

BETWEEN A ROCK AND A PANDEMIC

COVID-19 SPOTLIGHTS OHIO'S DIFFICULT PATH FORWARD IN PROTECTING VULNERABLE ADULTS

BY PAUL SHUGAR

Making decisions in contested guardianship hearings is never simple for probate judges and magistrates, and nothing has been easy for them during the COVID-19 pandemic.

A probate court must decide at least three things when considering a guardianship application. First, is there clear and convincing evidence that the proposed ward is incompetent pursuant to R.C. 2111.01? If that threshold is met, the next question is whether the guardianship is necessary — i.e., are there less restrictive alternatives than court supervision, such as willing powers of attorney? Then, finally, what decision is in the proposed ward's best interests?

These are not easy questions for a court to answer, even under the best circumstances.

Evaluating the first issue is difficult during a pandemic with long-term care facilities balancing the protection of their residents' health while honoring their legal rights. According to the Ohio Department of Health, 3,154 of Ohio's 6,020 total probable COVID-19 deaths — roughly 52% of the state's pandemic-related deaths through November 18, 2020 — occurred in long-term care facilities. This resulted in many facilities restricting access to residents, leaving Ohio's elderly literally behind glass without easy access to their family members, social services, medical professionals, attorneys, financial advisors, etc.

These same restrictions limit proposed wards in long-term care facilities from accessing the court — let alone their own

attorneys — to exercise their due process rights as to the legal determination of their competency. These restrictions, however reasonable from a public-health perspective, are in direct conflict with Ohio guardianship law and the proposed ward's right to his or her day in court. After all, guardianship matters are "in rem" proceedings, meaning these are supposed to be between the court and the proposed ward.

Video conferencing is an effective alternative

The pandemic forced the entire legal system to examine its reliance upon in-person hearings, and guardianships are no different. Before COVID-19, many guardianship

hearings would proceed without the proposed wards because various health issues prevented their attendance. One positive of this international health crisis is video-conferencing alternatives are now widely available to address this issue.

Even long after the pandemic is done, Zoom should remain. This would allow proposed wards to attend guardianship hearings and honor the law. Getting here, though, is easier said than done. High-speed Internet is accessible in most parts of Cuyahoga County, but might not even exist for someone living in Southeast Ohio's Meigs or Jackson Counties.

The Cuyahoga County Probate Court used its resources during this pandemic to improve

online access, and it and other probate courts across Ohio should advocate for this remaining to improve the guardianship process.

Elder abuse on the rise

Elder abuse was a problem in Ohio before the pandemic, and there is no vaccine to prevent the coming wave of cases once current health-and-safety restrictions are rescinded or relaxed. In 2017, the Ohio Department of Job and Family Services reported that 16,241 adults over the age of 60 were victims of abuse, neglect, and exploitation. According to the National Council on Aging, one in 10 Americans over the age of 60 has experienced elder abuse in some form. Yet the same report claims only one in 14 cases of abuse is reported to authorities.

Miami University's Scripps Gerontology Center's population research projects that one in four Ohioans will be age 60 and older by 2025. Additionally, the pandemic likely suppressed the abilities of county organizations — such as Adult Protective Services (APS) — to protect victims of elder abuse as they shelter in place and remain isolated from such safeguards.

The pandemic placed many estate planners on the front lines of this issue. With many Ohio attorneys now helping their clients execute wills, trusts, and advanced directives on front porches, driveways, and garages, they have access to this susceptible population that many do not. Additionally, as mandatory reporters of elder abuse under Ohio law, they will help ensure these cases reach the courts.

Unfortunately, how probate courts address these issues became more difficult during the pandemic.

Balancing competing interests is harder than ever

Because hostility between family can be the basis for appointing an independent guardian — usually an attorney in that court's jurisdiction — even a relative trying to save someone from elder abuse might not become the guardian. Fewer attorneys are volunteering to serve as independents because of the fiduciary responsibilities involved, and many do not want to make the difficult decisions the pandemic causes.

Long-term care facilities once provided the courts with neutral ground to place

wards should hostility arise between family members regarding financial/healthcare decision making, or even access to the ward. Placement in a long-term care facility, however, might not be in the ward's best interests during the pandemic given how many elderly have died in these facilities. Restrictions designed to keep a ward safe from the virus also could prevent them from having regular access to their family, friends, and support network.

Tragic news of people wasting away from lack of contact or dying alone has become part of this pandemic's story since it began in March, and this likely will continue until the health crisis ends. Many will not have the financial resources available to stay in their homes. For others, the choice will remain much more complicated.

One thing for certain is this problem will not end any time soon. Probate courts must continue making difficult rulings the best they can under the circumstances. Ohio Governor Mike DeWine has long advocated for the elderly, creating the Elder Justice

Initiative in 2014 when he was the state's attorney general. But further work is needed from him, the Ohio Legislature, and the Ohio Supreme Court to address the growing elderly population's needs.

While the pandemic's economic and budget fallout likely will limit the state's ability to resolve these issues, the lessons learned from this crisis will chart a path forward.



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