians about obtaining and handling such appointments;
3. Further research into supported decision-making (SDM);
4. Help for families to pay for and file petitions and medical certificates;
5. Increased use of volunteers and guardians and court visitors;
6. Separate training for professionals and non-professionals;
7. Ensuring that support for both professional and non-professional guardians is consistent throughout the Commonwealth;
8. Certification of guardian's knowledge and skill, including licensure as guardian;
9. Greater openness to non-lawyers serving as professional guardians;
10. Making best use of technology for training and supervision, court access and other elements of guardianship or its alternatives;
11. Clinical guidance for all guardians on how to respond to the varying needs of incapacitated persons with different medical and behavioral profiles;
12. Greater use of limited guardianships;
13. Limited caseloads for all guardians;
14. Financial soundness of the system;
15. Realistic expectations of public financing of guardianship.

IV. Next Steps

A. *Advisory Committees*

Participants in the Workshops were asked to sign up for one of three continuing Advisory Committees:

1. *Family and Volunteer Committee*. This committee will work on how to improve support for family members and volunteers who are trying to help a persons with decisional incapacity, either to obtain guardianship or to pursue an alternative.
2. *Court Process Committee*. This committee will explore ways to support the Probate Court's guardianship-related initiatives, along with other ideas or proposals to improve Court process in guardianship and/or its alternatives.
3. *Drafting Committee*. This committee will begin to prepare for drafting a statute for a public guardian of last resort, along with provisions to advance other priorities for guardianship reform in Massachusetts, including alternatives to guardianship.

Advisory Committees have been meeting, but remain open to new members. For information about a group for which you already have volunteered, or to sign up for one, please go to the Forum page of the Institute's website, at www.guardianship.institute. (Please

contact Claire Levey at (978) 775-3500, or claire@guardiancommunitytrust.org if you need your login credentials to be resent.)

B. Insights and Working Platform

The views of the Institute continue to develop and change as new ideas are introduced. The following are the central perceptions and analyses that inform the Institute in the wake of the Colloquium:

1. Interest in a public guardian for the Commonwealth is stronger and more broad-based than it has been in a very long time.
2. Interest in a public guardian has subtexts that interact in complex ways. These sub-themes include (a) the need for more guardians in some circumstances; (b) the need for more and better alternatives to guardianship as a first resort for persons with decisional needs; and (c) the need for better qualifications, standards and monitoring for all guardianships and alternatives that may be utilized.
3. As a practical tool for organizing guardianship reform efforts, the Institute proposes three components, which correspond to the Advisory Committees:
 - (i) Statewide systems and services to help families and volunteers to learn about guardianship and its alternatives, to serve as guardians or other agents, and to participate effectively in monitoring of relationships.
 - (ii) Ongoing changes in court process to reduce costs and delays, improve monitoring of guardianships and reach all persons who need decisional help.
 - (iii) Drafting legislation to put agreed-upon proposals before the Legislature.

C. Next Events.

The Institute is planning additional events in 2016 and 2017. A second colloquium tentatively is scheduled for June, 2016, to hear from the Director of the Kansas Guardianship Program about how volunteer services can be utilized to extend the reach of publicly-financed guardianship services.