



Enhancing Judicial Skills in Abuse in Later Life Cases

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A periodical for judges presiding over cases involving abuse in later life/elder abuse



Guardianship and the Fragile Promise of Protection

by Kennedy Brooks

"Some guardians have taken advantage of people in their care," the U.S. Department of Justice notes, describing mistreatment that may be financial, physical, emotional, or neglectful in nature.

For the courts, guardianship is an extraordinary measure meant to support people who face impediments to attending to their basic needs, care, and/or financial matters. It gives another person the authority to act in their best interest, which is both a serious duty and a position of trust. As the Department of Justice warns, this system can also be misused when guardians take advantage of the very people they are meant to protect.

Most guardians carry out their duties with honesty and care, but some have used their position to exploit or neglect those under their supervision. Abuse of power in guardianships can deeply harm individuals and weaken confidence in the justice system.

Courts play a vital role in preventing such harm. First, courts must make sure that appointment of a guardian is the last resort and that least restrictive alternatives have been explored. If appointment is necessary, courts should consider limited guardianships and tailor appointments with care and precision. Regular reviews, financial reports, and timely responses to warning signs help ensure guardianship remains a safeguard rather than a risk. When judges take time to question, verify, and act, they reinforce that guardianship is more than a legal process. It is a promise to protect the dignity, rights, and well-being of those who rely on the court's protection. But the judge's role extends beyond issuing orders and finding facts.

In this issue, our guest writer, Judge Karen Howze (Ret.), will explore ethical considerations that judges may have as they engage in improving access to justice for older adults in guardianship cases and within the courts generally. Judge Howze will also share a conversation with fellow Judge Shell Harrington, as they discuss the importance of judicial demeanor and respectful communication with older adults in the courts.

**Undue
Influence,
Capacity and
Judges'
Determinations
in Cases
Involving Older
Adults**

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Judicial Leadership: Improving Outcomes for Older Adults

— Judge Karen Howze (Ret.) —

Judges often see recurring patterns that affect the ability of older adults to engage in the guardianship process from the initial hearing through the end of the case. They also observe broader systemic factors that influence access to justice in all cases. Judges recognize that barriers to access don't begin at the courthouse door; other institutions are also involved: Adult Protective Services, law enforcement, the medical community, and other government and non-government organizations.

Some judges shy away from such engagement, concerned their involvement would violate the judicial canons, while others engage deeply, methodically chipping away at barriers to the protection of vulnerable adults.

Judicially led activities may be relatively new to some judges and some courts in the guardianship arena. However, there is a rich history of judicial engagement developed over decades to improve the justice response in domestic violence and to employ treatment approaches in mental health, juvenile justice, truancy, and criminal cases where substance abuse is an issue. Over time, coordinated activities in these areas were shown to improve the administration of justice and access to justice on a case-by-case basis.

So, what can judges do to get started in their quest to improve the administration of justice in adult guardianship cases- while remaining compliant with the Code of Judicial Conduct? Ask the following questions:

- What is the primary purpose of the activity?
- Is there a clear and direct connection between the activity and the law, the justice system, and the administration of justice? If yes, go to the next question. If no, the activity may raise ethical concerns.
- Who will be invited to participate in the activity?
- Is the invitee list balanced and inclusive? For example, if your activity explores the community response to elder abuse, ensure that if the prosecutor is invited, the defense bar is too.
- Could the gathering be perceived as judicial advocacy?

Step 1: Inside the Court

- Talk to your colleagues who hear adult guardianship cases. Do they share your concerns or see similar issues?
- Recognize that each judge has their own approach to managing dockets. These discussions can surface shared challenges and highlight effective practices that improve outcomes for older adults.

Step 2: Outside the Court

1. Identify the factors that affect the administration of justice in guardianship cases, particularly those involving elder abuse.
2. Make a list of community entities that intersect the lives of older adults. Move beyond the obvious organizations that appear regularly in court – include those that address housing, health, social connection, and financial security.
3. Collaboration, grounded in mutual respect for each institution's strengths and challenges.
4. Include the voices of people who have served as guardians, as their lived experience provides valuable insights into systemic barriers.

With each success, you will encourage continued exploration of the issues affecting subjects in guardianship proceedings and begin to identify early shifts in how aging and capacity intersect with justice. These efforts not only strengthen outcomes for older adults but also model a judicial leadership approach grounded in collaboration, access and dignity.

<https://www.ncjfcj.org/publications/Can I or Can't I? Extra-judicial Activity and Judicial Leadership>

DID YOU

KNOW?



There are approximately 1.3 million adults under guardianship or conservatorship in the U.S., with at least \$50 billion in assets controlled under such arrangements.



In one state (Virginia) between 2015-2021: more than 4,000 guardianships granted, but only 10 people had their rights restored.



Although the guardianship population is large, detailed demographics, reasons for guardianship, and data on alternatives are largely unknown.

<https://justiceinaging.org/guardianship-data-reform/>

The Compass of Compassion: How One Judge Redefines Guardianship

Judge Karen Howze in conversation with Judge Michelle C. Harrington



Guardianship proceedings can be challenging for judges. That was the case for Judge Michelle C. Harrington, who transitioned from a career as a divorce lawyer to presiding over guardianships, adoptions, and other probate matters in the District Court of Oklahoma County.

