

Adult Guardianship and the Protected Person's Bill of Rights

presented by

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2015 Commission to Study the Creation and Administration of Guardianships in Nevada's Courts

- Commission report led to significant changes to our guardianship statutes in 2017 legislative session
 - Mandatory appointment of counsel
 - Adoption of the Protected Person's Bill of Rights
- Ushered in philosophical shift to guardianship being person-centered rather than paternalistic

The principals of the Protected Person's Bill of Rights should be more accurately reflected throughout the guardianship statute

- Protected persons are those individuals who have a guardian.
 - The Protected Person's Bill of Rights was enshrined in the NRS to preserve as much of the protected person's dignity and decision making authority as possible.
 - Including principals like: preserving independence, freedom, privacy, the ability to correspond and visit with people, having healthcare wishes followed and the ability to have their money responsibly managed.

NRS 159.0523 and NRS 159.0525 allows the appointment of a temporary guardian in emergency situations

- The NRS does not require the petitioner to identify the specific risk and does not require the court to limit the temporary guardianship to the powers necessary to address the specific identified need.
- A temporary guardianship petition bypasses the normal notice requirements that would cue in other family members about this extraordinary grant of authority.
- The NRS should require the court to identify the specific risk and to tailor the order to that risk.

Devastating impacts of temporary guardianships

- Temporary guardianships in the current NRS do not prevent the temporary guardian from taking significant and irrevocable action such as:
 - Withdrawal of the protected person's life support, in cases where the temporary petition gave no indication that this action was being contemplated. The withdrawal of life support happened prior to the protected person's counsel having an opportunity to visit the client, obtain medical records, speak with medical staff or other family members.
 - In another instance a temporary guardianship petition alleged the proposed protected person was at imminent risk of financial exploitation. The petitioner was a family member and once the temporary guardianship was granted the temporary guardian promptly emptied the protected person's accounts and disappeared.

NRS 159.333 allows the protected person the right to communicate and visit with family and friends with whom they feel connected

- Currently the courts have allowed families to dictate visitation over the protected person's wishes.
- The right to decide who to visit and communicate with belongs solely to the protected person. Only under very specific circumstances may this right be restricted by court order.
- The revision would make clear that not only does the protected person retain the right to communicate with whom they wish, they also retain the right NOT to communicate.

NRS 159.375 does not allow the protected person to appeal certain orders

- Perhaps one of the most significant decision made in a guardianship is where the protected person lives.
- Currently, when the court grants the guardian permission to move the protected person out of state, away from their community, the statute does not allow the protected person to appeal that decision.
- Similarly, if the court restricts the protected person's right to communicate with a friend or family, the protected person cannot appeal that decision.

NRS 159.375 – limits the types of orders which are appealable

- There are significant life-changing decisions that are not currently appealable but have a profound impact on the protected person's life and well-being.
- Suggested revisions would make these significant life-changing decisions appealable by the protected person.

NRS 159.1905 places the burden of terminating a guardianship on the protected person

- It should not be harder to get out of a guardianship than it is to get in a guardianship.
- Many times, despite a protected person's ability to be independent, they are unable to terminate guardianship when their guardian objects to termination.
- If a protected person presents sufficient evidence showing the guardianship is no longer needed, then the guardianship must be terminated. Any party opposing the termination must show why the guardianship should not be terminated.

Fees, costs, compensation: a protected person's life savings at risk

CURRENTLY:

- The guardian's attorney may be paid from the protected person's estate, at attorney rates, when reasonable and properly noticed.
- Guardians *ad litem* may be paid by the protected person's estate, at attorney rates, even though they are prohibited from acting as attorneys.
- Other professional services: such as accountants may be paid from the protected person's estate.

NRS 159.344 allows payment of the guardian's attorney's fees out of the protected person's estate

- The attorney is required to file a notice of intent to seek fees from the protected person's estate before the court can consider a later request for those fees.
- This statute lists the factors the court can consider in determining whether those fees are reasonable before those fees can be paid.
- The statute should not allow fees when the required notice has not been filed and should require the court to make findings on each of the reasonableness factors.

Determination of the reasonableness of attorney's fees

- For example, the court reduced the protected person's estate by 30% without any findings on sustainability.
- In another instance, a protected person's life's savings was reduced to \$2,000 after the court awarded fees based on an attorney billing at the firm's highest rate despite the complexity of the work being that ordinarily performed by a paralegal.

Fees, fees, and more fees

- The court has awarded an attorney over \$150,000 in fees without determining whether they were reasonable and without the attorney filing notice of their intention to seek fees.
- In another example, the court awarded over \$40,000 in fees incurred for the filing of the guardianship petition. Not only did the protected person object to the guardianship, he objected to the **guardian** and was still forced to pay the attorney's fees.

NRS 159.183 - Compensation and expenses of guardian

- Currently, a guardian may be compensated from the protected person's estate for professional or other expenses.
 - However, attorneys for the guardian who fail to file a notice of intent to seek fees should be prohibited from using this provision as a means to obtain fees from the protected person's estate.
- Attorneys already have an avenue to seek fees requiring notice and reasonableness.

NRS 159.0455 - Appointment and duties of guardians *ad litem*

- A court may appoint a guardian *ad litem* to protect the best interests of the protected person.
- The guardian *ad litem* is prohibited from giving legal advice.
- The result, unfortunately, is that a guardian *ad litem*, who is an attorney, can be paid from the estate at their normal attorney hourly rate despite being specifically precluded from providing legal services, resulting in extreme and unchecked costs to the protected person's estate.
- The revision is intended to clarify how guardians *ad litem* may be paid.

NRS 159.044 Petition for appointment of guardian NRS 159.054 and 159.055 finding and order of court

- NRS 159.044 should require the petition to include the petitioner and the proposed guardian's phone and email information AND require the needs assessment be attached to the petition.
- NRS 159.054 and .055 should require the court's order granting guardianship to include findings that less restrictive alternatives are not available.

QUESTIONS??

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