

Courts strip elders of their independence

Within minutes, judges send seniors to supervised care

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Dawn Cromwell dares not leave her building. If she tried, a device girding her ankle would sound an alarm. For over a year, she has had to use store-bought reading glasses because her pleas for a prescription pair have gone for naught. She is given medications, but, she says, no one will tell her what they are.

For 20 months now, Cromwell's life has been defined by a 10.5-by-12.5-foot living space at North End Rehabilitation and Nursing Center. In her tiny closet, there are virtually no clothes, and she has no idea what's become of the cherished possessions in the Boylston Street apartment where she lived for years.

At 73, Cromwell is one of hundreds of forgotten docket numbers in Massachusetts probate and family courts, where judges routinely fast-track infirm elders into the care of guardians, often with little evidence to justify such wrenching decisions.

Cromwell, after a broken ankle and a brief rehab in early 2006, had expected to go home. But on the say-so from the nursing home's doctor - a short, nearly illegible diagnosis - a judge decreed that Cromwell was mentally ill and handed all of her decision-making to a guardian. Cromwell lost all power over her own life, with no opportunity to object, no right to have a lawyer represent her, no chance to even be in the courtroom.

Three months later, the same judge, E. Chouteau Merrill, made the guardianship permanent - in a two-minute hearing in which the judge asked not a single question.

"You think living in America is just great, but you never anticipate something like this," Cromwell said. "It's just been a disaster for me. If I was robbed on the street and everything taken, I wouldn't be as upset as I am now."

The Cromwell case typifies an everyday practice in Massachusetts probate courts. Too many judges, as Merrill did with Cromwell, award custody of elders to guardians without insisting on the minimal medical documentation required by court rules; without asking about the patient's long-term prognosis; and without considering whether an independent fact-finder should conduct an inquiry before such a life-altering judgment is rendered. And those whose lives are so radically affected are given no legal representation.

The guardianship system is meant to care for people who can no longer make sound decisions for themselves because they are mentally retarded, mentally ill, or physically incapacitated. Most often, guardianship is sought by a family member, usually for an elderly relative who has some form of severe dementia. When relatives are involved,

there is widespread agreement that judges make sound decisions when they decide a guardian is needed.

But a category called "unbefriended elders" - people such as Cromwell who have no relatives or even friends to serve as their guardians - is another matter. In these cases, judges are wholly dependent on the assertions of petitioners, mostly hospitals and nursing homes, that the person is incapacitated.

Many elders who are placed in the care of guardians, regardless of the circumstances leading up to it, do not receive the attention they deserve. From a case-by-case review in Suffolk Probate Court, and from scores of interviews with judges, lawyers, and court officials, numerous shortcomings in the guardianship system were found.

Among them:

After the court declares someone mentally ill and appoints a guardian, for all practical purposes most of the patients officially vanish. Almost none of the state's probate courts have any mechanism to track their whereabouts, monitor their treatment, determine whether they have recovered enough to reclaim their freedom and autonomy, or even learn whether they are dead or alive.

Handcuffed by an antiquated computer system, the courts know how many cases are filed but do not know how many people judges put under the control of guardians each year. The number in Massachusetts each year almost certainly exceeds 2,000.

Virtually unregulated, guardians, many of them lawyers and social workers, regularly ignore requirements that they file an initial inventory of assets of the people they are responsible for and an annual accounting of how they managed a person's finances. In Suffolk Probate Court, where five years of guardianship filings were examined, there were no financial reports in 85 percent of the cases.

Richard P. Iannella, the Suffolk County register of probate, said he has no doubt that the combination of hasty decision-making and lack of oversight has relegated people to nursing homes indefinitely, and sometimes unfairly.

"In a system this broken, I have no doubt that there are numerous elderly people who have been confined to nursing homes against their will even though they are perfectly competent," Iannella said. "And we have no idea what has happened to any of their life savings."

Iannella, an elected official whose office keeps the court's records, added: "These people are all of our parents. Other than getting old, what crime did they commit?"

Paula M. Carey, chief justice of the Probate and Family Court Department, took charge of the statewide system in October. She said the court's judges "are committed to the goal

of having better due process protections built into guardianship cases." Plans to substantially improve the system, she said, are well underway.