"I was a divorce lawyer for 30 years, and I taught and wrote on Family Law and Alternative Dispute Resolution," she says. "My social media logo was 'The divorce lawyer who doesn't like divorce.'" A humorist who has published several books, Judge Harrington approaches her role in cases involving vulnerable adults with "compassion within the bounds of the law." She has developed a five-point compass to drive her work - one that treats each vulnerable adult with dignity and respect, regardless of capacity, and ensures that any restrictions on autonomy meet the older adult where they are. "Often, I think a diagnosis of dementia sends everyone off, and assumptions are made. There is a built-in bias that says the person 'can't do this or that,' a bias that is often apparent in the hearings," she says.

Judge Harrington is acutely aware of the weight guardianships carry and often reminds herself -- and others -- of their power. "We can't act lightly. We want the subject of the hearings to participate. We want their input. We want to make it work for them. If we don't acknowledge that the aging process is normal and that it differs from individual to individual, we are doing the parties a disservice. We cannot assume the individual can't function autonomously today despite early-stage capacity issues."

She follows with an example: "An expert testified in a case on the issue of capacity and functionality and concluded: 'if we don't put a guardianship in place now, we will be right back here in a year or two with the same issue.' That was so telling," she says. "The attitude seemed to be 'let's get ahead of it since it is inevitable.' I am not suggesting that the norm should be to wait until the situation is critical. We should be working with all parties to provide enough support for safety while monitoring how dementia and other conditions may affect capacity over time." "The difference between minor guardianship or any proceeding designed to protect children is that we are participating in a process where there are services available -- testing, therapy, education for the child, social activities, parenting classes -- in the hope that the life of the child will get better. With older adults, we are often assuming it is not going to get better. I think that makes it even more imperative that each older adult's quality of life remains as high as possible under guardianship. Indeed, my orders cannot be one-size-fits-all. I need to hear and weigh the options."

To ensure that every older adult's voice is heard, Judge Harrington relies on her five-point compass that guides in her decision-making:

- 1 Call the Older Adult by Name.** "I always address the subject of the guardianship hearing by name. That may seem obvious, but I was troubled by the tendency of the parties to refer to the person as 'the ward' or 'the subject.' We should always acknowledge during these proceedings that the case is about a person. It is a sign of respect but also a means to connect with the older adult during the proceedings and to signal that it is their case."
- 2 Don't Assume That the Older Adult 'Hears' You.** "Just because the person is looking at you and nodding does not mean they understand you. I always try to slow down, stop, and check in. I don't assume that the individual understands or agrees. Depending on the case, I may also ask the person questions about what was said -- whether by a party, an attorney, or me. I often reframe the information to provide additional opportunities for the person to connect. And I don't ask: 'Do you understand?' Rather, I might ask: Mr. so-and-so, what do you think about that?"
- 3 Bad Choices for Others May Be Good Choices for the Older Adult.** "This is a common dynamic in my cases. Often, the helpers in these cases – family members and attorneys – are focused on 'good' and 'bad' decisions based on their lenses and not on the person whose life will be affected. Recently, a woman gave a neighbor three checks for thousands of dollars so the neighbor's child could attend college. Of course, the older adult's family members were concerned and believed she was being taken advantage of. I asked the woman why she gave her neighbors the money, and she said 'I want to make a difference in the world. They are good people, and I want to help out.' I asked the parties to answer a few questions: Is she being taken advantage of? Is it harmful? Is it opening her to danger? The attorney for her family members said it was harmful because using her funds to help her neighbor's child would affect her resources to fund her long-term care in the future. I said "her money, her choice," especially since there was no evidence that it affected her resources for her future care. On the surface, it was a concern that was not borne out by the facts and disregarded her wishes."
- 4 Listen Deeply To Move Past the Obvious.** "I presided over a guardianship case where one of the issues was whether the person's driving should be restricted, and if so, what would be the restrictions. Family members thought she was able to drive safely only if she didn't go outside a five-mile radius of her home where traffic was light and there was little risk to her, or members of the community. When I asked the person what she thought, she disagreed. Initially, her comments just sounded like resistance to losing some of her freedom, which was understandable. I went a step further and asked her if there was somewhere she wanted to go that was outside the five-mile radius. She said she was really sad because the five miles meant she would not be able to go pick up Kentucky Fried Chicken for her mother, who is in her 90s. Everyone thought the five miles would satisfy her need to drive, but no one thought there was another reason for that need – her mother. So, we worked out the safest route from her home to KFC, and it was added to her order. She was happy. Everyone understood her motivation, which ultimately informed decision-making under the guardianship in the future."
- 5 Kill the Legalese and the Acronyms.** "So often, hearings are filled with language that is not easily understood unless you are a lawyer. This is a work in progress, but I consider creating clarity a matter of accessibility. It requires translating legalese into plain language so non-lawyers can participate fully in proceedings and clearly understand my written orders in these cases that can be emotionally charged."

"I love this work. With each case, I am looking for ways to be more effective, to make the guardianship work for the individual. It is the things I don't like about our practices that led me to develop approaches to improve outcomes for seniors facing difficult capacity issues. I am committed to listening more deeply, questioning more often, looking for avenues to understand each elder and translate any capacity determinations into possibilities for maintaining autonomy and independence throughout the life of the guardianship."

In addition to her scholarly legal writing, Judge Harrington is a humorist who writes under the pen name Shel Harrington. The author of *Over 50, Defined – Words Just For Us That Aren't in the Dictionary . . . Yet!* and *Over 50, Even More Defined*, she also cultivates a "chronologically mature" audience at FatBottomFiftiesGetFierce.com. Her smile-inducing "Fat-Bottom-Fifties Get Fierce" Facebook page boasts almost half a million followers. Her upcoming book, *Quinbloits are Relatable*, is due out soon.