The Suffolk review focused in part on 37 guardianship orders that had been issued since 2003 at the urging of Massachusetts General Hospital. In one, the first judge of the Suffolk Probate Court, John M. Smoot, ruled that an elderly man was mentally ill based on a six-word diagnosis - "Alcohol-related brain degeneration. Korsakoff's syndrome" - and an anecdote related by the hospital's lawyer about the man's loss of short-term memory.

In response to inquiries for this story, Smoot appointed five lawyers in December to review the handling of all the Mass. General cases.

Joan Kenney, a spokeswoman for the Massachusetts court system, said that because judges are barred from commenting on pending cases, Merrill and Smoot would not comment on the decisions.

Joshua L. Abrams, a lawyer for Partners Healthcare, which owns the hospital as well as the nursing home where Cromwell resides, said he is confident that the review will confirm that the judges ruled correctly on the petitions. Abrams and several senior clinicians at Mass. General said they resort to guardianship only when there is no other option, and not until an exhaustive internal review concludes that it is justified.

Nationally, the elderly population is mushrooming - from an estimated 31.5 million in 2000 to a projected 70 million in 2030. The number of seniors without family or friends looking out for them is rapidly increasing as well.

The number of elders placed into the state's guardianship system without anyone to speak for them is unknown; however, in Suffolk County, Iannella found more than 40 cases each year. Based on those figures, Iannella estimated that across the state there may be 300 a year.

For now, reviewing cases one paper file at a time is virtually the only way to gauge how the system works. Because of that, the detailed examination of case files focused on Suffolk County. Many lawyers and court officials said the system's flaws are most pronounced in Suffolk, Middlesex, and Worcester counties. Those three counties account for about half of the guardianship cases filed each year.

Unlike many other states that have enacted greater protection for incapacitated elders in recent years, Massachusetts provides no legal counsel in guardianship cases for those who may be subject to a finding that they are mentally ill.

"Whether or not the guardianship is justified, our most vulnerable elderly people surely deserve legal protection when their rights are being drastically curtailed," said Wynn Gerhard, managing attorney of the Elder Law Unit at Greater Boston Legal Services. "If

criminal defendants are guaranteed an attorney, elders who have done nothing wrong ought to have the same protection."

Herbert P. Wilkins, a retired chief justice of the Supreme Judicial Court, wrote last June in a report commissioned by the high court that he found it "troublesome" that "the interests of a person for whom a guardian is sought are not adequately protected in the system."

Lawyers who specialize in the area said most other probate cases, like divorces, are adversarial. As a result, many judges take less care with guardianship cases because they are seldom contested. "I've seen judges who rubber stamp [guardianship] cases just to clear the docket," said Laura A. Sanford, an elder law attorney.

"When a petition is filed in a regular guardianship case, the proposed ward, who may be in a hospital, is given a piece of paper. I mean, they may not even be awake," Sanford said. Other times, she said, the patient may not understand the petition or be able to appear in court to oppose it.

Sanford added, "If somebody's disabled, sick, or confused, the court has no other choice but to follow what the petitioner is saying."

In December 2006, it took just 2 minutes and 10 seconds for Mass. General to convince Judge Merrill that 74-year-old Rose Doyle should be put in the care of a guardian. Doyle was confined to a nursing home for three months. She complained to Greater Boston Legal Services. In May 2007, after an outside psychiatrist concluded that Doyle was competent, Merrill reversed her decision. In November, Doyle died.

To those who work in the system and those who study it, the risk that judges will wrongly deprive people of their rights is unacceptably high, mostly because doctors and healthcare institutions rarely provide sufficient medical information.

There were 308 cases filed in Suffolk in the past five years involving people who were entrusted to guardians after they were ruled to be mentally ill. In 72 percent of the cases, mostly filed by hospitals and nursing homes, the medical certifications were so brief - some just a sentence or two - or so vague that they fell well short of what the court requires. Many were handwritten, some illegibly.

The court's form states: "Describe in detail the diagnosis leading to the aforementioned opinion (including the types of decisions which the proposed ward has sufficient mental ability to make)." An examination could find no cases in which the petition cited any decisions patients could make on their own - and no evidence in the files or audiotapes of hearings that judges objected to the scant evidence before them.

A study coauthored last year by Jennifer Moye, a Harvard Medical School and Veterans Administration psychologist who specializes in gerontology, compared medical certifications in guardianship cases in Massachusetts, Pennsylvania, and Colorado.

Massachusetts fared worst. The study found that in 154 cases in Massachusetts, the median length of the medical certification was 83 words. In one case, it was just seven words.

To some lawyers and probate specialists, the more difficult issue for the state and the court system to resolve is the quality and monitoring of the nonfamily guardians assigned to wards like Cromwell.

Guardians are not licensed, nor are there any training requirements for those who do it for a living, to say nothing of hard-pressed relatives and friends who take on such assignments. Professional guardians are often lawyers and social workers.

The probate courts have no way of knowing how many wards a guardian has. The compensation is low enough, especially when wards are indigent, that, according to court officials, some professional guardians "bulk up" on cases to make ends meet. For many infirm elders without assets, the guardian is paid a maximum of \$1,200 a year by Medicaid.

One guardian who is attracted to it is Leanna P. Moran, who at 28 has a master's degree in social work and owns her own guardianship business, Gold Star Guardianship Services Inc. "Once you say you'll take clients, you'll get every client," Moran said.

So many, Moran acknowledged, that she became overburdened. Moran was often selected by Mass. General. In several of those cases, the people entrusted to her care, or a relative, complained that Moran did little for them. They included Cromwell, who is in the North End nursing home, and Thomas Stalker, a 75-year-old who has been at Parkwell Nursing Home in Hyde Park for more than a year.

Moran declined to disclose how many cases she has. But in a 2006 e-mail to Constance Wark, who had complained that Moran was not attentive enough to her mother, Moran wrote: "I have over 70 individuals that I serve as guardian for, and I am responsible for making their financial, legal, housing, and medical decisions."

Wark, in a recent interview, said Moran was "an impediment" to her mother's care. "She was the guardian, the decision-maker. But she was mostly unreachable. Her cellphone mailbox was often full," Wark said.

She has since taken Moran's place as her mother's guardian.

At the time, Moran said, she employed another social worker full time and two others part time, but had to let them go a year ago. Since then, she said, she has tried unsuccessfully to resign from about a quarter of her cases, a process that requires a court petition, a hearing, and the appointment of a replacement.

The result, Moran said, is that she has short-changed some people.

In November, Cromwell said, Moran had visited her just twice in 2007. Stalker, whose guardianship was based on the six-word diagnosis, said he hadn't seen Moran all year.

Moran said there had been no more than a four-month gap in her visits to Cromwell. She said she didn't visit Stalker between January and November because Stalker had been hostile toward her and one of her employees. She visited both patients after she learned they had talked to reporters.

As for Cromwell's prescription glasses, Moran acknowledged that Cromwell had yet to get a new pair and attributed the delay to a bureaucratic mistake. This month, a nursing home official said he would make sure she got them quickly.

Cromwell and Stalker remain in nursing homes, even though Moran said both could fare well in less restrictive assisted living. But she said both have balked at assisted-living alternatives she has proposed.

In Stalker's case, Moran's lessened involvement may have contributed to a decision Moran acknowledges she should have blocked. Since last summer, Moran said, the nursing home has been administering antipsychotic drugs to Stalker. A separate guardianship hearing, at which the patient must have an attorney, is required before antipsychotic drugs can be given.

The nursing home, citing patient confidentiality, declined to discuss the medication issue. On Dec. 24, after reporters raised the issue with Parkwell, its attorney filed a petition in Suffolk Probate Court to obtain permission to administer the drugs - and appoint a second guardian to monitor the treatment.

One signal that many guardians may shirk their responsibilities is the wholesale indifference to court rules requiring guardians to file an inventory of a ward's assets within 90 days, as well as an annual financial accounting. In 308 cases reviewed in Suffolk Probate Court, there was no filing at all in 262.

Moran is among the nonfilers. According to a separate review by Iannella, Moran has been appointed a guardian 58 times in Suffolk Probate Court since 2004. As of Dec. 11, she had made inventory filings in just five cases. That afternoon, she filed inventories in 10 other cases and one annual account.

"I have not followed what I consider good guardianship practices on all my cases," Moran said.